**UNITED STATES SUPREME COURT AND EIGHTH CIRCUIT SENTENCING GUIDELINES CASES ANNOTATED**
**(Reflecting amendments and cases through May 1, 2004)**
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## I. CONSTITUTIONAL, STATUTORY, AND OTHER CHALLENGES:

### A. 5th/14th Amendment Due Process

Nichols v. United States, 511 U.S. 738 (1994). (It does not violate 6th Amendment right to counsel or 14th Amendment right to due process to count in criminal history score uncounseled misdemeanor conviction for which no prison term was imposed. Consistent with United States v. Thomas, 20 F.3d 817 (8th Cir.) (en banc), cert. denied, 513 U.S. 828 (1994).)

United States v. Granados, 202 F.3d 1025 (8th Cir. 2000) (BEAM, LAY, J. GIBSON*). (Defendant is entitled to less process during sentencing than during guilt phase of proceedings. Here

District Court issued subpoenas to number of defendant s coconspirators at his request, all but one of whom had testified at trial; none appeared at evidentiary hearing, but Court did what it could to give defendant process he requested. Defendant s argument--that his due process rights were violated by being denied opportunity to present witnesses at sentencing--implies witnesses would have provided different information at sentencing than they did at trial. But there is no evidence that allows this Court to make such inference, and thus it is impossible to discern whether District Court s findings would have differed. District Court had before it trial testimony, testimony from sentencing hearing, and deposition of witness who had not previously testified. Variety of witnesses did testify to specific drug quantities at trial, and they were under oath. This Court cannot conclude their testimony at sentencing would have resulted in appreciable difference in District Court s findings. No due process violation occurred.)

United States v. Ayers, 138 F.3d 360 (8th Cir.) (Ayers argues District Court s refusal to grant immunity to particular witness violated Ayers s rights to compulsory process under Sixth Amendment and due process under Fourteenth Amendment. This Court rejects argument as District Court did not have authority to grant witness immunity because Eighth Circuit has consistently refused to recognize concept of judicial immunity.), cert. denied, 525 U.S. 895 (1998).

United States v. Bartsh, 69 F.3d 864 (8th Cir. 1995). (Bartsh claimed this Court s prior decision affirming original District Court s upward departure was clearly erroneous and resulted in manifest injustice. This Court disagrees--none of errors in original PSR had any effect whatsoever on Bartsh s sentencing range under applicable version of Guidelines. Bartsh argued errors in original PSR violated his due process right to be sentenced on accurate and reliable information. Simple error in sentencing information does not constitute due process violation so long as defendant was afforded adequate opportunity to challenge information; because Bartsh was afforded such opportunity at original sentencing hearing, no due process violation.)

United States v. Carr, 66 F.3d 981 (8th Cir. 1995). (Carr challenged validity of his sentence on due process grounds claiming District Court s reliance, in part, on unsubstantiated allegations of drug use during supervised release to formulate sentence was violation of Fifth Amendment rights. Dismissal of drug use allegations against Carr does not preclude District Court from considering information at sentencing. While constitutional protection of due process operates to circumscribe information Court can consider, due process violation established only if defendant shows Court relied on materially false information and information is demonstrably basis for challenged sentence. Here, information concerning Carr s drug use is neither manifestly false nor demonstrable basis for sentence. District Court had credible information on Carr s drug use which could be considered in sentencing and relying on such information would not amount to due process violation. Moreover, hearing record makes clear District Court sentenced Carr on basis of his inability to follow terms of his supervised release: at hearing, Carr admitted he walked away from drug treatment program without permission in violation of his release conditions--valid and adequate basis for his sentence.)

United States v. Magee, 19 F.3d 417 (8th Cir. 1994). (McCrary argued that as period of participation in conspiracy and therefore, amounts of drugs attributable and foreseeable to defendant

substantially affect Guidelines range to which defendant is subject, those factual matters should have been determined by jury as part of conviction process; his proposed instructions apparently would have required jury to determine these factors beyond reasonable doubt. This circuit has repeatedly rejected arguments that sentencing scheme deprives defendant of Fifth Amendment right to due process and Sixth Amendment right to jury trial.)

United States v. Jones, 2 F.3d 827 (8th Cir. 1993). (The limits Guidelines place on discretion of District Courts to take into account various factors at sentencing do not violate Due Process Clause. This Court once again rejects due process challenge to Guidelines classification of drug offenses based on quantity rather than purity, as neither arbitrary nor irrational.)

United States v. Hipolito-Sanchez, 998 F.2d 594 (8th Cir. 1993). (This Court once again rejects argument that Guidelines departure system violates due process.)

United States v. Thompson, 972 F.2d 201 (8th Cir. 1992). (Sentencing Guidelines have survived challenges to their constitutionality under Due Process Clause.)

United States v. Abdullah, 947 F.2d 306 (8th Cir. 1991). (This Court once again rejects general constitutional challenge to Guidelines as unduly limiting sentencing judge s discretion and improperly granting discretion to prosecutor. Abdullah also asserted Fifth Amendment due process violation claiming Guidelines fail to provide standard of proof for District Court to apply in finding facts upon which sentence is based and District Court in his case failed to apply any express standard. This Court holds no particular standard of proof is required at sentencing phase; sentencing judge only needs to make findings sufficient to provide for meaningful appeal. In this case, Court holds District Court s findings as to Abdullah s role in offense were not clearly erroneous and District Court s failure to indicate what standard of proof it applied was not error.), cert. denied, 504 U.S. 921 (1992).

United States v. Nimrod, 940 F.2d 1186 (8th Cir. 1991). (This Court again rejects argument that Guidelines limit sentencing judge s discretion to individualize sentence and therefore violate Due Process Clause.), cert. denied, 502 U.S. 1079 (1992).

United States v. Hubers, 938 F.2d 827 (8th Cir.) (Requiring government motion for downward departure based on substantial assistance does not violate due process.), cert. denied, 502 U.S. 961 (1991).

United States v. Smeathers, 930 F.2d 18 (8th Cir. 1991). (No due process violation in imposition of sentence upon revocation of supervised release greater than maximum Guidelines sentence for original offense.)

United States v. Torres, 921 F.2d 196 (8th Cir. 1990). (Career offender Guidelines do not employ use of mechanical formula to exclusion of judge s sentencing discretion such as to violate due process.)

United States v. Weaver, 906 F.2d 359 (8th Cir. 1990). (Court rejects argument that Guidelines transfer sentencing authority from Court to prosecutor in violation of due process.)

United States v. Blackman, 904 F.2d 1250 (8th Cir. 1990). (Guidelines do not per se violate criminal defendant s right to due process under Fifth Amendment. They do not unconstitutionally eliminate sentencing judge s discretion.)

United States v. Nischwitz, 900 F.2d 139 (8th Cir. 1990). (Defendant was not allowed to withdraw his guilty plea as Guidelines do not unconstitutionally eliminate judge s sentencing discretion and they do not necessarily allow prosecutor to manipulate charges to obtain sentence he seeks.)

United States v. Dawn, 897 F.2d 1444 (8th Cir.) (Sentencing Guidelines do not violate Due Process Clause by eliminating individual sentencing.), cert. denied, 498 U.S. 960 (1990).

United States v. Bishop, 894 F.2d 981 (8th Cir.) (No due process violation in basing criminal penalty on quantity of drug without regard to purity of drug. Due process satisfied if statute bears reasonable relation to proper legislative purpose and is neither arbitrary nor discriminatory.), cert. denied, 498 U.S. 836 (1990).

United States v. Wivell, 893 F.2d 156 (8th Cir. 1990). (The limitations Guidelines place on judge s discretion do not violate defendant s right to due process by reason of being vague as there is no constitutional right to such directives.)

United States v. Lane, 883 F.2d 56 (8th Cir. 1989). (Court rejected argument that due process was offended by unduly restricting availability of probation.)

United States v. Brittman, 872 F.2d 827 (8th Cir.) (Guidelines do not violate due process by eliminating judges sentencing discretion; Arkansas "two-track" procedure made second sentencing hearing unnecessary.), cert. denied, 493 U.S. 865 (1989).

**B. 14th Amendment Equal Protection**

United States v. Prior, 107 F.3d 654 (8th Cir.) (Prior received mandatory life sentence following plea of guilty to possession with intent to distribute methamphetamine. Prior contends unbridled prosecutorial discretion to allow some, but not all, to avoid life in prison in exchange for their cooperation offends Equal Protection Clause. This Court disagrees: defendants convicted of § 841(a) are not all similarly situated with regard to their ability to provide substantial assistance to aid government and further prosecutions; allowing prosecutors to provide benefit of motion below mandatory minimum only to those who are capable of providing substantial assistance to government is rationally related to legitimate government interest in prosecuting criminal conduct. Sentencing scheme that removes discretion from Courts, but builds in safety-valve adjustment predicated on reasonable assumption government is in best position to supply Court with accurate report of extent and effectiveness of defendant's assistance, does not violate due process.), cert.

denied, 522 U.S. 824 (1997).

United States v. Reeves, 83 F.3d 203 (8th Cir. 1996). (Lynn Reeves argues his sentence is disproportionate to his co-defendants, considering his comparably minor role in offense. Argument is precluded by Circuit s earlier cases (U.S. v. Granados, U.S. v. Jackson).)

United States v. Thompson, 51 F.3d 122 (8th Cir. 1995). (Thompson argued disparity between his sentence and his co-defendants sentences constituted violation of due process (two co-defendants received sentences of 24 and 18 months respectively, while Thompson received 235 month sentence). Thompson contended disparity has no foundation in facts of case, e.g., drug distributions occurred in Nelson s house and undercover officers dealt directly with Nelson, not him. This Court holds District Court did not abuse its discretion in sentencing Thompson to 235 months where evidence supported Court s drug quantity determination as well as finding Thompson was leader or organizer of conspiracy; co-defendants were relatively minor players and received downward departures because they pleaded and cooperated with government.)

United States v. Mihm, 13 F.3d 1200 (8th Cir. 1994). (Because his brother Jerry received 121-month sentence for identical conduct (conspiring to manufacture marijuana), Mihm argued his 160-month sentence is inconsistent with Guidelines objective of imposing similar sentences on similarly situated offenders. However, brothers conduct was not identical for Mihm was also convicted of failing to appear at first trial and 18 U.S.C. § 3146(b)(2) required that Court impose consecutive sentence for that conviction. Mihm conceded Court correctly applied statute and relevant Guidelines provisions in determining sentencing range. Because Court then imposed sentence within that range, this Court does not have jurisdiction to review Mihm s sentence.)

United States v. Coohey, 11 F.3d 97 (8th Cir. 1993). (This Court once again rejects argument that counting weight of carrier medium constitutes denial of equal protection because length of sentence can vary with type of carrier medium being used and its weight. This Court also takes occasion to validate amendment to § 2D1.1(c) which treats each dose of LSD for sentencing purposes as weighing 0.4 milligrams--which will make LSD sentences more uniform by eliminating disparities caused by varying weights of different carrier medium.)

United States v. Davila, 964 F.2d 778 (8th Cir.) (This Court finds meritless Davila s claim that disparity in sentences between himself and co-conspirators constitutes due process violation where Davila failed to establish he is similarly situated with his co-conspirators. Davila was "ringleader" and co-conspirators entered into plea agreements.), cert. denied, 506 U.S. 964 (1992).

United States v. Askew, 958 F.2d 806 (8th Cir. 1992). (No unwarranted disparity between sentences Askew received and those received by conspirators who were equally or more culpable where conspirators who were prosecuted earlier in investigation received shorter sentences because government was then unaware of magnitude of conspiracy.)

**C. 5th Amendment Double Jeopardy**

Witte v. United States, 515 U.S. 389 (1995). (Offense that was basis of second conviction was taken into account as relevant conduct for first conviction. This was not double jeopardy violation because enhancing sentence based on relevant conduct does not "punish" that relevant conduct for double jeopardy purposes.)

United States v. Gutierrez, 130 F.3d 330 (8th Cir. 1997). (Gutierrez contends imposition of longer sentence after second trial violates double jeopardy clause of Fifth Amendment. No absolute bar to imposing more severe sentence on reconviction. Gutierrez s attempts to distinguish his case from Pearce are unavailing as he did ask for his conviction to be set aside shortly after initial verdict; while motion was denied at time, eventual new trial was belated fulfillment of request.)

United States v. Alton, 120 F.3d 114 (8th Cir.) (Defendants convicted of drug trafficking who are found to possess dangerous weapon are subject to two-level enhancement to BOL; where defendant is also sentenced for § 924(c) conviction, Guidelines prohibit District Court from applying enhancement (§ 2K2.4, comment. (n.2)) because § 924(c) penalizes same conduct. Alton filed § 2255 habeas action arguing Bailey required his § 924(c) conviction be set aside. At time of resentencing, Alton had completed sixty-month term of custody for his drug trafficking conviction and had begun his § 924(c) sentence. Alton argues because drug trafficking term of custody had been served, his sentence on that count had expired, and he had thus developed legitimate expectation of finality in that sentence. This Court holds resentencing on served portion of two interdependent sentences does not violate double jeopardy (Alton s sentence on drug charge had not expired because he was still in custody and subject to supervised release on that charge; and consecutive sentences for related drug and firearms charges constituted unified sentencing package). DISSENT: Case is distinguishable from U.S. v. Harrison in which drug sentence had not been fully served; believes Alton had legitimate expectation of finality in completion of sentence for drug related convictions, and double jeopardy clause should prevent District Court from resentencing Alton on drug charge.), cert. denied, 522 U.S. 976 (1997).

United States v. Street, 66 F.3d 969 (8th Cir. 1995). (Street contended District Court s consideration in sentencing of his conduct towards conservation agent subjected him to double-jeopardy because state already prosecuted him for that assaultive conduct. Street s argument is answered by Witte v. United States: fact state previously punished Street for actions against agent did not preclude District Court from considering that conduct and sentencing Street for his crimes against park rangers as such consideration was not punishment for double-jeopardy purposes. It is immaterial first prosecution and sentencing (of Street) was state, not federal.)

United States v. Gardner, 65 F.3d 82 (8th Cir. 1995). (Gardner and Morris appealed from District Court s denial of their motions to dismiss on double jeopardy grounds indictment alleging conspiracy to defraud and fraud. They asserted consideration of other incidents of overall criminal scheme for sentencing purposes in Illinois case precluded subsequent prosecution and punishment for that conduct. While Guidelines envision sentences for multiple offenses arising out of same criminal activity ordinarily will be imposed together, they also explicitly contemplate possibility of separate prosecutions involving same or overlapping relevant conduct. Protection from excessive

punishment lies in § 5G1.3 which permits District Court to coordinate and approximate sentences as if all offenses had been brought in same proceeding, rather than in constitutional proscription against double jeopardy.), cert. denied, 516 U.S. 1064 (1996).

United States v. Kirtley, 986 F.2d 285 (8th Cir. 1993). (No violation of Due Process or Double Jeopardy Clauses by using same earlier offense to add six criminal history points (three points, sentence exceeded one year and one month; two, offense committed while on parole; one, offense committed less than two years after release).)

United States v. Williams, 935 F.2d 1531 (8th Cir. 1991). (Williams s sentence enhancement on basis of his prior criminal conduct (attempt to influence jurors during his trial for fraudulent sale of timber and cattle pledged to FmHA as collateral) plus eventual imposition of sentence on that same criminal conduct (jury tampering) does not violate double jeopardy principles.), cert. denied, 502 U.S. 1101 (1992).

United States v. Thomas, 930 F.2d 12 (8th Cir. 1990). (Considering defendant s criminal history in determining his sentence does not violate double jeopardy.)

**D. 5th Amendment Self-Incrimination**

United States v. Dunnigan, 507 U.S. 87 (1993). (Application of § 3C1.1 obstruction-of-justice enhancement for perjury at trial does not violate defendant's explicit statutory and implicit constitutional right to testify on his own behalf.)

United States v. Pereira-Munoz, 59 F.3d 788 (8th Cir. 1995). (This Court rejects Pereira-Munoz s contention that § 3C1.1 sentence enhancement violated his Fifth Amendment right against self-incrimination. He was not penalized for exercising his right to remain silent, but rather because he chose to relinquish right by providing false identification.)

United States v. Clay, 16 F.3d 892 (8th Cir. 1994). (This Court rejects Clay s argument that § 3C1.1, when applied to perjured testimony during trial, impermissibly burdens accused s right to testify, and is therefore unconstitutional. This Court cites Supreme Court s case of U.S. v. Dunnigan which holds that enhancement for perjury during course of trial is not in contravention of privilege of accused to testify in his own behalf.)

United States v. McQuay, 7 F.3d 800 (8th Cir. 1993). (This Court rejects McQuay s contention that requiring him to earlier volunteer self-incriminating information in order to receive additional one-level reduction (§ 3E1.1(b)) would violate his Fifth Amendment right to remain silent. McQuay is not being punished for choosing to exercise his right to remain silent; he merely does not reap benefit of additional one-point reduction given to others who volunteer information about their conduct in more timely manner.)

United States v. Lyles, 946 F.2d 78 (8th Cir. 1991). (Appellants contended District Court s interpretation of their refusal to discuss their case pending appeal of their convictions, as

unwillingness to accept responsibility for alleged conduct, violated Fifth Amendment right against self-incrimination. This Court rejects constitutional challenge, commenting that § 3E1.1 is in tradition of leniency for defendants who express genuine remorse and accept responsibility.)

United States v. Lawrence, 918 F.2d 68 (8th Cir. 1990) (Lawrence was not punished for exercise of Fifth Amendment right not to incriminate himself when he failed to confess full extent of his drug involvement; rather, he was penalized (§ 3C1.1) for lying during investigation and sentencing proceedings.), cert. denied, 499 U.S. 941 (1991).

United States v. Follett, 905 F.2d 195 (8th Cir. 1990). (Guidelines do not unconstitutionally limit defendant s right to testify; they are not unconstitutionally mechanical; no constitutional right to individualized sentence in noncapital case.), cert. denied, 501 U.S. 1204 (1991).

**E. 6th Amendment Confrontation**

United States v. Weekly, 118 F.3d 576 (8th Cir.) (Romero contends District Court erred in admitting hearsay and government failed to provide "discovery" regarding statements of polygraph examiner; Romero argues admission of testimony violated her Sixth Amendment right to confront her accusers. There is no right of confrontation in sentencing process. Guidelines permit use of hearsay to resolve disputed facts provided information has sufficient indicia of reliability to support probable accuracy (§ 6A1.3(a)). Furthermore, Romero had opportunity to cross-examine agent regarding his interviews with co-conspirator and polygraph examiner, and Romero has not provided specific reason as to why agent s testimony was unreliable. As to discovery, Romero failed to distinguish her sentencing hearing from trial and does not suggest statements exist which are exculpatory to her.), cert. denied, 522 U.S. 1020 (1997).

United States v. Allen, 75 F.3d 439 (8th Cir. 1996). (District Court is clearly permitted to accept as true all factual allegations contained in PSR that are not specifically objected to by parties. This Court also rejects Allen s contention using figures from PSR violated his confrontation clause rights under Sixth Amendment (foreclosed by Wise).)

United States v. Matthews, 29 F.3d 462 (8th Cir. 1994). (On appeal from remand, Matthews contended testimony relied upon by District Court to find amount of cocaine chargeable exceeded 1.5 kilograms did not satisfy requirements of Confrontation Clause. This Court concludes District Court s analysis and findings regarding challenged testimony satisfied requirements of U.S. v. Wise where District Court carefully analyzed testimony given in open Court and found under clear and convincing standard of proof, testimony was sufficiently reliable to support finding Matthews was chargeable with at least 1.5 kilograms. Thus, this Court rejects Matthews s Confrontation Clause challenge to evidence.)

United States v. Hammer, 3 F.3d 266 (8th Cir. 1993). (While Confrontation Clause does not apply at sentencing, facts relied upon by District Court at sentencing must be proved by preponderance of evidence. Burden of proof is on government with respect to base offense level and any enhancing factors; burden of proof is on defendant with respect to mitigating factors. Unless

defendant has admitted facts alleged in PSR, report is not evidence and is not legally sufficient basis for making findings on contested issues of material facts. Government must prove by preponderance of evidence that prosecution s position is correct. This Court holds these principles were violated over objection asserted by Hirsch in timely fashion (timely objection to factual accuracy of PSR under procedure established by local rules; counsel at sentencing hearing took position government had burden of proof and had to come forward with evidence other than PSR and District Court rejected position). Brown urged on direct appeal only those factual challenges to PSR that he made in District Court. While he did not ask for evidentiary hearing in so many words, under Eighth Circuit cases factual dispute over PSR triggers right to such hearing. Where District Court chooses to make finding with respect to disputed fact, it must do so on basis of evidence, and PSR and statements of counsel are not evidence. Brown objected to specific allegations in PSR and continued these objections at sentencing. District Court should have required government to introduce evidence; not to do so was error. Brown s sentence reversed and remanded.)

United States v. Rayner, 2 F.3d 286 (8th Cir. 1993). (This Court rejects Rayner s contention that, by relying on testimony from trial of his co-conspirators to deny minor participant reduction, Court violated Confrontation Clause.)

United States v. Wiley, 997 F.2d 378 (8th Cir.) (Wiley s contention that hearsay introduced at sentencing hearing violated his right of confrontation under Sixth Amendment was disposed of by this Court s decision in Wise.), cert. denied, 510 U.S. 1011 (1993).

United States v. Parker, 989 F.2d 948 (8th Cir. 1993). (This Court reject Potter s Sixth Amendment challenge to admission of transcript of sworn testimony. Confrontation Clause was not violated where testimony had been taken under oath at sentencing hearing; Potter did not claim testimony was unreliable.)

United States v. Norquay, 987 F.2d 475 (8th Cir. 1993). (Schoenborn argued FBI agent s testimony and other accounts of his previous criminal conduct contained in PSR were hearsay. This Court rejects Schoenborn s confrontation clause violation contention where FBI agent s testimony summarized statements of Schoenborn himself; moreover, Schoenborn had ample opportunity to cross-examine agent about reliability of his recollection. Transcript of sentencing hearing made it clear trial Court did not rely on PSR hearsay accounts in considering whether other criminal conduct warranted upward departure.)

United States v. Wise, 976 F.2d 393 (8th Cir. 1992). (Panel decision had held District Court erred in making findings of fact as to number of participants in criminal activity (§ 3B1.1) based on probation officer s hearsay testimony without undertaking Confrontation Clause analysis required by Fortier (e.g., availability of witnesses, hearsay exceptions). Upon rehearing en banc, this Court affirmed sentence imposed by District Court. Court concluded enactment of Guidelines has not so transformed sentencing phase as to constitute separate criminal proceeding; therefore, right to confront witnesses does not attach--holdings to contrary in Fortier and Streeter are overruled. Constitutional limitations on use of hearsay at sentencing proceedings are captured in section 6A1.3. District Court must determine that information has sufficient indicia of reliability to support its

probable accuracy--this fulfills Confrontation Clause s basic purpose of promoting integrity of factfinding process. Despite District Court s abbreviated procedure, Wise had opportunity to voice his objections to PSR and to cross-examine probation officer who had prepared report. DISSENT: Procedures for assigning four level enhancement for leadership role violated Confrontation Clause (intent of Framers) and Due Process Clause. Even if there were no constitutional violation, District Court erred in placing burden of persuasion on Wise and in basing its findings on unreliable information. Sentencing is no longer focused on assessment of defendant s rehabilitative potential, rather; sentencing is now fully adversarial with goal of Guidelines, punishment and uniformity. Confrontation is required by due process. SPECIAL CONCURRENCE: Concurs except to extent majority disagrees with his dissent in Galloway. Takes issue with characterization of pre-guideline sentencing.), cert. denied, 507 U.S. 989 (1993).

United States v. Summerfield, 961 F.2d 784 (8th Cir. 1992). (Summerfield, who pleaded guilty, argued that because he filed objections to PSR-set out facts, government should have presented evidence other than PSR at sentencing. Here, District Court made its findings using live testimony it heard at trial of Summerfield s co-defendants and it considered this evidence in sentencing Summerfield, to which he made no objection. Thus, this Court rejects his Sixth Amendment right to confrontation claim. CONCURRENCE: This Court could have based its conclusion solely on Summerfield s failure to preserve record. Procedure here departed radically from deeply rooted traditions of fair play and due process.)

United States v. Lowrimore, 923 F.2d 590 (8th Cir.) (While this Court found merit in Lowrimore s challenge to procedure used at his sentencing (because Lowrimore objected to hearsay statements in PSR, Court should have decided whether each statement fell within recognized exception to hearsay rule or bore some particularized guarantees of trustworthiness; calling probation officer to testify about how report was prepared did not correct problem), violation of Confrontation Clause was deemed harmless as District Court was entitled to rely upon its recollection of testimony at Lowrimore s trial as adequate to support enhancements totaling 17 levels.), cert. denied, 500 U.S. 919 (1991).

United States v. Fortier, 911 F.2d 100 (8th Cir. 1990). (Sentence reversed, remanded for resentencing where District Court relied on presentence report which contained triple hearsay on issue of amount of drugs attributable to Fortier with no independent verification of facts in report, in violation of Confrontation Clause. Confrontation Clause requires District Courts not rely on presentence report alone for required trustworthiness evaluation in face of challenge by defendant; such fact-finding is judicial function.)

### F. 8th Amendment Cruel and Unusual Punishment/Proportionality

United States v. Collins, 340 F.3d 672 (8th Cir. 2003) (LOKEN, RILEY, SMITH*). (Mandatory life sentence for defendant with two prior drug felonies convicted of 500-gram methamphetamine conspiracy was not grossly disproportionate.)

United States v. Greger, 339 F.3d 666 (8th Cir. 2003) (LOKEN, BRIGHT, SMITH CAMP*).

(Defendant's 151-month prison sentence was not grossly disproportionate to codefendants' sentences of seventy months imprisonment, thirty-seven months imprisonment, and five months imprisonment plus five months community confinement and home detention.)

United States v. Villar, 184 F.3d 801 (8th Cir. 1999) (WOLLMAN,* BEAM, MURPHY). (Argument that 15-year prison term under § 924(e) is cruel and unusual punishment, is foreclosed.)

United States v. Skorniak, 59 F.3d 750 (8th Cir.) (Skorniak contended District Court erred by creating unwarranted disparity between his sentence and that of his co-conspirator and disparity violated Skorniak s Fifth Amendment right to due process and Eighth Amendment right to be free from cruel and unusual punishment. Although sentencing Guidelines were intended to avoid unwarranted sentencing disparities among similarly situated defendants, mere variations in sentences among co-conspirators do not mandate resentencing. District Court did not abuse its discretion where Skorniak s criminal history was V, his co-conspirator s, II; co-conspirator received reduction for acceptance of responsibility; co-conspirator withdrew from conspiracy earlier than Skorniak; and terms of co-conspirator s plea agreement held him accountable for less cocaine than did that of Skorniak s.), cert. denied, 516 U.S. 980 (1995).

United States v. Frieberger, 28 F.3d 916 (8th Cir. 1994). (Frieberger argued his 132-month sentence violated Eighth Amendment because it is disproportionate to his crime. This Court narrowly reviews sentence to determine whether it is grossly disproportionate. Frieberger s 132-month sentence for crime of conspiracy to distribute more than 100 grams of mixture containing detectable amount of methamphetamine was not disproportionate as compared to Harmlin v. Michigan situation; sentence was well within maximum term of 40 years of imprisonment authorized by statute applicable to Frieberger s offense.

Frieberger argued guideline violates Due Process Clause of Fifth Amendment by punishing methamphetamine distribution more severely than other drug crimes. Absent classifications based on forbidden or suspect ground, legislative decisions such as how severely to punish particular class of drug trafficking crimes need only have rational basis to survive substantive due process challenge. Frieberger offers nothing from which Court could conclude punishments chosen for methamphetamine offenses lack such basis.), cert. denied, 513 U.S. 1097 (1995).

United States v. Sather, 28 F.3d 821 (8th Cir.) (This Court rejects Sather s Eighth Amendment cruel and unusual punishment challenge to length of his sentence. Because he had already been convicted of at least three violent felonies or drug offenses, he was sentenced as armed career criminal.), cert. denied, 513 U.S. 1006 (1994).

United States v. Ailport, 17 F.3d 235 (8th Cir.) (This Court rejects Ailport s argument that his 360-month sentence as career offender violates Eighth Amendment prohibition of excessive punishment because sentence is disproportionate both to his offense of conviction (aiding and abetting distribution of methamphetamine) and to sentence received by his co-defendant. This Court concludes District Court properly calculated Ailport s sentence as career offender, § 4B1.1.), cert. denied, 512 U.S. 1242 (1994).

United States v. Shephard, 4 F.3d 647 (8th Cir. 1993). (Shephard attempted Eighth Amendment argument that his sentence is cruel and unusual in light of proactive role of government in soliciting Shephard to turn what cocaine he had into crack. This Court, however, rejected entire entrapment argument.), cert. denied, 510 U.S. 1203 (1994).

United States v. Coones, 982 F.2d 290 (8th Cir. 1992). (This Court rejects argument one plant/one kilogram ratio for marijuana (§ 2D1.1(c)) is irrational and constitutes cruel and unusual punishment. Congress intended to punish growers based on their place in chain of distribution. Likewise, this Court rejects argument sentence is cruel and unusual punishment because unproductive male marijuana plants were assessed against defendant when growers apprehended in later stages of cultivation--when male plants have been discarded--would receive lesser sentence.)

United States v. Knapp, 955 F.2d 566 (8th Cir.) (Knapp argued her 87 month sentence violated Eighth Amendment because it was disproportionate to her offense conduct and background, and other caretakers who had longer involvement with conspiracy received same sentence. This Court concluded that in light of substantial downward departure (from range of 188-235 months) District Court granted, argument simply lacked merit. CONCURRENCE: Calls attention to Seventh Circuit s United States v. Edwards holding that latecomer or minimal participant will not necessarily be chargeable for drug quantities attributed to other conspirators; key is scope of agreement between individual defendant and his co-conspirators.), cert. denied, 506 U.S. 859 (1992).

United States v. Gordon, 953 F.2d 1106 (8th Cir.) (This Court rejects Gordon s argument that career offender provisions (§ 4B1.1) result in sentencing range beginning at 262 months which is unconstitutionally disproportionate to gravity of his offense (aiding and abetting in manufacture of P-2-P) and offends Eighth Amendment. CONCURRENCE: Recognizing Harmelin requires affirmance, two members of panel express distress at what appears to be excessive sentence. Focusing on only existence of prior convictions without looking into what actually happened, results in irrational and unjust sentences.), cert. denied, 506 U.S. 858 (1992).

United States v. Harvey, 946 F.2d 1375 (8th Cir. 1991). (Life sentence without parole for drug crime of Harvey s magnitude is not cruel and unusual punishment. However, this Court agrees with District Court s recommendation of executive clemency after service of fifteen years (and in that event, with period of ten years supervised release). Executive clemency is one of "flexible techniques" for modifying sentences; existence of such techniques is one reason for Supreme Court holding that this type of sentence does not violate Eighth Amendment.)

United States v. Manuel, 944 F.2d 414 (8th Cir. 1991). (Manuel s sentence of 15 months for failure to appear is not grossly disproportionate to his crime and does not violate Eighth Amendment.)

United States v. Cornelius, 931 F.2d 490 (8th Cir. 1991). (Career offender sentence enhancement does not violate Eighth Amendment prohibition against cruel and unusual punishment.)

United States v. Stephenson, 924 F.2d 753 (8th Cir. 1991). (Assignment of criminal history points for imposition of prior sentence of less than sixty days and for committing instant offense while under sentence of probation did not result in either "grossly disproportionate" sentence or double counting in violation of Eighth Amendment or due process.)

United States v. Williams, 923 F.2d 76 (8th Cir.) (Sentencing Guidelines do not violate Presentment Clause. Though this Court concedes life in prison for being felon in possession is severe, it holds Guidelines do not violate Eighth Amendment; sentence was in statutory maximum and there was no abuse of discretion.), cert. denied, 502 U.S. 841 (1991).

United States v. Foote, 920 F.2d 1395 (8th Cir. 1990). (Gardiner challenged his enhanced sentence under Career Offender provision (§ 4B1.1) as violative of Eighth Amendment. This Court holds as matter of law, sentences under Guidelines are sentences within statutorily prescribed ranges and therefore do not violate Eighth Amendment.)

United States v. Meirovitz, 918 F.2d 1376 (8th Cir. 1990). (Meirovitz s life sentence without parole under Guidelines structure does not violate proportionality requirement of Eighth Amendment, considering gravity of his offense and harshness of penalty and as compared with sentences imposed on other defendants similarly situated in Eighth Circuit and sentences imposed for same crime in other jurisdictions.), cert. denied, 502 U.S. 829 (1991).

**G. Ex Post Facto Clause/Retroactivity**

Johnson v. United States, 529 U.S. 694 (2000). (18 U.S.C. § 3583(h) applies only to cases in which defendant committed initial offense after September 13, 1994. No ex post facto problem, however, because even prior to that date, 18 U.S.C. § 3583(e)(3) authorized District Court revoking term of supervised release and imposing additional imprisonment to also impose additional term of supervised release. On this point, consistent with United States v. St. John, 92 F.3d 761 (8th Cir. 1996), and United States v. Schrader, 973 F.2d 623 (8th Cir. 1992).)

United States v. DeLeon, 330 F.3d 1033 (8th Cir. 2003) (BOWMAN,* RICHARD ARNOLD, BYE). (Amendment to Guidelines Manual increasing penalty for ecstasy did not take effect until date it was published in final form in Federal Register--not on date proposed amendment was published, and not on date it was adopted by Sentencing Commission and circulated by letter to usual recipients of Guidelines Manual updates. Because defendant committed offense prior to date of Federal Register publication, it was Ex Post Facto violation to apply increased penalty to him.)

United States v. Zimmer, 299 F.3d 710 (8th Cir. 2002) (McMILLIAN, BEAM, HANSEN*). (Sentencing Guidelines are subject to Ex Post Facto Clause. Generally, District Court should apply Guidelines in effect at time of sentencing unless doing so would violate Clause. Such violation occurs where operative Guidelines at sentencing produce sentence harsher than one permitted under Guidelines in effect at time crime was committed. Where defendant's offense conduct straddles date of Guidelines amendment, amended version can be applied without violating Clause even if it

produces harsher sentence.

Zimmer: Because defendant was convicted of participating in conspiracy spanning from October 1996 through March 1998, District Court correctly applied November 1, 1997 amendments. This Court rejects defendant's argument that he withdrew from conspiracy because he did not meet his burden to show either that he made clean breast to authorities or that he communicated his withdrawal in manner reasonably calculated to reach coconspirators. Evidence at trial showed that, after November 1, 1997, Zimmer possessed methamphetamine precursor chemicals, forgave coconspirator's debt in return for expected drug proceeds, and attempted to get inmate to intimidate or eliminate witnesses.

Carver: Even if District Court erred in applying amended Guidelines, and offense level should have been 39 rather than 41, there was no ex post facto violation because Guidelines range would have remained same), cert. denied, 537 U.S. 1146 (2003).

United States v. Wilson, 184 F.3d 798 (8th Cir. 1999) (BEAM, F. R. GIBSON,* MURPHY). (This Court would not reach issue whether District Court erroneously applied 1997 Guidelines in violation of Ex Post Facto Clause because Wilson waived any objection by expressly approving plea agreement with full knowledge of potential penalties, and plea agreement specifically provided that base offense level was 15 (a determination he now challenges); moreover, at sentencing hearing, Wilson's attorney indicated both he and Wilson had reviewed PSR and believed it correct and accurate in all matters, and attorney told Court Wilson had no objection to sentence Court had imposed.)

United States v. Jacobs, 136 F.3d 1187 (8th Cir. 1998). (Jacobs contends due process rights were violated when government offered no evidence either at original sentencing or resentencing with respect to type of methamphetamine involved, and therefore District Court at resentencing improperly used higher marijuana equivalency in considering amount of methamphetamine for which Jacobs is responsible, and use of higher marijuana equivalency violated constitutional guarantee against ex post facto laws. This Court discusses [plain error] standard of review with respect to collateral challenge, and holds to extent Jacobs is directly appealing District Court s actions at his resentencing related to interim amendment to Guidelines, there was no plain error in this case. This Court leaves for initial District Court consideration, question of whether Jacobs is barred from arguing District Court violated constitutional guarantees of due process and against ex post facto laws by adopting calculation from original PSR that applied higher marijuana equivalency with respect to amount of methamphetamine for which he is responsible.)

United States v. Mihm, 134 F.3d 1353 (8th Cir. 1998). (Court analyzes proper interplay between 18 U.S.C. § 3582(c)(2), which gives District Court limited authority to reduce prior sentence by retroactively applying amendments to Sentencing Guidelines, and 18 U.S.C. § 3553(f), prospective "safety valve" exception to mandatory minimum drug sentences. District Court determined Mihm was eligible for § 3582(c)(2) relief, but refused to invoke safety valve, concluding it would be improper retroactive application. When defendant is eligible for § 3582(c)(2) reduction, District Court must consider all relevant statutory sentencing factors. Section 3553(f) safety valve is general sentencing consideration District Court must take into account in exercising its present

discretion to resentence under § 3582(c)(2). Grant of § 3582(c)(2) relief to Mihm is distinct sentencing exercise resulting in sentence "imposed on or after" 9/23/94; thus, no retroactivity bar to applying safety valve in these circumstances. Case remanded.)

United States v. Behler, 100 F.3d 632 (8th Cir. 1996). (Behler argues District Court s refusal to reconsider quantity determination violated Ex Post Facto Clause, contending he should be attributed lesser quantity on distribution and conspiracy charges because under 1987 Guidelines, District Court would have been free to consider his state of mind and thus to disregard amounts of methamphetamine he purchased for or diverted to his own personal use. Behler also contended he would have received more favorable rulings with respect to sentencing enhancements under 1987 version, but District Court erroneously refused to reconsider them on remand. Behler did not raise these ex post facto arguments in first appeal and this Court s determination is now law of case. Furthermore, even if District Court should have considered Behler s state of mind and did not, this would not have affected drug quantity determination in this case. While 1987 version required generally to determine seriousness of offense conduct, District Court must consider defendant s state of mind or motive in committing offense of conviction (§ 1B1.3(a)(2)), scienter requirement was subsequently eliminated from Guidelines. Quantity determination in this case, however, was derived solely from Behler s own purchases; his state of mind cannot yield quantity determination in conflict with his own conduct. As to amounts he diverted to his own personal use, once conspiracy and his membership in it has been established as in this case, those amounts are relevant to determining quantity of controlled substances defendant knew conspiracy distributed. Behler s ex post facto argument fails on enhancements as well, e.g., while § 3C1.1 changed, it would not have affected Behler as it does not apply to situation where defendant is charged with obstructing justice by threatening witness.), cert. denied, 522 U.S. 855 (1997).

United States v. LeCompte, 99 F.3d 274 (8th Cir. 1996). (In departing upward, District Court relied in part on Application Note 5 to § 2A3.4; however, Application Note 5 was added to Guidelines after LeCompte s offense. Ex Post Facto Clause precludes use of guideline in effect at time of sentencing if its use produces harsher sentence than would Guidelines in effect when crime was committed.)

United States v. St. John, 92 F.3d 761 (8th Cir. 1996). (Upon revocation of supervised release, St. John was sentenced to 14 months imprisonment to be followed by 22 months supervised release and he was ordered to pay balance of fine originally imposed. On appeal, St. John argues such application of § 3583(h) imposes increased penalty and thus violates Ex Post Facto Clause. He argues District Court erred in sentencing him to both terms of imprisonment and of supervised release because § 3583(e)(3) does not authorize imposition of both; at time he was originally sentenced in 1990, only Court to interpret § 3583(e)(3) had held because section was written in disjunctive, Court could revoke supervised release and either impose term of imprisonment or modify terms of original supervised release, but not both. St. John acknowledges this Court subsequently held § 3583(e)(3) authorized imposition of revocation sentence including both imprisonment and supervised release but he argues due process prohibits imposition of sentence based on case law decided after offense was committed. Likewise, he acknowledges § 3583(h) specifically authorizes imposition of both kinds of terms; however, because § 3583(h) was enacted

subsequent to his conviction and increases penalty for offense, applying this section to him would violate Ex Post Facto Clause. Ex Post Facto Clause does not apply to judicial constructions of statutes. Viewed from due process perspective, St. John s argument is that Schrader and its progeny unforeseeably (and incorrectly) expanded reach of § 3583(e)(3). This Court is not bound by prior decisions of other circuits; this Circuit has consistently and repeatedly held revocation sentences imposed under § 3583(e)(3) may include both imprisonment and supervised release as long as aggregate of two terms is less or equal to original term of supervised release. Schrader simply does not represent judicial expansion. As to ex post facto argument based on difference between prior law and new law, following lengthy analysis, this Court concludes defendant is not potentially subject to increased penalty under § 3583(h) because, given this Court s interpretation of § 3583(e)(3) in Schrader and subsequent cases like Krabvenhoft, maximum period of time defendant s freedom can be restrained upon revocation of supervised release under new law is either same as, or possibly less than, under prior law. Because application of new law does not result in increased penalty, there is no ex post facto violation. Judgment of District Court affirmed.)

United States v. Lambros, 65 F.3d 698 (8th Cir. 1995). (Though Lambros s conspiracy started before sentencing Guidelines abolished parole in November 1987, any conspiracy completed after Guidelines took force is governed by them.), cert. denied, 516 U.S. 1082 (1996).

United States v. Cooper, 63 F.3d 761 (8th Cir. 1995), reinstating 35 F.3d 1248 (8th Cir. 1994). (Following remand from Supreme Court for consideration in light of California Dep t of Corrections v. Morales, this Court distinguishes Morales as here government conceded application of November 1, 1991 Guidelines did increase Cooper s total sentence. Issue was whether Ex Post Facto Clause nonetheless permits application of amended Guidelines to determine Cooper s sentence because part of his criminal conduct occurred in 1992. This Court rejects Cooper s argument of error in applying Guidelines "one book" rule (§ 1B1.11(a)) because clause prohibits use of rule when effect is to increase penalty for offense committed before Guidelines amendment. Cooper s three firearm offenses are to be grouped under § 3D1.2 and application increased Cooper s penalty. Because last of these groupable offenses occurred in January 1992, Cooper had "fair warning" of total penalty this additional criminal conduct would entail--that is all Ex Post Facto Clause requires in this context. Sentencing Guidelines are subject to Ex Post Facto Clause of U.S. Constitution. Generally, District Court should apply Guidelines in effect at time of sentencing unless doing so is violative of Ex Post Facto Clause. Cooper was charged with being felon in possession of firearm (8/24/94), possession of short-barreled shotgun (9/24/91), and being felon in possession of three separate firearms (1/23/92). Cooper argued application of Guidelines as amended 11/1/91 to offenses committed prior to effective date of amendments violated clause. This Court states it was not amendments that disadvantaged Cooper, but rather his election to continue criminal activity after 1991 amendments became effective; that is, he could have avoided coming under amended Guidelines by desisting in repeated criminal possession of firearms prior to 11/1/91. This Court reasons that application of Guidelines in effect at time Cooper completed last offense does not violate clause, making analogies to jurisprudence in area of habitual offender statutes, conspiracies which straddle Guidelines effective date, and common scheme or plan/same course of conduct. Panel also pointed to commentary to U.S.S.G. § 1B1.11 as supporting its position. CONCURRENCE/DISSENT: Believes facts giving rise to three firearms offenses constituted

discrete offenses rather than same course of conduct, mandating pre-November 1, 1991 version of Guidelines be applied to two of counts.), cert. denied, 517 U.S. 1158 (1996).

United States v. Reetz, 18 F.3d 595 (8th Cir. 1994). (Reetz was indicted for mail fraud based on his using his position as investment advisor to defraud client of investment funds, in 1989. In April 1992, Reetz failed to appear at show cause hearing regarding mail fraud and instead, used false passport to exit and re-enter country. Following his apprehension and arrest, he was charged with four additional counts which included interstate transportation of stolen money stemming from conduct that occurred from March 1989 through at least January 1990 and involved Reetz absconding with assets of another client. He argued District Court should have applied 1988 sentencing Guidelines, in effect when he completed his mail fraud count as application of more punitive amendments in November 1989 to his mail fraud count violated Ex Post Facto Clause. This Court determined that Reetz s mail fraud and transport of stolen money counts both involved his conduct as investment advisor in which he created bogus investment schemes to defraud his clients of money. In addition to common purpose, both counts involved similar modus operandi. Thus, Court concluded two offenses constituted common scheme or plan (§ 1B1.3). As result, completion date for two counts--January 1990--post-dates effective date of November 1989 Guidelines. Therefore, District Court s application of Guidelines in effect at time of sentencing did not violate Ex Post Facto Clause.)

United States v. Behler, 14 F.3d 1264 (8th Cir.) (Behler argued ex post facto violation as District Court sentenced him under Guidelines in effect at time of his 1992 sentencing rather than 1987 version in effect at time of illegal conduct ending with his May 1989 arrest. Behler argued his sentence was harsher under 1992 Guidelines because method for determining methamphetamine quantity was changed subsequent to 1987 version in which quantity was determined by weight of entire substance or mixture containing methamphetamine whereas 1992 version provides quantity determination either by weight of entire substance or mixture, or by actual weight of methamphetamine itself which is contained in substance or mixture. Behler s base offense level was calculated at 30 while under 1987 Guidelines it would have been level 26. Government conceded that U.S. v. Bell controls and this Court remands for resentencing.), cert. denied, 513 U.S. 960 (1994).

United States v. Levi, 2 F.3d 842 (8th Cir. 1993). (Being merely advisory, Chapter 7 policy statement is not law within meaning of Ex Post Facto Clause. Thus, fact that District Court considered Chapter 7 policy statement that had been amended subsequent to Levi s initial sentencing does not implicate Ex Post Facto Clause.)

United States v. Loftus, 992 F.2d 793 (8th Cir. 1993). (If guideline is amended after defendant s crime, but before sentencing, and amendment increases offense level, guideline in effect at time of crime controls.)

United States v. Bell, 991 F.2d 1445 (8th Cir. 1993). (Government appeal of District Court decision to use Sentencing Guidelines in effect when Bell committed her crime (§ 2K2.1(a)(2) started at offense level 12) instead of those in effect when she was sentenced (§ 2K2.1(a)(4) at base

offense level 20 plus four levels under § 2K2.1(b)(5) would have been applicable). This Court concluded Ex Post Facto Clause s application to Sentencing Guidelines had not been decided in this circuit. It is effect, not form, of law which determines whether it is ex post facto: here, difference in sentences District Court could impose was 30 months maximum (Guidelines in effect when crime was committed) and 80 month minimum (those in effect at sentencing). Sentencing Commission, though located in Judicial Branch, acts like agency, with delegated power from Congress to prescribe sentences for criminals; constitutional constraints apply. District Courts do not retain amount of discretion under Guidelines to make Sentencing Guidelines analogous to parole Guidelines. Sentencing Guidelines are laws within meaning of Ex Post Facto Clause. Clause is violated if defendant is sentenced under Guidelines in effect at sentencing when they produce sentence harsher than one permitted under Guidelines in effect at time of commission of crime. District Court affirmed.)

United States v. Granados, 962 F.2d 767 (8th Cir. 1992). (Mora properly sentenced under Guidelines. No violation of ex post facto prohibition to punish defendant for amounts involved in conspiracy begun before effective date of Guidelines and continued afterwards. Burden of proving withdrawal from conspiracy rests upon defendant. Defendant must take affirmative action to withdraw; mere cessation of activities is not enough.)

United States v. Olderbak, 961 F.2d 756 (8th Cir.) (A defendant may be sentenced under Guidelines for his participation in any conspiracy that continued past November 1, 1987, effective date of Guidelines, even if defendant performed no overt act in furtherance of conspiracy after effective date.), cert. denied, 506 U.S. 959 (1992).

United States v. ABC, Inc., 952 F.2d 155 (8th Cir.) (Defendants contended Guidelines did not apply to them as only two overt acts in furtherance of conspiracy alleged to have taken place after Guidelines took effect were those charged in count of which they were found not guilty. Defendants were convicted, however, of count which expressly charged conspiracy continued until May 1988. Therefore, Guidelines applied as District Court concluded.), cert. denied, 502 U.S. 866 (1991).

United States v. Pregler, 925 F.2d 268 (8th Cir. 1991). (A conspiracy is ongoing act and Guidelines apply to one begun before effective date of Guidelines and continuing after effective date. Ex Post Facto Clause does not apply because conduct that is part of continuing course of conduct is included in base offense level calculated under Guidelines.)

United States v. Swanger, 919 F.2d 94 (8th Cir. 1990). (Sentencing under amended Guidelines violated Ex Post Facto Clause where in applying amended Guidelines in effect at time of sentencing instead of those in effect at time of offense, defendants offense levels were increased. Sentences vacated, remand for resentencing.)

United States v. Wayne, 903 F.2d 1188 (8th Cir. 1990). (District Court may sentence conspirator under Guidelines if conspiracy continued beyond effective date of Guidelines, without violating Ex Post Facto Clause. District Court s finding that conspiracy continued to May 1988

was not clearly erroneous.)

United States v. Walker, 885 F.2d 1353 (8th Cir. 1989). (Applying Guidelines to conspiracy begun before and continuing after Guidelines became effective does not violate Ex Post Facto Clause.)

**H. Rule of Lenity**

United States v. Hutton, 252 F.3d 1013 (8th Cir. 2001) (RICHARD. S. ARNOLD,* FAGG, MORRIS SHEPPARD ARNOLD). (Applying rule of lenity where there are two plausible readings of Guidelines provision (here, § 2B3.1(b)(2)(E). Under amended version of Guideline, it is clear that object that looks like dangerous weapon may warrant enhancement if it is possessed during robbery but never seen by anyone; this was not clear before, however, and defendant should receive benefit of any ambiguity that existed when he was sentenced.)

United States v. Hartje, 251 F.3d 771 (8th Cir. 2001) (WOLLMAN,* BOWMAN, MORRIS SHEPPARD ARNOLD). (Applying rule of lenity where there are two plausible readings of Guidelines provision (here, § 2B3.1(b)(2)(E))), cert. denied, 534 U.S. 1116 (2002).

United States v. Oetken, 241 F.3d 1057 (8th Cir. 2001) (BEAM, MORRIS SHEPPARD ARNOLD,* ALSOP). (Where there are two plausible readings of Guideline, this Court applies rule of lenity and gives defendant benefit of reading which results in shorter sentence.)

United States v. Crawford, 83 F.3d 964 (8th Cir.) (Attacking sentencing scheme which punishes distribution of cocaine base more severely than distribution of cocaine, Crawford argued distinction in § 841(b) and § 2D1.1 between cocaine base and cocaine is nonsensical because two terms refer to same chemical; therefore, Court should be governed by rule of lenity and he should be sentenced to lesser punishment for cocaine. Despite Crawford s stipulation to offense level 32 in his plea agreement which has practical results of waiver of issue--this Court discusses Crawford s argument based on same record before District Court in U.S. v. Davis. This Court has previously decided Davis testimony was "at best equivocal" and also based its decision on additional testimony establishing "practical, real-world differences" between cocaine base and other forms of cocaine, and concluding statutory distinction was not ambiguous and did not require application of rule of lenity. In addition to these decisions, Court points to Seventh Circuit case which looked to legislative history of § 841(b) showing Congress intended two terms to have different meanings (e.g., term cocaine base was to refer to crack, smokable form of cocaine made by dissolving cocaine hydrochloride in water and baking soda and reducing it to solid substance). Because Congress s intent was clear, no reason to apply rule of lenity.), cert. denied, 519 U.S. 903 (1996).

United States v. Jackson, 64 F.3d 1213 (8th Cir. 1995). (Jackson first argued for rule of lenity claiming ambiguity in statute distinguishing between cocaine base and cocaine for sentencing purposes. Jackson s vagueness argument precluded by established law of Circuit: despite lack of exacting definition of cocaine base in 21 U.S.C. § 841, term provides adequate notice to individuals and sufficiently limits governmental discretion so that it survives constitutional attack premised on

void for vagueness doctrine.

Jackson also argued for application of rule of lenity requiring imposition of lesser penalty when ambiguity exists concerning reach of criminal statute or penalties involved. In case of first impression, this Circuit rejects argument, noting important differences between cocaine powder and crack cocaine (e.g., cost, method of production, availability to urban poor, rapid high/addiction). Moreover, Jackson did not contend he was unaware of differences between two substances or unable to distinguish between crack and other forms of cocaine.), cert. denied, 516 U.S. 1137 (1996).

**I. Standard of Proof**

United States v. Watts, 519 U.S. 148 (1997) (per curiam). (District Court may consider acquitted conduct, proven by preponderance of evidence, as relevant conduct.)

United States v. Diaz, 296 F.3d 680 (8th Cir.) (en banc). (Apprendi v. New Jersey, 530 U.S. 466 (2000), does not forbid District Court from finding existence of sentencing factors by preponderance of evidence; it only prevents Court from imposing sentence greater than statutory maximum for offense simpliciter based on such findings.), cert. denied, 537 U.S. 940 (2002).

United States v. Anderson, 243 F.3d 478 (8th Cir.) (MORRIS SHEPPARD ARNOLD,* J. R. GIBSON, GOLDBERG). (District Court properly applied preponderance of evidence standard; here, relevant conduct raised defendant's sentencing range from 235-293 months to 360 months which is not so significant as to raise due process concerns that would require heightened standard of proof.), cert. denied, 534 U.S. 903 and 534 U.S. 929 (2001).

United States v. Plumley, 207 F.3d 1086 (8th Cir. 2000) (WOLLMAN,* F. GIBSON, MURPHY). (Preponderance of evidence was correct standard to apply in determining whether defendant made particular statement underlying specific offense characteristic.)

United States v. Alvarez, 168 F.3d 1084 (8th Cir. 1999) (BEAM, LAY, SIPPEL*). (This Court has previously suggested preponderance-of-evidence standard may not satisfy due process when consideration of relevant conduct results in drastic increase in sentence, but four-fold departure from median of initial Guidelines range does not trigger heightened standard.)

United States v. Whatley, 133 F.3d 601 (8th Cir.) (Whatleys suggest Supreme Court s recent decision in United States v. Watts obligates District Courts to make specific findings detailing precisely how acquitted conduct used for sentencing purposes has been proved by preponderance of evidence. This Court disagrees: it is enough if District Court simply makes factual findings necessary to support relevant sentencing adjustments.), cert. denied, 524 U.S. 940 and 524 U.S. 945 (1998).

United States v. Noske, 117 F.3d 1053 (8th Cir.) (James contends District Court committed error in adopting PSR without conducting evidentiary hearing. District Court made detailed findings of fact in addressing James's objections to PSR; Court noted it had presided at trial and heard all evidence. James not entitled to evidentiary hearing because District Court could properly base its

sentencing findings on evidence and testimony from trial.), cert. denied, 522 U.S. 922, 522 U.S. 959 (1997), and 522 U.S. 1119 (1998).

United States v. Buford, 108 F.3d 151 (8th Cir. 1997). (Once conviction has been legally obtained, government need only prove facts bearing on sentence by preponderance of evidence. Moreover, quantity of drugs involved in conspiracy is not essential element of offense and thus, government need not prove quantity beyond reasonable doubt.)

United States v. Murray, 67 F.3d 687 (8th Cir. 1995). (Murray conceded government is ordinarily required to prove factual prerequisite to sentence enhancement by preponderance of evidence. He correctly stated due process conceivably could require more than mere preponderance where sentence enhancement factor becomes tail which wags dog of substantive offense. Murray argues this is such case because quantity of powder and crack cocaine found in safe increased his BOL from 16 to 36 and resulted in nine-fold increase in his permissible sentence range. This Court rejects Murray s challenge on totality of evidence. Even assuming relevant conduct attributable to Murray became "tail," had District Court applied clear and convincing evidence standard of proof, it still would have satisfied any challenge by Murray to enhancement resulting from application of relevant conduct provisions.), cert. denied, 517 U.S. 1113 (1996).

United States v. Pugh, 25 F.3d 669 (8th Cir. 1994). (Pugh asked this Court to require clear and convincing standard of proof because, he argues, District Court s consideration of conduct for which he was convicted and his other relevant conduct, subjects him to potential sentence four times length of potential sentence that would apply if Court considered only conduct for which he was convicted. In addition to four counts of distribution, Pugh was also convicted of one count of conspiracy, offense that necessarily includes quantities other than 2.91 grams attributable to four distribution counts. This Court rejects contention that four-fold increase in potential sentence is large enough to require heightened evidentiary standard.)

United States v. Hulshof, 23 F.3d 1470 (8th Cir. 1994). (The government bears burden of proving disputed factors at sentencing by preponderance of evidence.)

United States v. Behler, 14 F.3d 1264 (8th Cir.) (Behler recognized that in this circuit drug quantity must be proved at sentencing by preponderance of evidence, but argued his was case where sentencing factor had such disproportionate effect on sentence that it required higher burden of proof than mere preponderance. He asserted that relevant conduct findings in his case increased his base offense level 16 levels and increased sentencing range 6 ½ times. He contended District Court should have used clear and convincing standard of proof. This Court distinguishes cases addressing uncharged relevant conduct findings under § 1B1.3. In this case, District Court s quantity determination fell under § 2D1.1 for Behler s conspiracy conviction. This Court holds there is no due process violation in this case because Behler was given notice of drug conspiracy charge and defended against that charge. He was found guilty of that charge and District Court made quantity determination in relation to that charge, using same evidence jury utilized in its guilt determination (§ 2D1.1(a)(3)) without resort to uncharged relevant conduct.), cert. denied, 513 U.S. 960 (1994).

United States v. Fleming, 8 F.3d 1264 (8th Cir. 1993). (Fleming mounted constitutional challenge to use of cross-reference provision, § 2K2.1, on basis that it is fundamentally unfair to consider uncharged conduct in sentencing under Guidelines. District Court s consideration of uncharged conduct in sentencing does not violate defendant s constitutional rights if government proves such conduct by preponderance of evidence. Relevant conduct guideline and cross-referencing provision similarly allow District Court to consider uncharged conduct in determining defendant s offense level. Here, this Court finds government proved aggravated assault by at least preponderance of evidence and District Court therefore properly applied cross-referencing provision. CONCURRENCE: Fleming was charged and pleaded guilty to second-degree assault of law enforcement officer in state Court. Rather than simply rely on state to see that Fleming is punished, Guidelines, through their cross-reference provisions and related enhancements, doubled Fleming s offense level based on this uncharged conduct. This sentencing regime turns federalism on its head and violates offender s right to due process of law.)

United States v. Rose, 8 F.3d 7 (8th Cir. 1993). (Rose contended he was denied due process because District Court relied on evidence adduced at trial as to number of marijuana plants involved, instead of holding evidentiary hearing at sentencing. Quantity of drugs need be established only by preponderance of evidence. District Court is authorized to determine quantity based on reliable evidence and this Court will reverse finding only if it is clearly erroneous. At Rose s trial on charge of manufacturing marijuana, government produced evidence its officers collected 172 cultivated marijuana plants. That evidence went unchallenged by Rose. When District Court indicated at sentencing its intention to rely upon trial testimony for determination of number of plants involved, Rose did not request opportunity to call rebuttal witnesses. District Court was entitled to rely on evidence presented at trial when sentencing Rose and its factual determination that 172 marijuana plants were attributable to Rose s manufacturing conviction was not clearly erroneous--this Court defers to District Court s decision to credit testimony of government s witnesses.)

United States v. Coleman, 990 F.2d 419 (8th Cir. 1993). (Heightened standard of proof (beyond mere preponderance) not required for relevant conduct despite attribution of additional marijuana increasing base offense level by six. Here, however, District Court did not explain why it found Coleman responsible for entire amount of marijuana at drying site. Despite government s advancing alternate theories for decision, this Court finds itself unable to engage in meaningful review and remands.)

United States v. Mills, 987 F.2d 1311 (8th Cir.) (The government must prove facts relied upon by District Court at time of sentencing by preponderance of evidence.), cert. denied, 510 U.S. 953 (1993).

United States v. Galloway, 976 F.2d 414 (8th Cir. 1992). (Because full panoply of constitutional rights no longer attaches after defendant has been adjudged guilty, imposition of sentencing factors based on proof by preponderance of evidence does not violate Constitution. Sentences imposed based on sentencing factors other than charged offense may violate due process if resulting sentence overwhelms or is extremely disproportionate to punishment that would

otherwise be imposed.), cert. denied, 507 U.S. 974 (1993).

United States v. Olderbak, 961 F.2d 756 (8th Cir.) (This Court rejects Olderbak s argument that because jury acquitted him of counts relating to drug activity which occurred after he moved to California, it was improper for District Court to consider any drug quantities involved in those transactions at sentencing. Facts underlying acquittal may be considered by District Court when those facts appear to be sufficiently reliable; government need not prove such facts beyond reasonable doubt.), cert. denied, 506 U.S. 959 (1992).

United States v. Payne, 940 F.2d 286 (8th Cir. 1991). (The particulars used to determine length of incarceration to be imposed under Sentencing Guidelines need only be proved by preponderance of evidence. District Court clearly stated it did not rely on facts in PSR that were disputed by defendants and not corroborated by co-conspirator, as required by Fortier.)

United States v. Culver, 929 F.2d 389 (8th Cir. 1991). (No particular standard of proof is required in sentencing, but due process must be satisfied with findings adequate to make appeal meaningful. While District Court did not specifically state evidence upon which it was relying, Court s upward departure complied with requirements of 18 U.S.C. § 3553(c)(2).)

United States v. Townley, 929 F.2d 365 (8th Cir. 1991). (Preponderance of evidence suffices for determinations at sentencing.)

United States v. Dyer, 910 F.2d 530 (8th Cir.) (Defendants challenged constitutionality of Guidelines based on failure to specify particular burden of proof for findings of fact relevant to sentencing. Decisional law supplies proper burden as preponderance of evidence, reasonable doubt standard not required by Constitution. "Proof to reasonable certainty" used in this case is held functional equivalent of preponderance.), cert. denied, 498 U.S. 907 and 498 U.S. 949 (1990).

United States v. Morphew, 909 F.2d 1143 (8th Cir. 1990). (Although District Court did not explicitly state standard of proof it used, this Court noted findings were adequate to conduct meaningful review. Contention that due process requires proof beyond reasonable doubt of factual determinations made at sentencing, flatly rejected.)

United States v. Oransky, 908 F.2d 307 (8th Cir. 1990). (Proof beyond reasonable doubt of facts relevant to sentence is not standard; due process demands only that government s proof preponderate.)

United States v. Luster, 896 F.2d 1122 (8th Cir. 1990). (Defendant s argument that possession of firearm and criminal record should only be used to enhance sentence if jury finds that those facts exist beyond reasonable doubt rejected under Barnerd and Gooden. Due process does not require right to jury trial on each fact that results in increased sentence.)

United States v. Sleet, 893 F.2d 947 (8th Cir. 1990). (No due process violation in District Court failing to require government proof of facts which result in increase in sentence beyond

reasonable doubt.)

### J. Sentencing Entrapment

United States v. Searcy, 284 F.3d 938 (8th Cir. 2002) (BYE, RICHARD S. ARNOLD,* RILEY). (On remand, District Court had upheld defendant's claim of sentencing entrapment based on finding defendant was not predisposed to deal in crack cocaine. Government appealed, and this Court reversed, determining defendant had not met his burden of establishing by preponderance of evidence lack of predisposition to sell crack. While defendant had never sold crack before; government had pursued purchase of crack; defendant had stated at beginning of contact with informant that he did not sell crack; and five or six conversations between informant and defendant took place before first sale of crack, defendant had been present during manufacturing of crack in past; had used it; had distributed it as gifts; and had displayed no reluctance to sell it in very first conversation with informant, which was uncoerced.)

United States v. Searcy, 233 F.3d 1096 (8th Cir. 2000) (WOLLMAN, LAY, BRIGHT*). (Sentencing entrapment, recognized in § 2D1.1, comment. (nn. 12, 15), provides basis for downward departure. When official government conduct leads defendant--who is predisposed to sell only small drug quantity or less serious drug type--to sell larger quantity or more serious type, resulting in increased sentence, sentencing entrapment has occurred. Focus is on defendant's predisposition; outrageous government conduct is not part of analysis. Government's coaxing of powder cocaine dealer to sell crack cocaine may constitute sentencing entrapment; remanded for District Court's consideration of downward departure on this basis.)

United States v. Berg, 178 F.3d 976 (8th Cir. 1999) (RICHARD S. ARNOLD,* BRIGHT, WOLLMAN). (Court rejects sentencing entrapment argument. Berg argued government informants induced him to participate in crime he was not otherwise predisposed to commit, because, although he had previously manufactured methamphetamine, he had never manufactured batch as large as 12 pounds. He thus sought downward departure, pointing out that informants stood to benefit under cooperation agreement with government if they induced Berg to commit crime with greater sentence. Court expresses concern that drug quantity in sting and reverse-sting operations can be easily manipulated by government, but concludes that here there is no indication informants set Berg up to manufacture greater amount of methamphetamine simply to enhance his sentence; additionally, it appeared Berg preferred to manufacture greater quantity. DISSENT: Berg should have been granted departure to level fairly reflecting his culpability. This type of government-created and government-manipulated crime is outside heartland encompassed by Guidelines because Commission did not contemplate or countenance maximal sentencing as law enforcement objective.)

United States v. Hunt, 171 F.3d 1192 (8th Cir. 1999) (WOLLMAN,* LOKEN, MORRIS SHEPPARD ARNOLD). (Hunt argues District Court should have departed downward because government engaged in sentencing entrapment. He contends he was not predisposed to manufacture 100 grams of actual methamphetamine and amount attributable to him would have been significantly less without ephedrine supplied by cooperating individual. However, Hunt admitted he intended to manufacture 100 grams; his accomplice testified they tried to manufacture 100 grams in 1996 but

"messed it up"; laboratory had capacity to manufacture 112 grams; and Hunt admitted he had manufactured 8 to 12 grams on 7 occasions before his arrest.)

United States v. Williams, 109 F.3d 502 (8th Cir.) (Williams argues District Court should have reduced weight of cocaine used to calculate his BOL because government engaged in sentencing entrapment. This is simply not case where government overcame Williams s predisposition to deal in small amounts of cocaine; evidence established William s predisposition to deal in five-kilogram quantities of cocaine.), cert. denied, 522 U.S. 917 (1997).

United States v. Turner, 93 F.3d 1422 (8th Cir. 1996). (Turner contended District Court erred in calculating his BOL because authorities engaged in sentencing manipulation by lengthening their investigation and arranging more drug buys merely to increase his sentence. This Court rejects sentencing-manipulation argument as three drug purchases at issue involved increasingly larger amounts and resulted in accumulation of evidence sufficient to arrest Turner s co-conspirator.)

United States v. Aikens, 64 F.3d 372 (8th Cir. 1995). (Aikens argued sentencing entrapment occurred when government agent requested crack rather than powder cocaine. Aikens claimed he had no predisposition to sell crack and undercover officer outrageously induced him to sell crack instead of powder cocaine for purpose of increasing his sentence. District Court properly rejected Aikens s request for downward departure for sentencing entrapment as evidence shows undercover officer acted reasonably by choosing to purchase crack in response to Aikens offer and evidence also showed Aikens s was predisposed to sell crack--indeed, jury rejected contention Aikens was induced to commit crime charged.)

United States v. Saleem, 60 F.3d 396 (8th Cir. 1995). (Doyle argued District Court erred in failing to find outrageous government conduct in form of sentence manipulation because when agents offered Brown leniency in exchange for cooperation, FBI agent told Brown to arrange controlled buy of at least 5 grams of crack (agent admitted knowing that quantity triggers mandatory minimum prison sentence). Agents offered leniency on contingency cooperation would lead to more culpable drug dealer; asking Brown to arrange buy of substantial quantity gave assurance Brown would identify more culpable supplier. Moreover, almost all subsequent controlled purchases from Doyle exceeded 5 gram minimum and Brown was not involved in later, substantially larger transactions. Nor was there evidence Doyle was coerced or tricked into supplying large quantities. In these circumstances, Doyle s claims of entrapment and sentencing entrapment are meritless.)

United States v. Hulett, 22 F.3d 779 (8th Cir.) (Hulett argued it unfair to predicate his sentence on 4 kilograms government agent sold him because price--half retail market rate--was artificially low. He asserted Court should have based sentence on purchase of 2 kilograms--quantity same amount of money would have bought at usual retail price--or should have departed downward because of coercive nature of police conduct. This Court notes amendment to Guidelines enacted subsequent to Hulett s sentencing, § 2D1.1, comment. n.17. Nevertheless, considering all circumstances of case, this Court could not say low price induced Hulett to buy quantities of cocaine he otherwise lacked resources to purchase, thereby driving up sentencing range. Thus, this Court rejects Hulett s argument based on theory of "sentencing entrapment." Author of opinion,

however, would reject use of reverse stings as violative of due process and also as leading to government corruption.), cert. denied, 513 U.S. 882 (1994).

United States v. Magee, 19 F.3d 417 (8th Cir. 1994). (Friends asserted he was entrapped by police for sentencing purposes. This Court rejects Friends s argument with respect to sentencing entrapment, finding no error in trial Court s conclusion there was no abuse of prosecutorial discretion in decision about when police should stop investigation of drug house.)

United States v. Warren, 16 F.3d 247 (8th Cir. 1994). (This Court rejects Warren s claim of sentencing entrapment where there were four undercover purchases and 107.4 grams of cocaine base and 111 grams of cocaine. Here, law enforcement officers articulated legitimate goals such as uncovering Warren s supply source, justifying four purchases of cocaine. Government s behavior does not trigger "fundamental fairness concerns," implicating Due Process Clause. Best way to eliminate illegal drug sales may be to make repeated undercover buys from single source; government s conduct was not outrageous.)

United States v. Shephard, 4 F.3d 647 (8th Cir. 1993). (This Court once again rejects argument that sentencing Guidelines violate due process because they vest too little discretion in District Court. This Court also rejects Shephard s sentencing entrapment arguments. In doing so, Court differentiates between sentence manipulation and sentence entrapment. Recognizing that there could be situations in which government engages in continuing undercover or sting transactions for sole purpose of ratcheting up sentence, Court decides abuse is not present on Shephard s record where there was course of transactions showing legitimate pattern of increasing amounts of drugs culminating with final 218 gram sale, indicating police did no more than persist in ascertaining what quantity Shephard was willing and able to deal. Where Shephard presented theories of entrapment on elements on his crimes and jury rejected his defense, District Court did not err in refusing to take these theories into account again at sentencing.), cert. denied, 510 U.S. 1203 (1994).

United States v. Barth, 990 F.2d 422 (8th Cir. 1993). (This Court holds sentencing entrapment may be legally relied upon to depart under sentencing Guidelines. Here, however, Barth s predisposition was exhibited by his skillful methods of effecting drug deals.)

United States v. Nelson, 988 F.2d 798 (8th Cir.) (Appellants argued sentencing entrapment because IBM and government knew about first mislabeled TCM in 1988 and loss would have been far less if government had brought it to halt in early stages. This Court expressed concern with government conduct, but concluded appellants made no argument which compelled conclusion they were not predisposed to commit these offenses.), cert. denied, 510 U.S. 914 (1993).

United States v. Lewis, 987 F.2d 1349 (8th Cir. 1993). (This Court rejects Lewis s argument he was predisposed to distribute only smaller quantities of cocaine and District Court erred in finding it was not sentencing entrapment for government to negotiate to purchase five kilograms. District Court finding Lewis was predisposed to conspire to distribute five kilograms not clearly erroneous where Lewis had admitted distributing pound quantities and evidence showed he may

have transported three kilograms.)

United States v. Calva, 979 F.2d 119 (8th Cir. 1992). (Calva argued his due process rights were violated as he was indicted on basis of one 2 ounce sale and so, remaining 8 1/8 ounce sales to government informant were instigated by government merely to increase his sentence, constituting sentencing entrapment. This Court acknowledges potential for abuse by police, but states Calva presented no evidence that government continued purchases merely to enhance his eventual sentence. Rather, government continued purchases from Calva for reasonable period to probe extent of distribution ring, identify forfeitable assets, and to snare Calva s supplier. Moreover, government conduct was not so egregious as to constitute due process violation.)

United States v. Stein, 973 F.2d 600 (8th Cir. 1992). (This Court rejects Stein argument that government s actions amounted to "sentencing entrapment" because value of bribe, which was determined by IRS when it set up Gallo (fictitious taxpayer) account ultimately determined severity of Stein s sentence. Nothing in record suggested that IRS agents acted outrageously in overcoming predisposition on Stein s part to only offer bribes for clients whose tax liabilities were smaller than Gallo s.)

United States v. Lenfesty, 923 F.2d 1293 (8th Cir. 1991). (No violation of due process rights where T. Smith argued she was victim of "sentencing entrapment" when agent repeatedly purchased drugs from her for effect of increasing amount of drugs in conspiracy, and her sentence. Here, record revealed T. Smith s predisposition to help agent find methamphetamine in whatever quantities he desired.)

United States v. Stuart, 923 F.2d 607 (8th Cir.) ("Sentencing entrapment" is affirmative defense with burden of proof on defendant. No entrapment found as matter of law as record did not show with sufficient clarity Hayden was predisposed to commit only lesser offense.), cert. denied, 499 U.S. 967 and 502 U.S. 847 (1991).

### K. Retaliatory Sentencing

United States v. Smotherman, 326 F.3d 988 (8th Cir.) (LOKEN, MORRIS ARNOLD, WEBBER) (per curiam). (Vindictive sentencing principle discussed in North Carolina v. Pearce is not triggered unless District Court imposed more severe sentence on remand after successful appeal. While original 262-month sentence was at bottom of applicable Guidelines range, and 250-month sentence on remand was near top of applicable Guidelines range, 250 months was nonetheless not more severe sentence than 262 months.), cert. denied, 124 S. Ct. 293 (2003).

United States v. Evans, 314 F.3d 329 (8th Cir. 2002) (HANSEN, RICHARD ARNOLD, LOKEN*). (On remand for resentencing, after this Court concluded that sentences for two of seven counts exceeded statutory maximums, District Court restructured sentences on other counts in order to achieve same total punishment called for by Guidelines range. This was proper, and did not violate Double Jeopardy Clause or prohibition against vindictive sentencing, because defendant's prior appeal unbundled his sentencing package and precluded him from having expectation of

finality in sentences he received on individual counts making up overall sentencing package. Vindictiveness cannot be presumed because overall sentence was not lengthened on remand. DISSENT: District Court's imposition on remand of more severe sentences on five unaffected counts to compensate for shortened sentences on two affected counts violated defendant's right to due process.), cert. denied, 123 S. Ct. 2275 (2003).

United States v. Arrington, 255 F.3d 637 (8th Cir.) (WOLLMAN, HAMILTON, MURPHY*). (Defendant was sentenced at bottom end of Guidelines range. After remand, District Court vacated enhancement but reimposed same sentence, which was now near top of Guidelines range. This Court rejects defendant's claim of vindictive sentencing because he received same sentence, and had no right to be sentenced at particular point within Guidelines range.), cert. denied, 534 U.S. 1049 (2001).

United States v. Edwards, 225 F.3d 991 (8th Cir. 2000) (BOWMAN, LOKEN,* BYE). (Defendant convicted of drug and gun offenses brought successful Bailey challenge. At resentencing, District Court imposed two-level § 2D1.1(b)(1) enhancement, yielding offense level of 43, and requiring life sentence. Although defendant thus received sentence longer than that which had been imposed prior to successful Bailey challenge, this Court found no indication of vindictiveness by District Court, and hence no due-process violation.), cert. denied, 531 U.S. 1100 (2001).

United States v. Johnson, 144 F.3d 1149 (8th Cir. 1998). (Johnson argues District Court violated his due process rights by imposing longer sentence on remand. Imposition of more stringent sentence upon resentencing is not improper when based on newly obtained information rather than vindictiveness. At resentencing, District Court received reports from psychologists that trauma Johnson caused was more severe than initially thought (e.g., attempts to take victim off anti-depressant drugs had failed, and her behavioral patterns continued to be disrupted). Due process rights were not violated by sentence imposed as there was no showing of vindictiveness or District Court erred by relying on new information.)

United States v. Templeman, 965 F.2d 617 (8th Cir.) (Templeman argued that sentence (108 months) following conviction after remand and retrial should not exceed sentence (63 months) he received pursuant to his conditional guilty plea. Due Process Clause not offended where it is clear from record vindictiveness played no part in sentence: additional information concerning Templeman s criminal activity was developed during trial.), cert. denied, 506 U.S. 980 (1992).

**L. 18 U.S.C. § 3553**

United States v. Eads, 144 F.3d 1151 (8th Cir. 1998). (Eads argued District Court did not properly state reasons supporting sentence. During sentencing hearing, District Court noted on record offenses were of serious nature, Eads had fled during his initial trial, had been unduly argumentative and disrespectful, and had at least two prior drug offense convictions. These findings provided adequate statement of reasons for sentence imposed.)

United States v. Jones, 965 F.2d 1507 (8th Cir.) (This Court rejects Jones s argument that Guidelines violate her due process rights by depriving District Court of discretion to consider specific circumstances of her crime. Moreover, District Court gave adequate reasons for imposing sentence where it did within applicable range: ongoing nature of offenses Jones committed; need to deter Jones from commission of those offenses in future.), cert. denied, 506 U.S. 924 (1992).

United States v. Knapp, 955 F.2d 566 (8th Cir.) (Knapp claimed her sentence was unlawful because District Court did not support it with individualized statement of reasons (§ 3553(c)). This Court looks to D.C. Circuit s reasoning that just as appeals Court generally cannot review defendant s challenge to District Court decision not to depart downward in first instance, it also lacks jurisdiction to review Court s methodology or reasoning in choosing to make downward departure. Nevertheless, this Court concluded District Court gave adequate statement of reasons, applicable to three "caretakers" in conspiracy. Sentencing transcript demonstrated District Court adequately addressed factors listed in § 3553(a), e.g., scope of conspiracy, defendants lack of prior criminal records, lesser culpability of three caretakers, justification for downward departures. In light of above, Knapp s right to due process and equal protection were not violated.), cert. denied, 506 U.S. 859 (1992).

United States v. Dumorney, 949 F.2d 997 (8th Cir. 1991). (District Court gave adequate reasons for sentencing career offender at top of guideline range where in its orally imposed sentence, it stated specifics, e.g., Dumorney had previously appeared before Court, his probation officer had warned him he would face life in prison if convicted again. This Court takes occasion to urge District Courts to refer to facts of each case and explain why they choose particular point in sentencing range, in order to cut down appeals involving section 3553(c)(1), and to assist researchers and Commission in reexamination of Guidelines and policies.), cert. denied, 508 U.S. 956 (1993).

United States v. Tate, 915 F.2d 400 (8th Cir. 1990). (Citing 18 U.S.C. § 3553(c)(1), this Court states District Court provided adequate justification for imposing Tate s sentence where it did within applicable range (197 months; range was 168 to 210 months) by considering his three prior convictions, commission of this offense while on probation supervision, and not using upper limit in consideration of Tate s military service.)

**M. Federal Rule of Criminal Procedure 32**

United States v. Quintana, 340 F.3d 700 (8th Cir. 2003) (MORRIS ARNOLD, BEAM, MELLOY*). (District Court was entitled to rely on PSR's recommendation for aggravating-role enhancement because defendant did not make sufficiently specific objection to it. Defendant specifically objected only to drug quantity and to denial of safety-valve relief. Although managerial role is one basis for safety-valve ineligibility, his objection was clearly focused on different basis for ineligibility, government's position that he had not truthfully and completely provided all information he had.)

United States v. Collins, 340 F.3d 672 (8th Cir. 2003) (LOKEN, RILEY, SMITH*). (When judge presided at trial, he need not hold evidentiary sentencing hearing to resolve factual disputes

based on trial testimony.)

United States v. Alatorre, 207 F.3d 1078 (8th Cir. 2000) (McMILLIAN, BRIGHT, RICHARD S. ARNOLD) (per curiam). (District Court s drug quantity finding was supported by numbers defendant provided government during post-arrest interview. Specifically, interviewing agent testified at sentencing about defendant s interview statements, and District Court did not err in relying on this testimony.)

United States v. Goolsby, 209 F.3d 1079 (8th Cir. 2000) (McMILLIAN, FAGG, ROSENBAUM) (per curiam). (Rejecting defendant s claim that District Court s drug quantity calculation was clearly erroneous because it was based on incorrect information in PSR. Because judge who sentenced defendant also presided at defendant s trial, judge could and did base findings of fact at sentencing on trial record, and could believe all, some, or none of such testimony. Witnesses testified to seeing defendant purchase minimum of 2 kilograms of cocaine base and 1 kilogram of cocaine powder, and to seeing defendant sell about 1 to 1 1/2 kilograms of crack cocaine each month for just over year. District Court s belief that evidence showed at least 1.5 kilograms of cocaine base, and probably more, was not clearly erroneous.)

United States v. Ramirez, 196 F.3d 895 (8th Cir. 1999) (RICHARD S. ARNOLD, LOKEN,* BYRNE). (When defendant has objected to PSR's relevant conduct recommendation, PSR is not evidence and government must determine whether facts it proved at trial are sufficient to support relevant-conduct finding that it will urge at sentencing; if not, government must request evidentiary hearing to fill this gap, notwithstanding government's argument in this case that local rule required parties to file sentencing position papers indicating whether evidentiary hearing is necessary to resolve any disputed issues. While defendant may request hearing to introduce relevant-conduct evidence, nothing in Guidelines or this Court's prior decisions precludes defendant from simply objecting to PSR's recommendation that prior act is relevant conduct, thereby putting government to its proof of that fact at sentencing.)

United States v. Davidson, 195 F.3d 402 (8th Cir. 1999) (McMILLIAN, MURPHY,* TUNHEIM). (In determining facts upon which defendant's sentence depends, District Court may rely on evidence submitted at trial or during sentencing hearing, and on uncontested statements from defendant's PSR. Court need not hold evidentiary hearing or otherwise develop factual record when sufficient trial evidence supports sentencing decisions.), cert. denied, 528 U.S. 1180 and 529 U.S. 1093 (2000).

United States v. Garrett, 161 F.3d 1131 (8th Cir. 1998) (BOWMAN, RICHARD S. ARNOLD, MORRIS SHEPPARD ARNOLD*). (District Court may not rely on facts in PSR if defendant contests them. Although PSR's uncontested facts could have formed sufficient basis for upholding District Court's finding that Garrett owned 2.5 grams of cocaine base (which he had disputed), District Court relied on "all of evidence" in PSR and this Court could not determine whether District Court would have come to same conclusion had it not relied on disputed fact. This Court thus reverses.)

United States v. Mayer, 130 F.3d 338 (8th Cir. 1997). (Where defendant objects to portions of PSR, District Court must base its findings on evidence rather than on disputed PSR information.)

United States v. Hudson, 129 F.3d 994 (8th Cir. 1997). (When defendant makes timely objection to PSR, if District Court chooses to make findings with respect to disputed facts, it must do so on basis of evidence, and not PSR. Because this Court has clearly stated governing principles as to when and how disputed sentencing facts must be proved, Court directs resentencing on remand be conducted on existing sentencing record, with no opportunity for either party to reopen or add to that record.)

United States v. Patterson, 128 F.3d 1259 (8th Cir. 1997). (Patterson appeals sentence imposed on him by District Court following revocation of his supervised release. This Court holds Patterson had right to be afforded opportunity for allocution prior to imposition of sentence, and Court s failure to provide him opportunity was not harmless error. Patterson s sentence vacated and case remanded for resentencing.)

United States v. Guerrero-Cortez, 110 F.3d 647 (8th Cir.) (Gonzalez-Gonzalez asserts District Court erred by denying him reduction for both acceptance of responsibility and for being minor or minimal participant in conspiracy and thus violated Rule 32(c)(1) of Fed. R. Crim. P.; he urges review because of importance of District Court s findings related to information in PSR to Bureau of Prisons. This Court holds it does not have authority to review District Court s denial of either reduction. Here, District Court complied with Rule 32 and ruled statutory minimum punishment of ten years applied and overrode punishment of 78-98 months as computed under Guidelines. Thus, allegedly erroneous sentencing computation under Guidelines would have no effect on Gonzalez-Gonzalez s sentence. This circuit requires only that District Courts comply with Rule 32.), cert. denied, 522 U.S. 1017 (1997).

United States v. Wiggins, 104 F.3d 174 (8th Cir. 1997). (Wiggins complains District Court incorrectly adopted findings of PSR without receiving additional evidence. Here, Court was not required to hold evidentiary hearing where Wiggins s counsel lodged only general objection to PSR; District Court does not have to hold hearing if defendant fails to pursue objections to PSR. Furthermore, sentencing judge also presided over Wiggins s trial; therefore, Court is not required to hold evidentiary hearing to resolve factual objections and may instead base its findings of fact on trial record, as it did here. Trial record amply supports sentence imposed on Wiggins.)

United States v. Randolph, 101 F.3d 607 (8th Cir. 1996). (Once challenged, PSR is not evidence and not legally sufficient basis for making findings on contested issues of material fact. If defendant objects to PSR s drug quantity recommendation, District Court must make specific finding on basis of evidence and not PSR. Court may rely on evidence presented at trial and on stipulations made at trial or in plea agreement.)

United States v. Delpit, 94 F.3d 1134 (8th Cir. 1996). (Malone complained he was sentenced without evidentiary hearing. Despite notice, he failed to move for evidentiary hearing as required by District Court s local rule nor did he say anything about need for evidentiary hearing at

sentencing. When defendant disputes material facts in his PSR, District Court must either refuse to take those facts into account or hold evidentiary hearing (disputed statements in PSR might lack indicia of reliability and trustworthiness required by preponderance of evidence standard). At Malone s sentencing, however, District Court made it clear it was relying on evidence and testimony from trial and on jury s verdict; unlike PSR, testimony presented at trial is evidence. Evidentiary hearing was not required for Malone as jury found him guilty beyond reasonable doubt of conduct on which his sentence is based, and Court heard testimony at trial concerning drug quantities involved with that conduct.)

United States v. Marshall, 92 F.3d 758 (8th Cir. 1996). (Marshall challenged use of government exhibit which summarized all tax returns bearing Marshall s tax preparer number filed between 1991 and 1993--and not admitted at trial--as basis of information in PSR to determine tax loss to be over $2 million (§ 2T1.4(a)(1), § 2T4.1). Marshall claimed District Court should have held evidentiary hearing regarding amount of loss. District Court need not hold evidentiary hearing to resolve factual objections where, as here, sentencing judge presided over trial. In such case, Court may base its findings of fact on trial record and here, trial record amply supports District Court s tax loss determination. Marshall admitted he prepared more than 1200 tax returns and testified all employees in his tax preparation business were under his control. Trial evidence showed returns listed in exhibit contained same types of discrepancies as those returns for which Marshall was convicted--improper claims of earned income and health care credits and incorrect filing status. Based on this, Court could have found by preponderance of evidence Marshall caused, either directly or through employees under his control, tax losses reflected in exhibit. Sentence affirmed.)

United States v. Elliott, 89 F.3d 1360 (8th Cir. 1996). (Where defendant objects to statements in PSR, District Court should neither merely accept PSR nor require defendant to disprove disputed facts; instead, government bears burden of proving disputed enhancement factors. Formal sentencing hearing is not exclusive means by which government may meet its evidentiary burden. District Court may base findings on evidence presented at trial even though no additional exhibits or testimony are introduced at sentencing phase. Here, for each enhancement Elliott challenges on appeal, District Court properly based its findings on evidence adduced at trial; none of these factual findings are clearly erroneous. This Court need not and does not decide whether it was improper for District Court to rely on witness s early testimony from first trial because Court s finding Elliott himself lied on witness stand provides independent and sufficient basis for enhancement (§ 3C1.1).), cert. denied, 519 U.S. 1118 (1997).

United States v. Byrne, 83 F.3d 984 (8th Cir. 1996). (This Court holds District Court did not abuse its discretion in denying Santonelli s request to subpoena witnesses to testify at sentencing hearing. Conviction was for drug trafficking conspiracy and co-conspirator statement about drug quantities involved in conspiracy did not so greatly increase sentence that would have otherwise been imposed so as to trigger due process concerns. Undercover officer and DEA agent testified at trial about statement and were subject to thorough cross-examination. In addition, co-conspirator had indicated through defense counsel that if subpoenaed, she would have invoked her Fifth Amendment privilege and refused to testify.)

United States v. Burke, 80 F.3d 314 (8th Cir. 1996). (Underlying issue in Burke s case was whether he would be sentenced for greater offense of sexual abuse or sexual contact (BOL of 27 versus 12). PSR recommended Burke s BOL be determined under § 2A3.1 (sexual abuse). Burke complied with procedures prescribed in Fed. R. Crim. P. and appropriately filed objections to PSR and also submitted "position" pleading. At sentencing, government merely announced support of probation officer s recommendations. District Court went on to adopt PSR finding of sexual abuse. On appeal, Burke argues he objected to PSR s factual assertions he sexually abused victim and government offered no evidence at sentencing in support of challenged assertions and therefore, District Court s critical finding of sexual abuse must be set aside. Government argues in response Burke made extensive admissions under oath at change of plea hearing and failed to preserve issue by requesting evidentiary sentencing hearing under Minnesota local rule. This Court observes Burke admitted conduct constituting abusive sexual conduct, not criminal sexual abuse, and when error at sentencing results from government s failure to prove PSR fact statements to which defendant timely objected, error is not excused because he failed to request hearing. This Court notes given probable existence of reliable victim hearsay establishing sexual abuse, with supporting medical evidence, government will probably be able to prove at sentencing hearing Burke s BOL should be determined under § 2A3.1(a) and resentencing will probably not provide relief from 120-month sentence. Nevertheless, this Court reverses and remands for resentencing as government erred at Burke s sentencing and he has right to insist he be sentenced on adequate record.)

United States v. Oehlenschlager, 76 F.3d 227 (8th Cir. 1996). (District Court did not err by failing to hold evidentiary hearing as Court was able to make reasonable estimate of market value of eggs based on undisputed fact of market value for birds. While defendant does not have burden of proof with regard to enhancement, in cases where District Court is able to make reasonable estimate of value based upon facts not in dispute, defendant will not be permitted to "sandbag" Court by contesting valuation without submitting request for evidentiary hearing as required by local rule.)

United States v. Goodwin, 72 F.3d 88 (8th Cir. 1995). (Goodwin argued District Court erred in failing to hold evidentiary hearing based on his objections to PSR. District Court did not abuse its discretion by determining drug quantity attributable to Goodwin without evidentiary hearing where Goodwin waived any outstanding objections he may have had to PSR: Court specifically gave Goodwin s lawyer at least two chances to raise any issues in addition to extent of downward departure; Goodwin completely failed to pursue his objections; he did not request evidentiary hearing as required by local rule; and after sentencing, Court issued statement of reasons in which it noted Goodwin s objections to certain parts of PSR but noted he did not pursue objections in light of government s motion for downward departure.)

United States v. Jones, 70 F.3d 1009 (8th Cir. 1995). (Jones argues District Court violated his due process rights (and Fed. R. Crim. P. 32(c)(1)) when Court refused to resolve Jones s objection--raised for first time at sentencing--to probation officer s recommended denial of mitigating role reduction. District Court had discretion to consider Jones s untimely objection if he satisfied Fed. R. Crim. P. 32(b)(6)(D) (for good cause shown, Court may allow new objection to be raised any time before imposing sentence). Because Jones did not state any reason for his failure to raise objection in timely manner, this Court concludes District Court did not abuse its discretion

by declining to rule on it.)

United States v. Greene, 41 F.3d 383 (8th Cir. 1994). (District Court erred by assuming no dispute over facts existed, but only dispute over application of law to facts. In addition to filing written objections, Greene s counsel specifically requested evidentiary hearing on PSR. This placed in dispute facts and inferences to be drawn from facts. This Court reverses Greene s sentence and remands for evidentiary hearing by District Court to find amount of loss Greene intended to inflict and to determine whether Greene abused his position of trust or used special skill. Record reflects Greene objected to PSR in timely fashion and requested evidentiary hearing; government bears burden of proof on disputed issues because they relate to factors which would enhance sentence. District Court did not follow legal requirements set forth in U.S. v. Hammer. Although District Court addressed Greene s objections at sentencing hearing, Court did not hold evidentiary hearing at all. Instead, Court accepted factual narrative plus ultimate facts and conclusions arrived at by probation officer in PSR, i.e., Greene intended to inflict loss of $50,000 and abused his position of trust or used special skill.)

United States v. Quintanilla, 25 F.3d 694 (8th Cir. 1994). (Where defendant failed to object to any portion of PSR concerning relevant conduct, District Court did not err in not making factual findings regarding relevant conduct.)

United States v. Fetlow, 21 F.3d 243 (8th Cir. 1994). (At his sentencing hearing, Morrison, convicted for conspiracy to possess with intent to distribute cocaine, and conspiracy to distribute cocaine, objected to PSR conclusion of base offense level of 34, corresponding to 15 kilograms of cocaine; PSR s enhancement under § 3B1.1(a) for being organizer or leader; and enhancement under § 2D1.1(b)(1) for possession of dangerous weapon. District judge responded to Morrison s objections by stating: I m going to deny objections and for record I find total offense level here is 40. This Court decides District Court violated Federal Rule of Criminal Procedure 32(c)(D) and as Court offered no explanation as to basis for its finding, this Court is unable to determine whether information relied on had sufficient indicia of reliability. This Court is also unable to determine whether District Court impermissibly relied on PSR or statements of counsel. District Court is required to do more explicit rulings. Case remanded for further proceedings.)

United States v. Beatty, 9 F.3d 686 (8th Cir. 1993). (Beatty objected to conclusion in PSR assessing four-level upward adjustment for role in offense (§ 3B1.1) and to factual allegations contained in four other paragraphs. While this Court concluded District Court improperly relied on allegations of fact contained in objected-to paragraphs of PSR and its addendum for true version of facts, its judgment was there were sufficient uncontroverted facts in remaining, unchallenged factual paragraphs in PSR and in plea agreement to support four-level upward adjustment for role in offense imposed by District Court. DISSENT: Finding of harmless error is egregious. This Court has required strict compliance with Rule 32(c)(3)(D); moreover, Bureau of Prisons places great reliance on PSRs.)

United States v. Flores, 9 F.3d 54 (8th Cir. 1993). (PSR is not evidence. If defendant objects to factual allegation in PSR and Court decides to consider challenged fact, government must

introduce evidence sufficient to convince Court by preponderance that fact in question exists. In absence of objection alerting Court to need for specific finding, Court may rely on PSR. Government s obligation to present evidence in support of PSR s factual statements only arises for facts defendant disputes.)

United States v. Johnson, 925 F.2d 1115 (8th Cir. 1991). (District Court erred in relying on statements in PSR to find defendant was leader of criminal activity involving five or more participants. This Court states error was harmless as declarant s testimony at trial and tape recording were adequate evidence to support District Court s finding.)

United States v. Lucas, 898 F.2d 606 (8th Cir.) (District Court did not err by considering charges filed against defendant which did not result in convictions and some charges in which he was not represented by counsel. No limitation shall be placed on information concerning defendant which Court may receive and consider for purpose of sentencing. District Court considered earlier arrest and charges only for limited purpose of evaluating defendant s claims of incompetence.), cert. denied, 498 U.S. 838 (1990).

**N. Evidence Sentencing Judge May Consider**

United States v. DeWitt, No. 03-2779 (8th Cir. 2004) (MELLOY, BEAM, COLLOTON*). (PSR is not evidence. Once defendant objected to drug quantity in PSR, District Court could not hold her liable for that quantity unless evidence was presented at sentencing. Government was precluded by plea agreement from presenting such evidence of its own volition. District Court remained entitled to independently evaluate evidence by investigating, calling witnesses, or compelling government to put on evidence.)

United States v. Poor Bear, 359 F.3d 1038 (8th Cir. 2004) (BYE, HANSEN, MELLOY*). (PSR is not evidence. If defendant objects to any factual allegations pertaining to matters on which government has burden of proof, evidence must be presented at sentencing to prove facts by preponderance of evidence.)

United States v. Cuervo, 354 F.3d 969 (8th Cir. 2004) (RILEY, HEANEY,* SMITH). (District Court's recollection of trial testimony is appropriate method of supporting sentencing determinations.)

United States v. Menteer, 350 F.3d 767 (8th Cir. 2003) (MORRIS ARNOLD, BEAM, BYE*). (Where state statute defines burglary more broadly than "generic burglary" defined by Supreme Court in Taylor v. United States, District Court generally may not look to facts underlying conviction to determine whether conviction was for violent felony. In such cases, government is generally obligated to introduce charging papers and jury instructions to show nature of prior conviction. However, in this case, unobjected-to facts in PSR established elements of generic burglary, and District Court was therefore entitled to rely on PSR.)

United States v. Camacho, 348 F.3d 696 (8th Cir. 2003) (MORRIS ARNOLD, HANSEN,* SMITH). (Disputed portions of PSR are not legally sufficient basis for making findings on contested issues of fact.)

United States v. Leaf, 306 F.3d 529 (8th Cir. 2002) (WOLLMAN, RILEY,* MELLOY). (It does not violate defendant's constitutional rights to due process and fair trial for District Court to rely on uncharged criminal conduct as basis for upward departure.)

United States v. Edwards, 91 F.3d 1101 (8th Cir. 1996). (District Court may consider hearsay evidence contained in PSR if individual being sentenced is given opportunity to explain or rebut evidence, and if Court makes explicit factual finding on any disputed issue.)

United States v. Escobar, 50 F.3d 1414 (8th Cir. 1995). (This Court rejects Keeper s assertion he was entitled to evidentiary hearing on sentencing issues which District Court resolved by reference to trial evidence. It is well established District Court is entitled to rely on evidence presented at Keeper s trial when sentencing him.)

United States v. Lloyd, 43 F.3d 1183 (8th Cir. 1994). (Lloyd contended District Court erred in using statements he made in course of plea negotiations, to determine quantity and other issues at sentencing. In determining relevant facts, District Court not restricted to considering information that would be admissible at trial. Nevertheless, statements were usable and admissible at trial because they were made after plea agreement was reached and pursuant to its terms.)

United States v. Lopez, 42 F.3d 463 (8th Cir. 1994). (Gunter challenged District Court finding he be held accountable for 323.09 kilograms of marijuana. District Court did not violate Gunter s due process rights basing its finding about transaction and quantity involved on evidence presented at sentencing hearing, rather than at trial; nor was there error in Court s finding.)

United States v. West, 15 F.3d 119 (8th Cir.) (West claimed two witnesses who were not allowed to testify at trial should not have been allowed to testify at his sentencing hearing. This Court finds no error in trial Court s decision to allow testimony of those witnesses at sentencing because government did not agree to identify witnesses it was going to produce at sentencing hearing, was under no legal obligation to do so, and moreover, West can hardly claim unfair surprise with respect to them.), cert. denied, 513 U.S. 863 (1994).

United States v. Pedroli, 979 F.2d 116 (8th Cir. 1992). (Based on Wise (sentencing does not constitute separate criminal proceeding), this Court rejects Pedroli s contention his constitutional rights were violated at sentencing due to District Court s reliance on hearsay contained in PSR. Assuming without deciding, use of hearsay was responsible for two level increase in his base offense level, no due process concerns arise because increase amounted to less than twofold increase in sentencing.)

United States v. Schwarck, 961 F.2d 121 (8th Cir. 1992). (The District Court had presided

at trial of co-conspirator Olderbak, at which Schwarck testified as prosecution witness. At sentencing, Court acknowledged it had taken Schwarck s Olderbak trial testimony into account in making its findings. Court was entitled to do so; no violation of due process.)

United States v. Simpkins, 953 F.2d 443 (8th Cir.) (Certainly District Court was permitted to rely on evidence received during trial in making findings relevant to sentencing (i.e., amount of cocaine involved and appellant s role in offense).), cert. denied, 504 U.S. 928 (1992).

United States v. Roberts, 953 F.2d 351 (8th Cir.) (The District Court was entitled to rely on evidence presented at trial when sentencing Roberts.), cert. denied, 505 U.S. 1210 (1992).

United States v. Haren, 952 F.2d 190 (8th Cir. 1991). (Claim that District Court improperly relied on its recollection of testimony at trial rather than referring to record, is without merit. Where District Court heard testimony from DEA agent and chemist as to both amount of amphetamine oil found at Haren s farm and amount of amphetamine oil would produce, evidence was not hearsay and Fortier does not apply. Calculation of drug quantity was not clearly erroneous.)

United States v. Marshall, 940 F.2d 382 (8th Cir. 1991). (Where Marshall stipulated to 364.93 grams of cocaine in his guilty plea, he cannot challenge who possessed quantity of .65 grams. He can, however, require government to present reliable evidence proving .65 grams were cocaine base. This Court remands for further findings concerning analysis of .65 grams, holding District Court could not rely on hearsay in lab report as basis for its decision without establishing reliability of statements or finding that exception to hearsay rule applied.)

United States v. Evans, 891 F.2d 686 (8th Cir.) (Due process not denied by Court s consideration of uncorroborated hearsay evidence in PSI as defendants had opportunity to explain or rebut evidence.), cert. denied, 495 U.S. 931 (1989).

United States v. Jones, 875 F.2d 674 (8th Cir.) (Additional evidentiary hearing regarding accuracy of PSI not required where sentencing judge presided over defendant s trial and record supports Court s findings of fact.), cert. denied, 493 U.S. 862 (1989).

**O. Appeal Waivers**

United States v. Woods, 346 F.3d 815 (8th Cir. 2003) (SMITH, LAY, BRIGHT*). (Knowing and voluntary appeal waiver enforced. Appeal regarding application of obstruction-of-justice enhancement does not fit within miscarriage-of-justice exception to enforceability of appeal waivers.)

United States v. Mendoza, 341 F.3d 687 (8th Cir. 2003) (LOKEN, HANSEN,* RILEY). (Defendant's Bailey argument is foreclosed by appeal waiver in plea agreement. Defendant does not argue, and there is no indication, that plea agreement was not knowing and voluntary.)

United States v. Blue Coat, 340 F.3d 539 (8th Cir. 2003) (WOLLMAN, GIBSON,

MELLOY*). (Defendant's argument, that District Court erred in imposing condition of supervised release requiring him to register as sex offender although he was convicted only of burglary, does not fall into "illegal sentence" exception to knowing and voluntary appeal waiver.)

United States v. Benitez-Diaz, 337 F.3d 1080 (8th Cir. 2003) (WOLLMAN, HEANEY, BYE) (per curiam). (Government has burden to show defendant waived his right to appeal as part of plea agreement. This Court enforces waiver: although District Court may have sentenced defendant using wrong edition of Guidelines Manual, this does not qualify for "illegal sentence" exception to appeal waiver enforceability because sentence was within statutory range for offense.)

United States v. Andis, 333 F.3d 886 (8th Cir. 2003) (en banc). (Knowing and voluntary appeal waiver will be enforced unless doing so would be miscarriage of justice. Illegal sentence, meaning one not authorized for conviction or outside of statutory penalty range, fits within miscarriage exception. Misapplication of Guidelines or abuse of District Court's discretion does not fit within miscarriage exception. In this case, appeal waiver is enforced against argument that District Court imposed improper conditions of supervised release. CONCURRENCE: would not recognize miscarriage exception. DISSENT: would hold that unauthorized conditions of supervised release fit within miscarriage exception.)

United States v. Kempis-Bonola, 287 F.3d 699 (8th Cir.) (HANSEN,* HEANEY, MURPHY). (As part of plea agreement, defendant agreed to waive his right to appeal unless District Court imposed sentence in violation of law apart from Guidelines. Defendant's issue on appeal--constitutional challenge under Apprendi v. New Jersey--survived appeal waiver because it was alleged violation of law apart from Guidelines.), cert. denied, 537 U.S. 914 (2002).

United States v. Michelsen, 141 F.3d 867 (8th Cir.) (Michelsen was charged with failure to pay past child support in violation of Child Support Recovery Act, and entered into plea agreement which contained provisions waiving appeal rights; case proceeded by consent before magistrate judge. Michelsen appealed to District Court challenging, as relevant, sentence imposed by magistrate judge. District Court granted government s motion to dismiss appeal with prejudice, holding Michelsen had validly waived his appellate rights. Michelsen contends magistrate judge s statement at sentencing indicating Michelsen had right to appeal, as well as similar language contained in written judgment, should negate waiver. This Court affirms order of dismissal, declining to follow Ninth Circuit case, and observing any statement by Court at sentencing hearing could not have affected Michelsen s decision--made three months earlier--to plead guilty and waive appellate rights. Notwithstanding waiver, Michelsen did in fact implicitly preserve right to appeal on grounds his sentence was illegal or imposed in violation of plea agreement. Court s recitation of Michelsen s statutory right could not unilaterally revoke earlier waiver to which Michelsen agreed. As to Michelsen s assertion he is entitled to appeal because sentence imposed by magistrate judge differed from sentence negotiated under plea agreement, this Court finds utterly without merit. Michelsen s plea agreement called for government to recommend suspended six-month sentence; government honored its commitment and sentence ultimately imposed, though inconsistent with government s recommendation, did not violate plea agreement nor run counter to Michelsen s professed understanding of agreement. DISSENT: Michelsen appeared pro se at

sentencing, and sentencing magistrate judge did not disclose content of probation officer s report and recommendation. In light of magistrate judge s statements concerning reasons for sentence (i.e., for punishment) which were contrary to recommendation of prosecutor, Dissent believes magistrate judge by his oral direction, and prosecutor by failing to object, recognized Michelsen should have right to appeal in this unusual case. Would rule waiver of appeal by Michelsen was nullified.), cert. denied, 525 U.S. 942 (1998).

United States v. Jones, 111 F.3d 597 (8th Cir. 1997). (Tonya and Sherdonna Jones argue District Court incorrectly applied sentencing Guidelines in determining their sentence. Both voluntarily waived their right to appeal their convictions and sentences, however, so long as sentences imposed were less than 46 months. Because 37-month sentences imposed were in accordance with agreement, Tonya and Sherdonna are precluded from challenging bargains they made.)

United States v. Rutan, 956 F.2d 827 (8th Cir. 1992). (This Court holds that defendant may, in valid plea agreement, waive his right to appeal under 18 U.S.C. § 3742(a). Such waiver is effective only insofar as it is result of knowing and voluntary decision to forego right to appeal. Court further holds that if waiver of appeal is made knowingly and voluntarily, it is enforceable.)

**P. Binding Nature of Guidelines**

Stinson v. United States, 508 U.S. 36 (1993). (Guidelines commentary that interprets or explains Guideline is binding unless it violates Constitution or federal statute, is inconsistent with that Guideline, or is plainly erroneous reading of that Guideline.)

United States v. Smith, 282 F.3d 1045 (8th Cir. 2002) (LOKEN,* LAY, RILEY). (Application Note is binding unless it is plainly erroneous or conflicts with Constitution, federal statute, or Guideline it interpets.)

United States v. Triplett, 104 F.3d 1074 (8th Cir.) (Commentary to Guidelines is binding on Courts when it interprets or explains guideline unless it violates Constitution or federal statute, or is inconsistent with, or plainly erroneous reading of, that guideline.), cert. denied, 520 U.S. 1236 and 520 U.S. 1270 (1997).

United States v. Jackson, 67 F.3d 1359 (8th Cir. 1995). (Commentary in Guidelines manual interpreting or explaining guideline is authoritative unless it violates constitution or federal statute, or is inconsistent with, or plainly erroneous reading of, guideline. When there is no such violation or conflict, this Court accords application note authoritative weight.), cert. denied, 517 U.S. 1192 (1996).

**Q. Notice at Sentencing**

Burns v. United States, 501 U.S. 129 (1991). (District Court may not depart upward from Guidelines range without first notifying parties that it intends to depart.)

United States v. Korn, 138 F.3d 1239 (8th Cir.) (Korn argues District Court erred when it imposed two-level enhancement, § 2D1.1(b)(1), on his sentence without giving him notice, relying on Burns. Court explains controlling law in Eighth Circuit differs from that in Seventh. While Burns mandates both parties be given adequate notice before Court departs from applicable Guideline range, Burns does not mandate adequate notice before Court addresses adjustment or enhancement. District Court s ruling is affirmed where Korn had notice of evidence of firearm admitted at trial, did not ask for continuance or time to respond to enhancement, and enhancement is contained within Guidelines (may have been appropriate for district judge to have sua sponte granted recess, but Korn did not raise issue on appeal).), cert. denied, 525 U.S. 947 (1998).

United States v. Coleman, 132 F.3d 440 (8th Cir.) (This Court has previously rejected notion District Court is required to give advance notice of intent to deny mitigating role reduction and panel is bound by that decision.), cert. denied, 525 U.S. 846 (1998).

United States v. LeCompte, 99 F.3d 274 (8th Cir. 1996). (Before District Court can depart upward on ground not identified either in PSR or in prehearing submission by government, Rule 32 requires that Court give parties reasonable notice it is contemplating such ruling. Here, LeCompte s PSR stated departure might be appropriate under commentary 5 to § 2A3.4. However, District Court first disclosed it was departing in part because of psychological injury to (§ 5K2.3), just before pronouncing sentence. Because psychological injury issue is fact intensive, notice of possible departure on this ground should be given prior to sentencing hearing.)

United States v. McCarthy, 97 F.3d 1562 (8th Cir. 1996). (Where Labrie contends for first time on appeal he did not receive adequate notice of District Court s intent to depart upward because notice was untimely and factors relied on by Court were different from those contained in letter provided to counsel day before sentencing hearing, this Court reviews for plain error. Here, notice was provided day before sentencing hearing and set forth specific grounds for upward departure; Labrie s counsel responded to notice on same day. At sentencing hearing, District Court asked Labrie and counsel if they had had sufficient time to consider notice and told them Court was willing to provide additional time. Labrie decided to proceed with sentencing and counsel presented arguments opposing departure. Labrie makes no demonstration of prejudice from timing of notice; this Court finds no error at all. This Court disagrees with Labrie s contention District Court relied upon grounds different from grounds specified in notice: Court informed counsel it was considering upward departure based on enormous profit Labrie reaped on his investment in enterprise and his abuse of his position in community--Labrie laundered drug proceeds through his legitimate business. At sentencing, Court stated it was imposing upward departure because Labrie knowingly permitted drug derived funds be invested in legitimate business and Court also referred to large return Labrie obtained on his investment. Reasons are not significantly different from those listed in notice and this Court finds no plain error with respect to notice), cert. denied, 519 U.S. 1139 and 520 U.S. 1133 (1997).

United States v. Rodamaker, 56 F.3d 898 (8th Cir. 1995). (This Court rejects appellant s contention District Court s action denied her due process because of District Court s failure to

give her advance notice it contemplated denying adjustment (§ 3B1.2(b)) to which government agreed in plea agreement. Rodamaker recognized this Court s refusal to extend Burns v. United States (U.S. v. Willis, U.S. v. Adipietro), but urged this circuit to follow Seventh and Ninth Circuit s contrary conclusion.)

United States v. McMurray, 20 F.3d 831 (8th Cir. 1994). (Absence of § 851(a)(1) notice did not affect fairness of McMurray s sentencing. Sentencing under Guidelines is "separate phase" of criminal process. Because McMurray s prior conviction was only relevant during sentencing phase, notice need be given to him only prior to that phase. He clearly had adequate notice because his initial PSR described 1982 conviction as "conspiracy to distribute cocaine" and recommended he be sentenced as career offender because of that conviction.)

United States v. Nomeland, 7 F.3d 744 (8th Cir. 1993). (Nomeland failed to raise in District Court his argument on appeal that District Court s notice that it intended to depart did not refer to psychological trauma factor and therefore failed to specifically identify ground on which it was contemplating upward departure. Where Nomeland did not state how he was prejudiced and sentencing transcript reflects District Court provided its notice by letter to counsel that was not part of record on appeal, this Court does not find plain error.)

United States v. Day, 998 F.2d 622 (8th Cir. 1993). (In response to District Court s upward departure in his criminal history category, Day contended that Court failed to provide adequate notice of its intent to make upward departure (Burns). At Day s first sentencing hearing, PSR suggested upward departure which was mooted by Day s receipt of lengthy mandatory minimum sentence. At his second sentencing, following remand, he should have anticipated departure issue, yet he did not object nor request more time to prepare when updated PSR was delivered. Thus, there was no procedural plain error. Moreover, Day failed to make adequate showing of prejudice.), cert. denied, 511 U.S. 1130 (1994).

United States v. Willis, 997 F.2d 407 (8th Cir. 1993). (Willis argued that District Court sua sponte enhanced his sentence for obstruction of justice without providing sufficient notice (Burns). This Court cites its recent case of Adipietro and states that given fact that Willis knew of potential bases for enhancement in Guidelines and potential factual bases in trial testimony, he cannot claim he was surprised and unable to comment at sentencing hearing.), cert. denied, 510 U.S. 1050 (1994).

United States v. Adipietro, 983 F.2d 1468 (8th Cir. 1993). (Where PSR, which Adipietro had ten days before sentencing, recommended two level adjustment for being manager or supervisor under § 3B1.1(c) and at sentencing hearing District Court sua sponte decided to apply three level adjustment of § 3B1.1(b), this Court rejects Adipietro s argument his right of notice under Burns v. United States was violated. Burns does not mandate adequate notice must be given before District Court addresses adjustment or enhancement. Moreover, Adipietro had adequate notice of enhancement based on his role.)

### R. Disparity Between Punishment for Crack and Powder Cocaine

United States v. Stallings, 301 F.3d 919 (8th Cir. 2002) (McMILLIAN, FAGG, MELLOY*.) (This Court has repeatedly considered and rejected defendant's argument that sentencing disparity between crack and powder cocaine violates Due Process Clause. Only this Court en banc can overrule earlier panel decisions.)

United States v. Patterson, 258 F.3d 788 (8th Cir. 2001) (WOLLMAN, BEAM, BARNES*). (Rejecting defendant's equal protection challenge to sentencing disparity between crack and powder cocaine.)

United States v. Nicholson, 231 F.3d 445 (8th Cir. 2000) (RICHARD S. ARNOLD,* LAY, FAGG). (Rejecting defendant's challenge to constitutionality of crack-cocaine sentencing ratio. This Court has already considered and rejected that argument.), cert. denied, 532 U.S. 912 (2001).

United States v. Wilson, 103 F.3d 1402 (8th Cir. 1997). (Wilson contends it was error for District Court to sentence him under enhanced Guidelines for crack cocaine because there was insufficient evidence to permit Court to conclude form of cocaine involved was cocaine base or crack. This Court has previously held whatever merits of argument that enhanced penalties are unsound as matter of policy, it is not at liberty to judicially revise sentencing Guidelines; enhanced penalties for cocaine base are not unconstitutional. Government s forensic chemist testified substance here was "cocaine base" and conclusion was not contradicted by any other evidence; thus, there unquestionably was sufficient record evidence to support Court s sentence as well as jury s verdict. Wilson has cited no authority for proposition word "crack" must always be used instead of term cocaine base.)

United States v. Spook, 97 F.3d 234 (8th Cir. 1996). (All six appellants challenge sentences imposed for crack-related crimes, based on 100:1 sentencing ratio between cocaine base and powder cocaine. They argue because cocaine and cocaine base are same drug, statute and sentencing Guidelines are ambiguous and District Court should have applied rule of lenity to impose lesser penalty provided for cocaine offenses. One of appellant additionally argues Guidelines violate Fifth Amendment right to equal protection because there is no rational basis for disparate sentences for cocaine and cocaine base. At sentencing hearings, appellants presented expert testimony to effect terms "cocaine" and "cocaine base" are synonymous as cocaine base is cocaine before it is mixed with any other substance. This Court has considered and rejected each of appellants arguments. In Jackson, it found argument for application of rule of lenity meritless because of practical, real world differences between crack and other forms of cocaine. While Jackson did not address one argument presented in this case--"crack," as previously understood, no longer exists--Jackson nonetheless controls. Appellants do not contend they were unaware they were dealing in crack or could not distinguish. In light of this Circuit s numerous decisions finding rational basis for 100:1 sentencing disparity, Court also rejects equal protection challenge to sentence (authoring judge continues to believe sentencing disparity is unconstitutional, but recognizes binding effect of this Court s prior decisions).), cert. denied, 519 U.S. 1133 and 520 U.S. 1129 (1997).

United States v. Carter, 91 F.3d 1196 (8th Cir. 1996). (Carter, African-American, objected to his offense level calculation derived from penalty scheme in § 841(b)(1) providing same penalties

for given amounts of crack and 100 times greater amounts of powder cocaine. Objection was premised on Congress s rejection of Amendment 5 proposed by Sentencing Commission which would have eliminated 100:1 ratio and equalized penalties for crack and powder cocaine. Carter argued 100:1 ratio had disproportionate adverse effect on African-Americans; Congress s rejection of Amendment evidenced discriminatory purpose on Congress s part in maintaining penalty scheme; and continued application of scheme violated Fifth Amendment, Equal Protection, and Due Process rights. This Court notes its previous determination Congress did not act with discriminatory purpose in enacting § 841(b)(1) and legitimate reasons existed for initial adoption of statute. Court concludes Carter has not shown Congress rejected Amendment 5 or President approved bill because they wanted to impose disproportionate adverse effect on African-Americans. Statute not involving suspect class or fundamental right enjoys strong presumption of validity and will survive equal protection challenge if rationally related to legitimate governmental purpose. Considering circumstantial and direct evidence of intent--such as historical background of Congress s decision, specific sequence of events preceding decision, departures from normal procedural sequence, substantive departures, and legislative or administrative history--Court concludes none of these sources provides sufficient evidence Congress acted with discriminatory purpose in rejecting Amendment. Carter failed to sustain burden of negating every conceivable basis of support for Congress s statutory rejection of Amendment. This Court further concludes Congress s rejection of Amendment and its direction Commission continue studying problem were rationally related to legitimate government purpose, namely, determining more appropriate punishment for crack offenses than existing ratio or ratio proposed by Commission.)

United States v. Thompson, 51 F.3d 122 (8th Cir. 1995). (Thompson argued statutory sentencing framework punishing crimes involving cocaine base versus powder cocaine by 100:1 ratio is unconstitutional or at least unenforceable. Thompson urged this Court to reconsider decision in United States v. Clary and cited recent District Court decision applying rule of lenity to sentence defendant under lower powder cocaine standards, relying on medical and scientific expert testimony to conclude terms "cocaine base" and "cocaine" are scientifically synonymous. This Court holds Thompson s constitutional arguments are foreclosed by Clary and its progeny. As to theory cited in District Court case, this Court noted there was no evidentiary basis in Thompson s case before Court to consider issues addressed in that decision.

Thompson claimed he was victim of retaliatory sentencing, i.e., he was punished for exercising his constitutional right to trial, based on disparity between his and his co-defendants sentences combined with comment made by District Court during side bar conference to effect Court would not give him three point reduction where jury had already been convened. This Court rejects Thompson s argument because District Court made specific findings to support guideline calculations and sentenced Thompson within applicable guideline sentencing range; its comment regarding Thompson s ineligibility for three point downward adjustment for acceptance of responsibility was nothing more than accurate statement of law.

Thompson also contended his sentence was grossly disproportionate to severity of offenses for which he was convicted, thus constituting cruel and unusual punishment. He highlighted both disparity between his sentence and his co-defendants sentences and disproportionality between sentences for cocaine base offenses versus powder cocaine offenses. This Court specifically rejects two disparity factors as independent grounds for vacating Thompson s sentence. Given narrow

review under Eighth Amendment, this Court holds Thompson s sentence was not grossly disproportionate to crimes for which he was convicted.)

United States v. Clary, 34 F.3d 709 (8th Cir. 1994). (Clary entered guilty plea to charge which called for ten-year mandatory minimum sentence; District Court sentenced him to four years, holding that 100:1 ratio for crack cocaine to powder cocaine was disproportionate and in violation of Equal Protection Clause both generally and as applied, and that selective prosecution of crack cases on basis of race was constitutionally impermissible as applied to Clary. This Court reversed, pointing to its past decisions and rational motives for creating distinction between crack and powder cocaine. It pointed to its previous conclusion there was no evidence Congress or Sentencing Commission had racially discriminatory motive when it crafted Guidelines with extended sentences for crack felonies and reflected it had also rejected strict scrutiny argument based on continued enforcement, rather than enactment. This Court rejects District Court s reliance on "unconscious racism" and reasoning behind conclusion. This Court also observes Clary presented only statistical evidence and offered nothing else to show selective prosecution, which is simply not enough.), cert. denied, 513 U.S. 1182 (1995).

United States v. Johnson, 28 F.3d 1487 (8th Cir. 1994) (McMILLIAN, WOLLMAN, MAGILL*). (Defendants challenged constitutionality of U.S.S.G. § 2D1.1 and 21 U.S.C. § 841, arguing that as applied these sections have disparate impact on blacks. This Court rejects defendants' argument. Defendants did not offer evidence that Congress or Sentencing Commission allowed either § 2D1.1 or § 841 to remain in effect to further racially discriminatory purpose, and there were legitimate reasons for Congress to adopt current crack penalties.)

United States v. Reed, 897 F.2d 351 (8th Cir. 1990). (The "100 to 1 ratio" of cocaine to cocaine base does not violate equal protection and Guidelines are not void for vagueness.)

United States v. Buckner, 894 F.2d 975 (8th Cir. 1990). (The "100 to 1 ratio" of cocaine to cocaine base does not violate Eighth Amendment.)

**S. Marijuana Calculations in Guidelines**

United States v. Marshall, 28 F.3d 801 (8th Cir. 1994). (Case was remanded for further consideration of constitutional validity of guideline provisions setting conversion ratio of one kilogram of marijuana per plant for 50 or more plants as compared to ratio of 100 grams per plant for 49 or fewer plants. This Court rejects Marshall s substantive due process challenge as he failed to provide any new facts or legal analysis; his argument was mere repetition of arguments this Court rejected in Angell.)

United States v. Marshall, 998 F.2d 634 (8th Cir. 1993). (Defendant may wish to challenge marijuana plant conversion ratio as arbitrary and capricious and violative of substantive due process on remand; law in this circuit addresses rationality of heightened culpability for growers and not surprising degree of disparity between conversion ratio for 50 or more plants versus 49 or fewer

plants.)

United States v. Meyers, 990 F.2d 1083 (8th Cir. 1993). (Guidelines equation of one marijuana plant to one kilogram of marijuana (in cases involving more than 50 plants) has been held valid, not unreasonable and arbitrary.)

United States v. Johnston, 973 F.2d 611 (8th Cir. 1992). (This Court rejects Johnston s contention that his due process rights are violated by § 2D1.1 scheme of sentencing based on number of marijuana plants (if 50 or more) rather than weight or net marketable product. Ratio (one plant to one kilogram of marketable marijuana) is not irrational and thus, not unconstitutional.), cert. denied, 506 U.S. 1068 (1993).

United States v. Smith, 961 F.2d 1389 (8th Cir. 1992). (Smith contended § 2D1.1 provisions for sentencing based on number of plants (if fifty or more) rather than weight of plants or net marketable value, violate his due process rights because they irrationally equate one plant with one kilogram of marketable marijuana. Challenged ratio not irrational as cases suggest Congress intended to account for heightened culpability of growers because of their primacy in distribution chain.)

**T. Other Constitutional Provisions**

Mistretta v. United States, 488 U.S. 361 (1989). (Excessive-delegation and separation-of-powers challenges rejected.)

United States v. Turechek, 138 F.3d 1226 (8th Cir. 1998). (Turechek argues § 2E1.4 is unconstitutional because it is irrational, contrary to legislative mandate of underlying statute, and inconsistent with spirit and intent of Sentencing Guidelines. This Court declines to consider merits of argument and affirms sentence because Turechek was sentenced well below statutory maximum term of imprisonment for violation of 18 U.S.C. § 1958, and therefore, lacks standing to challenge constitutionality. Due to his placement in criminal history category I, Guidelines applicable to him were more lenient than if he had been placed in any higher category. Because it is clear § 2E1.4 is not irrational as applied to Turechek, this Court finds he has no standing to make claim.)

United States v. Mendoza, 121 F.3d 441 (8th Cir. 1997). (Jury convicted Mendoza of conspiracy to distribute and possession with intent to distribute methamphetamine; District Court sentenced him to mandatory minimum 240 months. Mendoza contends imposition of mandatory minimum is unconstitutional. However, as Mendoza conceded, this Court has rejected his argument in United States v. Prior.)

United States v. Prior, 107 F.3d 654 (8th Cir.) (Prior argues § 841(b) is unconstitutional under doctrine of separation of powers. Prior's argument that District Court's ability to depart from mandatory minimum only if prosecution makes motion for departure on basis of defendant's provision of substantial assistance, is usurpation of function of judiciary, has previously been rejected by this Court.), cert. denied, 522 U.S. 824 (1997).

United States v. Vue, 38 F.3d 973 (8th Cir. 1994). (Vue argued drug equivalency tables and sentencing statutes fail to take into account possibility that opium will not be processed into heroin but instead may be smoked in its raw form, specifically, by custom among people of Hmong ethnic descent for drug s medicinal properties. This Court rejects Vues contention that this failure in equivalency tables and statutes amounts to discrimination against them as ethnic minority in violation of their equal protection rights. Vues offered no evidence of discriminatory purpose nor may they presume such purpose from fact tables and statutes have remained in effect despite equal protection challenges. Vues acknowledged that atypical method of opium use among people of Hmong ethnic descent does not provide rationale for departure from Guidelines.)

United States v. Thomas, 20 F.3d 817 (8th Cir.) (en banc). (This Court decides that District Court may consider constitutionally valid but uncounseled prior misdemeanor conviction when Court determines defendant s sentence for subsequent conviction under Guidelines, consistent with Sixth Amendment right to counsel.), cert. denied, 513 U.S. 828 (1994).

United States v. Garrido, 995 F.2d 808 (8th Cir.) (This Court agrees with District Court that Ismael s statement to INS agent was voluntary and could be used at sentencing. Agent s conduct was not that which would cause suspect s will to be overborne. Ismael waived his Fifth and Sixth Amendment right to counsel claims because he did not ask District Court for ruling and he made no showing of plain error resulting in manifest injustice.), cert. denied, 510 U.S. 926 (1993).

United States v. Elliott, 992 F.2d 853 (8th Cir. 1993). (Constitution does not preclude enhancement of sentence (§ 4A1.2) based on prior convictions which have not been previously ruled constitutionally invalid. DISSENT: Collateral attack must be permitted (Norquay). Due process requires certain procedures in certain situations; if they are not followed, resulting convictions are without legal effect.), cert. denied, 511 U.S. 1130 (1994).

United States v. Kelly, 989 F.2d 980 (8th Cir.) (Case remanded for District Court to reconsider, with benefit of Galloway addressing relevant conduct, its prior determination that Kelly s use of force and coercion against fourth victim should not be considered in computation of enhancement.), cert. denied, 510 U.S. 874 (1993).

United States v. Mills, 987 F.2d 1311 (8th Cir.) (Mills s argument that Sentencing Commission exceeded its statutory authority in promulgating § 1B1.3 on relevant conduct, is barred by this Court s conclusion in United States v. Galloway: Congress statutorily granted Commission authority to adopt relevant conduct guideline.), cert. denied, 510 U.S. 953 (1993).

United States v. Womack, 985 F.2d 395 (8th Cir. 1993). (Caraway argued that United States v. Rodriquez-Morales interpretation of two substantial assistance provisions to be used at government s option violates due process and separation of powers doctrine. This Court holds Caraway waived challenge to validity of Guidelines as he voluntarily consented to government s filing of only section 5K1.1 motion and to imposition of 20-year sentence by signing plea agreement which so provided. Moreover, after District Court ruled it could not depart below statutory minimum, it asked Caraway if he wished to withdraw plea--Caraway declined.), cert. denied, 510

U.S. 902 (1994).

United States v. Calva, 979 F.2d 119 (8th Cir. 1992). (This Court rejects Calva s constitutional challenges to section 1B1.3(a)(2), inclusion of additional 32 1/8 ounces of cocaine as uncharged relevant conduct, based on Galloway and Wise. CONCURRENCE: Disagrees, but is compelled by weight of recent precedent to join opinion.)

United States v. Galloway, 976 F.2d 414 (8th Cir. 1992). (This Court held that sentencing by considering relevant conduct (§ 1B1.3(a)(2)) is authorized by statute and does not violate constitutional rights to indictment, jury trial, and proof beyond reasonable doubt. DISSENT: In face of express constitutional prohibition, majority by process of legal legerdemain converts seven distinct crimes into "sentencing factors" and thus finesses out crucial constitutional protections granted all persons.), cert. denied, 507 U.S. 974 (1993).

United States v. Murphy, 899 F.2d 714 (8th Cir. 1990). (Due process is not violated by calculating defendant s offense level without regard to drug purity. Commission s decision to determine offense level on basis of entire weight of methamphetamine mixture satisfies due process. Guidelines do not violate Presentment Clause. District Court fully complied with requirements of Rule 32(C)(3)(D) and defendant failed to specify factual matters which were not resolved. Sentences within statutory maximum and within appropriate Guidelines range do not violate Eighth Amendment.)

United States v. Burton, 898 F.2d 595 (8th Cir. 1990). (Challenge to constitutionality of Sentencing Guidelines as violating Presentment Clause disposed of by Barnerd.)

United States v. Barnerd, 887 F.2d 841 (8th Cir.) (Court rejected due process argument that Guidelines violate his right to individual sentencing by restricting his right to present potentially mitigating evidence and limiting trial judge s discretion; by potentially lengthening sentence by facts that are not determined by jury or proved beyond reasonable doubt; and, by denying defendants right to confront witnesses who testify to facts relevant at sentencing and that Guidelines violate Presentment Clause of United States as they are legislation not signed by President. Court held no due process violation because lack of additional procedures at sentencing does not amount to "erroneous deprivation" of Barnerd s interests and § 6A1.3 deals with resolution of disputed sentencing factors. President s signature on actual Guidelines is not required since delegation is provided for in 28 U.S.C. § 991 which was signed by President.)

United States v. Nunley, 873 F.2d 182 (8th Cir. 1989). (Delegation, separation-of- powers, and due process challenges.)

United States v. Horton, 873 F.2d 180 (8th Cir. 1989). (Government appeal of District Court holding Guidelines unconstitutional; remand for resentencing under Guidelines.)

**U. Other Federal Rules or Statutes**

United States v. Snoddy, 139 F.3d 1224 (8th Cir. 1998). (Fed. R. Crim. P. 20 does not put any limitations upon sentencing power of transferee Court. "Continuation" of prosecution would naturally include consideration of all relevant Sentencing Guidelines, both aggravating and mitigating, enhancing or reducing.)

United States v. Rounsavall, 128 F.3d 665 (8th Cir. 1997). (District Court strongly disagreed with decision of prosecutor not to file § 3553(e) motion, but found no reason to hold evidentiary hearing regarding Rounsavall s claim of breach of plea agreement because government had simply agreed to consider her cooperation, nothing more. Rounsavall appeals denial of motion to compel government to file § 3553(e) motion. Relief may be granted absent government substantial assistance motion if defendant shows government refusal to make motion based on unconstitutional motive, refusal was irrational, or motion was withheld in bad faith. Defendant is entitled to evidentiary hearing to determine whether government acted improperly if she is able to make substantial threshold showing government acted irrationally, in bad faith, or in violation of one s constitutional rights. This Court agrees with District Court U.S. Attorney should have made motion for statutory downward departure and further holds Rounsavall made sufficient threshold showing to require evidentiary hearing to determine whether U.S. Attorney s reasons were irrational and/or made in bad faith. This Court rejects U.S. Attorney s stated reasons for failing to file statutory motion. As set forth in her affidavit, based on alleged representations made to Rounsavall, government may have violated plea agreement in failing to file motion. AUSA s representations to Rounsavall may have superseded broad discretion prosecutors generally enjoy in determining whether to file substantial assistance motion. Notwithstanding language of agreement, if government s refusal to file is irrational or in bad faith, particularly in light of representations made to defendant, District Court may require government to make downward departure motion. Desire to dictate length of defendant s sentence for reasons other than his or her substantial assistance is not permissible basis for exercising government s power under § 3553(e). Government must base its decision whether to file motion on factors related to Rounsavall s substantial assistance, not on whether her brother ultimately decided to enter into plea agreement. Case reversed and remanded to District Court for evidentiary hearing to determine whether government acted irrationally and/or in bad faith in failing to file § 3553(e) motion in light of Rounsavall s substantial assistance and government s conduct, and whether government considered factors outside Rounsavall s substantial assistance in declining to file downward departure motion.)

United States v. Engelhorn, 122 F.3d 508 (8th Cir. 1997). (At sentencing, Engelhorn objected to imposition of supervised release in event Court imposed maximum custodial sentence of one year. District Court imposed custodial sentence of twelve months, overruled defendant s objection, and included one-year period of supervised release, 18 U.S.C. § 3583(a). Engelhorn argues imposition of supervised release violates "like punishment" provision of Assimilative Crimes Act (18 U.S.C. § 13), and is therefore impermissible. Authorizing supervised release as part of sentence implies term of supervised release is to be imposed in addition to any incarceration authorized by particular substantive criminal statute. It is federal policy to give judges power to make independent determination of whether particular defendant needs supervision after incarceration; power to be exercised in furtherance of overall purpose of supervised release, to ease defendant s transition into community, or to provide rehabilitation to defendant who still needs

supervision and training programs after release. Here, Court is faced with issue of first impression, whether same policy considerations apply where defendant is charged under ACA, yet substantive state law under which he was convicted provides for no period of supervised release. This Court notes South Dakota law does provide for period of probation, and in this case supervised release is "like punishment" for ACA purposes. This Court holds although term of incarceration imposed upon defendant convicted under ACA may not exceed that provided in state substantive law, total sentence imposed--consisting of term of incarceration followed by period of supervised release--may exceed maximum term of incarceration provided for by state law. Sentencing Guidelines, including provisions for supervised release, were made applicable to ACA in 1990, 18 U.S.C. § 3551(a). Congress s intent is to give judges discretion to impose maximum term of incarceration plus period of supervised release upon those defendants, including ACA defendants, whom judges deem appropriate candidates for post incarceration supervision. This discretion is to be exercised upon considerations independent of length of prison time, including maximum term, imposed upon or served by defendant.)

United States v. Schaffer, 110 F.3d 530 (8th Cir. 1997). (This Court has recognized implicitly § 924(c)(1) mandates type of minimum sentence District Court may decrease following government s § 3553(e) motion for substantial assistance. Because there is not specific offense level for § 924(c)(1) conviction, § 2X5.1 instructs District Court to apply most analogous offense guideline. Schaffer believes two-level enhancement for possession of firearm (specific offense characteristic of drug trafficking crime under § 2D1.1(b)(1)) is guideline offense most analogous to using or carrying firearm during or in relation to drug trafficking crime. This Court holds for first time that mandatory minimum sentence of § 924(c)(1) is proper departure point following § 3553(e) motion based on substantial assistance. Guidelines that pertain to § 924(c)(1) refer back to statute which requires sixty-month minimum sentence; most logical conclusion from circular references is mandatory-minimum sentence becomes guideline sentence for purposes of § 3553(e). District Court correctly applied Guidelines by departing downward from sixty-month mandatory minimum in sentencing Schaffer for § 924(c)(1) conviction. Moreover, conduct that resulted in Schaffer s conviction under § 924(c)(1) is significantly different and more serious than conduct required for two-level enhancement under § 2D1.1(b)(1). Schaffer s approach would permit Schaffer to be sentenced for much lesser offense than one to which he pleaded guilty.)

## V. Miscellaneous

Edwards v. United States, 523 U.S. 511 (1998). (Where jury is instructed in disjunctive on multiple drug types (e.g., defendant distributed crack or powder cocaine), and thus does not determine drug type at trial, it is for District Court to determine drug type at sentencing for Guidelines purposes. Effectively overruling United States v. Owens, 904 F.2d 411 (8th Cir. 1990).)

United States v. Greatwalker, 285 F.3d 727 (8th Cir. 2002) (McMILLIAN, FAGG,* RILEY). (There can be no plea bargain to illegal sentence (i.e., one which exceeds statutory maximum or is below statutory minimum), even if prosecutor, defendant, and District Court all agree. Remedy is

plea withdrawal unless government and defendant agree to accept sentence reduced/increased to legal term, or sentence can otherwise be corrected both to be legal and to give defendant benefit of bargain.)

United States v. Due, 205 F.3d 1030 (8th Cir. 2000) (RICHARD S. ARNOLD,* HANSEN, MELLOY). (District Court s statement--that Jencks Act materials are not to be considered at sentencing--was incorrect; however, this Court need not decide if agent s rough notes were required to be divulged, because there was no prejudicial error in District Court s decision to deny motion for their production: notes would not have materially aided Due s attack on testifying agent s credibility. Also District Court did not err in admitting agent s hearsay testimony because Court found case agent credible, and such finding is close to invulnerable on appeal.)

United States v. Sandifer, 188 F.3d 992 (8th Cir. 1999) (RICHARD S. ARNOLD, JOHN R. GIBSON,* BOWMAN). (Reviewing for plain error, this Court rejects Sandifer's claim that victim impact statements were false and that District Court's reliance on them violated his due process rights, because statements were not demonstrably basis for sentence: Court admitted statements but sentenced Sandifer to lower half of sentencing range because of harsh sentences for crack, Sandifer's troubled childhood and psychological background, fact that this was Sandifer's first drug felony conviction, and fact that Court felt it had given Sandifer "break" in drug quantity determination; District Court stated information in victim impact statements confirmed what Court already knew about impact of drug dealing on neighborhood and community and this Court has no doubt experienced district judge knew of these effects before seeing statements.)

United States v. Behler, 187 F.3d 772 (8th Cir. 1999) (BEAM, HANSEN,* MOODY). (Law of case precluded District Court from reopening issues of Behler's role in offense or obstruction of justice because in his first appeal this Court specifically affirmed findings concerning these enhancements. Although Behler had second appeal in which this Court vacated his § 924(c) conviction and resulting sentence, this did not disturb any of District Court' prior findings regarding two enhancements; rather, vacation merely provided opportunity to consider previously unavailable firearm enhancement to sentence. Additionally, prior opinion specifically limited scope of remand.)

United States v. Jenkins, 141 F.3d 850 (8th Cir. 1998). (Resentencing judge was different than judge who initially sentenced Jenkins; Jenkins argued in support of reduction in his sentence from life to 360 months. On appeal, Jenkins argues he is entitled to be resentenced before different judge because second sentencing judge came to hearing with his mind made up, thereby depriving Jenkins of fair hearing. Reading record, forming tentative opinion, and preparing tentative written findings and conclusions before hearing reflect diligence and careful preparation. When Jenkins presented no evidence at hearing, and government presented lengthy testimony supporting sentence at top of revised Guideline range, District Court--quite predictably--was not persuaded to change its tentative findings and conclusions. Record fully supports District Court s judgment.)

United States v. Behler, 100 F.3d 632 (8th Cir. 1996). (Once sentence has been vacated or finding related to sentencing has been reversed and case has been remanded for resentencing, District Court can hear any relevant evidence on issue it could have heard at first hearing. On

remand, however, all issues decided by appellate Court become law of case and District Court is bound to proceed within scope of any limitations imposed on its function at resentencing by appellate Court. This Court concludes District Court properly interpreted circuit opinion and properly limited scope of resentencing in accordance with instructions.), cert. denied, 522 U.S. 855 (1997).

United States v. Makes Room For Them, 49 F.3d 410 (8th Cir. 1995). (Defendant need not be sentenced by same judge who presided at trial of case. Sentencing judge merely must familiarize self with evidence and legal issues involved and exercise informed discretion in imposing sentence. Sentencing judge may also consider evidence introduced during proceedings involving co-defendants. Here, judge had several sources of information from which to become familiar with evidence involved in Make Room s case. Moreover, judge indicated willingness to listen to any additional evidence parties wished to present at sentencing. No abuse of discretion.)

United States v. McNeely, 20 F.3d 886 (8th Cir.) (McNeely and Fowler contended there is no rational basis for § 2B3.1(b)(1) which provides for two-level enhancement to base offense level for robbery of financial institution or post office. Claim fails because enhancement reflects both seriousness of offense and past practice, rational basis.), cert. denied, 513 U.S. 860 (1994).

United States v. French, 12 F.3d 114 (8th Cir. 1993). (French argued District Court erred when it refused to allow him to call attorney who regularly represents defendants in criminal cases to testify as expert about impact on witness credibility of substantial-assistance reductions available under Guidelines. Subject matter of attorneys proposed testimony (i.e., witnesses who testify after signing plea agreements that contains substantial assistance provisions more likely to incriminate defendant falsely in order to receive reduction) is not suitable for expert opinion.)

United States v. Alexander, 982 F.2d 262 (8th Cir. 1992). (District Court s drug quantity determinations not based on hearsay where witnesses testified--and were subject to cross-examination--on basis of first-hand observation, personal recollections, and written records.), cert. denied, 512 U.S. 1244 (1994).

United States v. Filker, 972 F.2d 240 (8th Cir. 1992). (Where District Court accepted PSR s findings, but decided base offense level of 12 (rather than 18) was more appropriate offense level--resulting in sentence fifteen months less than minimum Filker would have received by PSR s calculations--and government did not object to Filker s sentence at sentencing hearing, this Court affirms, stating Filker s eighteen-month sentence did not constitute gross miscarriage of justice. DISSENT: District Court s arbitrary and insupportable decision to sentence Filker under inapplicable statute and guideline because Court deemed resulting sentence "more appropriate" is disregard of law and flies in face of Guidelines policy of ensuring rational, consistent sentencing decisions.)

United States v. Jackson, 959 F.2d 81 (8th Cir.) (Jackson received longer sentence than "ring leader" of drug conspiracy in which he was involved. Trial Court did not abuse its discretion because defendants were not similarly situated, e.g., "ring leader" received downward departure for

cooperating with government and amount of cocaine attributable to conspiracy was less when "ring leader" was sentenced, than when Jackson was.), cert. denied, 506 U.S. 852 (1992).

United States v. Nash, 929 F.2d 356 (8th Cir. 1991). (Any error under Fortier was harmless where application might change defendant s criminal history category, but would have no effect on his sentence (defendant received 240 month statutory maximum which was below yield of range with adjusted criminal history).)

United States v. Pregler, 925 F.2d 268 (8th Cir. 1991). (Pregler argued friend persuaded him through his skills as hypnotist to sell some cocaine in 1988, thereby allowing Guidelines to apply to his sentence. Pregler s due process rights were not violated by using professional stage hypnotist who was Pregler s friend as government informant. Pregler did not raise entrapment defense or undue influence.)

United States v. Brown, 921 F.2d 785 (8th Cir. 1990). (Dorsey contended his sentence was unjust because his base offense level was determined by total quantity of PCP and ether mixture without regard for quantity of pure PCP in mixture. This Court analogized case to United States v. Murphy, 899 F.2d 714 (8th Cir. 1990). Sentencing Commission decision to determine offense on basis of entire weight satisfies due process. It is neither arbitrary nor irrational to sentence according to total quantity of PCP mixture without regard to purity. Footnote recognizes more watered down drugs could garner higher sentences and that extraordinary circumstances might render sentence excessively harsh.)

United States v. Turpin, 920 F.2d 1377 (8th Cir. 1990). (Williams claimed Assistant U.S. Attorney assigned to Drug Task Force served dual role in state prosecutor s office and that case against him in state Court was dismissed solely to gain tactical advantage in federal Court. Due process clause is not implicated by Williams being subjected to harsher sentence in federal Court than state Court. Due process does not require right to trial by jury on each fact that results in increase in sentence nor does Constitution impose particular standard of proof for factual determinations at sentencing hearings.), cert. denied, 499 U.S. 953 (1991).

United States v. Frondle, 918 F.2d 62 (8th Cir. 1990). (No need to determine whether "splitting difference" between two and four kilograms to arrive at figure attributable to Frondle at sentencing, is so arbitrary and standardless means of approximation as to violate due process, where sentence would have been same. Where same sentence would have been imposed under either of two guideline ranges, Court need not resolve underlying dispute.), cert. denied, 499 U.S. 941 (1991).

United States v. Wright, 904 F.2d 403 (8th Cir. 1990). ("Two track" approach made resentencing of defendant convicted of bank robbery unnecessary as District Court had announced alternate sentence of 132 months under Guidelines.)

United States v. Amerson-Bey, 898 F.2d 681 (8th Cir. 1990). (Defendant argued that one-level enhancement to his base level for illegal possession of stolen firearm, pursuant to

§ 2K2.1(b)(1) (later amended), violated due process because it did not require knowledge. However, this was not raised in District Court and this Court declined to address it.)

United States v. Warner, 894 F.2d 957 (8th Cir. 1990). (Non-Guidelines sentence vacated and case remanded for entry of new commitment order directing defendant to serve Guidelines sentence; Guidelines do not violate due process (District Court had employed two-track sentencing procedure).)

United States v. Ruiz-Vargas, 873 F.2d 1157 (8th Cir. 1989). (Defendant appealed "old law" sentence imposed after Court struck Guidelines as unconstitutional but was "guided by" Guidelines; defendant did not seek resentencing under Sentencing Guidelines and Court ruled it would generally not overturn sentence which fell within statutory limits.)

## II. STANDARD OF REVIEW (General)

### A. Normal Review

United States v. Backer, Nos. 03-1381/1519 (8th Cir. 2004) (RILEY, BEAM, SMITH*). (District Court's application of Guidelines is reviewed de novo. In de novo review, no deference is afforded to District Court's sentencing decision.)

United States v. Camacho, 348 F.3d 696 (8th Cir. 2003) (MORRIS ARNOLD, HANSEN,* SMITH). (Although we accord due deference to District Court's application of Guidelines to facts under 18 U.S.C. § 3742(e), our review is essentially de novo.)

United States v. Weiland, 284 F.3d 878 (8th Cir. 2002) (McMILLIAN, MURPHY,* BATTEY). (When application of Guidelines involves mixed questions of fact and law, abuse-of-discretion standard is used. District Court abuses its discretion when it makes error of law or clearly erroneously assessment of evidence.)

United States v. Powell, 283 F.3d 946 (8th Cir.) (LOKEN,* HEANEY, RILEY). (Correct application of Guidelines is question of law subject to de novo review.), cert. denied, 537 U.S. 868 (2002).

United States v. Kenney, 283 F.3d 934 (8th Cir.) (HANSEN, McMILLIAN,* BEAM). (District Court's determination whether Guidelines authorize double-counting is reviewed de novo.), cert. denied, 537 U.S. 867 (2002).

United States v. Guy, 282 F.3d 991 (8th Cir. 2002) (McMILLIAN, HEANEY, MURPHY*). (Interpretation of Guidelines' scope is question of law that is reviewed de novo. District Court's factual findings under Guidelines are reviewed with appropriate deference because of District Court's greater familiarity with factual record.)

United States v. Blanton, 281 F.3d 771 (8th Cir. 2002) (WOLLMAN,* HANSEN, FENNER). (District Court's findings of fact are reviewed for clear error, and its interpretation of Guidelines and application of Guidelines to facts of case are reviewed de novo.)

United States v. Ross, 279 F.3d 600 (8th Cir. 2002) (BYE,* LAY, J. R. GIBSON). (District Court's application of Guidelines is reviewed de novo.)

United States v. Barber, 272 F.3d 1067 (8th Cir. 2001) (MORRIS SHEPPARD ARNOLD, BRIGHT,* KYLE). (District Court's application of Guidelines is reviewed de novo), cert denied, 535 U.S. 978 (2002).

United States v. Ramirez-Rios, 270 F.3d 1185 (8th Cir. 2001) (BOWMAN, HEANEY,* BYE). (This Court reviews interpretations of Guidelines de novo and reviews factual findings for clear error.)

United States v. Parker, 267 F.3d 839 (8th Cir. 2001) (WOLLMAN, HANSEN,* SCHREIER). (This Court reviews District Court's interpretation and application of Guidelines de novo.), cert. denied, 535 U.S. 1011 (2002).

United States v. Auginash, 266 F.3d 781 (8th Cir. 2001) (LOKEN, JOHN R. GIBSON,* MURPHY). (District Court's interpretation of Guidelines is question of law subject to de novo review, while its factual determinations are subject to review only for clear error.)

United States v. Letts, 264 F.3d 787 (8th Cir. 2001) (LOKEN, HEANEY, BYE*). (This Court limits its review of sentencing issues to determining whether District Court clearly erred in any of its factual findings or misapplied Guidelines.), cert. denied, 535 U.S. 908 (2002).

United States v. Newton, 259 F.3d 964 (8th Cir. 2001) (WOLLMAN, HANSEN, SCHREIER*). (This Court reviews de novo District Court's application of Guidelines.)

United States v. Lalley, 257 F.3d 751 (8th Cir. 2001) (MORRIS SHEPPARD ARNOLD, J. R. GIBSON,* GOLDBERG). (This Court reviews District Court's interpretation of Guidelines de novo and its factual determination for clear error.)

United States v. Lewis, 249 F.3d 793 (8th Cir. 2001) (BEAM, MORRIS SHEPPARD ARNOLD, ALSOP*). (District Court's application, construction, and interpretation of terms of Guidelines is reviewed de novo.)

United States v. Lewis, 200 F.3d 1177 (8th Cir. 2000) (WOLLMAN, LAY, BOWMAN (per curiam). (Challenge to imposition of consecutive sentences implicates application of Guidelines and this Court reviews such application de novo.)

United States v. Hoelzer, 183 F.3d 880 (8th Cir. 1999) (BEAM, HANSEN,* KOPF). (This

Court review factual bases of District Court's sentencing enhancements for clear error, and gives due deference to District Court's application of Guideline to facts. District Court must weigh evidence and base its sentencing decision on preponderance of evidence.)

United States v. Hawkins, 181 F.3d 911 (8th Cir.) (RICHARD S. ARNOLD, HANSEN,* STROM). (This Court reviews de novo question whether impermissible double counting occurs.), cert. denied, 528 U.S. 981 (1999).

United States v. Roach, 164 F.3d 403 (8th Cir. 1998) (HANSEN, LAY, MURPHY*). (This Court reviews District Court's fact findings for clear error and may affirm on any ground supported by record.), cert. denied, 528 U.S. 845 (1999).

United States v. Maggard, 156 F.3d 843 (8th Cir. 1998). (This Court reviews District Court's factual determinations for clear error while its interpretation of Guidelines is subject to de novo review. Appellant complained of offense level enhancements for role in offense and obstruction of justice, but appellant would be subject to same sentence based on application of career offender Guideline regardless of complained-of enhancements; because this Court's independent review convinced Court that sentence imposed was proper, this Court would not reach issue of alleged error in adjusting offense level.), cert. denied, 525 U.S. 1170 and 526 U.S. 1058 (1999).

United States v. Akbani, 151 F.3d 774 (8th Cir. 1998). (This Court reviews findings of fact at sentencing hearing for clear error and gives due deference to District Court's application of Guidelines to facts. When District Court has made legal interpretation of terminology in Guidelines and applies such interpretation to facts, this Court reviews de novo both interpretation and application.)

United States v. Whatley, 133 F.3d 601 (8th Cir.) (District Court s factual findings for sentencing must be supported by evidence sufficient to convince reasonable fact finder evidence preponderates in favor of findings; this Court reviews those findings for clear error and reverses only if left with definite and firm conviction District Court erred.), cert. denied, 524 U.S. 940 and 524 U.S. 945 (1998).

United States v. Dierling, 131 F.3d 722 (8th Cir. 1997). (Trial Court examines all relevant conduct in case to determine individual s role in charged offense, and findings are reviewed under clearly erroneous standard.), cert. denied, 523 U.S. 1054, 523 U.S. 1066 and 524 U.S. 922 (1998).

United States v. Wells, 127 F.3d 739 (8th Cir. 1997). (When government challenges sentences imposed under Guidelines, this Court reviews District Court s factual findings for clear error, and its application and construction of Guidelines de novo. Finding is clearly erroneous when reviewing Court, on basis of all evidence, is left with definite and firm conviction mistake has been made. Where there are two permissible views of evidence, District Court s choice between two cannot be clearly erroneous. Where appellant challenges construction or application of Guidelines in arriving at its finding of fact, this Court reviews de novo.)

United States v. Rodgers, 122 F.3d 1129 (8th Cir. 1997). (This Court reviews District Court s findings of fact at sentencing under standard in 18 U.S.C. § 3742(e) which provides this Court must give due regard to opportunity of District Court to judge credibility of witnesses, and shall accept findings of fact of District Court unless they are clearly erroneous. Furthermore, where there are two permissible views of evidence, factfinder s choice between them cannot be clearly erroneous.), cert. denied, 522 U.S. 1061 (1998).

United States v. Triplett, 104 F.3d 1074 (8th Cir.) (Applicability of section of sentencing Guidelines to particular case is question of law which this Court reviews de novo.), cert. denied, 520 U.S. 1236 and 520 U.S. 1270 (1997).

United States v. Collins, 104 F.3d 143 (8th Cir. 1997). (The correct application of Guidelines is question of law subject to de novo review. Factual determination of District Court is reviewed under clearly erroneous standard. Decision to depart from Guidelines will be reviewed for abuse of discretion.)

United States v. Choate, 101 F.3d 562 (8th Cir. 1996). (This Court reviews District Court s findings of fact only for clear error and may reverse findings only if, after review of entire record, it is left with definite and firm conviction mistake has been committed. Choate objected to inclusion in PSR of his post-indictment business dealings as relevant conduct. He argues findings are not of fact, but rather of law. But, Choate does not ask this Court to send case back for District Court to make different findings--instead, he wants this Court to make different findings. Choate s argument is solely directed to avoiding clearly erroneous standard of review and having this Court make its own assessment of facts which it may not do. Choate also argues District Court s findings were clearly erroneous on issue of whether his business practices while out on bond were fraudulent. This Court acknowledges testimony is conflicting, but adequate to support District Court s conclusion Choate was continuing his past pattern of selling franchise packages franchisees were not able to use as promised. On this record, this Court not left with definite and firm conviction District Court made mistake.)

United States v. Carter, 91 F.3d 1196 (8th Cir. 1996). (This Court reviews de novo Carter s equal protection challenge, i.e., Carter argued 100:1 ratio in sentencing for crack and cocaine powder had disproportionate adverse effect on African-Americans.)

United States v. McNeil, 90 F.3d 298 (8th Cir.) (Role of reviewing Court on appeal from sentencing determination is to determine whether sentence was imposed in violation of law, as result of incorrect application of sentencing Guidelines, is outside applicable range and is unreasonable; or was imposed for offense for which there is no applicable sentencing guideline and is plainly unreasonable. This Court gives due deference to District Court s application of Guidelines to facts.), cert. denied, 519 U.S. 1034 (1996).

United States v. Iron Cloud, 75 F.3d 386 (8th Cir. 1996). (Findings by District Court for purposes of sentencing, which require no legal interpretation of guideline term, are findings of facts and may not be overturned absent clear error. Factual finding is clearly erroneous when, although

some evidence may support it, record as whole leaves reviewing Court with definite and firm conviction mistake has been committed.)

United States v. Carr, 66 F.3d 981 (8th Cir. 1995). (Where analysis of purported error hinges on point of statutory interpretation, which is question of law, this Court reviews District Court decision de novo. In reviewing District Court s sentences below statutory maximum, this Court applies abuse of discretion standard.)

United States v. Marks, 38 F.3d 1009 (8th Cir. 1994). (Marks objected to District Court s drug quantity finding involved in cocaine distribution conspiracy to which he pleaded guilty; he argued proof should have been based on more than preponderance of evidence. This Court, however, has previously rejected argument that sentencing phase requires more stringent standard of proof than preponderance of evidence. Determination by District Court as to amount of cocaine involved was finding of fact which this Court accepts unless it is clearly erroneous.), cert. denied, 514 U.S. 1067 (1995).

United States v. Ridl, 26 F.3d 73 (8th Cir. 1994). (Notice of appeal in criminal case should follow and not precede disposition of post-trial motions. Filing timely motion for reconsideration reinvests jurisdiction in District Court. Where this Court dismissed notice of appeal as premature and essentially without effect, District Court retained jurisdiction to rule on motion for reconsideration, and 30-day appeal period ran anew from time District Court denied government s motion.)

United States v. Sales, 25 F.3d 709 (8th Cir. 1994). (Sales and Moore contended District Court erroneously applied preponderance of evidence standard of proof at sentencing when it determined quantity of methamphetamine they had conspired to distribute. This Court reviews issue of proper burden of proof at sentencing de novo. Government must prove all essential elements of offense beyond reasonable doubt. However, once conviction has been legally obtained, government need only prove facts bearing on sentence by preponderance of evidence. This circuit has repeatedly held quantity of drugs involved in conspiracy is not essential element of offense, and therefore government need not prove quantity beyond reasonable doubt.)

United States v. Pugh, 25 F.3d 669 (8th Cir. 1994). (This Court will reverse and remand for resentencing if it determines District Court sentenced defendant in violation of law or as result of misapplication of sentencing Guidelines.)

United States v. Haversat, 22 F.3d 790 (8th Cir. 1994). (Court of Appeals must remand for resentencing if sentence was imposed as result of incorrect application of Guidelines or if sentence is unreasonable departure from applicable guideline range.), cert. denied, 516 U.S. 938 (1995).

United States v. Fetlow, 21 F.3d 243 (8th Cir. 1994). (Case sets out standard of review for appeals of sentences imposed under federal sentencing Guidelines in 18 U.S.C. § 3742(e). Court of Appeals shall give due regard to opportunity of District Court to judge credibility of witnesses, shall accept findings of fact unless clearly erroneous, and shall give due deference to District

Court s application of Guidelines to facts.)

United States v. Pynes, 5 F.3d 1139 (8th Cir. 1993). (First-impression question involving interpretation of scope of Guidelines requires this Court s de novo review.)

United States v. Garrido, 995 F.2d 808 (8th Cir. 1993). (This Court reviews factual findings by District Court for clear error. It reverses when left with definite and firm conviction that District Court erred. This Court may affirm on any ground supported by record. This Court reviews determination of whether statement was voluntary, for clear error.), cert. denied, 510 U.S. 926 (1993).

United States v. Monroe, 978 F.2d 433 (8th Cir. 1992). (The preponderance of evidence standard applies in sentence decisions. This Court vacates sentence and remands where review of transcript does not indicate substance was more likely than not crack. District Court did not weigh chemist s testimony regarding infrared spectroscopy test results against other seemingly contradicting testimony. Moreover, District Court apparently relied on improper standard of proof.)

United States v. Marion, 977 F.2d 1284 (8th Cir. 1992). (This Court reviews de novo issues of whether Sentencing Commission adequately considered all factors articulated by Congress and whether particular guideline reasonably complies with Congress s statutory directive (reference here to § 2J1.6.)

United States v. Morton, 957 F.2d 577 (8th Cir. 1992). (District Court s factfinding satisfied due process. Although District Court did not state standard of proof it applied when making its findings, this Court was satisfied it applied preponderance of evidence standard at sentencing. In any event, this Court concluded after reviewing sentencing transcript, District Court s findings would have been same under preponderance standard.)

United States v. Renfrew, 957 F.2d 525 (8th Cir. 1992). (This Court may rely on post-sentence clarifying amendment in interpreting unamended Guideline except when it would require overruling Eighth Circuit precedent.)

United States v. Malbrough, 922 F.2d 458 (8th Cir. 1990). (Where government cross appealed, claiming District Court erroneously applied clear and convincing evidence standard of proof in making findings of fact relied on in sentencing, this Court was satisfied District Court did not apply that standard because of its use of terms such as "persuasive" and "reliable" evidence. This Court takes occasion to hold preponderance of evidence standard of proof is to be applied in sentencing determinations. Government also argued District Court s finding Malbrough manufactured 75 plants was clearly erroneous. This Court acknowledged evidence Malbrough manufactured more than 100 marijuana plants and evidence government agents failed to distinguish tomato and marijuana plants. Thus, District Court s finding of 75 was not clearly erroneous.), cert. denied, 501 U.S. 1258 (1991).

United States v. Vickerage, 921 F.2d 143 (8th Cir. 1990). (No abuse of discretion where

District Court imposed three-month sentence and decided not to depart from appropriate guideline range (2 to 8 months). Though Vickerage argued sentence was mechanistically determined and excessive, she did not argue Guidelines were incorrectly applied or sentence was outside Guidelines range.)

United States v. Weaver, 906 F.2d 359 (8th Cir. 1990). (It is sufficient that District Court s findings are adequate for meaningful review.)

United States v. Dawes, 890 F.2d 1437 (8th Cir. 1989). (Appeal on application of Sentencing Guidelines moot since appellant no longer incarcerated.)

**B. Plain Error Review**

Johnson v. United States, 520 U.S. 461 (1997). (Where defendant did not object below because settled precedent at time was adverse to his position, but law subsequently changed in favor of his position while case was pending on appellate review, unobjected-to error is "plain" and "clear under current law," satisfying second prong of plain-error standard of review.)

United States v. Warren, 361 F.3d 1055 (8th Cir. 2004) (BYE, SMITH, COLLOTON*). (This Court has authority to correct plain error even though it was not raised in District Court or on appeal. Court will act if error affects substantial rights of defendant and seriously affects fairness, integrity, or public reputation of judicial proceedings.)

United States v. Henkel, 358 F.3d 1013 (8th Cir. 2004) (BYE, HEANEY, HOVLAND*). (When defendant does not object or request explanation of District Court's imposition of conditions of supervised release at time of sentencing, we review for plain error.)

United States v. Griner, 358 F.3d 979 (8th Cir. 2004) (MORRIS ARNOLD,* BOWMAN, MURPHY). (When defendant fails to object to conditions of supervised release at time of imposition, this Court reviews for plain error.)

United States v. Johnson, 327 F3d. 758 (8th Cir. 2003) (WOLLMAN, RICHARD ARNOLD,* MELLOY). (Where defendant did not object below to District Court's restitution order, this Court's review is for plain error, that is, error so obvious that to ignore it would seriously undermine integrity of judicial proceedings.)

United States v. Diaz, 296 F.3d 680 (8th Cir.) (en banc). (Under plain-error test, this Court can grant relief only if there was error, it was plain, it affected substantial rights, and it seriously affected fairness, integrity, or public reputation of judicial proceedings. Defendant's claim in District Court that government did not prove all elements of offense was not sufficiently similar to Apprendi claim to trigger de novo rather than plain-error review.), cert. denied, 530 U.S. 940 (2002).

United States v. Kempis-Bonola, 287 F.3d 699 (8th Cir.) (HANSEN,* HEANEY, MURPHY). (Constitutional challenge raised for first time on appeal is reviewed for plain error.

Under plain-error review, relief is not warranted unless error was plain and affects defendant's substantial rights. Then, this Court has discretion to correct error if it seriously affects fairness, integrity, or public reputation of judicial proceedings.), cert. denied, 537 U.S. 914 (2002).

United States v. Thompson, 289 F.3d 524 (8th Cir. 2002) (MORRIS SHEPPARD ARNOLD, HEANEY, RILEY*). (Plain error standard only applies when defendant inadvertently fails to raise objection in District Court. Defendant who withdrew objections to PSR is precluded from arguing those objections on appeal.)

United States v. Perez, 270 F.3d 737 (8th Cir. 2001) (McMILLIAN, BEAM, HANSEN*). (Because defendant did not argue before District Court that its failure to inform him of drug-quantity element of offense rendered his guilty plea unknowing and involuntary, this Court reviews for plain error.), cert. denied, 535 U.S. 945 (2002).

United States v. Scott, 243 F.3d 1103 (8th Cir. 2001) (McMILLIAN, BOWMAN, LOKEN*). (Defendant attacks District Court's drug quantity finding, but he agreed to base offense level of 36 in his plea agreement; further, he failed to object at sentencing, and drug- quantity finding, which was based on crack cocaine sold to undercover agent and cocaine powder seized at airport, was not plain error.)

United States v. Kroeger, 229 F.3d 700 (8th Cir. 2000) (BOWMAN, MAGILL, HANSEN*). (Failure to raise argument both below and on appeal does not prevent this Court from considering it. Error may be plain--i.e., clear under current law--even though there is no case law on subject in this circuit, where Guidelines themselves clearly state law. Error which resulted in sentence thirty months greater than that permitted under properly calculated Guidelines range affected defendant's substantial rights. Justice required this Court to exercise its discretionary reversal power because thirty-month sentencing error affects fairness, integrity, and public reputation of judicial proceedings.)

United States v. Sample, 213 F.3d 1029 (8th Cir. 2000) (WOLLMAN, HANSEN,* MORRIS SHEPPARD ARNOLD). (Because Sample did not argue at sentencing hearing that District Court failed to afford her proper notice it was considering departure, this Court reviews adequacy-of-notice issue for plain error.)

United States v. Brown, 203 F.3d 557 (8th Cir. 2000) (McMILLIAN, RICHARD S. ARNOLD, HANSEN) (per curiam). (Because defendant did not present argument below, this Court was limited to reviewing for plain error, under which reversal is warranted only for error that is clear under current law.)

United States v. Brown, 198 F.3d 713 (8th Cir. 1999) (McMILLIAN, RICHARD S. ARNOLD, HANSEN) (per curiam). (Because defendant's argument was not presented below, this Court is limited to reviewing for plain error, and to warrant reversal, error must be clear under current law, and must have affected defendant's substantial rights.)

United States v. Davidson, 195 F.3d 402 (8th Cir. 1999) (McMILLIAN, MURPHY,* TUNHEIM). (Where appellant conceded she did not raise criminal-history objection below, review is only for plain error, and she cannot prevail unless (1) District Court erred, (2) error was plain or clear under then current law, and (3) error affected her substantial rights; when forfeited error satisfies these requirements, this Court has discretion to correct it. Because District Court did not err, this Court need not consider second and third prongs of analysis), cert denied, 528 U.S. 1180 and 529 U.S. 1093 (2000).

United States v. Jones, 195 F.3d 379 (8th Cir. 1999) (BEAM, HEANEY, FAGG*). (Defendant who does not raise sentencing argument in District Court must show plain error to prevail.)

United States v. Sandifer, 188 F.3d 992 (8th Cir. 1999) (RICHARD S. ARNOLD, JOHN R. GIBSON,* BOWMAN). (Although Sandifer objected to victim impact statements on grounds of relevance, he made no objection that information in statements was materially false; thus this Court reviews for plain error contention that District Court relied on false victim impact statements at sentencing in violation of his due process rights.)

United States v. Wilson, 184 F.3d 798 (8th Cir. 1999) (BEAM, F. R. GIBSON,* MURPHY). (Because Wilson raises his ex post facto claim for first time on appeal, this Court reviews claim for plain error.)

United States v. McClain, 171 F.3d 1168 (8th Cir. 1999) (FAGG, HEANEY,* WOLLMAN). (McClain unsuccessfully argued at sentencing that he did not qualify for sentencing as armed career criminal under U.S.S.G. § 4B1.4. Although he did not raise issue on appeal, this Court undertakes plain error review and reverses, after finding McClain did not have sufficient number of predicate violent felony convictions.)

United States v. Rios, 171 F.3d 565 (8th Cir. 1999) (LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD*). (Because Rios failed to request application of safety-valve provision or to object to sentence before trial Court, this Court reviews sentencing decision for plain error.)

United States v. Gladfelter, 168 F.3d 1078 (8th Cir.) (McMILLIAN, JOHN R. GIBSON,* HANSEN). (Because defendant did not object at sentencing to District Court's fining him without making specific findings, reversal is only for plain error, i.e., if there was error, which was deviation from unwaived legal rule; if error was clear or obvious; and if error affected defendant's substantial rights, which requires showing that error was prejudicial and affected outcome.), cert. denied, 528 U.S. 886 (1999).

United States v. Pennington, 168 F.3d 1060 (8th Cir. 1999) (BEAM, LAY, LOKEN*). (Government did not object to downward departure based on defendant's (1) having same Guidelines range as co-defendant whose conduct was more serious, (2) health problems, and (3) need to support mother. Reviewing for plain error-- i.e., clear error affecting substantial rights that resulted in miscarriage of justice–this Court finds no miscarriage of justice. Although government's

challenge to ground # 1 might well have had merit if timely presented below, this Court does not know whether District Court would have agreed with government's argument, and if so, how departure decision would have been affected.)

United States v. Weaver, Jr., 161 F.3d 528 (8th Cir. 1998) (WOLLMAN, BEAM, HANSEN). (Because of typographical error in PSR, District Court calculated Weaver's total offense level at 26, which resulted in Guidelines sentencing range of 120-150 months; his total offense level, however, should have been only 25, and his range 110-137 months. District Court sentenced him to 120 months imprisonment. Because he did not object to error this Court reviews only for plain error and reverses. Although Weaver's 120-month sentence fell within lower correct range, all of reasons District Court recited for imposing sentence applied under either range. Because review of record as whole persuades this Court that District Court might well have sentenced Weaver to less time under correct range, this Court is unwilling to say Weaver's substantial rights were not affected. Moreover, this is appropriate case in which to exercise discretion to reverse, because public's confidence in judicial process would be undermined if typographical error were to be allowed to influence sentence.)

United States v. Comstock, 154 F.3d 845 (8th Cir. 1998). (While this Court reviews de novo District Court's application of Guidelines, this Court must give due deference to District Court's application of Guidelines to facts. In reviewing ex post facto violation for plain error, this Court concludes substantial rights were clearly affected because Comstock would end up serving 17 more months in prison than he otherwise might have, and this error seriously affected fairness of sentencing proceedings.)

United States v. Jones, 145 F.3d 959 (8th Cir.) (When defendant fails to object to PSR, this Court reviews for plain error resulting in miscarriage of justice.), cert. denied, 525 U.S. 988 (1998).

United States v. Fairbanks, 144 F.3d 586 (8th Cir. 1998). (Fairbanks appeals from 210-month sentence imposed by District Court after he pleaded guilty to drug charges. Fairbanks argues he should not be bound by plea agreement waiver of right to appeal his sentence because government breached plea agreement. As Fairbanks failed to raise government s alleged breach at sentencing, this Court declines to address argument and specifically enforces Fairbanks s promise against him by granting government s motion to dismiss.)

United States v. Bongiorno, 139 F.3d 640 (8th Cir.) (This Court s review is for plain error (deviation from legal rule, clear error under current law, and error affected defendant s substantial rights) where defendant failed to raise arguments below.), cert. denied, 525 U.S. 865 (1998).

United States v. Morey, 120 F.3d 142 (8th Cir. 1997). (As Morey did not object at sentencing to two special conditions of supervised release, this Court is limited to plain error review.)

United States v. Griggs, 71 F.3d 276 (8th Cir. 1995). (Griggs failed to object to District Court s use of drug quantity table or its conversion of phenylacetic acid to amount of

methamphetamine. Thus, this Court cannot reverse unless District Court s actions are plain error. Plain error is obvious error which harms substantial rights of defendant. If error is plain, this Court may correct it at its discretion. Court should, however, correct plain error it seriously effects fairness, integrity, or public reputation of judicial proceedings.)

United States v. Aikens, 64 F.3d 372 (8th Cir. 1995). (Aikens argued District Court erred by failing to calculate separate BOL in bribery case against him, although his attorney did not object to this aspect of sentence at District Court level. Issues appellant has failed to raise at District Court level should not be considered at appellate level absent showing of plain error resulting in miscarriage of justice. This Court finds Aikens failed to show such plain error and thus it will not disturb District Court s grouping of bribery and cocaine charges.), cert. denied, 517 U.S. 1116 (1996).

United States v. Quintanilla, 25 F.3d 694 (8th Cir. 1994). (Because neither defendant raised issue in District Court, this Court reviews District Court s drug quantity determination for plain error.)

United States v. Robinson, 20 F.3d 320 (8th Cir. 1994). (Robinson argued for first time on appeal District Court error in not decreasing offense level for role in offense (§ 3B1.2) and for acceptance of responsibility (§ 3E1.1). Thus, this Court reviews only for plain error. Upon review of record, this Court finds District Court committed no error, much less plain error, in not decreasing offense level on these grounds.

United States v. Klein, 13 F.3d 1182 (8th Cir.) (Where defendant does not raise issue in District Court, on appeal he must "demonstrate that District Court committed plain error resulting in miscarriage of justice."), cert. denied, 512 U.S. 1226 (1994).

United States v. Jennings, 12 F.3d 836 (8th Cir. 1994). (Though Jennings raised drug quantity argument in his written objections to PSR, he failed to pursue issue at his sentencing hearing; thus, this Court is limited to reviewing record for plain error affecting Jennings s substantial rights.)

United States v. Kenyon, 7 F.3d 783 (8th Cir. 1993). (This Court ordinarily reviews District Court s interpretation of Guidelines de novo. Where defendant did not object at District Court, this Court will reverse only if District Court committed plain error.)

United States v. Redlin, 983 F.2d 893 (8th Cir.) (This Court will not reverse District Court on issue that is raised for first time on appeal unless gross miscarriage of justice would otherwise result. This Court found on specific facts of Redlin s case, his failure to specify alternative legal basis for calculation of loss constitutes waiver.), cert. denied, 510 U.S. 820 (1993).

United States v. Prendergast, 979 F.2d 1289 (8th Cir. 1992). (Though government did not raise issue of "loss calculation" (§§ 2B1.1 and 2F1.1) on appeal, this Court is obligated to correct misapplication of Guidelines, particularly where it is contrary to law of circuit and case is being

remanded for resentencing.)

United States v. Ragan, 952 F.2d 1049 (8th Cir. 1992). (Where government failed to object at sentencing hearing to District Court s grant of downward departure because Ragan had stopped using drugs for over year before his indictment and had maintained steady employment, this Court affirms as departure did not result in miscarriage of justice and therefore was not plain error.)

United States v. Schneider, 948 F.2d 1074 (8th Cir. 1991). (Schneider s failure to raise his arguments concerning diminished capacity (§ 5K2.13) and substantial assistance (§ 5K1.1) before District Court precludes this Court s consideration of these issues on appeal. Arguments are without merit in any event.)

United States v. Fritsch, 891 F.2d 667 (8th Cir. 1989). (Challenge to Sentencing Guidelines for failing to provide statutorily mandated guidance regarding sentences of probation, not raised in District Court and will not be considered on appeal absent showing of plain error resulting in miscarriage of justice. Court indicates that 28 U.S.C. § 994 did not require Sentencing Commission to establish mandatory sentences of probation for certain offenses.)

**C. Reviewability**

Williams v. United States, 503 U.S. 193 (1992). (Although Sentencing Reform Act established limited appellate review of sentencing decisions, it did not alter Court of Appeals' traditional deference to District Court's exercise of sentencing discretion. Selection of appropriate sentence from within Guidelines range, as well as decision to depart from range when authorized, are left solely to District Court. Except to extent specifically directed by statute, Court of Appeals may not substitute its judgment for that of District Court as to appropriateness of particular sentence.)

United States v. Wheeldon, 351 F.3d 897 (8th Cir. 2003) (LOKEN, RICHARD ARNOLD, BOWMAN) (per curiam). (In appeal after remand for resentencing, this Court declines to consider defendant's challenge to District Court's denial of downward departure because defendant did not raise issue in his first appeal. In any event, matter would be unreviewable because District Court's comments at resentencing indicate it was aware of its authority to depart.)

United States v. Reyes-Contreras, 349 F.3d 524 (8th Cir. 2003) (BYE, HANSEN, MELLOY) (per curiam). (Defendant who acknowledged as part of guilty plea that he was subject to statutory minimums of ten years in prison and five years of supervised release, and who was then sentenced to those terms, could not challenge his conviction or sentence on appeal.)

United States v. Archambault, 344 F.3d 732 (8th Cir. 2003) (MORRIS ARNOLD, HANSEN, SMITH*). (Although government agreed in plea agreement to recommend sentence at low end of Guidelines range, defendant waived right to appeal government's failure to object to District Court's upward departure because defendant sat idly by at sentencing.)

United States v. Banks, 340 F.3d 683 (8th Cir. 2003) (BOWMAN, BEAM, BYE) (per curiam). (Where this Court affirmed District Court's drug-quantity findings in prior appeal and remanded for resentencing on Apprendi issue, defendant could not challenge drug quantity in appeal from resentencing.)

United States v. Andrews, 339 F.3d 754 (8th Cir. 2003) (BOWMAN, BEAM,* BYE). (Argument rejected in appeal from original sentencing may not be renewed in subsequent appeal from resentencing.)

United States v. Pena, 339 F.3d 715 (8th Cir. 2003) (BOWMAN, RILEY, MELLOY*). (Sentence within applicable Guidelines range is reviewable only if it is imposed in violation of law or as result of incorrect application of Guidelines.)

United States v. Thompson, 335 F.3d 782 (8th Cir. 2003) (BYE,* RICHARD ARNOLD, HANSEN). (After defendant was convicted, his appeal challenging one conviction was dismissed and government's cross-appeal succeeded in reinstating second conviction. Defendant was resentenced and appealed. He was precluded from challenging District Court's Guidelines calculations regarding first conviction because those issues could have been raised in initial appeal, which was dismissed for failure to prosecute.), cert. denied, 124 S. Ct. 1111 (2004).

United States v. Smotherman, 326 F.3d 988 (8th Cir.) (LOKEN, MORRIS ARNOLD, WEBBER) (per curiam). (Absent constitutional infirmity, this Court lacks jurisdiction to review District Court's choice of sentence within properly determined Guidelines range.), cert. denied, 124 S. Ct. 293 (2003).

United States v. Munoz, 324 F.3d 987 (8th Cir. 2003) (WOLLMAN,* RICHARD ARNOLD, MURPHY). (Where defendant presented only general challenge to PSR in form of comprehensive assertion of innocence, District Court may have been entitled to adopt facts in PSR for lack of specific objection thereto.)

United States v. Washington, 318 F.3d 845 (8th Cir.) (BOWMAN, LAY, JOHN GIBSON*). (Any error in applying enhancement to offense level would be harmless because, in murder for hire resulting in death, statutory minimum penalty is life imprisonment.), cert. denied, 124 S. Ct. 209 and 124 S. Ct. 251 (2003).

United States v. Santos-Garcia, 313 F.3d 1073 (8th Cir. 2002) (McMILLIAN,* LAY, RILEY). (Defendant's failure to offer supporting argument and citation, in violation of Fed. R. App. P. 28(a)(9)(A), entitles this Court to disregard his argument.)

United States v. Ayala, 313 F.3d 1068 (8th Cir. 2002) (HANSEN, HEANEY, BYE) (per curiam). (Where defendant files two opening briefs, and this Court requires him to choose one to rely on, this Court is entitled to disregard arguments he presented only in non-chosen brief.)

United States v. Coyle, 309 F.3d 1071 (8th Cir. 2002) (HANSEN,* RICHARD ARNOLD, LOKEN). (Any double-counting in applying § 3A1.1(b)(1) vulnerable-victim enhancements both to offense level for carjacking and offense level for kidnaping was harmless error because, under grouping rules, total offense level would ultimately be same. Any error in grouping carjacking with kidnaping of first victim rather than with kidnaping of second victim would also be harmless because, grouped either way, total offense level would ultimately be same. Finally, this Court declines to consider defendant's related argument that vulnerable-victim enhancement was inapplicable based on circumstances of carjacking, because defendant briefed it cursorily and without legal citation, and only fleshed it out at oral argument.)

United States v. McFarlane, 309 F.3d 510 (8th Cir. 2002) (HANSEN,* MORRIS S. ARNOLD, PRATT). (When it is dubious whether appellate jurisdiction exists under 18 U.S.C. § 3742(a), this Court has jurisdiction to determine its jurisdiction.)

United States v. Montano-Gudino, 309 F.3d 501 (8th Cir. 2002) (WOLLMAN, RICHARD S. ARNOLD, LOKEN*). (Where District Court asked defense counsel if he concurred in its mitigating-role finding, and counsel responded affirmatively, issue was not preserved for appeal.)

United States v. Piggie, 303 F.3d 923 (8th Cir. 2002) (RILEY,* BEAM, MELLOY). (Defendant who voluntarily accepts provisions of plea agreement cannot challenge on appeal punishment to which he willingly exposed himself. Thus, defendant's stipulation in plea agreement to amount of tax loss precluded his appellate challenge to amount of tax loss.), cert. denied, 123 S. Ct. 2114 (2003).

United States v. Zimmer, 299 F.3d 710 (8th Cir. 2002) (McMILLIAN, BEAM, HANSEN*). (Even if District Court erred in determining that defendant was career offender, issue was moot because defendant's otherwise applicable offense level was higher than career-offender-determined offense level. (No mention of impact on defendant's criminal history category)), cert. denied, 537 U.S. 1146 (2003).

United States v. Thompson, 289 F.3d 524 (8th Cir. 2002) (MORRIS SHEPPARD ARNOLD, HEANEY, RILEY*). (Defendant who withdrew previously filed objections to PSR at sentencing is precluded from arguing those objections on appeal. Plain error standard only applies when defendant inadvertently fails to raise objection in District Court.)

United States v. Scott, 243 F.3d 1103 (8th Cir. 2001) McMILLIAN, BOWMAN, LOKEN*). (Defendant attacks District Court's drug quantity finding, but he agreed to base offense level of 36 in his plea agreement; further, he failed to object at sentencing, and drug quantity finding, which was based on crack cocaine sold to undercover agent and cocaine powder seized at airport, was not plain error.)

United States v. Tiger, 223 F.3d 811 (8th Cir. 2000) (RICHARD S. ARNOLD, HEANEY, MAGNUSON*). (Finding any error was harmless when defendant's criminal history category would have remained same regardless of criminal history point assigned to prior misdemeanor;

moreover, District Court's comments lead to conclusion District Court would have imposed same sentence regardless of disputed criminal history point.)

United States v. Amsden, 213 F.3d 1014 (8th Cir. 2000) (McMILLIAN, F. R. GIBSON, MORRIS SHEPPARD ARNOLD*). (Defendant was sentenced to 120 months imprisonment, following District Court's 2-level increase under § 3C1.1 for obstruction of justice. Having reversed obstruction enhancement and remanded, this Court has reduced Guidelines range from 51-63 months to 41-51 months; thus this Court cannot determine from record extent to which District Court's upward departure for extreme conduct may have been based on Guidelines range. Therefore, this Court remands on departure issue as well.)

United States v. Gunderson, 211 F.3d 1088 (8th Cir. 2000) (RICHARD S. ARNOLD, HEANEY,* LOKEN). (Although defendant s sentence was within applicable Guidelines range, his argument that District Court improperly based its sentence on defendant s religious beliefs and practices was reviewable, because Guidelines provide that defendant s religion is not relevant to determination of sentence.)

United States v. Shepard, 207 F.3d 455 (8th Cir. 2000) (RICHARD S. ARNOLD,* FAGG, HANSEN). (At sentencing, District Court mentioned that defendant s mother was afraid of him--a statement based on passage in PSR. Defendant argues he was not given fair chance to contest this issue as matter of fact. This Court does not believe this particular comment indicates District Court would have imposed more lenient sentence had it not been of view that defendant s family was afraid of him; moreover defendant takes position that resentencing would not be appropriate on this basis alone and simply asks for opportunity to contest this if case is remanded. Because it is not, this Court need not pursue issue.)

United States v. Goings, 200 F.3d 539 (8th Cir. 2000) (WOLLMAN,* HEANEY, LOKEN). (Defendant's written plea agreement contained waiver of right to challenge denial of reduction for acceptance of responsibility. Although generally this Court does not consider issues defendant knowingly and voluntarily waived in plea agreement, defendant argues government breached its agreement to recommend downward adjustment for acceptance of responsibility. This Court agrees government breached agreement. Defendant asks for remand for specific performance--generally preferred remedy in cases involving breach--however, this Court may affirm sentence on any ground supported by record, and proceeding to merits demonstrates remand would be exercise in futility because circumstances show government's failure to speak up at sentencing did not affect sentence. Among other things (see Annotation at § 3E1.1), sentence imposed represented bottom end of applicable range for offense level 18 (41-51 months), which coincided with top end of range for offense level 16 (33-41 months), and District Court stated its intention to impose sentence at low end of range for offense level 18: it is clear beyond doubt that Court would have imposed same sentence had it granted 2-level reduction for acceptance of responsibility.)

United States v. Oligmueller, 198 F.3d 669 (8th Cir. 1999) (BOWMAN, LAY, BEAM*). (This Court may affirm District Court on any basis supported by record.)

United States v. Martin, 195 F.3d 1018 (8th Cir. 1999) (BEAM, LOKEN, MORRIS SHEPPARD ARNOLD) (per curiam). (In challenging § 2K2.9 departure, Martin argues conduct is adequately accounted for in § 2K2.1(b)(5)--a Guidelines section not mentioned in PSR or by parties at sentencing. Although his conduct appears encompassed by § 2K2.1(b)(5)'s plain language, departure sentence he received is in middle of range that would have resulted from applying § 2K2.1(b)(5), so he cannot show prejudice from departure.)

United States v. Fairchild, 189 F.3d 769 (8th Cir. 1999) (LOKEN, HANSEN,* MORRIS SHEPPARD ARNOLD). (1. Refusing to reach argument that District Court engaged in impermissible double-counting by using two prior misdemeanor offenses involving firearms--for which he also received criminal history points--as proof that he possessed firearm for purposes of § 2D1.1(b)(1), because he agreed in his plea agreement that weapons possession adjustment applied to him.

2. Fairchild also waived argument that Court erred in assigning criminal history points for two prior misdemeanor conviction he argues are part of relevant conduct involved in count of conviction, because Fairchild's counsel specifically declined District Court's invitation to make this argument at sentencing. Moreover, any alleged error in scoring prior misdemeanors was harmless because his 135-month sentence fell within lower sentencing range that would have resulted if he had prevailed, and District Court made it quite clear--in declining to grant discretionary downward departure based on alleged overstating of seriousness of Fairchild's criminal history--that Fairchild's sentence would more than likely have been same: 135 months.)

United States v. Vernon, 187 F.3d 884 (8th Cir. 1999) (McMILLIAN, LAY,* MURPHY). (Defendant pleaded guilty to conspiracy to possess with intent to distribute cocaine "in amount exceeding 500 grams" or "50 grams or more" or cocaine base. Fifty grams of cocaine base results in base offense level of 32, which was base offense level utilized by District Court. Because District Court did not use Vernon's relevant conduct to increase his sentence beyond base level to which he pleaded guilty, any error that may have occurred in determining his relevant conduct was harmless.), cert. denied, 529 U.S. 1032 (2000).

United States v. Horn, 187 F.3d 781 (8th Cir. 1999) (LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD*). (Although District Court erred in applying 5-level enhancement, reducing Horn's offense level by 5 levels does not affect his sentence: without enhancement Horn's offense level is 26 and corresponding sentencing range is 63-78 months--this still exceeds statutorily authorized maximum sentence of 60 months. Sentence therefore remains same and error was harmless.), cert. denied, 529 U.S. 1029 (2000).

United States v. Wilson, 184 F.3d 798 (8th Cir. 1999) (BEAM, F. R. GIBSON,* MURPHY). (This Court would not reach issue whether District Court erroneously applied 1997 Guidelines in violation of Ex Post Facto Clause because Wilson waived any objection by expressly approving plea agreement with full knowledge of potential penalties, and plea agreement specifically provided that base offense level was 15 (a determination he now challenges); moreover, at sentencing hearing, Wilson's attorney indicated both he and Wilson had reviewed PSR and believed it correct and accurate in all matters, and attorney told Court Wilson had no objection to sentence Court had

imposed.)

United States v. Barrett, 173 F.3d 682 (8th Cir. 1999) (LOKEN,* HEANEY, MORRIS SHEPPARD ARNOLD). (Although Barrett objects to District Court's drug quantity determination and U.S.S.G. § 2D1.1(b)(1) increase, he stipulated conspiracy involved over 1.5 kilograms of cocaine base--the quantity used to determine his base offense level--and he agreed he would be subject to § 2D1.1(b)(1) enhancement; defendant may not challenge application of Guidelines to which he agreed in plea agreement (unless he proves agreement invalid or succeeds in withdrawing from it). Moreover, testimony at sentencing hearing supported challenged items.)

United States v. Hester, 140 F.3d 753 (8th Cir. 1998). (This Court has consistently held that when defendant objects to portions of PSR, District Court must base its findings on evidence rather than on disputed PSR information. At sentencing hearing, Allen chose to specifically address Court regarding only downward departure issues, and he testified concerning family obligations and work history; government opposed any downward departure and asked that remaining objections be overruled based upon trial testimony. District Court denied downward departure and Allen did not renew or raise objection to sentence imposed, nor did he request ruling on previously submitted objections. Because he never requested ruling from District Court on his objections to PSR and allowed sentencing to proceed without specifically renewing his objections to quantity determination or offense level computation, this Court concludes Allen waived these objections, and this Court will not consider them for first time on appeal.)

United States v. Diaz-Diaz, 135 F.3d 572 (8th Cir. 1998). (In response to government s cross-appeal from sentence, Diaz-Diaz argues cross-appeal is moot as he has served entire sentence and has been deported. This Court agrees with three other circuits: Villamonte-Marquez provides support for proposition deportation of defendant who has completed sentence does not automatically moot government appeal of downward departure in sentencing. This Court adds while it finds it unlikely government would seek to extradite, prospect Diaz-Diaz might return to U.S. on his own accord, given his history, is probable. If Diaz-Diaz were to illegally reenter U.S. prior to expiration of supervised release term, and if he were apprehended or his presence otherwise were to come to attention of government, he would be subject to incarceration or some alternative form of governmental supervision pursuant to conditions of his prior release from custody.)

United States v. Mayer, 130 F.3d 338 (8th Cir. 1997). (Before review of District Court s enhancement may be denied--as urged by government--it must be clear District Court would have imposed same sentence regardless of whether appellant s argument for lower Guideline range ultimately prevailed. Where record as whole does not suggest with sufficient certainty District Court would have imposed same sentence under lower range, this Court may review sentence.)

United States v. Miner, 108 F.3d 967 (8th Cir.) (This Court declines to consider Miner s sentencing arguments which were either not presented to District Court or did not have any effect on Miner s ultimate sentencing range.), cert. denied, 522 U.S. 904 (1997).

United States v. Darden, 70 F.3d 1507 (8th Cir. 1995). (This Court reviews factual findings

District Court makes in sentencing for clear error and application of guideline to facts de novo. No need for this Court to address Darden s argument concerning enhancement applied for attempted murder where it would have no impact on his sentence, no effect on his total offense level.), cert. denied, 517 U.S. 1149 (1996).

United States v. Baker, 64 F.3d 439 (8th Cir. 1995). (In cases where District Court departs below applicable Guidelines sentencing range with or without challenged enhancement, sentence is not reviewable. Here, District Court departed from applicable guideline sentencing range and this Court lacks authority to review extent of that departure. Court also noted Baker received lowest possible sentence--statutory minimum of ten years and in order for District Court to depart from statutory minimum sentence, government must file motion under 18 U.S.C. § 3553(e).)

United States v. Johnson, 43 F.3d 1211 (8th Cir. 1995). (Sentence which falls within two arguable Guidelines ranges is unreviewable only under circumstances where it is clear District Court would have imposed same sentence regardless of whether appellant s argument for lower guideline range ultimately prevailed. Here, it was far from clear District Court would impose same sentence if Johnson s criminal history category was determined to be II; Court expressly declined government s invitation to state on record it would impose same sentence if Johnson s argument concerning criminal history category later prevailed. Thus, Johnson s sentence is reviewable.)

United States v. Garrido, 38 F.3d 981 (8th Cir. 1994). (Ismael appealed only imposition of maximum sentence within applicable guideline s range. District Court need not state any reasons where applicable range is less than 24 months. Sentence was not result of incorrect application of Guidelines and because none of required jurisdictional bases are satisfied, this Court lacks jurisdiction to review Ismael s sentence.)

United States v. Severe, 29 F.3d 444 (8th Cir. 1994). (Where Withers explicitly and voluntarily exposed himself to specific sentence (he acknowledged in plea agreement that charge to which he had pleaded guilty had minimum penalty of imprisonment) he may not challenge that punishment on appeal. This Court concludes Withers waived right to challenge his sentence.), cert. denied, 513 U.S. 1096 (1995).

United States v. Wyatt, 26 F.3d 863 (8th Cir. 1994). (Wyatt argued District Court error in imposition of two-level weapon enhancement and denial of two-level minor participant reduction. This Court concludes these issues are not reviewable because Wyatt s sentence still represented downward departure from Guidelines sentencing range that would result if he had prevailed on both points (District Court had departed based on government s departure motion under § 5K1.1 and § 3553(e)).)

United States v. Thomas, 20 F.3d 817 (8th Cir.) (en banc). (Thomas conceded that even had District Court not included uncounseled misdemeanor, his criminal history score would be 11 and his criminal history category would have remained at V, resulting in same 27-33 month range. Implication that had District Court not considered uncounseled misdemeanor, Thomas may have received sentence not at top of range. Government contended Thomas s sentence was non-

reviewable as decision to impose sentence at high end of applicable range was entirely within discretion of sentencing judge. Plain language of § 3742 requires this Court to review sentence to ensure that sentencing judge considered only those factors that neither violate law nor result in or from misapplication of Guidelines. Once this Court determines there has been no violation of law, District Court may impose sentence without interference from appellate Court. Thomas has no grounds to argue his sentence was imposed as result of misapplication of Guidelines. Whether guideline was correctly applied, however, says nothing about that guideline s constitutionality.), cert. denied, 513 U.S. 828 (1994).

United States v. Auman, 8 F.3d 1268 (8th Cir. 1993). (District Court sentenced Auman on December 28, 1989, as career offender (§ 4B1.1) to 210-month term of imprisonment; his sentence was affirmed on appeal. In early 1992, Auman moved to modify his sentence and his motion was denied. This Court eliminates possible bases of jurisdiction: § 3742(a) merely gives basis for appellate review of District Court sentencing decision; § 3582(b) merely defines "final judgment"; § 3582(c)(2) permits District Court to reduce term of imprisonment if applicable sentencing range is subsequently lowered by Sentencing Commission. Auman argued Court mistakenly assumed his conviction for unlawful possession constituted controlled substance offense within meaning of § 4B1.2(2); as to amendment of commentary to § 4B1.2 on which Auman seeks to rely, it was not designated as amendment that could be used retroactively (§ 1B1.10(a)). Amendment, 469, which has relevancy to Auman, did not become effective until after District Court denied Auman s motion and thus this Court has no jurisdiction to consider Auman s motion under § 3582(c)(2).)

United States v. Hall, 7 F.3d 1394 (8th Cir. 1993). (Hall argued District Court error in imposing on him sentence similar to sentence it imposed on dissimilarly situated defendant in another case. To extent Hall argues District Court error because it refused to depart in light of other defendant s 188 month sentence, Evidente makes clear such claim is not reviewable. To extent Hall argued District Court imposed his sentence in violation of law, this Court rejects claim because fact that his sentence was similar to other defendants does not violate Constitution or any law.)

United States v. Livingston, 1 F.3d 723 (8th Cir. 1993). (By consenting to specific sentence in plea agreement, defendant waives right to challenge that sentence on appeal. Here, Livingston waived his right to challenge statutory minimum sentence imposed by District Court at resentencing.)

United States v. Hipolito-Sanchez, 998 F.2d 594 (8th Cir. 1993). (Because Hipolito-Sanchez did not show his 120-month sentence was imposed in violation of law or as result of incorrect application of Guidelines, this Court may not review sentence.)

United States v. Harris, 997 F.2d 1235 (8th Cir. 1993). (If District Court chooses to give reason for imposing particular sentence within Guidelines range even if spread of range was less than 24 months, and it gives reason claimed to be unlawful, question of law, reviewable de novo on appeal, would arise.), cert. denied, 510 U.S. 1055 (1994).

United States v. Merritt, 982 F.2d 305 (8th Cir. 1992). (Government s burden of proof

functionally met where District Court gave Merritt opportunity to object to applicability of enhancement sections and allowed him to call witnesses to demonstrate sections did not apply. This Court notes Merritt did not object to procedure. No difference in result would have been reached had government been required to present evidence proving enhancements should apply.), cert. denied, 508 U.S. 979 (1993).

United States v. Gordon, 974 F.2d 97 (8th Cir. 1992). (A sentence imposed within applicable Guidelines range is reviewable only if imposed in violation of law or as result of incorrect application of Guidelines.)

United States v. Rugh, 968 F.2d 750 (8th Cir. 1992). (Without grouping child pornography counts, Rugh s sentencing range was 15-21 months. If District Court had grouped two counts, his sentence range would have been 10-16 months. District Court said dispute was minor and sentenced Rugh to 15 months imprisonment, figure within both Guidelines ranges. Nevertheless, issue was not moot because District Court did not state that it would have given same sentence regardless of whether counts were grouped or not.)

United States v. Simmons, 964 F.2d 763 (8th Cir.) (Government s argument that remand was unnecessary because Bowers would receive same sentence or guideline range is rejected where Court could not discern which evidence served as basis of District Court s drug quantity determination, nor could Court say District Court would have imposed same sentence under different evidence nor that reliance on unreliable testimony was harmless.), cert. denied, 506 U.S. 1011 (1992).

United States v. Kloor, 961 F.2d 1393 (8th Cir. 1991). (This Court rejects government s argument that District Court s refusal to adjust Kloor s sentence downward for acceptance of responsibility is not reviewable because sentence would still have been within lower permissible range. There is no certainty District Court would have imposed same sentence if trial judge would have granted acceptance of responsibility adjustment; thus, issue is reviewable.)

United States v. Woodrum, 959 F.2d 100 (8th Cir. 1992). (Woodrum s sentence was imposed within applicable guideline range and because he does not argue his sentence was imposed in violation of law or as result of incorrect application of Guidelines, it is not reviewable. Sentence is not reviewable merely because it is at top of properly calculated guideline range.)

United States v. Wilson, 955 F.2d 547 (8th Cir. 1992). (Several appellants challenged District Court s assessment of two-level enhancement for more than minimal planning. Government argued issue was non-appealable because actual sentences fell within guideline ranges with or without enhancement. This Court acknowledged that its prior cases discussing whether sentence is appealable even though it is within overlap of two relevant guideline ranges, were inconsistent. Panel decided to address enhancements on merits to "make en banc submission unnecessary.")

United States v. Bailey, 955 F.2d 28 (8th Cir. 1992). (Where Bailey had been sentenced to

292 months imprisonment based on Guidelines range of 292 to 365 months and he was arguing that two criminal history points had been added improperly (which would have made relevant range 262 to 327 months), issue was properly before Court. In theory, if Bailey were to prevail with respect to two points and case remanded, he could get lesser sentence.)

United States v. Simpkins, 953 F.2d 443 (8th Cir.) (If sentence imposed falls within guideline range urged by appellant and if it is clear that District Court would have imposed same sentence regardless of whether appellant s argument for lower guideline range ultimately prevailed, then matter is not reviewable and will not be remanded for resentencing. Error in calculating guideline range is deemed harmless because appellant faces same sentence, win or lose. In this case, trial Court s discussion of Simpkins s objection, including its noting sentence would be at low end of category IV and high end of category III, made clear trial Court selected sentence it considered appropriate and legal regardless of ultimate disposition of Simpkins s objection.), cert. denied, 504 U.S. 928 (1992).

United States v. Riascos, 944 F.2d 442 (8th Cir. 1991). (Sentencing ranges with and without enhancement for being organizer or leader overlapped at exact point of Riascos s sentence. Where District Court explicitly noted it would sentence Riascos to twelve years and seven months even without challenged enhancement, this Court declines to remand for resentencing. Even if panel were inclined to reverse enhancement, Riascos s sentence would not have been affected.)

United States v. Dugan, 912 F.2d 942 (8th Cir. 1990). (This Court observed that even if Dugan were to win two legal arguments involving greatest number of points, her total offense level would still be 14, and District Court sentence of 20 months would be within same guideline range and hence not reviewable on appeal. Significantly, it was apparent from District Court record that sentence imposed was "bottom-line decision," giving Dugan in fact same benefit she would have received had her legal arguments been accepted. Thus, this Court stated no purpose would be served by appellate opinion extensively exploring potential for overlap between portions of Guidelines involved in case.)

United States v. Khang, 904 F.2d 1219 (8th Cir. 1990). (Sentencing Commission did not intend that claim involving overlapping sentencing ranges would not be reviewable. This Court reverses and remands as it was not clear error was harmless, i.e., that District Court, while recognizing sentence it gave Khang was within both ranges, would have given him same sentence had it not applied enhancement (§ 2D1.1(b)(1)) which was reversed.)

United States v. Luster, 896 F.2d 1122 (8th Cir. 1990). (Constitution does not impose particular standard of proof for factual determinations at sentencing hearing. Although District Court did not explicitly state standard of proof it used, its findings were "adequate for . . . meaningful review." Though Luster s sentence of 262 months imprisonment was within correct sentencing range, this Court expresses concerns in case such as this in which District Court sentenced at or near bottom of what it thought was applicable guideline range. This Court remands for resentencing, observing that District Court might well have sentenced Luster to fewer months imprisonment had it known it could sentence him to statutory minimum of 240 months.)

United States v. O Meara, 895 F.2d 1216 (8th Cir.). (District Court noted that with upward adjustment for role as organizer, Kost fell within sentencing range of 57-71 months; without adjustment, Kost would fall within range of 46-57 months. District Court sentenced him to 57 months, finding further consideration of whether Kost acted as organizer unnecessary. This Court adjudged as moot Kost s challenge to his upward adjustment because "sentence fell within range subject to Court s discretion." It appears District Court consciously sentenced within overlap.), cert. denied, 498 U.S. 943 (1990).

## CHAPTER ONE:
## INTRODUCTION AND GENERAL APPLICATION PRINCIPLES

### Part B. General Application Principles

United States v. Hipenbecker, 115 F.3d 581 (8th Cir. 1997). (While free on bond prior to sentencing, Hipenbecker embezzled funds from her employer. Because of this, District Court declined to make § 3E1.1 acceptance-of-responsibility downward adjustment and also made § 5K2.0 upward departure. Hipenbecker appeals, arguing District Court impermissibly double counted by both applying § 5K2.0 and declining to apply § 3E1.1. On issue of first impression in Eighth Circuit, this Court affirms. Sentencing Guidelines recognized potential for double counting in certain cases involving both § 3E1.1 and § 5K2.0, e.g., policy statement for § 5K2.0 specifically provides Court may depart from Guidelines even though reason for departure is taken into consideration in Guidelines; if Court determines in light of unusual circumstances, guideline level attached to that factor is inadequate. Sections address conceptually separate notions: § 3E1.1 operates to ameliorate sentence for defendant who has shown sincere remorse for his crime while upward departure under § 5K2.0 enhances otherwise inadequate sentence.)

United States v. Campbell, 77 F.3d 247 (8th Cir. 1996). (Campbell contended only criminal conduct to which he pleaded guilty was use of telephone in drug felony in 1986 prior to effective date of Guidelines; in his guilty plea, Campbell acknowledged use of telephone in drug felony in 1988, but claims it was in cooperation with police in investigation of co-defendant--Campbell thus argues there was no underlying commission of drug felony because his actions in 1988 were done in cooperation with police. This Court decides District Court did not clearly err in factual determination Campbell committed criminal conduct after 11/1/87 (effective date of Guidelines) where plea agreement stated Campbell agreed he utilized telephones to discuss sale and distribution of cocaine with co-defendant during 1988 and said discussions were part of conspiracy charged and also, plea agreement stated Campbell understands he will be sentenced in accord with applicable sentencing Guidelines. Furthermore, District Court also properly relied on testimony at trial by Campbell s co-conspirators--which was subject to cross examination by Campbell s lawyer--that Campbell had been involved in criminal activity after 11/1/87.)

United States v. Haversat, 22 F.3d 790 (8th Cir. 1994). (This Court expresses its concern about District Court s comments displaying its disdain for its sentencing Guidelines, disagreement with level of punishment Guidelines impose for white collar crimes, and indicating reluctance/refusal to apply Guidelines. Record provides great uncertainty about whether District Court carried out duty to follow and apply Guidelines; uncertainty in itself yet another reason to remand for resentencing.), cert. denied, 516 U.S. 938 (1995).

United States v. Beede, 974 F.2d 948 (8th Cir. 1992). (This Court rejects Beede s argument that he should have been sentenced non obstante United States Sentencing Guidelines because of lack of written Guidelines governing referral of cases for state or federal prosecution by Task Force officers.), cert. denied, 506 U.S. 1067 (1993).

United States v. Johnston, 973 F.2d 611 (8th Cir. 1992). (This Court reaffirms Guidelines as sentencing imperative and rejects their treatment as but one factor to be considered by District Court in determining appropriate sentence.), cert. denied, 506 U.S. 1068 (1993).

United States v. Davila, 964 F.2d 778 (8th Cir.) (The Guidelines apply to conspiracies that began before effective date of Guidelines and end after it, as did Davila conspiracy.), cert. denied, 506 U.S. 964 (1992).

United States v. Granados, 962 F.2d 767 (8th Cir. 1992). (Mora did not present any evidence he took affirmative action communicating his separation from conspiracy. To contrary, District Court was only presented with evidence and testimony affirming Mora was actively involved in conspiracy after November 1, 1987. Guidelines clearly applicable where testimony of co-conspirator directly linked Mora to conspiracy as late as October 1988.)

United States v. Askew, 958 F.2d 806 (8th Cir. 1992). (A defendant may avoid Guidelines sentence by proving he withdrew from conspiracy prior to November 1, 1987. However, he has burden of showing he affirmatively disavowed conspiracy (by communicating to authorities or to co-conspirators). Where Edwards Sr. did not raise issue at sentencing, he no doubt waived it--in any event; it is without merit.)

United States v. Lincoln, 925 F.2d 255 (8th Cir.) (Lincoln challenged neither his pre-Guidelines sentence of 10 years for arson nor his Guidelines sentence of 21 months for mail fraud, but rather that sentences were to be served consecutively instead of concurrently as he argued crimes were closely related. In this "straddle" situation, it is not abuse of discretion to impose consecutive sentences even if Guidelines would mandate concurrent sentences if both offenses were subject to them. Moreover, different harms Lincoln could have inflicted probably justify consecutive sentences even under Guidelines (§ 3D1.2).), cert. denied, 501 U.S. 1222 (1991).

United States v. Sanders, 924 F.2d 800 (8th Cir. 1991). (Upon revocation of probation, District Court sentenced Sanders to three years imprisonment, following earlier promise of District Court that upon any revocation of probation, she d be "gone for three years." This Court remands for resentencing. When probation is revoked, defendant must be sentenced in accord with

Guidelines (18 U.S.C. §§ 3553(b), 3565(a)).)

United States v. R.L.C., Juvenile Male, 915 F.2d 320 (8th Cir. 1990). (Sentence vacated and case remanded for resentencing where District Court sentenced juvenile to statutory maximum (three years) for involuntary manslaughter. Court holds phrase maximum term of imprisonment authorized if juvenile had been tried and convicted as adult, prohibits Court from sentencing juvenile to greater term than he could have received had he been sentenced as adult under Guidelines. Court considered language and legislative history of § 5037(c)(1)(B), policies of uniformity underlying federal sentencing reform, consequence of possible interpretations and rule of lenity.)

United States v. Smith, 909 F.2d 1164 (8th Cir.) (When conspiracy straddles effective date of Guidelines, then Guidelines apply.), cert. denied, 498 U.S. 1032 (1990).

United States v. Norquay, 905 F.2d 1157 (8th Cir. 1990). (Indian committed crime of burglary on Indian reservation. Court holds Federal Sentencing Guidelines are applicable to convictions under Major Crimes Act where state law defines elements of offense and punishment, but sentence imposed shall not exceed maximum sentence or fall below any minimum sentence provided by state law. Dissent would affirm on basis of belief Congress intended sentence of defendant convicted under Major Crimes Act to be determined by reference to state sentencing procedures.)

United States v. Stewart, 878 F.2d 256, 259 (8th Cir. 1989). (Guidelines apply to continuing crimes begun before enactment and continuing thereafter.)

**§ 1B1.1 (Application Instructions):**

United States v. Coleman, 349 F.3d 1077 (8th Cir. 2003) (MELLOY, HANSEN, SMITH*) (Conviction on count charging conspiracy to commit more than one offense shall be treated as if defendant had been convicted on separate counts of conspiracy for each offense. Here, government charged conspiracy to commit two bank robberies in indictment but proved conspiracy to commit five bank robberies at trial. Because government is not limited to proving overt acts charged in indictment, and because bank robberies fell within temporal and substantive scope of conspiracy charge, District Court properly treated defendant as if he had been convicted of five counts of conspiracy to commit bank robbery.)

United States v. Grassrope, 342 F.3d 866 (8th Cir. 2003) (RILEY, HEANEY, ERICKSEN*). (Under Application Note 1(i), serious bodily injury is deemed to have occurred if offense involved criminal sexual abuse. This deeming provision does not create irrebuttable presumption in violation of Due Process Clause.)

United States v. Bauer, 19 F.3d 409 (8th Cir. 1994). (Bauer s applicable Guidelines range was 151-188 months; District Court sentenced him to 170 months. At end of sentencing hearing, Court commented at length on reasons for its sentencing decisions, but did not relate those

specifically to its selection of 171 month sentence, despite this Court s urging District Courts to refer to facts of each case and explain why they choose particular point (18 U.S.C. § 3553(c)(1)). Here there was no reversible error. Bauer did not request further explanation at sentencing and record confirms District Court thoughtfully discharged statutory obligation. As case is remanded on different basis, on remand Bauer may move to reopen his sentence.)

United States v. Desormeaux, 4 F.3d 628 (8th Cir. 1993). (This Court holds District Court clearly erred in finding that stabbing victim had not suffered serious bodily injury per application n.(j) where she was hospitalized for four days for treatment of her lacerated kidney and resulting blood loss; suffered excruciating pain; lost one-third of her blood supply and nearly lost kidney. Facts are determined by evidence. Sentence vacated and case remanded to District Court once again for resentencing.)

United States v. Parker, 989 F.2d 948 (8th Cir. 1993). (Parker made several trips to Fort Smith for purpose of killing victim before actual assault and he admitted others in conspiracy engaged in more than minimal planning. This planning conducted by other members is reasonably foreseeable in conspiracy to murder scheme and Parker is held responsible for this planning (§ 2A2.1(b)(1)).

Testimony indicated Thomas promised to pay Parker if he killed victim. And it is reasonably foreseeable promise of money or something of value is motivating conspiracy to murder when person agreeing to commit murder has little or no other motive to commit crime (§ 2A2.1(b)(4)).)

United States v. Stanton, 975 F.2d 479 (8th Cir. 1992). (District Court adequately explained its reasons for imposition of Berry s sentence at particular point within range which exceeded 24 months, where Court compared involvement of Berry and another actor in same drug transaction to avoid unwarranted sentencing disparities, and considered Berry s background, involvement in offense, and age.), cert. denied, 507 U.S. 938 (1993).

United States v. Earles, 955 F.2d 1175 (8th Cir. 1992). (District Court s addition of two points for more than minimal planning was not clearly erroneous where evidence was presented that fraudulent pattern of activity extended over period of at least eight months and involved significant amount of planning.)

United States v. Callaway, 943 F.2d 29 (8th Cir. 1991). (District Court did not err in finding more than minimal planning. While Callaway s monthly receipt of disability checks as representative payee may have been "purely opportune," her concealment of granddaughter s absence and her use of benefits required repeated acts over period of time.)

**§ 1B1.2 (Applicable Guidelines):**

United States v. Courtney, No. 02-4083 (8th Cir. 2004) (LOKEN, McMILLIAN, HANSEN*). (If plea agreement contains stipulation establishing defendant's commission of additional offenses, defendant is treated as if he had been charged with and convicted of those additional offenses. Grouping rules are then applied.)

United States v. Casey, 158 F.3d 993 (8th Cir. 1998) (BEAM,* MURPHY, MELLOY). (Choosing Guideline section in "atypical case." § 1B1.2(a) provides that when plea agreement stipulation specifically establishes more serious offense than offense of conviction, District Court should use Guidelines section most applicable to stipulated offense (rather than section applicable to charged offense as is general rule). Although Appendix A, in describing this provision, also refers to "atypical case" in which Guidelines section most applicable to "the nature of offense conduct charged" should be used, this Court does not decide whether Appendix A creates "atypical case" exception in addition to stipulation exception, because this is not atypical case. This Court refuses to interpret "atypical case" to mean one in which defendant s criminal conduct includes acts that would constitute offense more serious than offense of conviction.

This Court thus reverses where defendant pleaded guilty to one count of bank theft, but District Court elected to treat it as burglary, and thus to subject defendant to higher sentencing range. Defendant did not stipulate to more serious offense, even though PSR outlined facts that arguably amounted to burglary without objection from defendant. And as noted above, this Court did not find this to be atypical case, to extent atypical case exception exists.)

United States v. Johnson, 144 F.3d 1149 (8th Cir. 1998) (BOWMAN, McMILLIAN, MURPHY*). (District Court properly considered criminal sexual abuse Guideline when departing upward for extreme conduct and injury in defendant's robbery sentence. Although § 2B3.1 (robbery) was applicable guideline, District Court properly referred to § 2A3.1 (sexual abuse), based upon defendant's rape of employee during robbery, in determining appropriate level for departure.)

United States v. Nattier, 127 F.3d 655 (8th Cir. 1997). (Application note 5 indicates in conspiracy cases where jury s verdict does not clearly indicate which of two or more offenses were found to be object of conspiracy, sentencing judge is authorized to impose sentence based on each object of offense that Court, were it sitting as trier of fact, would have convicted defendant of conspiring to commit. District Court here found both methods of violating money laundering statute were proven beyond reasonable doubt, thus defendants challenge to sentencing ramifications of ambiguous verdict on conspiracy count, contending two different objects of conspiracy each yield different BOLs, does not amount to reversible error; same is true for challenge to sentences imposed on money laundering counts.), cert. denied, 523 U.S. 1065 (1998).

United States v. Johnson, 962 F.2d 1308 (8th Cir. 1992). (District Court correctly applied section by increasing George Woodards offense level to reflect that conspiracy of which he was member was directed toward robbery of two banks, not just one.)

United States v. Collar, 904 F.2d 441 (8th Cir. 1990). (There is no statutory ambiguity calling for application of rule of lenity regarding treating stipulated offense as offense of conviction. Therefore, where Collar entered guilty plea to four robberies but admitted elements of two additional robberies in dismissed counts, Guideline applicable to six robberies in calculating base offense level was appropriate.)

**§ 1B1.3 (Relevant Conduct/Standard of Review):**

United States v. Regenwether, 300 F.3d 967 (8th Cir. 2002) (WOLLMAN, BRIGHT, JOHN R. GIBSON) (per curiam). (Whether act or omission constitutes relevant conduct is factual question. Thus, this Court reviews for clear error.)

United States v. Howard, 235 F.3d 366 (8th Cir. 2000) (McMILLIAN, RICHARD S. ARNOLD,* BOWMAN). (District Court's determination of whether particular acts fall within scope of relevant conduct is factual determination subject to clear error review. Focus is on specific acts and omissions for which defendant is to be held accountable, rather than on whether defendant is criminally liable as principal, accomplice, conspirator.)

United States v. Plumley, 207 F.3d 1086 (8th Cir. 2000) (WOLLMAN,* F. GIBSON, MURPHY). (Whether act or omission constitutes relevant conduct is factual determination subject to review under clearly erroneous standard.)

United States v. Strange, 102 F.3d 356 (8th Cir. 1996). (This Court will reverse only if District Court committed clear error when ascertaining drug quantity (as relevant to narcotics conspiracy, drug defendant is accountable for all contraband within scope of criminal activity jointly undertaken by defendant and reasonably foreseeable to him).)

United States v. Reeves, 83 F.3d 203 (8th Cir. 1996). (This Court reviews for clear error District Court s factual findings with respect to time span of defendant s involvement in conspiracy and resulting amount of loss attributable to him.)

United States v. Flores, 73 F.3d 826 (8th Cir.) (While jury determines whether defendant is member of drug conspiracy charged in indictment, it is left to District Court to determine appropriate quantity of drugs involved in conspiracy which is to be attributed to that defendant. District Court s drug quantity determination is factual finding that this Court reviews under clearly erroneous standard; this Court will reverse drug quantity finding only if it is firmly convinced mistake has been made.), cert. denied, 518 U.S. 1027 (1996).

United States v. Ballew, 40 F.3d 936 (8th Cir. 1994). (Finding that conduct was connected to continuing scheme to defraud is factual finding subject to review under clearly erroneous standard.), cert. denied, 514 U.S. 1091 (1995).

**§ 1B1.3 (Relevant Conduct/Standard of Proof):**

United States v. Winfrey, 900 F.2d 1225 (8th Cir. 1990). (Factual determinations at sentencing need not be proved beyond reasonable doubt; here, District Court required government to prove quantity of drugs by "satisfactory and convincing" evidence which Court equated with standard of "reasonable certainty.")

United States v. Ehret, 885 F.2d 441 (8th Cir. 1989). (No error to use clear and convincing standard of proof in determining quantity of drugs.), cert. denied, 493 U.S. 1062 (1990).

**§ 1B1.3 (Relevant Conduct):**

United States v. Watts, 519 U.S. 148 (1997) (per curiam). (District Court may consider acquitted conduct, proven by preponderance of evidence, as relevant conduct.)

United States v. Regenwether, 300 F.3d 967 (8th Cir. 2002) (WOLLMAN, BRIGHT, JOHN R. GIBSON) (per curiam). (Defendant successfully robbed credit union and attempted to rob bank. After failing to rob bank, defendant attempted to recruit accomplice for another try, but accomplice became FBI informant and defendant was arrested. Defendant had purchased shotgun to use in credit union robbery and had planned to brandish shotgun at second attempt to rob bank. Defendant was convicted only of credit union robbery. Upon release, defendant recruited different accomplice and made aborted third attempt to rob same bank. Then, they successfully robbed different bank. Defendant was convicted of bank robbery for successful one, and conspiracy to commit bank robbery for three unsuccessful tries at other bank. District Court did not clearly err in applying enhancement under § 2B3.1(b)(2)(E) because possession of shotgun was relevant conduct falling within charged conspiracy dates. Application Note 8's exclusion does not apply because bank robbery is not listed among excluded offenses. CONCURRENCE: Guidelines and conspiracy law are unfair.)

United States v. Zimmer, 299 F.3d 710 (8th Cir. 2002) (McMILLIAN, BEAM, HANSEN*). (In drug conspiracy, District Court may consider amounts from drug transactions in which defendant was not directly involved if they were part of same course of conduct or common scheme. Defendant can be held accountable only for drug transaction or drug activity where it was undertaken in furtherance of conspiracy and was known to defendant or reasonably foreseeable to him), cert. denied, 537 U.S. 1146 (2003).

United States v. Ray, 291 F.3d 1039 (8th Cir.) (WOLLMAN, LOKEN, MURPHY*). (Apprendi v. New Jersey does not require that relevant conduct be submitted to jury or proven beyond reasonable doubt), cert. denied, 537 U.S. 1036 (2002).

United States v. Weiland**,** 284 F.3d 878 (8th Cir. 2002) (McMILLIAN, MURPHY,* BATTEY). (Drugs that are part of same course of conduct or common scheme or plan of conspiracy case are to be counted as relevant conduct for determining base offense level.)

United States v. Thurmon, 278 F.3d 790 (8th Cir. 2002) (LOKEN, LAY, HEANEY*). (Once District Court determines defendant's relevant conduct for purposes of base offense level, it must use same relevant conduct for purposes of enhancements or reductions.)

United States v. Beeks, 266 F.3d 880 (8th Cir. 2001) (LOKEN, RICHARD S. ARNOLD, FAGG) (per curiam). (One conspirator may be held responsible for distribution of drugs by other conspirators if it was in furtherance of conspiracy and either known to him or reasonably foreseeable. Evidence at trial showed defendant knew extent of conspiracy; hence, District Court's drug-quantity findings were not clearly erroneous.)

United States v. Symonds, 260 F.3d 934 (8th Cir. 2001) (HANSEN,* HEANEY, TUNHEIM). (When determining defendant's drug quantity in setting base offense level, District Court may consider quantities which were reasonably foreseeable to him. District Court properly included quantities produced by another participant after defendant told him to stop using his garage, where defendant continued to receive personal-use quantities of drugs from that participant.)

United States v. Patterson, 258 F.3d 788 (8th Cir. 2001) (WOLLMAN, BEAM, BARNES*). (When determining defendant's drug quantity in setting base offense level, District Court may consider--in addition to drugs for which defendant was convicted--prior drug transactions that were part of regular scheme or pattern of drug activity.)

United States v. Smith, 232 F.3d 650 (8th Cir. 2000) (LOKEN, FAGG, MAGILL) (per curiam). (When Guideline includes more than one base offense level, District Court must look to relevant conduct to determine base offense level, and must consider all acts committed, aided, or willfully caused by defendant. Because defendant aided interstate murder-for-hire that resulted in murder, District Court properly found first-degree murder to be underlying unlawful conduct for purposes of calculating base offense level, even though murder was not charged as part of offense.)

United States v. Moore, 212 F.3d 441 (8th Cir. 2000) (RICHARD S. ARNOLD, JOHN R. GIBSON,* BEAM). (District Court did not clearly err in attributing 14 grams of cocaine base to Moore based on government witness who testified he bought 15-20 grams from Moore. These transactions constitute "same course of conduct" as they also involved sale of cocaine base in same city as charged drug offense and occurred just 4-6 months earlier. However, this Court reverses District Court's assessment of 31.8 grams of cocaine
base to Moore. Only evidence connecting Moore to that quantity is that it was possessed by Taylor, from whom he bought 3.33 grams of cocaine base that formed basis of his conviction. Even assuming Moore resided with Taylor at time of search, that finding would not tilt scales sufficiently to warrant finding that Moore and Taylor jointly undertook to sell 31.8 grams of cocaine base or that Moore aided or abetted Taylor in such objective.)

United States v. Alvarez, 168 F.3d 1084 (8th Cir. 1999) (BEAM, LAY, SIPPEL*). (In calculating drug quantity at sentencing, District Court may consider conduct charged in dismissed counts. Here dismissed conspiracy charge was based in part on drug quantity that District Court attributed to defendant; Court's finding was reasonably supported in record, and thus it was not clearly erroneous to attribute such quantity to defendant.)

United States v. Geralds, 158 F.3d 977 (8th Cir.) (BOWMAN, WOLLMAN, KELLY*). (District Court did not clearly err in concluding Geralds s possession of 18 ounces of crack cocaine was part of same course of conduct or common scheme or plan as powder cocaine distribution offense for which he was convicted. Two transactions were similar as follows: both were distribution-related offenses, involved forms of cocaine, involved similar quantity of cocaine, and involved Geralds s travel to St. Louis to acquire cocaine and his return to Southeast Missouri to distribute it. Although cocaine base transaction occurred 18 months prior to offense of conviction, both transactions were part of regular pattern of drug distribution, and occurred within 125 miles of

one another within Missouri. Government met its burden under either preponderance-of-the-evidence standard, or clear-and-convincing standard.), cert. denied, 526 U.S. 1031 (1999).

United States v. Palacios-Suarez, 149 F.3d 770 (8th Cir. 1998). (Palacios asks this Court to find error in District Court s fixing his sentence based on amount of cocaine and amphetamine that search of his car revealed; Palacios argues he should have been sentenced according to his alleged belief he was carrying only marijuana. Under § 1B1.3(a)(1)(A), Palacios is accountable at sentencing for full quantity of all illegal drugs in his possession. Palacios maintains it was not foreseeable to him person for whom he was delivering drugs would have had him carry cocaine instead of marijuana. Although Palacios pleaded guilty to drug conspiracy, his sentence was based on drugs in his car at time he was stopped and not on drugs in possession of co-conspirator; therefore, this Court finds no error in sentence imposed by District Court.)

United States v. Alaniz, 148 F.3d 929 (8th Cir.) (District Court found Cuevas responsible for 710 grams of methamphetamine, but he argues there was no evidence linking him to these drugs and there were not sufficient findings. Evidence at sentencing demonstrated by preponderance of evidence both that Cuevas directly aided (§ 1B1.3(a)(1)(A)) in acquisition of this methamphetamine and that its acquisition was reasonably foreseeable (§ 1B1.3(a)(1)(B)) to him.), cert. denied, 525 U.S. 1047 (1998).

United States v. Georges, 146 F.3d 561 (8th Cir. 1998). (Georges argues taxes saved by his deduction of $5,000 loan to long-time friend should not have been included in computing loss of IRS. Loan out of corporate funds was repaid by friend next year. Repayment, however, was not deposited into corporate account, but into Georges s personal account. Accountant, who did not have access to Georges s personal records, treated loan as deductible business expenses, thereby reducing corporation s taxable income; loan was not business expense. Based on § 2T1.1 (all conduct violating tax law should be considered part of same course of conduct), deposit of loan repayment into Georges personal account and deduction of loan were acts inextricably tied to long pattern of conduct engaged in by Georgeses to conceal income--or at least District Court could have so found. District Court finding tax loss caused by $5,000 loan-deduction should be included as relevant conduct for sentencing purposes was not clearly erroneous: when loan was repaid next year, Mr. Georges knowingly kept his accountant in dark when repayment was not deposited into corporate account.)

United States v. Robles, 139 F.3d 1187 (8th Cir. 1998). (Robles challenges attribution to him of kilogram of cocaine seized from apartment whose occupants included Robles. He argues District Court failed to determine scope of his jointly undertaken criminal activity after Robles objected to characterization in PSR; alternatively, he claims determination was incorrect. This Court holds District Court s determination of drug quantity was not clear error. After considering evidence presented by Robles and government, District Court made specific findings and concluded exhibits and documents received in evidence and statements in PSR not objected to, support PSR finding(s). Although this Court emphasizes value of specific references to individual pieces of trial testimony, it believes District Court s findings sufficiently addressed both scope of Robles s jointly undertaken criminal activity and foreseeability of co-conspirators acts. Robles asserts he

would not have been involved in distribution of this particular kilogram because it was intended to be sold as unit by others and not in smaller amounts in which he customarily dealt. However, on same day package was seized, Robles offered to sell cocaine to informant out of same apartment; when police executed search warrant later that same day, only cocaine found was one kilogram package at issue; and evidence also suggested that while Robles co-conspirators were trying to arrange whole kilogram sale, there was possibility kilogram would have to be broken up for sale. Robles intended to conduct future transactions and he cannot disclaim responsibility for drugs bought and kept in reserve to supply future, additional transactions. Record supports District Court s finding that regardless of whether Robles would have been directly involved with all of seized kilogram, he was active enough participant in conspiracy to be liable for it, and, by his own admission, Robles brought customers to apartment frequently.)

United States v. Varela, 138 F.3d 1242 (8th Cir. 1998). (District Court found Varela responsible for 21 kilograms cocaine seized from drug courier; Varela appeals calculation of his offense level, arguing he should be responsible only for 2 kilograms. While District Court did not specifically refer to either subparagraph (A) or (B), in case of conspiracy to transport and convey narcotics, all members of conspiracy are directly accountable under subparagraph (A) for quantity of drugs involved. Under facts of case, Varela is clearly responsible for entire shipment; this Court need not address foreseeability requirement of subparagraph (B). Because Varela admitted he knowingly entered into conspiracy to possess cocaine, District Court properly held him accountable for full amount of cocaine to be obtained by him and co-conspirators. Evidence indicates Varela expected shipment might well exceed 18 kilos and in any event, difference between 18 and 21 is not material for Guidelines purposes.)

United States v. Cain, 134 F.3d 1345 (8th Cir. 1998). (District Court held Paul Cain could be held liable for amount of loss caused by all conspirators in scheme, regardless of when he entered conspiracy. Paul may not be held liable for individual losses before he entered conspiracy, § 1B1.3, application note 2. District Court stated it based its finding on incorporation date of entity that was to provide management services for separate company that employed defendant; Paul was principal stockholder in entity, and there was evidence Paul received "commission check" from entity in late August 1993. This Court finds nothing in record to support conclusion entity was management corporation to make conspiracy operational and to further divert money from separate company that employed defendants. This Court holds District Court had no basis for characterizing entity as conspiratorial in nature, and thus no basis for finding Paul entered conspiracy when entity was incorporated. Only evidence of record with respect to Paul s date of entry into conspiracy is admission in plea agreement he entered in September 1993. This Court holds in resentencing Paul, District Court is to use September 1993 as date of entry and notes use of that date for Paul will affect both his criminal history assessment and determination of individual losses for which he may be held liable for sentencing purposes and restitution.)

United States v. Cain, 128 F.3d 1249 (8th Cir. 1997). (District Court imposed restitution of $508,096.61 (sum of $298,851.61 for stock transactions at issue during trial, $55,200.00 for stock sales not at issue during trial but made by CEO and CFO, both of whom pleaded guilty as conspirators, and $154,045.00 for stock sales between March and December, 1993, made by

commissioned stockbroker). Cain argues evidence failed to show he knew about stock sales not at issue during trial, and those made by commissioned stockbroker; as alternative, he asserts as he did not join company until mid-July, 1993, he should not be held responsible for any stock sales before that time. This Court finds no difficulty concluding from evidence that when Cain was hired in mid-July, 1993, he knew of stock sales made by CEO, CFO, and commissioned stockbroker. Thus, it is reasonable to conclude future stock sales by those three people were foreseeable to Cain. Nor is it irrational to believe Cain knew in mid-July, 1993, of original summary sheet s misrepresentation and fair inference is Cain agreed to use of summary sheet in future stock sales, whether made by himself or other three persons in question. This Court cannot extract from record, however, conclusion Cain agreed before he was hired to use of summary sheet in future stock sales. Accordingly, this Court reverses attribution to Cain of any stock sales before mid-July, 1993, vacates restitution order, and remands for additional proceedings.)

United States v. Spence, 125 F.3d 1192 (8th Cir. 1997). (Spence argues District Court erred in including marijuana seized at time of his Illinois arrest in drug quantity that established his BOL. Whether additional, uncharged drug trafficking is part of "same course of conduct" as offense of conviction is fact-intensive question reflecting traditional role of District Court to consider defendant s past criminal behavior. Spence s PSR included as relevant conduct 127 kilograms of marijuana seized at time of his Illinois arrest; based upon trial evidence, District Court found behavior underlying Illinois arrest was part of same course of conduct as offense of conviction because two incidents occurred within few months and involved distribution quantities of same drug. Finding is not clearly erroneous particularly considering government presented evidence of October 1995 telephone calls which suggested continuing involvement by supplier in Spence s drug trafficking activities.), cert. denied, 523 U.S. 1087 (1998).

United States v. Heath, 122 F.3d 682 (8th Cir.) (Heath argues District Court erred by including all losses alleged in indictment as relevant conduct; he argues evidence of hospital and medical services provided to him, which did not involve slip and fall insurance claims, do not constitute evidence of relevant conduct to offense of wire fraud. In calculating total loss of $111,632.01 which resulted in six-level adjustment to wire fraud count, § 2F1.1(b)(1), District Court included all hospital and medical expenses incurred in Heath s staged slip and fall insurance claims, as well as medical expenses incurred in connection with Heath s conduct to obtain controlled substances by fraud. District Court did not err in including all common scheme losses in its computation of relevant conduct loss: all of Heath s fraudulent activity involved common modus operandi. He conducted his scheme to defraud in continual manner from October 1995 to April 1996 during which time Heath was admitted to hospitals 53 times and defrauded 17 hospitals and insurance carriers.), cert. denied, 522 U.S. 975 (1997).

United States v. Fairchild, 122 F.3d 605 (8th Cir. 1997). (Criminal defendant convicted as co-conspirator may be held accountable for all reasonably foreseeable acts and omissions of others in furtherance of jointly undertaken criminal activity, § 1B1.3(a)(1)(B). Relevant factors include extent defendant benefitted from co-conspirators activities and whether defendant demonstrated substantial level of commitment to conspiracy.), cert. denied, 522 U.S. 1131 (1998).

United States v. Payne, 119 F.3d 637 (8th Cir.) (Defendant may be held responsible only for drug quantities implicated in conspiracy, reasonably foreseeable to him. This Court observes amount of drugs attributed to entire conspiracy is not automatically attributable to each defendant.), cert. denied, 522 U.S. 987 (1997).

United States v. Grajales-Montoya, 117 F.3d 356 (8th Cir.) (Deluca contests attribution of drug quantity to him. District Court held Deluca responsible for all drugs distributed by conspiracy, § 1B1.3(a)(1)(B). Deluca asserts District Court s application of Guideline constitutes error of law because he maintains Court attributed to him drugs that were from other separate conspiracies. This Court detects no confusion in trial Court s application of Guideline; it is apparent trial Court relied on its recollection of over five weeks of trial testimony and numerous exhibits in applying Guideline. Because Deluca was convicted as co-conspirator, trial Court did not err as matter of law in applying relevant conduct Guideline and it could hold Deluca responsible for all drug transactions that fell within scope of conspiracy headed by him and Mrs. Deluca. Deluca further argues trial Court s application of Guideline was faulty because it failed to conduct required relevant conduct analysis, § 1B1.3, application note 2, and therefore its factual findings are insufficiently specific. Where District Court read Deluca s objections, heard arguments on both sides, stated it was convinced both Delucas were leaders of entire matter, and noted its determinations were based on its notes and recollection of testimony, District Court clearly complied with formal requirements of Guideline.), cert. denied, 522 U.S. 983 and 522 U.S. 1007 (1997).

United States v. Strange, 102 F.3d 356 (8th Cir. 1996). (Defendants Strange and Zamorano denied knowledge that third delivery contained cocaine instead of marijuana. District Court applied § 1B1.3(a)(1)(B) to hold both answerable for 239.5 grams of cocaine located in third package. Defendants assert government failed to prove scope of conspiracy extended to encompass cocaine; they maintain evidence shows they contrived to exclusively distribute marijuana and given limited nature of enterprise, it could not have been reasonably foreseeable to them pertinent package would include cocaine. Court is persuaded it would have been more fitting to assess conspirators responsibility for cocaine under § 1B1.3(a)(1)(A) as section appertains to conduct personally undertaken by defendant being sentenced. Reasonable foreseeability is significant solely when evaluating relevant conduct under § 1B1.3(a)(1)(B); it is immaterial to analysis guided by § 1B1.3(a)(1)(A). Through their own actions, Strange and Zamorano aided, abetted, and willfully caused conveyance of at least three packages. Their convictions verify they embarked upon behavior with requisite criminal intent and every expectation of receiving some type of illegal drug to distribute. Without regard to reasonable foreseeability, they are accountable at sentencing for full quantity of all illegal drugs located within parcels. While disproportionate sentences may result on occasion, it is within province of Congress to resolve there is some deterrent value in exposing drug trafficker to liability for full consequences, expected and unexpected, of his own unlawful behavior.)

United States v. Crosby, 96 F.3d 1114 (8th Cir. 1996). (Crosby argues District Court erred in attributing to him certain amounts of methamphetamine his co-conspirators purchased without Crosby s knowledge or delivered to Crosby for Crosby s personal use only. District Court did not commit clear error as there was evidence showing Crosby reasonably should have foreseen total amount of drugs purchased and Crosby sold drugs he received rather than using them himself.)

United States v. Delpit, 94 F.3d 1134 (8th Cir. 1996). (Saunders contested his being held responsible for 532.3 grams of crack involved in Malone s use of juveniles in drug dealing. District Court correctly found 532.3 grams part of operation s "overall activity" and part of conspiracy count on which Saunders was convicted, § 1B1.3(a)(b).)

United States v. Jain, 93 F.3d 436 (8th Cir. 1996). (Government cross-appealed, arguing all $40,500 in referral payments should have been counted as relevant conduct because there was one common scheme or plan. Relevant conduct for sentencing purposes must be criminal conduct. District Court acquitted Jain of bribery charge and this Court acquits him of mail fraud charges. At time in question, Medicare did not reimburse payments for psychologist services, so no factual basis to presume Jain/North Hills fee arrangement targeted Medicare patients. In these circumstances, while District Court may consider conduct for which defendant has been acquitted, this Court concludes District Court s findings regarding relevant conduct are not clearly erroneous (i.e., Jain received less than $2000 for referring one Medicare patient to North Hills, § 2B4.1.), cert. denied, 520 U.S. 1273 (1997).

United States v. Reeves, 83 F.3d 203 (8th Cir. 1996). (In calculating loss attributable to each defendant, District Court used time period during which that defendant was involved in conspiracy. Vehicles stolen during that period were considered reasonably foreseeable. Lynn was found to have participated in conspiracy for almost two years; 33 vehicles were stolen during this period, having total value of $316,000 resulting in eight-level enhancement for aggregate loss, § 2B6.1 and § 2F1.1. District Court noted even assuming Lynn was not involved in conspiracy during six months following serious accident in early April 1991, amount chargeable to him would still exceed $200,000 with result his sentence would remain same. Direct trial testimony linking Lynn to conspiracy during entire year of 1992 precluded any further reduction; no error calculation.

United States v. Jenkins, 78 F.3d 1283 (8th Cir. 1996). (Jenkins contended District Court miscalculated quantity of cocaine attributable to him. District Court calculated quantity on basis of testimony of Jenkins s co-conspirators and combined testimony provided evidence of numerous drug transfers and wire transfers of drug proceeds. Upon review of sentencing transcript and PSR, this Court finds discrepancy between testimony of one of co-conspirators and facts recorded in PSR and factual findings made by Court. Calculation error, however, did not have impact on Jenkins s sentence; remaining drug quantity finding of 110.5 kilograms, which was not clearly erroneous, still qualified Jenkins for BOL 36 (still conservative estimate in light of large amount of money involved in wire transfers).)

United States v. Flores, 73 F.3d 826 (8th Cir.) (Conspiracy defendant may be held accountable for criminal activities for other co-conspirators provided activities fall within scope of criminal activity defendant agreed to jointly undertake; further, defendant is accountable only for those activities of co-conspirators which were reasonably foreseeable in relation to criminal activity defendant agreed to jointly undertake. Relevant to determination is whether or to what extent defendant benefitted from his co-conspirators activities and whether defendant demonstrated substantial level of commitment to conspiracy. In this case, Flores was not held accountable for total scope of all illegal activities conducted by co-conspirator or other members of his organization.

While Flores contends District Court s quantity calculation was clearly erroneous because scope of criminal activity he agreed to participate in was limited to one transaction, this Court finds no evidence of such limited agreement, explicit or implicit. Fair reading of record supports conclusion Flores intended to conduct future transactions and was simply deprived of opportunity to do so because he was arrested before additional transactions could be made. This Court also concludes quantity attributed to Flores was reasonably foreseeable as it was derived from two deliveries made to warehouse at about time Flores became part of conspiracy. Flores demonstrated substantial level of commitment by traveling approximately 1000 miles in order to help sell marijuana from warehouse delivery and he came up with cash to finance travel. Flores derived substantial benefits from activities of his co-conspirators as he gained access to both supply of marijuana and established method of distribution.), cert. denied, 518 U.S. 1027 (1996).

United States v. Darden, 70 F.3d 1507 (8th Cir. 1995). (Darden contends District Court erred by finding he was accountable for at least 213 kilograms of cocaine (amount supplied to Jerry Lewis organization by Gonzales from 1987-1991). Darden contends evidence does not support finding he directly participated in distribution of total amount. Defendant need not participate directly in distribution of all drugs for which he is held accountable; what is required is total amount be reasonably foreseeable to him--actual knowledge of total drug amount is not required. Relevant factor in determining reasonable foreseeability is whether defendant demonstrated substantial level of commitment to conspiracy. Jury found beyond reasonable doubt Darden was part of drug and murder enterprise and narcotics conspiracy, and he committed two attempted murders as well as two separate drug offenses, including possession of cocaine with intent to distribute in 1987 and 1989. Substantial evidence supports findings: testimony Darden played leading role in organization s drug trafficking operation in late 70s and early 80s; though Darden s role diminished over time, no evidence indicates he ever withdrew; testimony Darden sold organizations cocaine from 1987-89; and testimony from witness directly involved in distribution of 213 kilograms in question that he sold Darden some of that cocaine and Darden told him he planned to resell it for profit. Evidence also establishes Darden demonstrated substantial commitment to drug conspiracy by twice committing attempted murder on its behalf. There was testimony Darden knew of his co-conspirators use of violence to further interests of organization. District Court did not clearly err in finding by preponderance of evidence distribution of at least 213 kilograms of cocaine was foreseeable to Darden; even if he did not directly engage in distribution, it was reasonably foreseeable act of others in furtherance of jointly undertaken criminal activity for which Darden is accountable (§ 1B1.3(a)(1)(B)).), cert. denied, 517 U.S. 1149 (1996).

United States v. Murray, 67 F.3d 687 (8th Cir. 1995). (At sentencing, factual determinations may be based on information which has sufficient indicia of reliability to support its probable accuracy (§ 6A1.3(a)). Accordingly, when sentencing defendant Court may enhance sentence by considering quantity of drugs for which defendant was neither indicted nor convicted, or for which count was dismissed pursuant to plea agreement. Here, narcotics found in safe were reasonably foreseeable amounts and types in connection with criminal activity Murray jointly undertook with co-defendants. Murray possessed key to apartment, visited apartment prior to offense of conviction, and was identified as individual who placed safe in apartment. Thus, facts supported holding Murray accountable for narcotics in safe. Facts--even under clear and convincing evidence

standard--are sufficient to support District Court s findings; findings not clearly erroneous.), cert. denied, 517 U.S. 1113 (1996).

United States v. Skorniak, 59 F.3d 750 (8th Cir.) (Skorniak argued District Court erred by including certain transactions listed in PSR in drug calculation because insufficient evidence existed to establish they were foreseeable to him. District Court did not clearly err in including 1000 grams of cocaine identified in PSR where District Court determination was based on testimony of unindicted co-conspirator who Court found to be credible and admissions by Skorniak himself.), cert. denied, 516 U.S. 980 (1995).

United States v. Rice, 49 F.3d 378 (8th Cir.) (To determine whether criminal defendant convicted of conspiracy can be held accountable for all reasonably foreseeable acts and omissions of others in furtherance of jointly undertaken criminal activity, District Court must find by preponderance of evidence defendant s activities were in furtherance of conspiracy and were either known to him or reasonably foreseeable to him. Relevant to this determination is whether or to what extent defendant benefitted from his co-conspirator s activities. Additional relevant factor is whether defendant demonstrated substantial level of commitment to conspiracy. This Court concluded Rice, Blackstone, and Washington were involved to extent Court did not err in attributing all of conspiracy s drugs to them. Washington claimed because he did not directly participate in Jones s enterprise, he should not be held liable for drug amounts allegedly distributed by Jones. This Court disagrees as lives of Jones and Washington were "remarkably intertwined," such that even when both were working separately, they gave each other tips on how to be more successful drug dealer, facilitating each other s criminal enterprise.), cert. denied, 515 U.S. 1168 (1995).

United States v. Smith, 49 F.3d 362 (8th Cir. 1995). (Conduct of Gardner s co-conspirators was reasonably foreseeable even if conspiracy spanned beyond Gardner s actual participation.)

United States v. Ballew, 40 F.3d 936 (8th Cir. 1994). (District Court did not clearly err in finding truck thefts and subsequent switching of parts were connected to continuing scheme to defraud Ballew s insurance company. Record adequately supported finding thefts were conduct relevant to offenses of conviction where in order to both use truck for which he had claimed complete loss in order to get insurance money, Ballew had to disguise truck by partially rebuilding it with parts from other trucks and displaying license plates registered to another truck. Thus, stealing and using parts from other trucks was integral to Ballew s concealment and continuing use of truck and was inextricably bound to scheme of which jury found Ballew guilty. DISSENT: Majority stretched concept of relevant conduct past breaking point. Link between stolen trucks and insurance fraud entirely too tenuous to constitute relevant conduct. Record lacks sufficient evidence of commonality, similarity, regularity, or temporal proximity to hold Ballew accountable for truck theft through his conviction for wire and mail fraud. Crimes should have been treated as separate offenses.), cert. denied, 514 U.S. 1091 (1995).

United States v. Garrido, 38 F.3d 981 (8th Cir. 1994). (Garrido argued 43.05 pounds of marijuana seized at Carlos s house should have been excluded because they were not in furtherance of conspiracy and they were not reasonably foreseeable to Garrido. No clear error where agent s

testimony supported reasonable inference that Carlos made delivery of marijuana at Garrido s request and there was additional evidence indicating on-going relationship between Carlos and Garrido. Similarly Carlos s possession of 43.05 pounds was reasonably foreseeable to Garrido as Garrido was aware of on-going conspiracy, committed overt acts in furtherance of conspiracy on at least two separate occasions (Garrido called Carlos with expectation that Carlos would be able to make delivery of marijuana out of his "inventory").

Evidence support reasonable inference Valles was actively assisting Carlos in distribution of marijuana. District Court chose to discredit Valles s statement that only 30 pounds remained; District Court had opportunity to judge credibility of witnesses to which this Court gives due regard. Carlos s possession of 43.05 pounds which were virtually identical to 30 pounds seized at motel, gives rise to reasonable inference these 43.05 pounds were part of same shipment Valles had already attempted to sell to another. Evidence also established Carlos s possession of 43.05 pounds was reasonably foreseeable to Valles. Valles s discussions with detective indicate he was aware of volume of shipments and sales with which Carlos was involved. No error in finding it was reasonably foreseeable to Valles that Carlos would be in possession of 43.05 pounds of marijuana. DISSENT: Finding of conspiratorial relationship between Garrido and Valles and conspiracy rests on mere surmise and conjecture. No evidence exists that defendants ever touched, packaged, viewed, spoke about or made any kind of agreement relating to 43.05 pounds of marijuana.)

United States v. Karam, 37 F.3d 1280 (8th Cir. 1994). (District Court may consider as relevant conduct under this section conduct charged in dismissed counts.)

United States v. Sheahan, 31 F.3d 595 (8th Cir. 1994). (Sheahan argued conduct District Court considered was not part of same course of conduct or common scheme or plan as conduct to which he pleaded guilty, writing insufficient funds checks to one bank drawn on another bank s account. Yet Mercantile Bank was "common victim" and bank employee was "common accomplice" in both situations. Hence, District Court committed no clear error in considering checks written on closed accounts to be part of same course of conduct or common scheme or plan as offense of conviction.

Sheahan also argued conduct charged in some counts was not relevant conduct because it did not constitute criminal offense. Subject counts of indictment clearly alleged offenses subject to prosecution where indictment charged Sheahan and bank employee with acting in joint scheme or artifice to defraud Mercantile Bank of money and property or honest services of its employee. Government demonstrated by preponderance of evidence Sheahan acted with employee in scheme to deprive Mercantile of money or property, e.g., Mercantile was significantly under secured on Sheahan s corporate account, Sheahan double-pledged at least one item of collateral as security for corporate loan. This conduct was part of common scheme or plan and constituted "criminal conduct." District Court correctly concluded Sheahan s relevant conduct figured prominently in loss Mercantile suffered. Moreover, bank employee s conduct as joint participant in criminal activity with Sheahan may be counted as Sheahan s own relevant conduct as it was reasonably foreseeable to Sheahan.

Likewise, Sheahan s conduct in obtaining loan from another party and Sheahan s conduct in writing three insufficient funds checks were part of common scheme or plan because they involved "common accomplices," (same bank employee) and "common purposes" (loan, like three

checks, was intended to shield scheme to deprive Mercantile of employee s honest services.”).)

United States v. Quintanilla, 25 F.3d 694 (8th Cir. 1994). (Defendants argued their sentences should be vacated because District Court failed to make factual findings regarding relevant conduct. Because neither defendant objected to any portion of PSRs concerning relevant conduct, District Court did not err in not making factual findings regarding relevant conduct.)

United States v. Hulshof, 23 F.3d 1470 (8th Cir. 1994). (Hulshof argued District Court erred in determining his actions in transferring certain funds from bank account of his father, on which he was authorized signer, to his own private account, constituted relevant conduct. District Court made factual findings showing Hulshof conducted series of misleading withdrawals from his father s account for his personal use by falsifying records during time he was vice president of bank and in much same manner he used to falsify bank records involving his father s loan account. Hulshof also represented to his father that funds were applied to his father s loan account, when in fact money was improperly transferred to Hulshof s personal account. Applying § 1B1.3(a) and commentary, this Court finds District Court correctly concluded these transactions were part of relevant conduct.)

United States v. Lucht, 18 F.3d 541 (8th Cir.) (District Court found each defendant accountable for 5.98 kilograms of methamphetamine, representing aggregate amount of drug involved in substantive counts of conviction. Defendants argued District Court failed to make findings regarding scope of criminal activity jointly undertaken by each of them and foreseeability of conduct of others in connection with that criminal activity. This Court rejects argument as jury made these findings when it found each defendant guilty of substantive offenses; under Guidelines, District Court properly could aggregate amounts involved in these counts of conviction in order to determine defendants base offense levels. (See § 3D1.2(d) and § 3D1.3(b)).), cert. denied, 513 U.S. 949 (1994).

United States v. Finch, 16 F.3d 228 (8th Cir. 1994). (Finch contended her sentence was improper because it was determined in part by looking at conduct trial Court should not have considered. Relevant conduct includes reasonably foreseeable acts of others in furtherance of jointly undertaken criminal activity. Finch was convicted of conspiracy to distribute cocaine as well as one count of distribution of cocaine. Thus, amounts of cocaine for which Finch can be held responsible need not have been proven beyond reasonable doubt (but only by preponderance of evidence) and trial Court, therefore, could have considered amounts of cocaine involved in counts that did not result in conviction because they were part of conspiracy.)

United States v. Matthews, 5 F.3d 1161 (8th Cir. 1993). (Where District Court calculated amount of cocaine at 2.994 kilograms based upon PSR estimations of .24 grams per rock and only evidence offered at sentencing hearing concerning weight of rock was from police officer who testified rock in Southwest Arkansas weighs approximately .1 gram, this Court vacates “relevant conduct” determination so District Court might conduct new hearing at which parties present evidence to assist in determining accurate weight of crack. District Court did not rely on any evidence presented during sentencing hearing in determining weight of rock and only evidence

presented at hearing differed materially from weight figure eventually used by Court.

Matthews contended District Court erroneously sentenced him on basis of information given by Keith Burton who testified before grand jury he has sold crack for Matthews. At sentencing hearing, Burton recanted and testified he had never sold crack for Matthews and had testified falsely before grand jury because he had been coerced by DEA agent. This Court cannot say District Court s decision to discredit Burton s testimony at sentencing and to rely upon his grand jury testimony, was clearly erroneous.)

United States v. Ortiz-Martinez, 1 F.3d 662 (8th Cir. 1993). (This Court agrees entire amount of cocaine distributed by conspiracy was reasonably foreseeable to Fuentez. Substantial evidence showed he was personally involved in conspiracy from beginning to end--he began working as worker and money courier and was directly implicated in conspiracy by testimony of at least five witnesses. He figured prominently in several of law enforcement events involved in conspiracy, e.g., he sold undercover officer and police informant quarter kilogram of cocaine for $7,000.

Likewise, given District Court s opportunity to hear testimony and ascertain credibility of numerous witnesses, this Court did not find it clearly erroneous to attribute to Ramirez total amount of cocaine involved in conspiracy. Ramirez played important role in conspiracy working as courier/middle-man; he received $5,000 and delivered vehicle containing 9 kilograms of cocaine; and he made false exculpatory statement to police shortly after his arrest. Conspiracy leaders plainly believed Ramirez worthy of sufficient trust to handle 9 kilograms of cocaine worth about $207,000; strong circumstantial evidence--both documentary and testimonial--indicated his willing participation in full extent of conspiracy.

Similarly, District Court did not clearly err in attributing to Rodriguez amount of cocaine it did where government presented substantial evidence Rodriguez played important role in conspiracy. He directed $5,000 be wired to pay off cocaine debts to New Jersey operation. When he came to St. Louis, he came in supervisory capacity, collecting money to correct prior losses in trans-continental drug enterprise and managing dealing and distribution aspects of many members of conspiracy. He was sometimes referred to as "big boss" and his involvement in personally arranging delivery of 9 kilograms of cocaine and acting in managerial capacity with respect to enterprises s St. Louis contacts demonstrated his central role in conspiracy.)

United States v. Abanatha, 999 F.2d 1246 (8th Cir. 1993). (This Court rejects Mark s argument that his sentence is too long because he was held accountable for possessing more marijuana (125 pounds) than he was originally charged with (42 pounds). Court, when fixing defendant s sentence, may consider amounts of drugs from defendants other drug dealings--not one defendant was convicted of--provided these other dealings were part of same course of conduct of scheme.), cert. denied, 511 U.S. 1035 (1994).

United States v. Montanye, 996 F.2d 190 (8th Cir. 1993) (en banc). (Montanye joined ongoing conspiracy to manufacture methamphetamine by agreeing to supply laboratory glassware to others knowing they would use it to manufacture drug. Though Montanye did not appeal his sentence, panel of this Court remanded case for resentencing after concluding it was gross

miscarriage of justice to hold Montanye responsible for 37.5 kilograms producible from chemicals on hand when laboratory was discovered. Following en banc hearing, Montanye s jury conviction for attempt to manufacture methamphetamine was affirmed by equally divided vote of Court. En banc Court affirmed sentence which was based on 37.5 kilograms as Montanye did not object to PSR s foreseeability statement in District Court. This Court restates its holding that when conspiracy defendant does not make objection disputing factual issue of foreseeability, District Court is not required to make foreseeability findings. Likewise, government is not obliged to present evidence in support of PSR s factual statements unless defendant disputes those facts. In addition, forfeited error was not prejudicial as Montanye s sentence would be same even if his suggested number of kilograms was used in calculation. CONCURRENCE: Even assuming error, there would be no plain error, as same sentence would have been called for by Montanye s position at sentencing (no prejudice, no effect on outcome of proceedings). DISSENT: Gross injustice exists. This Court should reach issue and remand case to District Court to consider modifying sentence because record does not show Montanye knew quantity of methamphetamine to be produced by his co-conspirators. Post-conviction remedy advised as appropriate.)

United States v. Garrido, 995 F.2d 808 (8th Cir.) (While Ismael s simple knowledge that housemate possessed given [additional] amount of marijuana is not enough to attribute total amount to him, it was not clearly erroneous for District Court to determine marijuana seized in both locations was in furtherance of Ismael s agreement with housemate as Ismael also helped package marijuana which was similar in both locations. Whether possession of marijuana in house was in furtherance of conspiracy and reasonably foreseeable to two other defendants, must be determined on remand.), cert. denied, 510 U.S. 926 (1993).

United States v. Williams, 994 F.2d 1287 (8th Cir. 1993). (District Court s implicit finding that alleged negotiation for quarter pound was part of same course of conduct as actual sale of 3.5 grams that was offense of conviction, was not clearly erroneous. Negotiation and sale involved similar conduct which occurred at almost same time.)

United States v. Jones, 994 F.2d 456 (8th Cir. 1993). (Applicability of cross-reference provisions to be determined on basis of all acts committed by defendant that occurred during commission of offense of conviction and in preparation for or in furtherance of that offense.

Conduct relevant to charges dismissed pursuant to plea agreement may be considered by District Court at sentencing.)

United States v. Travis, 993 F.2d 1316 (8th Cir.) (District Court did not commit plain error in including entire quantity of drugs recovered from all individuals arrested in connection with case, where jury found Travis was member of conspiracy and quantities of cocaine reflected conduct of other conspirators in furtherance of conspiracy that was reasonably foreseeable by Travis.), cert. denied, 510 U.S. 883 and 510 U.S. 889 (1993).

United States v. Edwards, 994 F.2d 417 (8th Cir. 1993). (For sentencing purposes, Mason was directly involved in 93 kilograms of cocaine where government informant testified Mason helped break cocaine down and made all but one delivery to him.

PSR s of Edwards and Jones, which included lengthy addenda in response to objections, combined with sentencing judge (who had presided at trial) expressly overruling objections that affected sentence and found quantities attributed to Edwards and Jones in PSR s were accurate combined to support 93 kilograms as reasonably foreseeable quantities.), cert. denied, 510 U.S. 1048 (1994).

United States v. Lewis, 987 F.2d 1349 (8th Cir. 1993). (Government appealed District Court s decision not to include Lewis s actions in flying marijuana into country in 1982 as relevant conduct. This Court affirms where, compared with charged offense, asserted relevant conduct involved different drug; flying drugs into country instead of actively distributing; and different people.)

United States v. Nichols, 986 F.2d 1199 (8th Cir. 1993). (This Court holds it was not clearly erroneous for trial Court to find Nichols s other drug transactions were part of same course of conduct as his dealings with undercover government agent where testimony indicated some of sales occurred during same period of time as offenses of which Nichols was convicted; buyers of cocaine and marijuana would be same regardless of source of drugs; all of Nichols s transactions took place in Arkansas.)

United States v. Starr, 986 F.2d 281 (8th Cir. 1993). (The government has burden of proving relevant conduct with reliable evidence. Where government conceded before sentencing that it could prove no losses beyond those resulting from offense of conviction, it was reasonable for Starr s attorney to assume government would not attempt to prove allegations other than conduct involved in offense of conviction.)

United States v. Redlin, 983 F.2d 893 (8th Cir. 1993). (District Court s conclusion that amounts from dismissed charges were properly included did not constitute clear error where Redlin admitted he had disposed of, without authority, all grain for which he was initially charged and these actions were part of continuing course he undertook to cover up for missing grain.), cert. denied, 510 U.S. 820 (1993).

United States v. Rogers, 982 F.2d 1241 (8th Cir. 1993). (Philipp argued District Court erred as matter of law in attributing all quantities of LSD implicated in conspiracy to him based solely upon his conviction of conspiracy. Where Court could sentence Philipp for LSD possessed and sold by co-conspirator only if found by preponderance of evidence that co-conspirator s activities were in furtherance of conspiracy and were either known to Philipp or were reasonably foreseeable to him, this Court vacates sentence and remands for resentencing with direction that District Court make express findings concerning foreseeability.)

United States v. Chatman, 982 F.2d 292 (8th Cir. 1992). (District Court did not clearly err in determining Chatman s possession of 4.58 grams of crack was part of same course of conduct as crack distribution offense for which she was convicted. Chatman did not use crack herself; cash was found in purse along with crack; she had sold crack at least two times during week prior to seizure; and, in all three instances, crack was located in plastic bag kept on Chatman s person.)

United States v. Alexander, 982 F.2d 262 (8th Cir. 1992). (District Court did not clearly err in finding entire quantity of drugs foreseeable to Alexander and Jones. Alexander, while armed, accompanied leader of conspiracy when marijuana was delivered and money collected; Alexander also received money on behalf of leader. While Jones did not enter conspiracy until July 1989, once he began involvement, he transported large sums of money and was one of participant s step-father with whom he probably shared residence.

The District Court, however, failed to explain basis of holding Roberts accountable for 5,000 pounds (and he was arrested in 1988 well before end of conspiracy); thus, this Court is unable to decide whether finding was supportable and remands for redetermination of foreseeable quantity as to Roberts.), cert. denied, 512 U.S. 1244 (1994).

United States v. Prendergast, 979 F.2d 1289 (8th Cir. 1992). (Prendergast argued District Court incorrectly applied Guidelines by refusing to include as relevant conduct uncharged amount of net loss to two other investors he defrauded (totaling $243,000) for purposes of § 2F1.1(b)(1). (He took position to support his argument for concurrent state-federal sentences and for lower criminal history category). This Court concludes two transactions constituted relevant conduct as sales of promissory notes to two [other] investors clearly involved pattern of continuous conduct that was part of common scheme or plan as offense of conviction.)

United States v. Hayes, 971 F.2d 115 (8th Cir. 1992). (Postal inspectors discovered 24.3 grams of crack in package and replaced all but 10 grams with substitute substance. Hayes, who picked up package and delivered it to his cousin, was sentenced for conspiracy to distribute cocaine base on basis of full 243 grams. This Court vacates ten-year sentence and remands for further factual findings and resentencing where 243 grams may not have reflected Hayes s culpability if he reasonably believed package contained smaller quantity, intended primarily for his cousin s personal use.)

United States v. Jones, 965 F.2d 1507 (8th Cir.) (Hooks argued District Court erred in finding he participated in conspiracy to distribute at least 50 grams of crack; rather, he should have been sentenced based on amounts of crack that he actually sold (according to PSR, .5 grams). While District Court rejected government s argument that there was sufficient trial evidence to prove Hooks could foresee co-conspirator s large crack deals, it believed itself bound by jury s guilty verdict on count of indictment charging Hooks conspired to distribute more than 50 grams of crack. This Court acknowledges that in multi-level drug networks, defendants may aid conspiracies that span far beyond their actual participation. For activities to be reasonably foreseeable, they must fall within scope of agreement between defendant and co-conspirators. This Court vacates Hooks s sentence and remands where District Court gave jury generic conspiracy instruction which did not require linking Hooks to specific quantity of crack; Hooks received small quantities to sell and smoked much of it himself; and Hooks never received benefits from large quantity sales. DISSENT: Jury s verdict (Hooks was guilty of crime charged in Count One of indictment) was finding as to quantity which required ten-year mandatory minimum sentence. Moreover, there was evidence quantities handled by co-conspirators were reasonably foreseeable to him.), cert. denied, 506 U.S. 924 (1992).

United States v. Olderbak, 961 F.2d 756 (8th Cir.) (Based on record, District Court s findings were not clearly erroneous where co-conspirator Serpa s continued distribution was clearly foreseeable and that he had several regular purchasers of cocaine. Thus, Court s estimate (authorized by § 2D1.4, comment. 2) that cocaine amounts received by Serpa would be three times amount previously transferred between Olderbak and Serpa, was not error.), cert. denied, 506 U.S. 959 (1992).

United States v. Schwarck, 961 F.2d 121 (8th Cir. 1992). (Schwarck argued there was no evidence to show larger amounts of cocaine were attributable to him personally or distribution thereof by co-conspirators was reasonably foreseeable. Review of record did not indicate District Court s finding was clearly erroneous.)

United States v. Morton, 957 F.2d 577 (8th Cir. 1992). (The "offense of conviction" is substantive offense to which defendant pleads guilty. Where Morton pleaded guilty to three counts of mail fraud in open Court and specifically denied knowledge that cars involved in conspiracy count had rolled-back odometers, Morton could not be sentenced for loss on conspiracy s cars without further proof. This Court remands for District Court determination as to whether conspiracy is relevant conduct for calculation of loss under § 2F1.1.)

United States v. Quarles, 955 F.2d 498 (8th Cir. 1991). (A jury acquitted Quarles of aiding and abetting in possession of 210 grams of crack and convicted him of conspiring to possess crack with intent to distribute. 210 grams of crack had been found on Quarles s co-defendant/co-conspirator Brown. District Court did not err in using this amount to calculate Quarles s base offense level; evidence presented was sufficient to sustain conviction of conspiracy to possess with intent to distribute in excess of 50 grams. DISSENT: Considered inconsistent jury verdict mitigating factor not considered by Guidelines and urged adoption of United States v. Davern, vacated, reh g en banc granted, reasoning which provided for more flexible sentencing approach.)

United States v. Watts, 950 F.2d 508 (8th Cir. 1991). (Guidelines Manual requires conversion of certain assets associated with drug activity into quantities of drug. Left to Courts are determination of what numerator (assets to be converted) and denominator (drug unit value) are to be used.), cert. denied, 503 U.S. 911 (1992).

United States v. Hewitt, 942 F.2d 1270 (8th Cir. 1991). (This Court finds no merit in Hewitt s argument that his guilty plea "forced" co-defendant to plead guilty and therefore, none of co-defendant s statements could be used against him. District Court was not clearly erroneous in attributing 42 grams of cocaine from one Aberdeen trip to Hewitt; nothing prevents District Court from using statements of co-defendant in determining amount of drugs attributable to defendant.

This Court reverses and remands, however, on inclusion of amounts based on information cooperating co-defendant gave to police officer as information did not clearly establish dates of deliveries or amounts of cocaine involved. Moreover, because government knew about information before plea agreement was signed, this Court holds government should not be able to use information later to punish Hewitt for these additional amounts. Resentencing to be based on 436 grams of cocaine.)

United States v. Hammer, 940 F.2d 1141 (8th Cir. 1991). (This Court rejects Hammer s claim her seeming acts of participation in conspiracy (five kilograms of cocaine or more) were merely instances of innocent association with drug dealers where five co-conspirators testified Hammer made many cross-country car trips transporting cocaine, allowed her house to be used as storage place and distribution center for drugs, and personally organized transactions (involvement with 50 or more kilograms). CONCURRENCE: Written to point out sentencing disparity continues to exist under Guidelines (nine defendants, of which Hammer is one, from Plukey Duke cases used as illustration); defendants who go to trial pay heavy premium for their choice; prosecutor largely determines sentence of defendant by deciding who, what, and when to charge. Also takes issue with probation office using prosector s file to ascertain information from trial proceedings.)

United States v. Payne, 940 F.2d 286 (8th Cir. 1991). (Four defendants argued their sentences were unconstitutionally imposed because indictments failed to specify crack would be included in determining amount of drugs used to calculate their sentences. Whether uncharged drugs are part of common scheme or plan is factual finding. Majority expressed no doubt that crack for which defendants were sentenced was part of same conspiracy as charged in counts of conviction. DISSENT: Indictment neither specified amounts of powder cocaine involved in each count nor alleged conspiracy involved crack. This practice should not be permitted as it gives prosecution opportunity to "indict for less serious offenses which are easy to prove and then expand them in probation office." Here law enforcement officials were aware of nature of drugs involved in conspiracy before indictment was returned. Existence of crack is not merely "sentencing fact" when such finding can double or triple sentence. Government s failure to charge crack meant defendants did not have notice of charges and likely penalties. No evidence at trial two of defendants participated in distribution of crack.)

United States v. Townley, 929 F.2d 365 (8th Cir. 1991). (This Court finds error in District Court s sentencing Townley for amount of cocaine found in another s apartment where government relied on undisclosed informant s hearsay statements; police investigation failed to corroborate critical aspects of informant s story; police search of Townley s apartment failed to produce alleged drug proceeds and government never called any knowledgeable person to explain absence of proceeds or to delineate connections among individuals (government elected not to charge conspiracy); government produced no chemical evidence to establish Townley s cocaine and that found in apartment came from same source. Error also found in sentencing Townley for drugs which were part of his half-brother s purported drug operation. Government evidence lacked proof of Townley s knowledge that he was not just doing half-brother favor by picking up package. Medallions, group picture and hearsay statements were not inconsistent with "favor" analysis.)

United States v. Lawrence, 918 F.2d 68 (8th Cir. 1990). (Fact that Lawrence profited from one transaction and knew about other was sufficient to show conspiratorial involvement in 481.95 grams of cocaine; there was sufficient evidence to conclude Lawrence knew at some point in Chicago trip he and cohort were in possession of two kilograms. Unnecessary for this Court to consider transactions which wouldn t affect base offense level. DISSENT: Record shows no proper tie-in between charged conspiracy and drug tabulation.), cert. denied, 499 U.S. 941 (1991).

United States v. Frondle, 918 F.2d 62 (8th Cir.) (District Court attributed 5.701 kilograms of cocaine to Frondle for purposes of sentencing. Frondle acknowledged in his plea agreement awareness or foreseeability of at least two kilograms. Frondle argued witness was inherently unreliable, witness s allegations were uncorroborated and therefore must be disregarded, and he adequately rebutted any finding that certain transfers were part of conspiracy to which he was party. This Court states witness s credibility is for District Court to determine; District Court may consider uncorroborated evidence provided defendant is given opportunity to explain or rebut; it was not clear error to find transfers reasonably foreseeable by Frondle or that transfers were made in furtherance of conspiracy to which Frondle was party. This Court need not determine whether attribution of 701 grams was error in that underlying base offense level would not change.), cert. denied, 499 U.S. 941 (1990).

United States v. Barragan, 915 F.2d 1174 (8th Cir. 1990). (Where middleman Barragan was properly convicted of aiding and abetting extortion and collection of gambling debt, enhancement was proper because he was involved in criminal activity undertaken in concert with others (1B1.3(a)(1)), co-defendant s display of gun (2E2.1(b)(1)(C)) was in furtherance of jointly undertaken extortionate activity and conduct was reasonably foreseeable by Barragan.)

United States v. Lawrence, 915 F.2d 402 (8th Cir. 1990). (It was not clearly erroneous for District Court to determine Lawrence s marijuana and cocaine involvement constituted same course of conduct (lengthy discussion of broad and narrow views of scope of relevant conduct and contrasts with common scheme or plan).)

United States v. Hoelscher, 914 F.2d 1527 (8th Cir. 1990). (Giuffrida s contention that only two kilograms in count to which he pleaded guilty should be considered in computing Guideline range, rejected as trial evidence showed he was involved in distribution of five or six kilograms of cocaine. All relevant conduct can be considered to arrive at Guideline range.), cert. denied, 498 U.S. 1090 (1991).

United States v. Peters, 912 F.2d 208 (8th Cir. 1990). (District Court may properly determine quantity of narcotics in sentencing. Here, evidence at trial established 88 grams of cocaine used for sentencing, though this Court commented that weight of cocaine could have been developed with more precision, urging prosecutors to use more care.), cert. denied, 498 U.S. 1094 (1991).

United States v. Phillippi, 911 F.2d 149 (8th Cir.) (Phillippi argued only two kilograms of cocaine seized on her arrest should be considered. District Court s finding that various cocaine deliveries about which DEA informant testified were all part of common scheme involving at least ten kilograms, was not clearly erroneous. Though Court should have used six, rather than ten, kilograms in sentencing Phillippi, base offense level was same and sentence was squarely within range--harmless error.), cert. denied, 408 U.S. 1036 (1990).

United States v. Johnson, 906 F.2d 1285 (8th Cir. 1990). (District Court properly took into account quantities of cocaine not wholly accounted for in indictment but which reliable evidence

connected to defendants.)

United States v. Cohoon, 886 F.2d 1036 (8th Cir. 1989). (Information relating to criminal activity for which defendant was not prosecuted and uncorroborated hearsay evidence can be properly considered by District Court provided defendant has had opportunity to explain or rebut evidence; in this case, District Court held defendant accountable for 2 kilos of cocaine even though arrest and conviction involved sale of 3 ounces of cocaine.)

United States v. Allen, 886 F.2d 143, 145-46 (8th Cir. 1989). (No violation of ex post facto to punish defendant for amounts involved in conspiracy begun before effective date of Guidelines and continued afterward.)

United States v. Ehret, 885 F.2d 441, 445 (8th Cir. 1989). (Possession of cocaine prior to arrest related to ongoing conspiracy properly considered in imposing sentence.), cert. denied, 493 U.S. 1062 (1990).

United States v. Koonce, 884 F.2d 349, 352 (8th Cir. 1989). (Proper to use estimate of drugs received by informant in calculating total amount of drugs.)

United States v. Mann, 877 F.2d 688, 690 (8th Cir. 1989). (Defendant may be sentenced using amount sold to agent by co-defendant for which defendant was not indicted because evidence demonstrated sale was part of common scheme.)

**§ 1B1.3(a)(1) (Defendant's Own Acts and Other Participants' Reasonably Foreseeable Acts):**

United States v. Perez-Guerrero, 334 F.3d 778 (8th Cir. 2003) (HANSEN,* LOKEN, SMITH). (District Court did not err in determining that defendant remained part of drug conspiracy while he was incarcerated. Evidence showed that defendant continued to direct others in shipment and sale of drugs and collection of proceeds therefrom. Defendant is therefore responsible for all reasonably foreseeable acts of co-conspirators.)

United States v. Burns, 276 F.3d 439 (8th Cir. 2002) (BOWMAN, MORRIS SHEPPARD ARNOLD,* BYE). (Defendant argued that District Court should not have included in its loss calculation losses resulting from co-conspirators' fraudulent credit card transactions, because those co-conspirators were involved in another conspiracy separate and apart from one with which defendant was involved. This Court affirms, finding sufficient evidence of single conspiracy: defendant taught co-conspirators how to engage in credit card fraud, and he thereby aided or abetted their subsequent commission of such fraud.)

United States v. Scott, 243 F.3d 1103 (8th Cir. 2001) (McMILLIAN, BOWMAN, LOKEN*). (Defendant argued District Court erred in finding all drugs attributed to conspiracy were reasonably foreseeable to him; this contention was waived because defendant's plea agreement provided applicable base offense level would be 36. In any event, contention lacks merit because District

Court stated it had heard trial of other defendants and found that challenged drug sales were reasonably foreseeable relevant conduct. Court was entitled to consider relevant evidence introduced at trial of codefendant, and testimony at that trial amply demonstrated challenged sales were reasonably foreseeable to defendant as leader of conspiracy. District Court's drug-quantity finding thus was not clearly erroneous.)

United States v. Davidson, 195 F.3d 402 (8th Cir. 1999) (McMILLIAN, MURPHY,* TUNHEIM). (District Court found Davidson responsible for 286 grams of methamphetamine, based on methamphetamine and pseudoephedrine found in lab. Davidson argues this quantity was not reasonably foreseeable to her, but trial evidence showed lab's production was both within scope of conspiracy Davidson joined, and was reasonably foreseeable to her: she ordered, picked up, and delivered precursor chemical to person owning home in which lab was located; and amount of chemicals she delivered, when combined with third ingredient, was sufficient to produce up to 2,500 grams of methamphetamine.), cert. denied, 528 U.S. 1180 and 529 U.S. 1093 (2000).

United States v. Beal, 940 F.2d 1159 (8th Cir. 1991). (Beal objected to inclusion of nine kilograms of cocaine found in inventory search of Sandra Jefferson s rental car, in determination of Beal s sentence. This Court finds "no abuse of discretion" in determining quantity of drugs attributable to Beal where evidence showed Beal and Jefferson were closely associated and essentially partners in drug business.)

United States v. Payne, 940 F.2d 286 (8th Cir. 1991). (This Court concludes District Court correctly calculated defendants base offense levels where District Court considered each defendant who was part of conspiracy individually, gauging each defendant s relative involvement and knowledge of quantities of cocaine and crack distributed in Lincoln through drug ring, e.g., leaders accountable for total weight, two defendants found to have no ties to conspiracy after March 1988.)

United States v. Foote, 920 F.2d 1395 (8th Cir. 1990). (Where Foote complained of lack of connection between her and drug quantities involved to support range assigned, this Court notes District Court may consider quantities reasonably foreseeable to defendant; here, Foote could be said to have had constructive possession of quantities seized at apartment anyway.)

United States v. Rowe, 911 F.2d 50 (8th Cir. 1990). (Facts establishing close "working relationship" between Rowe and Hawkins during October investigation of their activities in housing project close to schoolhouse sufficient for inclusion of half-gram sold by Hawkins on October 10, in computing Rowe s sentence.)

United States v. Drew, 894 F.2d 965 (8th Cir.) (In calculating base offense level for defendant convicted of conspiracy, District Court properly considered entire quantity of drugs and firearms found at drug house, rather than only cocaine sold by defendant himself.), cert. denied, 494 U.S. 1089 (1990).

**§ 1B1.3(a)(2) (Same Course of Conduct or Common Scheme or Plan):**

United States v. Anderson, 243 F.3d 478 (8th Cir.) (MORRIS SHEPPARD ARNOLD,* J. R. GIBSON, GOLDBERG). (Defendant contends Court erred by including drug quantities associated with events from 1994 and 1996, several years before conspiracy to which he pleaded guilty. District Court did not err. Sentencing hearing testimony indicated defendant was longtime cocaine dealer interrupted only by occasional stays in prison. While these events were separated temporally from charged conduct, evidence shows he was engaged in career of drug dealing going back to at least 1994. Events were thus close to charged conduct in both similarity and regularity. Evidence supports finding that events were part of same course of conduct as charged conduct and District Court properly found they constituted relevant conduct.), cert. denied, 534 U.S. 903 and 534 U.S. 929 (2001).

United States v. Howard, 235 F.3d 366 (8th Cir. 2000). (McMILLIAN, RICHARD S. ARNOLD,* BOWMAN). (**Robinson.** Robinson argued he should not be held accountable for losses from Iowa investors because they were not charged in indictment. However, his actions in Iowa were part of same course of conduct or common scheme or plan as offense of conviction. Robinson told two Iowa investors they could pool their money to trigger line of credit to purchase Guaranteed Insurance Contracts, which would then be resold at profit. This was identical to claims made to investors involved in indicted offenses. Also, Robinson's actions in Iowa and criminal activity in indictment involved same *modus operandi*. District Court's determination that Robinson's activities in Iowa were relevant conduct under § 2F1.1 and should be added to total loss was not clearly erroneous.
**Howard.** Howard agues losses attributed to him were not reasonably foreseeable acts by others that he would have known about or anticipated. However, evidence suggests criminal activity in Iowa, like charged activity, was joint effort by Howard and Robinson. Howard solicited investor using same representations Robinson made to Iowa investors. Moreover, soon after Robinson's solicitation prompted two parties to deposit money into particular account, Howard arranged wire transfer from that account to his friend's personal account. Likewise, Howard knew third party (Walker) would recruit other investors; he faxed sample contract to Walker instructing potential investors into which account to deposit their money; he told Walker what terms should appear in contract; and Howard knew that accounts from which he arranged transfers contained investor funds. Thus, losses resulting from indicted criminal activity as well as that taking place in Iowa were reasonably foreseeable to Howard.)

United States v. Navarrete-Barron, 192 F.3d 786 (8th Cir. 1999) (HANSEN,* MAGILL, JONES). (Appellant was convicted of conspiracy to distribute controlled substances, and of possession with intent to distribute. Even if possession-with-intent count were to be reversed, 392 grams of cocaine base handled by Navarette-Barron and found in his car would still be part of sentence imposed with respect to conspiracy conviction as "part of same course of conduct or common scheme or plan as offense of conviction.")

United States v. Balano, 8 F.3d 629 (8th Cir. 1993). (Balano was tried for conspiracy to distribute more than five kilograms of cocaine in early 1991 and distribution of one ounce of cocaine in December 1991; jury acquitted him on conspiracy count and convicted him on distribution count. At sentencing, District Court found evidence was clear and convincing Balano had participated in

conspiracy charged, but it also held Balano s participation in that conspiracy was not relevant conduct that had to be considered under Guidelines. Government appealed, challenging trial Court s factual finding that Balano s participation in conspiracy was not part of same course of conduct or common scheme or plan as distribution for which he was convicted. This Court holds only appropriate standard of review is clear error and based on record and trial Court s written findings and conclusions, trial Court s conclusions as to relevant conduct are not clearly erroneous.)

United States v. Young, 992 F.2d 207 (8th Cir. 1993). (Undisputed facts indicated Young obtained all Dilaudid tablets as part of same course of conduct or scheme. This Court rejects Young s argument District Court should not have included tablets obtained for personal use pursuant to valid prescriptions as doctors indicated they would not have given Young prescriptions if they had known about all Dilaudid he had obtained. Moreover, even Young s testimony suggested he had not been using drug for medicinal purposes. This Court agreed Court erred in including tablets that were basis of Young s prior Oklahoma conviction, but exclusion of those tablets would not change Young s base offense level (§ 2D1.1(c))(5)).)

United States v. Calva, 979 F.2d 119 (8th Cir. 1992). (This Court rejects Calva s challenge to Sentencing Commission s statutory authority to promulgate relevant conduct guideline, largely relying on Galloway.)

United States v. Galloway, 976 F.2d 414 (8th Cir. 1992). (Galloway pleaded guilty to one count of theft from interstate shipment (stealing truckload of tires) and count 2 (transporting stolen vehicle in interstate commerce) was dismissed. Government appealed Galloway s 24-month sentence based on single count. Panel of this Court concluded Sentencing Commission exceeded its authority to encompass unconvicted criminal conduct at issue in case (seven interstate property offenses totaling $1,009,950). It affirmed sentence without reaching constitutional issues, holding provision unenforceable insofar as it permitted offenders to be systematically penalized for factually and temporally distinct property crimes that had neither been charged by indictment nor proven at trial. Upon en banc consideration, this Court reversed, holding statutory authority exists in 28 U.S.C. § 994(c)(2) for adoption of relevant conduct guideline ("cornerstone" of federal sentencing guideline system); moreover, constitutional arguments are answered by Supreme Court s opinion in McMillan v. Pennsylvania. Though consideration of uncharged thefts almost triples Galloway s sentencing range, section 1B1.3, as applied here, does not transgress limits of due process. Proof, by preponderance of evidence, of uncharged conduct required and Court must make ultimate decision as to whether conduct is relevant in terms of sentencing enhancement. DISSENT: With promulgation of § 1B1.3(a)(2), Sentencing Commission created sentencing policy without authority from Congress. Appropriate place for consideration of unconvicted conduct is under § 1B1.4. DISSENT: Disparity resulting from § 1B1.3 is flourishing in federal Courts. Relevant conduct Guidelines are political aberration, repugnant to basic principles of fair process traditionally thought indigenous to our federal criminal laws.), cert. denied, 507 U.S. 974 (1993).

United States v. Davila, 964 F.2d 778 (8th Cir.) (No clear error in District Court s finding that Davila s distribution of marijuana to states other than Nebraska was part of same course of

conduct as charged conspiracy.), cert. denied, 506 U.S. 964 (1992).

United States v. Montoya, 952 F.2d 226 (8th Cir. 1991). (In addition to crime of conviction which involved distribution of two kilos of cocaine, District Court included as relevant conduct to determine base offense level of 37, three additional drug transactions--two involving cocaine and one, 4900 pounds of marijuana. Montoya argued marijuana negotiations were completely unrelated to Omaha cocaine conspiracy and therefore should not have affected his sentence. District Court had expressed reservations about inclusion of marijuana negotiations, but reflected on "broad view" of "same course of conduct" taken by United States v. Lawrence. This Court remands for resentencing, stating Guidelines require some meaningful relationship among additional drug transactions before discreet transactions in different drugs may be attributed to same course of conduct or common scheme; proof of such relationship was lacking here. Court also emphasizes fact intensive inquiry required in which District Court is given broad discretion to assess relevant facts.)

United States v. Sparks, 949 F.2d 1023 (8th Cir. 1991). (Sparks argued District Court erred by admitting evidence of 7.5 grams of cocaine found on persons in basement. Evidence properly admitted, but argument as to whether 7.5 grams should be attributed to him need not be addressed where his offense level would remain same regardless.)

United States v. Barton, 949 F.2d 968 (8th Cir. 1991). (Where District Court calculated Barton s base offense level by adding amount of drugs involved in his 1989 offense of conviction (possession of marijuana with intent to distribute) with amount of drugs involved in 1983 state conviction for possession of marijuana, this Court remands for resentencing. Under no circumstances could Barton now be criminally liable or accountable in 1989 for conduct which resulted in his 1983 conviction; thus, Barton s actions in 1983 cannot be considered part of same course of conduct which resulted in 1989 conviction. District Court misapplied Guidelines. It should have considered 1983 conviction in calculation of Barton s criminal history category, not his offense level.)

United States v. Fuller, 942 F.2d 454 (8th Cir.) (This Court agreed testimony of buyer provided sufficient circumstantial evidence to establish that Leon was responsible for purchase of three ounces of methamphetamine. This Court held District Court s finding that Leon obtained three quarters of ounce of cocaine from supplier and gave it to customer formed link in furtherance of conspiracy, was not error; business practice of keeping valued customers happy with Christmas gifts was part of ongoing drug conspiracy. District Court was correct in considering these acts part of same course of conduct or common scheme or plan.), cert. denied, 502 U.S. 914 (1991) and 501 U.S. 1039 (1992).

United States v. Franklin, 926 F.2d 734 (8th Cir.) (Franklin argued District Court erred in sentencing him on basis of amount of cocaine originally in package intercepted by postal inspector who substituted flour for all but one ounce of four kilos, because he did not have constructive possession. This Court holds District Court acted correctly, looks to reasoning in United States v.

White, 888 F.2d 490 (7th Cir. 1989).), cert. denied, 502 U.S. 881 (1991).

United States v. Russell, 913 F.2d 1288 (8th Cir. 1990). (Record supported use of aggregate value of goods and transactions for which co-defendants were indicted and Russell stipulated to some involvement in theft of that amount.), cert. denied, 500 U.S. 906 (1991).

United States v. Streeter, 907 F.2d 781 (8th Cir. 1990). (No misapplication of Guidelines where District Court included 1/8th ounce of MDA from dismissed charge for sentencing purposes. No distinction made between uncharged and dismissed counts in appropriateness of inclusion of quantities of drugs in calculating base offense level.)

United States v. Sleet, 893 F.2d 947 (8th Cir. 1990). (To arrive at base offense level, District Court properly considered quantity of cocaine seized from defendant s person, van, and residence at time of arrest in addition to amount involved in DEA buy where District Court found uncharged conduct was part of same course of conduct or common scheme.)

United States v. Natal-Rivera, 879 F.2d 391, 392-93 (8th Cir. 1989). (Alleged offenses in dismissed counts were properly considered in sentencing defendant who pleaded guilty to one distribution count.)

**§ 1B1.4 (Information to be Used in Imposing Sentence):**

United States v. Harris, 997 F.2d 1235 (8th Cir. 1993). (Harris took issue with District Court sentencing him towards top of Guidelines range; he argued Court based his sentence on factors already taken into account in Guidelines. This Court observes District Court s specific reasons went beyond general basis in Guidelines for fixing sentencing range and thus, there was no error of law; Court specifically referred to quantity of drugs and weapons, fact that two weapons were stolen, and nature of Harris s prior conviction.), cert. denied, 510 U.S. 1055 (1994).

United States v. Smith, 909 F.2d 1164 (8th Cir. 1990). (Post-arrest statements used against Smith at sentencing did not deny him due process. Other than constraints of Constitution, no limitation shall be placed on information concerning defendant.), cert. denied, 498 U.S. 1032 (1991).

United States v. Mendoza, 902 F.2d 693 (8th Cir. 1990). (Where District Court imposed single sentence of 66 months imprisonment for conspiracy, possession and distribution offenses based on aggregating quantity of drugs involved, case remanded for resentencing as this Court could not be certain that trial Court did not increase Mendoza s sentence because of number of his separate convictions under 21 U.S.C. § 841(a)(1). This Court concluded Mendoza s separate convictions for distributing cocaine and for possessing cocaine with intent to distribute were based on same act and thus, one of convictions is impermissible.)

United States v. Lang, 898 F.2d 1378 (8th Cir. 1990). (District Court did properly rely on criminal activity for which defendant had not been prosecuted. Court s inquiry is largely unlimited

as to type of information it can consider. Court properly provided defendant chance to rebut or explain.)

**§ 1B1.5(b)(2) (Reference to Subsection or Table in Another Guideline):**

United States v. Kroeger, 229 F.3d 700 (8th Cir. 2000) (BOWMAN, MAGILL, HANSEN*). (An instruction in one Guideline to use particular table from another Guideline (e.g., drug-quantity table) refers only to that table, not any other provision of that other Guideline.)

**§ 1B1.8 (Use of Certain Information):**

United States v. McFarlane, 309 F.3d 510 (8th Cir. 2002) (HANSEN,* MORRIS S. ARNOLD, PRATT). (Where cooperation agreement afforded defendant only § 1B1.8 immunity, District Court was entitled to use incriminating statements he made during cooperation against him in determining whether to grant downward departure and, if so, extent of departure.)

United States v. Buckendahl, 251 F.3d 753 (8th Cir.) (BEAM,* HEANEY, BYE). (Sentencing disparity arising from U.S. Attorney's policy not to grant § 1B1.8 immunity does not provide basis for § 5K2.0 downward departure. This matter is within prosecutor's discretion, and does not produce sort of unwarranted disparity Guidelines were enacted to remedy. DISSENT: this should be basis for downward departure when defendant is substantially prejudiced thereby.), cert. denied, 534 U.S. 1049 (2001).

United States v. Abanatha, 999 F.2d 1246 (8th Cir. 1993). (This Court agrees that it was wrong for PSR to contain immunized information about Katherine s prior involvement in drug dealing: Fifth Amendment and guideline require no less. Regardless of how broadly Sentencing Reform Act may be construed so as to allow District Court to consider as much information as possible about defendant, Act is limited by constitutionally protected rights of that defendant. Here, inclusion did not produce prejudicial error.), cert. denied, 511 U.S. 1035 (1994).

United States v. Cox, 985 F.2d 427 (8th Cir. 1993). (Plain language in plea agreement fit exception, thus allowing use of "debriefing" statements for sentencing purposes. Moreover, PSR was furnished to Cox before his guilty plea was accepted by Court--no element of surprise involved.)

United States v. Stevens, 918 F.2d 1383 (8th Cir. 1990). (Prosecution s disclosure of Stevens s admissions regarding transactions involving 3000 pounds of marijuana for calculation of base offense level was valid, where Stevens violated terms of plea agreement (by using drugs while agreement was in effect) and agreement provided that if Stevens violated its terms, any information he had provided could be used against him.)

**§ 1B1.10 (Sentence Reduction as Result of Amended Range):**

United States v. Hasan, 245 F.3d 682 (8th Cir.) (en banc). (District Court erred in granting

downward departure for post-sentencing rehabilitation at 18 U.S.C. § 3582(c)(2) resentencing. At resentencing, District Court must determine what sentence it would have imposed had retroactive amendment been in effect at time defendant was originally sentenced. Defendant's commendable in-prison conduct should have been considered only to aid District Court in determining whether to sentence defendant within new sentencing range; it was not basis to depart from that range. District Court is only authorized by § 1B1.10 to depart from amended sentencing range when previous departure had been granted at original sentencing, and post-sentencing conduct could not provide grounds for such departure. § 5K2.0 was not relevant, applicable, or pertinent policy statement within language of 18 U.S.C. § 3582(c)(2). DISSENT: for reasons set forth in opinion for panel, 205 F.3d 1072 (8th Cir. 2000).), cert. denied, 534 U.S. 905 (2001).

United States v. Mihm, 134 F.3d 1353 (8th Cir. 1998). (Sentencing Commission s amendment of formula to equate each marijuana plant to 100 grams of marijuana, unless actual weight is greater, Amendment 516, § 2D1.1(c) may be applied retroactively to afford sentencing relief under § 3582(c)(2), § 1B1.10. Where use of amended plant equivalency formula lowered Mihm s BOL to bring mandatory minimum sentence into play, it is appropriate to consider whether safety valve provision should be applied, (§ 3553(f), § 5C1.2).)

United States v. Wyatt, 115 F.3d 606 (8th Cir. 1997). (Pursuant to § 3582(c)(2), Wyatt sought reduction in sentence asking District Court to apply new 100 gram-per-plant equivalency ratio retroactively. Wyatt stated under new amendment his adjusted offense level would be 23 (57-71 months) rather than original range of 108-135 months. Wyatt s original 60-month sentence is within new Guidelines range, but he seeks reduction because at original sentence government moved for departure below both Guidelines range and statutory mandatory minimum. District Court departed below Guidelines range and consequently, Wyatt argues applying amendment entitles him to new point from which departure should occur. Government opposed Wyatt s motion arguing that while it originally moved for departure, it would not have done so had current amendment been in effect; value of Wyatt s assistance no longer warrants departure; Wyatt s potential value as witness was seriously compromised by his subsequent escape from prison; government decision not to charge Wyatt with firearms violation and not to file notice of Wyatt s status as repeat drug offender were made in reliance on expected Guidelines range of 108-135 months. District Court denied Wyatt s motion "for reasons set out in government s response." Wyatt appeals, arguing District Court erred in denying motion because by adopting government s response, Court considered facts contrary to those in record at time of Wyatt s original sentencing and inappropriately considered facts that occurred subsequent to time of original sentencing. Motion to modify under § 3582(c) occasioned by retroactive amendment which alters previous guideline range, requires District Court to make two distinct determinations: by substituting only amended sentencing range for originally determined sentencing range and leaving all other previous factual decisions concerning particularized sentencing factors intact, Court must determine what sentence it would have imposed had new range been range at time of original sentencing; having made first determination, Court must consider that determination together with general sentencing considerations (§ 3553(a)) and in exercise of informed discretion, decide whether or not to modify original sentence previously imposed. In this case, District Court s ruling completely omits first step of decision-making process. Denial of Wyatt s motion absent indication District Court

considered what would have been appropriate sentence under retroactive amendment, constitutes abuse of discretion. On remand, Court must consider what sentence it would have imposed had amendment been in effect at time of original sentencing.

Wyatt contends District Court should not have considered what other charges government might have been able to file had it not entered plea agreement. This Court agrees District Court should not speculate about what charges government chose not to pursue, but District Court is free to consider complete nature of Wyatt s crime, § 3553(a). Wyatt also argues Court erred by not granting motion to modify original sentence. Discretionary decision to depart from Guidelines range on basis of substantial assistance made at original time of sentencing is not "guideline application decision" that remains intact when Court considers new guideline range. Court retains unfettered discretion to consider anew whether departure from new range is now warranted in light of defendant s prior substantial assistance. For purposes of considering where in new Guidelines range Court would have sentenced Wyatt, subsequent escape is not relevant factor; however it is appropriate for District Court to consider escape as relevant to Wyatt s nature and characteristics when determining whether ultimately to grant motion to modify. Regardless of outcome of motion, record must give some indication District Court took into its discretionary decision considerations required by Guidelines, § 3553(a).)

United States v. Adams, 104 F.3d 1028 (8th Cir. 1997). (Adams appealed denial of motion made under 18 U.S.C. § 3582(c)(2) to reduce his sentence based on amendment to Guidelines applicable to his case. Amendment 516 to § 2D1.1(c) changed weight equivalence of marijuana plant for sentencing purposes from one kilogram to one hundred grams. District Court had implicitly adopted number of plants PSR recited from plea agreement, 73 plants (DEA agents had discovered 110 marijuana plants growing on Adams s property). In rejecting Adams s motion, District Court asserted in part that had Adams been held accountable for entire 110 plants, statutorily required minimum imprisonment would have been five years. This Court concludes District Court erred in taking into account possibility Adams was in fact responsible for more than 73 plants when deciding whether to reduce his sentence: for efficiency reasons, trial Courts do not revisit factual findings; Court had already made finding 73 plants for which Adams was going to be held responsible adequately reflected seriousness of actual offense behavior (§ 6B1.2(a)); Guidelines direct District Court in situations like present to consider sentence it would have imposed had amendment been in effect at time of original sentencing (1B1.10(b)). Case remanded for resentencing.

Adams contends District Court erred by neglecting to consider certain matters statutes required it to consider, 18 U.S.C. § 3582(c)(2), and § 3553(a). No requirement District Court mechanically list every consideration of § 3553(a) when it sentences defendant in first instance; there must be evidence Court has considered relevant matters and that some reason is stated for Court s decision. Requirements imposed on Court deciding whether to resentence to explain itself could hardly be more rigorous than those applicable to original sentencing. This Court is satisfied District Court in this case, by mentioning several considerations which are found in § 3553(a), was aware of entire contents of relevant statute. On remand, this Court simply directs District Court s attention to considerations listed in § 3553(a) and reminds it of duty to weigh them in reaching decision.)

United States v. Williams, 103 F.3d 57 (8th Cir. 1996). (Under § 3582(c), defendant sentenced to imprisonment based on sentencing range subsequently lowered by Sentencing Commission, may be entitled to sentence reduction if District Court determines in light of factors set forth in 18 U.S.C. § 3553(a), reduction is consistent with applicable policy statements issued by Commission, § 1B1.10(a), p.s. In order that Williams may receive full benefit of both change in sentencing range and assistance he previously rendered, this Court concludes government may seek § 3553(e) reduction below statutory minimum in conjunction with § 3582(c)(2) reduction. Section 3553(e) contains no time limitation for closing such conclusion. Case remanded for District Court to reconsider sentence reduction.)

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

United States v. Cuervo, 354 F.3d 969 (8th Cir. 2004) (RILEY, HEANEY,* SMITH). (District Court properly applied 1997 Guidelines because evidence at trial showed that drug conspiracy did not end until after their effective date.)

United States v. Frank, 354 F.3d 910 (8th Cir. 2004) (LOKEN, HEANEY, MORRIS ARNOLD*). (District Court properly used Guidelines in effect at time of defendant's offense rather than Guidelines in effect at time of his sentencing. Although newer Guidelines might have benefitted defendant as to certain calculations, overall effect of newer Guidelines would have been higher offense level than that produced by older Guidelines.)

United States v. King, 280 F.3d 886 (8th Cir.) (McMILLIAN, FAGG*, RILEY). (Defendant sentenced under one version of Guidelines may be given benefit of later revision if revision merely clarifies, rather than substantively changes, Sentencing Commission's earlier intent. November 2001 amendments to § 2S1.1 do not apply retroactively because amendments substantively changed Guidelines, and Sentencing Commission did not include § 2S1.1 on list of amendments to be applied retroactively.), cert. denied, 537 U.S. 965 (2002).

United States v. Diaz-Diaz, 135 F.3d 572 (8th Cir. 1998) (FAGG, WOLLMAN,* MORRIS SHEPPARD ARNOLD). (Sentencing Commission's determination that amendment is clarifying change obligates court to apply amendment retroactively unless determination is plainly at odds with Guidelines. 1997 amendment to § 2L1.2 applied retroactively to defendant because of commentary describing amendment as clarifying change.)

United States v. Lambros, 65 F.3d 698 (8th Cir. 1995) (WOLLMAN,* ROSS, MORRIS SHEPPARD ARNOLD). (Courts are bound to use Guidelines in place at time of sentencing, including any clarifying changes not fundamentally inconsistent with Guidelines. 1988 amendment to § 4B1.1 was clarifying change and was appropriately applied to defendant.), cert. denied, 516 U.S. 1082 (1996).

## CHAPTER TWO:
## OFFENSE CONDUCT

**Part A. Offenses Against Person**

**§ 2A1.1 (First Degree Murder):**

United States v. Edwards, 159 F.3d 1117 (8th Cir. 1998) (LOKEN,* LAY, PRATT). (District Court s refusal to depart under § 2A1.1, comment. (n.1) (downward departure may be warranted if defendant did not cause death intentionally or knowingly) was not reviewable because Court was aware of its discretion to depart downward.), cert. denied, 528 U.S. 825 (1999).

United States v. Darden, 70 F.3d 1507 (8th Cir. 1995). (In course of sentencing Seals, District Court found she was accountable for murder of one Ronald Anderson though she was not charged with this murder in indictment; nevertheless, Court considered her involvement in murder to be relevant to her RICO convictions, resulting in BOL 43--the maximum offense level under Guidelines which carries mandatory life sentence--for Seals. Seals did not challenge finding murder was relevant conduct (§ 1B1.3(a)(1)), but argued evidence was insufficient to prove her involvement because evidence relied upon by Court was not credible, despite her concession some evidence implicated her in murder. This Court characterizes Seals s argument as attack on credibility of government witness and on District Court s choice between two permissible views of evidence. As findings based on credibility virtually never constitute clear error, Court s finding was permissible view of evidence; preponderance of evidence establishes Seals aided and abetted individuals who actually killed Anderson and Court properly held her accountable for murder. This Court does not address arguments concerning drug offenses or attempted murder of one Lorenzo Petty: even if these arguments were successful, her BOL would remain 43 because of accountability for Anderson s murder. DISSENT: No preponderance of evidence Seals participated in murder or attempted murder. No record evidence it was Seals s conscious purpose in delivering guns that anyone be killed, no evidence as to what Seals knew about guns and their intended use, and simply no evidence of Seals s intent to kill either of two men as required for first degree murder. Life sentence cannot stand. Dissent would remand for District Court to make individualized assessment of quantity of drugs reasonably foreseeable to Seals given her involvement in drug enterprise, § 2D1.1. Moreover, Seals s gun possession does not support upward adjustment, § 2D1.1(b), as only evidence of her possession of firearm was not during her commission of drug offenses.), cert. denied, 517 U.S. 1149 (1996).

United States v. Ryan, 9 F.3d 660 (8th Cir. 1993) (en banc op. issued 10/31/94). (A jury found Ryan guilty of arson; as result of arson, two volunteer firefighters died. Ryan was sentenced to 328 months imprisonment. District Court believed, applying § 2K1.4(c)(1), that based on its finding that Ryan s conduct was reckless and wanton, and grossly deviated from reasonable standard of care, first degree murder guideline, § 2A1.1 was most analogous. Act of arson is by its nature act of violence, inherently dangerous act which involves real risk of injury or death. District Court departed downward from level 43 to level 38, finding that Ryan did not cause deaths intentionally or knowingly; Court considered Ryan s state of mind, degree of risk inherent in conduct, and nature of underlying offense. While Ryan argued there is no homicide offense analogous to his offense, this Court finds facts supported judge s findings and approved judge s choice of offense level at mid-point between first and second degree murder which recognized that

malice aforethought was element of both offenses.), cert. denied, 514 U.S. 1082 (1995).

**§ 2A2.1 (Assault With Intent to Murder; Attempted Murder/Standard of Review):**

United States v. Rodgers, 122 F.3d 1129 (8th Cir. 1997). (This Court reviews for clear error whether evidence was sufficient to support finding victim suffered serious bodily injury.), cert. denied, 522 U.S. 1061 (1998).

**§ 2A2.1 (Assault With Intent to Murder; Attempted Murder):**

United States v. Rodgers, 122 F.3d 1129 (8th Cir. 1997). (Rodgers claims Court erred in imposing two-level upward adjustment, § 2A2.1(b)(1)(B), because injuries suffered by Wright as result of attempt on his life were not "serious" and District Court clearly erred in finding they were. This Court disagrees as Wright suffered wide array of injuries in attack: he was struck on head multiple times and received several stitches to resulting lacerations; he received bruises to both arms and left shoulder; additionally, Wright developed posttraumatic stress disorder for which he was subsequently hospitalized. This Court holds evidence adduced at trial was more than sufficient to support finding Wright suffered serious bodily injuries; not only did his injuries lead to hospitalization and require mental rehabilitation, they also involved impairment of his mental faculties. This Court acknowledges PTSD may not always rise to level of serious bodily injury, but holds that in this case, in combination with other injuries suffered, it did.), cert. denied, 522 U.S. 1061 (1998).

United States v. Wilson, 992 F.2d 156 (8th Cir.) (District Court s finding of premeditation and deliberation (18 U.S.C. § 1111) was supported by Wilson getting into car with man who had just been involved in shooting, being armed, and then aiming and firing gun towards group of people.), cert. denied, 510 U.S. 888 (1993).

United States v. Parker, 989 F.2d 948 (8th Cir. 1993). (Appellants challenged four level increase as based on belief unsupported by record that victim experienced terror by being ambushed at night. District Court did not clearly err in finding victim suffered serious bodily injury when it had before it evidence from related case as well as medical records and testimony to effect victim was in pain, needed crutches to walk, and suffered mental trauma.)

**§ 2A2.1(b)(1)(A) (Permanent or Life-Threatening Bodily Injury):**

United States v. Miner, 345 F.3d 1004 (8th Cir. 2003) (BYE, FAGG,* HANSEN). (Where defendant shot victim, causing one bullet to remain in victim's body and causing permanent scar when another bullet was removed, enhancement was properly applied.), cert. denied, ____ St. Ct. ____ (2004).

**§ 2A2.1(b)(2)(c) [deleted in 1990 (threatened Use of Dangerous Weapon)]:**

United States v. Sims, 952 F.2d 1014 (8th Cir. 1991). (Where stipulated facts indicated Sims

attempted to murder government witness by promising to pay informant money and by giving informant unregistered gun and ammunition for that specific purpose, this Court did not find clearly erroneous District Court s finding that from victim s point of view, Sims s offense involved threatened use of dangerous weapon (3-level increase.)

**§ 2A2.1(b)(4) [deleted in 1990 (Motivated by Payment or Offer)]:**

United States v. Sims, 952 F.2d 1014 (8th Cir. 1991). (Sims asserted that because he was convicted of attempted murder rather than conspiracy or assault, section does not apply. Defendant need not be charged with conspiracy in order for Court to consider conspiratorial conduct in applying Guidelines (see, e.g., § 1B1.3(a)(1) Ap. Note 1). Although Sims does not challenge Court s finding of conspiracy, this Court has no hesitation in concluding stipulated facts in case provided ample basis for District Court to conclude Sims had engaged in conspiracy with Manes; thus, no error in imposition of two point enhancement.)

**§ 2A2.2 (Aggravated Assault):**

United States v. Fairchild, 122 F.3d 605 (8th Cir. 1997). (Trial Court calculated Pierce s sentence on count 29, violent act in aid of racketeering, on basis of Guideline for aggravated assault; count 29 was related to beating Pierce inflicted with baseball bat and tire checker. Pierce asserts District Court committed impermissible double counting by adding four-level upward adjustment for use of dangerous weapon; character of these weapons as dangerous is already factored into BOL. This Circuit disagrees (United States v. Dunnaway).), cert. denied, 522 U.S. 1131 (1998).

United States v. LeCompte, 108 F.3d 948 (8th Cir. 1997). (LeCompte argued two-point (§ 2A2.2(b)(3)(A)) enhancement was improper because bodily injury victim sustained was not caused by dangerous weapons charged in indictment, but by LeCompte s fists and feet. This Court agrees with Fourth Circuit that Guidelines allow consideration of § 1B1.3 relevant conduct in determining specific offense characteristics under § 2A2.2(b)(3) enhancement, and includes whole, nearly continuous assaultive behavior of LeCompte upon his victim. Victim received injuries that were painful, obvious, and required medical attention (application n.1(b) of § 1B1.1). District Court was not required to assign use of specific dangerous weapons to particular resulting injury; Court did not err in considering injuries sustained during commission of assault.)

United States v. Dunnaway, 88 F.3d 617 (8th Cir. 1996). (Because defendants used bottle and their boots as dangerous weapons during assault, District Court added four levels to BOL, § 2A2.2(b)(2)(B). Defendants assert enhancement double-counts use of bottle and boots as dangerous weapons because use of weapons was already considered in deciding crime was aggravated assault. This circuit joins others in concluding enhancement under § 2A2.2(b)(2)(B) is not impermissible double-counting. Assault qualifies as aggravated assault under § 2A2.2 if assailant possesses dangerous weapon and intends to do bodily harm. Only when assailant then uses object as weapon--does more than brandish, display, or possess object--does assailant qualify for enhancement under § 2A2.2(b)(2)(B). Dangerous weapon adjustment rationally reflects Guidelines graduated adjustment scheme. Thus, District Court properly enhanced defendants

sentences.)

United States v. Street, 66 F.3d 969 (8th Cir. 1995). (Street contended District Court improperly classified his offense as aggravated assault and should have classified it as obstructing/impeding officers (§ 2A2.4) or as minor assault (§ 2A2.3). This Court looks to § 1B1.2(a) and determines two possible guideline sections for violation of 18 U.S.C. § 111(a), § 2A2.2 and § 2A2.4. In determining which guideline is most applicable, Court selects guideline solely by conduct charged in count of indictment or information of which defendant was convicted. Because Street s confrontations with park rangers did not involve any of three bases for aggravated assault, applicable guideline was § 2A2.4 which contained cross-reference stating if conduct constituted aggravated assault, apply § 2A2.2. "Conduct" to which cross-reference refers covers all "underlying conduct" Court may consider in determining sentence (§ 2A2.4(c)(1), Guidelines amendment 443). To make factual determination whether conduct is part of instant offense, District Court considers factors including temporal and geographical proximity, common victims, and common criminal plan or intent. Here, Court did not err in finding Street s conduct towards conservation agent was "part of instant offense": incidents between Street and rangers and between Street and agent were intertwined. Street also contended his confrontation with conservation agent did not constitute aggravated assault. District Court s finding Street intended to do bodily harm is not clearly erroneous (Court was not required to accept Street s assertion he only meant to scare agent). Street directed his son three times to shoot agent if agent used his mace and Street had been agitated and threatened to inflict various kinds of bodily harm upon rangers and agent.)

United States v. Thompson, 60 F.3d 514 (8th Cir. 1995). (Thompson argues District Court should have sentenced him under § 2A2.4 for obstructing or impeding officer, rather than for aggravated assault, based on his assertion his assault of TFD did not involve dangerous weapon with intent to do bodily harm, serious bodily injury, or intent to commit another felony. Thompson also argued he should not have had his sentence enhanced four levels, § 2A2.2(b)(3)(B) for inflicting serious bodily injury on TFD. District Court did not clearly err where TFD s injury required both hospitalization, albeit briefly, and involved impairment of his mental faculties when he was knocked unconscious. Record supported District Court s conclusion Thompson struck TFD in order to facilitate robbery of seized drug proceeds (that state robbery charge was subsequently dismissed is irrelevant.)

**§ 2A2.2(b)(3)(B) (Serious Bodily Injury):**

United States v. Slow Bear, 943 F.2d 836 (8th Cir. 1991). (District Court was not clearly erroneous in adding four-level enhancement for infliction of serious bodily injury on victim. Though jury acquitted Slow Bear of charge under statutory definition of assault resulting in serious bodily injury, victim sustained serious bodily injury under Guidelines definition (victim s skull fracture required hospitalization). Conduct which is subject of acquittal may be used to enhance sentence under Guidelines.)

**§ 2A2.2(b)(3)(C) (Permanent or Life Threatening Bodily Injury):**

United States v. Thin Elk, 321 F.3d 704 (8th Cir. 2003) (WOLLMAN, JOHN GIBSON, MELLOY*). (Drunk driver crashed his car at ninety-five miles per hour head-on into car of elderly couple who had been married for fifty-three years. Wife died of her injuries; husband was hospitalized to recover from pulmonary contusion, leg fracture, and arm fracture. Prior to accident, husband had been in generally good health, was active, walked five to seven miles per day, and had beginning stages of dementia; accident caused him to have memory loss and pancreatitis, greatly accelerated his dementia, limited his mobility, required him to have home health care, and left him depressed and without desire to live. These facts adequately support six-level enhancement.)

**§ 2A2.4 (Obstructing or Impeding Officers):**

United States v. Wollenzien, 972 F.2d 890 (8th Cir. 1992). (The record justified three-level increase based on degree of physical contact where District Court credited revenue agent s testimony over Wollenzien s, concluding there had been cowardly attack upon revenue officer, from behind and Wollenzien had struck agent in back of neck from behind, severe blow. Because physical contact is not element of crime under 18 U.S.C. § 111, increase for forcible assault does not constitute double-counting.)

**§ 2A3.1 (Criminal Sexual Abuse; Attempt):**

United States v. Evans, 285 F.3d 664 (8th Cir. 2002) (LOKEN, RICHARD S. ARNOLD,* FAGG). (District Court did not err in applying § 2A3.1, as evidence demonstrated repeated instances of sexual abuse, whether such abuse occurred in context of "domestic" relationship or not), cert. denied, 123 S. Ct. 1257 (2003).

United States v. Johnson, 144 F.3d 1149 (8th Cir. 1998). (Johnson objects to Court s reference in sentencing to criminal sexual abuse Guideline; he argued Guideline applicable to his offense was robbery, § 2B3.1. Johnson, however, was not sentenced under § 2A3.1: District Court merely considered it in deciding appropriate period for upward departure for conduct which involved sexual violence, which was permissible, § 1B1.2.)

United States v. LaRoche, 83 F.3d 958 (8th Cir. 1996). (District Court did not clearly err in assessing use of force enhancement, § 2A3.1(b)(1), as uncontested facts showed LaRoche forced victim to perform various sexual acts, he threatened her with retaliation if she told anyone about abuse, and victim feared retaliation by LaRoche.)

United States v. Saknikent, 30 F.3d 1012 (8th Cir. 1994). (Saknikent appealed District Court s application of abduction enhancement (§ 2A3.1(b)(5)) to his sentence for rape and sodomy of mentally retarded nine-year-old girl. Saknikent claimed there was not preponderance of evidence showing that he forced his victim to accompany him, i.e., that he abducted her by force (§ 2A3.1(b)(1)). This Court finds giving "force" its ordinary meaning of overcoming will of another, in context of abduction adjustments (see § 2A4.1(b)(7)) maintains Guidelines internal consistency and rationality. Thus, this Court agrees with District Court s determination that

abduction adjustment requires only that force necessary to overcome particular victim s will. This Court agrees District Court based its determination that Saknikent abducted his victim on relevant considerations: victim s mental incapacity; she resided half-block from store, had rarely been outside of town, and habitually visited store occasionally being escorted home by employees. These facts combined to support inference Saknikent s taking victim out of town was against her will.)

United States v. Bald Eagle, 997 F.2d 1234 (8th Cir. 1993). (Bald Eagle contended that District Court erroneously increased his base offense level for use of force and for abduction because § 2A3.1(b)(1), (b)(5) do not apply to crime of sexual abuse, but rather only to aggravated sexual abuse. Section applies to both crimes and nothing in guideline limits increases for use of force and for abduction. This Court concluded District Court correctly interpreted and applied guideline to increase Bald Eagle s base offense level.)

United States v. Bordeaux, 997 F.2d 419 (8th Cir. 1993). (Bordeaux pleaded guilty to aggravated sexual abuse and was sentenced to 180 months imprisonment. His base offense level was enhanced by four levels for use of force. This circuit has held that same amount of force that will sustain conviction under 18 U.S.C. § 2241(a) will also sustain application of enhancement under § 2A3.1(b)(1). This Court rejects Bordeaux s argument that because he pleaded guilty to violation of § 2241(c) rather than § 2241(a), guideline is not applicable. Bordeaux also argued that application of guideline requires evidence of "actual force" which was not present in his case. This Court affirms trial Court s application of enhancement for use of force where victim s statements, admitted into evidence, without objection, through psychologist s evaluation were sufficient to establish force in circumstances of case: difference in size between Bordeaux and victim, Bordeaux s repeated threats of disclosure to child s mother of "dirty book" found by child--were sufficient to compel submission by child.)

United States v. Yankton, 986 F.2d 1225 (8th Cir. 1993). (Whether increase for serious bodily injury is appropriate depends upon whether pregnancy and its consequences constitute "serious bodily injury." This Court finds Sentencing Commission did not intend situation in this case (twin pregnancy, one twin died in utero, rape victim gave birth by c-section to other twin born with fatal disease) to be addressed by specific offense characteristic adjustment. Rather, guideline was designed to cover immediate serious physical trauma resulting from rape.)

United States v. Arcoren, 929 F.2d 1235 (8th Cir.) (No explicit or implied exception to two-level increase where victim was less than 16 years old, based on defendant s reasonable belief victim was at least 16.), cert. denied, 502 U.S. 913 (1991).

United States v. Clown, 925 F.2d 270 (8th Cir 1991). (Indian defendant admitted intercourse with his cousin and pled guilty to crime of incest; cousin sustained some injury and described how defendant physically restrained and threatened her. Guidelines do not contain specific offense guideline for crime of incest. In determining most analogous federal offense (§ 2X5.1), District Court looked to underlying circumstances of crime and was not clearly erroneous in its finding offense involved several nonconsensual sexual acts. Under circumstances, § 2A3.1 was properly selected as analogous offense guideline.)

**§ 2A3.1(b)(1) (Use of Force):**

United States v. Blue, 255 F.3d 609 (8th Cir. 2001) (MORRIS SHEPPARD ARNOLD, BRIGHT, BYE) (per curiam). (District Court erred in applying four-level enhancement for use of force under § 2A3.1(b)(1). Size difference between defendant and twenty-month-old victim was insufficient to show use of force; some sort of physical or verbal threat is also required.)

United States v. Running Horse, Sr., 175 F.3d 635 (8th Cir. 1999) (BEAM, HEANEY, FENNER*). (There was no error in trial Court s 4-level enhancement of Running Horse s offense conduct for use of force because force proven sufficient to convict under 18 U.S.C. § 2241(a)(1) is also sufficient to sustain application of this enhancement).

United States v. Cree, 166 F.3d 1270 (8th Cir. 1999) (FAGG, BEAM, LOKEN). (Rejecting sufficiency-of-evidence challenge to enhancement where District Court found, based on victim's testimony, that weapon was in fact used.)

United States v. Norquay, 987 F.2d 475 (8th Cir. 1993). (There was no error in trial Court s four-level enhancement of Norquay s offense conduct for use of force as evidence sufficient for conviction under 18 U.S.C. § 2241(a)(1) is also sufficient to sustain application of this enhancement.)

United States v. Merritt, 982 F.2d 305 (8th Cir. 1992). (District Court did not clearly err in applying enhancement where victim s statement in PSR that Merritt used force, that Court found accurate, justified enhancement.), cert. denied, 508 U.S. 979 (1993).

United States v. Balfany, 965 F.2d 575 (8th Cir. 1992). Where victim testified Balfany threatened to beat her with belt if she told anyone of assault, District Court s finding that Balfany caused victim to engage in sexual act by threatening or placing her in fear of serious bodily injury was not clearly erroneous. Threat must be taken in context: victim was eight-year-old girl and threat did not involve isolated incident of abuse, but series of assaults.)

United States v. Amos, 952 F.2d 992 (8th Cir. 1991). (Government asserted District Court erred in refusing four level upward adjustment based on its belief Guidelines adequately took into account force inherent in aggravated sexual abuse by force. This Court reiterates that for adjustment to apply government need not show greater degree of force than is necessary to sustain conviction of aggravated sexual abuse by force.), cert. denied, 503 U.S. 1010 (1992).

United States v. Eagle Thunder, 893 F.2d 950 (8th Cir. 1990). (Government submission of misinformation regarding force was not material where Guidelines do not contemplate greater degree of force for upward adjustment than is necessary to sustain conviction under 18 U.S.C. § 2241(a).)

**§ 2A3.1(b)(2) (Minor Victim):**

United States v. Balfany, 965 F.2d 575 (8th Cir. 1992). (The District Court did not commit improper double counting in enhancing Balfany s offense level by four points for victim s age (under 12 years) as elements for violation of section 2242 do not include that victim be less than 12. Sentencing Commission obviously intended age of victim and other elements of aggravated sexual assault be addressed through enhancements of base offense level.)

**§ 2A3.1(b)(3) (Custodial Relationship):**

United States v. Brown, 330 F.3d 1073 (8th Cir.) (HANSEN, LOKEN,* SMITH). (District Court did not clearly err in applying enhancement where ten-year-old victim's parents entrusted her to defendant, friend of family, for overnight trip. This created relationship of temporary custody and care which defendant exploited by abducting and sexually abusing victim.), cert. denied, 124 S. Ct. 453 (2003).

United States v. Blue, 255 F.3d 609 (8th Cir. 2001) (MORRIS SHEPPARD ARNOLD, BRIGHT, BYE) (per curiam). (District Court erred in applying enhancement for victim being in defendant's custody, care, or supervisory control. Evidence filed to establish that victim's mother transferred care of victim to defendant, or that victim trusted defenndant or perceived him as his grandfather. Defendant's concessions that he lived with victim and victim's mother during six-month period one year prior to offense, and that he regarded victim as his grandson, were insufficient to support enhancement.)

United States v. Merritt, 982 F.2d 305 (8th Cir. 1992). (District Court s determination enhancement applied not clearly erroneous where Merritt was living with victim s grandmother, had greater access to victim because of that relationship and used access to sexually abuse victim; Merritt had supervisory control over victim when he picked her up from relatives home.), cert. denied, 508 U.S. 979 (1993).

United States v. Balfany, 965 F.2d 575 (8th Cir. 1992). (Government appealed District Court s refusal to enhance based on custodial relationship. Even according deference, failure to enhance by two levels was error as evidence showed on at least one occasion, assault took place while victim was clearly in Balfany s sole custody and care; Balfany was not stranger, but member of same household; he was in effect, victim s stepfather and thus, he abused his relationship to child and her trust; potential for greater and longer psychological damage to child exists. DISSENT: District Court should be given deference on its refusal to enhance though issue of custody is not free from doubt.)

United States v. Crane, 965 F.2d 586 (8th Cir. 1992). (Though victim s intoxicated mother invited Crane to commit assault, she also relinquished custody and control of child to Crane before he committed assault. Although victim did not live with Crane, he was not complete stranger. Rather, Crane was close friend of victim s mother and eventually became stepfather. Crane abused his relationship to victim and hence, her trust. Potential for greater and prolonged psychological damage to abused child exists.)

**§ 2A3.1(b)(4)(A) (Permanent or Life-Threatening Bodily Injury):**

United States v. Cree, 166 F.3d 1270 (8th Cir. 1999) (FAGG, BEAM, LOKEN). (Rejecting sufficiency-of-evidence challenge to enhancement where District Court found, based on victim's testimony, that weapon was used to cut victim on face and that there was "result from that cut" which fit permanence requirements, particularly on face of relatively young woman.)

**§ 2A3.1(b)(4)(B) (Serious Bodily Injury):**

United States v. Long Turkey, 342 F.3d 856 (8th Cir. 2003) (MORRIS ARNOLD, HANSEN,* SMITH). (This Court reviews for clear error District Court's determination that victim suffered serious bodily injury. Victim's injuries caused by defendant's sexual abuse--rectal laceration that needed to be repaired at hospital, pain comparable to childbirth caused by defendant forcing his fist into her vagina, and scalp bruising caused by defendant restraining her by her hair--required overnight hospitalization and constituted serious bodily injury.)

United States v. Guy, 340 F.3d 655 (8th Cir. 2003) (McMILLIAN, HEANEY, MURPHY*). (Enhancement was justified where sexual abuse victim was impregnated, suffered extreme physical pain and some physical injuries during childbirth due to her young age and small frame, and suffered from lengthy depression and post-traumatic stress disorder.)

United States v. Kills in Water, 293 F.3d 432 (8th Cir. 2002) (McMILLIAN,* JOHN R. GIBSON, MAGILL). (Defendant was convicted of aggravated sexual abuse. He argued that District Court erred in applying serious-bodily-injury enhancement. This Court disagrees. Although rape alone is not basis for enhancement, enhancement was justified by injuries victim suffered: bite marks, physical trauma to vaginal and perineal areas, psychological problems such as recurring nightmares and suicide attempt, and ongoing need for psychological counseling. District Court determined that these injuries exceeded those suffered by typical rape victims, and we defer to that factual finding.)

United States v. Evans, 285 F.3d 664 (8th Cir. 2002) (LOKEN, RICHARD S. ARNOLD,* FAGG). (District Court did not clearly err in applying enhancement where victim suffered broken wrist, dislocated shoulder, head trauma, and cuts and bruises), cert denied, 123 S. Ct. 1257 (2003).

United States v. Guy, 282 F.3d 991 (8th Cir. 2002) (McMILLIAN, HEANEY, MURPHY*). (Defendant argued because victim's pregnancy resulted from conduct which constituted criminal sexual abuse, serious bodily injury may not be "deemed" under § 1B1.1, comment. (n.1(j)), because of revised 1997 commentaries to §§ 2A3.1(b)(4)(B) and 1B1.1, and enhancement may be applied for immediate serious physical trauma from rape, but not for resulting pregnancy. Deeming provision, in combination with restriction in § 2A3.1 excluding use of provision in sentencing for criminal sexual abuse under 18 U.S.C. §§ 2241 or 2242, appears to have been intended to make § 2A3.1(b)(4)(B) enhancement automatically available if offender's conduct underlying his conviction for another type of offense also involved criminal sexual abuse, but not if conviction is for sexual abuse. Thus, District Court erred in using deeming provision as basis for defendant's

enhancement. Remanding because, although District Court relied on "protracted impairment" to find serious bodily injury, it did not make underlying findings as to what specific bodily or psychological impairment victim suffered. Likewise, District Court's findings were not specific enough for this Court to discern what District Court had in mind when it cited victim's pain and suffering as basis for § 2A3.1(b)(4)(B) enhancement or whether enhancement for extreme physical pain would be appropriate.)

**§ 2A3.1(b)(5) (Abducted Victim):**

United States v. Brown, 330 F.3d 1073 (8th Cir.) (HANSEN, LOKEN,* SMITH). (District Court did not clearly err in applying enhancement. Although ten-year-old victim's parents initially gave defendant permission to take her on overnight trip, abduction occurred when defendant deviated from consented-to plan and refused victim's requests to be taken home. It was not impermissible double-counting to also enhance defendant's sentence under (b)(1) because abduction and use of force were distinct offense characteristics.), cert. denied, 124 S. Ct. 453 (2003).

United States v. Kills in Water, 293 F.3d 432 (8th Cir. 2002) (McMILLIAN,* JOHN R. GIBSON, MAGILL). (Defendant was convicted of aggravated sexual abuse. He argued that District Court erred in applying abduction enhancement. This Court disagrees. District Court did not clearly err in making factual finding that although victim voluntarily accompanied defendant to abandoned trailer, she tried to leave at that point, and defendant forcibly dragged her inside and raped her. This set of facts satisfies Guidelines definition of abduction. Abduction enhancements will typically be sustained where perpetrator's isolation of victim increases likelihood that she will be harmed.)

United States v. Eagle Thunder, 893 F.2d 950 (8th Cir. 1990). (Remand to determine whether upward adjustment based on abduction was warranted where government presented material misinformation to District Court regarding defendant s removing rape victim from car to another location and victim s asking to be taken home.)

**§ 2A3.4 (Abusive Sexual Contact; Attempt):**

United States v. Crow, 148 F.3d 1048 (8th Cir. 1998). (Reversing and remanding for resentencing after finding clearly erroneous District Court's finding that force was used during sexual assault; only evidence arguably connoting force was victim's testimony that Crow removed her clothes although she did not want him to, and sexually assaulted her, hurting her. Record contained no evidence as to Crow's size in relation to victim's, victim's perceived ability to escape attack, or what victim meant when she said Crow "hurt" her.)

United States v. Knife, 9 F.3d 705 (8th Cir. 1993). (District Court s finding that Knife committed offense by means of force or threat was not clearly erroneous. Government s proof, if believed, was more than sufficient to meet preponderance burden. Though Knife denied victim s accusations and defense put on evidence attacking victim s credibility, witness credibility is issue for sentencing judge that is virtually unreviewable on appeal.)

United States v. Fire Thunder, 908 F.2d 272 (8th Cir. 1990). (Enhancement improper based on holding that because Fire Thunder was victim s stepfather, use of force was presumed; however, alternative holding that enhancement was appropriate because Fire Thunder threatened victim s father with death if she told anyone, affirmed.)

**§ 2A3.4(b)(3) (Custodial Relationship/Standard of Review):**

United States v. Miller, 293 F.3d 468 (8th Cir. 2002) (HANSEN,* BEAM, BYE). (Whether or not victim was in defendant's custody, care, or supervisory control is factual issue that this Court reviews for clear error.)

**§ 2A3.4(b)(3) (Custodial Relationship):**

United States v. Miller, 293 F.3d 468 (8th Cir. 2002) (HANSEN,* BEAM, BYE). (District Court did not clearly err in applying enhancement where defendant lived with victim's mother for extended intermittent periods throughout victim's life, victim referred to defendant as "Dad," defendant referred to victim and her siblings as "my children," and defendant had been entrusted with victim and her siblings on long-distance trip.)

United States v. Voice, 200 F.3d 584 (8th Cir. 2000) (McMILLIAN, RICHARD S. ARNOLD, HANSEN) (per curiam). (Finding no clear error in District Court's determination that evidence, which included testimony from victim's mother and from defendant's companion that defendant and companion were supposed to be babysitting victim when abusive contact occurred.)

**§ 2A3.4(c)(1) (Cross-Reference for Criminal Sexual Abuse):**

United States v. Poor Bear, 359 F.3d 1038 (8th Cir. 2004) (BYE, HANSEN, MELLOY*). (Critical difference in this case is whether defendant touched victim's genitalia directly or through her clothing. Defendant objected to factual allegations in PSR that he pulled down her pants and touched her vagina. FBI agent testified at sentencing that defendant admitted to rubbing victim's vagina with his fingers, but did not specify whether contact was direct or through clothing. On these facts, District Court erred in applying this section. Case is remanded for resentencing, limited to existing record.)

**§ 2A4.1 (Kidnapping, Abduction, Unlawful Restraint):**

**§ 2A4.1(b)(2) (Degree of Injury):**

United States v. Sickinger, 179 F.3d 1091 (8th Cir. 1999) (McMILLIAN, MORRIS SHEPPARD ARNOLD, SACHS*). (Reversing 4-level increase for causing permanent or life-threatening injury to friend who was with kidnaping victim when she was abducted, because "victim" plainly refers to victim of kidnaping and not to persons who suffered collateral injury during kidnaping but who are not themselves abducted. On resentencing District Court may consider whether upward departure is appropriate under U.S.S.G. § 5K2.0 based on severe injuries

to friend.)

**§ 2A4.1(b)(3) (Use of Dangerous Weapon):**

United States v. Coyle, 309 F.3d 1071 (8th Cir. 2002) (HANSEN,* RICHARD ARNOLD, LOKEN). (To "use" weapon means to do more than possess, brandish, or display it. Legal standard is identical to § 2B3.1(b)(2)(D) enhancement for use of dangerous weapon. Defendant's holding knife against driver's leg to facilitate her cooperation with carjacking was use of dangerous weapon.)

**§ 2A4.1(b)(4)(C) [deleted in 2003 (Victim Released Within One Day)]:**

United States v. Sickinger, 179 F.3d 1091 (8th Cir. 1999) (McMILLIAN, MORRIS SHEPPARD ARNOLD, SACHS*). (This Court affirms denial of one-level reduction for releasing kidnaping victim within 24 hours. Sickinger claimed his victim was "constructively released" within 24-hour period because she was left alone at convenience store on two occasions and could have escaped. But District Court could reasonably have determined that in light of extraordinarily severe nature of Sickinger's abusive behavior towards victim (and another person who was with her when she was kidnaped), she was not in position--physically, mentally, or emotionally--to flee.)

**§ 2A4.1(b)(5) (Sexually Exploiting Victim):**

United States v. Hernandez-Orozco, 151 F.3d 866 (8th Cir. 1998). (District Court was presented with evidence that at time Hernandez had sexual intercourse with 16-year-old victim, she was 16 years old, she had been forcibly detained for at least six weeks, transported to foreign country where she did not speak language, and she had been subjected to various threats against herself and her family. Victim also testified that she consented to sexual intercourse because she was more afraid (in Nebraska, where she was taken) than she had been in Mexico (the country from which she was kidnapped). District Court did not clearly err in finding that Hernandez accomplished his desire to have intercourse with victim by "placing [her] in fear" within meaning of 18 U.S.C. § 2242(1).)

**§ 2A4.1(b)(7) (Committed in Connection with Another Offense):**

United States v. Cree, 166 F.3d 1270 (8th Cir. 1999) (FAGG, BEAM, LOKEN). (Cree was convicted of kidnapping, assault, and interstate domestic violence. He argues base offense level for criminal sexual abuse does not apply per § 2A4.1(b)(7) because federal government lacks jurisdiction over sexual assault he committed outside of Indian country. However, Guidelines specifically direct Court to consider state and local offenses when applying § 2A4.1(b)(7).)

**§ 2A6.1 (Threatening or Harassing Communications):**

United States v. Humphreys, 352 F.3d 1175 (8th Cir. 2003) (MORRIS ARNOLD, HEANEY, FAGG) (per curiam). (District Court did not clearly err in denying (b)(5) reduction for single

instance involving little or no deliberation. Reduction applies only to defendants whose threats are product of single impulse or are single thoughtless response to particular event. Here, defendant discussed setting fire to President of United States in Internet chat room, by fax to White House, and in person to three individuals at different times.)

United States v. Rose, 315 F.3d 956 (8th Cir.) (LOKEN, BEAM,* MELLOY). (Threatening and vulgar telephone messages and emails--including threats to murder recipient's children, to put pictures of her children on pornographic web sites, and to send letters to her neighbors--were sufficiently accompanied by conduct evidencing intent to carry out threats where defendant in fact posted kids' pictures on web sites and sent letters to neighbors, obtained recipient's home address and telephone number, and obtained driving directions to recipient's residence.), cert. denied, 123 S. Ct. 2238 (2003).

United States v. McKinney, 88 F.3d 551 (8th Cir. 1996). (McKinney argued guideline for "minor assault" should have been applied. As McKinney was convicted of threatening to assault member of Congress, 18 U.S.C. § 115(a)(1)(B) and § 115(b)(4), and Appendix A to Guidelines cross-references these statutory provisions with guideline for "threatening communications," this Court affirms McKinney s sentence.)

United States v. Bellrichard, 62 F.3d 1046 (8th Cir. 1995). (Bellrichard was convicted of 17 counts of mailing threatening communications to AUSA who prosecuted him in earlier case and District Court judge who tried earlier case. He took issue with District Court s finding he engaged in conduct evidencing intent to carry out threats which resulted in six-point increase from BOL of 12, § 2A6.1(b)(1). No basis for finding District Court clearly erred where its finding was express and conclusion, supported by evidence (language of threatening communications, conduct of Bellrichard, statements of fellow inmate, and communications and threatening tones continuing even after trial. No error in failing to grant evidentiary hearing where District Court concluded Bellrichard s conduct evidenced intent to carry out his threats, relying upon evidence presented at trial.)

United States v. Hill, 943 F.2d 873 (8th Cir. 1991). (Hill argued that returning home to North Platte was not conduct indicating intent to carry out threat to kidnap 13 year-old Dobbins. District Court found return coupled with Hill s reported statements about painting his car to avoid detection by authorities evidenced intent to carry out threat. This Court holds where, as here, District Court committed no error of law and made findings of fact not clearly erroneous, this Court defers to District Court s application of Guidelines. CONCURRENCE: Government did not indict for intent to carry out threat to kidnap. Hill s sentence was more than doubled by uncharged conduct.)

**Part B. Basic Economic Offenses**

**§ 2B1.1 (Theft; Stolen Property; Property Damage and Destruction; Fraud and Deceit; Forger; Counterfeiting/Standard of Review):**

United States v. French, 46 F.3d 710 (8th Cir. 1995). (Amount of loss is factual determination this Court reviews only for clear error.)

**§ 2B1.1 (Theft; Stolen Property; Property Damage and Destruction; Fraud and Deceit; Forger; Counterfeiting):**

United States v. Jankowski, 194 F.3d 878 (8th Cir. 1999) (BOWMAN,* MORRIS SHEPPARD ARNOLD, BOGUE). (District Court clearly erred in applying enhancement for theft from person of another, because while armored car driver was present at scene of robbery, he was neither holding money nor within arm's reach of money, which was in back of truck and separated by bulkhead with plexiglass window.)

United States v. Payseno, 104 F.3d 191 (8th Cir. 1997). (Payseno appeals from 18-month sentence for interstate transportation of stolen property, 18 U.S.C. § 2314, selling stolen animal pharmaceuticals and implants. In calculating her total offense level, District Court imposed two-level increase for more than minimal planning, § 2B1.1(b)(4)(A) and four-level increase for being in business of receiving and selling stolen goods, § 2B1.1(b)(4)(B). Payseno contends on appeal § 2B1.1(b)(4) does not permit enhancements under both subparts (A) and (B). Government concedes enhancements under both subparts improper, but argues Payseno did not raise objections to District Court and no need to remand because sentence is still within appropriate guideline range. District Court may receive objections any time before imposition of sentence; Payseno s remarks at sentencing hearing as to how she came to obtain goods from Lewis which she then sold, appear to have been offered as objection to four-point enhancement, and that issue is sufficiently preserved. As § 2B1.1(b)(4) is written with conjunction "or" between subparts (A) and (B), clear meaning is one enhancement or other may be applied to offense level, but not both. Court s factual findings indicate Payseno received and sold stolen goods for profit over extended period of time; her own version of facts in PSR included admission she specifically purchased products from Lewis which she knew were stolen. Record was sufficient to support finding Payseno was in business of receiving and selling stolen goods and to support application of (B) enhancement. (Under these circumstances, not necessary to employ either "fence" test or "totality of circumstances" test to determine whether she was in such business). Payseno will not be punished twice for same behavior if one of enhancements is applied. She pleaded to interstate transportation of stolen property with value of more than $20,000 (§ 2B1.1(b)(1)(G) - offense level 6) and this offense level can be properly enhanced under § 2B1.1(b)(4) for more than minimal planning or for being in business of receiving and selling stolen goods; neither of these enhancements is based on same criminal behavior as underlying charge. Remand is necessary as District Court should have opportunity to consider which of two enhancements should apply despite government supposition 18-month sentence previously imposed would be within new guideline range. Imposition of both enhancements in § 2B1.1(b)(4) reversed, and case remanded for resentencing.)

United States v. Collins, 104 F.3d 143 (8th Cir. 1997). (Collins argues his offense level should not have been raised four points (2B1.1(b)(4)(B)) because he was not in business of receiving and transporting stolen goods. Sufficient support in record for imposition of four-level increase: Truman s auction was business which received and sold stolen goods; Collins was integral part of

scheme by which auction house received and sold stolen goods; and as he split proceeds of sales at Truman s auction house after sales occurred, Collins was part of business which received and sold stolen goods.)

United States v. French, 46 F.3d 710 (8th Cir. 1995). (This Court rejects French s argument it should apply net loss approach as there was no indication French acted with requisite mixed intent at time he began to sell cattle in unreported transactions. This Court finds District Court did not clearly err in finding French s sales of $331,000 worth of collateral (at livestock sale) on cross-collateralized loans resulted in loss of more than $100,000. Even if FmHA s loss of $331,000 collateral does not result in that amount "out of pocket" loss to FmHA, or if French decided to spend his ill-gotten gain by purchasing other cattle, French still "took" $331,000 worth of collateral and increased FmHA s risk of loss.)

United States v. Hulshof, 23 F.3d 1470 (8th Cir. 1994). (District Court was not clearly erroneous in including Arnold-Sandbulte transactions of $327,979 in determination of "loss." Actions of Hulshof placed bank at risk of this amount of loss. While evidence showed bank did not actually lose any money due to Arnold-Sandbulte transactions, this was largely because of recovery of farm economy in 1988, which enabled Hulshof to reverse entries which he had previously made to protect his father s loan account. Dollar value associated with defendant s conduct does not hinge upon actual loss.)

United States v. Johnson, 993 F.2d 1358 (8th Cir. 1993). (Government appeal of District Court s denial of additional three level enhancement due to Johnson s misapplication of credit union funds; government argued proper amount of loss included embezzled funds and in addition, misapplied funds. This Court affirms: amount of loss to credit union represents amount of money actually removed from credit unit accounts. Misapplied funds were transferred from one credit union account to another; credit union was never "at risk" to lose those misapplied funds.)

United States v. Bartsh, 985 F.2d 930 (8th Cir. 1993), pet. for reh g granted in part, limited remand to recalculate amount of restitution. (District Court did not err in failing to make specific finding of fact regarding amount of loss where whether amount of loss was $1.2 million suggested by Bartsh or closer to $1.5 million urged by government, amount is still within range of $1 to $2 million (11 level increase). Accurate determination of amount of loss must contain calculation for lost interest (here, additional $240,855.14).), cert. denied, 510 U.S. 1170 (1994).

United States v. Redlin, 983 F.2d 893 (8th Cir.) (Under loss calculation, whether defendant intended loss or whether he paid back money is irrelevant. District Court s decision to accept PSR s loss calculation was not gross miscarriage of justice where guideline was specifically applicable to conversion of mortgaged property; no other Court has accepted applicability of § 2F1.1 to violations of 15 U.S.C. § 714m(c); and Redlin s repayment of debts occurred after investigation revealed conversion.), cert. denied, 510 U.S. 820 (1993).

**§ 2B1.1(b)(1) (Amount of Loss):**

United States v. Wainright, 351 F.3d 816 (8th Cir. 2003) (LOKEN, McMILLIAN,* HANSEN). (Amount-of-loss calculations take into account relevant conduct, including acquitted conduct, and Apprendi does not apply where the resulting sentence is below statutory maximum.)

United States v. Wheeldon, 313 F.3d 1070 (8th Cir. 2002) (BOWMAN, RICHARD ARNOLD,* LOKEN). (Although there was no actual loss, because fraudulent bankruptcy discharge defendant was attempting to obtain was never granted, there was intended loss. Proper measure of intended loss was amount of defendant's assets he would have shielded from creditors had discharge been granted (not, as District Court found, entire amount of his debts owed to creditors).)

United States v. Holliman, 291 F.3d 498 (8th Cir. 2002) (MORRIS S. ARNOLD, HEANEY, RILEY*). (Amount of loss includes all relevant conduct proven by preponderance of evidence. Loss calculation need not be proven with precision; District Court need only make reasonable estimate of loss, given available information), cert. denied, 537 U.S. 1137 (2003).

United States v. Russell, 913 F.2d 1288 (8th Cir. 1990). (Where Moore challenged use of retail value of stolen goods as measure of loss under Guideline, this Court looked to statute under which he was convicted, 18 U.S.C. § 641, to affirm use of retail as it represented greater value. Value used for purposes of conviction must be used for sentencing to provide uniformity in sentencing. (Dissent expresses view Guidelines suggest appropriate market value should be determined with reference to victim. Here, as victims were wholesale distributors, not retail, wholesale constitutes fair market value.), cert. denied, 500 U.S. 906 (1991).

United States v. Hill, 911 F.2d 129 (8th Cir. 1990). (District Court s valuation of stolen jewelry conformed to loss definition in Comment 2 and was not clearly erroneous.), cert. denied, 504 U.S. 975 (1991).

**§ 2B1.1(b)(2) (Theft From Person of Another):**

United States v. Jankowski, 194 F.3d 878 (8th Cir. 1999) (BOWMAN,* MORRIS SHEPPARD ARNOLD, BOGUE). (In armored-car robbery, money was taken from back of truck by armored-car messenger and coconspirator, while unsuspecting armored-car driver remained in driver's seat, which was separated from back of truck by bulkhead with plexiglass window. Although driver was present, he was not holding money and could not have reached it. Thus, District Court clearly erred in finding that theft occurred "from person of another.")

**§ 2B1.1(b)(4)(A) [deleted in 2001 (More than Minimal Planning/Standard of Review)]:**

United States v. Young, 272 F.3d 1052 (8th Cir. 2001) (WOLLMAN, LAY, RILEY*). (Whether defendant engaged in more than minimal planning is fact question reviewed for clear error.)

United States v. Coney, 949 F.2d 966 (8th Cir. 1991). (Whether defendant engaged in more than minimal planning is factual determination this Court reviews for clear error.)

**§ 2B1.1(b)(4)(A) [deleted in 2001 (More than Minimal Planning)]:**

United States v. Wainright, 351 F.3d 816 (8th Cir. 2003) (LOKEN, McMILLIAN,* HANSEN). (More-than-minimal-planning enhancement applies where scheme involved repeated acts over extended period of time, and Apprendi does not apply where resulting sentence is below statutory maximum.)

United States v. Young, 272 F.3d 1052 (8th Cir. 2001) (WOLLMAN, LAY, RILEY*). (This enhancement applies especially frequently in property offenses. In larceny, defendant engaged in more than minimal planning by walking twelve miles to and from store he broke into, and by carrying large backpack and hammer with him for that purpose; by climbing tree and prying away building siding to gain entry and circumvent bars on first-floor entrance and windows; and by hiding stolen goods in abandoned house.)

United States v. Coney, 949 F.2d 966 (8th Cir. 1991). (District Court did not commit error by increasing Conley s offense level where it found he had stolen money from armored car s cargo on several earlier occasions and had taken substantial steps to conceal his thefts, including final theft of $25,000.)

United States v. Werlinger, 894 F.2d 1015 (8th Cir. 1990). (Defendant pleaded guilty to bank embezzlement and District Court found that defendant s attempts to induce coworkers to help conceal embezzlement was obstruction of justice under § 3C1.1 and adjusted upward. This Court reversed finding that § 2B1.1 fully accounted for conduct of defendant and Sentencing Commission did not intend for obstruction adjustment to apply cumulatively to same conduct (§ 2B1.1 expressly authorizes upward adjustment for embezzlement when more than minimal planning is involved). Also discusses congressional intent concerning "double counting" conduct in applying Guidelines.)

United States v. Sutherland, 890 F.2d 1042 (8th Cir. 1989) (per curiam). (District Court properly applied "more than minimal planning" enhancement where defendant spoke with another bank employee about robbing automatic teller machine several months earlier, obtained combination to automatic teller day before offense, and arranged for his accomplice to break open automatic teller while he waited outside so his picture would not be taken by camera in machine.)

**§ 2B1.2 [deleted in 1993 by consolidation with § 2B1.1]:**

United States v. Russell, 913 F.2d 1288 (8th Cir. 1990). (District Court s findings were not clearly erroneous; evidence of record could lead District Court to conclude Russell was in business of selling stolen property, warranting increase in his offense level (2B1.2(b)(3)(A).), cert denied, 500 U.S. 906 (1991).

**§ 2B1.2(b)(1) (Value of Property):**

United States v. Culver, 929 F.2d 389 (8th Cir. 1991). (Although evidence conflicted, there

was sufficient basis for Court s finding aircraft was worth more than $1 million.)

**§ 2B1.2(b)(4)(B) (More Than Minimal Planning/Standard of Review):**

United States v. Sykes, 4 F.3d 697 (8th Cir. 1993). (This Court reviews District Court s finding that defendant engaged in more than minimal planning for clear error.)

United States v. Wilson, 955 F.2d 547 (8th Cir. 1992). This Court reviews District Court s finding that defendant engaged in more than minimal planning only for clear error.)

**§ 2B1.2(b)(4)(B) (More Than Minimal Planning):**

United States v. Sykes, 4 F.3d 697 (8th Cir. 1993). (This Court rejects as meritless Sykes s argument that District Court erred by considering PSR information unrelated to charges to which he pleaded guilty. Sykes forged his name on at least two checks and attempted to cash them and he was successful in cashing other stolen checks. Thus, District Court s decision to impose enhancement was not clearly erroneous.)

United States v. Wilson, 955 F.2d 547 (8th Cir. 1992). (Appellant s argued adjustment constituted improper double counting because both charge of conspiracy and nine-level increase based upon value of stolen property fully reflected repetitive nature of their crimes. This Court holds that repetitive nature of criminal conduct itself may warrant this adjustment; Court rejects contention adjustment may not be imposed unless defendant engaged in extensive planning, complex criminal activity, or concealment. District Court s decision to impose enhancement was not clearly erroneous where conspirators knew their roles (e.g., shoplifting by four boosters, removing owner markings by Wilson, etc.) in overall scheme and carried them out repeatedly over course of conspiracy.)

United States v. Culver, 929 F.2d 389 (8th Cir. 1991). (Culver s purchase of disguises for himself and his girlfriend was sufficient to establish he used more than minimal planning.)

**§ 2B1.2(b)(5) (Organized Scheme to Receive Stolen Vehicles or Parts):**

United States v. Russell, 913 F.2d 1288 (8th Cir. 1990). (This Court holds District Court s construction of guideline at time of sentencing (2B1.2(b)(4)) was correct and applied to "organized criminal activity" not limited to vehicles or vehicle parts. (Dissent reasons Commission amended guideline to clarify, not fundamentally change, intended scope of specific offense characteristic and increase in offense levels was error as offenses did not involve auto theft ring or chop shop.)), cert. denied, 500 U.S. 906 (1991).

**§ 2B2.1 (Burglary):**

United States v. Rivers, 917 F.2d 369 (8th Cir. 1990). (Case remanded where one-level enhancement based on determination that value of property involved was greater than $2500.

(§ 2B2.1(b)(2)(B)) was based on burglary victim s opinion regarding value of her property admitted into evidence by way of officer who spoke with her over phone. Estimate of values of items was speculative; government did not carry its burden. This Court advised that in future cases involving enhanced sentencing under § 2B2.1, if known, government should disclose to defendant at time of guilty plea that it will claim property value to be greater than $2500.)

**§ 2B2.1(b)(4) (Possession of Dangerous Weapon):**

United States v. Gomez, 165 F.3d 650 (8th Cir. 1999) (McMILLIAN, HANSEN, KYLE*). (Gomez was convicted of first-degree burglary. Although conflicting testimony on issue existed, District Court elected to credit testimony of various witnesses that Gomez brandished broken bottle during burglary. Therefore, District Court did not clearly err in imposing enhancement for possession of dangerous weapon.)

**§ 2B3.1 (Robbery/Standard of Review):**

United States v. Gleason, 25 F.3d 605 (8th Cir.) (District Court s fact-finding about type of weapon used is reviewed for clear error.), cert. denied, 513 U.S. 911 (1994).

United States v. Dawn, 897 F.2d 1444 (8th Cir.) (Court properly applied Guidelines to enhance defendants sentences based on use of firearm because use of firearm need not be established beyond reasonable doubt for sentence enhancement; preponderance of evidence is sufficient.), cert. denied, 498 U.S. 960 (1990).

**§ 2B3.1 (Robbery):**

United States v. Tolen, 143 F.3d 1121 (8th Cir. 1998). (Issue presented as to whether Tolen made "express threat of death" against teller when Tolen robbed bank, § 2B3.1(b)(2)(F). This Court holds District Court s finding was clearly erroneous, vacates sentence, and remands for resentencing. Where Tolen approached teller in bank and, with his left hand hidden from view beneath counter, demanded teller "place cash in bag and no one will get hurt," this Court is of view situation is legally distinguishable from prior cases. In prior cases in which enhancement was affirmed, robber either brandished weapon or claimed, expressly or implicitly, to have one. Fact Tolen s left hand was out of view, deliberately or not, cannot support finding he was asserting he was armed; Tolen at most implicitly threatened to harm teller, but there was not colorable threat of death, express or implied.)

United States v. Johnson, 121 F.3d 1141 (8th Cir. 1997). (In determining Johnson s sentence for armed robbery, District Court gave two-level enhancement for causing bodily injury that required medical attention because Court found he had repeatedly raped female robbery victim, § 2B3.1(b)(3)(A). Johnson contended there was insufficient evidence of rape to support enhancement. This Court disagrees: District Court credited rape victim s testimony, which was consistent with medical records. In light of testimony and District Court s credibility determination, it was not clearly erroneous for it to have determined government established rape

by preponderance of evidence.)

United States v. Dodson, 109 F.3d 486 (8th Cir. 1997). (Dodson contends District Court erred in increasing his offense level by two based on finding police officer sustained "bodily injury" during Dodson s arrest. Notwithstanding Dodson s objection to recommended enhancement, government did not call officer to testify regarding nature of his injuries or whether he had suffered any pain as result of being choked. District Court held "choking" falls within category of "bodily injury" contemplated by guideline, while only evidence concerning injuries officer suffered was from PSR s description characterizing injuries as "minor." "Bodily injury" means any significant injury, type for which medical attention ordinarily would be sought (§ 1B1.1, comment. (n.1)(b)). Case remanded for resentencing in absence of even minimal showing regarding extent of injuries sustained by officer; record does not support two-level enhancement for bodily injury.)

United States v. Triplett, 104 F.3d 1074 (8th Cir.) (District Court increased Steven Triplett s BOL by two levels, § 2B3.1(b)(2)(F), for express threat of death and further increased BOL by seven under § 2B3.1(b)(2)(A) for discharge of firearm. Triplett challenges Court s use of both sections to enhance sentence. Government concedes disjunctive "or" precludes enhancement for both discharge of firearm under (A) and for express threat of death under (F). This Court concludes construction of guideline provision suggests particular subsections are to be applied alternatively and not collectively. On remand, District Court in making relevant calculation, may enhance BOL under either (A) or (F), but not under both.

Steven contends evidence is insufficient to support enhancement under (A) for discharge of firearm as it is unclear whether he or Joseph actually fired weapon. This Court finds argument meritless as seven-level enhancement is applicable if firearm was discharged during robbery. Guidelines do not require that defendant, as opposed to accomplice or co-conspirator, fired weapon. Rather, there merely must be evidence, as there is in this case, weapon was discharged during robbery.), cert. denied, 520 U.S. 1236 and 520 U.S. 1270 (1997).

United States v. Gleason, 25 F.3d 605 (8th Cir.) (Gleason conceded three-level enhancement warranted for use of dangerous weapon based upon his contention he used water pistol that resembled real gun. He argued, however, that commentary states object that appears to be dangerous weapon should be treated as such, but did not have similar "appearance" provision for firearms. This Court comments that District Court believed bank employees testimony that Gleason brandished real firearm, making lack of appearance provision for firearms inconsequential. Thus, imposition of five-level enhancement was not improper.), cert. denied, 513 U.S. 911 (1994).

United States v. Gray, 895 F.2d 1225 (8th Cir. 1990). (Relying on McLaughlin v. United States, 476 U.S. 16 (1986), held that unloaded BB gun was dangerous weapon warranting three-level increase in offense level.)

**§ 2B3.1(b)(2) (Firearm, Dangerous Weapon, or Threat of Death):**

United States v. Johnson, 962 F.2d 1308 (8th Cir. 1992). (No inherent contradiction in defendant s being acquitted of using firearm yet receiving this enhancement as particulars for

sentencing need only be proved by preponderance of evidence.)

**§ 2B3.1(b)(2)(B) (Use of Firearm):**

United States v. Christmann, 193 F.3d 1023 (8th Cir. 1999) (RICHARD S. ARNOLD,* BRIGHT, LOKEN). (Referring to § 1B1.3, comment. (n.1(e)), this Court holds that base offense level for bank robbery will be enhanced even if firearm used during robbery was not loaded.), cert. denied, 529 U.S. 1044 (2000).

United States v. Hoelzer, 183 F.3d 880 (8th Cir. 1999) (BEAM, HANSEN,* KOPF). (ATF agent testified that store clerk who was victim of firearms robbery reported that she had been hit with "unknown-type firearm" though she could not describe it. Hoelzer concedes clerk so testified at his state Court trial. Store clerk also reported to police that Hoelzer threatened to shoot her if she did not remain on floor. Hoelzer offers only his own testimony that he did not hit clerk and that clerk could have been hit with something other than gun. Thus, District Court's finding that Hoelzer otherwise used gun in offense is not clearly erroneous.)

**§ 2B3.1(b)(2)(C) (Firearm Brandished or Possessed):**

United States v. Roberts, 253 F.3d 1131 (8th Cir. 2001) (McMILLIAN,* RICHARD S. ARNOLD, BOWMAN). (Roberts and codefendant agreed to rob bank. Before robbery, codefendant placed gun in glove box of getaway car. While Roberts waited in car, codefendant told teller that he had gun, though he did not actually have one on his person. After police began pursuing defendants in getaway car, codefendant took gun from glove box and attempted to escape on foot until officers caught him. This Court holds that District Court erred in assessing five-level enhancement for firearm possession. Although Roberts was accountable for relevant conduct of codefendant in furtherance of their jointly undertaken criminal activity, codefendant's threat to bank teller did not support five-level increase, and District Court made no findings as to whether codefendant's possession of gun was in furtherance of jointly undertaken criminal activity and reasonably foreseeable to Roberts. Therefore, this Court instructs District Court to reconsider applicability of § 2B3.1(b)(2) on remand, and, if any sentence enhancement under that provision is imposed, to support it with statement of findings.)

**§ 2B3.1(b)(2)(D) (Use of Dangerous Weapon):**

United States v. Bartolotta, 153 F.3d 875 (8th Cir. 1998). (Government's evidence sufficiently established that mace was used as dangerous weapon in this case within meaning of § 2B3.1(b)(2)(D) (add 3 levels if "dangerous weapon was otherwise used"). Dangerous weapon is instrument capable of inflicting death or serious bodily injury, i.e., one involving extreme physical pain or protracted impairment of function of bodily member, organ, or mental faculty, or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation Here, employee who was sprayed in face with mace during attempted robbery developed chemical pneumonia as result of incident and missed almost two weeks of work, and had to take daily steroid shots and pills for period of time.), cert. denied, 525 U.S. 1093 (1999).

United States v. Elkins, 16 F.3d 952 (8th Cir. 1994). (No error in District Court s application of four-level enhancement for use of dangerous weapon. This Court rejects Elkins s contention that placing knife against throat of innocent bystander to facilitate cooperation with robbery demand is brandishment rather than "use.")

United States v. Smith, 973 F.2d 1374 (8th Cir. 1992). (Two level enhancement for express threat of death was proper where combination of Smith s threatening teller with statement "you don t want to find out" and appearance as if he had gun under his coat in robbery, instilled greater fear than necessary to carry out robbery.)

**§ 2B3.1(b)(2)(E) (Dangerous Weapon Brandished or Possessed):**

United States v. Regenwether, 300 F.3d 967 (8th Cir. 2002) (WOLLMAN, BRIGHT, JOHN R. GIBSON) (per curiam). (Defendant successfully robbed credit union and attempted to rob bank. After failing to rob bank, defendant attempted to recruit accomplice for another try, but accomplice became FBI informant and defendant was arrested. Defendant had purchased shotgun to use in credit union robbery and had planned to brandish shotgun at second attempt to rob bank. Defendant was convicted only of credit union robbery. Upon release, defendant recruited different accomplice and made aborted third attempt to rob same bank. Then, they successfully robbed different bank. Defendant was convicted of bank robbery for successful one, and conspiracy to commit bank robbery for three unsuccessful tries at other bank. District Court did not clearly err in applying enhancement under § 2B3.1(b)(2)(E) because possession of shotgun was relevant conduct falling within charged conspiracy dates. Application Note 8's exclusion does not apply because bank robbery is not listed among excluded offenses. CONCURRENCE: Guidelines and conspiracy law are unfair.)

United States v. Hutton, 252 F.3d 1013 (8th Cir. 2001) (RICHARD S. ARNOLD,* FAGG, MORRIS SHEPPARD ARNOLD). (Defendant robbed bank. He presented teller with note stating, "[d]on't panic, give me all that you have." Teller gave defendant money and after his arrest defendant confessed to robbery. He also admitted that during robbery he had inoperable replica of western-styled revolver concealed out-of-sight in waist band of his pants. No one in bank ever saw imitation gun. In these circumstances, District Court erred in assessing three-level enhancement for brandishing, displaying, or possessing dangerous weapon. This Court holds that concealed inoperable replica of gun which was possessed during commission of robbery but was never used does not warrant enhancement. This case is distinguishable from one in which defendant receives enhancement because someone perceived object to be dangerous weapon. **Note:** under amended version of Guideline, it is clear that object that looks like dangerous weapon **may warrant** enhancement if it is possessed during robbery but never seen by anyone; this was not clear before, however, and defendant should receive benefit of any ambiguity that existed when he was sentenced.)

United States v. Elliott, 992 F.2d 853 (8th Cir. 1993). (District Court did not err in finding Elliott s display/use of pellet gun he used in bank robbery was dangerous weapon (even unloaded pellet guns are considered dangerous weapons (§ 1B1.1).), cert. denied, 511 U.S. 1130 (1994).

**§ 2B3.1(b)(2)(F) (Threat of Death/Standard of Review):**

United States v. Luersen, 278 F.3d 772 (8th Cir.) (BOWMAN, FAGG, MORRIS SHEPPARD ARNOLD) (per curiam). (District Court's factual finding that threat of death was made is reviewed for clear error.), cert. denied, 535 U.S. 1105 (2002).

**§ 2B3.1(b)(2)(F) (Threat of Death):**

United States v. Luersen, 278 F3.d 772 (8th Cir.) (BOWMAN, FAGG, MORRIS SHEPPARD ARNOLD) (per curiam). (Although bank teller did not recall precise wording of robbery note, either version to which teller testified--"give me all your money or I will kill you" or "give me all your money or you will die"--constitutes threat of death.), cert. denied, 535 U.S. 1105 (2002).

United States v. Cadotte, 57 F.3d 661 (8th Cir. 1995). (Cadotte stated to bank teller "this is robbery" and told her he had .357 magnum in his pocket and "no one will get hurt" if she would put money in bag that had been placed on counter. On appeal, Cadotte contested two-level enhancement on basis his statements did not constitute express threat of death, and he neither intended to, nor did he, instill significantly greater fear than necessary to carry out robbery. Enhancement does not require subjective finding of defendant s intent in making threat, nor does it require actual finding of level of fear instilled by threat; District Court properly applied enhancement. DISSENT: Cadotte s words and actions cannot be reasonably construed to constitute "express threat of death," but at most, implicit threat.), cert. denied, 516 U.S. 1076 (1996).

United States v. Bell, 12 F.3d 139 (8th Cir. 1993). (Note which Bell handed to teller in course of robbery expressed sufficient immediate threat of death ("make any sudden moves alert anyone I ll pull pistol in this purse and shooting will start!") to warrant two level increase.)

**§ 2B3.1(b)(3)(A) (Bodily Injury):**

United States v. Hoelzer, 183 F.3d 880 (8th Cir. 1999) (BEAM, HANSEN,* KOPF). (PSR stated store clerk suffered bruises to face, chest, and legs from being hit, kicked, and stepped on by defendants. Hoelzer's attorney conceded store clerk testified at Hoelzer's state Court trial that she was injured. Although Hoelzer testified otherwise, District Court was not bound to accept his self-serving assertions. And although police officer who was first to arrive on scene testified in state Court that he did not see any indications of injury, victim need not manifest outward signs of injury to sustain bodily injury for purposes of enhancement. District Court did not clearly err in finding prosecution met its burden of proving clerk sustained bodily injury.)

United States v. Sumner, 171 F.3d 636 (8th Cir. 1999) (FAGG, WOLLMAN, WEBBER) (per curiam). (Upholding enhancement where robbery victim testified perpetrator punched her in face and kicked her repeatedly; she was required to visit hospital for X-rays; her face was red and puffy for substantial period of time; she had black eye for three weeks; and her face was tender six months after incident.)

**§ 2B3.1(b)(4)(A) (Abduction):**

United States v. Spears, 235 F.3d 1150 (8th Cir. 2001) (McMILLIAN, RICHARD S. ARNOLD,* BOWMAN). (Defendant's argument that he did not agree to, plan for, or commit abduction--and was not present when it occurred--is unavailing because abduction was reasonably foreseeable to him under § 1B1.3(a)(1)(B).)

United States v. Elkins, 16 F.3d 952 (8th Cir. 1994). (Four-level kidnapping enhancement was appropriate as Elkins held bank patron at knife-point. After receiving money from bank teller, Elkins forced patron, still at knife-point, out of bank and into parking lot where he demanded keys to patron s vehicle. After patron complied with demands, Elkins released him and escaped in vehicle. As Elkins forced bank patron to another location, Guidelines definition of abduction (§ 1B1.1. Comment. (n.1)) was satisfied.)

**§ 2B3.1(b)(4)(B) (Restraint):**

United States v. Schau, 1 F.3d 729 (8th Cir. 1993). (Mason and Monte argued District Court should not have increased their base offense levels for physically restraining their victims (§ 2B3.1(b)(4)(B)) because they did not actually find, tie, or lock them up. While carrying firearms, they ordered victims into bank vault, attempted to lock vault door, and wedged chair against vault door when it would not lock. Even though vault door was not locked and victims were able to free themselves easily, victims were forced to comply; thus, this Court concludes District Court properly increased base offense levels.

Mason and Monte also contended increase in their base offense levels for physically restraining victims while brandishing firearms constituted impermissible double-counting with § 924(c). They failed to raise issue below and District Court did not commit plain error as District Court increased base offense levels because of restraint of victims, not because of their possession of firearms during robbery.)

United States v. Kirtley, 986 F.2d 285 (8th Cir. 1993). (Kirtley argued that by merely asking tellers to tie their feet together with his materials, he did not physically restrain them within meaning of section. Although Kirtley did not bind tellers himself, he ordered them to bind themselves after producing gun and threatening them. Because tellers had no alternative despite they were able to free themselves later. Thus, increase was proper.)

**§ 2B3.1(b)(7) (Loss Exceeding $10,000):**

United States v. Powell, 283 F.3d 946 (8th Cir.) (LOKEN,* HEANEY, RILEY). (Value of car taken by robbers for getaway may be included in loss calculation. Because car's value was enough to establish increase, there was no need to consider whether damage done to another vehicle during course of escape should be included in "loss," which Application Note 3 defines as "value of property taken, damaged, or destroyed."), cert. denied, 537 U.S. 868 (2002).

**§ 2B3.1(c)(1) (Cross-Reference for First-Degree Murder):**

United States v. Weasel Bear, 356 F.3d 839 (8th Cir. 2004) (MURPHY,* LAY, FAGG). (Cross-reference applies regardless of whether crime occurred inside or outside federal territorial jurisdiction.)

**§ 2B4.1 (Bribery):**

United States v. Jain, 93 F.3d 436 (8th Cir. 1996). (Guideline governing commercial bribery and kickback offenses mandates increase in BOL if improper benefit exceeding $2000 was conferred upon defendant, § 2B4.1(a), (b)(1), and § 2C1.1, comment. (backg d). Amount of increase is determined by cross-reference to table in § 2F1.1. Here, District Court declined to impose increase because it found Jain received less than $2000 for referring one Medicare patient to North Hills. On cross-appeal, government argues all $40,500 in referral payments should have been counted as relevant conduct because there was one common scheme or plan. District Court s determination of relevant conduct (§ 1B1.3) affirmed.), cert. denied, 520 U.S. 1273 (1997).

United States v. Fitzhugh, 78 F.3d 1326 (8th Cir.) (Fitzhugh s commercial bribery offense is governed by § 2B4.1(a), BOL 8 and level must be increased based upon value of bribe or value of improper benefit to be conferred by bribe, whichever is greater. If value of bribe or improper benefit exceeds $2000, § 2B4.1(1)(b) incorporates by reference increases found in table in § 2F1.1(b)(1) governing sentencing for fraud offenses. District Court increased Fitzhugh s BOL by six levels based upon face amount of $137,500 loan by CMS to Fitzhugh s client, obtained by bribing president of CMS. On appeal, Fitzhugh argues increase was clear error because loan to client was over-secured so there was no risk of loss to CMS. Fitzhugh s focus on risk of loss is incorrect: victim s loss is proper focus for fraud offenses (where § 2F1.1(b)(1) table applies); severity of bribery offense is measured by amount of improper benefit conferred in return for bribe--or by amount of bribe if greater. Though District Court properly focused on benefits conferred by Fitzhugh s bribery offense, it nevertheless misapplied § 2B4.1(b)(1) as that provision requires finding value of improper benefit to be conferred. Value of transaction is often quite different than face amount of that transaction. Here, scanty evidence of record regarding loan to client suggests its value, properly calculated, would be far less than face amount of $137,500. No attempt was made to calculate value for purposes of § 2B4.1(b)(1) and six-level increase that resulted from error may have substantially affected Fitzhugh s sentence. Accordingly, this Court remands for resentencing.), cert. denied, 519 U.S. 902 (1996).

**§ 2B5.1 (Counterfeiting):**

United States v. Malone, 49 F.3d 393 (8th Cir.) (Malone contended government failed to prove by preponderance of evidence elements of § 2B5.1(b)(2) enhancement. He argued District Court could not consider computer equipment as evidence he manufactured or produced counterfeit bills because that evidence was not admitted at trial; he also contended government cannot meet its burden based on unreliable testimony of witness. Court properly considered computer equipment in finding Malone "manufactured or produced" counterfeit bills (Court overruled admission of

computer equipment during trial because government failed to disclose evidence to defense before trial, though illegally seized evidence could be used for sentencing purposes as long as evidence was not obtained to enhance sentence). This Court also rejects attack on witness s credibility as it is "virtually unreviewable on appeal." Computer equipment, witness s testimony, Malone s possession of master bill, as well as recovery of copied portion of counterfeit bill from Malone s residence constitutes reliable evidence Malone manufactured counterfeit bills.), cert. denied, 516 U.S. 877 (1995).

United States v. Lamere, 980 F.2d 506 (8th Cir. 1992). (This Court rejects appellants argument that District Court erred as matter of law by its failure to follow Application Note 4 (disregard discarded defective items). Note 4 was only proposed, never adopted. Furthermore, section 2B5.1 does not require counterfeit bills be of passable quality. In contrast, there is presumptively intentional distinction between (b)(1) and (b)(2) (which requires counterfeit be capable of escaping detection under minimal scrutiny).

Appellants urged Application Note 2 required limiting definition of "counterfeit" to items made in their entirety, precluding consideration of partially completed bills. This Court found argument unavailing: Note attempts to distinguish counterfeit instruments from genuine items which have been altered or forged.

District Court findings in calculating face value of currency to include partially completed bills were not clearly erroneous where bills were present for Court s inspection, currency had been hidden for safe-keeping (not destroyed), and one brother participated in negotiations to purchase cocaine, consideration for which would be quantity of counterfeit--appellants conduct suggested purpose to use/retain for ultimate completion and passage, partially completed bills.)

**§ 2B5.1(b)(2) (Counterfeiting Device or Materials):**

United States v. Penson, 893 F.2d 996 (8th Cir. 1990). (District Court did not err in enhancing sentence based on defendant s possession of counterfeiting device where defendant s own statement to federal agent supported finding; party s own statement is not hearsay (Fed. R. Evid. 801(d)(2)(A)).)

**Part C. Offenses Involving Public Officials**

**§ 2C1.1 (Bribery Involving Public Official; Extortion/Standard of Review):**

United States v. Hang, 75 F.3d 1275 (8th Cir. 1996). (Value of benefit received in exchange for bribe is factual finding this Court reviews for clear error. This Court may reverse sentence only if left with definite and firm conviction District Court erred.)

**§ 2C1.1 (Bribery Involving Public Official; Extortion):**

United States v. Harmon, 194 F.3d 890 (8th Cir. 1999) (BEAM, MORRIS SHEPPARD ARNOLD, KYLE*). (District Court properly applied § 2C1.1 rather than § 2B3.2 (extortion by force or threat of injury or serious damage) in determining base offense level of Harmon (a

prosecuting attorney) and Walls (the director of drug task force), who extorted money from others in exchange for not prosecuting them for crimes for which they otherwise would have been prosecuted. This conduct involves only threat of prosecution, and not threats of physical injury or property destruction.)

United States v. Griffin, 154 F.3d 762 (8th Cir. 1998). (Affirming District Court's decision to apply U.S.S.G. § 2C1.1 (offenses involving bribes) rather than U.S.S.G. § 2C1.2 (offenses involving gratuities). Distinction between bribe and illegal gratuity is corrupt intent of person giving bribe to receive quid pro quo, something recipient would not otherwise have done. Here it was clear that Griffin was to be paid by Cathryn Simmons for using his influence as Speaker of House to steer business her way, and it was not controlling whether Griffin received money before or after action he was performing for her.)

United States v. Baker, 82 F.3d 273 (8th Cir.) (While Baker argued his BOL should be 6 under § 2E1.2, District Court appropriately chose § 2C1.1 which governs bribery and extortion under color of official right where underlying crime was state law offense of extortion by police officer. District Court applied cross-reference to § 2J1.2--Baker s extortion offense was committed for purposes of obstructing justice in respect to another criminal offense, § 2C1.1(c)(2), other criminal offense was firearm violation by object of extortion. Baker argued District Court should have cross-referenced to § 2X3.1. This Court concludes District Court correctly applied these interrelated guideline provisions because cross-reference to § 2X3.1 would have required calculation of BOL of whatever firearms offenses motorists may have committed under state or federal law, and apparently would not have yielded greater BOL than § 2Jl.2.), cert. denied, 519 U.S. 1020 (1996).

United States v. Hang, 75 F.3d 1275 (8th Cir. 1996). (Hang was convicted of three counts of accepting bribe as public official. Hang worked as eligibility technician for Minneapolis Public Housing Authority. He apparently communicated to immigrants from Southeast Asian countries they would have to pay him money in order to obtain federally subsidized housing. Each count represented one incident in which Hang accepted money from Asian individual in order to accelerate application process. Hang challenges methodology employed by District Court in computing value of payment, § 2C1.1(b)(2)(A). Because bribes themselves involved small sums and government sustained no measurable loss, Court sentenced Hang based on benefit received by victims in return for their payments. Hang maintained each victim was otherwise eligible for public housing and therefore computation should be based on money housing recipients saved by more quickly accessing housing. This Court rejects Hang s theory. Testimony demonstrated Hang completely withheld public housing from certain individuals until they would pay him bribes; thus, victims eligible for public housing were prevented from receiving government services because of Hang s manipulation of his position. Value of benefit received need not be determined with precision. District Court did not commit clear error in calculating benefit received in exchange for victim s bribes and this Court affirms four-level increase according to cross-reference table § 2F1.1.)

United States v. Dijan, 37 F.3d 398 (8th Cir. 1994). (The District Court increased base offense level (10) for bribing government official by two levels because it found offense involved more than one bribe, § 2C1.1(b)(1). District Court found that benefit received as result of

conspiracy exceeded $1,000,500, resulting in increase of 12 levels, § 2F1.1(b)(1)(M). Dijan argued benefit received was less than that amount. In cases involving bribery to cancel tax liability, value of benefit received from bribe is amount of tax liability defendant sought to eliminate. Conspiracy here involved bribes to negate taxes of corporation and co-conspirator. It was not erroneous for Court to have concluded benefit received from bribes was between $1.5 and $2.5 million; increasing Dijan s offense level by 12 was not improper. Corporation owed taxes of $803,000 for fourth quarter of 1989, $789,000 for first quarter of 1990, employment taxes for second quarter of 1990 of $530,000; and co-conspirator owed almost $82,000 in personal income tax.)

United States v. Evans, 30 F.3d 1015 (8th Cir. 1994). (District Court did not clearly err in increasing Evans s base offense by two levels for accepting more than one bribe (§ 2C1.1(b)(1)). District Court did not overrepresent loss (§ 2C1.1(b)(2)(A)) by using amount of expected premiums from policies insurance company sold to two different entities.), cert. denied, 514 U.S. 1028 (1995).

**§ 2C1.1(b)(2) (Amount or Purpose):**

United States v. Loftus, 992 F.2d 793 (8th Cir. 1993). (The 1990 Guidelines were in effect when Loftus committed offense; 1991 Guidelines were in effect at his sentencing. Loftus contended under 1990 version, enhancement should occur only for bribery, not extortion; 1991 language ("bribe" to "payment") indicated Commission changed application to both bribery and extortion. This Court concludes 1991 amendment merely clarified meaning of 1990 version. Enhancement would apply to Loftus s extortion offense under either version: 1990 commentary specifically referenced applicability of section to extortion under Hobbs Act (18 U.S.C. § 1951), statute under which Loftus was convicted.)

United States v. Ziglin, 964 F.2d 756 (8th Cir. 1992). (Ziglin s offense level increase was computed according to 1989 Guidelines which provide for eleven level increase when benefit to be received is $800,000 to $1,500,000 (§ 2F1.1(b)(1)). Ziglin, however, did not object to apparently erroneous retroactive application of 1989 Guidelines; this Court declines to order resentencing as apparent error does not result in miscarriage of justice and thus is not plain error. Though Ziglin claimed he was to receive only $20,000, value of action to be received ($1,432,425.58 was amount of taxes to be "wiped off books") in return for bribe was determined correctly.)

**§ 2C1.2 (Offering, Giving, Soliciting, or Receiving Gratuity):**

United States v. Patel, 32 F.3d 340 (8th Cir. 1994). (Patel alleged District Court error in valuing amount of loss to government connected with his conviction of giving gratuity to government official. It is in context of § 2C1.2(b)(2)(B) table in § 2F1.1 is used to measure amount of loss caused by defendant s fraudulent conduct (it is not used to measure amount of loss caused by defendant s illegal gratuity). Numbers on § 2F1.1 s table have been "borrowed" by § 2C1.1: only relevant inquiry is value of gratuity. District Court was not clearly erroneous in concluding Patel promised to pay gratuity of $50,000 and Court properly added five levels to base offense level.)

**Part D. Offenses Involving Drugs**

**§ 2D1.1(a)(3) (BOL Based on Drug Quantity/Standard of Review):**

United States v. Johnston, 353 F.3d 617 (8th Cir. 2003) (LOKEN, HEANEY, MORRIS ARNOLD) (per curiam). (District Court must find drug quantity by preponderance of evidence, and finding is reviewed for clear error.)

United States v. Sanders, 341 F.3d 809 (8th Cir. 2003) (BOWMAN, MURPHY, BYE*). (District Court's drug-quantity findings are reviewed for clear error.), cert. denied, 124 S. Ct. 1525 (2004).

United States v. Quintana, 340 F.3d 700 (8th Cir. 2003) (MORRIS ARNOLD, BEAM, MELLOY*). (District Court's drug-quantity determination is reviewed for clear error. Witness credibility is virtually unassailable on appeal.)

United States v. Collins, 340 F.3d 672 (8th Cir. 2003) (LOKEN, RILEY, SMITH*). (District Court's drug-quantity findings are reviewed for clear error.)

United States v. Houston, 338 F.3d 876 (8th Cir. 2003) (HANSEN, LOKEN,* MURPHY). (This Court reviews District Court's drug-quantity findings for clear error. Government bears burden to prove drug quantity (and, where relevant to setting base offense level, drug potency) by preponderance of evidence. Drug purity of seized sample may be extrapolated to defendant's other drug transactions, or drug purity may be proven through testimony of coconspirator or expert witness.)

United States v. Curtis, 336 F.3d 666 (8th Cir. 2003) (WOLLMAN,* RICHARD ARNOLD, MELLOY). (District Court's drug-quantity finding is reviewed for clear error and will be reversed only if entire record definitely and firmly convinces this Court that mistake has been made.)

United States v. Eis, 322 F.3d 1023 (8th Cir. 2003) (WOLLMAN, RICHARD ARNOLD, MURPHY) (per curiam). (Government has burden to prove drug quantity by preponderance of evidence, but District Court's findings are reviewed for clear error only, and its decision to credit witnesses who were testifying against defendant to secure sentencing benefits for themselves is virtually never clear error.)

United States v. Sarabia-Martinez, 276 F.3d 447 (8th Cir. 2002) (WOLLMAN, HANSEN, FENNER*). (District Court's drug-quantity determination is reviewed for clear error. Attacks on witness credibility are virtually unreviewable on appeal. District Court may determine drug quantity attributable to defendant based solely on testimony of co-conspirator.)

United States v. Franco-Martinez, 271 F.3d 764 (8th Cir. 2001) (BYE, BRIGHT, RICHARD S. ARNOLD) (per curiam). (District Court was not bound by stipulation in plea agreement concerning drug quantity, which, in any event, was phrased as recommendation only.

CONCURRENCE: where parties enter arms-length agreement based on fair assessment of evidence, agreement ought to be accepted by District Court without further hearing.)

United States v. Causor-Serrato, 234 F.3d 384 (8th Cir. 2000) (HANSEN,* HEANEY, MORRIS SHEPPARD ARNOLD). (This Court reviews for clear error District Court's drug quantity findings; District Court may consider any evidence in its sentencing determination as long as it has sufficient indicia of reliability to support its probable accuracy. This Court will reverse drug quantity finding only when entire record firmly illustrates District Court made mistake. This Court is hesitant to find clear error in District Court's findings of fact when they are based on determinations of witness credibility, because District Court's assessment of witness credibility is quintessentially judgment call and virtually unassailable on appeal.), cert. denied, 532 U.S. 1072 (2001).

United States v. Loveless, 139 F.3d 587 (8th Cir. 1998). (District Court must make factual finding as to whether methamphetamine was d- or l-. Government bears burden of proving by preponderance of evidence methamphetamine was d-, and it may do so by using either direct or circumstantial evidence. This Court reviews District Court s finding for clear error.)

United States v. Covington, 133 F.3d 639 (8th Cir. 1998). (This Court reviews District Court s finding as to identity of drugs attributable to defendant for clear error, reversing only if left with definite and firm conviction mistake has been made.)

United States v. Lopez, 125 F.3d 597 (8th Cir. 1997). (Question whether District Court properly based Lopez s sentence on intended conduct rather than actual conduct, involves application of Sentencing Guidelines to facts and thus, this Court reviews District Court s decision de novo.)

United States v. Tauil-Hernandez, 88 F.3d 576 (8th Cir. 1996). (When drug quantity is at issue, government must establish at sentencing, by preponderance of evidence, type and quantity of drugs attributable to each conspirator. This Court reviews District Court s drug quantity findings for clear error, reversing only if entire record definitely and firmly convinces Court mistake has been made.), cert. denied, 520 U.S. 1121 (1997).

United States v. Logan, 54 F.3d 452 (8th Cir. 1995). (District Court s drug quantity determination is factual finding this Court reviews under clearly erroneous standard and will reverse only if it is firmly convinced mistake has been made. Government bears burden of establishing quantity of drugs attributable to defendant for sentencing purposes. If defendant objects to factual allegations contained in PSR, District Court may not adopt PSR s challenged facts until defendant s objections have been heard and government proves by preponderance of evidence facts stated in PSR are accurate.)

**§ 2D1.1(a)(3) (BOL Based on Drug Quantity):**

Neal v. United States, 516 U.S. 284 (1996). (Amendment 488 retroactively altered method

of determining weight of LSD for Guidelines purposes: rather than including weight of carrier medium, each dose of LSD on carrier medium is counted as .4mg of LSD. However, for purposes of statutory sentencing range, 21 U.S.C. § 841 still requires District Court to take into account total weight of carrier medium with its absorbed LSD. Consistent with United States v. Stoneking, 60 F.3d 399 (8th Cir. 1995) (en banc), cert. denied, 516 U.S. 1119 (1996).)

United States v. Gonzalez, No. 03-2263 (8th Cir. 2004) (RILEY, RICHARD ARNOLD, MELLOY*). (District Court did not clearly err in holding defendant responsible for over 150 kilograms of cocaine where trial testimony was that he received one 100-kilogram shipment and directed his co-defendants to retrieve another sixty-kilogram shipment.)

United States v. Underwood, Nos. 03-1543/1982/2716/2901 (8th Cir. 2004) (MURPHY,* HEANEY, SMITH). (District Court did not clearly err in estimating yield of methamphetamine production at 30% rather than 15%; this reflected District Court's choice as to what evidence to credit.)

United States v. Campos, No. 03-1329 (8th Cir. 2004) (BYE, HANSEN,* MELLOY). (In this post-Apprendi case, jury determined that defendant possessed 50 grams or more of methamphetamine with intent to distribute. It was thus error for District Court to find at sentencing that, due to amount meant for personal consumption, defendant had intended to distribute less than 50 grams of methamphetamine he possessed. DISSENT: Government failed to preserve objection below and error does not rise to level of plain error.)

United States v. Johnston, 353 F.3d 617 (8th Cir. 2003) (LOKEN, HEANEY, MORRIS ARNOLD) (per curiam). (District Court may find at sentencing higher drug quantity than that found by jury in verdict so long as sentence does not exceed statutory maximum for offense of conviction. Here, District Court's finding was based on credibility determinations, which will not be overturned on appeal even though witness testimony suffered from some weaknesses and some conflicts.)

United States v. Harris, 352 F.3d 362 (8th Cir. 2003) (RILEY, BEAM,* SMITH). (District Court did not clearly err in calculating drug quantity where it relied on police officer's testimony that defendant said he had made fifty trips to buy half-ounces of crack and fifty trips to buy half-ounces of powder cocaine. District Court expressly credited police officer rather than defense witness, and credibility determinations are virtually unassailable on appeal.)

United States v. Castaneda-Villa, 345 F.3d 668 (8th Cir. 2003) (RILEY, HANSEN, SMITH) (per curiam). (Under 2002 amendment, base offense level is capped at thirty if defendant receives mitigating-role reduction. Defendant was ineligible for cap where he stipulated in plea agreement, and where unobjected-to facts in PSR showed, that he was ineligible for mitigating-role reduction.)

United States v. Sanders, 341 F.3d 809 (8th Cir. 2003) (BOWMAN, MURPHY, BYE*). (District Court clearly erred in holding defendant responsible for only 350 grams of methamphetamine. First, District Court's statement that it was deferring to jury was erroneous because jury had only determined whether, for purposes of triggering statutory penalty range,

defendant was involved with 100 grams or more. Second, District Court's drug-quantity finding was not supported by its decision to credit particular witness who denied supplying methamphetamine to defendant because, even subtracting quantity attributed to defendant's transactions with that witness, evidence still showed he was responsible for more than 500 grams.), cert. denied, 124 S. Ct. 1525 (2004).

United States v. Banks, 340 F.3d 683 (8th Cir. 2003) (BOWMAN, BEAM, BYE) (per curiam). (Apprendi does not forbid District Court from finding sentencing factors that do not increase defendant's sentence beyond statutory maximum, including drug quantity, by preponderance of evidence at sentencing hearing.)

United States v. Collins, 340 F.3d 672 (8th Cir. 2003) (LOKEN, RILEY, SMITH*). (It was not impossible for defendant to be responsible for drug quantities testified to by government witnesses. Witnesses knew he was incarcerated for seven months and limited their testimony to drug sales by defendant outside his incarceration period 2nd to drug sales by defendant's middlemen during his incarceration period.)

United States v. Houston, 338 F.3d 876 (8th Cir. 2003) (HANSEN, LOKEN,* MURPHY). (Where defendant objected to PSR holding him responsible for actual methamphetamine rather than methamphetamine mixture, and government failed to present any evidence of drug purity at sentencing, District Court clearly erred in holding defendant responsible for actual methamphetamine. Defendant's statement to law enforcement, in which he admitted manufacturing particular quantities of methamphetamine but never specified whether he was referring to actual or mixture, proved nothing as to drug purity. Nor is it enough to say that defendant attempted to or hoped to produce pure methamphetamine--doing so would obliterate having different penalties for actual and mixture.)

United States v. Curtis, 336 F.3d 666 (8th Cir. 2003) (WOLLMAN,* RICHARD ARNOLD, MELLOY). (District Court clearly erred in holding defendant responsible for just fifty grams of methamphetamine where, as part of oral plea agreement, defendant admitted at change-of-plea colloquy that he was responsible for more than fifty grams.)

United States v. Exson, 328 F.3d 456 (8th Cir.) (WOLLMAN, RICHARD ARNOLD, MURPHY*). (Where amount of drugs seized does not reflect scale of offense, District Court may approximate drug quantity based on any evidence with sufficient indicia of reliability. District Court found particular witness credible and based its quantity calculation on that witness's testimony. No clear error.), cert. denied, 124 S. Ct. 549 (2003).

United States v. Munoz, 324 F.3d 987 (8th Cir. 2003) (WOLLMAN,* RICHARD ARNOLD, MURPHY). (Where defendant presented only general challenge to PSR in form of comprehensive assertion of innocence, District Court may have been entitled to adopt facts in PSR for lack of specific objection thereto. In any event, jury's drug-quantity finding beyond reasonable doubt defeated defendant's argument that District Court erred in finding same quantity at sentencing by

preponderance of evidence.)

United States v. Kessler, 321 F.3d 699 (8th Cir. 2003) (WOLLMAN,* HEANEY, MELLOY). (District Court did not clearly err in determining drug quantity attributable to defendant by relying on laboratory analyst's testimony, based on seized samples and materials, of probable yield of methamphetamine lab.)

United States v. Alvarez, 320 F.3d 765 (8th Cir. 2002) (BOWMAN, RICHARD ARNOLD, LOKEN) (per curiam). (Apprendi requirements do not apply to drug-quantity determinations made by District Court at sentencing that set punishment below statutory maximum for offense simpliciter.)

United States v. Tirado, 313 F.3d 437 (8th Cir. 2002) (BYE, LAY, RILEY*). (Where defendant was acquitted of possession with intent to distribute, and found guilty of simple possession, District Court was nonetheless correct to use acquitted drug quantities in setting offense level because preponderance of evidence supported them.)

United States v. Brown, 311 F.3d 886 (8th Cir. 2002) (HANSEN, RICHARD ARNOLD, LOKEN*). (If amount of drugs seized does not reflect scale of offense, District Court must approximate quantity of drugs trafficked during relevant conduct. Here, defendant was arrested at bus station on his way to South Carolina with three kilograms of cocaine, and he admitted having made four previous trips during past five months. Given his purchases of expensive jewelry, his lack of legitimate employment, his offer to hire driver for $5,000 per trip, and other evidence, District Court's estimate that defendant transported three kilograms on each of four prior trips was most reasonable quantity estimate that could be inferred from record and was thus not clear error.)

United States v. Montano-Gudino, 309 F3.d 501 (8th Cir. 2002) (WOLLMAN, RICHARD S. ARNOLD, LOKEN*). (When defendant is directly involved in drug transaction, it is irrelevant whether drug quantity was known to or reasonably foreseeable by defendant. District Court did not clearly err in holding defendant responsible where his co-conspirators sent him to empty storage unit of large quantity of methamphetamine, even if he did not know precise quantity or type of drug he would be transporting.)

United States v. Titlbach, 300 F.3d 919 (8th Cir. 2002) (LOKEN, JOHN R. GIBSON,* GOLDBERG). (Defendant argued that it violated Apprendi v. New Jersey, 530 U.S. 466 (2000), for District Court to find him responsible at sentencing for greater drug quantity than jury found in special verdict form. Because his sentence did not exceed statutory maximum for offense determined by jury, this argument lacks merit. In making drug-quantity finding, District Court properly relied on three incidents in which defendant directly participated in drug activity or in which drug activity was reasonably foreseeable to her: assisting in preparation of chemicals for methamphetamine cooking and cleaning up lab, serving as look-out during a drug sale, and going to store with coconspirator who purchased ephedrine), cert. denied, 537 U.S. 1137 (2003).

United States v. Hernandez, 299 F.3d 984 (8th Cir. 2002) (RILEY, BEAM,* MELLOY).

(Defendant argues that, because indictment did not specify exact quantity of methamphetamine, cocaine, and marijuana, maximum drug quantity District Court could hold him responsible for at sentencing was 500 grams. District Court did not violate Apprendi v. New Jersey, 530 U.S. 466 (2000), because indictment charged range of drug quantities carrying potential life sentence.), cert. denied, 587 U.S. 1134 (2003).

United States v. Zimmer, 299 F.3d 710 (8th Cir. 2002) (McMILLIAN, BEAM, HANSEN*). (Guidelines permit District Court to approximate drug quantity for sentencing purposes where there has not been seizure of drugs directly establishing relevant amount. In drug conspiracy, District Court may consider amounts from drug transactions in which defendant was not directly involved if they were part of same course of conduct or scheme. Defendant can be held accountable only for drug transaction or drug activity where it was undertaken in furtherance of conspiracy and was known to defendant or reasonably foreseeable to him.

Zimmer: Where defendant initiated conspiracy, recruited participants, and facilitated participants' meeting each other, it was certainly foreseeable to defendant that participants would do what he wanted them to do: manufacture and sell methamphetamine.

Carver: Defendant was lead cook in methamphetamine-manufacturing conspiracy, and personally produced or instructed others how to produce enough methamphetamine to support District Court's drug-quantity findings), cert. denied, 537 U.S. 1146 (2003).

United States v. Hollingsworth, 298 F.3d 700 (8th Cir. 2002) (WOLLMAN, BEAM,* LOKEN). (Iodine need not be listed in Guidelines as list I or list II chemical because table of listed chemicals applies only to § 2D1.11 calculations. In convictions for 21 U.S.C. § 841 offenses, analysis proceeds under § 2D1.1. Where there was no drug seizure or amount seized does not reflect scale of offense, District Court must approximate drug quantity. In making this determination, it may consider size or capability of any laboratory involved. Quantity need not be ascertained with exact certainty, but approximation must be supported by competent evidence in record. Validity of sentence premised on drug-quantity estimate depends on basis of District Court's calculation. District Court did not clearly err in basing its drug-quantity finding on amount of iodine seized and expert testimony regarding how much methamphetamine could be produced from iodine, rejecting defendant's argument that he did not possess amounts of other chemicals needed to be combined with iodine to manufacture that amount of methamphetamine), cert. denied, 123 S. Ct. 1307 (2003).

United States v. Diaz, 296 F.3d 680 (8th Cir.) (en banc). (Apprendi v. New Jersey, 530 U.S. 466 (2000), does not forbid District Court from finding existence of sentencing factors, including drug quantity, by preponderance of evidence; it only prevents Court from imposing sentence greater than statutory maximum for offense simpliciter based on such findings. In other words, United States v. Aguayo-Delgado, 220 F.3d 926 (8th Cir. 2000), has been adopted by this Court en banc.), cert. denied, 537 U.S. 940 (2002).

United States v. Smotherman, 285 F.3d 1115 (8th Cir. 2002) (McMILLIAN, HEANEY,* MORRIS SHEPPARD ARNOLD). (Reversing District Court's drug-quantity finding because it committed math error: it converted quarter-pound to 260 grams rather than 113 grams.)

United States v. Fellers, 285 F.3d 721 (8th Cir. 2002) (WOLLMAN,* LAY, RILEY). (Jury found defendant responsible for 50-500 grams of methamphetamine. District Court determined that 500-1,500 grams were reasonably foreseeable to him during course of conspiracy. District Court's finding, used for Guidelines calculations, does not violate Apprendi v. New Jersey), cert. granted, 123 S. Ct. 1480 (2003).

United States v. Kurkowski, 281 F.3d 699 (8th Cir.) (McMILLIAN, FAGG,* RILEY). (Where defendant's sentence does not exceed statutory maximum, drug quantity for sentencing purposes need not be submitted to jury or found beyond reasonable doubt under Apprendi v. New Jersey.), cert. denied, 537 U.S. 854 (2002).

United States v. Frazier, 280 F.3d 835 (8th Cir.) (HANSEN,* HEANEY, TUNHEIM). (Drug output of entire conspiracy was attributable to defendant because he was intricately involved in it: he established one distribution location, recruited other participants, was present at other distribution locations, and procured 22,000 capsules to be used in selling heroin.), cert. denied, 537 U.S. 911 (2002).

United States v. Sarabia-Martinez, 276 F.3d 447 (8th Cir., 2002) (WOLLMAN, HANSEN, FENNER*). (Defendant was properly held responsible for carload of drugs where cooperating witness testified that co-conspirator told witness that co-conspirator and defendant retrieved car, carrying drugs and driven by members of defendant's family, when it broke down.)

United States v. Woods, 270 F.3d 728 (8th Cir. 2001) (McMILLIAN, BEAM,* HANSEN). (Rejecting defendant's argument that District Court should not have taken into account drug amounts specified in charges of which he had been acquitted: even acquitted conduct can be considered if proven by preponderance of evidence.), cert. denied, 535 U.S. 948 (2002).

United States v. Jiminez-Villasenor, 270 F.3d 554 (8th Cir. 2001) (BYE,* BRIGHT, RICHARD S. ARNOLD). (In conspiracy case, District Court may consider all drugs that were part of same common course of conduct, or common scheme or plan; government need only prove drug quantity by preponderance of evidence. Court did not clearly err in holding defendant responsible for 1.3 kilograms of methamphetamine in light of evidence at trial; also, drug notes recovered from codefendant's house listing money balances reflected figures consistent with purchases of pounds, not ounces, of methamphetamine. Personal-use quantities need not be excluded in conspiracy cases. Even if quantity findings were erroneous, defendant's base offense level would be 32 because jury returned guilty verdict on crime involving "in excess of 500 grams of methamphetamine."

United States v. Beeks, 266 F.3d 880 (8th Cir. 2001) (LOKEN, RICHARD S. ARNOLD, FAGG) (per curiam). (One conspirator may be held responsible for distribution of drugs by other conspirators if it was in furtherance of conspiracy and either known to him or reasonably foreseeable. Evidence at trial showed defendant knew extent of conspiracy; hence, District Court's drug-quantity findings were not clearly erroneous.)

United States v. Symonds, 260 F.3d 934 (8th Cir. 2001) (HANSEN,* HEANEY,

TUNHEIM). (When determining defendant's drug quantity in setting base offense level, District Court may consider quantities which were reasonably foreseeable to him. District Court properly included quantities produced by another participant after defendant told him to stop using his garage, where defendant continued to receive personal-use quantities of drugs from that participant.)

United States v. Torres, 258 F.3d 791 (8th Cir. 2001) (WOLLMAN,* HAMILTON, MURPHY). (Defendant argues District Court's quantity finding was erroneous because it substantially exceeded quantity defendant admitted selling. He does not contest that District Court's determination was supported by testimony of witnesses but simply asserts that determination was erroneous because it does not comport with his testimony. Witness credibility, however, is within District Court's province. This Court's review of sentencing hearing transcript reveals nothing to suggest District Court's decision to give weight to testimony of other witnesses rather to defendant's was clearly erroneous.)

United States v. Nunez, 257 F.3d 758 (8th Cir. 2001) (McMILLIAN,* J. R. GIBSON, LAUGHREY). (District Court had sufficient evidence to find defendant accountable for 455 grams of methamphetamine found in rented house. Evidence at trial showed that police officers found bills related to house in defendant's name, and house's owner testified that defendant leased house. District Court was entitled to disbelieve defendant's claim that man named "Gusto" was subleasing house. Moreover, District Court could reasonably conclude that defendant was operating house as "stash house" regardless of whether "Gusto" had been living there.)

United States v. Gallardo-Marquez, 253 F.3d 1121 (8th Cir.) (BOWMAN, BOGUE, MAGNUSON*). (District Court must determine amount of drugs for which defendant is responsible by preponderance of evidence. District Court's drug-quantity finding was not clearly erroneous when it relied upon defendant's own statements to police, as corroborated by co-conspirators' testimony.), cert. denied, 534 U.S. 1031 (2001).

United States v. Atkins, 250 F.3d 1203 (8th Cir. 2001) (WOLLMAN, McMILLIAN,* BYE). (District Court did not clearly err in calculating drug quantity attributable to Atkins, as coconspirators' and officer's testimony supported finding that Atkins was responsible for production of more than 500 grams of methamphetamine.)

United States v. Calerin-Rodriguez, 244 F.3d 977 (8th Cir. 2001) (McMILLIAN, J. R. GIBSON,* BEAM). (District Court's finding as to drug quantity was not clearly erroneous. Court discounted testimony of various trial witnesses as to drug quantity and still arrived at challenged quantity. Defendant asks this Court to discard District Court's credibility determinations but it is clear from sentencing transcript that determinations were cautious and well-supported.)

United States v. Scott, 243 F.3d 1103 (8th Cir. 2001) (McMILLIAN, BOWMAN, LOKEN*). (Defendant attacks District Court's drug quantity finding, but he agreed to base offense level of 36 in his plea agreement; further, he failed to object at sentencing, and drug- quantity finding, which was based on crack cocaine sold to undercover agent and cocaine powder seized at airport, was not plain error.)

United States v. Anderson, 243 F.3d 478 (8th Cir.) (MORRIS SHEPPARD ARNOLD,* J. R. GIBSON, GOLDBERG). (It was clearly erroneous to hold defendant accountable for 520.7 grams of crack cocaine associated with uncharged shooting incident where police report stated that bags found at scene contained 520.7 grams of "crack/cocaine"--an equivocal statement at best--and chemist reported that it was "powder cocaine" weighing 490.9 grams. Further, only evidence tying him to drugs was that they were found in car that contained briefcase with papers inside it that were somehow connected to him.

It also was clearly erroneous to attribute 56 grams of crack cocaine to defendant where only supporting evidence was hearsay testimony of officer who said that one of defendant's coconspirators sold 56 grams of crack to unnamed confidential informant and officer did not know where informant obtained drug. This Court discerns same infirmity in government's proof concerning another 43 grams of crack seized from coconspirator's house; coconspirator said crack came from someone other than defendant and seemed to admit on cross-examination that it did not came from defendant.), cert. denied, 534 U.S. 903 and 534 U.S. 929 (2001).

United States v. Fraser, 243 F.3d 473 (8th Cir. 2001) (WOLLMAN, RICHARD S. ARNOLD,* HANSEN). (When determining defendant's drug quantity in setting base offense level for possession-with-intent-to-distribute offense, District Court must exclude any quantities defendant possessed for personal consumption. DISSENT: Majority plainly misreads Guidelines.)

United States v. Causor-Serrato, 234 F.3d 384 (8th Cir. 2000) (HANSEN,* HEANEY, MORRIS SHEPPARD ARNOLD). (Rejecting defendant's claim that District Court's drug-quantity determination was erroneous because District Court made no specific findings on amount attributable to him. District Court estimated defendant's drug quantity based on evidence presented; although District Court found coconspirators' testimony suspect, government presented corroborating testimony of undercover agent. District Court's determination regarding defendant's involvement in conspiracy was within its fact-finding purview.), cert. denied, 532 U.S. 1072 (2001).

United States v. Wadlington, 233 F.3d 1067 (8th Cir. 2000) (RICHARD S. ARNOLD, HEANEY, MAGNUSON*). (At sentencing, District Court adopted PSR's drug quantity calculation after determining that government's trial and sentencing witnesses were credible. Sentencing judge who presides over trial may base findings of fact on trial record, and because this Court is not firmly convinced that District Court erred in making these determinations, this Court affirms.), cert. denied, 534 U.S. 1023 (2001).

United States v. Moore, 212 F.3d 441 (8th Cir. 2000) (RICHARD S. ARNOLD, JOHN R. GIBSON,* BEAM). (District Court's finding as to drug quantity for sentencing purposes is factual determination which this Court reviews for clear error. Finding is clearly erroneous when although there is evidence to support it, reviewing Court on entire evidence is left with definite and firm conviction that mistake has been made.)

United States v. Goolsby, 209 F.3d 1079 (8th Cir. 2000) (McMILLIAN, FAGG, ROSENBAUM) (per curiam). (Rejecting defendant s claim that District Court s drug quantity calculation was clearly erroneous because it was based on incorrect information in PSR. Because

judge who sentenced defendant also presided at defendant s trial, judge could and did base findings of fact at sentencing on trial record, and could believe all, some, or none of such testimony. Witnesses testified to seeing defendant purchase minimum of 2 kilograms of cocaine base and 1 kilogram of cocaine powder, and to seeing defendant sell about 1 to 1 1/2 kilograms of crack cocaine each month for just over year. District Court s belief that evidence showed at least 1.5 kilograms of cocaine base, and probably more, was not clearly erroneous.)

United States v. Alatorre, 207 F.3d 1078 (8th Cir. 2000) (McMILLIAN, BRIGHT, RICHARD S. ARNOLD) (per curiam). (District Court s drug quantity finding was supported by numbers defendant provided government during post-arrest interview. Specifically, interviewing agent testified at sentencing about defendant s interview statements, and District Court did not err in relying on this testimony.)

United States v. Hyatt, 207 F.3d 1036 (8th Cir. 2000) (BEAM, HEANEY, KYLE*). (**Identity.** District Court did not clearly err in concluding substance attributable to defendant for sentencing purposes was methamphetamine as opposed to amphetamine, even though vast majority of quantity attributed to him was not available for testing: two of six controlled buys from defendant s customers were methamphetamine; controlled buy from defendant s supplier also was methamphetamine; all co-conspirators pleaded guilty to methamphetamine, not amphetamine, thus evidencing their belief that drug they were distributing was methamphetamine; and transcript shows District Court did not find credible defendant s claim that he distributed only amphetamine. )

United States v. Granados, 202 F.3d 1025 (8th Cir. 2000) (BEAM, LAY, J. GIBSON*). ((1) Defendant argues record does not support District Court s finding that Becky Gonzales transported quarter kilogram of cocaine for him in fall of 1994 because witness testifying as to transaction did not see cocaine or know its quantity. District Court likely estimated amount of cocaine Gonzales transported by looking at several other trips involving similar amounts of cocaine, and this finding was not clearly erroneous.

(2) District Court also did not clearly err by attributing to defendant cocaine and heroin brought by Oscar Pena. Although Pena stated in his deposition that these drugs were not tied to defendant s conspiracy, other testimony connected defendant with Pena at time he (Pena) moved drugs, and another witness testified defendant confronted her after she stole cocaine from Pena shipment.

(3) Granados argues evidence is insufficient to support finding of 250 grams of cocaine from winter 1994 trip. There was testimony that defendant, Gonzales, and two others drove to Chicago to get cocaine; that cocaine weighing quarter to half kilogram was then bagged; and that Gonzales told police she went to Chicago in December 1994 with $10,000, which was used to buy cocaine and bring it back in van; further, detective testified $10,000 could buy more than half of kilogram of cocaine in Chicago. District Court could conceivably find defendant responsible for quantity greater than 250 grams.)

United States v. Fairchild, 189 F.3d 769 (8th Cir. 1999) (LOKEN, HANSEN,* MORRIS SHEPPARD ARNOLD). (**Identity.** Rejecting contention that government failed to prove by preponderance of evidence that Gruber sold d-methamphetamine, where witnesses testified as to

high quality of methamphetamine Gruber sold, and government agents tested small portion of methamphetamine recovered during investigation and found it was d-methamphetamine. **Weight.** This Court also rejects Gruber's contention that District Court should have considered only actual weight of methamphetamine rather than to adopt method–using weight of mixture containing detectable amount of methamphetamine–which resulted in higher offense level: Guidelines direct Court to use method that results in greatest offense level for defendant.)

United States v. Vernon, 187 F.3d 884 (8th Cir. 1999) (McMILLIAN, LAY,* MURPHY). (Defendant pleaded guilty to conspiracy to possess with intent to distribute cocaine "in amount exceeding 500 grams" or "50 grams or more" or cocaine base. Fifty grams of cocaine base results in base offense level of 32, which was base offense level utilized by District Court. Because District Court did not use Vernon's relevant conduct to increase his sentence beyond base level to which he pleaded guilty, any error that may have occurred in determining his relevant conduct was harmless.), cert. denied, 529 U.S. 1032 (2000).

United States v. Stone, 181 F.3d 896 (8th Cir. 1999) (McMILLIAN, RICHARD S. ARNOLD,* MORRIS SHEPPARD ARNOLD). (Rejecting argument that government failed to prove all 120 plants taken from patch were marijuana plants: in addition to positive laboratory results on random sampling of plants removed, investigator who removed and counted plants had 12 years of law-enforcement experience, he was trained in identification and eradication of marijuana, he had been involved in investigating at least 30 marijuana patches, and each of 120 plants he removed appeared to be marijuana. Although defendants also argue there was insufficient evidence to link them to all plants, and although plants came from five different plots and defendants were filmed tending to plants in only one plot, investigator testified plots were close to each other and connected by trial, sizes of plants were same, plots were planted similarly, and when something was done to one plot, it was done to all.), cert. denied, 528 U.S. 1127 (2000).

United States v. Deering, 179 F.3d 592 (8th Cir.) (HANSEN, FAGG, MORRIS SHEPPARD ARNOLD) (per curiam). (**Identity.** Even assuming, as Deering argues, that statutory definition of cocaine base has same definition as that adopted by Guidelines (i.e., "crack"), District Court did not clearly err in finding that substance in question was crack: among other things, police officer testified at trial that substance was "rock-like" and drug agent testified that Deering had said he sold crack cocaine.), cert. denied, 528 U.S. 945 (1999).

United States v. Mosby, 177 F.3d 1067 (8th Cir. 1999) (LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD*). ((1) Court rejects Mosby's argument that there were two separate conspiracies--separated by one-month period of time during which leader of conspiracy lost his source of methamphetamine and found new source--and that only drugs from first conspiracy should have been attributed to him. Trial evidence supports conclusion that period of time during which co-conspirators did not have source of methamphetamine was not hiatus between conspiracies but mere change in personnel in ongoing conspiracy; this conclusion is buttressed by fact that many of same people remained involved and sought to achieve same objectives after source of drugs had changed.

(2) Mosby was accountable for 498.96 grams of actual methamphetamine based on calculating 567 grams of methamphetamine at 88% purity: police seized 122.25 grams of 567

grams, which was determined to be 88% pure methamphetamine; expert testimony tended to prove purity of methamphetamine produced in lab is usually 85-95% pure, and 88% figure is within this range; unseized methamphetamine was produced in same lab by same cooks who produced portion tested; and other testimony tended to show Mosby provided necessary materials to manufacture methamphetamine.), cert. denied, 528 U.S. 1196 (2000).

United States v. Molina, 172 F.3d 1048 (8th Cir.) (HANSEN,* LAY, MURPHY). (Member of conspiracy is responsible for all reasonably foreseeable acts or omissions of others in furtherance of conspiracy; when objective of conspiracy is to distribute drug quantities, government must show by preponderance of evidence that drug quantities fell within scope of criminal activity jointly undertaken and were reasonable foreseeable. There was sufficient evidence to attribute to Fraga, as relevant conduct, cocaine inside package that was intercepted en route to his shared residence: he confessed his involvement in drug trafficking, claiming to have had exclusive involvement in four controlled buys; during each controlled buy, Fraga sold powder cocaine, and intercepted package likewise contained powder cocaine; and Fraga lived at address to which package was sent.), cert. denied, 528 U.S. 893 (1999).

United States v. Hunt, 171 F.3d 1192 (8th Cir. 1999) (WOLLMAN,* LOKEN, MORRIS SHEPPARD ARNOLD). (Upholding finding that Hunt was responsible for 100-300 grams of actual methamphetamine; chemist/DEA agent testified that based on amount of precursors, production capability of Hunt's laboratory was 112 grams actual methamphetamine--testimony consistent with Hunt's admitted objective of manufacturing 100 grams of methamphetamine.)

United States v. Hall, 171 F.3d 1133 (8th Cir. 1999) (RICHARD S. ARNOLD, MORRIS SHEPPARD ARNOLD,* PANNER). (**Type.** District Court did not clearly err in finding methamphetamine involved in case was d- rather than l-methamphetamine. Forensic chemist testified he tested 11 samples, all of which were of d- variety, and nothing in record suggested any l-methamphetamine was involved; in such circumstances District Court may infer all methamphetamine was of same type as samples tested. **Quantity.** Defendants complain District Court, which did not preside over trial, consulted only selected pages of trial transcript in determining quantity. This argument is disingenuous because Court consulted all transcript citations defendants had offered. After consulting cited portions of trial transcript, using most conservative estimates, and disregarding ambiguous or incomplete testimony underlying drug quantity, this Court concludes more than enough evidence supports District Court's determination.), cert. denied, 529 U.S. 1027 (2000).

United States v. Johnson, 169 F.3d 1092 (8th Cir.) (BOWMAN, MURPHY,* ALSOP). (District Court entitled to rely on evidence including drug prices and organizational capability in approximating drug quantities beyond amount seized; in such circumstances, it is proper to rely on witnesses' testimony to establish drug amounts. Drug-quantity finding that defendant was accountable for between 1080 and 1419.67 grams of crack was based on testimony at trial and sentencing from undercover officer and several individuals involved in Johnson's distribution network. District Court is best able to assess value of testimony in light of corroborating and conflicting evidence, witness demeanor, and other factors; its findings regarding witness credibility

are thus given great deference and are virtually unreviewable.), cert. denied, 528 U.S. 857 (1999).

United States v. Brown, 169 F.3d 531 (8th Cir. 1999) (BOWMAN, LOKEN, HAND*). (Affirming finding that Brown and Hay were each accountable for five ounces of methamphetamine and five ounces of cocaine discussed by Brown and confidential informant. Record evidence leads to fair inference that actual agreement was made to sell substances, and that both Brown and Hay assented to transaction even though co-conspirator Humphreys had said he would not do deal. Further, appellants failed to sustain their burden of proving they were unable to supply full 10 ounces: Brown expressed intent to complete deal and although searching authorities did not find total of 10 ounces, Brown had told confidential informant he could supply as much as needed. Hay attempts to avoid responsibility for methamphetamine on basis that he supplied only cocaine to conspiracy, but he pleaded guilty to conspiracy involving both drugs, stipulated he knew conspiracy was distributing both, and traces of both were detected on drug paraphernalia at his house.)

United States v. Garrison, 168 F.3d 1089 (8th Cir. 1999) (RICHARD S. ARNOLD,* FAGG, DAWSON). (Calculation of drugs bought and sold during conspiracy was based on testimony of more than dozen couriers; thus there was ample evidence to support District Court's drug quantity finding.)

United States v. Goodson, 165 F.3d 610 (8th Cir.) (WOLLMAN, ROSS,* BEAM). (**Identity.** Although forms of cocaine base other than crack, e.g., coca paste, are to be treated as cocaine, here there was no evidence Goodson was distributing coca paste or other exotic forms of cocaine base; only evidence was that seized drugs were crack cocaine: police officer described drugs as hard, rocklike substances, and testified that
Goodson referred to drugs as crack cocaine.

**Quantity.** Finding on drug quantity not clearly erroneous because District Court credited officer's testimony concerning quantity, and this Court defers to that finding.), cert. denied, 527 U.S. 1030 (1999).

United States v. Marsalla, 164 F.3d 1178 (8th Cir. 1999) (FAGG,* HEANEY, WOLLMAN). (**Identity.** Although Urena Lowe testified that she had no doubt rocklike substance she sold to defendant Marsalla was crack cocaine, chemist for defense vigorously challenged Lowe's ability to identify disputed substance as crack. District Court found substance was crack, based on Lowe's experience with it as maker, buyer, handler, observer, and seller. **Held:** District Court justifiably relied on Lowe's well-grounded opinion. Crack cocaine usually has distinctive appearance and form that makes it easily recognizable to person experienced with it. And although record presented conflicting views about Lowe's ability to identify disputed substance, government's evidence showed her real-life experiences enabled her to recognize crack. Finding is further supported by lack of any evidence that Marsalla complained about quality of substance he received from Lowe. DISSENT: Visual identification doctrine should not be applied here. There is no doubt visual identification of controlled substance is virtually impossible, even for chemist. Therefore, prosecution should introduce expert testimony on chemical composition of substance in vast majority of cases.)

United States v. Roach, 164 F.3d 403 (8th Cir. 1998) (HANSEN, LAY, MURPHY*). (This Court rejects argument that trial evidence was not specific enough to allow determination of precise drug quantities because witness gave numerical ranges. Court may make specific numeric determination of quantity based on imprecise evidence, so long as record reflects basis for Court's decision. Appellants also challenge Court's finding that substance carried by one witness was "ice" methamphetamine; even though it was not established that substance was "ice," its incorrect classification would not have affected appellants' base offense levels.), cert denied, 528 U.S. 845 (1999).

United States v. Benitez-Meraz, 161 F.3d 1163 (8th Cir. 1998) (BEAM, LAY,* SIPPEL). (District Court's finding attributing 78 ounces of methamphetamine to appellant was reasonably supported by evidence, and was not clearly erroneous, where trial testimony attributed at least that much to appellant. District Court is not limited to actual amount of drugs seized when imposing sentence, but can consider witness testimony and determine its credibility when calculating total drug quantity involved in conspiracy. Witness credibility is issue for sentencing judge that is virtually unreviewable on appeal.)

United States v. Garrett, 161 F.3d 1131 (8th Cir. 1998) (BOWMAN, RICHARD S. ARNOLD, MORRIS SHEPPARD ARNOLD*). (When Garrett was arrested, police found 2.5 grams of cocaine base on coffee table and 33 grams on his person. He objected to inclusion of 2.5 grams arguing it belonged to other occupants of apartment. Addendum to PSR concluded Garrett was only person in apartment who was dealing drugs, and District Court attributed 2.5 grams to Garrett based on "all of evidence" in PSR. Because it appears Court relied partly on controverted fact--that Garrett was only drug dealer occupying apartment--this Court reverses. District Court may not rely on facts in PSR if defendant contests them; and although PSR's uncontested facts could have formed sufficient basis for concluding Garrett owned 2.5 grams, District Court relied on "all of evidence" in PSR and this Court therefore cannot determine whether Court would have come to same conclusion had it not believed Garrett was only drug dealer in apartment.)

United States v. Cordova, 157 F.3d 587 (8th Cir. 1998). (Dominguez argues trial judge erred in finding him responsible for distributing between 100 and 400 kilograms of marijuana. Trial Court not clearly err. Based on evidence, trial Court found that Dominguez was "major player" in conspiracy to distribute drugs to South Dakota through two other persons, and it is also clear that trial Court attributed to Dominguez 300- 350 pounds of marijuana which South Dakota men bought during conspiracy. It was logical to infer that Dominguez supplied all marijuana sold to South Dakota men during conspiracy, because record supports strong inference that Dominguez supplied marijuana to Cordova who in turn supplied it to South Dakota men. Moreover, Cordova acknowledged he was only middleman and Dominguez was his supplier, and when South Dakota men arrived in Denver unexpectedly, Cordova went to Dominguez's house and returned with drugs, or Dominguez arrived at Cordova's house with drugs; when prior arrangements were made, drugs were already at Cordova's house.)

United States v. Maggard, 156 F.3d 843 (8th Cir. 1998). (District Court properly attributed 10 to 30 kilograms of methamphetamine to appellants at sentencing based on testimony of co-

conspirators and immunized witnesses as to scale of conspiracy.

**Quantity.** District Court could properly consider total amount of drugs involved in conspiracy in determining quantity of drugs attributable to appellants, who were convicted of conspiracy to distribute methamphetamine; moreover, relatively small amount of drugs were seized and Guidelines direct District Court to approximate quantity of controlled substances under such circumstances.

**L- or D- Methamphetamine.** No finding necessary on whether methamphetamine was "l" or "d" because appellant was convicted of conspiracy which ended in July 1996; conspiracy's completion date controls which version of Guidelines applies, and under applicable Guidelines--those issued in November 1995--no distinction is made between "l-" and "d-" methamphetamine.

**Withdrawal from conspiracy.** Defendant who maintains conspiracy was complete as to him by certain date must show he affirmatively withdrew either by making clean breast to authorities or communicating withdrawal in manner reasonably calculated to reach co-conspirators; mere cessation of activities is not enough.), cert. denied, 525 U.S. 1170 and 526 U.S. 1058 (1999).

United States v. Brown, 156 F.3d 813 (8th Cir. 1998). (**Identity.** Brown contended government failed to prove he was distributing "crack" cocaine as opposed to some other form of cocaine base. Government chemist testified substance seized was "cocaine base" but did expressly state it was "crack" cocaine and appeared unfamiliar with process for manufacturing crack; testimony that substance chemically is "cocaine base" does not entirely exclude possibility that it may be form of cocaine base other than "crack" (Court emphasizes in footnote that dispute here concerns definition of "cocaine base" from standpoint of chemist). Nevertheless, this Court affirms finding that Brown was distributing crack: there was no evidence he distributed coca paste or other exotic forms of cocaine base that are not considered crack; crack cocaine usually has distinctive appearance and form that makes it easy to recognize; and government called number of users and distributors--among most knowledgeable experts on crack--who testified that substance they obtained from Brown was crack and who offered no complaints about its quality.

**Standard of proof.** Brown also argues that government should be required to prove substance was crack by clear and convincing evidence because of severity of penalty for crack; Court declines to decide issue because government satisfied its burden under clear and convincing standard.

**Quantity.** Government conceded that evidence supported finding of more than 50 grams but less than 150 grams of crack, despite PSR's recommendation that Court should find Brown was responsible for 150 to 500 grams; notwithstanding government's concession District Court found Brown responsible for 150 to 500 grams. This Court finds clear error and **remands**. Although District Court was not bound by government's concession, Court did not articulate any reason for rejecting it or even state clearly that it was rejecting concession, and this Court thus cannot be assured rejection was intentional. Moreover government did not introduce evidence to show Brown was responsible for more than 150 grams of crack.)

United States v. Milton, 153 F.3d 891 (8th Cir. 1998). (Reversing where District Court attributed one kilogram of crack cocaine to Mitchell from transaction supposedly taking place in January 1996 (in Omaha, Nebraska); however, in its case against one of Mitchell's co-conspirators, government had offered written stipulation that Milton was absent from Nebraska at all times during

January 1996. Thus Court's finding was clearly erroneous because it contradicted facts stipulated to by government and another party.), cert. denied, 525 U.S. 1165 (1999).

United States v. Campbell, 150 F.3d 964 (8th Cir. 1998). ((1) Reversing where District Court clearly erred in attributing two kilograms of cocaine to Campbell which had been sold to friend of one of government's witnesses against Campbell. Trial testimony established only that Campbell was present at garage where drugs were sold, Campbell knew drugs were sold there, and two kilos of cocaine were sold at garage on same day Campbell was there. But there was no evidence Campbell was present at garage when sale of drugs actually took place or was involved in sale in any way.

(2) Record amply supported attribution of seven ounces of methamphetamine to Campbell based on trial testimony that Campbell had sold approximately one ounce of methamphetamine to one person at least six times, and that same person traded firearms to Campbell for additional one or two ounces of methamphetamine.)

United States v. Ortega, 150 F.3d 937 (8th Cir. 1998). ((1) Case involves methamphetamine offense as to which applicable Guidelines treated d-methamphetamine more harshly than l-methamphetamine; government had burden to prove methamphetamine was more likely than not d-methamphetamine. Expert witness testified that each of government's drug exhibits contained d-methamphetamine and some samples also contained l-methamphetamine. Even if independent laboratory analysis seized would have demonstrated greater percentage of l-methamphetamine than d-methamphetamine, this demonstration would have no effect on defendant's sentence: more serious controlled substance found in mixture, regardless of its percentage to whole, determines category of entire quantity for sentencing purposes.

(2) Reversing for specific findings necessary to independent drug quantity determination where record contained no indication District Court made quantity determination based upon evidence rather than on disputed PSR; District Court's ambivalent pronouncements about quantity ("Well, I said there was, undoubtedly, something under 1,000 grams and I also stated that I felt there was more than one kilogram...") when coupled with Court's apparent acceptance of PSR's drug quantity estimate would not permit this Court to determine what quantity District Court found attributable to conspiracy count.), cert. denied, 525 U.S. 1087 (1999).

United States v. Santana, 150 F.3d 860 (8th Cir. 1998). (Finding no clear error in District Court's drug quantity determination where District Court expressly found credible and reliable co-defendant's testimony as to numerous multi-ounce deliveries of cocaine from Diaz; District Court's findings regarding credibility of witnesses "are virtually unreviewable on appeal.")

United States v. Brown, 148 F.3d 1003 (8th Cir. 1998). (District Court may consider amounts from drug transactions in which defendant was not directly involved upon finding that drug transaction or activity (a) was in furtherance of conspiracy, and (b) was either known by defendant or reasonably foreseeable to him. Here, evidence established that each considered quantity was tied to narcotics-distribution conspiracy entered into by Hewitt; and each quantity was either directly connected or imminently foreseeable to Hewitt, who would surely have realized profit as to each quantity had conspiracy not been foiled.

Defendant Brown argued certain drugs should be excluded because government did not establish his connection to them at trial, but District Court was entitled to rely on *pretrial* testimony which established Brown's connection to drugs in question.

Court also rejects Brown's argument that Court should assume jury concluded only cocaine powder was involved because jury did not make specific finding as to nature of drugs involved in conspiracy: regardless of jury's actual or assumed beliefs about conspiracy, Guidelines require judge to determine whether controlled substances at issue--and how much of those substances--consisted of cocaine, crack, or both.), cert. denied, 525 U.S. 1169 (1999).

United States v. Puckett, 147 F.3d 765 (8th Cir. 1998). (Findings on drug quantity were not clearly erroneous where evidence at trial showed conspirators were dealing large amounts of crack over extended period of time, and Redmond was significantly involved in conspiracy, had large amounts of cash, and left supply of drugs for dealing at acquaintance s residence (§ 2D1.1, comment. (n.12).)

United States v. Gipp, 147 F.3d 680 (8th Cir. 1998). (District Court s drug quantity determination not clearly erroneous where evidence showed Gipp sold resale quantity of drugs, entered into agreement with others to unlawfully distribute controlled substances in four different communities, and knowingly involved himself in conspiracy (§ 1B1.3).)

United States v. Eads, 144 F.3d 1151 (8th Cir. 1998). (Eads contended sentence was improperly calculated upon full amount of methamphetamine shipped in conspiracy. In his plea agreement, Eads accepted without objection this quantity as basis for sentence calculation and he cannot successfully object for first time on appeal. Moreover, his demonstrated knowledge of nature and scope of conspiracy permitted sentence based on total amount of drugs.)

United States v. Koontz, 143 F.3d 408 (8th Cir. 1998). (Koontz argues that because some of drugs found in his car were amphetamine, trial Court should have used amphetamine (§ 2D1.1(c)(7) & application note 10) rather than methamphetamine (§ 2D1.1(c)(4)) as basis for calculating sentence, and four-pound figure was unrealistically high. Trial Court did not err in using four pounds of methamphetamine as basis for calculating Koontz s sentence where federal drug agent s testimony was Koontz acknowledged selling four pounds of methamphetamine in year prior to his arrest; county detective who testified at trial described Koontz s request to talk with federal drug agent by saying Koontz told him he wanted to talk about drug cases involving methamphetamine; when asked on cross-examination whether he told agent he could help out in sources of methamphetamine, Koontz answered in affirmative.

This Court rejects Koontz s contention that because four-pound figure is based primarily on uncharged conduct, "clear and convincing evidence" should be standard of proof; appropriate standard is "preponderance of evidence.")

United States v. Kang, 143 F.3d 379 (8th Cir. 1998). (Substance Kang is accused of having possessed and distributed is referred to consistently as "cocaine base or crack. " Kang complains sentence was calculated as if substance was simply "crack," and under rule of lenity, phrase appearing in disjunctive should be interpreted as limited to "cocaine base" as opposed to "crack,"

which would produce shorter sentence. This Court rejects Kang s argument because "cocaine base" and "crack" as used in Sentencing Guidelines are same thing. Although chemically there are forms of cocaine base that are not "crack," Guidelines make two terms synonymous for sentencing purposes.)

United States v. Loveless, 139 F.3d 587 (8th Cir. 1998). (Loveless argues District Court erroneously determined methamphetamine he conspired to distribute was d- rather than l-. District Court did not commit clear error where there was ample circumstantial evidence upon which it could conclude Loveless conspired to distribute d-methamphetamine (e.g., individuals who bought methamphetamine supplied by Loveless, testified that when they used this methamphetamine, they experienced stimulating effects only d- would produce such as sleeplessness and severe loss of appetite; these individuals also testified they never received any complaints from customers about methamphetamine they sold them).)

United States v. Moss, 138 F.3d 742 (8th Cir. 1998). (Moss asserts District Court erred in calculating quantity of drugs attributable to him and erred in relying on witness s uncorroborated testimony and discounting two witnesses contradictory testimony regarding nine ounces of crack attributed to Moss. District Court, faced with conflicting testimony of witnesses, did not expressly make credibility finding, but it is apparent Court chose to credit one witness s testimony regarding nine ounces. As this Court does not pass upon credibility of witnesses or weight to be given their testimony, it declines to reverse District Court s drug quantity determination. Though express credibility finding would have been preferable, District Court s assessment of witness credibility in this case is evident.)

United States v. Ayers, 138 F.3d 360 (8th Cir.) (Ayers claims District Court arbitrarily assessed amount of crack attributable to him. No clear error or arbitrary determination of amount of crack attributable to Ayers where it was proper for District Court to reasonably estimate total drug quantities based on its assessment of evidence; Court calculated amount by totaling amounts from various drug transactions described by witnesses, discounting some testimony based on its credibility findings, and approximating certain amounts based on all evidence.), cert. denied, 525 U.S. 895 (1998).

United States v. Coleman, 138 F.3d 344 (8th Cir.) (Because physical evidence of methamphetamine production consisted of preliminary ingredients, District Court had to approximate quantity of finished product for which defendants would be sentenced. District Court s calculation began with 81 pounds of iodine which Austin testified to purchasing for operation. It then applied what Austin had testified to be defendants formula (3 parts ephedrine to 2 parts iodine to one part red phosphorus); and Court took into account practicalities of manufacturing process and made conservative estimates. Defendants challenge each step of calculation. District Court s reliance on Austin s testimony was not clear error; determinations of witness credibility are virtually unreviewable. District Court considered Austin s criminal history and drug abuse, and its possible effects on his mental acuity, but concluded there was nothing to indicate at time of trial Austin suffered any impairment to render his testimony unreliable. This Court notes District Court did not credit Austin s testimony entirely, and defers to Court s

evaluation of Austin s credibility. District Court s use of iodine quantity to calculate methamphetamine quantity and computation of yield also are not clear error as it heard extensive expert testimony on these issues at trial and at sentencing, from two chemists for government and one for defense. Further, Austin testified to particular formula which specified relative proportions of chemical ingredients. District Court s use of 16.67 kilograms for sentencing was conservative and not clearly erroneous.

This Court rejects assertions three defendants should not be held responsible for full amount of methamphetamine produced by conspiracy. Gessaman and Ward assert they did not agree to jointly undertake production of total amount of methamphetamine, nor was amount reasonably foreseeable to them (§ 1B1.3(a)(1)(B)). Because Ward did not raise issue of foreseeability either in objections to PSR or at sentencing, District Court properly relied on PSR s findings which held Ward accountable for full amount of drugs produced by conspiracy. Record supports findings on foreseeability as to Gessaman who stipulated she purchased ingredients and generally assisted leader in operation. Further, evidence from co-defendant s trial and sentencing showed she rented farmhouse, helped purchase iodine and lab equipment, accepted iodine deliveries, and worked in laboratory---making yield reasonably foreseeable.), cert. denied, 525 U.S. 899 (1998).

United States v. Jacobs, 136 F.3d 1187 (8th Cir. 1998). (Jacobs was held responsible for 364 marijuana plants. Under Guidelines in effect at time of Jacobs s offenses and at time of original sentencing, each plant was assigned for sentencing purposes weight of one kilogram. Amendment 516 (1995) which has effect of reducing weight considered for sentencing purposes in case involving 50 or more marijuana plants was specifically made retroactive, § 1B1.10, and would lower Jacobs s offense level by at least two levels. This Court concludes District Court merely overlooked Jacobs s filing invoking amendment and Court s subsequent failure to consider it was inadvertent. This Court vacates Jacobs s sentence and remands case for further consideration of issue.)

Patterson v. United States, 133 F.3d 645 (8th Cir. 1998). (This Court rejects Patterson s argument government failed to prove by preponderance of evidence during sentencing phase, Patterson was responsible for possession of "crack" cocaine. Where forensic chemist testified at trial he had performed tests on substance obtained from Patterson s home, and substance was cocaine base, or "crack" as defined in Sentencing Guidelines, evidence is sufficient to support sentence imposed by District Court, § 2D1.1 (Note (D))).

United States v. Covington, 133 F.3d 639 (8th Cir. 1998). (Covington claims there was insufficient evidence substance he possessed was crack cocaine, rather than some other type of cocaine base. Covington does not challenge finding he possessed 832.17 grams of cocaine base, rather, he suggests lab test or testimony of chemistry expert is required before District Court may find by preponderance that cocaine base is crack cocaine. This Court disagrees as identity of controlled substance can be proved by circumstantial evidence and opinion testimony. Where police detective testified at sentencing it was his opinion, based on significant narcotics experience consisting of hundreds of encounters with crack cocaine, that tan rock-like substance in Williams s purse was crack, was more than sufficient to support District Court s finding cocaine base was crack cocaine.)

United States v. Dierling, 131 F.3d 722 (8th Cir. 1997). (Appellants object to District Court s reliance on testimony by immunized witnesses who were admitted drug addicts, raising questions of truthfulness and impaired memory. In some situations, District Court approximates quantity of controlled substance, § 2D1.1, comment. (n.12). In such situations, it is proper to rely on testimony of witnesses to establish drug quantities; District Court assessment of credibility of witness is nearly unreviewable. Here, no demonstrated untruthfulness and nothing in record to indicate witnesses had suffered memory loss or hallucinated about amount of drugs they saw. Appellants also argue witnesses were unreliable because prices they reported did not always fit amounts of methamphetamine. District Court could have found partial payment made or two buyers paid reduced rates because of position in conspiracy.

Younger argues District Court erred by partially basing his sentence on 300 grams of substance containing methamphetamine found in jar seized during stop of his vehicle and on other seized substances containing methamphetamine; he contends substances were only 0.5% methamphetamine, and were therefore, undistributable or unmarketable. Appellants have not presented evidence contents of jar or any methamphetamine introduced at trial was tainted or unmarketable, and 0.5% is detectable amount (§ 2D1.1(c)); Guidelines require drug calculations include methamphetamine Younger challenges.

Dierling argues District Court erred in including in its count amounts that could have been manufactured from recipe he gave someone while they were in jail; Dierling contends recipe would not have yielded methamphetamine. Government presented evidence to contrary and it was for trial Court to resolve any conflict.), cert. denied, 523 U.S. 1054, 523 U.S. 1066 and 524 U.S. 922 (1998).

United States v. Padilla-Pena, 129 F.3d 457 (8th Cir. 1997). (In determining BOLs, District Court may rely on evidence including drug prices and organizational capabilities to approximate total drug quantities beyond drugs actually seized, § 2D1.1, application note 12; further, sentencing judge who presides over trial is entitled to base findings of fact on trial record. Based on evidence, District Court found both Luis and Ana Rosa to be central figures in conspiracy; both could be reasonably expected to foresee bulk of conspirators activities, § 1B1.3(a)(1)(B). District Court assigned both Luis and Ana Rosa BOL reflecting drug quantity of 10-30 kilograms of heroin and methamphetamine. In determining quantity, district judge relied heavily upon trial testimony of another defendant; Court s estimate was based upon processing of heroin which another defendant witnessed in individual cities, while overall drug conspiracy actually encompassed several cities at given time. This Court concludes judge s method of determining quantity of heroin was reasonable, and he did not rely solely on one estimate; instead, judge corroborated his findings by analyzing additional evidence including amounts of money seized from conspirators as well as defendant s testimony concerning both amounts of heroin she had transported between two cities, and daily volume of sales required to maintain heroin market in given city. Where judge found defendant-witness credible on issue of drug quantity, based in part on availability of evidence which substantiated much of her testimony, this Court finds no clear error in determination.

Angelica was assigned BOL reflecting drug quantity of 3-10 kilograms of heroin; she contends evidence ties her only to money involved in conspiracy and not to drugs themselves. Although Angelica was never personally found in possession of drugs, her ability to foresee drug quantity of at least three kilograms of heroin is well established, e.g., during interdiction stop, officers seized approximately $27,000 in cash from Angelica who was traveling from one city to co-

conspirator s home in another state; Angelica was identified as party to intercepted phone conversations in which money and heroin business were discussed. No clear error.

Michael was assigned BOL reflecting quantity of 3-10 grams of heroin. Because District Court could not establish Michael was member of conspiracy prior to 12/11/94, he argues only amount of heroin that can reasonably be attributed to him is 1.5 kilograms. This Court rejects argument. No error in BOL determination where Michael was in close contact with another appellant whom District Court considered to be one of two "cornerstones" of operation; based on Michael s telephone conversation with another appellant in which he discussed heroin business; and Court finding Michael was aware of heroin activities in Omaha in 12/94, which alone involved heroin in excess of three kilograms.

No clear error in District Court s finding Francisco could have reasonably foreseen at least one kilogram of heroin based on his involvement in Omaha operations and his close contact with co-conspirators.), cert. denied, 524 U.S. 905 and 524 U.S. 906 (1998).

United States v. Santonelli, 128 F.3d 1233 (8th Cir. 1997). (Where case was returned to District Court on limited remand, i.e., reconsideration of drug quantity because sentence may have been affected by incorrect information, correction of offense level relating to quantity of drugs permitted adding point for place where drugs were sold (§ 2D1.2). Santonelli asserts if remand permitted enhancement for sale of drugs in protected location--a matter not anticipated on remand--case should be remanded again for reconsideration of double counting. This Court emphasizes its limited remand which did permit review of correct offense level which would include one-point enhancement. 1996 PSR included enhancement; thus, Santonelli received notice and could have made appropriate objection. Nevertheless, Santonelli did not contest revised PSR on amount of drugs, and therefore, his contention this Court should revisit double counting is rejected.)

United States v. Sobrilski, 127 F.3d 669 (8th Cir. 1997). (Offense level for Sobrilski s and Martin s convictions for conspiracy to distribute and possess methamphetamine and amphetamine and for attempt to distribute amphetamine is that for distribution and possession of those two drugs. In determining their offense level, District Court attributed to them 2,041 grams of substance found in woods near their trailer; this constituted major portion of total 2,425 grams of cocaine equivalency and effect was to significantly increase offense levels, and hence, sentences. Sobrilski and Martin contend inclusion of 2,041 grams was erroneous because they were not jointly involved in possession or distribution of that portion of substance. Record supports District Court s decision to include 2,041 grams defendants were directly involved and amount was reasonably foreseeable within scope of criminal activity they jointly undertook. Amount was part of larger quantity contained in flask which two others brought back with Sobrilski to trailer; entire flask of substance, including portion hidden in woods, was integral and essential part of conspiracy and attempt to distribute. Sobrilski recognized availability of additional grams when he offered undercover officer additional ten pounds per purchase. Martin s close connection with entire illegal venture and her activities in connection with transactions were sufficient to make amount also attributable to her; moreover, they also were attributable to her because she aided and abetted Sobrilski in distribution.), cert. denied, 522 U.S. 1152 (1998).

United States v. Cole, 125 F.3d 654 (8th Cir. 1997). (Cole argues District Court erred in

calculating amount of methamphetamine that could be produced from seized chemicals and glassware because Court used theoretical ratio of one gram of ephedrine to .75 gram of methamphetamine rather than Cole s lower calculation (usually yielded .25 gram) to which he testified at sentencing. Chemist who analyzed Cole s laboratory testified .75 figure was average based upon yields seen in field. District Court determined testimony of chemists and lab investigator established mean yield was .75 and found irrelevant Cole s assertion he never reached .75 average. Here, District Court was required to approximate quantity of controlled substance considering size and capability of Cole s laboratory. Although Court could have found Cole s testimony on methamphetamine yield not credible, Court did not make such finding; rather, it found Cole s testimony irrelevant, erroneously turning inquiry into what average cook was capable of yielding, not what Cole could have produced based on seized chemicals. District Court committed error, and this Court remands so Court may apply correct legal standard in evaluating Cole s testimony and determining drug quantity. DISSENT: District Court s statement, taken in context of Court s discourse at sentencing, simply evinced belief government witnesses testimony as to what Cole could produce was more credible than Cole s testimony on point. In dissent s view, Court then relied on credited testimony in approximating drug quantity.)

United States v. Ortiz, 125 F.3d 630 (8th Cir. 1997). (Roeles Ortiz contends District Court wrongfully attributed to him $128,000 in drug proceeds (translating into 4.46 kilograms of cocaine for sentencing purposes) seized from Eric Ortiz. Roeles maintains he could not have reasonably foreseen Eric s $128,000 drug deal. This Court concludes drug quantity findings were not clearly erroneous as Roeles was committed, continuing member of conspiracy who stood to benefit if Eric had escaped undetected with cash. Facts satisfy reasonable foreseeability test (§ 1B1.3).), cert. denied, 522 U.S. 1132 (1998).

United States v. Lopez, 125 F.3d 597 (8th Cir. 1997). (Lopez s sole claim on appeal is District Court error in using methamphetamine guideline in calculating drugs attributable to him as result of transaction. Lopez does not contest agreement was for methamphetamine or his act of aiding and abetting agreement was relevant conduct. He argues, however, his sentence should be based on amphetamine, substance actually distributed. Guideline calls for inclusion of types and quantities of drugs not specified in count of conviction, § 2D1.1, comment. note 12, that were part of same course of conduct or common scheme or plan as offense of conviction, § 1B1.3(a)(2). Where defendant negotiated for or attempted to receive specific substance, but that substance, was, unanticipated by and unknown to defendant, replaced with different substance, defendant s culpable conduct is more accurately evaluated by ascribing to him intended rather than unintended substance. This Court rejects Lopez s argument as seriousness of his conduct is most accurately accounted for by basing his offense level on methamphetamine because methamphetamine --and not amphetamine--was drug involved in Lopez s scheme or plan. Lopez concedes he intended to aid and abet transaction involving methamphetamine, and he had previously sold methamphetamine to one of parties and attempted several times to arrange methamphetamine transaction with other. Amphetamine was never part of Lopez s scheme or plan, and District Court properly concluded Lopez s sentence should be based on methamphetamine guideline.)

United States v. Stewart, 122 F.3d 625 (8th Cir. 1997). (Stewart argues District Court erred

in sentencing him to enhanced penalties for selling crack-cocaine because there is no supporting evidence. District Court s finding is not clearly erroneous where sentencing judge presided at Stewart s trial and there is evidence in record to support factual finding: police detective testified at trial he bought crack-cocaine from Stewart on three occasions; detective also identified crack-cocaine he bought from Stewart when government introduced it into evidence; government had cocaine analyzed by chemist and entered chemist reports into evidence at Stewart s trial (reports state cocaine base was "rock-like").

Stewart argues there must be evidence cocaine base he sold contained cocaine hydrochloride and sodium bicarbonate before District Court may find cocaine base is crack. This Court rejects Stewart s argument because Guidelines only state crack cocaine is "usually prepared" by processing those two compounds, § 2D1.1(c), Note (D). Language does not require such evidence before District Court can conclude substance is crack cocaine, and such evidence was not required in Stewart s case.)

United States v. Fairchild, 122 F.3d 605 (8th Cir. 1997). (Fairchild asserts some of drugs were for personal use and were improperly calculated in his offense level. This Court declines to disturb District Court s conclusions on appeal where District Court carefully reviewed evidence presented and determined witnesses who testified about quantities were believable, and Court made clear they were credible witnesses whose testimony Court relied upon.

Leisinger challenges District Court s decision to rely on certain evidence. This Court cannot say District Court abused its discretion; for example, credibility determinations are at discretion of District Court and conclusions as to credibility of witness are virtually unreviewable on appeal.

Pierce challenges reliability of VanBrocklin s testimony he owed Fairchild $10,000 as drug debt, and VanBrocklin s motorcycle was taken as compensation for that debt. Here, District Court determined Pierce was involved in taking VanBrocklin s property, and 226.8 grams of methamphetamine was estimate of amount of methamphetamine VanBrocklin would need to receive to incur this level of debt. Again, District Court is rarely reversed on credibility determinations and this Court declines to do so here (despite authoring judge s belief "calculating prison sentences based upon drug weight often leads to excessive prison sentences, particularly in conspiracy drug cases, and provides inaccurate measure of offender s degree of criminality."

Appellants argue District Court s failure to determine whether they should be sentenced pursuant to Guidelines applicable to d- or l-methamphetamine requires remand. Because no objection was made before District Court, this Court reviews decision to consider drugs as d only for clear error. Government bears burden of establishing type of methamphetamine involved in particular offense. PSRs for each appellant reference two tests performed on discovered methamphetamine and both times tests revealed d. Appellants filed no objections to these reports. This Court cannot say District Court committed clear error by sentencing appellants for d.), cert. denied, 522 U.S. 1131 (1998).

United States v. Logan, 121 F.3d 1172 (8th Cir. 1997). (District Court attributed three to ten kilograms of methamphetamine and/or heroin to Logan, § 2D1.1(a)(3), § 2D1.1(d)(3); Logan argues evidence did not support finding of such large amount. This Court acknowledges trial testimony in which Logan conceded 450 grams of methamphetamine; one witness testified to purchasing amount

which totaled approximately 2,137 grams of methamphetamine; and assuming $9,000 translates to approximately 255 grams, quantities total only 2,842 grams--less than three kilograms required to sustain BOL given to Logan. This Court remands for resentencing as District Court made no findings at sentencing with respect to other conspirators whose drug amounts should be attributed to Logan; rather, Court merely overruled Logan s objection to amounts attributed to him. This Court cannot tell what other drug amounts, if any, ought to have been included in determining BOL.)

United States v. Payne, 119 F.3d 637 (8th Cir.) (Foster argues District Court erred in finding him responsible for distribution of more than 20 kilograms of cocaine. District Court did not clearly err in holding Foster responsible for more than 20 kilograms (§ 1B1.3) where this Court s review of evidence indicates authorities seized 20 kilograms shortly after its distribution from Foster to co-defendant. Credited testimony indicated witness obtained 46 kilograms of cocaine from Foster on four trips he made to Los Angeles while member of this conspiracy. Cocaine seized in suitcase and trial testimony alone show Foster s responsibility for 66 kilograms, greater amount than District Court attributed to him.), cert. denied, 522 U.S. 987 (1997).

United States v. Weekly, 118 F.3d 576 (8th Cir.) (District Court may base defendant s sentence on drugs attributed to his co-conspirators if it finds by preponderance of evidence co-conspirators activities were in furtherance of conspiracy and were either known to defendant or reasonably foreseeable to him (see also § 1B1.3). Relevant to determination of reasonable foreseeability is whether and to what extent defendant benefitted from co-conspirators activities and whether defendant demonstrated substantial level of commitment to conspiracy. Braddock and Weekly argue District Court clearly erred in finding them responsible for entire amount of heroin--28 kilograms--because entire amount was not reasonably foreseeable to them; they contend Court relied on very general evidence to establish their involvement and Court should have sentenced them on basis of quantity determination of less than 10 kilograms, § 2D1.1(c). No clear error in finding 28-kilogram amount generated by conspiracy reasonably foreseeable to Braddock and Weekly where Weekly and Braddock benefitted from conspiracy and were substantially committed to it; Weekly distributed heroin to low-level dealers; Braddock worked as street-level distributor; primary role of Braddock and Weekly in conspiracy was to package heroin for sale by mixing it with diluting agents; agent testified during course of surveillance he saw Weekly repeated times and specifically recounted two undercover purchases involving Weekly, and agent testified Weekly and Braddock were paid $1,000 each time they diluted heroin, and they, along with few others, were responsible for packaging drugs for retail sale (no reason why District Court could not rely on this testimony).), cert. denied, 522 U.S. 1020 (1997).

United States v. Granados, 117 F.3d 1089 (8th Cir. 1997). (At sentencing hearing, Granados objected to quantity of drugs attributed to him and requested evidentiary hearing on issue. Strict compliance with Rule 32(c)(3)(D) requirement that Court make findings of fact as to each controverted material fact in PSR is essential to meaningful appellate review and fairness of sentencing process. Here, in discussing whether evidentiary hearing regarding quantity was necessary, district judge admitted trial testimony regarding quantity was often vague and uncertain; later, judge expressed concern his recollections of trial testimony might not constitute sufficient records for substantiating sentence. Subsequently, however, district judge made factual finding

attributing five kilos of controlled substances to Granados. While finding was based upon judge s recollection of trial testimony concerning couple of locations where Granados had stored cocaine, testimony indicated some cocaine had become unusable, and testimony involving "descriptions of others to various quantities," judge failed to make specific quantity determinations. Later, judge admitted record did not justify his fact finding. This requires reversal; Guidelines require strict compliance, and those convicted are entitled to articulation of findings required by Rule. Sentenced vacated and case remanded for resentencing.)

United States v. Grajales-Montoya, 117 F.3d 356 (8th Cir.) (Because Deluca could be held responsible for all drug transactions that fell within scope of conspiracy headed by him and his wife, this Court accordingly reviews trial Court s determination of amounts attributable to Deluca for clear error, mindful this Court defers heavily to District Court s findings with respect to witness credibility that enter into such determinations. This Court agrees with trial Court its estimate of drugs attributable to Deluca was conservative one, and District Court did not clearly err in calculating drug quantity which indicated BOL-38.), cert. denied, 522 U.S. 983 and 522 U.S. 1007 (1997).

United States v. McFarland, 116 F.3d 316 (8th Cir.) (District Court properly relied on trial testimony to establish drug quantities attributable to McFarland for sentencing purposes. As McFarland failed to object specifically to any drug quantity calculations contained in his PSR, District Court could have relied directly on PSR.), cert. denied, 522 U.S. 961 (1997).

United States v. Purvis, 114 F.3d 737 (8th Cir. 1997). (Purvis challenges calculation of drug quantity. This Court acknowledges determination of drug quantities involved in this case poses challenge: in contrast to large scale of operation, government s investigation recovered only small amount of drugs (thus, Court had to approximate drug quantity involved based on witnesses testimony); and probation office s PSR relied in part on information provided by confidential informants whose testimony was not part of trial record. Where District Court did not take into account drug amounts based strictly on information in PSR concerning confidential informants materials and found credible evidence, based on witnesses called by government at trial, to support PSR findings and then specifically found Purvis responsible for approximately 10 kilograms of each of three substances, this Court is satisfied District Court based its calculation on proper evidence and its determination is amply supported by trial testimony.)

United States v. Guerra, 113 F.3d 809 (8th Cir. 1997). (Guerra objects to District Court s determination that 15-20 pounds of methamphetamine were attributable to him. At sentencing, government must prove drug quantity by preponderance of evidence. Criminal defendant convicted of conspiracy may be held accountable for all reasonably foreseeable acts and omissions of others in furtherance of jointly undertaken criminal activity (§ 1B1.3(a)(1)(B)). This Court concludes record contains evidence linking Guerra to distribution of 15-20 pounds of methamphetamine attributed to him (e.g., testimony revealed Guerra had substantial level of commitment to conspiracy, Guerra received monetary benefit from methamphetamine); given actions of Guerra and testimony at trial, it was reasonably foreseeable Guerra knew drugs which he supplied to Cordova were being distributed to others. This Court not definitely and firmly convinced mistake was made in

attributing 15-20 pounds of methamphetamine to Guerra as Court s findings are supported by evidence.)

United States v. Morales, 113 F.3d 116 (8th Cir. 1997). (District Court used figures from two seized packages of marijuana to estimate amount contained in unrecovered package; Court determined net weight of marijuana contained in seized packages was 57% of packages total weight. Court then used same percentage to determine net weight of unrecovered package. Both Morales and Toca challenge District Court s method for calculating amount of marijuana contained in unrecovered package. Unrecovered drug quantities can be estimated from similar known transactions, § 2D1.1 comment. (n.12). This Court concludes District Court s methodology was reasonable way to estimate drug quantity of unrecovered package and its finding was not clearly erroneous.)

United States v. Emmanuel, 112 F.3d 977 (8th Cir. 1997). (Emmanuel contends District Court erred in determining methamphetamine involved was Schedule II controlled substance and that it was d- as opposed to l-methamphetamine. District Court sentenced Emmanuel to sixty months imprisonment, applying mandatory minimum required by 21 U.S.C. § 841(b)(1)(B)(viii). While Emmanuel attempts to distinguish between d- and l-methamphetamine to avoid application of statutory mandatory minimum which by its own terms makes no distinction, mandatory minimum prescribed by statute trumps Emmanuel s claim of error as to type of methamphetamine.)

United States v. Rodriguez, 112 F.3d 374 (8th Cir. 1997). (Rodriguez challenges District Court s attribution to him of from three to ten kilograms of heroin and/or methamphetamine resulting in BOL-34, § 2D1.1(a)(3), § 2D1.1(c)(3). Co-defendant cooperating with government, testified Rodriguez was his sole source for heroin and his primary source for methamphetamine; he gave Rodriguez addresses where drugs should go and Rodriguez then packed drugs and sent them to those addresses through private shipping service. Owner of shipping service testified that in relevant 22-month period, service was used by Rodriguez/agent six times per month (for total of 132 packages). This Court concludes even assuming most packages contained heroin or methamphetamine from Rodriguez, there is no evidence of how much of either drug was in any individual package. Despite co-defendant s testimony of specific amounts sent to St. Louis, total is far less than three kilograms necessary to sustain BOL given Rodriguez. Given shipping service owner s testimony that sometimes packages contained only clothes and personal items, nothing in record from which this Court can discern how many packages had drugs and how many did not. Government relied exclusively on its suggested method of calculating drug amounts and disclaimed reliance on drug amounts attributable to co-defendants, and District Court made no specific findings with respect to whether drugs attributable to co-defendants could also be attributed to Rodriguez. This Court therefore remands Rodriguez s case for resentencing on drug quantities in light of all uncertainties.

Under all of circumstances [similar to above], this Court is concerned quantity of drugs that could or should be attributed to Glaus is too uncertain to sustain BOL requiring at least three kilograms. This Court therefore remands Glaus s case for resentencing in light of uncertainties described (e.g., documented sales aggregate to amount far less than three kilograms; no testimony about frequency with which heroin was sent to Glaus after amounts increased; District Court made

no specific findings with respect to drugs attributable to other defendants that could be attributed to Glaus. This Court recognizes difficulty District Court faced in attempting to approximate relevant drug amounts for Rodriguez and Glaus (§ 2D1.1 application n.12) from trial testimony that was often imprecise and sometimes contradictory. However, approximations reached by District Court simply too tenuous connection to evidence presented at trial to sustain BOLs assigned.))

United States v. Jones, 111 F.3d 597 (8th Cir. 1997). (Demetrius Jones asserts District Court erred in calculating his sentence based on crack rather than other form of cocaine base that would not merit increased sentence for crack. When type of drugs attributable to defendant is at issue, government bears burden of proving type of drugs by preponderance of evidence. Demetrius claims lab reports do not specifically describe substance attributable to him as crack form of cocaine base, but simply as cocaine base. Lab report, however, specifically describes drugs as " crack' cocaine," and "rock-like substance." Furthermore, Demetrius failed to challenge governments s assertion substance he distributed was crack until several week before his sentencing hearing, even though substance was repeatedly described during his plea hearing as crack; to contrary, he repeatedly acquiesced in and affirmatively responded to Court s meticulous questions at plea hearing describing substance as crack. Moreover, stipulation of facts relative to sentencing, which Demetrius signed, refers to substance Jones distributed as "cocaine base (crack cocaine)." This Court is satisfied lab report and Demetrius s admissions during plea colloquy and in stipulation of facts, provided adequate basis for District Court s finding substance distributed was crack cocaine.)

United States v. Robinson, 110 F.3d 1320 (8th Cir.) (Absent objection to drug quantity finding recommended by PSR, District Court was not required to hold evidentiary hearing into quantity of drugs attributable to Robinson. Even had Robinson objected to drug quantity attributed to him in PSR, given trial testimony of Robinson s co-conspirators that he personally assisted them in "rocking up" 83 ounces of cocaine base and packing it for delivery, this Court cannot say District Court committed clear error.), cert. denied, 522 U.S. 975 (1997).

United States v. Williams, 109 F.3d 502 (8th Cir.) (District Court found Williams responsible for at least 5, but not more than 15 kilograms of cocaine and calculated BOL at 32, § 2D1.1(c)(4). District Court based estimation on two alternative theories: Williams could be held accountable because although informant s testimony regarding relevant conduct was not entirely reliable, it sufficiently established Williams was at least five percent culpable for previous 28 kilograms, which placed Williams at or above 5 kilogram threshold. Alternatively, Court reasoned Williams should be held responsible for 5 kilograms of cocaine because that was amount he intended to purchase from informant. Williams claims District Court arbitrarily allocated level of culpability and failed to make specific factual findings of his involvement in previous transactions. This Court agrees District Court arbitrarily allocated Williams s level of involvement in previous transactions. District Court may not base quantity determination upon arbitrary assumption, nor may it base determination of defendant s level of involvement in previous transactions upon arbitrary assumption. District Court may not attribute responsibility to defendant for quantities of cocaine involved in previous transaction unless Court can conclude defendant is more likely than not actually responsible for quantity greater than or equal to quantity for which defendant is being held responsible. At sentencing, Court indicated its discomfort with assessing Williams s level of

involvement in previous transactions, noting Williams s responsibility for prior transactions could not be fairly estimated. Nevertheless, this Court concludes 5 kilograms was appropriate weight of cocaine to attribute to Williams under application note 12 of § 2D1.1 because that is amount of cocaine Williams agreed to purchase from informant. Application note plainly states in reverse sting, agreed-upon quantity of cocaine determines offense level. Panel leaves for another day issue of whether last sentence of 1995 version of note 12 applies to reverse stings as Williams both intended to and was reasonably capable of purchasing agreed-upon 5 kilograms of cocaine.), cert. denied, 522 U.S. 917 (1997).

United States v. Johnson, 108 F.3d 919 (8th Cir. 1997). (Johnson challenges constitutionality of crack-cocaine sentencing ratio. This Court has repeatedly rejected similar challenges to this guideline, and only Court en banc may reconsider these decisions.)

United States v. Buford, 108 F.3d 151 (8th Cir. 1997). (It was not unreasonable for jury to conclude Buford possessed baggie of cocaine thrown out window. This Court finds District Court's determination of quantity of drugs--including that baggie--for sentencing was not clearly erroneous. District Court based determination upon testimony of confidential informant and police officers who executed search warrant; this Court will not reweigh evidence and determine credibility of witnesses on appeal. Entire record overwhelmingly supports District Court's determination; this Court not convinced mistake has been made.)

United States v. Gibson, 105 F.3d 1229 (8th Cir. 1997). (Gibson argues District Court erred in determining he was accountable for at least three kilograms of heroin, but not more than ten kilograms for BOL - 34. After carefully reviewing trial record, this Court concludes District Court did not err in determining amount of heroin attributable to Gibson based on testimony of three couriers at trial, surveillance of controlled purchases, testimony from purchaser at controlled buys, telephone pen register records, clone pager intercepts, pager records, car rental receipts.)

United States v. Garin, 103 F.3d 687 (8th Cir. 1996). (Garin asserts District Court erred in attributing 16 pounds of methamphetamine to him, alleging witnesses on which District Court relied were unreliable and untrustworthy. Given District Court s careful assessment of credibility of co-conspirator (§ 6A1.3(a)), this Court finds no clear error in determination of drug quantity attributable to Garin.), cert. denied, 520 U.S. 1148 (1997).

United States v. Randolph, 101 F.3d 607 (8th Cir. 1996). (Government must prove at sentencing type and quantity of drugs attributable to defendant by preponderance of evidence. Without explanation, District Court found Randolph and Mitchell responsible for more than 500 grams but less than two kilograms of cocaine. Government appeals 60-month sentences imposed upon each defendant. This Court encourages District Courts to specify evidence supporting their drug quantity findings. When District Court s failure to chart path through disputed or equivocal evidence leaves this Court unable to meaningfully review critical sentencing factor, Court must remand for further clarification.

At sentencing, Randolph argued he was responsible only for 250 grams; he now argues government waived its right to contest District Court s quantity finding by failing to offer evidence

at sentencing hearing. Cooperating witness provided drug quantity evidence at trial, as to which District Court made no credibility finding. Witness s testimony to smallest estimate of drugs--if believed--would produce total quantity well in excess of District Court s finding. This Court cannot meaningfully review District Court s quantity finding without explanation of evidentiary basis. District Court did not adopt quantities to which Mitchell stipulated in his plea agreement nor larger quantities recommended in PSR. Although District Court is not bound by such stipulations (§ 6B1.4(d)), lacking explanation why District Court rejected Mitchell s admissions and what evidence supports Court s lessor quantity finding, this Court remands for resentencing. Mitchell argues his 60-month sentence should be affirmed as downward departure; however, District Court did not grant Mitchell departure though it is not precluded from considering departure issues on remand.)

United States v. Behler, 100 F.3d 632 (8th Cir. 1996). (Behler challenges District Court s finding it was more probable than not entire amount of methamphetamine attributable to Behler was d. Behler asserts, except for amount seized at time of his arrest, drugs were not d-methamphetamine but mixture of d and l. Government must prove methamphetamine is more likely than not d. When government seizes and tests amount of controlled substance that is less than whole for which defendant is responsible, District Court is permitted to infer from samples that whole quantity contains same substance. District Court did not clearly err by concluding whole amount should be categorized and sentenced as d: no evidence in record substance was d, l; and even assuming substance was mixture as Behler contends, no sentencing error because calculation would not change. Because d, l is mixture or substance containing both l and more serious substance of d-methamphetamine, this more serious controlled substance determines category of whole quantity for sentencing purposes (1987 version of Guidelines). Court acknowledges some dispute among circuits concerning whether d, l is merely mixture or separate, singular substance; dispute is immaterial to analysis in this case.), cert. denied, 522 U.S. 855 (1997).

United States v. Van Thournout, 100 F.3d 590 (8th Cir. 1996). (Van Thournout argues District Court erred in calculating weight of LSD for purposes of applying mandatory minimum sentence, 21 U.S.C. § 841(b)(1)(B)(v), pursuant to Chapman. He argues amended LSD Guidelines created ambiguity between method to be used in calculating weight of LSD under Guidelines (uniform weight per dose) and under mandatory minimum sentence provisions (weight of LSD includes weight of carrier medium). This Court held in Stoneking amended LSD Guidelines did not alter holding in Chapman that weight of carrier medium is included in calculation of entire weight of mixture or substance containing detectible amount of LSD for purposes of applying mandatory minimum sentence provisions.)

United States v. Kime, 99 F.3d 870 (8th Cir. 1996). (In addition to 2771.51 kilograms of marijuana, District Court attributed 6 pounds of methamphetamine to Bell based on trial testimony. Bell argues because individuals who testified are former co-conspirators looking to trade testimony for leniency, there is insufficient indicia of reliability to credit their testimony. Record is replete with evidence linking Bell to conspiracy s distribution of methamphetamine and District Court was entitled to rely on information having sufficient indicia of reliability to support its probable accuracy (§ 6A1.3(a)); mere fact testimony comes from Bell s former partners in crime does not necessarily

render it unreliable.), cert. denied, 519 U.S. 1141 (1997).

United States v. Byler, 98 F.3d 391 (8th Cir. 1996). (Byler contended District Court incorrectly found Byler received three pounds of methamphetamine compound in April despite fact that co-defendant who offered only testimony as to this delivery, testified at trial only two pounds were delivered. Government needed to prove by preponderance of evidence both that delivery in fact occurred and quantity of methamphetamine delivered. This Court agrees with Byler District Court erred in finding three pounds--rather than two--were delivered in April. Error was harmless, however, because Byler was correctly sentenced at BOL--34. Following directive of § 2D1.1(c), Note B, this Court calculates entire weight of mixture and weight of actual amphetamine to arrive at higher offense level. Purity level of methamphetamine must be multiplied by its gross weight. Although April delivery was never recovered, purity levels can be estimated (§ 2D1.1, comment. (n.12)). It was not clearly erroneous for District Court to follow PSR and conclude April and June deliveries involved similar purity levels. In addition, Wishon testified each transaction involved same amount of money in exchange for same quantity suggesting amphetamine delivered on each of those occasions was of roughly comparable purity levels. Accordingly, it was not clearly erroneous for Court to find April delivery had purity level of 28%, which was purity level of least pure package of methamphetamine recovered from co-defendant s car in June.)

United States v. McCarthy, 97 F.3d 1562 (8th Cir. 1996). (McCarthy contends District Court improperly calculated quantity of marijuana attributable to him in determining his BOL. At sentencing, District Court credited co-conspirator s testimony McCarthy was present at co-conspirator s ranch during 1992 marijuana import operation; while there, McCarthy served as lookout while other co-conspirators were cleaning and drying over 2000 pounds of marijuana. McCarthy s job was to inform other co-conspirators when non-conspirators were approaching ranch, as well as to help transport conspirators to and from cleaning site, to help move processed marijuana, and to obtain necessary supplies for cleaning and drying marijuana. McCarthy claims District Court should have attributed to him only quantity of 150 pounds, quantity he transported back to Minnesota, claiming he was not present when 2000 pound load of marijuana was being processed. Essentially, McCarthy challenges credibility of witness whom District Court credited over McCarthy. Credibility determinations are within exclusive domain of District Court, virtually unreviewable on appeal; Court was entitled to credit co-conspirator s testimony rather than McCarthy s in determining extent of McCarthy s participation and quantity of drugs which should be attributed to him. Additionally, McCarthy admitted he knew other conspirators were processing and drying shipment of marijuana and McCarthy s various activities qualified him as aider and abetter for entire shipment.), cert. denied, 519 U.S. 1139 and 520 U.S. 1133 (1997).

United States v. McGrady, 97 F.3d 1042 (8th Cir. 1996). (McGrady claims government did not establish he was responsible for 35 or more grams of crack (necessary for BOL--30) and there was variance between weight of seized drugs close to time of offense and over year later when they were reweighed at his request (37.22 grams at initial weighing; 32.45 grams at second weighing). After hearing evidence at sentencing hearing, District Court made findings crediting expert testimony that evaporation had caused weight discrepancy. These findings were supported by evidence and are not clearly erroneous.)

United States v. Perkins, 94 F.3d 429 (8th Cir. 1996). (Perkins asserts District Court erred in converting one-third of $5723 in cash seized from two socks in footlocker into quantity of cocaine for sentencing determination purposes. Here, District Court approximated quantity of cocaine attributable to Perkins pursuant to Application Note 12, § 2D1.1. District Court did not clearly err given Perkins s lack of employment for year before offense and minimal income in three years before that, and fact he was observed with both cash and crack shortly before search. Some line drawing is necessary when approximations are made; District Court s conservative approach was correct; quantity determination affirmed.), cert. denied, 519 U.S. 1136 (1997).

United States v. Maza, 93 F.3d 1390 (8th Cir. 1996). (Under Guidelines in effect at time of sentencing, sentence for d-methamphetamine is greater than sentence for l-methamphetamine by factor of 25. Government argued on cross-appeal District Court clearly erred in finding government failed to prove Leiphardt and Walker had distributed d-methamphetamine and sentenced them under lower guideline for distribution of l. This Court is firmly convinced District Court clearly erred in finding government failed to meet its burden of proof. Testimony linked two samples of methamphetamine to Leiphardt and one of them to Walker; laboratory testing revealed both samples were d. Government s expert testified at sentencing hearing l-methamphetamine has little, or any, stimulating effect that d has; Verdon testified that he has never received any complaints about methamphetamine he received from Leiphardt and Walker. Remanded for Leiphardt to be resentenced under guideline provisions for d-methamphetamine.), cert. denied, 519 U.S. 1138 (1997).

United States v. Brown, 91 F.3d 1109 (8th Cir. 1996). (Brown challenged trial Court s attribution to her for sentencing purposes of 37.53 grams of crack cocaine, § 2D1.1(a)(3), § 2D1.1(c)(5). Finding not clearly erroneous and while Court could have been more explicit, trial Court indicated it credited trial testimony with respect to quantities.)

United States v. Scott, 91 F.3d 1058 (8th Cir. 1996). (Defendant s BOL for drug-related crimes is calculated according to quantity of drugs directly attributable to him and, in case of jointly undertaken criminal activity, all reasonably foreseeable quantities that were in scope of criminal activity that he jointly undertook (§ 1B1.3, application note 2). PSR recommended Scott be held accountable for at least 500 grams but less than 1.5 kilograms of crack for BOL 36. Probation officer s calculations were based on trial testimony; probation officer also noted specific individuals had seen Scott in possession of crack at various times during relevant time period. District Court believed calculations were conservative, but adopted them as reasonable from evidence adduced at trial. This Court agrees drug quantity determination is well supported by trial record, and indeed conservative indication of large quantities of crack Scott imported into Lincoln.)

United States v. Tauil-Hernandez, 88 F.3d 576 (8th Cir. 1996). (District Court attributed between 5 and 15 kilograms to Tauil-Hernandez; she argues quantity finding is clearly erroneous because she was only responsible for distributing between 3 1/2 and 5 kilograms (lesser quantity would reduce her statutory minimum from ten years to five and BOL from 32 to 30). Tauil-Hernandez concedes 4650-4750 grams of cocaine should be attributed to her for sentencing purposes; however, that leaves government 250-350 grams short of 5 kilograms. Government

pointed to two additional transactions which Tauil-Hernandez argued were not part of her role in conspiracy. Attributing either of these transactions to Tauil-Hernandez would push her over 5 kilogram sentencing threshold. Tauil-Hernandez failed to meet her burden on review. Conspirator is responsible for all reasonably foreseeable acts of others taken in furtherance of conspiracy, § 1B1.3(a)(1)(B). Tauil-Hernandez admitted making numerous trips to transport cocaine to Omaha; she could clearly foresee co-conspirator would recruit another courier during her hospitalization to keep Omaha conspirators supplied with cocaine: no clear error attributing 500 grams transported to Omaha to her. District Court s ultimate drug quantity finding not clearly erroneous. While evidence at sentencing hearing viewed favorably to Tauil-Hernandez, would have supported drug quantity finding of less than 5 kilograms, it is not this Court s task to reweigh evidence unless firmly convinced mistake has been made. Though her principle role in conspiracy was that of courier, Tauil-Hernandez apparently persuaded more than one New York drug dealer to distribute cocaine in Omaha and she transported large quantities of drug over long period of time. Sentence at statutory minimum based on 5 kilogram quantity finding was harsh, but deserved.

Before Mordan pleaded guilty, District Court suppressed 500 grams of cocaine as illegally seized. Mordan argues District Court then erred in basing drug quantity finding for sentencing purposes on suppressed half kilogram (excluding this quantity would reduce his BOL from 26 to 18). This is issue of first impression in Eighth Circuit. This Court agrees with most of its sister circuits that District Court may properly consider suppressed evidence in determining Guidelines sentence. Congress has told Courts not to apply exclusionary rules at sentencing, § 1B1.4. When deciding whether to extend rule to proceedings other than criminal trials, Court balances likelihood of deterring constitutional violations against cost of withholding reliable information from proceedings in question. Extending exclusionary rule to sentencing would have detrimental effect on traditional judicial prerogative of sentencing offender based on all relevant and reliable information available. However, under relevant conduct regime, exclusionary rule is needed at sentencing to deter police who have lawfully obtained enough evidence to convict from illegally seizing additional contraband in order to greatly increase offender sentence. This Court concludes whatever increased deterrence might result from extension of rule, does not outweigh cost of truncating sentencing judge s traditionally broad inquiry into all that may be relevant and reliable in determining appropriate punishment.), cert. denied, 520 U.S. 1121 (1997).

United States v. Caldwell, 88 F.3d 522 (8th Cir.) (In calculating total amount of drugs, District Court credited co-conspirator s testimony he had purchased marijuana from Caldwell over period of fifteen years but limited calculation to five-year period that could have been charged in indictment under statute of limitations; corresponding offense level 38 was highest possible, § 2D1.1(c)(1). This Court agrees with Caldwell extrapolation amounted to clear error as there was no basis in record for conclusion that because certain quantity of drugs was seized from Caldwell in one year, same quantity of drugs could be attributed to him for each of preceding four years. This Court calculates that even if District Court used largest figure in co-conspirator s testimony for sentencing purposes, amount would be far less than initial calculation. This Court instructs which amounts should be counted at resentencing and notes government s concession that case must be remanded for resentencing in light of Amendment 516 to Guidelines.), cert. denied, 519 U.S. 1048 (1996).

United States v. Campos, 87 F.3d 261 (8th Cir.) (District Court s determination of drug quantity was not clearly erroneous where many of Campos s arguments amounted to attack on credibility determinations of District Court, which are virtually unreviewable on appeal. Ample evidence supported quantity findings as three witnesses gave similar accounts of various participants in conspiracy and testified Campos provided operation quantities of cocaine well within range of District Court s findings. Testimony was corroborated by information obtained from pen registers FBI used to monitor telephones.), cert. denied, 519 U.S. 1019 (1996).

United States v. Risch, 87 F.3d 240 (8th Cir. 1996). (Risch argued, and government conceded, his case should be remanded for consideration of whether sentence should be reduced based on Amendment 516 (§ 2D1.(c) amended by replacing 1 kilogram per plant ratio with instruction to treat each plant as equivalent to 100 G of marijuana). Because § 1B1.10 does not mandate retroactive application of Amendment 516, but instead gives District Court discretion to resentence under lowered Guidelines range, this Court remands to permit District Court to consider whether Risch s sentence should be reduced.)

United States v. McMullen, 86 F.3d 135 (8th Cir. 1996). (McMullen contends District Court erred in finding all methamphetamine involved in conspiracy was D rather than L. At time McMullen was sentenced, sentences for L were lighter than for D. Although McMullen was sentenced after amendment became effective, he committed crime before that time; applicable rule is one in effect when crime was committed, § 1B1.11(b)(1), as application of amended guideline would violate Ex Post Facto Clause. For sentencing purposes, government bears burden of proving by preponderance of evidence what type of methamphetamine was involved in conspiracy. District Court recited four considerations for finding that all drugs were D. This Court agrees with McMullen if District Court based finding on judicial experience, on price of drugs (and government presented no evidence about relative prices of D and L), or on fact drugs originated in California, it was error. District Court had also mentioned all methamphetamine recovered by police was D, which Court was entitled to consider. This Court is unable to tell from record whether Court gave dispositive weight to consideration(s) not entitled to be weighed. This Court remands with instructions to District Court to consider only such matters as are entitled to go in balance.)

United States v. Atkinson, 85 F.3d 376 (8th Cir. 1996). (Atkinson argued District Court erred in including 34.34 grams of crack which Atkinson s co-conspirator sold to undercover police officer, asserting officer "manipulated" Atkinson s sentence by insisting on buying crack. This Court need not address "sentencing entrapment" argument because any error in inclusion of 34.34 grams would be harmless as it had no effect on BOL--36.)

United States v. Byrne, 83 F.3d 984 (8th Cir. 1996). (Drug quantities were calculated on basis of Byrne s statement she distributed 10 grams of heroin and 21 grams of cocaine per week during conspiracy. She argues District Court should have excluded any drugs attributable to transactions during first month of conspiracy; this Court holds District Court did not err in including that month in calculations as evidence showed conspiracy was in existence in that month. Santonelli made same argument with same result.

Santonelli argued District Court erred in attributing to him drugs seized in co-conspirator s

apartment at time of her arrest on March 3, 1994, because he had been in custody since his arrest on February 2, 1994. PSR calculation of drug quantity did include these drugs and their inclusion did change offense level. Because sentence may have been affected by incorrect information, this Court vacates Santonelli s sentence and remands for resentencing.

Santonelli argued 1.6 grams of crack found in apartment at same time should not have been attributed to him as there was no evidence crack was part of conspiracy--more likely for her personal use. Including crack was not clearly erroneous as it was reasonably foreseeable that crack, form of cocaine, would be distributed by members of conspiracy to distribute heroin and cocaine.

Santonelli argued PSR double-counted in calculating drug quantity because probation officer added grams of cocaine and heroin seized from co-conspirator s apartment to estimate heroin and cocaine per week for duration of conspiracy when drugs actually seized should have been subtracted from, not added to, estimated quantity. If it was double-counting, error was harmless where PSR calculated total drug quantity involved in conspiracy on basis of smaller amounts than co-conspirator reported in her statement; PSR did not include drugs represented by money seized in calculation of total drug quantity, or any enhancements for transactions near protected location, or obstruction, in calculation of offense level. Including these factors would have more than offset any double-counting.

Santonelli argued he actually sold less than one gram of cocaine to undercover officer and co-conspirator had identified him only as one of her two sources of heroin, not cocaine. District Court was not clearly erroneous in attributing to Santonelli cocaine distributed by co-conspirator as her distribution of cocaine was conduct reasonably foreseeable as part of conspiracy.)

United States v. Betz, 82 F.3d 205 (8th Cir. 1996). (Betz contended District Court erred in calculating quantity of marijuana attributable to him and prosecution failed to produce sufficient evidence to link him to vast majority of marijuana plants included in offense level calculation. District Court accepted government s attribution to Betz of all marijuana plants encircled by chicken wire found in National Forest in 1992 and 1993, as well as all plants without surrounding chicken wire found in 1993 in locations that had had chicken wire in 1992. Court also attributed to him some plants surrounded by old garden fence rather than chicken wire, and some plants found in ditch without chicken wire. These attributed plants were all within 7-mile radius of Betz s residence. Government bears burden of proving by preponderance of evidence quantity of drugs involved. Defendant challenging District Court s quantity determination faces difficult burden on appeal. Betz challenges government s theory use of chicken wire rings to protect plants constituted unique "signature" of growing marijuana that enabled officers to identify marijuana grown by Betz; using chicken wire to protect plants must be so common place that it cannot be "signature." Betz argues there was no other characteristic which differentiated any of plants from any others. This Court finds no clear error in District Court s decision to attribute to Betz all plants encircled by chicken wire where officers testified they identified similarities of style of marijuana growing with chicken wire; Betz was photographed in patch of marijuana planted with chicken wire and seen driving his motorcycle in vicinity of other patches of plants with chicken wire, and admitted growing marijuana in National Forest over three years; two rings of chicken wire were stored at his residence which also contained marijuana leaves drying in shed, $5600 in admitted drug proceeds, and other indicia of substantial marijuana-growing business. Systematic use of wire throughout area suggested each enclosure was part of single program, rather than each patch being haphazard product of variety

of different growers. This Court also affirms District Court s determination as to some 84 plants growing in 1993 in plots which in 1992 had had wire; indication of use of wire in earlier years was sufficient signature. Panel not persuaded District Court was clearly erroneous in attributing to Betz 35 plants protected by old garden fence and 69 plants found in ditch. While wire signature was lacking, there was evidence these plants were found near wire-encircled plants and on-the-scene officers concluded plants should be attributed to same grower.)

United States v. Stavig, 80 F.3d 1241 (8th Cir. 1996). (Stavig argues District Court should have departed downward because government agents engaged in sentencing entrapment during reverse-sting operation leading to his arrest. He argues he was willing to accept only ten ounces, or approximately 280 grams, but by providing artificially low repayment schedule and insisting on one kilogram purchase, government caused him to purchase one kilogram quantity. He contends District Court should have used ten ounce quantity as basis for his sentence. This Court has repeatedly recognized sentencing entrapment may be legally relied upon to depart under sentencing Guidelines; however, Court has yet to find sentencing entrapment existed under facts of particular case. Guidelines require District Court to determine if government has engaged in sentencing entrapment. Under application note 12, District Court shall exclude from sentencing calculation amount of drugs which flow from sentencing entrapment. Further, under application note 17, downward departure is warranted when sentencing entrapment occurs. Here, District Court found note 17 did not apply because Stavig did not receive larger quantity of cocaine due to lower price. In District Court s opinion, Stavig was willing to accept entire kilogram as long as he could negotiate satisfactory repayment terms. District Court did not err in holding situation did not fall within boundaries of application note 17. Stavig had received cocaine from confidential informant before under similar financial arrangements. Regardless of how or why one kilogram quantity was chosen by government, it fell within same BOL (1/2 to 2 kilograms) as Stavig s former dealings with confidential informant and his associates (§ 2D1.1(c)(7)). Transaction fails to show government provided Stavig with financial arrangements so attractive he was able to purchase significantly larger quantity than he would have otherwise purchased. On these facts, government did not engage in sentencing entrapment and District Court did not err in refusing to depart downward under Guidelines/sentencing Stavig to 60-month mandatory minimum. This Court expresses its continuing deep concern about proclivity of reverse-sting operations to raise questions of sentencing entrapment and comments sentencing entrapment claims arise in this context largely because sentencing discretion is delegated all way down to individual drug agent operating in field. Further, potential exists for sentence to be determined by confidential informant when he notifies government agents of amount defendant is likely to accept and considering most confidential informants are seeking reduction in their own sentences through substantial government assistance, great incentive exists for informant to arrange large scale transactions and to encourage defendants to accept large quantities. Nevertheless, Stavig failed to meet his burden. Government was required to prove one kilogram quantity by preponderance but it was uncontested Stavig accepted kilogram from officer at hotel. Stavig failed to make prima facie showing of sentencing entrapment, and government was not required to produce evidence rebutting his claim. District Court conducted lengthy sentencing hearing and after detailed testimony regarding transactions, it conscientiously made well-supported findings of fact. Findings were not clearly erroneous and pinpointed determinative issues.)

United States v. Williams, 77 F.3d 1098 (8th Cir.) (Although government must prove all elements of crime beyond reasonable doubt, government need only prove drug quantity--for purpose of sentencing--by preponderance of evidence. District Court held defendants responsible for entire amount of cocaine base involved in school parking lot sale and also accepted part of informant s testimony to set defendants BOLs. Appellants claim informant s status, exchanging information for leniency in his own sentencing, proves unreliability of his testimony and because he was only witness who testified to drug transactions other than parking lot, they argue government s evidence was insufficient to prove their involvement in those sales. Informant s testimony, although not entirely credited by District Court, established both defendants rather extensive involvement in drug trafficking. District Court s calculation--which also included information from highway patrol trooper--was supported by sufficient evidence and therefore, not clearly erroneous.), cert. denied, 519 U.S. 967 (1996).

United States v. Long, 77 F.3d 1060 (8th Cir.) (In challenging application of mandatory ten-year minimum sentence for cocaine base, Long argues cocaine base is chemically indistinguishable from cocaine, creating ambiguity in statute that should be resolved in her favor under rule of lenity. This Court need not address argument as Long stipulated in plea agreement her sentence would be governed by § 2D1.1(c)(3), 150-500 grams cocaine base. Court also rejects Long s argument on merits, citing U.S. v. Jackson.), cert. denied, 519 U.S. 859 (1996).

United States v. Early, 77 F.3d 242 (8th Cir. 1996). (Early pleaded guilty to possession of cocaine base with intent to distribute and challenges District Court s failure to apply Guidelines governing possession of powder cocaine. Written plea agreement--which is not challenged--expressly provides parties agreed applicable BOL at 27 grams of cocaine base is level 28; thus, he may not challenge this application on appeal. Court also notes this circuit has clearly held 100:1 crack-to-powder cocaine ratio provides no basis for departing downward.)

United States v. Griggs, 71 F.3d 276 (8th Cir. 1995). (Griggs contended District Court improperly converted phenylacetic acid which he conspired to obtain, to amount of methamphetamine for sentencing under drug quantity table, § 2D1.1(c); he contends Court should have determined sentence by using weight of phenylacetic acid for which he was responsible and chemical quantity table, § 2D1.11, resulting in shorter sentence. Griggs admitted to manufacturing methamphetamine approximately six times. Thus, under § 2D1.11(c)(1), Court was correct in using drug quantity table in § 2D1.1 because offense involved unlawful manufacture of methamphetamine and § 2D1.1 gives higher BOL than § 2D1.11. District Court properly approximated amount of methamphetamine by calculating how much methamphetamine Griggs could have produced from phenylacetic acid he conspired to obtain. This Court distinguishes U.S. v. Hoster.

In his reply brief, Griggs argues Court erred in assuming he was responsible for D rather than L methamphetamine and improperly sentenced him based on that assumption. No plain error as District Court adopted PSR at sentencing hearing; by doing so, Court impliedly found Griggs was responsible for D methamphetamine. Moreover, under § 2D1.1(c) weight of mixture of two controlled substances is assigned to controlled substance resulting in greater offense level; thus, Court need only have found some portion of Grigg s methamphetamine mixture was D to sentence him for dextro-methamphetamine using full weight of mixture.)

United States v. Kinshaw, 71 F.3d 268 (8th Cir. 1995). (Thomas claimed District Court incorrectly attributed 120 grams methamphetamine to him for sentencing purposes based on drug note suppressed at trial. District Court primarily relied on witness s trial testimony Thomas was dealing with numerous individuals in small amounts; Court also found credible testimony of other co-conspirators Thomas had distributed small quantities of methamphetamine to several individuals. District Court made credibility determinations and there was enough evidence having sufficient indicia of reliability, in record, to support District Court s findings without reference to suppressed drug note.)

United States v. Easley, 70 F.3d 65 (8th Cir. 1995). (Jury convicted Easley of manufacturing marijuana on one plot of land, but acquitted him of manufacturing it on other plot. While 65 plants were recovered, tested, and found to be marijuana, law enforcement officers destroyed 2212 plants without testing them. Easley contends his sentence should not have been based on plants never tested, never shown to be marijuana. Record contained ample evidence from which District Court could find by preponderance of evidence (standard of proof in this situation) Easley was involved in manufacture of more than 2000 plants.), cert. denied, 517 U.S. 1113 (1996).

United States v. Jackson, 67 F.3d 1359 (8th Cir. 1995). (Government generally bears burden of proving drug quantities by preponderance of evidence. District Court credited testimony of certain witnesses and also took into account Jackson s taped reference to delivery of "three O s," to conclude government had made clear and convincing showing of Jackson s responsibility for at least 226.8 grams of crack. This Court affirms BOL 34 as supported by evidence.), cert. denied, 517 U.S. 1192 (1996).

United States v. Jacobs, 65 F.3d 96 (8th Cir. 1995). (Same holding as Demkier.), cert. denied, 516 U.S. 1148 (1996).

United States v. Demkier, 65 F.3d 94 (8th Cir. 1995). (Demkier pleaded guilty to conspiracy to distribute one gram or more of mixture or substance containing detectible amount of LSD within 1,000 feet of school. On appeal, Demkier argued District Court erred in including weight of carrier medium in calculating total weight of LSD. He argued applicability of mandatory minimum should be determined on basis of .4mg per dose specified in amended Guidelines (§ 2D1.1(c), amendment 488, effective 11/1/93). Following Stoneking case, this Court recognizes continued applicability of Chapman and holds District Court did not err in including weight of carrier medium; Court correctly sentenced Demkier to minimum mandatory sentence under 21 U.S.C. § 841(b)(1)(B)(v) because his offense conduct involved at least one gram of mixture or substance containing detectible amount of LSD.)

United States v. McCrary, 64 F.3d 420 (8th Cir. 1995). (This Court vacated McCrary s sentence and remanded case to trial Court for reconsideration and articulation of basis it used to determine amount of drugs attributable to McCrary. On remand, District Court again established BOL of 38, indicating attribution of 1.5 kilograms or more of cocaine base, making it clear it was relying on evidence presented at trial and at first sentencing hearing. District Court s choice to believe evidence presented at trial and sentencing hearing was not clearly erroneous as it had

sufficient indicia of reliability: government presented evidence members of relevant conspiracy made multiple wire transfers totaling approximately $65,000 over six-month period to confederate in California; government produced expert testimony to effect $65,000 could represent receipts for 324 grams sold in 1/10 gram quantities to individual customers, but amount could buy 3-5 kilograms in bulk purchases from supplier in California. Expert opined system of multiple, relatively small wire transfers was structured to avoid notice to government and stated packages of cocaine base are usually not shipped in small amounts. District Court concluded $65,000 was used to make bulk purchases. This Court has specifically approved use of monetary evidence to calculate drug quantities. McCrary also argued District Court erred in attributing entire 3-5 kilogram amount to him in sentencing him as member of conspiracy. No error where evidence at trial indicated approximately $65,000 in wire transfers to California, together with testimony McCrary was responsible for these transfers.)

United States v. Hiveley, 61 F.3d 1358 (8th Cir. 1995). (To determine drug quantity, District Court relied in large part on estimates of co-conspirators; remainder of total was based on marijuana seized from trailer on Hiveley s property. Hiveley argued co-conspirators testimony regarding quantity was not credible because their testimony was rejected by jury at trial. No clear error where District Court noted some of witnesses exhibited credibility problems, but Court went on to make specific findings concerning each witness s testimony and quantity attributed to determine BOL based on 1695 kilograms of marijuana. DISSENT: Unwise sentencing policies put people in prison for years, not only ruining lives of prisoners and often their family members, but also draining American taxpayers of funds measurable in billions of dollars. Long sentences do not work and ultimately penalize society.)

United States v. Valencia, 61 F.3d 616 (8th Cir. 1995). (In arriving at Valencia s 240-month sentence, District Court determined appropriate BOL to be 30, § 2D1.1(c)(5). Valencia argued for first time on appeal District Court erred in determination of amount of cocaine involved. This Court does not find District Court error.)

United States v. Fregoso, 60 F.3d 1314 (8th Cir. 1995). (Brown argued District Court erred in calculating drug quantity attributable to him by including amounts of cocaine he personally consumed or intended for personal consumption; he contended because offense charged was conspiracy to distribute cocaine, quantities acquired for personal use had no relationship to conspiracy. This Court rejects argument based on evidence indicating conspiracy existed and Brown was member; thus, Brown s purchases for personal use were relevant in determining quantity of drugs Brown knew were distributed by conspiracy.)

United States v. Stoneking, 60 F.3d 399 (8th Cir. 1995). (Amendment 488 to § 2D1.1(c) altered method of determining weight of pure LSD and its carrier medium for sentencing purposes; rather than using weight of carrier medium, each dose of LSD on carrier medium should be treated as equal to 0.4mg of LSD for purposes of drug quantity table. This Court reverses District Court holding that amended guideline was in conflict with mandatory minimum sentence and thus did not apply. This Court reasons commentary to amended guideline anticipated creation of dual method of calculating weight of LSD for sentencing purposes and clearly indicates where per dose approach

conflicts with mandatory minimum sentence approach, mandatory minimum approach prevails. Moreover, Sentencing Commission cannot override Congress or Supreme Court s decision in Chapman to establish new mandatory minimum sentences by amending Guidelines. This Court also rejects Stoneking s argument dual weight method creates arbitrary and capricious distinction between drug offenders and violates due process. Dual weight method does not violate due process because it increases penalty for those persons involved in greater quantities of LSD as measured by actual weight of LSD as it is distributed, including carrier medium: this is rational basis for punishment. DISSENT: To find weights of LSD must be calculated differently under mandatory minimum statute and under Guidelines defies rational analysis and thwarts avowed congressional goal of sentencing uniformity. Chapman does not require entire carrier medium to be weighed, rather it requires only that entire "mixture" be weighed. Formula set forth in Amendment 488 merely standardizes amount of carrier medium that can be properly viewed as "mixed" with drug.), cert. denied, 516 U.S. 1119 (1996).

United States v. Logan, 54 F.3d 452 (8th Cir. 1995). (This Court agrees with Logan s contention government failed to carry its burden of proof because trial testimony relied upon by PSR and District Court did not support conclusion Logan sold over 1 kilogram of heroin during conspiracy. District Court clearly erred in adopting PSR s conclusion Logan provided House with heroin beginning in January 1992 rather than in "early spring" 1992. Where government failed to clarify what date or even what month was in reference, spring would begin in March at earliest. No clear error in District Court s finding co-conspirator s heroin purchases from Logan averaged 50 grams per purchase with two purchases month. District Court may approximate drug quantity based on similar transactions by defendant, so long as estimates have sufficient accuracy. Both co-conspirator and her daughter testified to purchases, one of which was seized from co-conspirator upon her arrest. District Court did not clearly err in finding of two purchases based on travel trips to Chicago. This Court determines evidence supports conclusion of BOL of 30 rather than 32.)

United States v. Alexander, 53 F.3d 888 (8th Cir. 1995). (Alexander argued District Court erred in calculating amount of drugs attributable to him. Of total 1,379.02 kilograms marijuana attributable to Alexander, 2,555 pounds was based on testimony of three witnesses. While some testimony raised questions for District Court to resolve in its factfindings, this Court found ample basis for District Court s conclusions in pertinent testimony. As for Alexander s argument District Court was not justified in holding him responsible for two ounces of "crystal" based on testimony of one of same witnesses, subtracting this amount (equivalent to 56.7 kilograms of marijuana) from total for which Alexander was held responsible does not affect his offense level under § 2D1.1(c)(4) and consequently has no effect on sentencing range. Moreover, District Court sentenced Alexander below sentencing range; consequently, he suffered no harm from inclusion of crystal in drug calculation.

O Brien argued District Court erred in accepting testimony of various witnesses concerning amount of drugs (525 kilos marijuana) attributable to him. O Brien s challenges hinge on credibility of various witnesses; District Court s credibility determinations not clearly erroneous.

This Court rejects as "utterly meritless" Kvamme s argument District Court erred in finding him responsible for possessing 400 pounds of marijuana as he had specifically pleaded guilty to possessing this amount.)

United States v. Thompson, 51 F.3d 122 (8th Cir. 1995). (Thompson argued District Court erred by using preponderance standard for determining quantity of drugs involved in conspiracy. Determination of appropriate evidentiary standard requires de novo review by this Court. Thompson contended drug quantity determination in his case called for use of clear and convincing standard because evidence relied upon to determine drug quantity came from crack addicts, convicted felons and/or co-defendants and as result of their unreliable testimony, he received four-fold increase for "invisible quantities" of cocaine base. This Court holds heightened standard of proof not required in this case where District Court s drug quantity determination was supported by evidence introduced at trial to prove conspiracy count and determination was both directly and indirectly supported by testimony by witnesses, each of whom was subjected to cross-examination by defense.

Thompson also argued District Court finding his offense involved 1400 grams of cocaine base was clearly erroneous as evidence supporting factual determination lacked sufficient indicia of reliability because it merely consisted of testimony of so-called "ne er-do-wells." Thompson also noted undercover buys involved less than 2 grams of cocaine base. This Court holds there was sufficient evidence from which District Court could conclude more than 500 grams of cocaine base were involved in conspiracy.)

United States v. Escobar, 50 F.3d 1414 (8th Cir. 1995). (Because Keeper objected to quantity of drugs attributed to him in PSR, District Court was required to make foreseeability finding about amount of drugs attributable to Keeper. This Court agrees entire 1064 grams of heroin were foreseeable (§ 1B1.3(a)(1)(B)) to Keeper. District Court did not err in attributing amount to Keeper based on evidence at sentencing, e.g., significant portion of total amount of heroin brought to St. Louis by co-defendants provided to Keeper for purposes of further distribution, Keeper was aware of scale of drug operation run from apartment which he entered on several occasions for short time periods before traveling to areas known for high drug sales.)

United States v. Wilson, 49 F.3d 406 (8th Cir.) (Wilson argued District Court erred in determining his base offense level by using plant count estimates rather than harvested weight. This Court rejects Wilson s contention that District Court did not indicate source upon which it relied for plant count; rather, Court was clear in its adoption of findings of PSR, figures were corroborated by trial testimony, and findings were not clearly erroneous. Wilson argued District Court erred in application of Guidelines by using plant count to weight conversion of § 2D1.1(c) instead of harvested drug weight; he argued plant count conversion should only be applied to seized live plants (in his case, some of marijuana attributed to him was sold many months before law enforcement personnel intervened). This Court holds that where, as here, evidence demonstrates offender was involved in planting, cultivation, and harvesting of marijuana plants, application of plant count to drug weight conversion of § 2D1.1(c) is appropriate.), cert. denied, 516 U.S. 945 (1995).

United States v. Rice, 49 F.3d 378 (8th Cir.) (District Court attributed to Rice all drugs involved in conspiracy. This Court affirms District Court s determination entire amount of cocaine in conspiracy should be attributed to Rice for sentencing as he showed substantial level of commitment to conspiracy and his active and direct involvement in number of drug transactions along with other activities in which he engaged made amount established clearly foreseeable to him.

District Court did not err in assigning Blackstone BOL of 36 where government presented

voluminous evidence demonstrating Blackstone s direct involvement with over 50 kilograms of cocaine and DEA sweep of several individuals to whom Blackstone regularly supplied cocaine netted $95,000 (which translates into at least 6 kilograms of cocaine).), cert. denied, 515 U.S. 1168 (1995).

United States v. Smith, 49 F.3d 362 (8th Cir. 1995). (District Court properly held Gardner responsible for drug amounts involved in conspiracy that were either known to him or reasonably foreseeable by him (§ 1B1.3(a)(B)). Gardner asserted certain amount of crack was given to Page by another individual, yet Page testified Gardner located source and was present at time of transaction. Also, attribution of cocaine powder to Gardner based on money evidence showed he transferred to co-conspirator was not clear error.

District Court s finding Carr should be held responsible for between 5 and 15 kilograms of cocaine because he was involved in distribution of large amounts of both crack and powder cocaine did not constitute clear error where evidence showed Carr was intimately aware of and involved in drug conspiracy: wiretap evidence of drug related transactions, notes detailing drug transactions, and triple-beam scale with traces of cocaine on it were found in Carr s apartment--clearly showing that even if he was not directly responsible for distributing specific amounts of drugs assigned him, he was certainly aware of extent of conspiracy and amounts assigned to him were reasonably foreseeable by him.

Evidence showed Gardner was actively and directly involved in number of drug transactions and aware of many more within scope of conspiracy. District Court s determination Gardner should be held responsible for at least 5 kilograms of cocaine did not constitute clear error: drug notes implicating Gardner were found at his residence and at co-conspirator s store, and he was also implicated through wiretap evidence. Testimony revealed Gardner showed co-conspirator how to most profitably sell drugs by selling them in smaller quantities; Gardner sold another ounce of crack and was responsible for at least 1.5 kilograms of cocaine powder.

Determination of quantity of drugs attributable to McMillan not clearly erroneous. Quantity for which McMillan was substantively convicted of selling, coupled with wiretap evidence introduced at trial, established McMillan s involvement with conspiracy. Acknowledging different interpretations of monetary amounts handled by McMillan was possible based on evidence, this Court could not say District Court s finding McMillan was responsible for transferring approximately $150,000 to drug dealer was clearly erroneous. Government satisfied its burden of proving drug quantity by preponderance of evidence; McMillan s base offense level was properly assessed at 32.

District Court did not commit clear error in determining Smith was responsible for at least 5 grams of crack; evidence adduced at trial sufficed to support finding. This Court did not need to reach propriety of District Court s determination Smith should be held responsible for 30 grams of crack because 5 grams attributable through officer s testimony coupled with unchallenged prior drug conviction sufficed to invoke mandatory minimum sentence.

As District Court relied on now discredited testimony in determining amount of drugs attributable to Bobo for sentencing purposes, this Court vacates Bobo s sentence and remands for determination of whether reduction in Bobo s offense level is warranted.)

United States v. William, 48 F.3d 346 (8th Cir. 1995). (William pleaded guilty to

distributing .3 gram of crack, but PSR recommended holding her accountable for over 9 grams as relevant conduct because she arranged drug transaction between her co-defendant and two others. Her sole claim on appeal was she never intended to arrange second drug transaction, rather, she merely wanted $50 owed her for grill. Though only evidence presented at sentencing was undercover agent s testimony William was paid for arranging second drug transaction, no clear error in attributing to her additional crack.)

United States v. Johnson, 47 F.3d 272 (8th Cir. 1995). (Johnson argued District Court erred in finding him responsible for 66.5 kilograms of cocaine (§ 2D1.1(a)(3)). He claimed PSR was unreliable and some drug transactions may have been counted twice; he also argued District Court should not have considered his statements to DEA agents (Johnson conceded agents informed him of his Miranda rights, but he was entitled to specific warning his statements could be used against him at sentencing). District Court made specific findings on which transactions it included in arriving at total; having reviewed record, this Court saw no clear error in those findings. Likewise, this Court finds no error in District Court s reliance on Johnson s incriminating statements; Court was unpersuaded that commonly-given Miranda warnings advising defendant his statements can and will be used against him in Court, do not necessarily include District Court.)

United States v. Vue, 38 F.3d 973 (8th Cir. 1994). (Vues challenged determination one gram of opium or 50 milligrams of heroin is equivalent to 50 grams of marijuana as determination has no pharmacological basis, but is rather drawn from statutes establishing mandatory minimum sentences for offenses involving various large amounts of drugs of different types. Courts have repeatedly held mandatory minimum sentencing statutes have rational basis and do not violate due process; this Court holds for same reasons, equivalency tables are not irrational.)

United States v. Karam, 37 F.3d 1280 (8th Cir. 1994). (Karam argued District Court erred in determining his sentence by considering drug quantities in dismissed count of indictment (pursuant to § 1B1.3). He claimed absent erroneously considered quantity, his adjusted offense level would be 23 instead of 25, with range of 57-71 months. However, he was indisputably subject to statutory mandatory minimum of ten years (§ 841(b)(1)(B)). Statute trumped any guideline determination based on quantity and Karam received downward departure to 72 months based on government s substantial assistance motion. Moreover, Karam made no objection to PSR s counting of additional 280 grams of heroin. Having failed to object to PSR quantity determination either before or at sentencing, Karam cannot be heard to complain on appeal, absent plain error, which was not present here. Moreover, Karam received substantial downward departure below otherwise applicable statutory mandatory minimum sentence; extent of such departure is unreviewable on appeal.

District Court based Haro s drug quantity determination of 980 grams on testimony of co-defendant who testified he and another picked up seven grams of heroin on daily basis from Haro for approximately 20 weeks. District Court s determination was not clearly erroneous and this Court declines to review assessment concerning credibility of co-defendant witness.

El Hani contended District Court erred in determining amount of heroin attributable to him exceeded one kilogram. Because one of counts of indictment charged El Hani with conspiracy, he may be held accountable for conduct of others in furtherance of conspiracy as long as it was

reasonably foreseeable to him (§ 1B1.3(a)(1)(B)). Given evidence introduced at trial, District Court s calculation concerning El Hani s drug quantity was not clearly erroneous.)

United States v. Cabbell, 35 F.3d 1255 (8th Cir. 1994). (Cabbell argued District Court used unreliable testimony from three witnesses to include 20 grams of cocaine base in determining his base offense level. District Court s quantity determination supported by preponderance of evidence as Court was required to approximate quantity of drugs in question. Here, Court relied on testimony of seven witnesses; despite fact three witnesses had credibility problems, District Court took conservative approach to reach quantity of 20 grams and it partially granted Cabbell s quantity determination objection by lowering his offense level from 32 to 30. This Court disagrees with Cabbell s argument that District Court erred in not deducting any amount for his personal use of crack.)

United States v. McMurray, 34 F.3d 1405 (8th Cir. 1994). (McMurray contended District Court erred in treating powder cocaine he was convicted of distributing as cocaine base for purpose of determining his sentence. District Court found it clear powder was intended for conversion to crack and seizure of powder cocaine did not reflect scale of offense. This Court concludes District Court did not clearly err in holding McMurray accountable for cocaine base as there was ample evidence that co-conspirators in case, including McMurray, distributed cocaine base rather than powder cocaine (e.g., authorities seized drug paraphernalia used for conversion and several witnesses testified about co-conspirators cocaine base sales.

Lomax argued District Court incorrectly calculated amount of drugs attributable to him as 12.6 kilograms and erred in assessing his base offense level as 40. He contended error in accepting calculation of probation officer who drafted PSR, claiming report was compiled and based on unreliable testimony. District Court did not clearly err in drug quantity determination; calculation amply supported: e.g., witnesses whom Court found credible testified to quantities well over five kilogram threshold for assigning base offense level of 40, wire transfer receipts totaling $180,000 supported inference of substantial drug dealing. In light of evidence, District Court made cautious estimates.), cert. denied, 513 U.S. 1179 (1995).

United States v. Wellman, 33 F.3d 944 (8th Cir. 1994). (District Court based drug quantity finding on trial testimony that based on regularity and quantity of purchases of methamphetamine from Wellman between 1986 and 1993, methamphetamine totalled over 1000 grams. Wellman argued District Court erred in using this quantity because witness was not credible witness and drug quantity was speculative. This Court finds no clear error where District Court stated it found witness s testimony credible and quantity of drugs calculated in PSR correct.), cert. denied, 514 U.S. 1077 (1995).

United States v. Newton, 31 F.3d 611 (8th Cir. 1994). (Newton first argued District Court improperly relied upon actual weight of methamphetamine, rather than total weight of mixture containing methamphetamine, which he claims would have yielded smaller base offense level. In case of mixture or substance containing methamphetamine, Court is to use offense level determined by entire weight of mixture or substance or offense level determined by weight of actual methamphetamine, which ever is greater. Section 2D1.1(c).

Newton challenged District Court s calculation of purity level of unrecovered methamphetamine. Using percentages of purity from methamphetamine actually seized, District Court concluded each eight-ball amounted to 1.2 grams of actual methamphetamine. This Court looked to application note 12 and prior holdings to effect that Court may extrapolate drug quantity from drugs and money actually seized. Likewise, in making its calculation of purity level of drugs in Newton s possession at time of drug purchase, District Court properly relied on purity level of drugs actually seized.

Newton argued District Court erroneously credited special agent s investigative reports in making sentencing determination; reports indicated agent purchased two eight-balls from Newton and that Newton told him that he had eight additional eight-balls left. Newton asserted at sentencing he possessed only three additional eight-balls. Even had District Court ignored agent s statements and relied wholly on Newton s statement, Newton would remain accountable for possessing in excess of ten grams of methamphetamine for base offense level of 26; hence, no reversible error.)

United States v. Wright, 29 F.3d 372 (8th Cir. 1994). (Defendants challenged District Court s finding conspiracy involved more than 100 grams of methamphetamine. Court calculated quantity by noting seized package contained 30.9 grams of methamphetamine and McNabb admitted she had received three to six other packages for which she paid same price. Defendants argued quantity finding was clearly erroneous because it was based on speculation. This Court disagrees, citing to § 2D1.1, comment. (n.12) and noting District Court properly relied on McNabb s admission.)

United States v. Wiley, 29 F.3d 345 (8th Cir.) (Wiley argued District Court improperly sentenced him for possession with intent to distribute cocaine base when his indictment referred only to cocaine. This Court adopts Fifth Circuit s expression of doubt there is any variance in this case because cocaine base is merely isomer of cocaine. Even if variance between cocaine and cocaine base is assumed, this Court concludes variance was plainly harmless as Wiley was on notice before trial that government intended to present evidence of his possession of cocaine base. Because Wiley s conviction was valid, this Court rejects Wiley s challenge to his sentence.), cert. denied, 513 U.S. 1005 (1994).

United States v. Marshall, 28 F.3d 801 (8th Cir. 1994). (No clear error by district judge in finding 414 marijuana plants: Court was entitled to discredit Marshall s testimony that he "cloned" over 100 plants on night he was arrested; furthermore, he admitted his intention in making cuttings was to produce other viable marijuana plants.)

United States v. Roach, 28 F.3d 729 (8th Cir. 1994). (At trial, government introduced 20-gram sample from one of five 500-gram bottles marked "Ephedrine" supplied to Roach by undercover agents and seized when Roach was arrested. Sample was Ephedrine. Roach argued that as contents of remaining four bottles were not tested, District Court erred in concluding they contained Ephedrine and including 2000 grams of whatever substance they contained in calculation of his base offense level. Roach s argument fails: this Court has approved random testing of substances and has said District Court can rely on statements made at trial in making factual findings at sentencing; here, Court had before it testimony that four taped-sealed, "Ephedrine"-labeled jars,

identical to one from which sample was taken, in fact contained "Ephedrine." No clear error. Likewise, District Court did not commit clear error in determining quantity of Ephedrine attributable to Hester.)

United States v. Maxwell, 25 F.3d 1389 (8th Cir. 1994). (Defendants argued cocaine was often in powder form when Maxwell and Majied distributed it and that they therefore should not be held accountable for cocaine base. While Maxwell and Majied sometimes distributed cocaine powder, they distributed to other members of conspiracy who then converted it into cocaine base. Maxwell and Majied were aware co-conspirators were converting powder; Majied provided co-conspirators with directions for conversion. District Court did not clearly err in holding all co-conspirators accountable for cocaine base as that was form in which cocaine was finally distributed to persons outside conspiracy.

In determining defendant s base offense level, District Court must consider all acts part of same course of conduct as offense of conviction (§ 1B1.3(a)(2)). Because government seized only small amount of drugs, District Court approximated quantity of drugs attributable to each defendant. This Court found District Court s drug quantity determinations not clearly erroneous as it considered factors in § 2D1.1, comment. (n.12), e.g., price generally obtained for controlled substance, records. Furthermore, District Court properly attributed certain of co-conspirators sales to other people as those sales were in furtherance of conspiracy and reasonably foreseeable to other co-conspirator(s).), cert. denied, 513 U.S. 1031 (1994).

United States v. Sales, 25 F.3d 709 (8th Cir. 1994). (Sales and Moore argued District Court erred in calculating quantity of drugs because testimony upon which Court relied lacked credibility, sufficient reliability, and corroboration. District Court may consider any evidence as long as it has sufficient indicia of reliability to support its probable accuracy. District Court determined Sales and Moore were responsible for more than 3 but less than 10 kilograms of methamphetamine, calculation based on testimony of several participants in conspiracy. While Court questioned Moore s girlfriend s credibility and amount of methamphetamine she attributed to Sales and Moore, testimony of other witnesses involved in drug distribution operation convinced this Court that District Court did not clearly err in calculating quantity of methamphetamine involved and attributed to Sales and Moore for purpose of sentencing them. Even if quantity described by girlfriend was wholly ignored, record supports calculation of methamphetamine distributed as result of conspiracy between Sales and Moore (testimonial quantities enumerated at sl. op. pg. 5).)

United States v. Quintanilla, 25 F.3d 694 (8th Cir. 1994). (Quintanilla claimed he was properly held accountable for only 17 pounds of marijuana seized from his residence. This amount did not reflect scale of drug trafficking operation. Drug records seized from Quintanilla indicated during course of his drug trafficking scheme he had distributed over 401 pounds of marijuana; no plain error in holding him accountable for at least 100 kilograms of marijuana (n.12).

Velasquez was properly held accountable for 150 pounds of marijuana he had negotiated to sell to Mendez, not simply marijuana he had in his possession when his residence was searched. As Quintanilla s co-conspirator, his sale of large amount of marijuana to other people was reasonably foreseeable to Velasquez (§ 1B1.3(a)(B)). Velasquez had expressed concern about large number of people carrying bags of marijuana from Quintanilla s residence. No plain error in concluding

Quintanilla s foreseeable sales of marijuana to other individuals helped to further objective of conspiracy to distribute marijuana.)

United States v. Pugh, 25 F.3d 669 (8th Cir. 1994). (This Court rejects Pugh s contention that record evidence was insufficient to support District Court s finding. District Court based quantity determination on detective s testimony--which Court explicitly found credible--that Pugh had received 1000-1500 rocks of crack from his suppliers. District Court then estimated weight of rocks, used lowest figure within that range, and discounted it by estimating Pugh diverted ½ of crack to his personal use. To this amount, District Court added amount of crack found when Pugh was arrested. This Court finds no error in District Court s methods of approximation: average weight of 0.1 grams per rock was appropriate approximation given actual weight of two samples of crack that were purchased from Pugh and later weighed. District Court s credibility determinations are virtually unreviewable and as whole, District Court s methodology worked in Pugh s favor. This Court concludes District Court s findings were not clearly erroneous and it did not err when it found Pugh responsible for 54.2 grams of crack and sentenced him accordingly.)

United States v. Robinson, 22 F.3d 195 (8th Cir. 1994). (This Court agrees with Walter Robinson that District Court erred in calculating his sentence based on sale of 2 kilograms of cocaine because he and his brother had only enough money to purchase less than 2 kilograms. Robinsons were arrested as result of reverse sting operation in which government agents arranged to sell them cocaine. Thus, District Court s apparent reliance on commentary to guideline discussing how to calculate negotiated amount of drugs when transaction was not completed is improper, as commentary by its terms applies when defendant is seller or distributor, not buyer as was Walter; moreover, Robinson did not intend to produce and was not reasonably capable of producing negotiated amount of money for transaction. Irrelevant that Robinsons expressed desire to buy two or more kilograms of cocaine where record shows, and District Court found, Robinsons did not have enough money to buy amount at negotiated price. This Court finds clear error in District Court s calculation of Walter Robinson s sentence based on quantity of two kilograms of cocaine and holds his sentence must be recalculated using base offense level of 26, corresponding to quantity of cocaine less than 2 kilograms.)

United States v. Bieri, 21 F.3d 811 (8th Cir.) (Bieris contended District Court erred in calculating weight of marijuana for purpose of determining base offense level, thus misapplying sentencing Guidelines in violation of their due process rights. District Court calculated base offense level by adding quantity of Ruiz s prior deliveries to Bieris (approximately 46 pounds) and marijuana seized from Bieris premises in January 1992 pursuant to search warrant. Bieris argued calculation should have been based solely on amount seized pursuant to search warrant. District Court could consider amounts from other drug transactions which were part of same course of conduct or scheme, § 1B1.3(a)(2). District Court did not clearly err in believing Ruiz s testimony regarding quantities of marijuana he delivered to Bieris from 1990 to January 1992; his story was corroborated by tape-recorded conversation with Susan Bieri. Evidence of paraphernalia and quantities of marijuana recovered at Bieris farm support conclusion Bieris distributed marijuana delivered by Ruiz in 1990, and that it was no longer part of quantity found on farm in 1992. No error in calculation of quantity of marijuana to determine base offense level.), cert. denied, 513 U.S.

878 (1994).

United States v. Wyatt, 19 F.3d 1283 (8th Cir.) (Based on government s evidence introduced at sentencing, District Court s drug quantity finding was not clearly erroneous: investigative report introduced contained Wyatt s post-arrest statements describing his previous crack transactions with one of his co-conspirators and others; government also introduced testimony corroborating statements. While Wyatt testified he never engaged in crack transactions before November 23 and he did not remember making statements to authorities, District Court was entitled to discredit his testimony.)

United States v. Bauer, 19 F.3d 409 (8th Cir. 1994). (Bauer argued District Court s quantity determination (that he conspired to possess and distribute in excess of 15 kilograms of cocaine) was erroneous as matter of law because government failed to prove additional 40 kilograms were part of his jointly undertaken criminal activity, § 1B1.3(a)(1)(B). District Court s quantity determination was not clearly erroneous where record included evidence in support, e.g., video tape showing Bauer and another taking 2 kilograms of cocaine from 42-kilogram stash; taped conversations which indicated Bauer s approval was needed before confidential informant could become carrier for conspirator; seizure of drug notes from convicted drug dealer, that referenced Bauer and another; Bauer s admission he was long-time drug dealer and District Court s finding that Bauer s testimony as to quantity was wholly incredible.)

United States v. Tran, 16 F.3d 897 (8th Cir. 1994). (Here, this Court did not have to probe question of "foreseeability" to conclude District Court properly calculated amount of drugs for which Tran was responsible. He participated in actual distribution made by two co-conspirators and also had keys to towel dispenser where crack was hidden as well as keys to "stash house" where drug was processed and found. District Court s finding of approximately 102 grams of crack included drugs obtained from 11 controlled buys, drug seized from restaurant, and drugs discovered during search of apartment.)

United States v. Finch, 16 F.3d 228 (8th Cir. 1994). (Trial Court did not hold Finch responsible for two shipments that were subject of counts of which she was acquitted and held her responsible only for lowest amount of range established for each of other shipments. Government suggested in its appeal brief that trial Court improperly calculated base offense level because Finch should have been held responsible not only for amount of cocaine she actually possessed or distributed, but for total amount of cocaine foreseeably involved in conspiracy. This Court declines to reach this issue where government did not appeal sentence.)

United States v. Jonsson, 15 F.3d 759 (8th Cir.) (Jonsson challenged District Court s calculation of quantity involved in conspiracy to which he pleaded guilty. He pleaded guilty to distributing at least five kilograms of cocaine but claims clear error in District Court s imposing sentence based on finding that conspiracy involved at least 20.2 kilograms. Jonsson s primary argument was based on fact that one drug carrier who testified against him did not have first-hand knowledge that one of two metal boxes he delivered on separate occasions actually contained

cocaine. This Court does not find clear error in District Court s inference that first box also contained cocaine where carrier had first-hand knowledge that second box contained cocaine, both deliveries were arranged by Jonsson in same manner, pick-up was made in same place, same type of box was used, and boxes were delivered to same storage bin.), cert. denied, 513 U.S. 986 (1994)

United States v. West, 15 F.3d 119 (8th Cir.) (West contended testimony at sentencing hearing of one of witnesses whose testimony was excluded at trial, did not have sufficient indicia of reliability to support its probable accuracy. He complained specifically about reliability of witness s estimate of amount of cocaine she saw in West s possession. Estimate was based on witness s viewing of paper bag into which police officer poured cocaine; when bag appeared to contain amount of cocaine she had seen, she told officer so. This Court stated it was unclear as to what weight, if any, trial Court gave to experiment, but it did not see anything inherently unreliable in it. Moreover, more than ample evidence supported trial Court s findings West was responsible for at least 525 grams of cocaine based on three other witnesses testimony.), cert. denied, 513 U.S. 863 (1994).

United States v. Casares-Cardenas, 14 F.3d 1283 (8th Cir.) (Cardenas objected to inclusion in his base offense level of kilogram of cocaine and seven ounces of heroin seized from car driven by co-conspirator and stopped in Utah at time Cardenas was in jail. Inclusion of narcotics discovered in car in Utah is correct as preponderance of evidence shows Casares participated in conspiracy to transport them; threshold of proof was exceeded when jury convicted Casares of conspiracy. Moreover, Casares, from jail, helped procure car in which narcotics were transported, and there was no evidence he had withdrawn from conspiracy prior to seizure of car.), cert. denied, 513 U.S. 849 (1994).

United States v. Holmes, 13 F.3d 1217 (8th Cir. 1994). (This Court does not find trial Court s factual conclusion that all 213 squares contained LSD clearly erroneous where 3.5 squares of batch of 13 and 3.5 squares of batch of 200 were tested. Test squares were identical in appearance to untested squares. This Court has accepted use of random testing to establish by preponderance of evidence that substance contains cocaine base for purposes of sentencing.)

United States v. Jennings, 12 F.3d 836 (8th Cir. 1994). (Jennings argued government failed to meet its burden of proving methamphetamine attributed to him was dextro-methamphetamine which carries harsher sentence than l-meth. District Court did not clearly err in finding that all methamphetamine attributed to Jennings was more likely than not d-meth, where government produced three expert witnesses who testified they had examined eight samples obtained on four occasions, which all proved to be d-meth; experts testified l-meth is almost never found in samples seized in that geographical area. As to Jennings s challenge that "bad batch" was not recovered by government and thus never tested, though testimony was contradictory, District Court did not clearly err in finding it was more likely d-meth based on witness testimony. As this Court has not addressed issue of use of "bad batches" for sentencing purposes, and Guidelines do not speak directly to question, this Court could not conclude that error here, if any, should have been clear to District Court under current law; thus, District Court did not commit plain error.)

United States v. Johnson, 12 F.3d 760 (8th Cir. 1993). (District Court s determination that substance at issue was cocaine base rather than cocaine powder is finding of fact, which this Court reviews for clear error. Government was required to establish only by preponderance of evidence that substance was cocaine base. This Court finds that government more than adequately demonstrated that seized substance contained cocaine base, based on testimony of forensic chemist, independent laboratory reanalysis, and fact that defendants offered no evidence to dispute expert s testimony.), cert. denied, 512 U.S. 1211 (1994).

United States v. Wessels, 12 F.3d 746 (8th Cir. 1993). (District Court was not clearly erroneous in its determination that Wessels was responsible for three and one-half pounds of methamphetamine where Court credited witness s testimony (witness credibility is issue for sentencing judge that is virtually unreviewable on appeal) that he personally supplied Wessels with three and one-half to four pounds of methamphetamine during course of their drug trafficking activities.

This Court finds error in District Court s taking judicial notice that methamphetamine involved in case was d rather than l. Type of methamphetamine involved was essential to calculation of proper sentence, and government, rather than Wessels, carried burden of producing evidence on issue. As District Court did not receive any evidence as to type of methamphetamine involved, this Court remands for further findings on issue.), cert. denied, 513 U.S. 831 (1994).

United States v. Ruvalcaba, 9 F.3d 41 (8th Cir. 1993). (In conspiracy to supply drugs, conspirators criminal liability is determined by amount of drugs promised or negotiated, not amount contained in particular delivery. Ruvalcaba claimed his involvement in transaction was limited to 98 pounds. This claim presented factual issue in which his credibility played central role. District Court s finding of conspiracy to distribute 500 pounds of marijuana was not clearly erroneous where numerous inconsistencies in Ruvalcaba s testimony supported District Court s decision to discredit his testimony regarding scope of his involvement. Co-conspirator testified he had agreed with Ruvalcaba to provide 500 pounds of marijuana and there were tape-recorded conversations which contained discussions of that amount.), cert. denied, 510 U.S. 1203 (1994).

United States v. Kenyon, 7 F.3d 783 (8th Cir. 1993). (Kenyon argued that District Court should have found that on his third trip to Colorado, he brought only 57 grams of cocaine into South Dakota, not 113 grams. This Court concludes District Court s finding was not clearly erroneous where special agent testified on direct examination that Kenyon transported 4 ounces (113 grams) on his third trip and based this conclusion on statements made by Kenyon s co-defendants; although agent s testimony on cross-examination was somewhat confusing, he did not clearly contradict his conclusion. District Court could properly have found agent s conclusion was credible and his testimony as whole, sufficient to meet preponderance of evidence standard.)

United States v. Cassidy, 6 F.3d 554 (8th Cir. 1993). (On cross-appeals, government and Cassidy both complained that District Court credited only part of evidence they presented. Both parties pointed out alleged inconsistencies in other side s testimony. This Court states credibility determinations are not all-or-nothing proposition. District Court s findings were not clearly erroneous where there was testimony at sentencing to support its findings on both amount of powder

cocaine and amount of crack relevant to Cassidy s offense.)

United States v. Echols, 2 F.3d 849 (8th Cir. 1993). (Preponderance of evidence standard was appropriate for District Court s determination of whether seized money should be converted to quantity of drugs. District Court did not clearly err in finding that seized money was derived from drug sales given Echols s unemployed status, his intermingling of marked bills with rest of his money, his sale of crack to undercover officer, and his possession of additional crack when arrested.)

United States v. Ortiz-Martinez, 1 F.3d 662 (8th Cir. 1993). (District Court s calculation of drug quantities was not clearly erroneous where Court adopted conclusions of PSR. U.S. Probation Office had obtained amount of greater than 50 kilograms by two independent methods: first, by totaling amounts derived from testimony of witnesses and corroborating evidence in case; second, officers seized approximately 13.5 kilograms of cocaine, $545,552 in U.S. Currency and checks, and organization transferred approximately $400,000 by wire representing 41 kilograms of cocaine, which, when added to 13.5 kilograms actually seized, totalled over 50 kilograms. This Court has previously endorsed extrapolation of drug quantities from similar financial information.)

United States v. Casas, 999 F.2d 1225 (8th Cir. 1993). (Appellants argued that District Court improperly attributed 45 kilograms of cocaine to them based on unreliable testimony, i.e., lacking in sufficient indicia of reliability under § 6A1.3. This Court did not find District Court s findings as to drug quantity clearly erroneous where District Court made specific credibility findings and on balance found credibility of witnesses who testified when called by government, sufficient to establish that no less than 45 kilograms of cocaine was involved in conspiratorial action to get cocaine into Iowa.), cert. denied, 510 U.S. 1078 (1994).

United States v. Hipolito, 998 F.2d 594 (8th Cir. 1993). (Because Hipolito-Sanchez withdrew any objection he had to PSR s determination he was responsible for at least 500 grams but less than 2 kilograms of cocaine, he waived his right to challenge that amount on appeal.)

United States v. Smiley, 997 F.2d 475 (8th Cir. 1993). (No requirement drugs be produced as evidence in order to be counted at sentencing. In conviction for conspiracy involving illegal drugs, base offense level is same as if object of conspiracy had been completed. Weight under negotiation in uncompleted distribution is used to determine applicable amount of drugs unless District Court finds defendant lacked intent and capability. (Extensive discussion of whether section 2D1.4 requires District Court to make specific findings, and of burden of proof).

District Court is authorized by Guidelines and case law to determine quantity of drugs based on reliable evidence. Here, there was sufficient evidence to support Court s quantity determination where one kilogram amount came up on two occasions in context of quantity discussions initiated by Smiley (Ruiz and Foley distinguished). DISSENT: Sentencing decision unsupported by evidence--rests on surmise and conjecture. Additional kilo inclusion has substantial impact on sentence and Court lacked reasonable basis to find Smiley had intent to produce it. Rules of evidence don t apply in guideline sentencing and "anything goes.")

United States v. Grady, 997 F.2d 421 (8th Cir.) (Where District Court s quantity

determination was based largely on testimony of government witness, Grady claimed witnesses s testimony was contradictory, unspecific about dates and amounts of cocaine, and failed to establish by preponderance of evidence that Grady distributed over 2 ounces of crack. This Court determined that witnesses s testimony adequately supported trial Court s determination and Court s finding based on amount of crack seized by law enforcement officials and witnesses testimony was not clearly erroneous.), cert. denied, 510 U.S. 958 (1993).

United States v. Wiley, 997 F.2d 378 (8th Cir.) (Wiley claimed that there was no evidence at sentencing hearing to prove that marijuana distributed by two others was obtained from him. This Court finds that trial transcript showed that government presented evidence through witness that Wiley was source of marijuana. Though Wiley contests credibility of witness, District Court disagreed and found witness credible and reliable. This was not clearly erroneous.), cert. denied, 510 U.S. 1011 (1993).

United States v. Williams, 994 F.2d 1287 (8th Cir. 1993). (Williams challenged inclusion in his base offense level of negotiated but undelivered drugs; he argued § 2D1.4 (now deleted) did not apply to him as his offense of conviction was neither attempt nor conspiracy. Application Note 12 reinforces reading that section applied if conduct involved negotiation, not limited to attempts and conspiracies.

Once agent asked about price of quarter pound, Williams did offer to try to obtain and sell him that amount, which was sufficient to show additional quantity was "under negotiation"--completed sale or agreement to sell is not required. Moreover, District Court did not clearly err in finding Williams had intent and capacity to produce this amount of cocaine if agreement had been made. Williams stated he could; evidence of his prior drug involvement substantiated Williams s ability to produce drugs; and his need to make money was probative of his intent to do so.)

United States v. Edwards, 994 F.2d 417 (8th Cir. 1993). (The District Court s comments at sentencing and its specific overruling of appellants quantity objections to PSRs, made it clear Court credited government informant-witness s quantity testimony for sentencing purposes.), cert. denied, 510 U.S. 1048 (1994).

United States v. Lewis, 987 F.2d 1349 (8th Cir. 1993). (This Court rejects Lewis s contention that five kilograms of cocaine should not have been included in quantity of drugs for which he was sentenced: District Court made independent finding of fact at sentencing. There was no clear error in finding Lewis conspired with Carlos to distribute cocaine and negotiations indicated Lewis was reasonably capable of producing five kilograms.)

United States v. Nichols, 986 F.2d 1199 (8th Cir. 1993). (When defendant is convicted of conspiracy involving illegal drugs, base offense level is to be same as if object of conspiracy had been completed.

If conviction is for offense involving negotiation to traffic in illegal drugs, weight under negotiation in uncompleted distribution is to be used to determine applicable amount of drugs unless trial Court finds defendant did not intend to produce and was not reasonably capable of producing negotiated amount.

Under circumstances of case (derived from testimony of undercover agent, transcripts of telephone conversations, etc.), this Court holds it was not clearly erroneous for trial Court to find one kilogram each of methamphetamine and cocaine and thirty pounds of marijuana were under negotiation, Nichols intended to obtain those amounts, and he was reasonably capable of obtaining those amounts.)

United States v. Buchanan, 985 F.2d 1372 (8th Cir. 1993). (Where District Court made it plain it would have sentenced Buchanan to 210 months even if stipulation (2,085.9 grams of cocaine for base offense level of 30 instead of 2,313.5 grams at 32) had been accepted as truth, any error was harmless.), cert. denied, 512 U.S. 1228 (1994).

United States v. Adipietro, 983 F.2d 1468 (8th Cir. 1993). (District Court found Adipietro was responsible for over 1000 kilograms based on reasonable foreseeability to him that object of conspiracy would be delivery of that amount of marijuana. Where Court based finding of foreseeability on credibility of witness s testimony concerning meeting on subject, this Court finds no error.

District Court s finding Auricchio could reasonably foresee future shipments of marijuana over similar period of time in similar amounts was not clearly erroneous where Auricchio knew Adipietro intended to engage in on-going marijuana transactions and Auricchio willingly lent his services helping unload, repackage and store marijuana.)

United States v. Schenk, 983 F.2d 876 (8th Cir. 1993). (Weight of blotter paper may be properly included in calculating weight of LSD to determine base offense level.)

United States v. Mason, 982 F.2d 325 (8th Cir. 1993). (Appellants contested District Court s decision to sentence them on basis of 2.5 kilograms of cocaine when only small portion of that amount was produced at trial. This Court found quantity determination not clearly erroneous where approximation (comment. (n.12)) was conservative given evidence that eight to ten bags, each containing equivalent of approximately one pound of powder, were thrown from appellant s car during high speed chase and estimate was based on only those bags recovered.)

United States v. Graham, 982 F.2d 315 (8th Cir. 1992). District Court did not clearly err in attributing 100 pounds of marijuana to Graham where he admitted to participating in marijuana distribution network led by Carter and District Court credited Carter s testimony of amounts he gave Graham and money Graham owed.)

United States v. Alexander, 982 F.2d 262 (8th Cir. 1992). (Where District Court did not provide description of how it reached quantity of 22,000 pounds (and witnesses testimony often was vague as to number of deliveries and quantities of marijuana), this Court remands for specific findings and reconsideration of quantity of drugs.), cert. denied, 512 U.S. 1244 (1994).

United States v. Clark, 980 F.2d 1143 (8th Cir. 1992). (Clark claimed District Court error in determining quantity of marijuana involved was 767 plants since actual plants had been destroyed. This Court was troubled by county attorney s destruction of seized evidence, but found quantity

not clearly erroneous where determination was based on videotapes of growing marijuana and testimony of deputies who had counted plants. Moreover, Clark conceded responsibility for 501 plants and there was evidence of similarity in manner of cultivation of all plants.)

United States v. Appleby, 975 F.2d 1384 (8th Cir. 1992). (This Court rejects Appleby s argument that District Court erred in determining conspiracy was responsible for between 30 and 100 kilograms of methamphetamine (base offense level of 38) where there was single conspiracy and Court based its finding on laboratory production, drums of precursor chemical (phenylacetic acid), testimony of chemist, and defendant admissions. DISSENT: Twenty years imposed by Guidelines goes beyond mere punishment; oppressive sentences for first-time offenders require substantial public funding.)

United States v. Turner, 975 F.2d 490 (8th Cir. 1992). (District Court did not commit plain error (and Baker did not object below to calculation of base offense level) in attributing 15 kilograms of cocaine base to him where trial testimony indicated Baker received one to five kilograms week beginning early 1988 and ending in fall 1989 and PSR stated Baker was fully aware his co-conspirators were selling cocaine base.)

United States v. Lattimore, 974 F.2d 971 (8th Cir. 1992). (Lattimore pleaded guilty to possession with intent to distribute 23 grams of crack cocaine. He was assigned sentencing range of 78 to 97 months. District Court, finding that his sentencing range should begin at mandatory minimum, departed downward to 60 months, mandatory minimum under 21 U.S.C. § 841(b). Government appealed. This Court reviewed this question of law de novo and reversed with instructions to District Court to enter sentence within guideline range. Guideline sentence reflects aim of Guidelines to provide incremental and graduated sentencing. It does not run afoul of mandatory minimum created by Congress; sentencing range fits comfortably within statutory range and is appropriate for this particular defendant and this particular crime. Moreover, section 5G1.1 further evidences Commission s consideration of mandatory minimum and statutory maximum sentences. DISSENT: Because Sentencing Commission skewed Guidelines by overlooking Congress s minimum sentence and further because Commission never considered racial disparity resulting from crack Guidelines, District Court possessed authority to depart downward from Guidelines, but not below mandatory minimum.), cert. denied, 507 U.S. 1020 (1993).

United States v. Candie, 974 F.2d 61 (8th Cir. 1992). (Quantity is issue for sentencing judge; government must prove quantity at sentencing by preponderance of evidence. As District Court s finding as to each controverted material fact in PSR is essential to meaningful appellate review and fairness of sentencing process, this Court vacates sentence and remands for resentencing where it was not clear whether Court credited witness s estimate that Candie sold 1350 grams of crack (sentencing judge s assessment of witness credibility unreviewable on appeal) or did not fully credit testimony but was satisfied, for reasons it did not articulate, conspiracy was responsible for more than 50 kilograms of cocaine equivalent or thought it had no alternative but to accept particular witness s evidence.)

United States v. Wheeler, 972 F.2d 927 (8th Cir. 1992). (This Court rejects Wheeler s

argument that guideline is unconstitutionally vague because term "cocaine base" has been subject to conflicting judicial definitions. Even Wheeler s expert testified that twelve rock-like substances were cocaine base and not cocaine and he could differentiate between two. Court found it unnecessary to adopt precise chemical definition of cocaine base because here it was undisputed twelve rock-like substances could be smoked.)

United States v. Swinney, 970 F.2d 494 (8th Cir.) (District Court s findings on amount of drugs attributable to defendants not clearly erroneous as defendants were responsible for their own conduct and as much of conduct of their co-conspirators as they could foresee (§ 1B1.2).), cert. denied, 506 U.S. 1011 (1992).

United States v. Bluske, 969 F.2d 609 (8th Cir. 1992). (In addition to drugs in counts on which Bluske was convicted, he was also held accountable for drugs in acquitted and dismissed counts, and in uncharged transactions; Bluske challenged inclusion of drugs from two dismissed counts. Though aggregation rule provides government "fearsome tool in drug cases," defendant is not entirely without protections, e.g., § 6A1.3(a). This Court remands for resentencing where District Court relied on probation officer s account. No evidence was introduced at trial relating to two drug transactions as government dismissed two counts pertaining to those buys and they were omitted from indictment, nor was there evidence probation officer attended trial or had available trial transcript. Once alerted to Bluske s objections, Court had obligation to receive other evidence and to make specific factual findings based on preponderance of evidence. This Court holds District Court erred in relying solely on PSR which contained baseless conclusion of probation officer to resolve disputed fact.)

United States v. Stockton, 968 F.2d 715 (8th Cir. 1992). (Evidence supported District Court s calculation defendants produced significantly more than 30 kilograms of methamphetamine (e.g., Stockton stated that Darrell probably cooked another five pounds; agent and two chemists observed empty drum of PA; Badley admitted he had previously purchased two 110 pound drums of PA), minimum for base offense level of 38; therefore, District Court did not err. CONCUR: System of punishment based on weight of drugs, not criminality of offender, wastes lives and has not proved effective weapon in war on drugs.)

United States v. Evans, 966 F.2d 398 (8th Cir.) Where District Court found that DeWitt should be held responsible for [manufacturing] 40 marijuana plants and proceeded to multiply forty plants by 100 grams per plant to arrive at DeWitt s offense level of 12, this Court remands for resentencing based on more precise determination of amount of marijuana involved. Nothing in record supported District Court s independent determination plants weighed 100 grams each; government admitted actual weight of plants unknown.), cert. denied, 506 U.S. 988 (1992)

United States v. Curtis, 965 F.2d 610 (8th Cir. 1992). (In calculating 125 plants for sentencing purposes, District Court had eliminated "seedlings" which were two inches or less in height and those plants which appeared to be dead or dying. Thompson argued that in order for marijuana plants to be counted for sentencing, plants must be viable; then, only fifty percent of viable plants should be considered because only female plant produces controlled substance, THC.

This Court noted it had previously rejected argument that guideline contemplated only mature, viable marijuana plants. Moreover, Guidelines do not distinguish between male and female plants; likewise, this Court declines to do so.)

United States v. Martz, 964 F.2d 787 (8th Cir.) (Martz contended District Court should have compiled total weight by using Typical Weight Per Unit Table (note 11) which would have resulted in offense level of 28 rather than 36. District Court s determination that extrapolating lightest-known unit across dosage units is more reliable estimate than Table was not erroneous. Table is to be used only when more reliable estimate of weight is unavailable; moreover, Table does not include weight of carrying mechanism (here, blotter paper). Though Martz argued sample of blotter paper tested in her case did not constitute representative sample, random testing was sufficient here as sample was not too small or arbitrary or from too many disparate sources. DISSENT: Extrapolation not proper in this case where only three samples were taken, blotter paper did not come from same source at same time and constituted only small fraction of total amount attributed to Martz. District Court did not have enough case-specific information from which to make more reliable estimate of total weight than Table afforded.), cert. denied, 506 U.S. 1038 (1992).

United States v. Simmons, 964 F.2d 763 (8th Cir.) (At sentencing phase, government must generally satisfy preponderance of evidence standard. Drug quantity is issue for sentencing judge. District Court must consider all acts part of same course of conduct or common scheme or plan as offense of conviction. Evidentiary hearing on quantity of drugs at issue is discretionary with District Court. While this Court ordinarily defers to factual findings of District Court, here, findings leave scant room to evaluate whether District Court arrived at base offense level by using unreliable evidence, as Bowers claims. This Court held one witness s interview and testimony lacked sufficient indicia of reliability to serve as basis for calculating quantity of cocaine base properly attributable to Bowers (e.g., witness lied as to her own drug use, her drug use had caused memory impairment). Thus, as conclusory, ambiguous statement of drug quantity in PSR was based on witness s inherently unreliable statements, case is remanded to District Court for further factual findings on quantity of cocaine base and resentencing. Physical evidence from valid consensual search may be used to determine drug quantity.), cert. denied, 506 U.S. 1011 (1992).

United States v. Summerfield, 961 F.2d 784 (8th Cir. 1992). (Nothing in plea agreement or Fifth Amendment prevented government from using cooperating witness s statements against Summerfield despite witness and Summerfield having agreed to cooperate together. Furthermore, even rejecting witness s testimony, Summerfield s base offense level would not change (31 kilos methamphetamine) notwithstanding witness s testimony. Any error was harmless.)

United States v. Galvan, 961 F.2d 738 (8th Cir. 1992). (Where trial testimony clearly attributed at least 538.65 grams of cocaine to Galvan and base offense level of 26 encompasses amounts of at least 500 grams but less than two kilograms of cocaine, this Court need not reach question of whether government proved whether 38 ounces of cocaine was attributable to Galvan (§ 1B1.3).)

United States v. Ulrich, 953 F.2d 1082 (8th Cir. 1991). (Ulrich s challenge to prior

conviction failed because its exclusion would not change his criminal history category; therefore, any error would be harmless.)

United States v. Pou, 953 F.2d 363 (8th Cir.) (While appellants claimed insufficient evidence that conspiracy dealt in 5-15 kilograms of cocaine, nothing in record suggests it was error for District Court to credit testimony of government witnesses as to amounts of cocaine involved. Moreover, they were given benefit of doubt as evidence demonstrated they easily might have been placed in next higher category--15-50 kilograms--for sentencing purposes. Here, District Court found individuals personally involved in transactions though it could have attributed amounts to participants in conspiracy under § 1B.3(a)(1).), cert. denied, 504 U.S. 926 (1992).

United States v. Roberts, 953 F.2d 351 (8th Cir.) (District Court properly included pound of cocaine in calculating Roberts s base offense level where trial evidence supported Roberts s conviction for that amount.), cert. denied, 505 U.S. 1210 (1992).

United States v. Haren, 952 F.2d 190 (8th Cir. 1991). (There was adequate ground for District Court to use amount of 2 kilograms in sentencing Alaniz where testimony revealed he often dealt in ounce and half-ounce amounts, sometimes received half-pound amounts, and once received two pounds.)

United States v. Watts, 950 F.2d 508 (8th Cir. 1991). (Indictment alleged conspiracy involving heroin, cocaine, and crack cocaine. Jury did not need to decide among different drugs because indictment used "and"--not "or." Evidence of all three drugs was introduced but conversion was based on transactions occurring during specific period of time. Evidence of crack distribution during relevant time period was not contradicted or unclear.), cert. denied, 503 U.S. 911 (1992).

United States v. Glover, 946 F.2d 1354 (8th Cir. 1991). (Evidence was sufficient to connect Glover with crack found at apartment ("stash pad") where he had key, had paid rent once, and photos of him and film developed with his name on container were found there.), cert. denied, 502 U.S. 1079 (1992).

United States v. Duckworth, 945 F.2d 1052 (8th Cir. 1991). Duckworth argued District Court erred in considering aggregate amount of drugs for which he was responsible in conspiracy instead of lesser amount charged in indictment. This Court holds District Court s finding was not clearly erroneous where trial testimony supported finding as to quantity of crack sold by Duckworth.)

United States v. Apfel, 945 F.2d 236 (8th Cir. 1991). (District Court did not clearly err in finding Apfel bought one pound of methamphetamine from his suppliers for resale. Witnesses, whom Apfel was able to confront, testified Apfel bought methamphetamine in at least one ounce quantities, quantities were too big for personal use, Apfel packaged drugs in smaller quantities for resale and he frequently sold drug to others. District Court expressly discredited Apfel s testimony that he bought drugs mostly for personal use.)

United States v. Freeman, 942 F.2d 480 (8th Cir.) (Here, Streeter rule (when offense involves fewer than fifty marijuana plants, actual weight, rather than number of plants, should be used for sentencing purposes) was applied retroactively to defendants sentences. Streeter rule has nothing to do with admissibility of evidence at trial. (Defendants had argued evidence of how much marijuana was implicated should be inadmissible at trial unless it addresses actual weight of marijuana involved).)

United States v. Regan, 940 F.2d 1134 (8th Cir. 1991). (Regan contested his base offense level, arguing government did not prove by preponderance of evidence he was involved in distribution of 77 kilograms of cocaine. Where trial testimony clearly supported attribution of at least 50 kilograms to Regan and base offense level of 36 applies to amounts of at least 50 kilograms of cocaine but less than 150 kilograms, this Court need not resolve whether government proved difference between 50 and 77 kilograms.)

United States v. Bechtol, 939 F.2d 603 (8th Cir. 1991). (District Court imposed sentence based on 43 mature marijuana plants and 18 cuttings. This Court rejects Bechtol s argument that Guidelines contemplate only mature, viable plants and holds that cutting which has developed root hairs is plant under Guidelines.)

United States v. Ruklick, 919 F.2d 95 (8th Cir. 1990). (Weight of blotter paper is to be included in weight calculations for LSD offenses.)

United States v. Coppock, 919 F.2d 77 (8th Cir. 1990). (District Court finding that Coppock was growing more than 100 marijuana plants in his home not clearly erroneous where officer testified to quantity at trial and Court examined plants in bag admitted as exhibit at trial.)

United States v. Dailey, 918 F.2d 747 (8th Cir. 1990). (Stipulation made for trial purposes (here, for chain of custody and authenticity) is no less binding at sentencing. Here, in addition to "waiver," indictment charged Dailey with crime involving 22 grams of cocaine base and jury found him guilty as charged; lab report was attached to presentence report.)

United States v. Prine, 909 F.2d 1109 (8th Cir. 1990). (Sentences of both defendants vacated in light of Streeter where amount of marijuana involved (28 plants) was issue (defendants expert testified seized plants represented 3.5 lbs. smokable product). On remand for resentencing, actual weight, rather than number of plants, should be used for sentencing purposes.), cert. denied, 500 U.S. 954 (1991).

United States v. Streeter, 907 F.2d 781 (8th Cir. 1990). (Drug Quantity Table, as it existed at time Collins was sentenced on basis of 19 marijuana plants, held invalid to extent it automatically equated one marijuana plant with 100 grams in cases involving fewer than 50 plants; Table in such respect conflicts with 21 U.S.C. § 841(b)(1)(D).)

United States v. Follett, 905 F.2d 195 (8th Cir.) (Weight of carrier paper is properly included in determining quantity of LSD, citing Bishop.), cert. denied, 501 U.S. 1204 (1990).

United States v. Luster, 896 F.2d 1122 (8th Cir. 1990). (Remand for resentencing of Mr. Luster who had been sentenced to 262 months (bottom of Guideline range), as PSI report should have used net weights of cocaine mixtures (i.e., weights of substances without packaging); and while sentencing enhancement (21 U.S.C. § 841(b)(1)(A)(iii)) required 240 months in prison as statutory minimum, District Court may have sentenced him to fewer months.)

United States v. O Meara, 895 F.2d 1216 (8th Cir.) (No error in sentencing defendant on basis of additional drugs which undercover police officer "fronted" to defendant because negotiation leading to acceptance of additional drugs did not materially differ from rest of undercover police operation.), cert. denied, 498 U.S. 943 (1990).

United States v. Bishop, 894 F.2d 981 (8th Cir.). (District Courts did not err in considering blotter paper weight as well as weight of pure LSD in determining sentence as blotter paper serves purpose of making LSD ready for retail sale and ingestion by consumer; no error in not applying dosage tables as tables are to be used in cases where weight of controlled substances are unknown (parties had stipulated to weight of drugs); no error in not using dosage tables on unrecovered units of LSD as Court estimated weight based on lightest unit recovered.), cert. denied, 498 U.S. 836 (1990).

United States v. Stewart, 878 F.2d 256, 259 (8th Cir. 1989). (District Court properly calculated quantity of drugs by using entire amount of mixture and not only "pure" controlled substance.)

**§ 2D1.1(b)(1) (Firearm Enhancement/Standard of Review):**

United States v. Mendoza, 341 F.3d 687 (8th Cir. 2003) (LOKEN, HANSEN,* RILEY). (Enhancement should be applied if weapon was present unless it is clearly improbable that weapon was connected with offense. Government has burden to prove by preponderance of evidence weapon's possession by defendant and connection with offense. District Court's finding is reviewed for clear error.)

United States v. Perez-Guerrero, 334 F.3d 778 (8th Cir. 2003) (HANSEN,* LOKEN, SMITH). (This Court reviews for clear error District Court's factual finding that defendant possessed firearm in connection with drug conspiracy. Government must prove by preponderance of evidence that weapon was present and that it was not clearly improbable that weapon had nexus with conspiracy.)

United States v. Braggs, 317 F.3d 901 (8th Cir. 2003) (McMILLIAN, LAY, RILEY*). (District Court's finding that defendant possessed firearm during drug-trafficking offense is reviewed for clear error. Government has burden to prove enhancement by preponderance of evidence, but constructive possession or reasonably foreseeable possession by co-conspirator suffice, and District Court must impose enhancement unless it is clearly improbable that weapon had nexus to criminal activity.)

United States v. Harris, 310 F.3d 1105 (8th Cir. 2002) (MORRIS S. ARNOLD, HEANEY, MURPHY*). (Enhancement applies if weapon was present, unless it is clearly improbable that weapon was connected with offense. Government has burden to show by preponderance of evidence that weapon was possessed by defendant and that it was not clearly improbable that weapon was connected with offense. In conspiracy case, government must also establish that weapon was possessed by defendant during period of conspiracy and that it was connected to activity of conspiracy. District Court's application of enhancement is reviewed for clear error.), cert. denied, 123 S. Ct. 2121 (2003).

**§ 2D1.1(b)(1) (Firearm Enhancement):**

United States v. Gonzalez, No. 03-2263 (8th Cir. 2004) (RILEY, RICHARD ARNOLD, MELLOY*). (District Court did not clearly err in applying enhancement where testimony at sentencing was that defendant possessed gun for protection and to control his drug clientele, and that defendant asked co-defendant to deliver gun to two other members of conspiracy.)

United States v. Underwood, Nos. 03-1543/1982/2716/2901 (8th Cir. 2004) (MURPHY,* HEANEY, SMITH). (District Court did not clearly err in applying enhancement where defendant had gun in her home, where she manufactured methamphetamine.)

United States v. Mendoza, 341 F.3d 687 (8th Cir. 2003) (LOKEN, HANSEN,* RILEY). (District Court did not clearly err in applying enhancement where one firearm was possessed by defendant's driver and another firearm was possessed by individual watching over defendant's drug transaction in case there was trouble. These individuals' possession of firearms were in connection with defendant's drug activity and were known or reasonably foreseeable by defendant.)

United States v. Perez-Guerrero, 334 F.3d 778 (8th Cir. 2003) (HANSEN,* LOKEN, SMITH). (District Court did not clearly err in applying enhancement where, at time of traffic stop, defendant had gun in car and had key to hotel room in which drugs were stored.)

United States v. Alvarez, 320 F.3d 765 (8th Cir. 2002) (BOWMAN, RICHARD ARNOLD, LOKEN) (per curiam). (Apprendi requirements do not apply to firearm enhancement applied by District Court at sentencing that does not set punishment above statutory maximum for offense simpliciter.)

United States v. Braggs, 317 F.3d 901 (8th Cir. 2003) (McMILLIAN, LAY, RILEY*). (District Court did not clearly err in applying enhancement based on finding that it was reasonably foreseeable to defendant that his co-conspirator would possess gun while they were riding in car to and from defendant's drug sale to third party. There was strong connection between defendant and individual who possessed gun, good reason to believe that individual tended to carry guns, and close spatial and temporal proximity between individual's gun possession and defendant's drug sale.)

United States v. Harris, 310 F3.d 1105 (8th Cir. 2002) (MORRIS S. ARNOLD, HEANEY, MURPHY*). (Defendant was convicted of conspiracy "between about 1996 and 1997." Witness testified that defendant showed him .45-caliber handgun in defendant's bedroom in fall of 1996. Ammunition and magazine for .45-caliber handgun was recovered from defendant's bedroom in April 1997 along with plastic bags, scanner, and large amount of currency. At least one witness testified that defendant sold drugs out of his bedroom, and cocaine base was found hidden in toilet bowl down hall from bedroom in April 1997. On these facts, District Court did not err in finding that defendant possessed .45-caliber handgun during period of conspiracy and that it was not clearly improbable that handgun was connected with activity of conspiracy. DISSENT: evidence establishes that defendant possessed firearm prior to, but not during, conspiracy period.), cert. denied, 123 S. Ct. 2121 (2003).

United States v. Cave, 293 F.3d 1077 (8th Cir. 2002) (RILEY,* BEAM, MELLOY). (District Court did not clearly err in applying enhancement because defendant undisputedly owned nineteen firearms and nineteen grams of cocaine base found in close proximity to each other. Temporal and spatial connections were adequate even if defendant never used or touched firearms. Dismissal of gun-possession charge was irrelevant.)

United States v. Frazier, 280 F.3d 835 (8th Cir.) (HANSEN,* HEANEY, TUNHEIM). (Nexus is established if weapon was stored in same location as drugs; here, closet at drug-distribution location. Government is not required to make prima facie showing that weapon was capable of being fired.), cert. denied, 537 U.S. 911 (2002).

United States v. Atkins, 250 F.3d 1203 (8th Cir. 2001) (WOLLMAN, McMILLIAN,* BYE). (Fact that Atkins did not own firearm recovered from coconspirator's car did not defeat enhancement; constructive possession is sufficient. Government met its burden of establishing that temporal and spacial relation existed between weapon, drug-trafficking activity, and Atkins: investigating officer testified that Atkins was present in vehicle from which loaded handgun was recovered along with day planner containing formulas for manufacture of methamphetamine; and coconspirator testified that Atkins and weapon's owner had been in close association for at least several weeks and that Atkins had been present at residence while methamphetamine was being manufactured.)

United States v. Calderin-Rodriguez, 244 F.3d 977 (8th Cir. 2001) (McMILLIAN, J. R. GIBSON,* BEAM). (District Court's finding that increase was warranted by evidence as to Contreras was not clearly erroneous. Police found semiautomatic handgun under mattress in Contreras's apartment; magazine was out of gun and contained 5 rounds of ammunition. District Court's finding that increase was warranted as to Calderin-Rodriguez also was not clearly erroneous. Court relied on trial testimony of witness who testified that once when he went to buy drugs from Calderin-Rodriguez, he was searched and Calderin-Rodriguez had gun in his hand. Although defendant argues this testimony is uncorroborated and thus not trustworthy, no one who witness said was present at time of incident testified at trial; so if there is no corroboration, neither is there contrary evidence.)

United States v. Tyler, 238 F.3d 1036 (8th Cir. 2001) (BEAM, HEANEY, MORRIS SHEPPARD ARNOLD*). (When police arrested Tyler, then found loaded gun among his belongings in his car, this Court could hardly conclude District Court clearly erred in finding it was not clearly improbable that firearm was connected with criminal activities. This Court often has remarked on how commonly guns are associated with drug dealing.)

United States v. Edwards, 225 F.3d 991 (8th Cir. 2000) (BOWMAN, LOKEN,* BYE). (Defendant convicted of drug and gun offenses brought successful Bailey challenge. At resentencing, District Court imposed two-level § 2D1.1(b)(1) enhancement, yielding offense level of 43, and requiring life sentence. Although defendant thus received sentence longer than that which had been imposed prior to successful Bailey challenge, this Court found no indication of vindictiveness by District Court, and hence no due-process violation.), cert. denied, 531 U.S. 1100 (2001).

United States v. Robinson, 217 F.3d 560 (8th Cir.) (BOWMAN,* HANSEN, CARMAN). (Defendant argues District Court failed to make specific findings other than to state "it is not clearly improbable that weapon was connected with offense." District Court's language tracks commentary of U.S.S.G. § 2D1.1, and its abbreviated statement should not be viewed in vacuum. Evidence that defendant possessed weapon at time of offense--including admission of weapon itself into evidence, and arresting officer's testimony that he found weapon on defendant at time of arrest--was uncontested. Also, defendant presented no evidence at trial or sentencing that he possessed weapon for any legitimate reason. In these circumstances, District Court's finding was sufficient.), cert. denied, 531 U.S. 999 (2000).

United States v. Moore, 212 F.3d 441 (8th Cir. 2000) (RICHARD S. ARNOLD, JOHN R. GIBSON,* BEAM). (Gun was found in room which Court could reasonably conclude Moore occupied, and room contained at least one scale, two beepers, and approximately $2,780 in cash. Also, detective testified Moore told him that he owned gun to protect himself. Enhancement upheld.)

United States v. Thompson, 210 F.3d 855 (8th Cir. 2000) (WOLLMAN,* F. GIBSON, MURPHY). (Record was replete with evidence that weapons played role in defendant s activity: he twice possessed firearm while actively engaged in drug transactions; during negotiation of one drug sale, he told FBI agent that he (defendant) was carrying handgun, and patted left hip to indicate gun s location; two years later he fired shotgun into air while transferring drugs to one of his distributors.), cert. denied, 532 U.S. 996 (2001).

United States v. Alatorre, 207 F.3d 1078 (8th Cir. 2000) (McMILLIAN, BRIGHT, RICHARD S. ARNOLD) (per curiam). (District Court did not clearly err in finding that government s evidence showed defendant had at least constructively possessed sawed-off shotgun found adjacent to bedroom dresser containing drugs and scale, in residence defendant shared with others and in which some of his personal effects were found.)

United States v. Jones, 195 F.3d 379 (8th Cir. 1999) (BEAM, HEANEY, FAGG*).

(Upholding enhancement where record is full of references to firearms recovered from various drug houses used by coconspirators, including Jones.)

United States v. Fairchild, 189 F.3d 769 (8th Cir. 1999) (LOKEN, HANSEN,* MORRIS SHEPPARD ARNOLD). (Substantial nexus between firearms and criminal activity existed where police raided home of drug conspirators and discovered 32 firearms, all of which were owned by Gruber, and where Gruber pistol-whipped associate who had failed to comply with Gruber's orders regarding payment of money for drugs. During pistol-whipping, Gruber not only possessed firearm, he deployed and employed it, and use of weapon occurred during commission of drug trafficking offense: such evidence constitutes nexus sufficient to connect Gruber's firearms to drug conspiracy.)

United States v. Hernandez, 187 F.3d 806 (8th Cir. 1999) (BEAM, HANSEN,* KOPF). (Applying clear error review, this Court rejects government's challenge to District Court's refusal to apply enhancement to defendant convicted of possessing marijuana with intent to distribute. Marijuana was in trailer and unloaded shotgun was in truck's sleeping compartment. Hernandez testified that he purchased shotgun long before he received offer to transport marijuana and he never intended to use gun to protect his cargo of marijuana; and that he purchased gun only to protect himself during overnight truck driving trips following attempted break-in. While his original motive for purchasing gun may not have been reason he possessed it while transporting marijuana, government did not present evidence to discredit Hernandez's assertions and District Court specifically found his testimony credible.)

United States v. Behler, 187 F.3d 772 (8th Cir. 1999) (BEAM, HANSEN,* MOODY). (Although some witnesses testified that firearm was used only for hunting purposes, their testimony is inapposite because they admitted they were not involved in Behler's drug dealing and thus testimony had no direct bearing on whether he carried firearm in connection with drug offenses. District Court did not clearly err in finding Behler possessed firearm during commission of drug trafficking offenses where government presented testimony of statements made by Behler's ex-wife and live-in girlfriends that Behler had gun in car on their trips to buy drugs, and authorities found gun in Behler's bedroom on day of his arrest following drug transaction at his residence.)

United States v. Newton, 184 F.3d 955 (8th Cir. 1999) (RICHARD S. ARNOLD, WOLLMAN,* MAGNUSON). (Newton reached agreement with special agent--to whom Newton had been selling drugs--for loan to buy car to replace one Newton had been using to transport drugs; to secure loan Newton agreed to post guns as collateral and they later agreed loan would be repaid with drugs. Newton used loan funds to buy pickup truck and on some seven occasions thereafter delivered drugs to Fink and confidential informant. Government established element of possession of guns, for when viewed in context of ongoing dealings, auto loan agreement was part of drug transactions between Newton and special agent. And because guns directly facilitated continuing drug transactions, there was sufficient nexus between Newston, firearms, and drug transactions, to satisfy "connected with" requirement of § 2D1.1(b)(1).)

United States v. Guel, 184 F.3d 918 (8th Cir. 1999) (RICHARD S. ARNOLD, HANSEN,*

PERRY). (Brass knuckles--which are dangerous weapons--were found in pocket of green coat in motel room in which Guel had been observed leaving; two witnesses testified Guel owned green coat; and items found in green coat, including key for motel room registered in name of Guel's alias, and note from another person to Guel, strongly suggested coat belonged to Guel. At time in question, Guel was attempting to obtain additional drugs and to collect outstanding drug debts. District Court did not clearly err in concluding coat belonged to Guel and he possessed brass knuckles in connection with drug trafficking offense.)

United States v. Moore, 184 F.3d 790 (8th Cir. 1999) (MURPHY, MAGILL,* REASONER). (Affirming enhancement where police found several firearms in Moore's bedroom, including loaded weapon under Moore's pillow, small quantity of drugs in bedroom, large quantity of methamphetamine in next room, and 20 pounds of marijuana in basement.), cert. denied, 528 U.S. 1161 (2000).

United States v. Hall, 171 F.3d 1133 (8th Cir. Mar. 30, 1999) (RICHARD S. ARNOLD, MORRIS SHEPPARD ARNOLD,* PANNER). (Upholding enhancement where officers found loaded gun and additional appropriate ammunition in closet in Randall Hall's bedroom during search; authorities also had found in Mr. Hall's premises digital scale, bottle of "cutting" powder, vial of methamphetamine, and instructions for making methamphetamine.), cert. denied, 529 U.S. 1027 (2000).

United States v. Howard, 169 F.3d 1127 (8th Cir. 1999) (LAY, McMILLIAN, HALL*). (- Affirming enhancement as to Howard where government showed loaded .45 caliber handgun was present in Howard s pickup truck, under driver s seat in which he was sitting; Howard had been using truck to dispose of waste product from process conducted to extract ephedrine from cold tablets to manufacture methamphetamine.

- Affirming enhancement as to Potts where government showed .44 caliber pistol was present in Pott s bedroom on floor next to ammunition, and amid ephedrine and methamphetamine. Although Potts argues gun belonged to Maasen, Potts had stated that Maasen did not enter her bedroom on night trailer was searched.)

United States v. Johnson, 169 F.3d 1092 (8th Cir.) (BOWMAN, MURPHY,* ALSOP). (Baseball bat when used as club is "dangerous weapon" within meaning of this section.), cert. denied, 528 U.S. 857 (1999).

United States v. Brown, 169 F.3d 531 (8th Cir. 1999) (BOWMAN, LOKEN, HAND*). (**Brown.** Affirming enhancement where numerous firearms were seized from clubhouse; although firearms may have been kept for club security, use or intended use of firearms for lawful purpose does not preclude their use for facilitating drug trade. Also, record suggests defendant was willing to use firearms at clubhouse to defend drug trafficking from law enforcement, based on intercepted discussion between defendant and another person about possible problem with law enforcement and surveillance of clubhouse.

**Hay.** Affirming enhancement based on 26-piece firearm collection kept in safe in Hay's residence: sentencing testimony established Hay regularly sold cocaine out of his house, either in

basement, or in kitchen on same level of house where safe was located; Hay would place drug proceeds inside safe with firearms; officers discovered wooden box
containing $3,505 in cash inside safe, including four $20 bills from controlled buy; and one loaded pistol in safe was directly adjacent to wooden box.)

United States v. Garrett, 161 F.3d 1131 (8th Cir. 1998) (BOWMAN, RICHARD S. ARNOLD, MORRIS SHEPPARD ARNOLD*). (Affirming enhancement where defendant was arrested at apartment where he had been staying: police found firearm tucked in couch on which he had been sleeping, they also found ammunition clip and cocaine base on Garrett, and in pleading guilty to possessing cocaine base with intent to distribute, Garrett admitted he possessed firearm.)

United States v. Rogers, 150 F.3d 851 (8th Cir. 1998). (Although authorities found .44 revolver in same chair as package of methamphetamine, Rogers argued it was clearly improbable weapon was connected with offense because third person had traded gun to Rogers in exchange for drugs. **Held:** drugs-for-gun trade is sufficient to warrant two-level enhancement under § 2D1.1(b)(1); even though Rogers may have neither fired nor flaunted gun when he later sold drugs, fact remains he traded drugs to get gun and could have easily converted gun from "currency to cannon."), cert. denied, 525 U.S. 1113 (1999).

United States v. Brown, 148 F.3d 1003 (8th Cir. 1998). (Affirming possession-of-firearm enhancement where record reflected that Hewitt possessed number of firearms at various houses where he and another cooked and sold crack cocaine.), cert. denied, 525 U.S. 1169 (1999).

United States v. Belitz, 141 F.3d 815 (8th Cir. 1998). (Government has burden at sentencing to show by preponderance of evidence weapon was present and it is not clearly improbable weapon was connected with criminal activity. Belitz contends it was clearly improbable gun found in living room had connection with drugs stored in basement, asserting he had legitimate and innocent reason for possessing gun, i.e., Belitz, gunsmith, had made repairs on friend s gun, and gun was waiting to be picked up. Belitz further contended he should not receive enhancement because he had no reason to use weapon to protect drugs (drugs belonged to friend and Belitz had no financial interest in them), and when opportunity arose to use weapon against police entering, he was non-violent and cooperative. This Court decides Belitz s contentions do not require reversal. Another s ownership of gun is not controlling if defendant had constructive possession. Belitz clearly had dominion over firearm at time it was found, and fact he allegedly possessed it for legitimate purpose is not controlling. Temporal and spatial relation existed between Belitz, weapon, and drugs. At very least, District Court was entitled to conclude readily accessible gun enhanced Belitz s comfort level while drugs were in his home. Moreover, self-serving testimony need not be accepted when surrounding circumstances create doubt, and high incentive to fabricate exists. District Court finding was based in part on witness credibility. Not clear error for District Court to find government s circumstantial showing established required nexus between handgun and drug activity; persuasive nature of showing not necessarily overcome by attempted rebuttal.)

United States v. Berry, 138 F.3d 1241 (8th Cir. 1998). (Berry argues District Court erred in enhancing his BOL because firearms were found in bedroom of his residence and marijuana in

truck parked outside residence. District Court did not clearly err in assessing enhancement where Berry admitted he possessed two firearms; two firearms were loaded; cash and scales used for weighing marijuana were found in bedroom with firearm; and Berry placed 44 kilograms of marijuana in his truck, parked vehicle at his home, intending to deliver marijuana at later date.)

United States v. Jacobs, 136 F.3d 1187 (8th Cir. 1998). (This Court sees no error in District Court s ruling that it is not clearly improbable weapon that was basis for vacated firearm conviction, and two other weapons found in Jacobs s house, were connected with drug offenses, § 2D1.1, application note 3.)

United States v. Hudson, 129 F.3d 994 (8th Cir. 1997). (Hudson challenges fact findings on which enhancement was based. Hudson objected to PSR s recommended § 2D1.1(b)(1) enhancement, she specifically objected to PSR s assertion she possessed firearm during October 3 meeting. Given objections, PSR is not evidence to presence of weapon during October 3 incident and government introduced no other evidence to establish disputed fact at sentencing hearing. To extent District Court relied on October 3 incident to establish "pattern," finding is likewise flawed. Case remanded for resentencing.)

United States v. Ortiz, 125 F.3d 630 (8th Cir. 1997). (Roeles Ortiz maintains his offense level should not have been enhanced two levels where jury acquitted him of gun-related charges arising from Steven s shooting. In sentencing Roeles, District Court could consider conduct underlying gun-charge acquittals, providing conduct proved by preponderance of evidence. District Court assessed enhancement based on findings Roeles participated in series of intimidating acts against Stevens to get him to cover up Eric s drug dealing activities, and sufficient evidence placed Roeles at scene of shooting. Findings are not clearly erroneous.), cert. denied, 522 U.S. 1132 (1998).

United States v. Fairchild, 122 F.3d 605 (8th Cir. 1997). (Record is replete with evidence of possession of firearms and other weapons by individual appellants as well as other organization members. Constructive possession suffices to justify upward adjustment for possession of firearm during commission of offense. Here, District Court did not commit clear error by applying two-level upward adjustment to each appellant.), cert. denied, 522 U.S. 1131 (1998).

United States v. Barresse, 115 F.3d 610 (8th Cir. 1997). (Barresse argues District Court erred in increasing his BOL because he possessed firearm during course of conduct that included conspiracy offense to which he pleaded guilty. Assuming issue was properly preserved in District Court, this Court concludes Court did not clearly err in finding sufficient nexus between Barresse s firearm possession and his drug trafficking activity where firearm, drug paraphernalia, and quantity of amphetamine were seized from Barresse during December 1994 traffic stop and his stipulation of facts relevant to sentencing recited he was involved in methamphetamine distribution conspiracy between April 1995 and February 1996.)

United States v. Emmanuel, 112 F.3d 977 (8th Cir. 1997). (Emmanuel urges District Court

erred by applying two-level enhancement for possession of firearm during commission of crime. Where PSR provided for presumptive sentence of 57-71 months and District Court applied mandatory minimum of 60 months, mandatory minimum trumps this objection.)

United States v. Vaughn, 111 F.3d 610 (8th Cir. 1997). (Vaughn argues government did not prove connection between seized firearm and drug offenses. Court concludes District Court did not clearly err in finding sufficient nexus where officers executed search warrant for Vaughn s mother s residence and found Vaughn and several other individuals counting money in living room; in Vaughn s bedroom, officers discovered approximately 95 grams of cocaine base, 80 grams of cocaine, along with loaded .357 revolver on dresser. Officers also seized money from Vaughn s bedroom.)

United States v. McCracken, II, 110 F.3d 535 (8th Cir. 1997). (Both defendants contend there was insufficient evidence of adequate nexus between guns seized and alleged criminal activity to support two-level enhancement. Government bears burden of proving by preponderance of evidence weapon was present and it is probable weapon was connected with drug charge. Lack of proof of use or actual possession does not prohibit adjustment; enhancement may be based on constructive possession, which includes ownership, dominion, or control over item or dominion over premises. District Court s application of two-level enhancement was not clearly erroneous as government placed into evidence three loaded firearms seized from residence where both McCracken Senior and McCracken Junior resided--two firearms were found in McCracken Senior s bedroom wherein was also 110 grams of methamphetamine; McCracken Junior was present in living room where officers seized loaded firearm within close proximity to six grams of methamphetamine.)

United States v. Macklin, 104 F.3d 1046 (8th Cir.) (Macklin and Love challenge two-level enhancement, arguing there was no nexus between firearms found in their bedrooms and crime of drug trafficking. Given proximity of firearms to drugs in this case, ease with which defendants could access firearms, ongoing drug trafficking occurring out of residence, and likely need for defendants to protect both drugs and cash found in residence, this Court holds District Court did not clearly err in finding it was not clearly improbable firearms were connected with offense of drug trafficking.), cert. denied, 522 U.S. 891 (1997).

United States v. Friend, 101 F.3d 557 (8th Cir. 1996). (This case was remanded for further consideration in light of Bailey. Trial record contains no evidence any firearm was ever actively used or carried during and in relation to conspiracy; government only proved conspiracy stored weapon with its hoard of drugs and cash. In these circumstances, this Court concludes evidence was legally insufficient to sustain conviction of [lesser included] § 924(c) offense. When § 924(c) conviction is reversed on appeal, District Court should be given opportunity on remand to consider whether to impose § 2D1.1(b)(1) enhancement.)

United States v. Behler, 100 F.3d 632 (8th Cir. 1996). (Based on Bailey, this Court reverses conviction on § 924(c) count for instructional error and remands count for new trial. Should government decide to dismiss count to avoid another trial or if defendant is acquitted on this count,

Court provisionally vacates sentence on drug counts so District Court may consider whether Behler s sentence on drug counts should be enhanced under § 2D1.1(b)(1).), cert. denied, 522 U.S. 855 (1997).

United States v. Caldwell, 97 F.3d 1063 (8th Cir. 1996). (This Court reverses conviction on § 924(c) count based on Bailey and remands for new trial on that count. District Court did not consider § 2D1.1(b)(1) enhancement because such enhancement would have been double counting in light of Caldwell s conviction on § 924(c)(1) count (§ 2K2.4). Prohibition against double counting would not apply in absence of that conviction, thus Court vacates sentence as to possession with intent to distribute methamphetamine count and remands for District Court to consider whether § 2D1.1(b)(1) enhancement is warranted.)

United States v. Knight, 96 F.3d 307 (8th Cir. 1996). (Knight s challenge based on Bailey to two-point enhancement, is misplaced as Bailey specifically points out increases warranted when defendant merely possesses firearm during drug-trafficking offense. Moreover, in plea agreement, Knight stipulated increase applied.), cert. denied, 520 U.S. 1180 (1997).

United States v. Rehkop, 96 F.3d 301 (8th Cir. 1996). (This Court grants government s request to vacate sentence on possession of methamphetamine with intent to distribute-count as reversal of Rehkop s § 924(c) conviction may render appropriate two-level enhancement for specific offense characteristic of possessing dangerous weapon. District Court had not considered § 2D1.1(b)(1) enhancement because Rehkop s conviction on § 924(c) charge precluded application of two-level enhancement in order to avoid double-counting.)

United States v. Thomas, 93 F.3d 479 (8th Cir. 1996). (In light of this Court s decision to vacate Thomas s § 924(c) conviction, any double-counting concern is eliminated and Court remands to District Court to consider whether sentence enhancement under § 2D1.1(b) is warranted where, in course of searching motel room where drugs were found, police discovered loaded 9mm semi-automatic handgun under pillow.)

United States v. Scott, 91 F.3d 1058 (8th Cir. 1996). (Scott challenged enhancement because knife was not produced at trial nor described at trial. Scott submits there is no evidence knife was "dangerous." Witness at trial testified Scott threatened him with knife and witness felt threatened by this conduct. This testimony, which District Court credited, is sufficient to find by preponderance of evidence Scott did possess dangerous weapon, knife, in connection with his criminal conduct.)

United States v. Tauil-Hernandez, 88 F.3d 576 (8th Cir. 1996). (Police found handgun under motel room mattress near bundles containing over $14,000 in cash. Tauil-Hernandez had rented room and was arrested returning to it. Tauil-Hernandez admitted conspirators distributed cocaine from apartment she shared; she knew gun was kept in apartment and knew which of conspirators had brought gun to motel room. District Court did not clearly err in imposing enhancement. Even crediting Tauil-Hernandez s testimony she was afraid of gun and never used it, she knew other conspirators possessed gun in furtherance of conspiracy.), cert. denied, 520 U.S. 1121 (1997).

United States v. Betz, 82 F.3d 205 (8th Cir. 1996). (Betz argues government failed to present evidence from which to infer firearms had nexus to his drug activities; he argues it is common for people living in rural areas to have firearms on their premises. He points out firearms were not found in close proximity to large amounts of marijuana and none of weapons was found in shed where marijuana was located. At sentencing, burden is on government to show by preponderance of evidence dangerous weapon was present and it was not clearly improbable weapon had nexus with criminal activity. Undisputed that four firearms, along with drugs and proceeds from drugs sales, were seized from Betz s residence during execution of search warrant. Even though guns were not found in shed with marijuana, they were found on premises from which Betz conducted drug-related activities, where they were readily accessible. Three of guns were loaded and one had ammunition nearby. No error in District Court s determination, in all circumstances; it was not clearly improbable firearms were connected to Betz s drug offense. This Court agrees with District Court that anyone who has marijuana in his home, admitted he is growing and cultivating marijuana in two sections of National Forest, and who has over $6000 in currency on his kitchen table, has something to protect.)

United States v. Payne, 81 F.3d 759 (8th Cir. 1996). (Burden lies on government to prove by preponderance of evidence both that weapon was present and it is at least probable weapon was connected with offense. Payne argues government failed to prove he possessed firearm: he claims there was no proof he owned or even knew about semi-automatic rifle, his fingerprints were not found on rifle, and apartment where weapon was found was leased in another s name. District Court did not err in finding Payne had possession over firearm in downstairs bedroom where at time officers entered apartment, Payne was alone in it and was observed coming out of downstairs bedroom in which rifle was found in visible location; although apartment was leased under another s name and there were two bedrooms, authorities had been told Payne lived there and agents had seen Payne enter it; Payne s pictures, personal papers, and clothing were all found in downstairs bedroom.

Payne contends there was no connection between rifle and his charged offense: no spacial nexus because no drugs were found in apartment and no temporal nexus because government did not show he had recently committed any drug-related activity there. As Payne pleaded guilty to conspiracy to distribute and possess with intent to distribute cocaine, government had to prove by preponderance weapon was found in same location where drugs or drug paraphernalia were stored or where part of conspiracy took place. Government did present evidence apartment was location related to drug distribution conspiracy in which Payne was involved: authorities observed co-conspirators drive in direction of apartment after they picked up what was packaged like original cocaine; authorities had previously observed Payne and other members of conspiracy enter and leave apartment on different occasions; and found Payne there with loaded semi-automatic rifle in his possession within hour of co-conspirator s delivery (sufficient to establish temporal nexus between rifle and conspiracy). Government also established sufficient spacial nexus: evidence corroborated co-conspirator statement he and Payne used apartment to store and package drugs for distribution and to count proceeds. While Payne contends "unless clearly improbable" standard of proof violates Due Process Clause of Fifth Amendment, he did not raise claim in District Court and failed properly to preserve issue. Claim would not succeed in any event as language does not shift burden of proof to defendant and preponderance standard is already required in this circuit. Here, evidence was

sufficient to satisfy preponderance burden and imposition of enhancement (e.g., two government agents testified at sentencing hearing rifle was found in apartment used by co-conspirators to store cocaine and drug proceeds; one co-conspirator told authorities he and Payne used apartment for this purpose, and Payne stipulated he was member of conspiracy to possess and distribute cocaine; money counter and quantity of money were found at apartment where Payne was seen close to rifle near time when attempted drug delivery was en route.).)

United States v. Early, 77 F.3d 242 (8th Cir. 1996). (District Court did not clearly err in applying enhancement where Early concedes he showed firearm to confidential government informant during course of drug sale and informant testified he had seen Early with firearms at other drug sales. Although Early claims he showed informant firearm because he was trying to sell it as part of separate transaction, presence of firearm increased risk of violence associated with drug transactions.)

United States v. Kinshaw, 71 F.3d 268 (8th Cir. 1995). (This guideline requires government to prove by preponderance of evidence dangerous weapon was present during underlying crime and it was not clearly improbable weapon was connected with offense. Kinshaw conceded loaded 9-millimeter Ruger pistol was discovered in his bedroom, but claims he was merely adjusting gun s sight for its owner. District Court found police officers seized Ruger from Kinshaw s room and Kinshaw was still dealing drugs at that time. Another s ownership of gun is not controlling if defendant is found to have control over it and premises; Kinshaw need not have used gun during crime or have even touched it. District Court s findings on this issue are not clearly erroneous; two-level enhancement affirmed.)

United States v. Darden, 70 F.3d 1507 (8th Cir. 1995). (Darden argues enhancement was improper because he was not present at drug trafficking for which he was held accountable and thus, his weapons could not have been present either. Darden is held accountable for at least 213 kilograms of cocaine because he participated in drug-related activities of organization in variety of ways such that total amount was foreseeable to him. Enhancement is proper because evidence supports District Court s finding he participated in those activities while possessing guns (e.g., testimony he regularly carried pistol while selling drugs for enterprise, police officer testimony on one occasion he found loaded gun and numerous drugs underneath seat of car Darden was driving, testimony Darden shot someone who had expressed suspicion of someone informing on drug trafficking business. Attempted murder Darden committed in furtherance of organization of drug trafficking activity is precisely kind of act enhancement was designed to deter. No clear error.), cert. denied, 517 U.S. 1149 (1996).

United States v. Britton, 68 F.3d 262 (8th Cir. 1995). (Britton argues District Court erroneously applied enhancement because government failed to prove required nexus between cocaine sale and pistol, noting pistol was seized 8 months after sale. Although length of time between seizure of firearm and charged offense may be relevant in determining whether there is nexus between firearm and offense, it is not controlling. In circumstances of Britton s case, 8-month lapse between seizure of pistol and cocaine sale does not make nexus between weapon and sale clearly improbable: Britton was not arrested after sale because narcotics investigation

continued. More importantly, government introduced evidence establishing nexus between pistol and cocaine sale (e.g., pistol was found along with drugs in Britton s office, site of cocaine sale; following his arrest, Britton admitted he was drug dealer and had used pistol during all transactions because he frequently carried large amount of money). Britton s occupation as firearm dealer did not have impact as statement related to Britton s drug dealing.), cert. denied, 517 U.S. 1105 (1996).

United States v. Jackson, 67 F.3d 1359 (8th Cir. 1995). (This Court concludes record supports District Court s finding it was not clearly improbable weapons found were related to drug trafficking conspiracy where testimony indicated Jackson had supplied firearms to two co-defendants and Jackson made arrangements for people on roof with high-powered rifles as lookouts and they were in position to protect themselves with multitude of firearms.), cert. denied, 517 U.S. 1192 (1996).

United States v. Baker, 64 F.3d 439 (8th Cir. 1995). (It was not clear error for District Court to conclude it was not clearly improbable weapon was connected to offense where Baker admitted he was involved in ongoing conspiracy to transport cocaine; in furtherance of conspiracy, he was leading two vehicle-convoy to transport cocaine; eight kilograms of cocaine were found in second vehicle; and weapon was found in Baker s truck, readily accessible and loaded.)

United States v. Hiveley, 61 F.3d 1358 (8th Cir. 1995). (Hiveley challenges two level increase, contending government failed to show it was not clearly improbable weapons seized from his residence had nexus with criminal activity of conspiracy. While no weapons were seized from trailer where 1100 pounds of marijuana were found and Hiveley s wife testified two guns belonged to her, evidence overall supported District Court s two level enhancement where search of master bedroom revealed marijuana, cocaine, cash, drug scale, and six guns. Moreover, constructive possession will suffice to justify upward adjustment.)

United States v. Alexander, 53 F.3d 888 (8th Cir. 1995). (Alexander contended Court erred in finding adequate connection between guns found at Alexander s house and drug conspiracy. Police found two shotguns in Alexander s bedroom, one on each side of bed. There were shells for guns in room and false bottom "stash can" containing methamphetamine and eight $100 bills. While Alexander argued guns could have been used for hunting or could have belonged to his girlfriend who also lived in house, given proximity of guns to drugs, location of guns where they could be reached, and transaction of drug business at house, District Court could find it not clearly improbable guns were connected with Alexander s drug business.)

United States v. Shields, 44 F.3d 673 (8th Cir. 1995). (Shields pleaded guilty to conspiracy to distribute and possession with intent to distribute 500 grams or more of cocaine. Parties stipulated three firearms were seized from Shields s residence pursuant to search warrant some 37 days after last known drug transaction. Stipulation also stated arms were intended for Shields s protection of his person and property in connection with running his shop. Nevertheless, PSR recommended two-level enhancement for possession of dangerous weapons during offense; both Shields and U.S. Attorney objected to enhancement. District Court included enhancement in calculating sentence. On appeal, Shields argued because no evidence was presented to support

enhancement, sentence was clearly erroneous; this Court agreed. Because government presented no evidence regarding presence of weapons and their nexus to drug crimes--and as matter of fact, conceded there was no such evidence--District Court s enhancement based on § 2D1.1(b)(1) was clearly erroneous. Reversed and remanded with directions.)

United States v. Halls, 40 F.3d 275 (8th Cir. 1994). (Halls challenged application of enhancement for presence of firearm, asserting increase was inappropriate because weapon should have been suppressed. Where suppression issue was resolved based on "inevitable discovery exception to exclusionary rule," Guidelines issue is also resolved and increase was therefore appropriate.), cert. denied, 514 U.S. 1076 (1995).

United States v. Vue, 38 F.3d 973 (8th Cir. 1994). (Challenge to enhancement based on argument that placement of gun at bottom of duffle bag in car did not provide close enough connection to drugs found in apartment building where Vues were arrested, to warrant enhancement. At original trial, Vues were convicted of using or carrying firearm during and in relation to federal drug trafficking crime. While Vue convictions were reversed on other grounds, evidence was sufficient to sustain convictions on that count; thus, it was not clearly erroneous for District Court to apply enhancement.)

United States v. Richmond, 37 F.3d 418 (8th Cir. 1994). (Richmond argued District Court clearly erred in imposing enhancement because government failed to establish "temporal and spatial connection" between cocaine and gun. This Court decides government provided sufficient evidence to establish Hooten connection and to establish it was not clearly improbable weapon had nexus with criminal activity. Temporal connection: Richmond was in possession of gun and cocaine at same time; gun and cocaine were found essentially simultaneously in Richmond s apartment; Richmond displayed pistol in order to protect his property at time during which he was in possession of cocaine; weapon was stored in easily and rapidly accessible location, loaded and ready for immediate use. Spatial connection: cocaine and gun were found in same one-bedroom apartment--in two rooms which were not spatially distant from one another (i.e., neither gun nor cocaine was found in spatially isolated section of apartment). In light of evidence and Richmond s demonstrated willingness to use gun to protect his non-drug-related property, District Court s findings were not clearly erroneous.), cert. denied, 513 U.S. 1178 (1995).

United States v. McMurray, 34 F.3d 1405 (8th Cir. 1994). (T. Lomax argued District Court erred in enhancing his sentence two levels. When he was arrested at Omaha airport, search of his luggage revealed .25 caliber gun and digital scale containing cocaine residue. Lomax argued government failed to prove connection between gun and conspiracy. In light of undisputed evidence gun was found near drug paraphernalia, this Court concludes District Court did not clearly err in finding government met its burden of establishing relationship between gun and conspiracy.), cert. denied, 513 U.S. 1179 (1995).

United States v. Wright, 29 F.3d 372 (8th Cir. 1994). (Wright argued enhancement was unwarranted because some of guns were part of collection and others were used for hunting. Argument is without merit as it is not improbable that weapon was connected with offense as

handguns and ammunition were found in defendants bedroom and marijuana was found in case with shotgun.

McNabb argued enhancement was unwarranted because she was not living at Wright s home at time of arrest. Argument is without merit where at minimum, she had constructive possession of weapons.)

United States v. Roach, 28 F.3d 729 (8th Cir. 1994). (Roach argued two-point enhancement was improper because District Court acquitted him of knowingly carrying destructive device, C-4 plastic explosive (it was missing mechanism required for detonation). Acquittal on weapons charge does not preclude sentencing enhancement for acquitted conduct. It was not clear error for District Court to determine C-4 appeared to be destructive or dangerous weapon, and thus, it was to be treated as dangerous weapon for enhancement purposes.)

United States v. AWP, 26 F.3d 863 (8th Cir. 1994). (District Court s decision to apply enhancement was not clearly erroneous where carried loaded firearm while he harvested marijuana, then returned to field unarmed shortly before his arrest. Although he claimed he had carried gun earlier only to disguise himself as squirrel hunter, this Court agreed he posed risk of danger when armed to anyone who might have approached him on marijuana patch.)

United States v. Maxwell, 25 F.3d 1389 (8th Cir.) (District Court did not clearly err in finding it was not improbable firearm was connected with drug conspiracy: when officers executed search warrant at Davis s residence, they found .25 caliber semi-automatic pistol at back of cabinet. On top of cabinet, they found Davis s social security card, birth certificate, and Nebraska identification card. Although pistol was not loaded, officers found it near portable police scanner and two pagers. Moreover, officers intercepted telephone conversation in which Davis informed his cocaine supplier he had purchased pistol.

Maxwell admitted weapons found when officers searched his apartment were his, rather, he argued District Court erred in enhancement because government failed to prove sufficient nexus between drug offense of conviction and his possession of weapons. This Court concluded District Court committed no error in finding it was not clearly improbable that weapons were connected with drug offense: revolver was found at headboard of Maxwell s bed next to $5,000 in currency. Maxwell claimed shotgun was for hunting, but he admitted he had never been hunting. Maxwell sometimes stored cocaine at his apartment and it had been site of drug transactions. Majied argued mere presence of firearm is not sufficient to apply enhancement. District Court did not clearly err in enhancing Majied s sentence: government met its burden of establishing it was not clearly improbable that firearm was connected to drug offense. Witness saw Majied with pistol in housing project where co-conspirators sold cocaine base which Majied had supplied to them.), cert. denied, 513 U.S. 1031 (1994).

United States v. Cotton, 22 F.3d 182 (8th Cir. 1994). (Cotton claimed District Court error in increasing her base offense two levels, arguing gun was found in her daughter s bedroom and belonged to her daughter who carried it for protection; no evidence of nexus between weapon and Cotton s criminal activity; this type of gun, antique two-shot Derringer, not commonly used as tool of trade. Government met its burden of proving weapon was present and that it was not clearly

improbable weapon had nexus to criminal activity. Loaded gun was seized from same room in which bag of crack, cellular telephone, and $275 cash were found. Cotton admitted to storing money in her daughter s room. Enhancement was not clearly erroneous.)

United States v. Lucht, 18 F.3d 541 (8th Cir.) (District Court did not clearly err in finding sufficient nexus between drugs and firearms to support two-level enhancements where loaded handgun was located near drugs and triple-beam balance scale; loaded revolver was located across room from drug; eight handguns were seized from house along with drug residue and paraphernalia, ammunition, scale, and $6000 cash; and revolver was located next to defendant s bed and fully loaded semi-automatic was found under his bed.

Government bears burden of establishing by preponderance of evidence weapon was present and it was not clearly improbable weapon had nexus with criminal activity. This Court holds any misallocation of burden of proof in this case was harmless error given overwhelming evidence supporting enhancement.), cert. denied, 513 U.S. 949 (1994).

United States v. Hayes, 15 F.3d 125 (8th Cir.) (Hayes argued District Court erred because he did not possess firearms throughout commission of offense and government failed to prove firearms had nexus with drug offense. District Court did not err when it found Hayes had constructive possession of firearms in self-storage locker where Hayes had ready access to locker--evidenced by his possession of access card and key to facility, Hayes visited facility, and locker held evidence connecting it to Hayes. According to testimony of experienced postal inspector, weapons were of type associated with drug distribution and they were recovered in locker with drug paraphernalia indicating location was utilized to prepare drugs for distribution. District Court had ample facts to find it was probable weapons were connected with offense.), cert. denied, 512 U.S. 1225 (1994).

United States v. Patterson, 11 F.3d 824 (8th Cir. 1993). (Pesek argued District Court erred in applying weapon enhancement because government failed to prove he used weapons found in his home to further drug trafficking. District Court did not clearly err in applying enhancement as authorities found marijuana and drug paraphernalia along with weapons in Pesek s home. Even assuming that weapons were not present during other cocaine distribution offense to which Pesek pleaded guilty, they were present when he was arrested following Los Angeles transaction.)

United States v. Williams, 10 F.3d 590 (8th Cir. 1993). (Semi-automatic firearm was found in second floor bedroom, behind television console, in briefcase which contained approximately $2500 in currency. Because officers found Williams, cocaine and other drug paraphernalia in kitchen on first floor, Williams argued there was no nexus between firearm and offense conduct of possession of cocaine with intent to distribute. Upon examination of temporal and geographical proximity between firearm and cocaine, this Court holds District Court s enhancement was not clearly erroneous. Williams had constructive possession of firearm; distance between Williams and firearm was minimal; firearm was loaded and found in close proximity to cocaine, currency and drug paraphernalia. This Court holds District Court s finding that sufficient nexus existed between cocaine and firearm to support 2 point enhancement was not clearly erroneous.)

United States v. Matthews, 5 F.3d 1161 (8th Cir. 1993). (Matthews contended District Court error in enhancing by two levels where agents seized firearm during search conducted more than year after crack distribution offense to which Matthews pleaded guilty. This Court vacates enhancement and directs District Court to determine, based upon existing record, whether government established required nexus between Matthews s firearm possession and offenses of conviction.)

United States v. Hammer, 3 F.3d 266 (8th Cir. 1993). (District Court s finding of possession of dangerous weapon during commission of offense was supported by evidence where two guns were found where Hendrickson lived; at least one of guns was in bedroom used by her, on dresser, and she admitted she knew of that gun. Inside gun s carrying case was several hundred dollars worth of what Hendrickson acknowledged to be drug money. Drug packages were received at house, and methamphetamine was cut, packaged, and distributed from house. Undisputed facts showed at least constructive possession--more than mere presence of gun was shown.)

United States v. Wiley, 997 F.2d 378 (8th Cir.) (Holub did not contend that he did not possess firearm, but rather that government did not prove firearm was connected to offense. While this Court acknowledged that Holub s gun remained in bedroom while marijuana transaction took place in living room and Holub did not directly threaten government informant with gun to consummate sale, District Court s finding that it was not clearly improbable that weapon was connected with offense, was not clearly erroneous.), cert. denied, 510 U.S. 1011 (1993).

United States v. Garrido, 995 F.2d 808 (8th Cir.) (District Court s findings weapon was used to further conspiracy and possession was reasonably foreseeable to Ismael, were not clearly erroneous where Ismael admitted he lived in Carlos s house and helped him package marijuana; rifle was found in same closet--in Carlos s house--with plastic bags containing marijuana residue and packaging materials.), cert. denied, 510 U.S. 926 (1993).

United States v. Meyers, 990 F.2d 1083 (8th Cir. 1993). (Jury acquittal on 18 U.S.C. § 924(c)(1) firearms charge does not prohibit enhancement under Guidelines. District Court did not clearly err in imposing enhancement based on finding of presence of TEC-9 in Meyers bedroom and connection between weapon and drug offense was not "clearly improbable.")

United States v. Bruce, 984 F.2d 928 (8th Cir.) (Two-level enhancement appropriate where loaded revolver was found under Bruce s bed and it was not clearly improbable gun was connected with marijuana offense. Moreover, fact gun was not found until after one of conspiracies was over does not mean gun had not been used during course of conspiracy to protect drugs and drug proceeds.), cert. denied, 510 U.S. 901 (1993).

United States v. Rowley, 975 F.2d 1357 (8th Cir. 1992). (District Court s finding by preponderance of evidence that it was not clearly improbable weapons were connected to offense not clearly erroneous. Although Rowley had many hunting weapons, proximity of automatic weapons, albeit unloaded, quickly accessible, in bedroom where he kept marijuana, exacerbated

danger of drug-related violence.)

United States v. Bost, 968 F.2d 729 (8th Cir. 1992). (Bost challenged enhancement which was based on weapons seized at his residence and at mini-mart nearly two and one-half months after any overt acts of conspiracy occurred; no one ever saw Bost or his colleagues possess weapon nor was there discussion about weapons during any of Bost s drug transactions; there was no evidence drug transactions occurred in Bost s home where three of weapons were found. This Court reverses enhancement and remands with instructions where government did not meet its burden as it offered no evidence to prove tie between weapons and Bost s offense; thus, Court was left with firm conclusion District Court erred in finding connection.)

United States v. England, 966 F.2d 403 (8th Cir.) (This Court rejects defendants claim that their acquittal for carrying weapon in connection with drug-trafficking crime prevents two-point enhancement for same conduct. District Court did not clearly err in finding it not "clearly improbable" defendants weapons were connected to their drug trade where each had large cache of weapons in his home; testimony indicated some used firearms for protection of their drug business during course of conspiracy; one had weapon and ammunition in his car while on his way to pick up drugs, at time of his arrest; during searches of two of defendants homes, police found weapons near drug paraphernalia.), cert. denied, 506 U.S. 1025 (1992).

United States v. Granados, 962 F.2d 767 (8th Cir. 1992). (On basis of record as whole, District Court reasonably concluded that at point in conspiracy Granados had threatened Magill with nine-millimeter gun in attempt to collect drug debt. Regardless, Granados himself admitted to owning nine-millimeter semi-automatic handgun and collecting guns during conspiracy. Two point enhancement proper as gun was in Granados s presence and control at point during conspiracy.)

United States v. Pou, 953 F.2d 363 (8th Cir.) (Fact that firearms were seen in J. Pou s apartment on more than one occasion, same apartment from which cocaine was distributed, demonstrated connection between weapons and Pou s drug offenses more than adequate for this Court to hold that District Court did not err in enhancement.), cert. denied, 504 U.S. 926 (1992).

United States v. Haren, 952 F.2d 190 (8th Cir. 1991). (District Court s finding that guns were involved with his offenses was not clearly erroneous where R. Haren manufactured amphetamine, led conspiracy to distribute amphetamine, and kept several guns at home base of his drug operation. District Court was not clearly erroneous in finding V. Haren possessed firearms as she did exercise dominion, along with her husband, over mobile home where guns were found. Moreover, mobile home was adjacent to sheds that served as amphetamine labs; there was evidence that drug transaction took place in mobile home and V. Haren counted drug proceeds there. V. Haren retrieved guns from sheriff s office and testified at sentencing hearing she believed one was handgun. This Court did not find District Court error in connecting guns with V. Haren s offense.)

United States v. Marshall, 940 F.2d 382 (8th Cir. 1991). (Marshall challenged firearm enhancement, claiming firearms were not connected to offense; guns were used for hunting and they were not readily accessible because they were in upstairs bedroom. This Court finds District Court

was not clearly erroneous in enhancing where weapons were loaded and found near drug paraphernalia.)

United States v. Eberspacher, 936 F.2d 387 (8th Cir. 1991). (An acquittal under § 924(c) does not prevent firearm-possession enhancement. Government s burden on weapons charge is to prove guilt beyond reasonable doubt; Guidelines enhancement should be applied if weapon was present unless it is clearly improbable weapon was connected with offense. District Court recognized distinction and explicitly relied on it in imposing enhancement. Moreover, as trier of fact, District Court was in unique position to evaluate government s proof on issue.)

United States v. Duke, 935 F.2d 161 (8th Cir. 1991). (District Court was not clearly erroneous in finding Duke had possessed firearm during drug trafficking crime where among other information, PSR revealed search of Duke s home uncovered 23 grams of cocaine-like substance, two scales, and .22 caliber revolver.)

United States v. Burks, 934 F.2d 148 (8th Cir. 1991). (Government contended that subsequent to Burks s arrest, search of his home revealed semi-automatic machine pistol with three loaded clips under his bed and in taped conversation, Burks stated he would not hesitate to use weapon during drug transaction; Burks contended conversations regarding drug purchases occurred outside his residence and at time of his arrest, he was headed away from home. This Court affirmed two level enhancement; finding not clearly erroneous.)

United States v. Nash, 929 F.2d 356 (8th Cir. 1991). (This Court finds two point firearm enhancement was correctly applied where there was evidence defendant admitted both purpose of trip to California was to arrange purchase of 4 kilograms of cocaine and that his supply of cocaine came from California; loaded semi-automatic was found in luggage of defendant s girlfriend who had traveled to California with him; gun belonged to defendant; guns are "tools of trade" for drug dealers.)

United States v. Turpin, 920 F.2d 1377 (8th Cir. 1990). (Fact that gun was accessible to Turpin in car from which evidence indicated drug sales had been transacted supports conclusion gun was connected to conspiracy.), cert. denied, 499 U.S. 953 (1991).

United States v. Englebrecht, 917 F.2d 376 (8th Cir. 1990). (Where District Court s finding that Englebrecht used firearm in course of conspiracy to grow and distribute marijuana, did not directly affect his sentence, this Court need not address issue.), cert. denied, 499 U.S. 912 (1991).

United States v. Jackson, 914 F.2d 1050 (8th Cir. 1990). (District Court finding and two level increase in base offense level was not clearly erroneous where pistol was found in common area of Jackson s apartment, partially exposed, and Jackson did not object to being sentenced on basis of bags of cocaine found under couch alongside gun.)

United States v. Streeter, 907 F.2d 781 (8th Cir. 1990). (Though guns were on ground floor and marijuana was in attic and guns were unloaded and either hidden or encased, connection of guns

to offense was not "clearly improbable.")

United States v. Baker, 907 F.2d 53 (8th Cir. 1990). (Upward adjustment for possession of firearm justified where loaded revolver in metal box was found underneath bed, on top of which were bags of cocaine, scales, packing materials and cash.)

United States v. Weaver, 906 F.2d 359 (8th Cir. 1990). (Where weapon was found along with various drug-related items in bedroom reported to be Weaver s, government was not obligated to prove ownership.)

United States v. Khang, 904 F.2d 1219 (8th Cir. 1990). (At time of Khang s arrest, firearm was found in his home near stash of opium. Khang pleaded guilty to importation of opium and government conceded firearm was not related to importation charge. Nevertheless, District Court enhanced Khang s sentence two levels. This Court reverses and remands. Mere presence of firearm is insufficient to mandate application of enhancement. Because Guideline presents aggravating circumstance, Courts strictly construe penal statutes, and Commission developed specific offense characteristics, government must establish relationship between defendant s possession of firearm and offense he committed. (DISSENT: Analogously to acceptance of responsibility, ultimate responsibility for determining whether firearm was possessed during commission of crime should rest with District Court.)

United States v. Wayne, 903 F.2d 1188 (8th Cir. 1990). (District Court s finding that Wayne possessed firearm during commission of offense not clearly erroneous where there was substantial evidence he conducted his narcotics activities from his home and search of home revealed number of guns; it was not clearly improbable weapon was connected with offense.)

United States v. Figueroa, 900 F.2d 1211 (8th Cir.) (District Court s conclusion that both defendants possessed guns during offense is finding of fact which is reviewed under clearly erroneous standard. Record supported Court s conclusion where undercover agent heard one defendant clicking safety of gun in his pocket during transaction and, when police stopped car, they found pistol under other defendant s seat.), cert. denied, 496 U.S. 942 (1990).

United States v. North, 900 F.2d 131 (8th Cir. 1990). (District Court erroneously concluded that it was not clearly improbable that weapons found in defendant s home at time of his arrest were connected with offense. Cap and ball pistol was model of late 19th century Colt revolver, which record shows had not been fired in over year and no firing caps were found in police search of home. .410 shotgun and inoperable .22 caliber rifle were found in defendant s son s room. Son testified these weapons were his, were used for hunting purposes, and that defendant had not used them in five years.)

United States v. Murphy, 899 F.2d 714 (8th Cir. 1990). (Testimony of witnesses who had seen defendant with firearm and who knew that he was armed methamphetamine dealer supported District Court s finding that it was not clearly improbable weapon was connected with conspiracy to which he pleaded guilty.)

United States v. Luster, 896 F.2d 1122 (8th Cir. 1990). (District Court s finding that defendant possessed firearm for purposes of § 2D1.1(b)(1) not clearly erroneous. Mere presence of weapon during charged offense sufficient unless clearly improbable that weapon was connected with offense.)

United States v. Green, 889 F.2d 187 (8th Cir. 1989). (Green s undenied possession of firearm and ammunition in separate room from where she conducted drug transactions and additional hazard presence of firearm created in her drug operation made connection of gun to offense not clearly improbable. Thus, District Court s upward adjustment was not clearly erroneous.)

United States v. Holland, 884 F.2d 354 (8th Cir.) (Upward adjustment for possession of weapon proper where weapon kept in briefcase containing drugs.), cert. denied, 493 U.S. 997 (1989).

United States v. Koonce, 884 F.2d 349, 354 (8th Cir. 1989). (Adjustment for weapons proper where several weapons found in defendant s residence even though charged drug transaction was mailing drugs.)

**§ 2D1.1(b)(2) (Use of Aircraft):**

United States v. Ray, 250 F.3d 596 (8th Cir. 2001) (WOLLMAN, MURPHY,* CARMAN). (District Court properly applied enhancement for using chartered airplane to transport marijuana. Although Ray argued he had no role in arranging transportation and did not personally transport drugs, jury found he conspired with and aided and abetted coconspirator in transporting marijuana, and there was evidence Ray knew when he boarded that plane was being used to transport marijuana.), cert. denied, 535 U.S. 980 (2002).

**§ 2D1.1(b)(5)(A) (Environmental Harm):**

United States v. Kroeger, 229 F.3d 700 (8th Cir. 2000) (BOWMAN, MAGILL, HANSEN*). (Defendant convicted of endangering human life while manufacturing and attempting to manufacture drugs, in violation of 21 U.S.C. §§ 841(a)(1) and 858, whose offense level is established under § 2D1.10(a)(1), may not also have offense level enhanced for environmental harm under § 2D1.1(b)(5).)

**§ 2D1.1(b)(5)(B) (Substantial Risk of Harm to Human Life):**

United States v. Underwood, Nos. 03-1543/1982/2716/2901 (8th Cir. 2004) (MURPHY,* HEANEY, SMITH). (District Court did not err by declining to apply enhancement. Factors to be considered include quantity of chemicals found, their method of storage, and their disposal; duration and extent of manufacturing operation; and location of laboratory. Evidence showed that methamphetamine lab was in co-defendant's house but did not show how often defendant was there or how much she knew about conditions in house. Some evidence also showed that most dangerous

phase of production (mixing anhydrous ammonia with lithium strips) was done by co-defendant away from house.)

**§ 2D1.1(c) (Drug Quantity Table):**

United States v. Ortega, 150 F.3d 937 (8th Cir. 1998). (Case involves methamphetamine offense as to which applicable Guidelines treated d-methamphetamine more harshly than l-methamphetamine; government had burden to prove methamphetamine was more likely than not d-methamphetamine. Expert witness testified that each of government's drug exhibits contained d-methamphetamine and some samples also contained l-methamphetamine. Even if independent laboratory analysis seized would have demonstrated greater percentage of l-methamphetamine than d-methamphetamine, this demonstration would have no effect on defendant's sentence: more serious controlled substance found in mixture, regardless of its percentage to whole, determines category of entire quantity for sentencing purposes.), cert. denied, 525 U.S. 1087 (1999).

United States v. Holmes, 13 F.3d 1217 (8th Cir. 1994). (While trial Court properly included weight of blotter paper in determining total weight of LSD seized, after Court sentenced Holmes, § 2D1.1(c) changed to provide that District Court should treat each dose of LSD as weighing 0.4 milligrams. Thus, Holmes s 213 doses would result in total weight of .852 grams, lower weight making him eligible for shorter sentence. This Court remands in order to allow District Court to consider, in exercise of its discretion, whether it should apply Amendment 488 retroactively to reduce Holmes s sentence.)

United States v. Angell, 11 F.3d 806 (8th Cir. 1993). (Government cross-appealed from sentences imposed upon both defendants, contending District Court erred in applying 1 plant/1 pound equation to marijuana plants seized at drug-growing cite rather than 1 plant/1 kilogram equation established by § 2D1.1(c). District Court had acknowledged Guidelines equivalencies but chose to rely on trial testimony from government witness. This Court concluded District Court erred in not applying weight equivalency provision of § 2D1.1(c). This Court reviews its holdings that section does not violate equal protection or due process guarantees and that ratio is not irrational. It recalls Johnston to effect that in light of validity of weight ratio provision, expert testimony about plants yield of marketable marijuana would be irrelevant. This Court holds District Court should have applied § 2D1.1(c) weight equivalency ratio and should have sentenced Angells on basis of base offense levels resulting from application of that provision of Guidelines. Sentences are vacated and cases remanded for resentencing.), cert. denied, 512 U.S. 1239 (1994).

United States v. Coohey, 11 F.3d 97 (8th Cir. 1993). (District Court included weight of both LSD and carrier medium, blotter paper, and determined Coohey s 5950 doses, based on 6.5 milligrams per dose, weighed 38.675 grams. Coohey contended Court should have excluded weight of carrier medium and used approximate weight of 0.05 milligrams of pure LSD per dose. After Coohey was sentenced, Sentencing Commission amended section, provided weight of LSD for sentencing purposes is to be determined by treating each dose as weighing 0.4 milligrams. Thus, weight of LSD for which Coohey is responsible would be 2.38 grams. This Court remands case in order to allow District Court to consider whether, in exercise of its discretion, Amendment 488

should be applied retroactively to reduce Coohey s sentences.)

United States v. Young, 992 F.2d 207 (8th Cir. 1993). (District Court properly included entire weight of Dilaudid tablets, rather than weight of hydromorphone only. Unless otherwise specified, weight of controlled substance in table refers to entire weight of any mixture containing detectable amount of controlled substance. Commentary suggests phrase "one gram of hydromorphone" actually means "one gram of substance containing hydromorphone." This Court joins other Courts in concluding it was appropriate for Sentencing Commission to adopt same method for computing weights of pharmaceuticals as Congress adopted for "street" drugs. DISSENT: More logical rule to apply in 21 U.S.C. § 841(b)(1)(C) pharmaceutical drug cases is "pure weight" test. In "street weight" cases, defendant should be held responsible because he can control weight, dose, and purity of proscribed drug; in pharmaceutical drug cases, pharmaceutical manufacturer controls weight/proportion of inert material.)

**§ 2D1.1(d)(1) (Murder Cross-Reference):**

United States v. Graham, 323 F.3d 603 (8th Cir.) (WOLLMAN,* MURPHY, AUTREY). (Defendant's methamphetamine laboratory exploded, killing one person and injuring another. He was convicted of four drug-related offenses, but not murder. District Court properly set his offense level using murder Guideline, § 2A1.1, under this cross-reference because "malice" element of 18 U.S.C. § 1111(a) was satisfied. Defendant was experienced methamphetamine manufacturer who, one could reasonably infer, was well aware of serious risk of death or serious bodily harm involved in manufacturing process.), cert. denied, 124 S. Ct. 235 (2003).

**§ 2D1.2 (Drug Offenses Near Protected Location or Involving Underage or Pregnant Individuals):**

United States v . Euans, 285 F.3d 656 (8th Cir. 2002) (HANSEN, McMILLIAN,* BEAM). (Because government proved beyond reasonable doubt defendant conspired to distribute drugs within limits of protected locations, District Court properly applied enhancement. DISSENT: Under statutory scheme, enhancement should apply only to distribution offenses, not to conspiracies. Defendant was charged with violating 21 U.S.C. § 846 because she could not have been charged under 21 U.S.C. § 860, and § 860 violation cannot be object of § 846 conspiracy.)

United States v. Oppedahl, 998 F.2d 584 (8th Cir. 1993). (Where admitted object of conspiracy was distribution of LSD within 1000 feet of school, protected location violation is relevant conduct under § 1B1.3 and two point enhancement is appropriate. Thus, Court need not address whether 21 U.S.C. § 860 would apply directly to conspiracy charge.)

**§ 2D1.4 [deleted in 1992 by consolidation with Guidelines for substantive offenses (Attempts and Conspiracies) (Standard of Review)]:**

United States v. McCormick, 29 F.3d 352 (8th Cir. 1994). (Government must prove quantity of drugs involved in offense by preponderance of evidence. Case does not implicate heightened standard of proof if it does not involve any uncharged relevant conduct and District Court merely made quantity determination under § 2D1.4(a). This Court reviews District Court s quantity determination under clearly erroneous standard.)

United States v. Murphy, 899 F.2d 714 (8th Cir. 1990). (Due process does not require particular standard of proof for factual determinations at sentencing. Preponderance of evidence may be used to prove facts and District Court s application of clear and convincing standard is more favorable to defendant than what is required.)

United States v. Ehret, 885 F.2d 441, 445 (8th Cir. 1989). (No error to use clear and convincing standard of proof in determining quantity of drugs involved in crime.), cert. denied, 493 U.S. 1062 (1990).

**§ 2D1.4 [deleted in 1992 by consolidation with Guidelines for substantive offenses (Attempts and Conspiracies)]:**

United States v. McCormick, 29 F.3d 352 (8th Cir. 1994). (McCormick argued there was no evidence that precursors missing from company s inventory were ever manufactured into [38.9 kilograms of] methamphetamine and he should be accountable only for amount seized, 21 kilograms. McCormick, however, was convicted of conspiracy to manufacture methamphetamine and amount of methamphetamine seized does not reflect scale of offense. Record indicates McCormick had access not only to precursor chemicals missing from company but also to 110 gallons of P2P, from which 180.5 kilograms of methamphetamine could be manufactured, with some to spare. Given this evidence, District Court chose conservative estimate of quantity that McCormick was capable of manufacturing with his accomplice; quantity determination was not clearly erroneous.)

United States v. Garrido, 995 F.2d 808 (8th Cir.) (Application Note 1 is appropriate to apply only when weight under negotiation is being used to determine base offense level, in which case government must demonstrate defendant actually agreed to or negotiated for sale of contested amount. Comment. (n.2) should be applied when District Court finds greater amount of drugs available for sale than was seized.

When calculating that object of conspiracy involved 150 pounds, District Court included totals from two seizures and 75.35 additional pounds of marijuana not seized. Though PSR referred to confidential informant telling agent 150 pounds was available, informant did not testify at trial and government introduced no evidence to support PSR statement. It was insufficient to have found object of conspiracy was sale of 150 pounds based on detective s testimony of that was amount he wanted to buy. Moreover, only reliable evidence produced linking two quantities of marijuana seized was similar packaging, which was insufficient to establish linkage for determining object of conspiracy. Remand for resentencing.), cert. denied, 510 U.S. 926 (1993).

United States v. Funk, 985 F.2d 391 (8th Cir. 1993). (This Court rejects defendants argument District Court erred in using most abundant precursor chemical, phenylacetic acid, to

determine their base offense levels. In this case, amount of methamphetamine seized was for less than capability of defendants laboratory using precursor chemicals on hand; therefore section 2D1.4 required Court to estimate larger quantity for sentencing purposes. Estimation requires fact intensive inquiry which should not be constricted by inflexible rule; limiting estimating discretion to least abundant precursor would be contrary to mandate of section 2D1.4.

District Court s finding defendants would have produced 250 grams of methamphetamine from 1550 grams of phenylacetic acid on hand was not clearly erroneous where Funk had prior experience as "cook"; lab was fully equipped except for readily available household products; and while shooting of co-conspirator may have ended criminal enterprise, elaborate set-up/large amount of phenylacetic acid justified calculation.)

United States v. England, 966 F.2d 403 (8th Cir.) (This Court s review of trial transcript indicated District Court did not clearly err in attributing [estimated] sixty-five pounds of methamphetamine to defendants, in addition to four pounds actually seized by government, where District Court based its estimation of drug quantity involved in conspiracy on trial testimony of government s main witness--a credibility determination. CONCURRENCE**:** "Draconian" forty-year sentences are result of Sentencing Commission setting scales of punishment for drug crimes based on weight of drugs, not criminality of offender.), cert. denied, 506 U.S. 1025 (1992).

United States v. Davila, 964 F.2d 778 (8th Cir.) (A preponderance of evidence supports District Court s quantity calculation (1000 pounds of marijuana distributed during conspiracy) where Davila testified at sentencing hearing that during this period, he brokered 800 to 1000 pounds of marijuana.), cert. denied, 506 U.S. 964 (1992).

United States v. Granados, 962 F.2d 767 (8th Cir. 1992). (Where Granados admitted he and Mora signed agreement to distribute drugs, only question regarding amount of cocaine for which Granados was held accountable is whether Mora s other sales were either known or reasonably foreseeable by Granados (§ 1B1.3(a)(1)). District Court s sentencing Granados on basis of more than 5, less than 15 kilograms of cocaine not clearly erroneous where Granados admitted to participating in conspiracy, was aware of its nature and scope, knowingly joined in overall scheme, and suspected origin of cocaine. Facts of record indicated close working relationship among co-defendants and uncontested PSR statements regarding meeting about California trips in which Granados participated, supported finding.)

United States v. Beshore, 961 F.2d 1380 (8th Cir.) (Though no methamphetamine was produced by defendants laboratory, District Court was correct in using amount of precursor chemicals found to approximate amount of methamphetamine defendants were capable of producing. Approximation contemplated by this guideline does not require that every precursor chemical be present. Fact that hydriodic acid had not been moved onsite did not mean Court could not approximate; Court correctly estimated amount of drug that was object of defendants attempt.), cert. denied, 506 U.S. 884 (1992).

United States v. Watts, 950 F.2d 508 (8th Cir. 1991). (In conspiracy, co-conspirator s unlawful drugs may be attributed to other co-conspirator defendants.), cert. denied, 503 U.S. 911

(1992).

United States v. Brown, 946 F.2d 58 (8th Cir. 1991). (While PSR recommended Brown be sentenced based on 3,000 pounds of marijuana that government supplied, he argued he should have been sentenced on at most 1,000 pounds because there was no reliable evidence he agreed to purchase, or had capability to arrange purchasers, of 3,000 pounds (Application Note 1). This Court notes indictment did not specify quantity nor did jury find him guilty of conspiracy to distribute any particular quantity; moreover, drug quantity is consideration for District Court. Reversal and remand for resentencing of Brown as section requires District Court itself to make findings with respect to defendant s intent and ability to produce purchasers for negotiated quantity.), cert. denied, 510 U.S. 856 (1993).

United States v. Riascos, 944 F.2d 442 (8th Cir. 1991). (Riascos argued sentence based on five kilograms was too harsh because five kilos he promised were never delivered; only two and one-half grams were handed over. He also claimed he never intended to produce that much cocaine and couldn t have even if he wanted to. This Court will not disturb District Court s findings of intent and capability which were not clearly erroneous; Riascos promised to find five kilos on at least two occasions and when co-conspirator came to Florida to complete deal, Riascos told him he was still working toward goal.)

United States v. Fulcher, 943 F.2d 824 (8th Cir. 1991). (After crediting testimony of DEA chemist, District Court properly applied Application note 2 by calculating quantity of amphetamine Fulcher s laboratory could have produced. That Fulcher may have abandoned his efforts to manufacture drug, neither affected his laboratory s production capacity nor altered fact that when he set up lab he intended to produce large quantity of amphetamine.)

United States v. Carper, 942 F.2d 1298 (8th Cir. 1991). (District Court did not clearly err in attributing to Stark not only methamphetamine found in her home at time of her arrest, but also amount of methamphetamine sales reflected in her drug records, where government proved by preponderance of evidence, relying on evidence produced at trial, that Stark s notes were of drug transactions. Moreover, it was reasonable for District Court to infer all figures in notes reflected drug sales/transactions during course of conspiracy.)

United States v. Rogers, 939 F.2d 591 (8th Cir.) (Though DeLinda claimed error in relying on precursor chemicals, District Court arrived at correct calculation of base offense level after hearing expert testimony estimating amount of methamphetamine that could be produced from precursor chemicals and evidence about amount of drugs made in previous cooks.), cert. denied, 502 U.S. 991 (1991).

United States v. Eberspacher, 936 F.2d 387 (8th Cir. 1991). District Court did not clearly err in increasing base offense level from 26 to 30 by attributing four kilograms of cocaine to Eberspacher on account of kilogram wrappers found at his business; it is not mere conjecture to assume kilogram wrapper with trace amounts of cocaine on it at one time actually contained kilogram of cocaine. Wrappers are kind of evidence Guidelines contemplate being used to estimate

drug quantities for sentencing purposes.)

United States v. Burks, 934 F.2d 148 (8th Cir. 1991). (District Court s finding on quantity of controlled substances exceeding six ounces was not supported by evidence. Testimony of undercover investigator (prone to exaggerate) was that Burks offered to sell him drug lab capable of producing 7-8 pounds of amphetamine for $50,000. Review of record, however, revealed no drug lab was shown to exist nor was location given, no equipment nor any drugs were ever discovered, investigator never saw or smelled on Burks s person drugs; course of Burks s conduct (involving transactions with "source") was not such as exhibited by one who owns drug lab. This Court reverses on issue of quantity and remands, expressing concern that where government conducts undercover investigation, inclusion of offenses stemming from exaggerated and fabricated facts may in future open door for serious error. DISSENT: Citing evidence of one who referred to Burks as his source of drugs for two years and evidence concerning Burks s involvement in transport of 110-pound barrel of phenylacetic acid, Dissent would not find District Court s finding of quantity clearly erroneous).

United States v. Nash, 929 F.2d 356 (8th Cir. 1991). (Defendant s arguments failed to meet onerous burden of clearly erroneous standard where testimony of three witnesses, whom defendant cross-examined, more than adequately supported trial Court s determination of quantity of cocaine attributable to him.)

United States v. Stephenson, 924 F.2d 753 (8th Cir. 1991). (This Court rejects appellants argument base offense level should be determined strictly by amount of cocaine base either purchased or seized during conspiracy period. District Court also considered amount of cash recovered in determining minimum amount of drugs involved in conspiracy and its findings were not clearly erroneous.)

United States v. Francis, 916 F.2d 464 (8th Cir. 1990). (Application Note I, in effect when Francis was sentenced, held conspirator accountable for drugs involved in entire conspiracy which were "known" or "reasonably foreseeable" to conspirator. Under reasonably foreseeable standard, District Court did not clearly err in including all drugs (cocaine and crack) involved in family conspiracy in calculating Francis s sentence.), cert. denied, 500 U.S. 926 (1991).

United States v. Lawrence, 915 F.2d 402 (8th Cir. 1990). (Case remanded for resentencing on issue of quantity of cocaine to be included in Lawrence s base offense level where District Court s quantity determination was arbitrary, not based on preponderance of evidence. (Lawrence admitted purchasing one pound of cocaine during period 1980-88; because conspiracy charge to which Lawrence pled guilty covered half of that period, District Court credited him with half of sixteen ounces.).)

United States v. Foley, 906 F.2d 1261 (8th Cir. 1990). (Reversed and remanded for resentencing excluding 2 ounces of cocaine where "negotiation" did not include Foley offering to arrange another sale to undercover agent nor agreement to another sale, merely agent inquiring about cost of 2 ounces and Foley replying. Court will not countenance government manufacture of

conduct or negotiation without evidence of participation by defendant in conduct.)

United States v. North, 900 F.2d 131 (8th Cir. 1990). (Vacated District Court s determination of defendant s base offense level because it was based upon improper quantity of drugs. Defendant was not responsible for co-conspirator s sale of drugs to undercover agent because evidence showed conspiracy s objective was limited to co-conspirator supplying drugs to defendant. Therefore, that sale was outside of scope of conspiracy, separate and distinct act detached from North s specific knowledge, benefit or participation.)

United States v. Murphy, 899 F.2d 714 (8th Cir. 1990). (Testimony of government agents, who interviewed defendant pursuant to his plea agreement to cooperate, and defendant s admissions at plea hearing are substantial evidence that defendant distributed amount of drugs used in calculation of his base level; not clearly erroneous.)

United States v. Foote, 898 F.2d 659 (8th Cir. 1990). (Defendant argued that Guidelines commentary which stated that conspirator s sentence should be based on "conduct of co-conspirators in furtherance of conspiracy that was known to defendant or was reasonably foreseeable," impermissibly expanded conduct he could be punished for under 21 U.S.C. § 846. Court rejected argument finding defendant pleaded guilty to knowingly and intentionally distributing cocaine and was criminally responsible for his conduct and his co-conspirator s conduct which he knew about or could reasonably foresee. Drugs obtained during police search are properly considered in sentence for conspiracy.)

United States v. O Meara, 895 F.2d 1216 (8th Cir.) (This Court was not persuaded that it was unforeseeable that defendant s co-conspirator would accept additional amount of drugs if offered to him.), cert. denied, 498 U.S. 943 (1990).

United States v. Evans, 891 F.2d 686 (8th Cir.) (District Court correctly considered evidence concerning amount of methamphetamines defendants were capable of producing along with seized chemicals in determining offense level.), cert. denied, 495 U.S. 931 (1989).

United States v. Johnson, 888 F.2d 1255 (8th Cir. 1989). (Court rejected Johnson s argument that his offense level should be calculated solely on weight of cocaine since he had not participated in phone calls or exchange of LSD and psilocybin with his co-conspirator. Court found that since he pleaded guilty to conspiracy to possess and distribute LSD and psilocybin, he admitted material facts in charge and his knowledge of conduct. Section 2D4.1 allows imposing sentence on basis of conduct of co-conspirators known to defendant or reasonably foreseeable if defendant is convicted of conspiracy. Since Court found knowledge, it did not address "reasonably foreseeable" language.)

United States v. Gohagen, 886 F.2d 1041 (8th Cir. 1989). (Court rejected Gohagen s argument that his offense level should be based solely on quantity of cocaine base introduced at trial and not include estimated weight of large unrecovered chunk of cocaine base observed by undercover detective. Section 2D1.4 allows Court to approximate quantity of controlled substance

when there is no seizure and it was not clearly erroneous for Court to add weight of cocaine base testified to by detective in determining offense level.)

United States v. Ehret, 885 F.2d 445 (8th Cir. 1989). (No error to consider total amount of drug defendant intended to purchase rather than lesser amount he could have purchased with money he had at time of arrest.), cert. denied, 493 U.S. 1062 (1990).

**§ 2D1.6 (Use of Communication Facility in Committing Drug Offense):**

United States v. Williams, 895 F.2d 435 (8th Cir. 1990). (Defendant pleaded guilty to using communication facility in commission of drug offense; District Court departed upward for defendant s extensive involvement in underlying drug offense. Court rejected defendant s argument that since Guideline she was sentenced under did not make quantity of drugs involved in underlying offense factor in determining sentence, her extensive involvement was invalid justification for upward departure; such departure is properly within discretion of District Court.)

**§ 2D1.8 (Renting or Managing Drug Establishment):**

United States v. Cabbell, 35 F.3d 1255 (8th Cir. 1994). (Craig argued District Court erred in sentencing him under § 2D1.8(a)(1) because he contends he did not participate in actual distribution of drugs in premises he maintained; thus, he argues he should have received lesser sentence. Decision not clearly erroneous even though jury did not specifically find beyond reasonable doubt Craig had participated in drug transactions on premises; there were sufficient facts of record to allow District Court to find by preponderance of evidence Craig had done so.)

**§ 2D1.10 (Endangering Human Life While Manufacturing Drugs):**

United States v. Fortney, 357 F.3d 818 (8th Cir. 2004) (LOKEN,* HEANEY, MORRIS ARNOLD). (Amendment 608, adding three-level enhancement for substantial risk of harm to human life, accurately implements Congressional directive. District Court properly attributed to defendant all methamphetamine he manufactured, not merely amount he manufactured on day he endangered human life.)

United States v. Kroeger, 229 F.3d 700 (8th Cir. 2000) (BOWMAN, MAGILL, HANSEN*). (Offense level for defendant convicted of endangering human life while manufacturing and attempting to manufacture drugs, in violation of 21 U.S.C. §§ 841(a)(1) and 858, is established by adding three to offense level from § 2D1.1's drug-quantity table. Only drug-quantity table is to be used; it is error to import any other part of § 2D1.1.)

**§ 2D1.11 (Distributing, Importing, Exporting, or Possessing Listed Chemical; Attempt or Conspiracy):**

United States v. Bewig, 354 F.3d 731 (8th Cir. 2003) (RILEY, RICHARD ARNOLD,* MELLOY). (If no drugs are seized, District Court must approximate drug quantity, and finding is

reviewed for clear error. Where defendant ordered from supplier and resold 4.841 kilograms of pseudoephedrine, it is reasonable to compare him to largest legitimate purchaser of pseudoephedrine from same supplier, who bought approximately 1 kilogram, and conclude that defendant bought and resold over 3 kilograms for use in methamphetamine manufacturing.)

United States v. Hollingsworth, 298 F.3d 700 (8th Cir. 2002) (WOLLMAN, BEAM,* LOKEN). (Iodine need not be listed in Guidelines as list I or list II chemical because table of listed chemicals applies only to § 2D1.11 calculations. In convictions for 21 U.S.C. § 841 offenses, analysis proceeds under § 2D1.1), cert. denied, 123 S. Ct. 1307 (2003).

**Part E. Offenses Involving Criminal Enterprises and Racketeering**

**§ 2E1.1 (Unlawful Conduct Relating to RICO):**

United States v. Olson, 22 F.3d 783 (8th Cir. 1994). (This Court agrees with government s contention that District Court misapplied § 2E1.1(a), in calculating Olson s base offense level at 17 for her RICO conspiracy conviction. District Court calculated Olson s offense level under § 2F1.1 (fraud and deceit) at 17. Because 19 is greater than 17, Court committed error in failing to give Olson base offense level of 19 under § 2E1.1(a).)

**§ 2E1.4 (Use of Interstate Facilities to Commit Murder-For-Hire):**

United States v. Smith, 232 F.3d 650 (8th Cir. 2000) (LOKEN, FAGG, MAGILL) (per curiam). (When sentencing defendant for using interstate facilities to commit murder-for-hire, District Court calculated base offense level as 43, based on underlying unlawful conduct of first-degree murder. Defendant argued District Court should have only applied base offense level of 32, pursuant to Guideline, because murder was not part of offense charged in his indictment and therefore was not his underlying unlawful conduct. District Court's calculation was proper, because sentencing Courts must look to relevant conduct to determine base offense level when Guideline includes more than one base offense level, and relevant-conduct criteria includes all acts committed, aided, or willfully caused by defendant during commission of offense of conviction. Because defendant aided interstate murder-for-hire that resulted in murder, first-degree murder is underlying unlawful conduct, regardless whether murder was charged as part of offense.)

United States v. Turechek, 138 F.3d 1226 (8th Cir. 1998). (Turechek argues central tenant of Guidelines is that those with prior criminal history will generally receive harsher sentences than those without prior criminal history, and § 2E1.4 is irrational because it is inconsistent with this principle. This Court will not address potential merits of hypothetical case in which interplay between Guidelines and statutory maximum or minimum lead to situation where defendant s criminal history is rendered irrelevant. Turechek received 87-month sentence and it is reasonable assumption that had he been career criminal contract killer, he would have received ten years statutory maximum.)

**Part F. [deleted in 2001 by consolidation with § 2B1.1] Offenses Involving Fraud or Deceit**

**§ 2F1.1(b)(1) (Amount of Loss/Standard of Review):**

United States v. O'Malley, No. 03-1897 (8th Cir. 2004) (MELLOY, McMILLIAN,* BOWMAN). (District Court's amount-of-loss determination is reviewed for clear error.)

United States v. Piggie, 303 F.3d 923 (8th Cir. 2002) (RILEY,* BEAM, MELLOY). (Loss calculations are factual findings which this Court reviews for clear error and reverses only if it is left with definite and firm conviction that District Court erred. District Court's calculation method must be reasonable, but amount of loss need not be determined with precision.), cert. denied, 123 S. Ct. 2114 (2003).

United States v. Sample, 213 F.3d 1029 (8th Cir. 2000) (WOLLMAN, HANSEN,* MORRIS SHEPPARD ARNOLD). (This Court reviews District Court's factual findings regarding amount of loss for clear error, and reviews District Court's application of Guidelines to facts de novo.)

United States v. Coon, 187 F.3d 888 (8th Cir. 1999) (LOKEN,* HANSEN, MORRIS SHEPPARD ARNOLD). (District Court's fraud-loss finding is reviewed for clear error. As long as determination is plausible in light of record as whole, clear error does not exist.)

United States v. Bender, 33 F.3d 21 (8th Cir. 1994). (This Court reviews District Court s findings of fact under clearly erroneous standard. However, when determination of loss attributable to defendant requires District Court to make legal interpretation of Guidelines and apply interpretation to facts of case, this Court reviews determination of loss de novo. Government has burden of proof with respect to base offense level and any enhancing factors; defendant has burden to prove mitigation factors.)

**§ 2F1.1(b)(1) (Amount of Loss):**

United States v. O'Malley, No. 03-1897 (8th Cir. 2004) (MELLOY, McMILLIAN,* BOWMAN). (Amount of loss by victim was entire profit retained by all co-conspirators, and District Court's finding to contrary was clear error.)

United States v. Shevi, 345 F.3d 675 (8th Cir. 2003) (LOKEN,* FAGG, MURPHY). (Where defendant fraudulently obtained discharge of loan secured by boat, actual loss to lender was its net loss after subtracting funds it recovered through foreclosure sale of boat, not total value of loan discharged in bankruptcy. While mail fraud loss is measured by amount of loss defendant intended to inflict if that amount is greater than loss actually inflicted, District Court made no fact finding on intended loss, and must do so on remand. When defendant conceals assets to perpetrate bankruptcy fraud, and concealed assets were worth less than amount of debts sought to be discharged, intended fraud loss is measured by value of concealed assets rather than total amount of discharged debt. District Court made no fact finding on amount of concealed assets, and must do so on remand.), cert. denied, 124 S. Ct. 1182 (2004).

United States v. Ferrara, 334 F.3d 774 (8th Cir. 2003) (WOLLMAN,* MAGILL, BEAM).

(District Court did not run afoul of Apprendi v. New Jersey by making fraud-loss calculations at sentencing that did not raise defendant's sentence beyond statutory maximum for offense simpliciter.), cert. denied, 124 S. ct. 1127 (2004).

United States v. Piggie, 303 F.3d 923 (8th Cir. 2002) (RILEY,* BEAM, MELLOY). (Amount of loss is not limited to money handled by defendant, but also includes reasonably foreseeable losses caused by co-conspirators, which losses were part of same conspiracy. Amount of loss is actual loss or intended loss, whichever is greater. By paying money to college basketball players, defendant intended to deprive colleges of services of amateur players; his intended loss therefore included colleges' forfeited scholarships, investigation costs, and fines because they were natural and probable consequences of his actions, even though those losses would not have been incurred if defendant's criminal scheme had gone undetected as he had planned.), cert. denied, 123 S. Ct. 2114 (2003).

United States v. Tucker, 286 F.3d 505 (8th Cir. 2002) (BOWMAN, RICHARD S. ARNOLD,* WOLLMAN). (District Court did not clearly err in holding defendant responsible for at least $70,000 in losses, because he admitted responsibility for $17,146 in losses and evidence presented at sentencing--that he also supplied checks to two other individuals totaling $25,407 and that loss attributable to counterfeit checks drawn on business account totaled $24,713--was sufficiently reliable.)

United States v. Burns, 276 F.3d 439 (8th Cir. 2002) (BOWMAN, MORRIS SHEPPARD ARNOLD,* BYE). (Defendant argued that District Court should not have included in its loss calculation losses resulting from co-conspirators' fraudulent credit card transactions, because those co-conspirators were involved in another conspiracy separate and apart from one with which defendant was involved. This Court affirms, finding sufficient evidence of single conspiracy: defendant taught co-conspirators how to engage in credit card fraud, and he thereby aided or abetted their subsequent commission of such fraud.)

United States v. Bush, 252 F.3d 959 (8th Cir. 2001) (LOKEN, J. R. GIBSON, MORRIS SHEPPARD ARNOLD*). (Bush argued he should not be held accountable for losses from three individuals because those losses resulted from dealings unrelated to offense of conviction, i.e., conspiracy to commit securities fraud. Bush took money from those individuals, promising it would be used to further business of or to buy stock in his company, but diverted proceeds to other uses. Because crime was of character that could have permitted grouping for his multiple transactions under § 3D1.2, pertinent Guideline is § 1B1.3(a)(2); thus, District Court was allowed to consider all acts and omissions constituting same "common scheme or plan" as offense of conviction. District Court did not err as these transactions shared "common purpose" and "similar *modus operandi*".)

United States v. Howard, 235 F.3d 366 (8th Cir. 2000) (McMILLIAN, RICHARD S. ARNOLD,* BOWMAN). (**Robinson.** Robinson argued he should not be held accountable for losses from Iowa investors because they were not charged in indictment. However, his actions in Iowa were part of same course of conduct or common scheme or plan as offense of conviction.

Robinson told two Iowa investors they could pool their money to trigger line of credit to purchase Guaranteed Insurance Contracts, which would then be resold at profit. This was identical to claims made to investors involved in indicted offenses. Also, Robinson's actions in Iowa and criminal activity in indictment involved same *modus operandi*. District Court's determination that Robinson's activities in Iowa were relevant conduct under § 2F1.1 and should be added to total loss was not clearly erroneous. **Howard.** Howard argues losses attributed to him were not reasonably foreseeable acts by others that he would have known about or anticipated. However, evidence suggests criminal activity in Iowa, like charged activity, was joint effort by Howard and Robinson. Howard solicited investor using same representations Robinson made to Iowa investors. Moreover, soon after Robinson's solicitation prompted two parties to deposit money into particular account, Howard arranged wire transfer from that account to his friend's personal account. Likewise, Howard knew third party (Walker) would recruit other investors; he faxed sample contract to Walker instructing potential investors into which account to deposit their money; he told Walker what terms should appear in contract; and Howard knew that accounts from which he arranged transfers contained investor funds. Thus, losses resulting from indicted criminal activity as well as that taking place in Iowa were reasonably foreseeable to Howard.)

United States v. Chmielewski, 218 F.3d 840 (8th Cir. 2000) (RICHARD S. ARNOLD,* BEAM, COMNY). (In sentencing defendant for making false statements, District Court properly considered amount of loss South African government suffered when defendant created false invoices to allow his customers to avoid paying South African import taxes. This Court holds defendant's case is unlike cases where extraterritorial acts cannot be used to determine offense level because those cases involve offenses which are not crimes against United States. Here defendant falsified documents subsequently provided to United States, and thus his offenses constituted domestic acts and crimes against United States. )

United States v. Griffin, 215 F.3d 866 (8th Cir. 2000) (BOWMAN, LOKEN,* ALSOP). (Defendant was convicted for unauthorized transfer of food stamps. District Court determined amount of loss was entire proceeds from his food-stamp sales, because unauthorized transfers harmed USDA's strong interest in maintaining integrity of food-stamp program; however, this Court concludes that damage to integrity of food stamp program is not element of loss, because USDA was not "intended recipient," citing 2F1.1, comment. (n.8(d.)). This case is remanded for resentencing because District Court misapplied section 2F1.1(b). Loss, both intended and actual, is full face value of food stamps unlawfully purchased. District Court is permitted to estimate amount of loss. Court offers guidance on how loss might appropriately be determined in this unusual case.)

United States v. Sample, 213 F.3d 1029 (8th Cir. 2000) (WOLLMAN, HANSEN,* MORRIS SHEPPARD ARNOLD). (Upholding amount-of-loss determination, which was based on defendant's statement to Secret Service, even though it differed from statement defendant provided at sentencing hearing; District Court's decision was based on witness credibility, which is committed to its domain and is virtually unreviewable on appeal.

(1) District Court departed based on degree of psychological harm defendant in credit-card-fraud case inflicted on victims. Reviewing for plain error, this Court notes PSR gave adequate notice of possible upward departure under 2F1.1, and departure was not, as defendant contends,

under§ 5K2.3: Application Notes 11 and 12 to § 2F1.1 authorize District Court to depart if Court finds amount of loss does not reflect seriousness of defendant's conduct, and in particular, if "offense caused reasonably foreseeable, physical or psychological harm or severe emotional trauma."

(2) Reviewing under unitary abuse-of-discretion standard, this Court upholds departure. Because departure was on basis of encouraged factor not taken into account by Guidelines, decision will be upheld as long as factual record contains sufficient evidence to support basis for departure. Record is replete with evidence defendant caused her victims severe emotional trauma. While she may not have been able to apprehend precise effects of harm caused by her actions, she undoubtedly could foresee level of personal upheaval likely to result.

(3) Court also rejects defendant's argument that extent of departure was unreasonable, reviewing again for abuse of discretion: defendant's identity-theft scheme exhibited degree of callousness sufficient to justify nine-month departure and was more than reasonable under circumstances.)

United States v. Baker, 200 F.3d 558 (8th Cir. 2000) (RICHARD S. ARNOLD, LOKEN,* SIPPEL). (Defendant received insurance premium payments from several elderly clients and represented she would use money to purchase policies or annuities, but instead she converted money to her own use. District Court aggregated victim losses in calculating amount of loss. Defendant challenges this calculation on basis that she refunded losses. This argument is legally insufficient because amount of loss is greater of loss defendants intended to inflict at time or fraud, or actual loss, so later repayments do not necessarily affect loss determination. In any event, District Court found losses were not refunded and trial evidence supports that finding.)

United States v. Oligmueller, 198 F.3d 669 (8th Cir. 1999) (BOWMAN, LAY, BEAM*). (Amount of loss in determining sentence for fraudulent loan application is greater of actual loss to victim or intended loss. District Court was correct in determining intended loss was zero--despite government's argument that intended loss is possible or potential loss to victim--because intended loss means just that: loss defendant intended to cause victim. Here there is no evidence that, at time of fraudulent conduct, defendant intended to repay anything less than full value of loans. Thus amount of actual loss controls. District Court found actual loss was $58,000 by taking debt at time fraud was discovered-- $894,000--and subtracting $836,000 in payments defendant made thereafter; this was incorrect because Court may not consider payments made after fraud is discovered unless payments are result of sale of pledged assets. Actual loss was thus $829,000. Because this figure significantly overstates risk to bank--defendant had sufficient unpledged assets to support loan amount and to pay most of what was owed--this Court concludes departure is warranted under Application Note 8(b) to level that corresponds to $58,000 loss figure District Court found.)

United States v. Ramirez, 196 F.3d 895 (8th Cir. 1999) (RICHARD S. ARNOLD, LOKEN,* BYRNE). (Reversing determination that amount of loss was (1) $1,540,000 Ramirez solicited from Minnesota investors in 1993 for bogus electric-car project, conduct underlying instant offense, plus (2) approximately $1,550,000 different investors lost in other electric-car investments as early as 1975 and as late as 1997, as evidenced by claims filed by twenty other persons in forfeiture portion of criminal proceedings against Ramirez. There was no evidence these twenty claimants were

involved in 1993 project underlying instant offense. One claimant, Illinois resident, filed forfeiture claim for $1 million based on 1980 loan to different electric-car company, and as there is no evidence this transaction was related to offense of conviction in any significant way, it is not relevant conduct as matter of law. Reducing amount-of-loss finding by this $1 million claim results in fraud loss in same category as $1,540,000 fraud loss that Ramirez has conceded.)

United States v. Coon, 187 F.3d 888 (8th Cir. 1999) (LOKEN,* HANSEN, MORRIS SHEPPARD ARNOLD). (Amount of fraud loss is loss defendants intended to inflict at time of fraud, or actual loss, whichever is greater; as result, later repayments do not necessarily affect loss determination under U.S.S.G. § 2F1.1.)

United States v. Whitehead, 176 F.3d 1030 (8th Cir. 1999) (BOWMAN, MURPHY, VIETOR*). (District Court properly determined amount of loss in check-kiting scheme to be $4,000--the actual loss suffered--notwithstanding Whitehead's lack of intent to cause any loss to victim banks and his contention that actual loss was zero because he had pledged $4,000 to satisfy amount in float. $4,000 in restitution was pledged to satisfy amount in float only after scheme was discovered, and amount of actual loss is determined when check kiting is discovered, not at time of sentencing, i.e., restitution made after discovery does not offset total amount of loss.)

United States v. Jackson, 155 F.3d 942 (8th Cir.) (Jackson appeals loss calculation representing estimate of loss Jackson intended to inflict using yet uncashed checks. Loss need not be determined with precision; Court need only make reasonable estimate given available information. This Court upholds District Court's conclusions that there was substantial evidence of Jackson's pattern and practice of fraudulent check negotiations over period of years, and that losses attributable to Jackson's past transactions in stolen personal checks were evidence of his likely intent with respect to blank checks.), cert. denied, 525 U.S. 1059 (1998).

United States v. Brekke, 152 F.3d 1042 (8th Cir. 1998). (Brekkes argued District Court should not have calculated amount of loss at $350,000 (full amount of fraudulent loan) because they made payments before they defaulted and repaid almost $130,000 to SBA in accordance with settlement. Even taking into account Brekkes' $20,000 in payments, figure is still within $200,000-$350,000 range requiring eight-level enhancement. This Court also will not consider repayment to SBA, because it was in response to SBA's legal action; this Court also will not consider subordinate liens on Brekkes' properties, because when Brekkes defaulted, bank received nothing from properties on which Brekkes led bank to believe it had first priority liens. Moreover, District Court had benefit of hearing Brekkes testify and was therefore in better position than this Court to determine issue of Brekkes intent.)

United States v. Akbani, 151 F.3d 774 (8th Cir. 1998). (In check-kiting scheme, appropriate method for calculating amount of loss is either actual loss resulting from fraudulent conduct, or amount of loss defendant intended to inflict, whichever is greater. General proposition in check-kiting cases is that amount of loss is to be determined when scheme is discovered, rather than at time of sentencing; nothing suggests amount of loss must be determined as of exact moment of discovery, at which point balances of bank accounts in question would still be artificially inflated by very

scheme for which defendant is being sentenced.)

United States v. Oseby, 148 F.3d 1016 (8th Cir. 1998). (Reversing in case involving conspiracy to make false material statements and to misapply and convert tribal funds in connection with "screening" of "excess property" belonging to federal agency. District Court erred in failing to (1) specify whether amount of loss represented actual or intended loss, or both; (2) make finding as to time span over which conspiracy occurred, which was essential finding as Court set amount of loss at gross margin for "excess property" sales from 1991 to 1994; and (3) consider whether Oseby was part of conspiracy for entire period, given evidence that he ceased screening in November 1992. On remand Court must make factual findings as to when conspiracy began, and whether Oseby had jointly undertaken any criminal activity after November 1992; and also must clearly state method for calculating loss, and then determine loss by greater of intended or actual loss. This Court adds that it is irrelevant to loss finding whether Oseby personally reaped 100% of profits from sale of excess property.)

United States v. Patterson, 148 F.3d 1013 (8th Cir.) (District Court did not err in calculating amount of loss in bank-fraud case; Court combined its finding of $14,000 loss as to counts one through four (conspiracy, bank fraud, bank embezzlement, and false bank entries) with its finding of $30,027.86 loss as to counts five and six (conspiracy and false bank entries). Court correctly found that $30,027.86 in bank funds to which Patterson had no legal claim, but used to pay off personal debt, constituted portion of total loss, because commentary explains that amount of loss is value of money, property, or services unlawfully taken; $14,000 loss was undisputed.), cert. denied, 525 U.S. 1056 (1998).

United States v. Jorgensen, 144 F.3d 550 (8th Cir. 1998). (Defendants argue District Court erred in determining amount of loss caused by their fraud; and government cross appeals claiming District Court calculated too low of loss figure, § 2F1.1(b). Proper loss amount is either amount of loss defendant intended to inflict or actual loss resulting from fraudulent conduct, whichever is greater. Loss need not be determined with precision; Court need only make reasonable estimate of loss given available information. In this case, District Court ruled price victims would have paid for defendants products if they had been properly labeled, could not be determined from evidence presented. Although District Court employed somewhat novel approach in calculating loss value (Court multiplied total dollar amount of mislabeled meat attributed to particular defendant by one percent profit margin to determine amount of loss attributable to that particular defendant), this Court concludes District Court calculated reasonable estimate of losses attributable to each defendant. This Court also rejects government s argument loss figures were too low as District Court found evidence supporting higher loss calculation not persuasive. District Court s findings were not clearly erroneous.)

United States v. McCord, Inc., 143 F.3d 1095 (8th Cir. 1998). (Following passage of Major Fraud Act of 1988 (18 U.S.C. § 1031), Sentencing Commission added § 2F1.1(b)(4)(A), and concluded enhancement should apply to all fraud cases involving conscious or reckless risks of serious bodily injury. Applying enhancement, District Court determined BOL for both McCord and McCord, Inc. was 13. On appeal, defendants argue enhancement does not apply to their offenses.

Relying on Act s legislative history, defendants argue § 2F1.1(b)(4)(A) is limited to convictions for procurement fraud. This Court disagrees: Commission concluded risk-of-serious-bodily-injury enhancement is appropriate for all fraud offenses; it is well within Commission s general Guidelines authority; and nothing in Act or legislative history suggests intent to limit Commission to enhancement for procurement fraud. 18 U.S.C. § 1001 has no maximum sentence and there is nothing in Motor Safety Carrier Act suggesting intent to repeal or supersede 18 U.S.C. § 1001. Main issue on appeal is whether government proved by preponderance of evidence enhancement applies to defendants offenses. Given large number of violations; general risks to drivers and others of driving large trucks while fatigued; specific evidence of particular McCord Inc. drivers driving while seriously fatigued; and Lloyd McCord s admissions he was aware of repeated, systematic hours of service violations and chose not to put end to these unlawful practices, this Court concludes District Court did not clearly err in finding offenses to which defendants pleaded guilty involved conscious or reckless risk of serious bodily harm.)

United States v. O Hagan, 139 F.3d 641 (8th Cir. 1998). (District Court used level 8 for insider trading, § 2F1.2(a), then added 11 levels from § 2F1.1(b)(1)(L) to account for more than $5 million in "gain resulting from offense(s)" as required by § 2F1.2(b)(1) (1987). Counts were grouped as required by § 3D1.2(d). O Hagan did object to Court s calculation of amount of gain resulting from offenses and to Court s two-level enhancement for abuse of position of trust. Because correctness of Court s separate Guidelines determination with respect to fraud counts needs to be determined in order to decide if O Hagan should be resentenced on those counts, this Court proceeds to consider objections. O Hagan contends Court erred in including $1.9 million he purloined from his clients and for which he was convicted in state Court (District Court added $1.9 million to $4.2 million realized in stock transactions to arrive at total amount, above $5 million). Having convinced both government and District Court his state crimes were part and parcel of federal criminal conduct so as to preclude counting them for criminal history purposes, and having convinced Court state crimes were "obviously" part of federal conduct so as to justify and receive 23 months credit, this Court finds it totally inconsistent for O Hagan to claim thefts were not "relevant conduct" so as to preclude including their dollar amount in gain realized. This Court concludes District Court s fact findings regarding amount of gain are not clearly erroneous, and it committed no error when it decided thefts from clients were relevant conduct, § 1B1.3, and added $1.9 million to $4.2 million in stock transaction in calculating O Hagan s offense level.

This Court s review convinces it District Court s Sentencing Guidelines determination of offense level 21 for grouped fraud counts is correct, and as criminal history Category I offender, O Hagan s correct Guidelines range is 37-46 months. Although O Hagan s present 41-month sentences on all fraud counts are within this range, this Court cannot say whether or not District Court would have imposed same 41-month sentences under presently correct 37-46 month range as it did when correct range for sentencing when all 57 counts were before it was 41-51 months. Thus, this Court remands to District Court for resentencing within 37-46 month range, noting again 23 months credit for time served was proper and may be reapplied in resentencing proceedings.)

United States v. Cain, 134 F.3d 1345 (8th Cir. 1998). (In determining sentence for each defendant, District Court disagreed with amount of loss specified in plea agreement and instead found amount for sentencing purposes was $524,296.61, § 2F1.1(b)(1) which had effect of adding

ten levels to each defendant s BOL, § 2F1.1(b)(1)(K). District Court stated it based its finding on evidence from trial of defendants brother, and also held each defendant could be held liable for losses caused by all conspirators in scheme regardless of when each defendant entered conspiracy. Case of defendants brother remanded for resentencing because defendants brother could not be held liable for losses caused by other conspirators in scheme prior to time brother entered conspiracy even if brother knew of conduct that led to those losses. In addition, [same] District Court found in case of defendants brother amount of loss caused by all conspirators was $508,096.61--and there is no explanation for discrepancy. This Court also notes specific losses caused by all conspirators are listed individually in PSRs in defendants brother s case and in defendants cases and are identical, yet total $508,379.71, amount different from District Court s finding in any of three cases on losses caused by all conspirators. Because of anomalies, this Court remands defendants cases to District Court for resentencing.)

United States v. Whatley, 133 F.3d 601 (8th Cir.) (Defendants challenge calculation of loss occasioned by their fraud, figure that determines enhancement to respective BOLs, § 2F1.1(b)(1). District Court s method for calculating loss must be reasonable, but loss need not be determined with precision. Defendants suggest amount of loss should be reduced by allowances for reasonable profit and overhead of running business. District Court found defendants business was conspiracy to commit wire fraud; this Court not inclined to allow defendants profit for defrauding people or credit for money spent perpetuating fraud.

Two defendants suggest amount of loss used to fix sentences should reflect only their own conduct. No such limitation; sufficient evidence in case for District Court to conclude co-workers actions that caused losses were reasonably foreseeable to two defendants and were part of same conspiracy to commit wire fraud in which they engaged. Defendant who worked for organization for only first four of ten months it operated, challenges amount of loss, taking issue with District Court s calculation. Taking total amount of loss and dividing it by ten months of scheme s operation, and multiplying result by four, was reasonable. As District Court was in best position to evaluate competing concerns, this Court will not reject its factual findings unless it thinks them clearly erroneous.

Whatleys challenge findings they represented falsely they were acting on behalf of charity and defrauded unusually vulnerable victims. Enhancement, § 2F1.1(b)(3)(A), was proper as telemarketing script indicates products bought by victims scheme were going to schools and churches, and script used term "donation" to describe transfer of funds from victims to defendants operation.), cert. denied, 524 U.S. 940 and 524 U.S. 945 (1998).

United States v. Williams, 128 F.3d 1239 (8th Cir. 1997). (No clear error in computation of loss calculation at $211,786.73, adding eight levels to Williams s BOL, § 2F1.1(b)(1)(I). Loss need not be determined with precision, and this Court is satisfied District Court s calculation represents reasonable estimate of companies losses. Affected companies identified all cloned telephones on which calls to Williams were placed between January and June 1996. District Court calculated total loss by adding up charges for all calls made from these telephones during same six-month period. Only calls placed during first months of 1996 were taken into account despite fact Williams had been selling cloned telephones since 1994. Calculation method could not capture losses from purchasers who bought cloned phones from Williams, but did not happen to call between

January and June 1996; and Williams admitted he had been frequently called by persons to whom he had sold cloned telephones. CONCURRENCE: Method District Court used does not properly calculate loss--it instead compensates telephone companies for telephone users unlawful gain. Record does not include data sufficient to support conclusion error was prejudicial, and this is matter on which defendant has burden of persuasion.)

United States v. Wells, 127 F.3d 739 (8th Cir. 1997). (Extensive discussion of calculation of loss; burden of proving extent of loss falls on government which must prove extent of loss by preponderance of evidence. This Court rejects government s position that intended loss is always measured by possible or potential loss. Loss does not hinge on actual loss if District Court determines either that defendant intended to succeed to full extent of fraud, or there was no evidence defendant intended to cause less than great as possible loss. Then, intended loss can properly be measured by possible loss as defendant intended to cause that possible loss. Where there is evidence of extent of loss defendant intended to cause, however, crucial question for determining intended loss for sentencing purposes is loss defendant actually intended to cause. Method used by District Court to determine loss depends in first instance on Court s factual finding of intent of defendant to cause loss, and on Court s factual finding of extent of actual loss. Under application note 7, loss for sentencing purposes is greater of intended loss or actual loss. Here, District Court did not commit clear error in determining there was no intention to cause bank loss--District Court judge presided over entire trial and sentencing, and was in better position to weigh credibility of witnesses and determine motivations and intent underlying defendants actions. Government has not pointed out sufficient evidence to detract from Court s findings. Because District Court found intended loss was zero, it went on to calculate actual loss caused by defendants fraud. Government appeals Court s determination two banks harmed by defendants fraud suffered actual losses in amount of only $40,000; contending calculation was clearly erroneous and method was legally insufficient. In reaching finding, Court reduced loss by amount banks had recovered or could expect to recover, and by amount of another bank s judgment against one of company s customers. Given defense evidence of future recovery in absence of government evidence on amount banks could actually expect to recover, Court s estimate of $40,000 loss was not clearly erroneous. As to government claim that as monies recovered or expected to be recovered from lease payment were from other bank s judgment against company s customer, is not asset pledged to secure loan, and should not have been deducted from loss calculation, this Court states there was no error as transaction is being treated by analogy as loan, and right to collect future payments based on assignment of right protects bank to same extent as does right to collect future lease payments after asserting rights for secured creditor to collect payments.

Government argues District Court erred by not increasing defendants offense by two points for more than minimal planning, § 2F1.1(b)(2)(a). Government argues increase is called for by duration of conspiracy; conspiracy involved repeated acts that were not merely opportune, including consistently concealing existence of certain addenda from banks, changing language of lease documents, forging personal guaranties of their wives, and selling certain lease contracts to banks. District Court clearly erred in not assessing two-point enhancement for more than minimal planning.)

United States v. Hogan, 121 F.3d 370 (8th Cir. 1997). (Hogan challenges two-level upward

departure under application note 10(f) (fraud or deceit where defendant knowingly endangered solvency of one or more victims). No abuse of discretion in departing upward where Hogan defrauded victims whose investments in Hogan s counterfeit CDS seriously endangered their solvency (e.g. people at or near retirement age, relying on small, fixed incomes in conjunction with their investments to maintain solvency; others with serious medical conditions depending on investments to pay medical bills; still others depending upon investments to finance college educations). Hogan knew some of these people quite well; District Court could reasonably infer Hogan knew his criminal activity endangered solvency of at least one of his victims.)

United States v. Dolan, 120 F.3d 856 (8th Cir. 1997). (Dolan contends District Court erred in determining amount of intended loss attributable to his conduct. Dolan is attorney who represented Anderson in connection with business litigation against several financial institutions. Dolan was convicted by jury on one count of conspiracy to commit bankruptcy fraud and one count of concealing and aiding and abetting in concealment of property of bankruptcy estate. District Court determined actual loss suffered by Anderson s creditors due to Dolan s conduct was at least $200,000, and that intended loss was approximately $340,000, § 2F1.1(b)(1)(I). Dolan contends District Court should have attributed to him only those losses that resulted from settlements in which he participated. Dolan argues all claims but that of South Omaha were settled on merits and paid in full, resulting in intended loss of only $25,000. Dolan maintains he did not cause or intend to cause any actual loss or harm to any of Anderson s creditors. This Court observes both jury and sentencing judge must have accepted testimony of creditors they would not have accepted Dolan s and Anderson s settlement offers had they known true extent of Anderson s assets. Due to nature of Dolan s convictions, District Court was correct in determining Dolan was responsible for all losses suffered by Anderson s creditors as result of conspiracy, not merely South Omaha loss. District Court was not bound to accept Dolan s self-serving assertions he intended no loss to his creditors; Dolan s renewed assertion cannot, without more, overcome sentencing judge s determination of Dolan s intent. No clear error in District Court s calculation of amount of loss where evidence demonstrated Dolan and Anderson together intended to conceal assets from creditors who were entitled to them by settling claims without revealing true extent of Anderson s assets. District Court properly considered loss intended by Dolan as part of conspiracy, rather than actual loss or maximum potential loss, in imposing sentence. This Court concludes District Court correctly interpreted Guidelines and properly calculated amount of loss.)

United States v. Van Brocklin, 115 F.3d 587 (8th Cir. 1997). (District Court found defendants conduct caused loss to First Federal of $3.892 million resulting in thirteen-level specific offense characteristic enhancement, § 2F1.1(b)(1)(N). Defendants claim District Court erroneously equated bank s loss with profit made by defendants. Determining loss according to defendant s profit in some cases provides reasonable estimate of actual loss; here, District Court clearly erred in equating "loss" solely with defendants profit. Government never established by preponderance of evidence what would or should have been paid for those loans had sales been legitimate. Any loss to bank from defendants scheme did not occur simply because loans were sold, but only if loans were sold at artificially low price. Government has burden of showing loss under § 2F1.1 and evidence at trial on sentencing simply did not establish what loss was; evidence did not establish what First Federal should have received on sales in completely legitimate

transaction. Equating defendants entire profit with "loss" to First Federal in all likelihood overestimates actual loss to bank. This Court therefore holds District Court clearly erred in determination of bank s loss and remands for new determination of loss to bank under § 2F1.1 or for recalculation of sentences under another appropriate guideline.), cert. denied, 523 U.S. 1122 (1998).

United States v. Gjerde, 110 F.3d 595 (8th Cir.) (District Court applied two-level enhancement for more than minimal planning, § 2F1.1(b)(2). District Court did not err where Gjerde s acts were thoughtful and complex, and extended over period of several months; and each instance was not purely opportune, § 1B1.1(f).), cert. denied, 522 U.S. 949 (1997).

United States v. Stover, 93 F.3d 1379 (8th Cir. 1996). (Chandi argues imposition of ten-level increase was based upon clearly erroneous finding amount of loss for which she was responsible exceeded $500,000, § 2F1.1(b)(1)(K). She argues her total offense level should be reduced by one because 13 couples (representing $107,705) were clients of Families for Children before she joined agency and 8 additional couples from New York (fees of $37,275) had no contact with her and only paid fees pursuant to New York law limiting fees to services rendered. Evidence supports inference Chandi did have contact with New York clients; in any case she is responsible for those clients losses because they were of foreseeable consequence of defendants fraudulent scheme, § 1B1.3. Payments made by New York clients were based upon agency s misrepresentations and none of those clients successfully adopted child through agency. Thus, amount of loss attributable to Chandi exceeds $500,000 regardless of whether she may be held accountable for losses suffered by clients whom agency acquired prior to her joining agency. District Court s finding as to total amount of loss attributable to Chandi was not clearly erroneous.)

United States v. Berndt, 86 F.3d 803 (8th Cir. 1996). (Asmussen s BOL was 6 for tampering with odometers, § 2N3.1(a). Fraud was involved, § 2F1.1(b). While burden of proof is on government in regard to enhancing factors, loss need not be determined with precision, Court need make only reasonable estimate of loss given available information. Asmussen found fault with Court s determination there were 90 cars involved when government was able to identify specifically only 67 vehicles. To determine amount of loss in odometer case, this Court considers all harm resulting in all acts or omissions part of same course of conduct or common scheme or plan as offense of conviction, § 1B1.3(a)(2). Government claimed 100 vehicles were involved, relying on statement made by Asmussen s co-conspirator; PSR used 80 vehicles for its calculation, but stated scam involved 80-100 vehicles; and evidence could be collected on only 67 vehicles. It was not clearly erroneous for District Court to use 90 vehicle figure for determination of loss considering fraud involves element of deceit and secrecy, it is likely there are more automobiles involved in odometer tampering scheme than government can track down. Estimate of loss was reasonable and calculation ($4,000) per vehicle is affirmed.)

United States v. Schwalb, 83 F.3d 1039 (8th Cir. 1996). (Enhancement for more than minimal planning, § 2F1.1(b)(2)(A), was not clearly erroneous given evidence of elaborate steps taken to induce victim to invest in woolen mill equipment deal and efforts to conceal offense from victim which helped induce him to invest in later sewing machine deal. See also § 1B1.1, comment.

(n.1(f)).)

United States v. Sandow, 78 F.3d 388 (8th Cir. 1996). (District Court attributed $2,631,301 to Sandow based on total loss to victims, and increased his BOL 13 levels, § 2F1.1(b)(1)(N). Sandow contends loss to victims should have been calculated from exact premium amounts--$1,873,870--rather than approximate figure of $2,000,000. No point to argument as even using more precise premium amounts, yields loss to victims of $2,505,171, still more than $2,500,000. Sandow also argued he should not be held responsible for premiums collected after he left two of four companies in question; thus, Sandow reiterates contention establishment of various companies amounted to separate conspiracies rather than single one. Calculation of loss to victims is to include all reasonably foreseeable acts of others that occurred during commission of offense of conviction (§ 1B1.3(a)(1)(B); § 1B1.1). Court held no error in trial Court s conclusion evidence was insufficient with respect to multiple conspiracies; accordingly, trial Court s determination of amount of loss to victims was not clearly erroneous.)

United States v. Roggy, 76 F.3d 189 (8th Cir.) (Roggy claimed District Court erred in finding General Mills suffered loss in excess of $80 million; he claimed amount of loss should be either $85,000 which was amount he overcharged General Mills or $166,000 which was total bill for his services (BOL of 12 or 13 instead of maximum 24). Roggy contended consequential damages may only be considered in government fraud procurement cases. This Court holds District Court was correct in considering consequential damages in this product substitution case in calculating loss as both title to and general rule contained in subsection (c) do not limit application to cases where government is party. Moreover, actual loss suffered by General Mills was much greater than either amounts Roggy claimed (e.g., it was left with more than 16 million bushels of tainted oats and 160 million boxes of tainted cereal, facilities where oats were processed were contaminated). Intended loss figure is only used in calculating loss if it is greater than actual loss (comment. (n.7)); thus, District Court was correct in using actual loss of $146.9 million sustained by General Mills.), cert. denied, 517 U.S. 1200 (1996).

United States v. Allen, 75 F.3d 439 (8th Cir. 1996). (This Court recognizes Allen s "objection" that District Court did not adequately take into account deductions for legitimate expenses incurred by four companies in question. District Court s failure to make specific finding with respect to objection amounted to harmless error because deduction of $132,000 from previously calculated figure of $2,745,400 still leaves more than $2,500,000 as amount of loss; thus, ultimate calculation of total offense level would remain same.)

United States v. Wonderly, 70 F.3d 1020 (8th Cir. 1995). (Wonderly argued District Court clearly erred as record did not support two-level increase. Record well supports District Court s finding offense involved more than minimal planning or more than one victim, § 3F1.1(b)(2).), cert. denied, 517 U.S. 1146 (1996).

United States v. Cheek, 69 F.3d 231 (8th Cir. 1995). (Cheek argued District Court improperly increased BOL under § 2F1.1(b)(3)(B) for abusing bankruptcy process; she argued because her lies to bankruptcy Court formed basis for her bankruptcy fraud conviction, she could

not have committed offense without also violating judicial process. Thus, she reasons Sentencing Commission must have taken violation into account in establishing BOL for bankruptcy fraud offense and increase constitutes impermissible double-counting. Section 2F1.1(a) establishes single BOL for wide range of fraud-related offenses; that enhancement might apply in great number of cases demonstrates violation of 18 U.S.C. § 152 involved higher level of culpability and thus deserved greater punishment than some other crimes which correspond to § 2F1.1. In this Court s view, Commission intended Cheek s sentence be enhanced under § 2F1.1(b)(3)(B) because her abuse of bankruptcy process makes her more culpable and thus distinct from others who have committed offenses under § 2F1.1.)

United States v. Manzer, 69 F.3d 222 (8th Cir. 1995). (District Court calculated total loss to be $2.7 million and assessed Manzer 10-point increase under 1987 version of Guidelines, § 2F1.1(b)(1). Manzer argues District Court erred in basing amount of loss on fixed civil statutory damages provision (47 U.S.C. § 605(e)(3)(C)(i)(II)) rather than actual or intended amount of loss. This Court acknowledges difficulty in calculating amount of loss in case such as this involving sale and distribution of modification and cloning packages to multiple dealers who may have in turn further disseminated pirating technology. District Court need only make reasonable estimate of range of loss, given available information. Here, District Court s estimation is more than adequately supported on record by testimony of HBO analyst who conservatively projected actual loss to HBO alone as over $6 million based on her review of revenue records and client lists seized from Manzer s place of business, and her projections of dealer replications; thus, no clear error.

This Court finds no ex post facto violation in District Court s use of post-1988 amendment version of 47 U.S.C. § 605 because evidence supported finding actual loss caused by Manzer s conduct was far greater than $2.7 million, civil statute in question was merely referred to for guidance in measuring loss but did not actually control, and amount of loss determined was consistent with statute in effect at time of Manzer s conduct--and before statute s amendment.)

United States v. Anderson, 68 F.3d 1050 (8th Cir. 1995). (Focus of section should be on amount of possible loss defendant attempted to inflict on victim. In this case, District Court determined intended loss (approximately $340,000) was larger than actual loss ($244,971--claims that either were not paid or were settled for less than their probable value due to Anderson s failure to disclose full extent of his assets). Anderson argued District Court did not make reasonable estimate because he intended no loss to his creditors; Anderson contended Court erred by failing to deduct payments he intended his creditors to receive. District Court was not bound to accept Anderson s self-serving assertions at sentencing that he intended no loss to his creditors; Court s credibility determination is important part of weighing process and findings as to credibility of witness are virtually unreviewable on appeal. Here, District Court was careful to link calculation to Anderson s intent. District Court noted difference between Anderson s listed liabilities in bankruptcy and property he did disclose made maximum potential loss $930,059; however, because Anderson actually made settlements totaling $590,000 during bankruptcy proceedings, Court determined Anderson did not intend maximum possible loss; thus, Court measured intended loss as difference between maximum potential loss based on undisclosed assets and amount Anderson actually repaid in settlements to creditors. This Court concludes District Court did not misinterpret Guidelines and its calculation of amount of loss was not clearly erroneous--rather, well within range

of reasonable estimate, based upon record made at extensive sentencing hearing, and clearly explained in writing.)

United States v. Sheets, 65 F.3d 752 (8th Cir. 1995). (Following dispute with co-worker Hancock, Sheets filed false amended income tax returns in Hancock s name showing nearly $390,000 in unreported gambling income with additional tax liability of $103,697.90. In calculating victim s loss, District Court based loss on tax liability shown on false tax returns and raised BOL by six, § 2F1.1(b)(1)(G). Sheets contended District Court improperly applied guideline. He contended record did not support District Court s finding he intended to inflict financial loss on Hancock, rather that he intended to frighten and harass Hancock. This Court rejects Sheet s argument: Sheets admitted filing false tax returns that put Hancock at risk for additional tax liability and anticipated IRS would assess Hancock for additional taxes owing on fictitious income; and to keep suspicion on Hancock, Sheets denied any knowledge of false returns. Sheets also argued even if District Court correctly found he intended to inflict financial loss on Hancock, Court misapplied § 2F1.1 because intended loss was not possible. District Court properly applied guideline to increase Sheet s BOL as Sheets took all steps necessary for his scheme to succeed unless Hancock persuaded IRS he was victim instead of tardy taxpayer; actual loss was possible if deception entailed in fraud succeeded.)

United States v. Smith, 62 F.3d 1073 (8th Cir. 1995). (After Smith was convicted of conspiracy to commit fraud using access devices and aiding and abetting with intent to commit fraud, District Court found $70,000-$120,000 loss to victimized stores, total of unauthorized charges. Smith argued she was responsible for wholesale value of merchandise, minus value of merchandise recovered from three cohorts. District Court did not err as defendant is responsible for total value of loss she attempted to inflict rather than actual loss; dollar value of unauthorized charge card purchases accurately represents loss that Smith attempted to inflict on stores.), cert. denied, 516 U.S. 1098 (1996).

United States v. Graham, 60 F.3d 463 (8th Cir. 1995). (As Graham was not successful in divesting bankruptcy estate of properties, District Court properly focused upon amount of loss Graham intended to inflict. He argued District Court should have further reduced value of property by $55,000 lien recorded against property as Graham failed to properly record trust interest before lien was filed; therefore, he argues because lien would stand even if trust had existed, amount of loss should be reduced by $55,000 because lien reduced his expected gain and intended loss. This Court agrees with District Court s calculation: trial evidence indicated if trust instrument had been accepted by bankruptcy Court, lienholder would have become bankruptcy creditor and subject to bankruptcy distribution; as result, Graham would have been able to retain full value of his one-half interest in property. Fact his scheme was flawed does not persuade this Court he intended for bankruptcy estate to lose any less than amount he stood to gain had his deception been better executed.)

United States v. Peters, 59 F.3d 732 (8th Cir. 1995). (District Court found amount of loss was $153,476, full amount of false claims Peters and others submitted, resulting in seven-level increase in BOL. Peters argued because program was in part loan program, District Court should

only have included amount government was unlikely to recover ultimately; Peters asserted because school district pledged substantial collateral to secure loan, amount of loss to government should have been 0, or at least substantially less that $153,476. This Court rejects Peters s argument application note 7(b) applies as it appears to contemplate type of loan made by lending institution. Even if portion of amount could be characterized as interest-free "loan" under program, interest-free loan from government is still best characterized as government benefit and § 2F1.1, comment. (n.7(d)) controls as case involves diversion of government program benefits and District Court did not err in calculation of loss.)

United States v. Irons, 53 F.3d 947 (8th Cir. 1995). (District Court increased Irons s base offense level by 8, § 2F1.1(b)(1)(I), based on its finding Irons intended to cause insurance company loss of $215,664.96--amount of disability payments insurance company paid Irons, and intended to cause another company loss of $6,362.52--amount company paid Irons for damage to Irons s van. Irons argued loss to insurance company was only $50,000 (for total of $56,362.53)--and thus base offense level should only have been increased by 5--because after staged collision, Irons was involved in second genuine car crash that contributed to his disability and company had paid only about $50,000 of disability benefits before second collision. Record supports District Court s finding all disability payments company paid Irons were based on first car accident, not second. Logical to infer Irons intended to use his fraud to collect full amount of benefits available under his disability policies with company.)

United States v. Ballew, 40 F.3d 936 (8th Cir. 1994). (District Court considered evidence of Ballew s involvement in theft of four trucks at sentencing, worth $68,026, to which was added $10,900 loss to defrauded insurance company, resulting in five-level increase under § 2F1.1(b)(1)(F). Ballew argued evidence of his involvement in other thefts was unreliable and even if reliable, did not constitute evidence of relevant conduct. Based on record, this Court finds District Court did not clearly err in finding Ballew stole three of other trucks and benefitted from theft of fourth. Involvement in theft is question of fact.), cert. denied, 514 U.S. 1091 (1995).

United States v. Bender, 33 F.3d 21 (8th Cir. 1994). (Bender argued District Court erred in calculating amount of loss attributable to him. District Court is not required to calculate amount of loss with precision, but must only make reasonable estimate based on evidence. Essentially, Bender argued he withdrew from conspiracy and was not aware of and did not have any involvement in later transactions which increased loss to amount over $10,000. This Court decides Bender waived any argument he may have had concerning amount of loss attributable to him by admitting in his plea agreement he was involved in conspiracy that extended to December 1987. This Court concluded District Court had sufficient evidence from plea agreement and parties stipulations to determine Bender had not withdrawn from conspiracy. Thus, Court did not err in finding Bender responsible for loss over $12,000 and imposing three-level enhancement (§ 2F1.1(b)(1)(D)).)

United States v. Sheahan, 31 F.3d 595 (8th Cir. 1994). (District Court did not err in finding Sheahan s offense involved more than minimal planning as finding was amply supported by record. Scheme existed for more than year and involved substantial contact and coordination between Sheahan and co-defendant; moreover, Sheahan actively worked with co-defendant to avoid detection

of their activity.

District Court could fairly infer from government evidence that $30,000 loan Sheahan obtained from another party was just another part of relevant conduct, acquired for specific purpose of helping Sheahan and bank employee avoid detection of their criminal activity.

Sheahan argued District Court erred by failing to reduce its amount of loss finding by subtracting value of collateral Mercantile released in settlement of civil lawsuits with Sheahan. Sheahan reasoned Mercantile is responsible for increasing amount of loss because in settling civil cases, it released its right to recover against valuable collateral. Under his reasoning, collateral that was available to Mercantile at one time should be subtracted from amount of loss. This Court disagrees. Even if Mercantile would not have released its interests in additional collateral, availability of that collateral to Mercantile would not reduce loss calculations for purposes of Guidelines. DISSENT: As Sheahan was not told at change of plea hearing, his sentence would be based in part on conduct alleged in dismissed counts of indictment as relevant conduct, matter should be remanded and Sheahan given opportunity to withdraw his guilty plea. Believes District Court s findings on Sheahan s culpability and amount of bank s loss, clearly erroneous.)

United States v. Strassburger, 26 F.3d 860 (8th Cir. 1994). (Where Strassburger was convicted of fraud for his role in misbranding meat by grade and date of production, this Court rejects his contention that § 2N2.1 was relevant guideline, based on application note 2 to § 2N2.1.

Relying on application note 7(a), Strassburger argued because retailers to whom company sold no-roll meat were able to sell it as "choice" meat to consumers, victims suffered no loss. This Court looks to application note and determines amount for which retailers could have resold mislabeled meat to consumers is value of meat properly labeled as no-roll meat. Court concludes proper application of section requires determination of price paid for choice meat retailers requested minus value of no-roll meat they received.

District Court did not clearly err when it determined Strassburger s fraud resulted in loss of approximately $130,000 over five-year period. District Court credited government s evidence, which was not clearly erroneous, and multiplied number of pounds of mislabeled meat (2.6 million) by price differential (invoice by invoice analysis) and calculated total loss to be $130,000.)

United States v. Adediran, 26 F.3d 61 (8th Cir. 1994). (Adediran argued District Court erred in considering in its calculations losses suffered by Rockford banks based on insufficient evidence linking him to Rockford. Because this Court had already held preponderance of evidence supported conclusion Adediran opened accounts there, District Court did not clearly err by making finding.)

United States v. Atkins, 25 F.3d 1401 (8th Cir.) (Atkins argued preponderance of evidence only supported two-level increase (linkage to four of fraudulent tax returns) rather than five-level increase (attribution of all 30 returns for total of $57,902 to Atkins). When viewed in aggregate, facts support District Court s decision to attribute all returns to Atkins. Evidence showed Atkins was involved in conspiracy at all levels: recruited others to file fraudulent tax returns; gave individuals instructions on how to file fraudulent returns; obtained personal information from individuals; prepared fraudulent W-2s; went with at least two of individuals when they filed their false returns; was compensated for her role in conspiracy; Atkins worked at office which served as headquarters for conspiracy; Atkins s brother owned office; and numerous friends and family

members of Atkins filed fraudulent returns. See § 1B1.3(a)(1)(B). This Court affirms District Court s finding that all 30 returns should be attributed to Atkins.), cert. denied, 513 U.S. 953 (1994).

United States v. Olson, 22 F.3d 783 (8th Cir. 1994). (Even if offense level for Olson s underlying RICO activity is applied under this section, rather than § 2E1.1(a), Olson s base offense level should have been 19. District Court s refusal to increase Olson s offense level for more than minimal planning, § 2F1.1(b)(2)(A), is clearly erroneous. Olson s multiple crimes, committed over two-year period, clearly warranted increase to her offense level to 19.)

United States v. Morris, 18 F.3d 562 (8th Cir. 1994). (Both government and defendants challenged District Court s calculation of "loss." At sentencing, government argued total loss attributable to Morris with respect to bank fraud and false entries convictions was $826,000. District Court excluded $156,000 from loss computation because repayment was made prior to any discovery of overdrafts which this amount represented. District Court failed to take into account application note 7(b) as whole: focus for sentencing purposes should be on amount of possible loss defendant attempted to inflict on victim--not actual or net loss. This Court also rejects Morris s challenge to District Court s failure to consider value of real property that had been mortgaged to secure certain loans as her offense level did not turn on whether bank recovered or could have recovered its potential loan losses by foreclosing on pledged security.)

United States v. Kok, 17 F.3d 247 (8th Cir. 1994). (This circuit has held that amount of "loss" does not depend upon actual or "net loss." Thus, where there was no evidence of actual loss with regard to line of credit, focus for purposes of sentencing should be on amount of possible loss that Kok attempted to inflict: difference between amount of credit bank extended based on false representations and amount of credit bank would have extended had it known company s true financial condition.

Kok challenged Court s inclusion of bonuses paid by his employer in loss computation. Guidelines do not define who may be considered "victim" for purpose of calculating loss. As result of scheme perpetrated by Kok, employer suffered actual losses: employer s president testified that based on false financial statements Kok prepared, company paid over $200,000 in bonuses to Kok and three other employees. Inquiry to determine loss must focus on amount of loss related to false statement. Here, District Court properly included employer s actual losses in determining intended loss under section.)

United States v. Costanzo, 4 F.3d 658 (8th Cir. 1993). (District Court calculated Civella s base offense level as six and applied seven-level enhancement based on amount of loss inflicted on drug manufacturers which Court calculated as $493,275. Civella did not object to amount of loss calculation at his sentencing, but argued on appeal that District Court erred in failing to apply more favorable methodology which it subsequently used in sentencing his co-defendants. This Court reviews for plain error and states that trial Court did not commit plain error in holding that amount of loss to drug manufacturers was difference between normal wholesale price for drugs ($720,845) and total for pharmaceuticals purchased at institutional prices ($209,569).)

United States v. Willis, 997 F.2d 407 (8th Cir. 1993). (Willis challenged District Court s six-level increase based on language in 1991 version of Application Note 7(b), contending that District Court should have calculated loss as actual (net) loss suffered by bank after Willis and his partners had repaid part of nominee loans. Note 7 specifically directs District Court to use either intended or actual loss. Where District Court finds that defendant intended to defraud bank of entire amount of loans obtained by false loan application, it is free to use total amount as loss for purposes of § 2F1.1. District Court found that Willis had intended to defraud bank to extent of entire amount of seven nominee loans. Finding is not clearly erroneous where all of loans were unsecured with exception of one where collateral was van worth only $2,000 and where Willis and his partners repeatedly persuaded nominee borrowers into renewing loans when partners were unable to make necessary payments.), cert. denied, 510 U.S. 1050 (1994).

United States v. Ravoy, 994 F.2d 1332 (8th Cir. 1993). (This Court agreed with District Court that amount of loss resulting from equity skimming scheme totalled more than $200,000 and should include residence subsequently resold by defendants to party whose eventual failure to pay mortgage resulted in FHA foreclosure. Defendants received cash buy-down from property, rented property, received monthly rent payments, and never made mortgage payment. But for sale of residence, there is little doubt defendants intended to never pay mortgage and force lenders to foreclose: focus is on loss defendants intended /attempted to inflict.

Trial Court need not determine amount of loss with precision. It must make reasonable estimate given available information; it may consider scope of operation.)

United States v. Little, 990 F.2d 1090 (8th Cir. 1993). (District Court did not clearly err in identifying amount of $200,000 as probable or intended loss. Little s claim that his company was entitled to half amount of checks as commission and trustee still owed company money is irrelevant in light of United States v. Prendergast. Moreover, Little had never disclosed to trustee amounts he was depositing or rationale for withholding those funds.)

United States v. Nelson, 988 F.2d 798 (8th Cir.) (District Court subtracted $17,000 exchange price from sale price for each of switched label TCM s and loss associated with fraudulent conduct was $1,746,000. Data Hardware challenged calculation because "intended loss" bore no relationship to economic reality. District Court did not clearly err in calculating loss. IBM did not buy or want used TCM s; IBM took used TCM s pursuant to its exchange program. District Court s failure to reduce loss by $1.7 million restitution payment was not error as subsequent recovery of funds does not diminish dollar amount applicable in sentencing.), cert. denied, 510 U.S. 914 (1993).

United States v. Mills, 987 F.2d 1311 (8th Cir.) (District Court is not required to determine amount of loss with precision, but rather must make reasonable estimate of loss based on available evidence. On basis of record, this Court concludes government proved losses to 71 victims by preponderance of evidence and District Court did not clearly err in finding total amount of [intended] loss was $1,545,350. This Court rejects Mills s contention that because he returned $746,816 to victims before being criminally charged, Court should have reduced total loss figure by that amount as foreclosed by United States v. Prendergast: focus should be on amount of possible loss defendant attempted to inflict.), cert. denied, 510 U.S. 953 (1993).

United States v. George, 986 F.2d 1176 (8th Cir.) (District Court did not err in finding banks would have stopped doing business with George if they had known they were lending money in amounts greater than actual invoices. Despite bank s recovery of substantial portion of money included in Court s calculation (in excess of $4 million), George intended to inflict [greater] loss as result of his fraudulent conduct.), cert. denied, 510 U.S. 899 (1993).

United States v. Starr, 986 F.2d 281 (8th Cir.) (Record supported District Court s finding of more than minimal planning (§ (b)(2)) where Starr opened accounts at two different banks using two different aliases and engaged third person to deposit check drawn on one account into other account. This Court reverses increase (§ (b)(3)(A)) where government did not show Starr misrepresented that he was acting on behalf of charitable organization.)

United States v. Lamere, 980 F.2d 506 (8th Cir. 1992). (This Court rejects Lameres argument that District Court s reference to Application Note 7 (dealing with probable or intended loss) was error as matter of law. While it would be error to increase appellants offense level based upon specific offense characteristics in § (b)(2)-(b)(6), it is appropriate to look to underlying commentary for guidance in interpreting terms appearing in specific subsection to which Court was referred (here § 2B5.1.).)

United States v. Prendergast, 979 F.2d 1289 (8th Cir. 1992). (This Court rejects Prendergast s position that only "net loss" should be included in "loss" calculation. Focus for sentencing purposes should be on amount of possible loss defendant attempted to inflict on victim. Decision notes split in circuits on definition of "loss.")

United States v. Edgar, 971 F.2d 89 (8th Cir. 1992). (District Court correctly used greater of intended loss and actual loss to calculate offense level increase. It did not err in using going-concern value of company rather than its liquidation value in calculating value of its concealed assets. Though Court properly concluded present value of amount buyer was willing to pay for company is valid measure of company s value, it erred when it treated amount company s owner was to receive under employment agreement as part of purchase price for company. Nor did present value of employment agreement constitute portion of intended loss as company owner s future earnings from personal service were never part of bankruptcy estate. Court concludes that amount of debt places cap on intended loss when individual debtor or sole owner of corporate debtor is party who benefits from concealment. As amount of debt is not fixed in Chapter 11, District Court must make reasonable estimate of amount of debt anticipated at time of fraudulent transfer. This Court reverses and remands for reasonable estimate of intended loss. CONCUR AND DISSENT: Would remand for District Court to impose sentence it thought appropriate (e.g., probation) (§ 5K2.0). Statutory scheme would have district judges first consider sentence which would best achieve statutory purposes and next consider sentences recommended by Guidelines; Sentencing Commission formulated Guidelines instructions in reverse order.)

United States v. Saunders, 957 F.2d 1488 (8th Cir.) (Though Coleman contended dollar amount of checks covered by his bank employee friend ($6,045.24) should be deducted from District Court s determination of dollar figure associated with his conduct ($8,634.53), amount of possible

loss to bank, upon which Court relied, was correct figure.), cert. denied, 506 U.S. 889 (1992).

United States v. Earles, 955 F.2d 1175 (8th Cir. 1992). (Earles challenged addition of six points for amount of victim losses (between $100,000 and $200,000). In calculating defendant s involvement for sentencing purposes, Court is not confined to amount of money personally taken in and handled by defendant. Conspiracy in which Earles participated defrauded victims of over $100,000. Also, District Court properly included amount which did not result in actual loss as victim was able to stop payment on check.)

United States v. West, 942 F.2d 528 (8th Cir. 1991). (West argued District Court error in determining loss to victim. As Guidelines establish that loss includes "probable or intended loss," West s arguments about recalled unused product, withheld funds and settlement credit cannot lower relevant amount.)

United States v. Fousek, 912 F.2d 979 (8th Cir. 1990). (Upward departure permissible (5K2.0) where attorney, appointed as standing trustee in bankruptcy cases, embezzled funds he had held as trustee. This Court concluded embezzlement by bankruptcy trustee atypical of embezzlement contemplated by Sentencing Commission and some loss of confidence in bankruptcy trustee system stands to reason with no specific evidence necessary.)

United States v. Manuel, 912 F.2d 204 (8th Cir. 1990). Where this Court could not fathom justification for base offense level of 12 under this guideline, recognizing Manuel was involved in closely related/sufficiently linked counts of stealing and forging U.S. Treasury instruments (§ 3D1.2(d)), it remanded for resentencing.)

United States v. Morphew, 909 F.2d 1143 (8th Cir. 1990). (Offense level properly raised seven levels as finding of victims monetary loss in loan brokering scheme by District Court was not clearly erroneous.)

United States v. Oliver, 908 F.2d 260 (8th Cir. 1990). (Sentencing Commission has resolved inconsistencies between sentencing provisions of 18 U.S.C. § 495 (no maximum term for offense conduct involving forgery and uttering of $500 or less U.S. Treasury check) and 18 U.S.C. § 510, by specifying § should be used for sentencing offenders under either statute.)

United States v. Johnson, 906 F.2d 1285 (8th Cir. 1990). (Johnson used false identity to obtain bank loans used to purchase two cars, one of which was later repossessed by bank. Other car was stolen and insurance reimbursed bank for loan amount. For sentencing, District Court used total amount of credit extended to Johnson. This Court agreed that despite banks recouping substantial portion of loans as secured creditors, focus for sentencing should be on amount of possible loss Johnson attempted to inflict on bank.)

United States v. Hearrin, 892 F.2d 756 (8th Cir. 1990). (Increase in BOL pursuant to section was not erroneous since record revealed facts which satisfied definition of "more than minimal planning" in Guidelines. Court rejected argument government failed to establish benchmark against

which to measure defendant s conduct and that mail fraud necessarily involves several acts and, therefore, always involves more than minimal planning. Court also rejected argument that phrase "more than minimal planning" is inherently ambiguous, finding that Guidelines define term with clarity and provide helpful illustrations.)

**§ 2F1.1(b)(2)(A) (More Than Minimal Planning/Standard of Review):**

United States v. Lim, 235 F.3d 382 (8th Cir. 2000) (HANSEN,* MURPHY, BYE). (This Court reviews for clear error District Court's finding that offense involved more than minimal planning.)

United States v. Moser, 168 F.3d 1130 (8th Cir. 1999) (LOKEN, JOHN R. GIBSON, MORRIS SHEPPARD ARNOLD*). (This Court reviews finding of more than minimal planning for clear error.)

United States v. Sheahan, 31 F.3d 595 (8th Cir. 1994). (This Court reviews District Court s finding of more than minimal planning (§ 2F1.1(b)(2) for clear error.).)

**§ 2F1.1(b)(2)(A) (More Than Minimal Planning):**

United States v. Lim, 235 F.3d 382 (8th Cir. 2000) (HANSEN,* MURPHY, BYE). (District Court's more-than-minimal-planning finding was not clearly erroneous where mail-fraud defendant made false financial statements, opened credit accounts under two false names, and made eight separate purchases using false accounts. Jewelry company's continued filling of defendant's fraudulent orders--despite non-payment--indicates criminal action by design, not purely opportune circumstance.)

United States v. Baker, 200 F.3d 558 (8th Cir. 2000) (RICHARD S. ARNOLD, LOKEN,* SIPPEL). (District Court imposed increase under (A) and (B) because fraud offense involved more than minimal planning, or scheme to defraud more than one victim. Although defendant argues Court erred in imposing more-than-minimal-planning adjustment because her fraud offense was "simple stealing," she does not deny that she defrauded more than one victim. Thus District Court s finding of more than one victim is sufficient to support two-level increase.)

United States v. Moser, 168 F.3d 1130 (8th Cir. 1999) (LOKEN, JOHN R. GIBSON, MORRIS SHEPPARD ARNOLD*). (Affirming enhancement in bank-fraud case in which stolen check was deposited in bank account opened under false name and social security number. Stolen check was made payable to name matching account, and defendant had obtained matching false identity card, which was used to open account; more important, Moser wrote twelve checks on account using false name, which indicates repeated acts over period of time.)

United States v. Patterson, 148 F.3d 1013 (8th Cir.) (Affirming more-than-minimal-planning enhancement; creation of numerous false documents in transactions in which Patterson was involved amounted to "significant affirmative steps" to hide offense. "Repetition" is not required to show

more than minimal planning, although it may be indicative of it; moreover Court found repeated use of false documents, and Court's finding was not clearly erroneous.), cert. denied, 525 U.S. 1056 (1998).

United States v. Ravoy, 994 F.2d 1332 (8th Cir. 1993). (This Court rejects Ravoy s contention crimes of mail fraud and equity skimming involve extensive planning, and thus, additional two-level increase constitutes double-counting. District Court did not clearly err in assessing two-level adjustment where Ravoy purchased ten residences over 16 month period; handled most of rent payments and continually covered up his true intentions from sellers, subsequent renters, and lenders. In addition, Court s finding scheme was to defraud more than one victim was not clearly erroneous. Either finding alone would have supported increase.)

United States v. Little, 990 F.2d 1090 (8th Cir. 1993). (Little contested enhancement for more than minimal planning, claiming there was no repetition of intentional criminal act, but merely continuation of established pattern. Little s admission, however, that his company had continuing practice of depositing checks into company accounts conceded point (definition at § 1B1.1). District Court also held there were repeated acts over period of time and Little took significant, affirmative steps to conceal offense.)

United States v. Lublin, 981 F.2d 367 (8th Cir. 1992). (District Court s addition of two points was not clearly erroneous where Lublin had detailed written instructions about how to conceal his identity at various banks, how to structure transactions so as to avoid detection, and what answer to give if teller asked for his social security card. Lublin planned what he was going to do and took affirmative steps to conceal crime.)

United States v. Pooler, 961 F.2d 1354 (8th Cir. 1992). (Though Court expresses concern about application of more-than-minimal-planning enhancement to offense which was committed by simple book entry, District Court was not clearly erroneous.)

United States v. West, 942 F.2d 528 (8th Cir. 1991). (As it was not disputed offense itself required more than minimal planning and West was involved for almost two years, District Court s application was not clearly erroneous.)

United States v. Manuel, 912 F.2d 204 (8th Cir. 1990). (Though government argued Manuel s base offense level should be enhanced to level 10 for more than minimal planning, record before District Court did not demonstrate information for support.)

**§ 2F1.1(b)(4) (Misrepresentations and Violations of Court Order):**

United States v. Mohamed, 161 F.3d 1132 (8th Cir. 1998) (BOWMAN,* RICHARD S. ARNOLD, MORRIS SHEPPARD ARNOLD). (Mohamed refused to repay estate of her ex-husband certain life insurance proceeds after judgment awarding her proceeds was reversed. She also failed to comply with subsequent Court orders intended to enforce judgment in favor of estate. To further frustrate collection efforts, she filed for bankruptcy and failed to disclose cash and other assets as

well as transfers of funds to her husband. District Court imposed two-level enhancement for violating judicial or administrative order. Although she makes various arguments as to why violation of Court orders does not warrant enhancement, this Court does not address them, because offense of concealing assets on bankruptcy petition per se warrants enhancement.)

United States v. Lloyd, 947 F.2d 339 (8th Cir. 1991). (Increase was proper where Lloyd sought protection from his creditors under shelter of Chapter 11 bankruptcy and he then abused bankruptcy process and hindered orderly administration of bankruptcy estate by concealing assets.)

**§ 2F1.1(b)(5)(C) (Use of Sophisticated Means):**

United States v. Anderson, 349 F.3d 568 (8th Cir. 2003) (LOKEN,* McMILLIAN, HANSEN). (Whether scheme is sophisticated is fact question reviewed for clear error. District Court did not clearly err in applying enhancement where defendant engaged in complex tactics involving off-shore banks, thereby concealing his fraud by causing his victims to consult lawyers, financial advisors, and accountants in order to determine that their investments were worthless.)

**§ 2F1.1(b)(7)(A) (Risk of Serious Bodily Injury):**

United States v. Hoffman, 9 F.3d 49 (8th Cir. 1993). (As part of scheme to defraud automobile insurance companies, Hoffman would drive in front of unsuspecting motorists who were traveling at slow speeds and slam on his brakes to cause collisions. He contended increase under this section was improper because he arranged only slow-speed accidents and thus, there was no risk of serious bodily injury. This Court disagrees: referencing § 1B1.1, it holds risk of this kind of injury is inherent in automobile accidents Hoffman arranged. Contrary to Hoffman s view, government does not have to show that he intended serious bodily injury, only that he intended to cause accidents.

This Court also rejected Hoffman s contention that victims of fraud (here, insurance companies) must face risk of serious bodily injury for section to apply. This Court observes that section does not specify any particular person who must face risk of injury. Even if section did limit its application to offenses that involve risk of injury to victim of offense, section would still apply because drivers of other automobiles can be considered victims.), cert. denied, 510 U.S. 1203 (1994).

**§ 2F1.1(b)(8)(B) (Jeopardizing or Affecting Financial Institution):**

United States v. Stolee, 172 F.3d 630 (8th Cir. 1999) (FAGG, LAY, WOLLMAN) (per curiam). (Stolee argues that, because $1,000,000 went to corporation and not himself personally, enhancement was improper. This argument fails because Stolee was sole owner and president of corporation, and he arranged for funds to be deposited into account he controlled, and directed how funds were used; thus he indirectly benefitted from illegally derived funds and enhancement applies. Stolee also argues he did not benefit from funds individually but did so with corporate "participant"; this argument also fails because corporation was not separate participant but only legal entity through which Stolee committed offense.)

United States v. Wilson, 41 F.3d 399 (8th Cir. 1994). (Wilson argued District Court improperly enhanced his sentence by four levels because subsection (B) is aimed at major bank crimes involving threat to safety and soundness of financial institutions, and thus does not apply in his case. This Court rejects argument as Wilson s interpretation essentially treats disjunctive "or" between subsections (A) and (B) as "and." No reason to deviate from plain-meaning reading of subsection (B); moreover, subsection of guideline was expanded (test in subsection (A) is more demanding than that in subsection (B)).)

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

**§ 2G1.1(b)(1) (Promoting Prostitution or Prohibited Sexual Conduct):**

United States v. Evans, 285 F.3d 664 (8th Cir. 2002) (LOKEN, RICHARD S. ARNOLD,* FAGG). **(**District Court did not clearly err in applying use-of-force enhancement. Existence of intimate relationship between defendant and prostitutes did not mitigate defendant's culpable conduct, because force was relevant to Mann Act violations as means of controlling prostitutes. Evidence of physical force and coercion was manifold), cert. denied, 123 S. Ct. 1257 (2003).

United States v. Evans, 272 F.3d 1069 (8th Cir. 2001) (LOKEN, RICHARD S. ARNOLD,* FAGG). (District Court did not clearly err in applying 4-level use-of-force enhancement where defendant beat victims; whether or not violence was part of defendant's personal relationships with victims, it was also part of illegal conduct.), cert. denied, 535 U.S. 1029 (2002).

**§ 2G1.2(b)(1) [deleted in 1996 by consolidation with § 2G1.1 (Transporting Minor for Sex)]:**

United States v. Kelly, 989 F.2d 980 (8th Cir.) (Four-level increase for use of force arising out of Kelly s treatment of three of victims was supported by substantial evidence.), cert. denied, 510 U.S. 874 (1993).

**§ 2G2.2 (Pornography Involving Minor):**

United States v. Jones, 994 F.2d 456 (8th Cir. 1993). (Mr. Jones s conduct in taking photos of nine-year-old child was done in preparation for commission of offense of conviction, receiving photos, and thus was properly considered by District Court in applying cross-reference provision.)

United States v. Stanton, 973 F.2d 608 (8th Cir. 1992). (District Court properly increased Stanton s base offense level by five where his possession and intent to sell magazines (to friend) for ($10) profit meets definition of "distribution.")

**§ 2G2.2(b)(1) (Prepubescent Minor or Minor Under Age Twelve):**

United States v. Deaton, 328 F.3d 454 (8th Cir. 2003) (HANSEN, RILEY, MELLOY) (per

curiam). (This Court reviews pictures involved to uphold District Court's determination that images were plainly of actual children younger than twelve.)

**§ 2G2.2(b)(2) (Distribution, Including for Pecuniary Gain or to Minor):**

United States v. Imgrund, 208 F.3d 1070 (8th Cir. 2000) (McMILLIAN, HEANEY, BOGUE*). (Defendant transmitted computer files of child pornography to undercover agent posing as 14-year-old boy, and (according to PSR) proposed that agent take photographs of himself and 12-year-old friend and send them to defendant; agent responded by sending defendant pornographic images. District Court refused to impose 5-level enhancement because defendant s dissemination of pornography was "gratuitous" and it was necessary for him to receive some pecuniary gain. This Court remands for reconsideration in light of United States v. Horn, 187 F.3d 781 (8th Cir. 1999) (distribution is not limited to transactions for pecuniary gain), cert. denied, 529 U.S. 1029 (2000), decided shortly after defendant s sentence was imposed. It is unclear whether District Court was satisfied that defendant contemplated swap or trade of images, and thus remand is appropriate to allow Court to reconsider its ruling and make additional findings if necessary. On remand, Court should apply enhancement only if persuaded that government has demonstrated defendant expected to receive pornographic images in exchange for images he sent.)

United States v. Horn, 187 F.3d 781 (8th Cir. 1999) (LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD*). (Issue is whether trading tapes in order to augment personal collection constitutes "distribution" for purposes of enhancement in this subsection. "Distribution" is given its usual meaning, and includes but is not limited to transactions for pecuniary gain. As Horn was found to have engaged in trade or barter, enhancement or distribution was properly imposed.), cert. denied, 529 U.S. 1029 (2000).

**§ 2G2.2(b)(3) (Sadistic, Masochistic, or Depicting Violence):**

United States v. Wolk, 337 F.3d 997 (8th Cir. 2003) (RILEY, BEAM, SMITH*). (These three images--nude child wearing leather collar and being held against genitals of masked male holding whip, nude child wearing leather collar and being held with her legs spread against male's genitals, and nude child wearing collar and handcuffs that are chained to collar worn by male--are sadistic and violent, supporting enhancement. Guideline has no mens rea requirement, i.e., that defendant intended to transport sadistic or violent material.)

United States v. Stulock, 308 F.3d 922 (8th Cir. 2002) (WOLLMAN,* HEANEY, BYE). (Defendant was acquitted of possessing three images of minor female in bondage because he had only viewed them on website. This was properly treated as relevant conduct, however, and District Court did not clearly err in applying enhancement based on finding that defendant had encountered images during his search for and receipt of child pornography videotape for which he was convicted.)

United States v. Parker, 267 F.3d 839 (8th Cir. 2001) (WOLLMAN, HANSEN,* SCHREIER). (District Court erred by failing to grant enhancement. Terms "violence" and

"sadism," as ordinarily used, are not limited to activity involving rope, belt, whip, chains, or other instruments; sexual penetration with foreign object of minor female was "violence" even if self-inflicted, and conduct portrayed in other images (forced oral sex, adult male ejaculating into face and open mouth of crying baby, and adult males urinating in face of female child) was sufficiently painful, coercive, abusive, and degrading to qualify as sadistic or violent.), cert. denied, 535 U.S. 1011 (2002).

**§ 2G2.2(b)(4) (Pattern of Abuse or Exploitation):**

United States v. Ashley, 342 F.3d 850 (8th Cir. 2003) (BOWMAN, BYE,* ERICKSEN). (Application Note 1 and amendment notes make clear that "pattern of activity" includes acts of sexual abuse or exploitation committed prior to instant offense, including broader range of activity than would be considered relevant conduct. Thus, defendant's five-year-old convictions for molesting his children were properly used to enhance his sentence for instant conviction for receiving child pornography.)

United States v. Horn, 187 F.3d 781 (8th Cir. 1999) (LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD*). (This Court agrees with defendant that enhancement for engaging in pattern of activity involving sexual exploitation or abuse of minor does not include trafficking in child pornography. Application Note 1 was amended in 1996 and now states quite explicitly that sexual abuse does not include trafficking in material relating to sexual abuse or exploitation of minor; moreover Commission stated revision was merely clarifying (defendant committed his offense in 1995).), cert. denied, 529 U.S. 1029 (2000).

United States v. Pharis, 176 F.3d 434 (8th Cir. 1999) (McMILLIAN, MORRIS SHEPPARD ARNOLD, SACHS*). (District Court correctly denied 5-level increase, concluding enhancement for engaging in "pattern of activity involving sexual abuse or exploitation of minor" was inapplicable; Pharis s prior state convictions for making obscene telephone calls to minors and exposure of his genital area to minors did not involve physical sexual contact with children or creation of child pornography as required for this enhancement.)

**§ 2G2.2(b)(5) (Use of Computer):**

United States v. Stulock, 308 F.3d 922 (8th Cir. 2002) (WOLLMAN,* HEANEY, BYE). (Defendant was convicted of receiving child pornography for buying videotape by mail in response to solicitation he received by email. District Court properly applied enhancement because it applies both to defendant who advertises child pornography through his computer and to defendant who receives advertisement for child pornography through his computer.)

**§ 2G2.4(b)(3) (Possession of Pornography Involving Minors; Computer-Use Enhancement):**

United States v. Vincent, 167 F.3d 428 (8th Cir.) (FAGG,* BEAM, MORRIS SHEPPARD ARNOLD). (Enhancement applies to those who receive, as well as those who send, pornography

by computer; formulation of Guidelines is not subject to judicial review unless Commission oversteps constitutional bounds. Court also rejects due process argument that there is no rational justification for penalizing those who receive pornography by computer more than those who buy from suppliers: Internet has become common means of transmitting such material, it is difficult to detect and prevent in cyberspace, and this section provides extra deterrent.), cert. denied, 528 U.S. 848 (1999).

**§ 2G2.4(c)(2) (Trafficking):**

United States v. Horn, 187 F.3d 781 (8th Cir. 1999) (LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD*). (Affirming application of this subsection's cross-reference to § 2G2.2--which is required when offense involved "trafficking in material involving sexual exploitation of minor"--over defendant's argument that District Court did not make specific finding he trafficked or intended to traffic in child pornography: (1) memo book contained information about tapes defendant had sent to others, and it appeared some of videos contained child pornography; (2) defendant sent detective two tapes which turned out to contain some child pornography; and (3) defendant's letters to detective contained passage describing his usual method for sending sexually explicit material involving minors. District Court also correctly held cross-reference applies when offense involves exchange or barter of material--not only when material is offered for sale.), cert. denied, 529 U.S. 1029 (2000).

**Part H. Offenses Involving Individual Rights**

**§ 2H1.1(a)(3) (Use or Threat of Force):**

United States v. Webb, 252 F.3d 1006 (8th Cir. 2001) (WOLLMAN, MURPHY,* GOLDBERG). (District Court's finding that defendant did not use force during sexual assault was clearly erroneous. Defendant sheriff's office door was closed and eventually locked during meeting with victim. After he proceeded to fondle victim's breasts and kiss her neck, and she complained and moved away, he pushed her down on love seat and laid his 370 pound body on top of her and refused to let her up. While he was lying on her, he insinuated he would help her (by protecting her from abusive husband) only if she cooperated, and told her she was "talking to right guy"; when he got up to lock door, victim was able to escape from love seat, but then defendant grabbed her hand and placed it on his exposed penis and asked for oral sex. In these circumstances, defendant clearly used both physical and psychological coercive power and sufficient force to prevent victim from escaping sexual contact.)

United States v. Webb, 214 F.3d 962 (8th Cir. 2000) (WOLLMAN, MURPHY,* GOLDBERG). (Government challenged District Court's application of Guidelines, arguing it erred in interpreting § 2H1.1(a)(3)(A)'s "use or threat of force against person" to require use of violence, and in finding defendant had not used force in his sexual assault of private citizen. This Court looks to its and other circuits' prior holdings--in abusive-sexual-conduct cases--that use of force is satisfied by use of such physical force as is sufficient to restrain person or prevent victim from escaping. This Court finds that proper standard under § 2H1.1(a)(3)(A) for judging whether

defendant used or threatened force during sexual assault is whether any force involved was sufficient to prevent victim from escaping sexual contact. Reversed and remanded for District Court to reconsider defendant's base offense level in light of new definition; this Court recognizes District Court's vantage point in judging credibility and demeanor of witnesses, and any disparities in size or coercive power of defendant and victim.)

**§ 2H1.1(b) (Public Official or Under Color of Law):**

United States v. Webb, 214 F.3d 962 (8th Cir. 2000) (WOLLMAN, MURPHY,* GOLDBERG). (Defendant, state sheriff found guilty of violating private citizen's civil rights by sexual assault, argued District Court erred in imposing six-level enhancement at sentencing because his offense was committed under color of state law; defendant contended application of enhancement amounted to double-counting because statute under which he was convicted required his conduct to be under color of law. This Court upholds enhancement as it is also warranted if defendant was public official at time of offense, fact to which defendant stipulated.)

**Part J. Offenses Involving Administration of Justice**

**§ 2J1.1 (Contempt):**

United States v. Ferrara, 334 F.3d 774 (8th Cir. 2003) (WOLLMAN,* MAGILL, BEAM). (Defendant was caught operating fraudulent schemes and entered into consent agreement with government requiring him to comply with disclosure requirements. He violated that agreement and was convicted of contempt of court. District Court properly applied cross-reference to § 2X5.1 and properly determined that § 2F1.1 was most analogous Guideline.), cert. denied, 124 S. Ct. 1127 (2004).

**§ 2J1.2 (Obstruction of Justice/Standard of Review):**

United States v. Schnurstein, 977 F.2d 449 (8th Cir. 1992). (Whether assault caused physical injury is factual finding subject to clearly erroneous standard of review.)

**§ 2J1.2 (Obstruction of Justice):**

United States v. Plumley, 207 F.3d 1086 (8th Cir. 2000) (WOLLMAN,* F. GIBSON, MURPHY). (Witness testified that defendant " informed us all to keep our mouth shut, because if anyone cooperated with police he would kick our ass. "

**(1)** Sufficiency of evidence. District Court properly applied preponderance-of-the-evidence standard in determining whether this statement was in fact made, and reviewing for clear error, this Court upholds District Court s finding that defendant made threat.

**(2)** Seriousness of threat. Statement was sufficiently serious to warrant enhancement. This Court agrees with sister circuits which have found that threats of violence, as such, fit within " the

more serious forms of obstruction " as contemplated by applicable background commentary.

**(3)** Nexus with underlying offense. Fact that threat occurred prior to conduct forming basis for obstruction-of-justice conviction does not mean threat may not be considered relevant conduct for purposes of specific offense characteristic. Although threat involved pipe-bombing investigation, and obstruction-of-justice conviction was based on instructions focusing on investigation into motorcycle theft, both threat and defendant s subsequent efforts to ensure that his companions grand jury testimony aligned with his own appear to have been part of overall scheme to evade responsibility for both theft and bombing, crimes that were related to each other at outset (one of stolen motorcycles was used in bombing).)

United States v. Jackson, 67 F.3d 1359 (8th Cir. 1995). (Upon de novo review, this Court holds District Court erred in applying § 2J1.2(b)(2) for three-level increase to Graham. Basis of District Court s ruling was unnecessary expense incurred by government in investigating source of leaked grand jury testimony; flaw in reasoning was lack of causal link between Graham s crimes and government s need to investigate link. Problem is one of nexus: Graham neither procured nor disseminated leaked summaries. Although Graham s crimes were triggered by contents of summaries, he bore no responsibility for their initial release. Had Graham succeeded in forcibly halting Jackson s cooperation with law enforcement, then he might have qualified for increase. Fact government learned of leak as consequence of Graham s actions does not make Graham source of leak.), cert. denied, 517 U.S. 1192 (1996).

United States v. Dykstra, 991 F.2d 450 (8th Cir.) (Dykstra argued error in applying general obstruction of justice guideline (base offense level 12) in sentencing him for violation of 26 U.S.C. § 7212(a), rather than § 2A2.4 (base offense level 6). Violation of omnibus clause of § 7212(a) tracks statutes which prohibit corrupt endeavors to impede due administration of law under which any pending proceeding is being had before federal department or agency. Thus, District Court did not err in applying § 2J1.2 as most appropriate.), cert. denied, 510 U.S. 880 (1993).

United States v. Schnurstein, 977 F.2d 449 (8th Cir. 1992). (The District Court did not clearly err in applying eight level upward adjustment where it decided government provided sufficient evidence that assault committed by Schnurstein caused physical injury--victim went to hospital and spent time there to assess nature, character, and extent of injuries suffered.)

United States v. Cammisano, 917 F.2d 1057 (8th Cir. 1990). (Case remanded for resentencing where District Court imposed eight point upward adjustment, finding preponderance of evidence demonstrated Cammisano was member of organized crime and also, criminal history score underrepresented his involvement with crime. Both §§ 4A1.3 and 5K2.0, though not cited by District Court, are relevant. Upon remand, Court must fully articulate its reasons for any departure and extent of departure.)

**§ 2J1.2(c) (Investigation or Prosecution of Criminal Offense):**

United States v. Russell, 234 F.3d 404 (8th Cir. 2000) (BOWMAN,* BEAM, BOGUE). (Defendant was convicted of obstructing justice in connection with his role as confidential informant

in undercover drug operation pursuant to which he was paid to identify drug dealers and make controlled drug buys. He also was expected to testify. During prosecution of those persons identified during drug sting, defendant Russell had falling out with authorities over terms of his payment and thereafter signed affidavits exonerating various defendants who had been indicted, one of whom Russell had already testified against at criminal trial. Subsection (c) controlled defendant's base offense level because his actions involved obstruction of investigation or prosecution of criminal offense, and because calculation using § 2X3.1 resulted in offense level greater than highest possible level under § 2J1.2(a) and (b).

**§ 2J1.3(b)(2) (Perjury; Bribery of Witnesses - Substantial Interference with Administration of Justice):**

United States v. Plumley, 207 F.3d 1086 (8th Cir. 2000) (WOLLMAN,* F. GIBSON, MURPHY). ((1) Double-counting argument. Defendant contends substantial-interference enhancement amounts to "double-counting" single statement he repeated on several occasions, and this effectively penalizes him for exercising his right to testify on his own behalf during judicial proceedings. This argument fails because although District Court initially indicated its intent to rely in part on one of statements underlying perjury conviction (defendant denied involvement in motorcycle theft, each time giving different alibi), District Court orally amended this decision during sentencing hearing and chose instead to rely only on separate statements regarding legal representation that defendant had made during two suppression hearings. Because these two incidents were wholly separate from, and in addition to, defendant s grand-jury statement leading to his perjury charge and his statement to government agent that led to false-statement charge, no double-counting occurred.

(2) Application. District Court was required to be convinced of defendant s untruthfulness on two occasions in question by preponderance of evidence; here Court found he had lied at both suppression hearings, and such credibility determinations are " close to invulnerable on appeal "; and given resultant need for additional preparation, investigation, and testimony, conclusion that defendant s perjury at suppression hearings required unnecessary expenditure of substantial governmental and Court resources was not clearly erroneous.)

**§ 2J1.3(c)(1) (Perjury/Bribery Cross Reference):**

United States v. Blanton, 281 F.3d 771 (8th Cir. 2002) (WOLLMAN,* HANSEN, FENNER). (Whether perjury was "in respect to a criminal offense" is question of fact. District Court clearly erred in failing to apply cross reference where witness had been informed prior to or during her grand jury testimony about subject of grand jury's inquiry, car used in series of bank robberies, and witness lied about car.)

**§ 2J1.6 (Defendant's Failure to Appear):**

United States v. Bell, 183 F.3d 746 (8th Cir. 1999) (LOKEN,* HANSEN, MORRIS SHEPPARD ARNOLD). (Bell pleaded guilty to (1) aiding and abetting possession of cocaine base with intent to distribute, (2) using minor in drug trafficking offense, and (3) failing to appear.

District Court grouped three offenses; determined base offense level was 32 under U.S.S.G. § 2D1.2(a)(1), Guideline for drug offenses involving underage individuals; added 2 levels for obstruction of justice, based on Bell's failure to appear; and subtracted 3 levels for acceptance of responsibility. This Court rejects Bell's argument that impermissible double-counting occurred: use-of-a-minor crime was counted once by using § 2D1.2 as base offense level, and failure-to-appear crime was counted once when Bell received obstruction-of-justice adjustment, adjustment expressly required when failure-to-appear offense is grouped in this fashion under U.S.S.G. § 2J1.6, comment. (n.3) and 3C1.1, comment. (n.8). Obstruction adjustment was not based on conduct that was part of crime itself, because obstruction of justice was independent of Bell's drug-trafficking crimes.)

United States v. Crow Dog, 149 F.3d 847 (8th Cir. 1998). (District Court properly refused to group failure to appear conviction and conviction for underlying offense, and correctly imposed separate and consecutive sentence for failure to appear conviction. 18 U.S.C. § 3146(b)(2) provides that sentence for failure to appear count must be consecutive to sentence of imprisonment for any other offense, and U.S.S.G. § 2J1.6, comment. (n.3), which suggests contrary treatment, conflicts with and thus must yield to § 3146(b)(2). Application Note 3 is also inconsistent with two Guidelines, U.S.S.G. §§ 3D1.1(b) and 5G1.2(a).)

United States v. Marion, 977 F.2d 1284 (8th Cir. 1992). (Second District Court concluded amended section 2J1.6 failed to reasonably comply with Congress s statutory directive and so, discarded Guidelines and sentenced Marion to eighteen-month sentence consecutive to five-month term on underlying social security fraud conviction. This Court holds guideline must be upheld as Commission s amendment now distinguishes between defendant who fails to report to serve sentence already imposed and one who fails to appear for trial, appeal, or sentencing; distinction in method of computing sentence indicates Commission considered factors listed by Congress. District Court erred in discarding guideline.)

United States v. Lee, 887 F.2d 888 (8th Cir. 1989). (Court found that when defendant received sentence which was only fraction of statutory maximum for offense and then failed to appear after sentencing to serve that sentence (as opposed to failing to report for trial or sentencing when possibility exists that max will be imposed) § 2J1.6 of Guidelines does not govern sentencing for failure to appear offense. Application of 2J1.6, in this case by increasing offense level nine levels because maximum term on underlying offense was fifteen years or more, where defendant failed to appear for eighteen-month sentence was not sufficiently reasonable and violated statutory mandate to Sentencing Commission. Court remanded for resentencing as if there was no Guideline applicable to offense. Court did not address issue where sentence is "more than fraction" of maximum term.)

**§ 2J1.7 (Commission of Offense While on Release):**

United States v. Gullickson, 981 F.2d 344 (8th Cir. 1992). (Gullickson s status as probationer did not fall within 18 U.S.C. § 3147 which governs release of defendants pending trial, sentencing, or appeal. Thus, he was not on release status when he committed federal crime and not subject to enhancement.)

United States v. Lincoln, 956 F.2d 1465 (8th Cir.) (Three-level enhancement satisfies requirement of 18 U.S.C. § 3147, as statute does not require minimum enhancement term; whatever enhancement results from three-level upward adjustment satisfies statute s requirement. Offense Lincoln committed on release was neither consolidated for trial or sentencing or grouped with mail fraud offense; thus, District Court ruled correctly by requiring Lincoln to serve his subornation sentence consecutively to his arson and mail fraud sentences, and to serve his enhancement under § 3147 and § 2J1.7 consecutively to all three sentences.), cert. denied, 506 U.S. 891 (1992).

**Part K. Offenses Involving Public Safety**

**§ 2K1.3 (Receipt, Possession, or Transportation of Explosives; Prohibited Transactions):**

United States v. Nation, 243 F.3d 467 (8th Cir. 2001) (WOLLMAN,* RICHARD S. ARNOLD, HANSEN). (Escape is categorically crime of violence as defined in § 4B1.2. Guidelines direct Court to examine nature of expressly charged conduct rather than particulars of defendant's behavior, and here criminal information charged defendant with being convicted felon who escaped from correctional facility. Every escape, even "walkaway" escape, involves potential risk of injury to others. Thus, District Court incorrectly calculated defendant's base offense level under § 2K1.3(a).)

**§ 2K2.1 (Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions/Standard of Review):**

United States v. Oetken, 241 F.3d 1057 (8th Cir. 2001) (BEAM, MORRIS SHEPPARD ARNOLD,* ALSOP). (District Court's application of Guidelines is reviewed de novo.)

United States v. Regans, 125 F.3d 685 (8th Cir. 1997). (District Court s finding regarding purpose in possessing firearm is reviewed for clear error.), cert. denied, 523 U.S. 1065 (1998).

**§ 2K2.1 (Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions):**

United States v. Charles, 209 F.3d 1088 (8th Cir. 2000) (McMILLIAN, HEANEY,* BOGUE). ((1) Prior convictions at issue. On March 9, 1994, defendant entered convenience store and took property. Nine days later he re-entered convenience store to take property and was arrested. He was charged with commercial burglary and theft of property for March 22 incident (counts one and two), and with commercial burglary for March 31 incident (count three). He pleaded guilty to all three counts, they were consolidated for sentencing, and he was sentenced to 15 days imprisonment and 5 years probation. His probation was later revoked, and he was sentenced to 2 years imprisonment.

(2) Effect at later federal sentencing on possession-of-stolen-firearm charge. Defendant did not have at least two prior qualifying felony convictions for purposes of establishing base offense level of 24 under § 2K2.1(a)(2), because his three sentences for prior convictions ran concurrently

(sentencing judge could have delineated on order that sentences were to run consecutively, but did not); and charges against him were consolidated for sentencing. Thus they are treated as single sentence and are not counted separately. Accordingly, commercial burglary convictions are not two prior felony convictions and he does not qualify for base offense level of 24. Accordingly, reversal is warranted.)

United States v. Wright, 145 F.3d 972 (8th Cir.) (Wright submits mere possession of firearm near narcotics cannot constitute possession "in connection with" another offense to qualify for sentence enhancement, and his enhanced sentence of 120 months imprisonment should be vacated. This Court points out District Court did not apply enhancement based merely on evidence of proximity; rather Court relied on Wright s admission he possessed gun in connection with narcotics trafficking. This Court finds no error in application of § 2K2.1(b)(5) or § 2K2.1(c)(1) to defendant who admits he possessed firearm in connection with another offense. 120-month sentence imposed affirmed.), cert. denied, 525 U.S. 919 (1998).

United States v. Miner, 108 F.3d 967 (8th Cir.) (Sentencing Guidelines required cross-referencing of Miner s gun- related crimes, § 2K2.1(c)(1), and District Court properly applied §§ 2X1.1 and 2A2.1(a)(1) based on finding Miner committed assault with intent to commit murder.), cert. denied, 522 U.S. 904 (1997).

United States v. Cooper, 63 F.3d 761 (8th Cir. 1994), reinstating 35 F.3d 1248 (8th Cir. 1994). (Supreme Court vacated panel s judgment and remanded for further consideration in light of California Dep t of Corrections v. Morrales. This Court concludes Supreme Court s decision does not alter result in this case. Cooper argued District Court misapplied Guidelines because it failed to take evidence and make explicit findings regarding aggregate number of firearms involved for purposes of determining appropriate offense level. Five firearms were implicated in three counts to which Cooper pleaded guilty. Cooper objected to inclusion of additional two firearms from offenses that occurred prior to November 1, 1991, and also to inclusion of firearms derived from uncharged conduct. Where District Court applied two-level upward adjustment (§ 2K2.1(b)(1)(B)) which would have been same for either five or seven firearms, more specific finding was not required for sentencing purposes.

Cooper argued amendment was promulgated in violation of enabling legislation and congressional intent, violating directive that unwarranted sentencing disparities are to be avoided in sentencing of defendants with similar records found guilty of similar criminal conduct. Reading 28 U.S.C. § 994(o) in its entirety makes it clear Congress authorized and envisioned periodic revisions could be either upward or downward. Sentencing Commission s articulated reasons for amendment were sufficient to meet requirements of 28 U.S.C. § 994(p); even if this Court agreed reasons were not sufficient, Congress did not subject Commission process to all aspects of APA, e.g., provisions for judicial review.), cert. denied, 517 U.S. 1158 (1996).

United States v. Fleming, 8 F.3d 1264 (8th Cir. 1993). (Applying cross-reference provisions, District Court calculated Fleming s sentence using base offense level of twelve and adding three points for using firearm in commission/attempted commission of another crime; five points (§ 2A2.2(b)(2)(A)) as firearm was discharged; and three point victim-related adjustment

(§ 3A1.2(a)(b)). District Court sentenced Fleming at upper end of guideline range after finding Fleming had assaulted police officer and fired shot. District Court concluded cross-reference to aggravated assault was proper. District Court based its findings on testimony adduced at trial and this Court finds ample evidence to support District Court s finding and no error in application of Guidelines.)

**§ 2K2.1(a) (Base Offense Level):**

United States v. Piggie, 316 F.3d 789 (8th Cir.) (BOWMAN,* LAY, MURPHY.) (Apprendi requirements do not apply to setting offense level based on type of firearm because it does not raise defendant's sentence beyond statutory maximum. Parties' stipulation that firearm was inoperable, without stipulation that inoperability was permanent, did not preclude application of enhancement; and defendant's general or Apprendi-based objections to enhancement did not require government to prove non-permanence of inoperability to justify enhancement. Absence of specific objection below leaves this Court reviewing only for clear error, and finding none. DISSENT: by stipulating that gun was inoperable and failing to submit any evidence showing that inoperability was not permanent, government failed to meet its burden to prove basis for enhancement. Government's conduct was bad faith or hoodwinking of defendant.), cert. denied, 124 S. Ct. 157 (2003).

United States v. Oetken, 241 F.3d 1057 (8th Cir. 2001) (BEAM, MORRIS SHEPPARD ARNOLD,* ALSOP). (Offense for which defendant was convicted after he committed instant offense was not "prior felony conviction," and hence § 2K1.1(a)(4)(A) could not be used to set base offense level.)

United States v. Kind, 194 F.3d 900 (8th Cir. 1999) (RICHARD S. ARNOLD, LOKEN,* BYRNE). (Issue: is "aggravated harassment" "crime of violence" for purposes of determining whether Kind had at least two prior felony convictions of crime of violence, thus warranting base offense level of 24 under § 2K2.1(a)(2)? State Court complaint underlying Kind's aggravated-harassment offense indicated he had harassed female acquaintance at her residence, then had retreated to her garage with firearm; victim told police she had understood Kind was threatening to shoot lot of people, including herself. This Court agrees with District Court that Kind committed crime of violence for purposes of this section.), cert. denied, 528 U.S. 1180 (2000).

**§ 2K2.1(b)(1) (Number of Firearms/Standard of Review):**

United States v. Kissinger, 986 F.2d 1244 (8th Cir. 1993). (This Court may reverse District Court s findings regarding defendant s purposes in possessing firearm only if they are clearly erroneous.)

**§ 2K2.1(b)(1) (Number of Firearms):**

United States v. Lewis, 236 F.3d 948 (8th Cir. 2001) (RICHARD S. ARNOLD,* BEAM, LOKEN). (This Court rejects argument that defendant should not have received two-level enhancement under § 2K2.1(b)(1)(B) for possessing multiple firearms, because he did not actually

or constructively possess them. Sentencing testimony from defendant's father and from agent involved in search of defendant's apartment established that firearms found in apartment were under defendant's control; in fact, two firearms were found in safe to which defendant alone had combination.)

United States v. Shepard, 207 F.3d 455 (8th Cir. 2000) (RICHARD S. ARNOLD,* FAGG, HANSEN). (Upholding as not clearly erroneous District Court s factual finding that defendant possessed 5 firearms; although he disputes his possession as to one, there was evidence he told bail bondsman that he owned gun, evidence District Court evidently believed.)

United States v. Kissinger, 986 F.2d 1244 (8th Cir. 1993). (District Court s finding--that Kissinger kept derringer in Washington as part of his collection of weapons, but when he removed gun from his collection and carried it with him to South Dakota to use for personal protection, he no longer possessed it for collection or sporting purposes--was not clearly erroneous. Moreover, surrounding circumstances supported District Court s determination.)

United States v. Napoli, 954 F.2d 482 (8th Cir. 1992). (Government appealed what it characterized as District Court s downward departure. This Court reframes issue as dispute over applicability of guideline and affirms District Court s calculation of base offense level of 4 (as opposed to PSR recommendation of 14) and sentence of probation pursuant to § 5B1.1. District Court s findings that Napoli did not possess shotgun for unlawful purpose; that he mistakenly believed shotgun was collector s item; that Napoli himself modified shotgun; and that he never fired it--were not clearly erroneous. While Napoli s belief shotgun was collectible was mistaken, that does not make section inapplicable to case.)

United States v. Amerson-Bey, 898 F.2d 681 (8th Cir. 1990). (Knowledge of stolen nature of firearm is not required for enhancement.)

United States v. Anderson, 886 F.2d 215, 216 (8th Cir. 1989). (No need to show knowledge that gun was stolen to support increase of offense level.)

**§ 2K2.1(b)(2) (Lawful Sporting Purposes or Collection/Standard of Review):**

United States v. Truelson, 169 F.3d 1173 (8th Cir. 1999) (BEAM, LOKEN, BOGUE). (This Court reviews finding regarding defendant's purpose in possessing firearms for clear error.)

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

United States v. Quinn, 358 F.3d 559 (8th Cir. 2004) (MORRIS ARNOLD, HANSEN, RILEY) (per curiam). (Because defendant conceded at sentencing that he possessed any of eight firearms in connection with another felony offense, justifying § 2K2.1(b)(5) enhancement, he was not entitled to reduction under § 2K2.1(b)(2), which requires that all firearms be possessed solely for lawful sporting or collection purposes.)

United States v. Johnson, 326 F.3d 934 (8th Cir. 2003) (WOLLMAN,* RICHARD ARNOLD, SMITH). (Because defendant properly received enhanced base offense level under § 2K2.1(a)(4)(A) for prior crime-of-violence conviction, he was ineligible to receive lawful-sporting-purposes reduction under (b)(2).)

United States v. Ramirez-Rios, 270 F.3d 1185 (8th Cir. 2001) (BOWMAN, HEANEY,* BYE). (Defendant, who admitted wife's handgun was kept for personal protection, did not qualify for sporting-purposes reduction. Declining to consider argument that defendant possessed two other firearms for hunting, because possession of handgun for protection purposes precludes application of reduction.)

United States v. Letts, 264 F.3d 787 (8th Cir. 2001) (LOKEN, HEANEY, BYE*). (District Court did not clearly err in finding that defendant's 55 firearms did not constitute collection, as he kept several of them loaded, and officers found weapons in various and sundry places rather than together. Likewise, District Court did not clearly err in finding that defendant did not possess firearms solely for lawful sporting purposes, noting firearms included assault rifle equipped with flare launcher.), cert. denied, 535 U.S. 908 (2002).

United States v. Truelson, 169 F.3d 1173 (8th Cir. 1999) (BEAM, LOKEN, BOGUE). (Defendant's purpose in possessing firearms turns on relevant surrounding circumstances, including number and type of firearms, amount and type of ammunition, location and circumstances of possession and actual use, and defendant's criminal history. District Court did not clearly err in finding Truelson failed to prove firearms were possessed solely for collection, given variety of new and used guns found in Truelson's residence; presence of partially used ammunition; Truelson's equivocal answer regarding collection (he had answered "yeah, pretty much," when asked if he purchased or possessed firearms for collection purposes); and evidence of ongoing drug activity.)

United States v. Waggoner, 103 F.3d 724 (8th Cir. 1997). (Waggoner went pheasant hunting, violating special condition of his probation and 18 U.S.C. § 922 which bars felons from possessing firearms. Waggoner's probation was revoked and he served remaining six months of his original sentence. Subsequently, Waggoner pleaded guilty to § 922 violation for conduct that led to his probation revocation. At sentencing, Waggoner argued his BOL for § 922 violation should be reduced from 12 to 6 because he possessed firearm solely for lawful sporting purposes, § 2K2.1(b)(1). District Court denied reduction because hunting in violation of condition of probation is not lawful sporting purpose. As to whether gun used to hunt pheasants was possessed "solely for lawful sporting purpose" given Waggoner's no hunting condition of probation is issue of guideline interpretation which this Court reviews de novo; Waggoner has burden of proof. Waggoner violated express Court order not to engage in "hunting activities," order entered to protect public from resumption of his prior illegal activities; District Court had inherent power to punish for contempt of that order. While punishment imposed on Waggoner for violating these particular Court orders was probation revocation, his conduct properly considered unlawful in criminal sense of term. Waggoner was prohibited from all "hunting activity" and he violated this special condition. Thus, he committed violation by using firearm that was in his possession for unlawful sporting purpose. For that reason peculiar to Waggoner's § 922 offense, he was properly denied

§ 2K2.1(b)(1) reduction. DISSENT: Waggoner's hunting was consistent with purpose of § 2K2.1(b)(1) reduction. Dissent would adopt Fifth Circuit definition of "lawful"--a sporting purpose or collection that would be lawful if performed by any citizen free of all legal disabilities. Majority view Waggoner theoretically could be prosecuted for criminal contempt is not consistent with circuit precedent and potential of contempt conviction fails to illuminate whether hunting itself was lawful. Factors listed in comment. (n.2) (1989) favor Waggoner. Guidelines tend to treat probation violations as breach of trust, rather than unlawful behavior.)

United States v. Mendoza-Alvarez, 79 F.3d 96 (8th Cir. 1996). (Mendoza-Alvarez challenged District Court s failure to grant him eight-level reduction, § 2K2.1(b)(2) (possession solely for lawful sporting purposes or collection), for his conviction for possession of firearm by illegal alien. District Court denied reduction because Mendoza-Alvarez was apprehended driving his car with loaded rifle in violation of Ia. Code Ann. § 483A.36. Mendoza-Alvarez claims he possessed rifle solely for sporting purposes, had been hunting morning police stopped his auto, and was in hurry to get to work; he presented his Ia. hunting license and affidavits confirming he used rifle for hunting rabbits. In oral plea agreement, government promised Mendoza-Alvarez it would remain silent on his eligibility for reduction except to ensure factual accuracies. Nonetheless, when District Court asked government for position on issue, government s lawyer responded Court has no discretion, § 2K2.1(b)(2) does not apply. Government clearly violated oral plea agreement. This Court rejects government s contention its violation did not prejudice Mendoza-Alvarez because denial of reduction was compelled as matter of law. Court concludes transporting firearm in violation of auto safety laws does not constitute per se otherwise unlawful use of firearm under § 2K2.1(b)(2). Ordinary and natural meaning of word "use" means something more than illegally transporting firearm after hunting, context of § 2K2.1(b)(2) also supports interpretation of "otherwise unlawfully used" requiring something more than bare violation of auto safety law. Court concludes "otherwise unlawful use" must be some action similar to "unlawful discharge" such as using gun to threaten or beat another person. Court reverses and remands, commenting it is still incumbent on defendant seeking such reduction to show he possessed firearm for lawful sporting purpose and thus, Mendoza-Alvarez will be required to demonstrate by preponderance of evidence he possessed rifle for hunting.)

United States v. Moit, 100 F.3d 605 (8th Cir. 1996). (Moit argued evidence established his father possessed guns as keepsakes, solely for collection purposes, and Moit kept them for his father. Moit noted age of some weapons indicated they were antique firearms of type one would collect. Government argued § 2K2.1(b)(2) did not apply where defendant kept gun collection on behalf of another person and guns were not found in locations consistent with collection purposes. District Court found substantial evidence, and appropriate inferences to be derived from evidence, showed guns and ammunition were not used solely for lawful sporting purposes or collection. After reviewing record as whole, this Court is left with firm and definite conviction mistake has been committed and concludes District Court clearly erred in finding as to Moit s purpose in possessing guns. This Court notes District Court did not specifically identify either "substantial evidence" or "appropriate inferences" to which it referred nor did it make any explicit findings as to witnesses credibility. All guns were unloaded, hunting-type firearms, and ammunition retrieved by officers was consistent with weapons involved. Although spent .22 casings were also discovered, .22 rifle

found stored in cabinet was inoperable (and Moit testified his brother had used another .22 rifle at property). Moit denied having shot any of guns since becoming convicted felon and his criminal history reflected no convictions for offenses involving firearms. This Court rejects government s argument one who possesses gun collection owned by another can never receive § 2K2.1(b)(2) decrease.)

United States v. Hernandez, 972 F.2d 885 (8th Cir. 1992). (This Court rejects Hernandez s argument that Commission exceeded its statutory authority by allowing enhancement absent showing he had actual knowledge weapon was stolen. Degree of scienter required by statute (18 U.S.C. § 922(b)) was established by Hernandez s conviction; Guideline s indifference to whether defendant knew gun was stolen is not in conflict with statute--it is different issue.), cert. denied, 507 U.S. 922 (1993).

United States v. Dinges, 917 F.2d 1133 (8th Cir. 1990). (District Court s finding that Dinges was not entitled to downward adjustment because he possessed assault rifle for neither sporting purposes nor as collector s item, not clearly erroneous where surrounding circumstances included later ATF ban of assault rifles, presence in Dinges s car of number of different kinds of firearms, quantity of ammunition and explosives.)

**§ 2K2.1(b)(3) (Possession of Destructive Device):**

United States v. Backer, Nos. 03-1381/1519 (8th Cir. 2004) (RILEY, BEAM, SMITH*). (Facts clearly show that enhancements for obliterated serial number and for destructive device should have been applied. District Court was incorrect in belief that application of enhancements would constitute impermissible double-counting, and was also wrong in denying enhancements as substitute for awarding acceptance-of-responsibility reduction to defendant. Case remanded for resentencing.)

United States v. Lee, 351 F.3d 350 (8th Cir. 2003) (RILEY,* BEAM, SMITH). (It is not impermissible double-counting or Double Jeopardy violation to apply this enhancement to defendant on grounds that he possessed sawed-off shotgun and when his base offense level was set under provision applicable to sawed-off shotguns, § 2K2.1(a)(5).)

**§ 2K2.1(b)(4) (Stolen Firearm or Altered Serial Number):**

United States v. Backer, Nos. 03-1381/1519 (8th Cir. 2004) (RILEY, BEAM, SMITH*). (Facts clearly show that enhancements for obliterated serial number and for destructive device should have been applied. District Court was incorrect in belief that application of enhancements would constitute impermissible double-counting, and was also wrong in denying enhancements as substitute for awarding acceptance-of-responsibility reduction to defendant. Case remanded for resentencing.)

United States v. Hedger, 354 F.3d 792 (8th Cir. 2004) (WOLLMAN, BOWMAN, RILEY*).

(It was not impermissible double-counting for defendant to receive enhancement under (b)(4) for possessing stolen firearm as well as enhancement under (b)(5) for possessing firearm in connection with another felony offense, i.e., act of stealing it.)

United States v. Martinez, 339 F.3d 759 (8th Cir. 2003) (MORRIS ARNOLD, BEAM, MELLOY*). (This Guideline does not require that defendant knew firearm was stolen, and its lack of scienter requirement does not violate due process.)

United States v. Kenney, 283 F.3d 934 (8th Cir.) (HANSEN, McMILLIAN,* BEAM). (Defendant received both enhancement under § 2K2.1(b)(4) for possessing stolen firearms and enhancement under § 2K2.1(b)(5) for possessing firearms in connection with another felony offense: the burglary in which he stole them. This was not impermissible double-counting. First, Application Note 12--by prohibiting (b)(4) enhancement if (a)(7) applies--shows that Sentencing Commission intended to allow both (b)(4) and (b)(5) enhancements. Second, each enhancement concerns conceptually separate notions because it is possible to be in possession of stolen firearms without having stolen them, and because (b)(4) punishes harm of possessing stolen firearms while (b)(5) punishes harm of possessing firearms in connection with another felony offense.), cert. denied, 537 U.S. 867 (2002).

United States v. Hawkins, 181 F.3d 911 (8th Cir.) (RICHARD S. ARNOLD, HANSEN,* STROM). (Hawkins pleaded guilty to stealing firearms from firearms dealer, and District Court enhanced his offense level by 2 levels under § 2K2.1(b)(4) because firearms were stolen; Hawkins argues this constitutes impermissible double-counting. Addressing question of first impression in this Circuit, this Court agrees with those Circuits that have concluded such 2-level increase may be applied if offense is not one of those enumerated in Application Note 12 to § 2K2.1, or if base offense level is not calculated under § 2K2.1(a)(7). Because Application Note 12 does not violate Constitution or federal statute, and does not reflect plainly erroneous reading of § 2K2.1, it is binding on this Court. Thus, District Court properly applied increase under § 2K2.1(b)(4): Hawkins pleaded guilty to violation of 18 U.S.C. § 924(m), offense not enumerated in Note 12, and his base offense level was calculated pursuant to subsection (a)(6), not (a)(7). Moreover, enhancement does not amount to double-counting because § 2K2.1 applies to wide variety of firearm violations, and it is not necessary that firearms involved were stolen for defendant to be sentenced under § 2K2.1. Here, stolen nature of firearms was not considered in calculating Hawkins's base offense level.), cert. denied, 528 U.S. 981 (1999).

**§ 2K2.1(b)(5) (Use or Possession in Connection with Another Felony/Standard of Review):**

United States v. Davis, 360 F.3d 901 (8th Cir. 2004) (WOLLMAN,* RICHARD ARNOLD, MORRIS ARNOLD). (Defendant's argument that this section does not apply to another felony offense that was temporally and spatially distinct from offense of conviction questions District Court's application of Guidelines to facts and is reviewed de novo.)

United States v. Mack, 343 F.3d 929 (8th Cir. 2003) (MORRIS ARNOLD, BEAM,

MELLOY*). (District Court's determination as to defendant's purpose for possessing firearm is factual finding reviewed for clear error.)

United States v. Agee, 333 F.3d 864 (8th Cir. 2003) (HANSEN,* LOKEN, SMITH). (This Court reviews for clear error District Court's finding as to defendant's purpose for possessing firearm. Enhancement must be imposed unless it is clearly improbable that he possessed firearm in connection with another felony.)

United States v. Marks, 328 F.3d 1015 (8th Cir. 2003) (MORRIS ARNOLD, BEAM,* MELLOY). (This Court reviews for clear error District Court's finding that defendant used or possessed firearm in connection with another felony. Finding must be supported by preponderance of evidence, but enhancement should be applied unless it is clearly improbable that gun was used in connection with another felony.)

United States v. Scolaro, 299 F.3d 956 (8th Cir. 2002) (MURPHY, HEANEY,* BRIGHT). (This Court reviews de novo District Court's legal conclusion concerning application of § 2K2.1(b)(5) enhancement and for clear error its factual findings.), cert. denied, 123 S. Ct. 1774 (2003).

**§ 2K2.1(b)(5) (Use or Possession in Connection with Another Felony):**

United States v. Davis, 360 F.3d 901 (8th Cir. 2004) (WOLLMAN,* RICHARD ARNOLD, MORRIS ARNOLD). (Defendant committed carjacking using 9-millimeter handgun. He was arrested ten days later with .25-caliber pistol on his person. He pleaded guilty to being felon in possession of firearm: .25-caliber pistol. District Court properly applied enhancement on basis that defendant had earlier used 9-millimeter handgun in connection with carjacking. Enhancement applies to any firearm, not just firearm involved in offense of conviction.)

United States v. Quinn, 358 F.3d 559 (8th Cir. 2004) (MORRIS ARNOLD, HANSEN, RILEY) (per curiam). (Because defendant conceded at sentencing that he possessed any of eight firearms in connection with another felony offense, justifying § 2K2.1(b)(5) enhancement, he was not entitled to reduction under § 2K2.1(b)(2), which requires that all firearms be possessed solely for lawful sporting or collection purposes.)

United States v. Hedger, 354 F.3d 792 (8th Cir. 2004) (WOLLMAN, BOWMAN, RILEY*). (It was not impermissible double-counting for defendant to receive enhancement under (b)(4) for possessing stolen firearm as well as enhancement under (b)(5) for possessing firearm in connection with another felony offense, i.e., act of stealing it.)

United States v. Bryant, 349 F.3d 1093 (8th Cir. 2003) (MORRIS ARNOLD,* BEAM, BYE). (District Court did not clearly err in finding that defendant possessed firearm in connection with another felony where two witnesses testified that defendant shot at them, although two other witnesses testified that they saw person other than defendant holding gun.)

United States v. Mack, 343 F.3d 929 (8th Cir. 2003) (MORRIS ARNOLD, BEAM, MELLOY*). (District Court did not clearly err in finding that defendant possessed firearms in connection with another felony offense, possessing or operating stolen vehicle. Defendant was arrested in driver's seat of stolen car with ammunition on his person and guns elsewhere in car. Defendant's maintenance of easily accessible firearm within stolen car permits inference that gun emboldened defendant to continue his illegal conduct.)

United States v. Martinez, 339 F.3d 759 (8th Cir. 2003) (MORRIS ARNOLD, BEAM, MELLOY*). (Defendant's possession of firearm in connection with his possession of stolen credit cards did not support enhancement because, under Missouri law, possession of stolen credit cards is not felony. This Court declines government's invitation to use defendant's conduct in another dismissed charge as basis for enhancement because that ground was not considered below at either change of plea or sentencing.)

United States v. Anderson, 339 F.3d 720 (8th Cir.) (HANSEN, RICHARD ARNOLD, BYE*). (Iowa aggravated misdemeanor of assault with dangerous weapon qualifies as "another felony offense" because it is punishable by more than one year in prison. There was sufficient evidence that defendant displayed gun in threatening manner toward others: motorists' 911 calls and truck drivers' CB traffic so stated.), cert. denied, 124 S. Ct. 948 (2003).

United States v. Agee, 333 F.3d 864 (8th Cir. 2003) (HANSEN,* LOKEN, SMITH). (Defendant was observed by police bicycling away from his home. When they stopped him, he discarded gun. Drugs, drug-use paraphernalia, and drug-manufacturing paraphernalia were found in his home. District Court did not clearly err in inferring that defendant had possessed firearm during his prior in-home drug activities, regardless of whether those activities were manufacturing, possession, or consumption of drugs.)

United States v. English, 329 F.3d 615 (8th Cir. 2003) (WOLLMAN, RICHARD ARNOLD,* SMITH). (It was proper to apply enhancement for possessing firearm in connection with another felony offense, where other felony was Iowa crime of possession of stolen property exceeding certain value, despite fact that guns were predicate stolen property. Application Note 18 excludes "firearm possession offense" as other felony, but this Court defines firearm possession offense as one in which firearm is element of crime. Firearm is not element of generic possession of stolen property crime. Nor was it double-counting to impose both this enhancement and enhancement under (b)(4), because Iowa statute requires that defendant knew property to be stolen and that property was of certain value, two elements not required for (b)(4) enhancement.)

United States v. Marks, 328 F.3d 1015 (8th Cir. 2003) (MORRIS ARNOLD, BEAM,* MELLOY). (Defendant used or possessed firearm in connection with another felony (Missouri felony of resisting arrest by means other than flight) when he displayed gun to police officer pursuing him.)

United States v. Mann, 315 F.3d 1054 (8th Cir.) (BOWMAN,* MORRIS ARNOLD, RILEY). (Defendant fired single shot at police officer and fled. When he was arrested at his home,

several firearms were recovered and he pleaded guilty to being felon in possession, but none of firearms could be positively identified as one he fired. § 2K2.1(b)(5)'s reference to "any firearm" means what it says: because defendant used some unidentified firearm to commit another felony (armed criminal action and assault of police officer), District Court properly applied enhancement. DISSENT: defendant should not receive enhancement either because, as specific offense characteristic, § 2K2.1(b)(5) must pertain to offense charged in indictment; or, if Guideline is ambiguous, defendant should receive benefit of rule of lenity.), cert. denied, 124 S. Ct. 125 (2003).

United States v. Bell, 310 F.3d 604 (8th Cir. 2002) (HANSEN, BEAM, RILEY) (per curiam). (District Court did not clearly err in finding that defendant possessed revolver in connection with another felony offense--possession of cocaine base--where defendant was found lying on bed with revolver beneath mattress and two grams of cocaine base were found in pair of shorts lying on bedroom floor.)

United States v. Friend, 303 F.3d 921 (8th Cir. 2002) (BOWMAN, LAY, MURPHY) (per curiam). (Amendment 599 applies only to 18 U.S.C. § 924(c) convictions. Moreover, sentences for attempting to injure federal building and for being felon in possession of firearm did not reflect double-counting.)

United States v. Scolaro, 299 F.3d 956 (8th Cir. 2002) (MURPHY, HEANEY,* BRIGHT). (Defendant beat up party host, tied him up, repeatedly threatened to kill him, and placed him in closet, then broke into his gun cabinet and stole firearms. Defendant pleaded guilty to possessing stolen firearms and received enhancement for possessing firearms in connection with another offense. He argued that he could not have possessed firearms in connection with assault because assault preceded his acquisition of firearms. This Court disagrees because § 2K2.1(b)(5) enhancement can be based on relevant conduct, which includes acts committed by defendant in preparation for offense of conviction. Evidence therefore shows that defendant possessed stolen firearms in connection with Iowa felony of aggravated assault with intent to inflict serious bodily injury. DISSENT: majority uses relevant conduct to trump plain meaning of "in connection with."), cert. denied, 123 S. Ct. 1774 (2003).

United States v. Kenney, 283 F.3d 934 (8th Cir.) (HANSEN, McMILLIAN,* BEAM). (Defendant received both enhancement under § 2K2.1(b)(4) for possessing stolen firearms and enhancement under § 2K2.1(b)(5) for possessing firearms in connection with another felony offense: the burglary in which he stole them. This was not impermissible double-counting. First, Application Note 12--by prohibiting (b)(4) enhancement if (a)(7) applies--shows that Sentencing Commission intended to allow both (b)(4) and (b)(5) enhancements. Second, each enhancement concerns conceptually separate notions because it is possible to be in possession of stolen firearms without having stolen them, and because (b)(4) punishes harm of possessing stolen firearms while (b)(5) punishes harm of possessing firearms in connection with another felony offense.), cert. denied, 537 U.S. 867 (2002).

United States v. Linson, 276 F.3d 1017 (8th Cir. 2002) (LOKEN, BYE, BOGUE*). (Enhancement for using or possessing weapon in connection with another felony offense should be

applied unless it is clearly improbable that weapon was used in connection with other felony. Enhancement was proper where sawed-off shotgun was found in residence with shotgun shells, marijuana, bong, two pipes, rolling papers, burnt marijuana cigarette, hemostats, scales, methamphetamine, razor blade, straws, plastic baggies, bag of white pills, flasks, rubber stoppers, test tubes, tongs, and surveillance monitor. Inference was bolstered by defendant's prior conviction for drug possession and distribution.)

United States v. Chavarria-Cabrera, 272 F.3d 1049 (8th Cir. 2001) (McMILLIAN, BEAM,* HANSEN). (District Court correctly applied enhancement, because "other felony offense" in this case was not "another weapons charge, recast as state law crime" (in which case, according to one other circuit, "other felony" would have had to occur at separate point in time) but conviction for involuntary manslaughter, i.e., conduct distinct from weapons possession; and "in connection with" provision does not require proof that defendant intended to commit other offense.)

United States v. Letts, 264 F.3d 787 (8th Cir. 2001) (LOKEN, HEANEY, BYE*). (Affirming enhancement as not clearly erroneous, because government's evidence showed that firearms seized from outside of defendant's house at least had potential of facilitating methamphetamine manufacture. Evidence of manufacture included containers found in garage with user amounts of methamphetamine, other equipment and materials consistent with drug manufacture; and loaded firearms were found above garage door.), cert. denied, 535 U.S. 908 (2002).

United States v. Martinez, 258 F.3d 760 (8th Cir. 2001) (WOLLMAN, HANSEN, BARNES*). (For firearm to be possessed in connection with another felony offense, it must have some purpose or effect with respect to that offense, i.e., it must facilitate or have potential to facilitate that offense. Defendant need not actually be charged with that other felony offense. This Court affirms application of enhancement where firearm was found on top of chest containing drugs, and evidence showed defendant's continuing involvement for ten months with drugs and at least four other firearms; accessible placement of firearm supports conclusion that it was used to facilitate drug trafficking or was intended for protection.)

United States v. Fredrickson, 195 F.3d 438 (8th Cir. 1999) (BEAM, LOKEN, MORRIS SHEPPARD ARNOLD) (per curiam). (This Guideline does not require actual commission of another felony offense. This Court affirms enhancement as not clearly erroneous where, during previous six years, Fredrickson had fired rifle near his son's head, inquiring whether his son thought he was crazy enough to shoot boy and his mother; wrote numerous intimidating letters from prison to his ex-wife and others; violated domestic- abuse protective order obtained against him; stalked postal employees; and promptly obtained shotgun each of three times he was released from incarceration. Also, his friend testified that Fredrickson was angry and hostile, and had told him he wanted gun to "shoot people.")

United States v. James, 172 F.3d 588 (8th Cir. 1999) (McMILLIAN, F. R. GIBSON, HANSEN*). (Upholding finding that James knew or had reason to believe firearms he transferred to associates in Chicago would be used in connection with another felony offense. James was gang

member; firearms were shown to have been involved in criminal activity--one firearm was recovered in connection with homicide, and others in connection with drug trafficking, assaults, and juvenile-offender offenses; James and another person delivered firearms to two others who were gang members involved in drug trafficking; and testimony indicated firearms are used in drug trade to protect drugs.)

United States v. McClain, 171 F.3d 1168 (8th Cir. 1999) (FAGG, HEANEY,* WOLLMAN). (Upholding enhancement based on evidence that McClain attempted to manufacture methamphetamine and used firearm in connection with manufacturing attempt: evidence showed McClain was arrested in shed 15 feet from open bag containing active lab, which had not been present before McClain arrived on scene; McClain had methamphetamine and precursor ingredient on his person, and told deputy it was for "making dope"; he had tossed gun into bed of truck parked in shed when deputy was handcuffing another person in shed; and ammunition was found on McClain. Although it is open question whether government must prove non-garden variety sentencing facts by preponderance of evidence or by clear and convincing evidence, Court does not address standard of proof here because government showed attempt to manufacture methamphetamine under either standard.)

United States v. Regans, 125 F.3d 685 (8th Cir. 1997). (Regans pleaded guilty in state Court to possession of heroin, and then pleaded guilty to federal charge of being felon in possession of firearm. District Court imposed four-level enhancement, § 2K2.1(b)(5), because carrying firearm along with heroin warranted finding firearm was possessed "in connection with" drug felony. Regans argues District Court erred in finding requisite connection between firearm and his drug felony because firearm was merely coincidental to his possession of heroin for personal use. Regans notes defendants in other cases were drug dealers. This enhancement and other Guidelines provisions, e.g., § 2D1.1(b)(1), are based in part on increased risks of violence whenever guns are in possession of persons engaged in committing drug felonies. While firearm may not be tool of trade because possession for use is not trade like drug trafficking, when drug user chooses to carry illegal drugs out into public with firearm, there are many ways in which weapon can facilitate drug offense and dangerously embolden offender. Thus, finding of requisite connection in this situation is consistent with purpose of § 2K2.1(b)(5).), cert. denied, 523 U.S. 1065 (1998).

United States v. Johnson, 60 F.3d 422 (8th Cir. 1995). (Johnson argued District Court erred when it found mere possession and drug paraphernalia constituted possession of firearm in connection with felony for purposes of imposing four level enhancement. Here, loaded pistol was in same room where drug and drug paraphernalia belonging to Johnson were kept, prior controlled drug buys occurred at house, and Johnson had taken both loaded pistol and drugs with him to get food just prior to his arrest. In light of testimony at sentencing and fact that possession of drug paraphernalia is felony under state law, District Court did not clearly err in finding government had met its burden of showing Johnson possessed loaded firearm in connection with another felony offense.)

**§ 2K2.1(c)(1) (Cross Reference for Use or Possession of Firearm or Ammunition In Connection with Another Offense/Standard of Review):**

United States v. Brings White, 354 F.3d 841 (8th Cir. 2004) (MORRIS ARNOLD, HEANEY,* FAGG). (District Court's finding as to defendant's purpose in possessing firearm is reviewed for clear error.)

United States v. Jones, 327 F.3d 654 (8th Cir. 2003) (McMILLIAN,* MURPHY, MELLOY). (District Court's finding as to defendant's purpose for possessing firearm is reviewed for clear error. Legal standards are equivalent to those for § 2K2.1(b)(5).)

**§ 2K2.1(c)(1) (Cross Reference for Use or Possession of Firearm or Ammunition In Connection with Another Offense):**

United States v. Brings White, 354 F.3d 841 (8th Cir. 2004) (MORRIS ARNOLD, HEANEY,* FAGG). (District Court did not clearly err in finding that defendant used firearm in committing aggravated assault. Although he was acquitted of attempted murder in state court, state trial transcript shows that defendant's conduct satisfied elements of aggravated assault.)

United States v. Jones, 327 F3.d 654 (8th Cir. 2003) (McMILLIAN,* MURPHY, MELLOY). (Defendant pleaded guilty to being felon in possession of firearm. Thirty grams of cocaine base was found beneath car seat. In car trunk, forty-six grams of marijuana, two firearms, and ammunition were found in duffle bag. District Court properly applied cross-reference to § 2X1.1, and in turn to § 2D1.1, based on finding that defendant possessed firearms in connection with trafficking of cocaine base. It was not clearly improbable that firearms facilitated or had potential to facilitate defendant's trafficking of cocaine base, despite spatial isolation between distribution-type quantity of cocaine base (underneath car seat) and firearms (in trunk).)

**§ 2K2.2 [deleted in 1991 by consolidation with § 2K2.1 (Trafficking and Other Prohibited Transactions)]:**

United States v. Dennis, 926 F.2d 768 (8th Cir. 1991). (Dennis argued District Court erroneously increased his offense level for distributing six firearms when he was indicted for possessing only single sawed-off shotgun. This Court makes analogy to drug cases, sanctioning use of uncharged but relevant conduct used to calculate offense levels and finds no clear error. Increase for possessing stolen weapon when defendant is serving state sentence for receiving stolen property that included sawed-off shotgun, does not violate double jeopardy; by one act, two offenses were committed.)

United States v. Williams, 879 F.2d 454, 457 (8th Cir. 1989). (Defendant s awareness that weapon is stolen is not necessary for adjustment for stolen weapon.)

**§ 2K2.4 (Use of Firearm, Ammunition, or Explosive During or in Relation to Certain Crimes):**

United States v. Triplett, 104 F.3d 1074 (8th Cir.) (Because Steven Triplett s sentence under Guidelines for violations of both §§ 2114(a) and 924(c) might have been less severe than had

he been convicted of violating only § 2114(a) with enhancement for using firearm, District Court was required to calculate Triplett s prison term by comparing results achieved from two methods of computation. After comparing sentence range calculated under each of two approaches, District Court was permitted to depart upward if calculation under first method (determine BOL and range under § 2B3.1 for robbery excluding specific offense characteristic related to firearm, and then add to maximum sentence 60-month mandatory sentence under § 2K2.4(a) and § 924(c)) would result in decrease in total punishment (comment. n.2). In any event, upward departure could not exceed maximum of range under second calculation (determine BOL under § 2B3.1 including any applicable characteristic related to firearm, but then disregard 60-month mandatory sentence under § 2K2.4(a) and § 924(c)). [Binding] comment. n.2 instructs where sentence under § 2K2.4 is imposed in conjunction with sentence for underlying offense, any specific offense characteristic related to explosive or firearm is not to be applied in respect to guideline for underlying offense, to avoid double counting. If District Court added two-level enhancement under § 2B3.1(b)(2)(F) for express threat of death unrelated to possession or use of firearm, enhancement was proper in conjunction with § 924(c) (application n.2). As part of remand instruction, District Court--if it elects to enhance Triplett s sentence based on subsection F--should clarify conduct on which it bases enhancement which is not firearm-related.), cert. denied, 520 U.S. 1236 and 520 U.S. 1270 (1997).

United States v. Davis, 103 F.3d 660 (8th Cir. 1996). (District Court correctly imposed consecutive sentences for firearms offenses; express statutory language prohibits District Court from allowing firearms terms of imprisonment to run concurrently with each other or with underlying crime of violence.), cert. denied, 520 U.S. 1258 (1997).

United States v. Halford, 948 F.2d 1054 (8th Cir. 1991). (Comment. (n.2) and background explain section 924(c) applies even where another criminal statute (here, armed robbery) provides for enhanced punishment for using weapon. Congress authorized cumulative punishment; no violation of double jeopardy. This Court once again rejects argument that possibility of two defendants receiving different sentences though they engaged in identical conduct violates goal of unwarranted sentence disparities.), cert. denied, 503 U.S. 996 (1992).

United States v. Carnes, 945 F.2d 1013 (8th Cir. 1991). (Carnes s conviction under 18 U.S.C. § 924(c) required term of imprisonment called for by statute, to run consecutively to any other term of imprisonment.)

United States v. Foote, 898 F.2d 659 (8th Cir. 1990). (Guidelines are not invalid because prosecutor has discretion to choose either to charge use of firearm as separate substantive offense or to accept firearm use as specific offense characteristic. Guidelines are not invalid for failure to adequately comply with statutory requirement that Sentencing Commission consider capacity of federal correctional facilities.)

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

**§ 2L1.1(b)(1) (Purpose of Offense/Standard of Review):**

United States v. Juan-Manuel, 222 F.3d 480 (8th Cir. 2000) (McMILLIAN,* JOHN R. GIBSON, MAGILL). (This Court reviews for clear error District Court's finding as to whether defendant's offense was "other than for profit.")

**§ 2L1.1(b)(1) (Purpose of Offense):**

United States v. Juan-Manuel, 222 F.3d 480 (8th Cir. 2000) (McMILLIAN,* JOHN R. GIBSON, MAGILL). (Defendant agreed to drive illegal aliens from Arizona to Florida in exchange for forgiveness of debt he owed "coyote" who had helped smuggle him and others into United States. En route to Florida, defendant and his passengers were stopped and arrested. Defendant argued he was entitled to three-level reduction under section 2L1.1(b)(1) because he did not commit offense "for profit." Applying November 1997 Guidelines commentary--because it was in effect at time of offense--this Court holds reduction was properly denied. November 1997 commentary deleted language in prior commentary that "for profit" did not include defendant who committed offense only in exchange for his own entry or transportation; thus defendant who commits offense only in return for his own entry may be found to have committed offense for profit, and "payment" and "expectation of payment" (as used in November 1997 commentary) can refer to something other than money.)

**§ 2L1.1(b)(5) (Substantial Risk of Death/Serious Bodily Injury):**

United States v. Ortiz, 242 F.3d 1078 (8th Cir. 2001) (HANSEN, MORRIS SHEPPARD ARNOLD, BYE) (per curiam). (Defendant was driving twenty-three illegal aliens in van equipped to accommodate only fourteen passengers when tire blew out, van overturned, and passengers were injured. This Court found no clear error in District Court's application of enhancement for intentionally or recklessly creating substantial risk of death or serious bodily harm because defendant conceded there were not enough seatbelts in van. Application Note 6 provides that reckless conduct includes carrying substantially more passengers than vehicle's rated capacity or harboring persons in crowded, dangerous, or inhumane conditions.)

**§ 2L1.1(b)(6) (Death/Degree of Injury):**

United States v. Flores-Flores, 356 F.3d 861 (8th Cir. 2004) (LOKEN, FAGG,* BOWMAN). (Defendant had been hired to transport eleven illegal aliens in van without seats or seatbelts for eight of them. During trip, defendant had passenger take over driving. Passenger fell asleep, van crashed, and two aliens died. This Court affirms District Court's application of eight-level enhancement because defendant's conduct was causally connected to deaths, and passenger's negligence was not intervening cause relieving defendant of responsibility.)

**§ 2L1.2 (Unlawful Entering or Remaining in United States):**

United States v. Rodriguez-Arreola, 313 F.3d 1064 (8th Cir. 2002) (BOWMAN, RICHARD ARNOLD, LOKEN*). (In setting offense level for defendant convicted of illegally reentering United States after deportation following drug-trafficking conviction, prior indeterminate state

sentence of eight months to five years, from which defendant was paroled after eight months, was properly measured by high end of imposed range and thus qualified as sentence exceeding thirteen months (despite absence of specific guidance in this particular Guideline and its commentary, and despite rule of lenity). Apprendi requirements do not apply to proof of prior felony because Almendarez-Torres has not been overruled.)

United States v. Cardosa-Rodriguez, 241 F.3d 613 (8th Cir. 2001) (RICHARD S. ARNOLD,* FAGG, BOWMAN). (For defendant sentenced under § 2L1.2, alien status is not basis for departure. Defendant's alien status, without more, cannot take case outside of heartland because Sentencing Commission clearly considered deportable-alien status when formulating § 2L1.2. This case is distinguishable from cases in which departures for voluntary consent to deportation have been upheld; in such cases, defendants can choose to consent, and consent saves government time and expense.)

**§ 2L1.2(b)(1)(C) (Deportation After Aggravated Felony/Standard of Review):**

United States v. Mejia-Barba, 327 F.3d 678 (8th Cir. 2003) (LOKEN, RILEY, SMITH*). (This Court reviews de novo question whether prior offense is aggravated felony.)

United States v. Alas-Castro,184 F.3d 812 (8th Cir. 1999) (WOLLMAN, RICHARD S. ARNOLD, BEAM) (per curiam). (This Court reviews de novo determination whether prior state offense constituted crime of violence.)

**§ 2L1.2(b)(1)(C) (Deportation After Aggravated Felony):**

United States v. Gonzalez-Lopez, 335 F.3d 793 (8th Cir.) (HANSEN,* LOKEN, SMITH). (Defendant's Utah conviction for automobile homicide was crime of violence because element of causing death of another inherently requires use of physical force against another person. That use of force need not be intentional.), cert. denied, 124 S. Ct. 591 (2003).

United States v. Demirbas, 331 F.3d 582 (8th Cir. 2003) (BOWMAN,* HEANEY, BYE). (For prior state offense, defendant received suspended sentence of four years in prison and was placed on five years of probation. This satisfied definition of aggravated felony, which applies if defendant received sentence of at least one year in prison, even if prison term is suspended and defendant is placed on probation.)

United States v. Mejia-Barba, 327 F.3d 678 (8th Cir. 2003) (LOKEN, RILEY, SMITH*). (Iowa crime of identity theft satisfies theft definition in 8 U.S.C. § 1101(a)(43)(G) and constitutes aggravated felony.)

United States v. Valladares, 304 F.3d 1300 (8th Cir. 2002) (WOLLMAN, RICHARD S. ARNOLD, LOKEN*). (Prior to November 1, 2001, § 2L1.2(b)(1) provided for sixteen-level enhancement if prior deportation followed any aggravated felony conviction, while Application Note 5 authorized downward departure to account for seriousness of aggravated felony. As amended,

Guideline provides sliding scale of eight to sixteen levels depending on seriousness of aggravated felony. Valladares's California robbery conviction was by its nature crime of violence, making it sixteen-level aggravated felony under either old or new Guideline, and making his Ex Post Facto Clause argument irrelevant.)

United States v. Gomez-Hernandez, 300 F.3d 974 (8th Cir. 2002) (WOLLMAN, RICHARD S. ARNOLD, LOKEN*). (Prior to November 1, 2001, § 2L1.2(b)(1) provided for sixteen-level enhancement if prior deportation followed any aggravated felony conviction, while Application Note 5 authorized downward departure to account for seriousness of aggravated felony. As amended, Guideline provides sliding scale of eight to sixteen levels depending on seriousness of aggravated felony. Alcaras's conviction for California crime of aggravated sexual intercourse with minor under age sixteen was felony under California Penal Code definition distinguishing between felony and misdemeanor. His conviction was crime of violence because it involved use, attempted use, or threatened use of physical force against another, and Application Note 1 does not additionally require that it be listed as crime of violence. Gomez-Hernandez's conviction for Iowa crime of going armed with intent was also crime of violence because it involved use, attempted use, or threatened use of physical force. Because statutory definition encompassed non-violent conduct, District Court properly looked to underlying charging papers and facts of defendant's offense. Unobjected-to portion of PSR established that defendant swung at individual with hammer five or six times, hitting him in head and causing injury.), cert. denied, 537 U.S. 1138 (2003).

United States v. Guzman-Landeros, 207 F.3d 1034 (8th Cir. 2000) (McMILLIAN, HANSEN, MORRIS SHEPPARD ARNOLD) (per curiam). (Texas conviction for burglary of vehicle qualifies as crime of violence and constitutes aggravated felony. All burglaries are crimes of violence and are thus aggravated felonies.)

United States v. Tejeda-Perez, 199 F.3d 981 (8th Cir. 1999) (WOLLMAN, FAGG,* BATTEY). (8 U.S.C. § 1101(a)(48)(B), not § 4A1.2(b), applies for purposes of defining "term of imprisonment" as used here. Conviction is "aggravated felony" within meaning of § 2L1.2(b) if defendant receives sentence of at least 1 year, even if sentence is suspended. Because this interpretation is based on "more than guess as to what Congress intended," rule of lenity does not apply. Defendant here received 1-15 year suspended prison sentence for second-degree theft, and thus theft conviction is "aggravated felony" even though prison sentence was suspended. Because District Court declined to impose enhancement, it did not consider defendant's motion for downward departure under § 2L1.2 n.5. This Court declines invitation to decide propriety of such motion, and leaves it for District Court's consideration first.)

United States v. Alas-Castro, 184 F.3d 812 (8th Cir. 1999) (WOLLMAN, RICHARD S. ARNOLD, BEAM) (per curiam). (Nebraska offense for sexual assault of child qualifies as crime of violence--and thus constitutes aggravated felony warranting 16-level enhancement--because it requires intentional physical contact between adult 19 years of age or older and child 14 years of age or younger, and this type of contact between parties of differing physical and emotional maturity carries "a substantial risk that physical force . . . may be used in course of committing offense.")

United States v. Estrada-Quijas, 183 F.3d 758 (8th Cir. 1999) (McMILLIAN,* LAY, MURPHY). (Appellant was convicted of illegal-reentry offense and argued that, because he was subject to lesser penalty when he illegally re-entered United States in 1991 than when he was found in 1997--appellant's 1987 felony conviction was not considered "aggravated felony" in 1991 for sentencing purposes--he suffered ex post facto violation. This Court rejects argument because offense of illegal reentry is on-going and ends only when offender is discovered, which in this case was in 1997; thus District Court properly applied Guidelines in effect in 1997 and applied 16-level aggravated-felony enhancement.)

United States v. Cazares-Gonzalez, 152 F.3d 889 (8th Cir. 1998). (Concluding that 1978 rape conviction qualified as "aggravated felony" under 1991 Guidelines definition even though it did not so qualify under pre-1996 statutory definition of "aggravated felony" under 8 U.S.C. § 1101(a)(43).)

United States v. Diaz-Diaz, 135 F.3d 572 (8th Cir. 1998). (Under version of § 2L1.2 applicable when Diaz-Diaz was sentenced, presence of prior deportation subsequent to aggravated felony conviction automatically triggered 16-level enhancement. District Court acknowledged Diaz-Diaz s state Court felony conviction technically fell within Guidelines definition of "aggravated felony," but found underlying conviction did not reflect kind of grave offense warranting heightened sentence. District Court concluded 16-point increase would be unduly harsh and contrary to intent of Sentencing Commission. Thus, disregarding Diaz-Diaz s felony drug trafficking conviction, District Court employed total offense level of 8 and category II criminal history; it sentenced Diaz-Diaz to 10 months imprisonment.

In November 1997, amended version of § 2L1.2 became effective, which no longer mandated 16-level enhancement where there is presence of prior deportation subsequent to aggravated felony conviction. Where Court applies earlier addition of Guidelines Manual, Court shall consider subsequent amendments to extent such amendments are clarifying rather than substantive changes, § 1B1.11(b)(2). Commentary to Amendment 562 describes it as making clarifying changes to commentary. This Court acknowledges one might disagree with assessment, but because this Court cannot say Commission s determination changes to commentary implemented by Amendment 562 are merely clarifying is plainly at odds with Guidelines, it is obliged to apply Amendment retroactively in this case. Under amended version, seriousness of aggravated felony is encouraged factor upon which departure may be based, § 2L1.2 comment. n.5 (1997). Although this Court believes Diaz-Diaz s situation to involve precisely sort of circumstances § 2L1.2(b) felony enhancement provision was intended to address, it acknowledges it is dealing with fact-based judgment call falling within District Court s sentencing discretion, and this Court is not permitted to substitute its judgment for that of District Court; thus, this Court concludes District Court did not abuse its discretion in granting downward departure based upon now-encouraged factor of seriousness of Diaz-Diaz s underlying felony conviction.)

United States v. Baca-Valenzuela, 118 F.3d 1223 (8th Cir. 1997). (Baca-Valenzuela challenges sentence on grounds he should not have received sixteen-level offense enhancement for "aggravated felony" because he was convicted of "aiding and abetting" cocaine possession, rather than commission of crime as principal. Baca-Valenzuela contended in District Court enhancement

was in error because crime of which he was convicted not specifically listed as aggravated felony in either statute, 8 U.S.C. § 1101(a)(43) or applicable guideline, § 2L1.2(b)(2). District Court rejected argument finding conviction of aiding and abetting offense is same as conviction of offense as principal. This Court agrees with reasoning: whether one is convicted as principal or as accomplice/aider and abettor, crime of which he is guilty is same--whatever underlying offense. Here, Baca-Valenzuela s role in 1987 drug offense was apparently such that prosecutor chose to charge him with possession of cocaine with intent to distribute, 21 U.S.C. § 841(a)(1), as aider and abettor under 18 U.S.C. § 2. Although convicted on theory of accomplice liability, Baca-Valenzuela was nevertheless convicted and punished for cocaine offense, same as if he had been principal or only party involved in conduct. He properly received enhanced punishment based on prior conviction. This Court distinguishes United States v. Mendoza-Figueroa. District Court correctly concluded Baca-Valenzuela had been convicted of crime involving "illicit trafficking in any controlled substance (as defined in 21 U.S.C. § 802)," § 2L1.2. Crime was within definition of aggravated felony in both statute and sentencing guideline, and thus, Baca-Valenzuela properly received enhanced sentence based on prior commission of aggravated felony.)

United States v. Maul-Valverde, 10 F.3d 544 (8th Cir. 1993). (This Court reviews de novo District Court s departure downward from range of 37-46 months to 16-month sentence on rationale that Maul-Valverde s 1977 burglary conviction was too old to be counted in determining his criminal history category and thus it should not be basis of 16-level enhancement under § 2L1.2(b)(2). This Court rejected District Court s rationale as Sentencing Commission was cognizant of fifteen-year cap in other guideline provisions and guideline is consistent with controlling statutes (e.g., 8 U.S.C. § 1326(b)).)

United States v. Rodriguez, 979 F.2d 138 (8th Cir. 1992). (As matter of law, Rodriguez committed aggravated felony as commission of lascivious acts with child (Ia. Code § 709.8) by its nature involved substantial risk that physical force against person (here ten-year olds) might be used in course of committing offense. Focus is nature of crime; it matters not whether risk ultimately causes actual harm.)

**§ 2L1.2(b)(1)(D)-(E) (Deportation After Felony or Specified Misdemeanors):**

United States v. Mendoza-Alvarez, 79 F.3d 96 (8th Cir. 1996). (Mendoza-Alvarez was sentenced to 24 months imprisonment upon plea of guilty for illegal reentry after deportation; he does not dispute he was deported from U.S. prior to 1987. To BOL of 8, District Court increased four levels under § 2L1.2(b)(1). While Mendoza-Alvarez urged he was not convicted of felony but only for misdemeanor, this Court has no need to resolve dispute where government told District Court it did not offer proof of deportation because it did not consider it to be at issue. Government conceded it did not know of any deportation order and on this basis, this Court finds evidence totally deficient as to proof of deportation. Fact that Mendoza-Alvarez may have voluntarily returned to Mexico after California conviction is not proof of deportation. Therefore, this Court concludes District Court erred in applying four-level enhancement.)

United States v. Lazaro-Guadarrama, 71 F.3d 1419 (8th Cir. 1995). (Lazaro-Guadarrama

challenges District Court s imposition of four-level enhancement, § 2L1.2(b)(1), because he had previously been deported after conviction for possession of counterfeit green card. This Court identifies issue as whether Lazaro-Guadarrama s prior felony conviction under 18 U.S.C. § 1546 constituted felony involving violation of immigration laws. Definition of immigration laws provided is broad. Section 1546 was originally part of Title 8 and had been enacted with some differences, as part of Immigration and Nationality Act. While not specifically regulating immigration, § 1546 controls creation and possession of documents necessarily connected with immigrants and immigration. Also noteworthy, sentencing guideline portion applicable to offenses under § 1546 is also Chapter 2, Part L--same Guidelines portion applicable to federal immigration law violations. Term involving in guideline (involving violation of immigration laws) presents loose term, capable of broad interpretation; thus, rule of lenity applies, favoring statutory construction yielding shorter sentence. Because Lazaro-Guadarrama s prior felony related to immigration law violation-- which does not call for enhanced sentence--this Court reverses and vacates sentence imposed.)

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

**§ 2N1.1 (Tampering or Attempt Involving Risk of Death or Bodily Injury):**

United States v. Courtney, No. 02-4083 (8th Cir. 2004) (LOKEN, McMILLIAN, HANSEN*). (Application Note 1 expressly authorizes upward departure when offense caused extreme psychological injury to victims. Victim-impact statements documented psychological injury cancer patients suffered as result of being given diluted chemotherapy drugs. Three-level upward departure was justified.)

United States v. Moyer, 182 F.3d 1018 (8th Cir. 1999) (FAGG, BEAM, MORRIS SHEPPARD ARNOLD*). (Dr. Moyer stole morphine from intravenous units of four patients who were under her care; on each occasion, Dr. Moyer inserted hypodermic needle and syringe into patient's morphine delivery device, removed some of morphine, and replaced stolen morphine with saline solution. Dr. Moyer requested downward departure from applicable Guidelines range for her tampering convictions. Application Note 1 provides departure may be warranted where offense "did not cause risk of death or serious bodily injury, and neither caused nor was intended to cause bodily injury." District Court correctly found that Dr. Moyer's actions exposed her patients to risks of death or serious bodily injury and that case was thus typical of heartland of cases.), cert. denied, 530 U.S. 1203 (2000).

**Part P. Offenses Involving Prisons and Correctional Facilities**

**§ 2P1.1 (Escape; Instigating or Assisting Escape):**

United States v. Pynes, 5 F.3d 1139 (8th Cir. 1993). (Pynes argued he was in custody for revocation of supervised release, rather than for felony, and thus his base offense level should be eight rather than thirteen. This Court rejects argument and concludes as Pynes was on supervised release by virtue of his original felony conviction, and hence upon revocation of his supervised release, he was in custody for "conviction of any offense." Moreover, Pynes pleaded guilty to

indictment which charged him with escaping while "having been lawfully confined for felony crime."

This Court also rejected Pynes s argument that District Court erred in denying him seven-level reduction for voluntary return. Pynes surrendered only when he saw deputy marshals crossing street to find and arrest him; District Court declined to find he turned himself in voluntarily, determination this Court finds not clearly erroneous. District Court did decrease offense level by four as Pynes escaped from non-secure custody.)

United States v. McLemore, 5 F.3d 331 (8th Cir. 1993). (Because McLemore failed to assert in District Court he was entitled to seven-level reduction (§ 2P1.1(b)(2)) instead of four-level reduction (§ 2P1.1(b)(3)), this Court will not reverse four-level reduction unless there is plain error resulting in fundamental miscarriage of justice. This Court finds no error in calculation of number of hours that McLemore was on escape status, i.e., more than ninety-six hours, where in his furlough agreement, McLemore agreed to remain at all times at his wife s residence. He violated agreement when he left that residence without authorization; thus, he was properly placed on escape status at that time rather than at time he was due back at correction center.)

United States v. Evidente, 894 F.2d 1000 (8th Cir.) (Court found § 2P1.1 sufficiently reasonable response to congressional directive even though Commission might have written Guideline on escape that would have considered circumstances that defendant suggested mitigate or aggravate seriousness of offense.), cert. denied, 499 U.S. 922 (1990).

**Part Q. Offenses Involving Environment**

**§ 2Q1.2 (Hazardous/Toxic Substances or Pesticides - Mishandling, Record Keeping, Transporting):**

United States v. Freeman, 30 F.3d 1040 (8th Cir. 1994). (Freeman asserted District Court error in applying § 2Q1.2(b)(1)(B) to him because jury acquitted him of discharging hazardous substance without permit. As standard of proof is lower at sentencing than at trial, Freeman s acquittal does not preclude District Court from enhancing his sentence based on Court finding of discharge. District Court based increase on its finding that government proved discharge, which is not clearly erroneous.

Freeman also asserted section only applies if government proves actual environmental contamination and Freeman contended there was not evidence of environmental contamination in this case. This Court recognizes different Courts of appeals have interpreted application note 5 in different ways, but decides this case does not require it to decide whether government must show actual environmental contamination to justify increase because assuming showing is required, record shows environmental contamination.)

**§ 2Q2.1 (Fish, Wildlife, and Plants):**

United States v. Oehlenschlager, 76 F.3d 227 (8th Cir. 1996). (Oehlenschlager pleaded

guilty to illegally importing wildlife in foreign commerce and aiding and abetting illegal importation of wildlife. On appeal, he challenges five-level upward adjustment, § 2Q2.1(b)(3)(A), to his BOL imposed on basis of market value of approximately $54,100 (§ 2F1.1(b)) of wildlife by valuation equating value of eggs with value of live birds which would be hatched from eggs. Oehlenschlager argued eggs have little or no value themselves and have high mortality rate in wild so every egg would not necessarily hatch into live bird. On appeal, he argues District Court erred in adopting valuation of wildlife set forth in PSR without holding evidentiary hearing upon learning Oehlenschlager contested value of eggs. In this situation fair-market retail value of waterfowl eggs, question of fact, is difficult to ascertain: although Oehlenschlager sometimes traded eggs for eggs, no evidence he sold eggs and no known price list for eggs. Thus, District Court was required to make reasonable estimate of market value based upon reliable facts. This Court agrees with District Court s assessment it is fair and reasonable to base value of eggs, for which there is no reasonably available market price, on value Oehlenschlager himself placed on live birds. While Oehlenschlager argued for theory which would discount market value to account for risk of mortality of eggs, this is sum by which Oehlenschlager stood to profit in event his criminal enterprise succeeded and legally reasonable theory by which to estimate market value. Even discounting value by 20% to compensate for risk of unfertilized or "dump nest" eggs, valued remained in excess of $40,000, warranting same five-level increase, § 2F1.1(b)(1)(F). Reasonable to estimate market value of eggs as equivalent to uncontested market value of live birds (gross amount Oehlenschlager intended to realize from his illegal activity) and District Court did not err in failing to hold evidentiary hearing as Court was able to make reasonable estimate based on undisputed fact of market value for birds.)

**Part R. Antitrust Offenses**

**§ 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements/Standard of Review):**

United States v. Haversat, 22 F.3d 790 (8th Cir. 1994). (This Court reviews District Court s factual findings at sentencing for clear error, 18 U.S.C. § 3742(e).), cert. denied, 516 U.S. 938 (1995).

**§ 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements):**

United States v. Haversat, 22 F.3d 790 (8th Cir. 1994). (Haversat and Gibson argued District Court error in determination that volume of commerce involved was based on erroneous computation which added two-level increase, § 2R1.1(b)(2); they argued amount involved was below $15 million break point. This Court finds no clear error in District Court s determination of volume of commerce involved where record was clear that conspiracy was underway in May 1986 when new price books were introduced and significant sales were made between May 1986 and April 1987 under pricing scheme of conspiracy. This volume of commerce finding will control at resentencing.), cert. denied, 516 U.S. 938 (1995).

**Part S. Money Laundering and Monetary Transaction Reporting**

**§ 2S1.1 (Laundering of Monetary Instruments):**

United States v. King, 280 F.3d 886 (8th Cir.) (McMILLIAN, FAGG,* RILEY). (November 2001 amendments did not apply to defendants' case because amendments substantively changed Guidelines, and Sentencing Commission did not include § 2S1.1 on list of amendments to be applied retroactively.), cert. denied, 537 U.S. 965 (2002).

United States v. Nguyen, 46 F.3d 781 (8th Cir. 1995). (Nguyen argued he was sentenced under wrong guideline because he was primarily engaged in gambling, rather than money laundering, which is addressed by § 2E3.1. Nguyen acknowledged in plea agreement § 2S1.1 would apply; defendant who explicitly and voluntarily exposes himself to specific sentence may not challenge that punishment on appeal. Moreover, § 2S1.1 is correct guideline for crime to which Nguyen pleaded. As to Nguyen s assertion that Sentencing Commission is considering lowering offense level for money laundering under § 2S1.1, he may make motion before District Court if Commission makes such change in future (§ 1B1.10).)

United States v. Morris, 18 F.3d 562 (8th Cir. 1994). (This Court agreed with government that District Court erred in not sentencing Morris and Higgs pursuant to § 2S1.1 on money laundering convictions. District Court had determined defendants use of fraudulently obtained loan proceeds to close out account at bank where Morris exercised control had effect of concluding scheme to defraud bank. This Court believes evidence was sufficient to support jury determination that financial transaction was intended to promote carrying on of bank fraud. District Court also determined money laundering offense was same as bank fraud offenses and neither Congress nor Sentencing Commission intended money laundering to be punished more severely. This Court states that in enacting 18 U.S.C. § 1956(d), Congress intended cumulative punishment for specified unlawful activities and money laundering violations.)

**§ 2S1.1(a)(2) (Base Offense Level):**

United States v. Nattier, 127 F.3d 655 (8th Cir. 1997). (Defendants contend District Court erred in calculating sentences because general verdicts are ambiguous and Guidelines calculation provides disparate sentencing ranges for two types of money laundering charged and two possible objects of single charged conspiracy. This Court has encouraged special verdict forms; if general jury verdict is utilized, District Court should sentence defendant on alternative yielding lower sentencing range. Where, however, trial evidence is so strong this Court can confidently say jury must have been convinced beyond reasonable doubt one particular offense carrying heavier penalty, was involved in criminal activity, it has affirmed imposition of higher sentence. Here, BOL for conspiracy count would be same as determined for substantive offenses charged as object of conspiracy (§ 2X1.1): embezzlement of bank funds and money laundering. Because jury found defendants guilty of substantive money laundering counts, this Court has no difficulty determining jury found money laundering was object of convicted conspiracy. Thus, offense level calculation for conspiracy count would be same as that for money laundering counts (§§ 3D1.2, 3D1.3). District Court was of opinion evidence at trial proved promoting unlawful activity and concealing proceeds beyond reasonable doubt. District Court based sentencing calculation for group on BOL-23, higher

offense level of two types of money laundering. This Court likewise concludes trial evidence was so strong on each mode of violation that jury must have found defendants did violate both prongs of § 1956; District Court was correct in imposing Guidelines sentence based on violation of (a)(1)(A)(i) alternative.), cert. denied, 523 U.S. 1065 (1998).

**§ 2S1.1(b) (Specific Offense Characteristics):**

United States v. Goff, 20 F.3d 918 (8th Cir.) (Although nature of Goff s money laundering criminal activity has been adequately taken into consideration and therefore may not justify departure, this Court expresses concern that District Court s blanket acceptance of PSR, including four-level enhancements under § 2S1.1(b), to which Goff specifically objected, may have been based upon Court s intention to depart downward, rather than careful consideration of whether government met burden of proof with respect to those enhancements. On remand, District Court is encouraged to reconsider those enhancements on proper factual record), 513 U.S. 987 (1994).

**§ 2S1.1(b)(1) (Knowledge):**

United States v. Long, 977 F.2d 1264 (8th Cir. 1992). (Bell contended that because he was charged with laundering drug money, essential element of his crime was his knowledge that laundered funds were proceeds of narcotics distribution. Thus, he reasons, to increase his offense level because he knew money was drug proceeds constitutes improper double counting. This Court rejects argument: guideline, unlike statute section under which Bell was convicted, distinguishes between classes of money launderers, punishing more severely those who knowingly launder proceeds from narcotics sales.)

**§ 2S1.1(b)(2) [deleted in 2001 by creation of § 2S1.1(a)(2) (Value of Funds)]:**

United States v. Bad Wound, 203 F.3d 1072 (8th Cir. 2000) (WOLLMAN,* ROSS, LOKEN). (Defendant was convicted of offenses resulting from his participation in scheme to defraud college through phony office-supply companies. Court added 6-level enhancement to defendant s base offense level under this subsection, which calls for such enhancement for money-laundering convictions involving more than $2 million.

(1) Loss caused by co-conspirators. Defendant asserts only loss caused by his three companies ($174,488.92) should be considered, and $2 million-plus attributed to him included distinct loss caused by his co-conspirators six phony supply companies. However, defendant convicted of conspiracy is properly held accountable for all reasonably foreseeable acts of co-conspirators advancing conspiracy; factors relevant to foreseeability include whether defendant benefitted from co-conspirator s activities and demonstrated substantial level of commitment to conspiracy. Here defendant benefitted, although indirectly, from co-conspirators activities to advance his scheme: although he did not realize financial gain directly from phony companies not under his control, co-conspirators acts in furtherance of overall scheme allowed him to receive illicit funds through his own companies. Evidence also suggested defendant was substantially committed to overall scheme and not just as it related to his three companies. Further, defendant was co-conspirator s " right hand . . . to make sure operations, accounting structure, specifically,

was maintained "; and defendant and co-conspirators used nearly identical means to defraud college.

(2) Loss occurring prior to defendant s joining conspiracy. District Court made no finding regarding precise time that defendant joined conspiracy, there is insufficient evidence from which this Court can make that determination, and time when he joined could have significant consequences because defendant cannot be held liable for losses caused by co-conspirators prior to time defendant entered conspiracy. Accordingly, this Court reverses and remands for such determination. )

United States v. Hildebrand, 152 F.3d 756 (8th Cir.) (Government argued District Court should have determined value of money laundered by equating it to amount of fraud loss, after grouping fraud and money laundering offenses; and then concluding total amount of fees collected in conspiracy to file claims in purported class action was reasonably foreseeable to each defendant. This Court disagrees. It is wrong to assume Commission intended to equate amount of fraud loss with value of money laundered for every fraudulent scheme that includes some form of money laundering. Fraud and money laundering counts are not so closely related as to permit loss and value grouping under § 3D1.2(d). District Court must determine value of laundered proceeds attributable to each conspirator, keeping in mind (1) different types of money laundering involved (i.e., "reinvestment" money laundering versus "[c]oncealment" money laundering); and (2) what was reasonably foreseeable to each money laundering conspirator.), cert. denied, 525 U.S. 1033 (1998).

United States v. Mahler, 984 F.2d 899 (8th Cir. 1993). (This Court vacates sentence insofar as it was based on finding that Mahler laundered more than $350,000 and remands where hearsay statements in PSR which Mahler challenged and upon which District Court based its finding on amount of money Mahler laundered, did not have sufficient indicia of reliability to support their probable accuracy. Once Mahler challenged factual conclusion, government was required to introduce evidence to show by preponderance of evidence amount of money Mahler had laundered; probation officer s conclusion was insufficient.)

**§ 2S1.2(b)(1)(B) [deleted in 2001 by consolidation with § 2S1.1 (Monetary Transaction in Property from Unlawful Activity/Standard of Review)]:**

United States v. Hare, 49 F.3d 447 (8th Cir.) (Whether District Court properly applied § 2S1.2(b)(1)(B) is mixed question of law and fact that this Court reviews de novo; it reviews underlying factual findings for clear error.), cert. denied, 516 U.S. 879 (1995).

**§ 2S1.2(b)(1)(B) [deleted in 2001 by consolidation with § 2S1.1 (Monetary Transaction in Property from Unlawful Activity)]:**

United States v. Hetherington, 256 F.3d 788 (8th Cir. 2000) (McMILLIAN, J. R. GIBSON,* LAUGHREY). (District Court increased defendant's offense level for offense of engaging in monetary transaction in criminal derived property, finding that evidence established defendant was

fully knowledgeable that particular tender offer of Omni Financial Corporation, of which defendant was chairman of board of directors--and even Omni's entire operation--were based on fraud involving purchase and sale of securities. Evidence supports conclusion that defendant knew funds he received were proceeds of securities fraud; District Court's finding was not clearly erroneous.), cert. denied, 534 U.S. 1050 (2001).

United States v. Hawkey, 148 F.3d 920 (8th Cir. 1998). (Hawkey argues two-level enhancement, § 2S1.2(b)(1)(B), constitutes double counting and attempted to distinguish his case from United States v. Hare. Knowledge that property at issue was derived from specified unlawful activity is not required element under § 1957. This Court concludes case is governed by Hare, and because specific offense characteristic enhancement applies to conduct not element of offense, it does not amount to impermissible double counting.

Alternatively, Hawkey argues record does not support conclusion he knew funds were proceeds of any other specified unlawful activity. Hawkey had knowledge of how proceeds were derived and he had control over how they were spent; because he clearly knew he was using funds for purposes other than those for which they were intended, this Court concludes District Court did not err in applying two-level upward adjustment.)

United States v. Hare, 49 F.3d 447 (8th Cir.) (District Court increased Hare s base offense level by two because of his knowledge funds were proceeds of wire fraud, § 2S1.2(b)(1)(B). This Court summarily rejects Hare s contention wire fraud is not specified unlawful activity within meaning of statute. As to Hare s argument adjustment amounted to impermissible double-counting, this Court concludes because specific offense characteristic enhancement (defendant must have known funds were not merely criminally derived, but were proceeds of specified unlawful activity) applies to conduct not element of offense, it does not amount to impermissible double-counting.), cert. denied, 516 U.S. 879 (1995).

**§ 2S1.3 (Structuring; Failure to Report; Filing/Standard of Review):**

United States v. Mitchell, 31 F.3d 628 (8th Cir. 1994). (This Court reviews District Court s factual determinations for sentencing purposes under clearly erroneous standard.)

**§ 2S1.3 (Structuring; Failure to Report; Filing):**

United States v. Larson, 110 F.3d 620 (8th Cir. 1997). (Section 2S1.3(b) lists specific offense characteristics for sentencing defendant for failing to file currency and monetary instrument reports; subsection (b)(1) provides for two-level increase where funds were known to be proceeds of unlawful activity or intended to promote unlawful activity. Here, District Court made two findings of intent to promote unlawful activity; by preponderance of evidence, Court found both that Larson intended funds to: promote unlawful exportation of fossils from Peru, and promote unlawful conspiracy to take fossils from United States public lands. On appeal, Larson mistakenly combines District Court s two findings of fact; either of two distinct factual findings of intent could sustain application of § 2S1.3(b)(1). Because finding Larson intended to promote conspiracy is sufficient to support application of § 2S1.3(b)(1), this Court need not reach question of whether

Larson s exportation of fossils was unlawful under Peruvian law. District Court s finding Larson intended funds to promote unlawful conspiracy was not clear error where there was sufficient evidence to conclude for both Larson s exportation of funds to Peru, which were then used to acquire fossils later sold, and Larson s direct importation of funds from Japan, were intended by Larson to produce proceeds for Institute that would promote its ongoing conspiratorial enterprise. Because funds Larson failed to report were to aid unlawful conspiracy, two-level increase was properly applied. DISSENT: Government provided no evidence about Larson s plan for money. Only arguable nexus between trips and fossil conspiracy is general business done by Institute, and these general connections stretch concept of relevant conduct beyond case law.)

United States v. Mitchell, 31 F.3d 628 (8th Cir. 1994). (Dowdy is former fire captain and convicted drug dealer; Mitchell, former fireman, is licensed real estate agent and friend of Dowdy. Mitchell challenged his sentence arguing District Court erred by enhancing his base offense level, § 2S1.3(b)(1), for using funds which he knew or believed to be criminally derived. This Court agrees with District Court s finding that government had established by preponderance of evidence that Mitchell knew Dowdy was drug dealer and money used to purchase cashier s checks was derived from Dowdy s illegal activities. Mitchell was found guilty of structuring financial transaction to evade currency reporting requirements; charges that led to Mitchell s conviction were initiated following IRS investigation into criminal activities of Dowdy. This Court finds abundant evidence in record: Mitchell had enjoyed long friendship with Dowdy; Mitchell had visited home of one of Dowdy s girlfriends on several occasions when significant amounts of cash and drugs were on hand; Mitchell was familiar with Dowdy s earning capacity and was also aware of Dowdy s extravagant life style; Mitchell paid bulk of property purchase price in cash in small denominations delivered in paper or plastic bags; and Dowdy was true owner of property purchased by Mitchell.)

**Part T. Offenses Involving Taxation**

**§ 2T1.1 (Evasion; Failure to File, Etc.; False Returns):**

United States v. Ervasti, 201 F.3d 1029 (8th Cir. 2000) (BOWMAN,* LAY, BEAM). (Defendant and his wife were convicted for offenses arising out of misappropriation of over $5.7 million of impounded tax monies from over 100 clients of their payroll processing corporation. In determining tax loss attributable to offense, all conduct violating tax laws should be considered part of same course of conduct, or common scheme or plan, unless evidence demonstrates conduct is clearly unrelated. District Court determined tax loss arising out of defendant's fraud was $5,747,478.88. Defendant asks this Court to distinguish between fraud loss--which she concedes to be foregoing amount--and tax loss--which she contends is far less because much of $5.7 million related to liabilities that were not due, and for which Forms 941 had not been filed, at time corporation went out of business. This Court affirms District Court's finding, because Court was well within its discretion to consider overall scope of unlawful scheme in assessing amount of tax loss.)

United States v. Noske, 117 F.3d 1053 (8th Cir.) (Noskes challenge District Court's

calculation of tax loss in deciding BOLs. This Court concludes District Court correctly calculated amount of tax loss following evidentiary hearing/adoption of amounts specified in PSR. District Court properly used 28% of untaxed distributions to Noske "nonprofit" corporation, which should have been paid as distributors personal income tax; government not required to prove it actually lost that amount in taxes (§ 2T1.1(a)(B)); record shows distributors were not entitled to charitable deductions for sham distributions. District Court also properly included uncharged relevant criminal conduct in amounts of tax--computed from IRS files--evaded by clients by using Noskes business trust scheme.

District Court was correct in adding two levels to BOL for Noskes use of sophisticated means (§ 2T1.1(b)(2)).), cert. denied, 522 U.S. 922, 522 U.S. 959 (1997), and 522 U.S. 1119 (1998).

United States v. Mathis, 980 F.2d 496 (8th Cir. 1992). At plea stage, Mathises agreed tax loss was about $104,000. Before sentencing, they paid stipulated tax loss and then contended District Court should have used actual tax loss of zero (for base offense level of 10 rather than 12). District Court properly used 12 level as payment of taxes Mathises attempted to evade does not alter tax loss or offense level under Guidelines.)

**§ 2T1.1(b)(2) (Use of Sophisticated Means/Standard of Review):**

United States v. Hart, 324 F.3d 575 (8th Cir. 2003) (WOLLMAN, HEANEY, BYE*). (Question whether facts as found by District Court constituted sophisticated means is reviewed de novo by this Court.)

United States v. Brooks, 174 F.3d 950 (8th Cir. 1999) (RICHARD S. ARNOLD, BRIGHT,* F.R. GIBSON). (This Court reviews factual finding of whether tax evasion scheme qualifies as "sophisticated" for clear error.)

**§ 2T1.1(b)(2) (Use of Sophisticated Means):**

United States v. Hart, 324 F.3d 575 (8th Cir. 2003) (WOLLMAN, HEANEY, BYE*). (Neither defendant's failure to keep any records, nor his practice of having personal income paid to corporation as commissions and then transferred to private banker, constituted sophisticated means. Former method of concealing tax evasion was as unsophisticated as could be imagined, and latter method did not in fact conceal tax evasion because payer reported all commission payments to IRS.)

United States v. Brooks, 174 F.3d 950 (8th Cir. 1999) (RICHARD S. ARNOLD, BRIGHT,* F.R. GIBSON). (This Court rejects challenge to 2-level enhancement imposed for use of "sophisticated means" to impede discovery of tax evasion scheme. Trial testimony revealed that defendant concealed ownership of his property and evaded his tax obligations by submitting inaccurate withholding forms to his employer; cashing his paychecks personally instead of relying on his employer's direct deposit system; changing name on his deed, utilities, and homeowner's insurance policy to trust; establishing bank account in name of second trust for payment of bills associated with first trust; and using P.O. Box to receive his mail relating to his property, utilities,

and insurance.)

**§ 2T1.4(b)(2) (Aiding, Assisting, Procuring, Counseling, Advising):**

United States v. Jagim, 978 F.2d 1032 (8th Cir. 1992). (District Court did not err in enhancing Ziebarth s sentence where scheme was extensively planned and executed with careful attention to detail. Tax shelter scheme was conceived and initiated; then original conspirators brought other participants into deal and false tax forms were prepared for and signed by many of them.)

**§ 2T1.9 (Conspiracy):**

United States v. Sileven, 985 F.2d 962 (8th Cir. 1993). (District Court did not clearly err in finding Sileven encouraged others to break law. Trial record established Sileven repeatedly encouraged clients to hide income through his actions and words.)

United States v. Telemaque, 934 F.2d 169 (8th Cir. 1991). (Telemaque argued § 2T1.3 was more relevant, but evidence amply supported her conviction for conspiracy to impede collection of tax (fraudulent tax returns claiming refunds in excess of billion dollars were filed).)

**§ 2T4.1 (Amount of Tax Loss/Standard of Review):**

United States v. Hart, 324 F.3d 575 (8th Cir. 2003) (WOLLMAN, HEANEY, BYE*). (Government has burden to prove amount of tax loss by preponderance of evidence at sentencing. Where amount is uncertain, District Court must make reasonable estimate based on available evidence, and finding will be reviewed for clear error.)

United States v. Willis, 277 F.3d 1026 (8th Cir. 2002) (McMILLIAN, MURPHY,* BATTEY). (District Court's factual findings regarding amount of tax loss will be upheld unless clearly erroneous.)

**§ 2T4.1 (Amount of Tax Loss):**

United States v. Hart, 324 F.3d 575 (8th Cir. 2003) (WOLLMAN, HEANEY, BYE*). (District Court did not err in finding that defendant used business commissions as personal income, given his plea-agreement stipulations to that effect and evidence at sentencing.)

United States v. Willis, 277 F.3d 1026 (8th Cir. 2002) (McMILLIAN, MURPHY,* BATTEY). (District Court did not clearly err in determining amount of tax loss by crediting IRS agents' trial testimony rather than tax forms defendant filed after he was indicted.)

**Part X. Other Offenses**

**§ 2X1.1 (Attempt, Solicitation, or Conspiracy):**

United States v. Smith, 997 F.2d 396 (8th Cir. 1993). (Smith was convicted of being felon in possession of firearm; several witnesses had testified that Smith went to place where one Dennis Simkins was camping and shot and wounded him with pistol. District Court applied cross-referencing provision. Smith argues that under 1991 amendment, prerequisite for applying section to him is conviction for aggravated assault. This Court concludes that cross-reference provision contains no language requiring that defendant be convicted of other offense (§ 2K2.1(c)(1)(A) (1991)). DISSENT: Would apply 1991 Guidelines and not use cross-referencing provision because amendment to 1991 Guidelines makes provision inapplicable to Smith s circumstances. Cross-referencing provision of § 2K2.1(c)(1)(A) in effect triggers provision which is inapplicable unless defendant has been convicted of committing substantive offense. Smith was never convicted of aggravated assault and thus cannot be sentenced under guideline for aggravated assault.)

United States v. Wilson, 992 F.2d 156 (8th Cir.) (Because Wilson had used firearm in attempt to commit another offense, § 2K2.1(c)(2) required reference to § 2X1.1; then § 2A2.1(a)(1) was applied as Wilson s gun shot into crowd was characterized as attempted first degree murder.), cert. denied, 510 U.S. 888 (1993).

**§ 2X1.1(a) (Base Offense Level):**

United States v. Simmons, 260 F.3d 937 (8th Cir. 2001) (McMILLIAN, RICHARD S. ARNOLD, ROSENBAUM*). (When dealing with attempted offenses, District Court must begin with Guideline for substantive offense, and then include adjustment for any intended offense conduct that can be established with reasonable certainty. Defendant's statements to co-conspirator showed with sufficient certainty that he planned to incapacitate postmaster with concoction of grain alcohol and Valium, shoot any police officers who responded, and steal more than $50,000 in money orders; even though he did not consummate his plans, and no such items were found in his possession.)

**§ 2X1.1(b)(2) (Uncompleted Conspiracy):**

United States v. McGarr, 330 F.3d 1048 (8th Cir. 2003) (HANSEN, RILEY, MELLOY*). (Because essential facts were undisputed, it was question of law whether District Court correctly concluded that conspirators were about to carry out all acts necessary for successful completion of robbery. Conclusion was correct because defendant had surveilled robbery targets and had sent his brother with shotgun to locate targets and await further instructions. Only fact that robbery targets left before defendant gave go-ahead call to brother thwarted robbery conspiracy. There will always be some level of uncertainty in these cases, but it does not rise to level of impermissible speculation here.)

United States v. Brown, 74 F.3d 891 (8th Cir.) (Brown pleaded guilty to possession of incendiary device, 18 U.S.C. § 371. On appeal, Brown suggests District Court erred as matter of law in applying § 2X1.1(b)(2) by failing to distinguish between conspiracy and substantive offense. However, District Court was careful to note substantive offense was possession of incendiary device, and not arson or murder, as Brown suggested. Alternatively, Brown argues denial of reduction was

clearly erroneous because conspirators did not possess incendiary device. This Court agrees reduction was not warranted because spark plug and wire were easily obtainable and by hiring Vaughn who "could do job," Brown did all he believed necessary for completion of offense. Whether reduction under § 2X1.1 is warranted is fact-specific inquiry, and Courts have upheld denial even though defendant had not reached last step before completion of substantive offense. Brown also argued District Court erred in restricting his cross-examination, thereby preventing him from proving he had abandoned spark plug conspiracy and moved on to other conspiracies. This Court observes District Court allowed cross-examination about various plans to cause harm, but noted discussion of other plans was irrelevant to conspiracy to which Brown had pleaded guilty--possession of incendiary device. Moreover, plans to use device had not been abandoned.), cert. denied, 519 U.S. 820 (1996).

United States v. Penson, 62 F.3d 242 (8th Cir. 1995). (Alvarez argued District Court misapplied § 2X1.1 which permits three-level reduction for partially completed offenses. Court holds Alvarez s argument is precluded by U.S. v. Johnson. Defendants here intended to cash stolen treasury checks that would have caused U.S. to suffer loss of over $60 million and they would have continued to pursue their scheme but for intervention of postal inspectors. Thus, District Court did not err in denying reduction.)

United States v. Adipietro, 983 F.2d 1468 (8th Cir. 1993). (This Court rejects Adipietro s argument of entitlement to reduction for uncompleted conspiracy where he was convicted of conspiracy involving controlled substance, offense expressly covered by another offense guideline section (§ 2D1.4). Therefore, by its own terms, § 2X1.1 does not apply.)

United States v. Westerman, 973 F.2d 1422 (8th Cir. 1992). (Westerman was not entitled to three level reduction because record demonstrates co-conspirator completed all acts conspirators believed necessary on their part for successful completion of offense (i.e., claim for proceeds under fire insurance policy were sent in, thus completing mail fraud). District Court error (focusing on arson rather than mail fraud as object offense and Westerman s belief all acts done necessary for completion of arson) was harmless.)

United States v. Johnson, 962 F.2d 1308 (8th Cir. 1992). (No reduction of offense level warranted where intended bank robberies would have been completed but for intervention of law enforcement officials.)

**§ 2X2.1 (Aiding and Abetting):**

United States v. Miller, 283 F.3d 907 (8th Cir.) (WOLLMAN,* HANSEN, FENNER). (Aiders and abetters receive same offense level as they would if convicted as principals.), cert. denied, 537 U.S. 871 (2002).

**§ 2X3.1 (Accessory After Fact):**

United States v. Russell, 234 F.3d 404 (8th Cir. 2000) (BOWMAN,* BEAM, BOGUE).

(Defendant was convicted of obstructing justice in connection with his role as confidential informant in undercover drug operation pursuant to which he was paid to identify drug dealers and make controlled drug buys. During prosecution of those identified during drug sting, defendant had falling out with authorities over terms of his payment and thereafter signed affidavits exonerating various persons who had been indicted, one of whom Russell had already testified against at criminal trial. Court calculated defendant's base offense level by using dismissed drug charges as applicable underlying offenses, making drug-quantity findings, and then referring to drug-quantity table to establish base offense level. This calculation placed defendant at level 34 from which District Court then subtracted 6 levels, as required by § 2X3.1, to arrive at final base offense level of 28. Defendant contends use of this Guideline first requires government to show defendant's guilt as accessory after fact in drug crimes used to calculate his sentence. This Court disagrees. While § 2X3.1 ordinarily applies to convictions for acting as accessory after fact, it also serves as tool for calculating base offense level for particularly serious obstruction offenses; and where defendant has obstructed investigation or prosecution of criminal offense, government need not charge convicted defendant as accessory.)

**§ 2X4.1 (Misprision of Felony):**

United States v. Booker, 186 F.3d 1004 (8th Cir. 1999) (BEAM, MORRIS SHEPPARD ARNOLD,* PANNER). (District Court correctly set McGlothern's base offense level at 19--9 levels below offense level of 38 for underlying offense--based on drugs possessed by co-defendant Booker. Although McGlother argues there is no proof he knew of amount of drugs Booker had hidden in his truck and cites Note 10 to § 1B1.3, this Court concludes Note 10 applies only to specific offense conduct, and § 2X4.1(a) quite explicitly states that level of underlying offense is first relevant datum in determining base level applicable to misprision conviction and that Note 1 then directs Court to add to offense level "any applicable specific offense characteristics that were known, or reasonably should have been known, by defendant.")

United States v. Rawe, 21 F.3d 850 (8th Cir. 1994). (Rawe pleaded guilty to misprision of felony (conspiracy to rob and robbery of bank). She claims error in imposition of six-level increase because gun was used in underlying offense and one-level increase because guard s gun was taken during robbery. This Court concludes Rawe reasonably should have known firearm might be used during robbery and that guard s gun might be taken as she knew gun had been used in prior aborted robbery attempt, her co-defendants had threatened her with guns, conspirators had discussed using guns during prospective robbery, and armed guard would be present at ATM robbery.)

**§ 2X5.1 (Other Offenses/Standard of Review):**

United States v. Ferrara, 334 F.3d 774 (8th Cir. 2003) (WOLLMAN,* MAGILL, BEAM). (This Court reviews de novo whether there exists sufficiently analogous Guideline, and where there are multiple analogous Guidelines, this Court gives due deference to District Court's fact-bound selection of most analogous one.), cert. denied, 124 S. Ct. 1127 (2004).

United States v. Osborne, 164 F.3d 434 (8th Cir. 1999) (RICHARD S. ARNOLD, JOHN R.

GIBSON,* FAGG). (This Court reviews de novo District Court s determination whether there is sufficiently analogous Guideline to defendant s crime. However, this Court reviews with due deference District Court s choice of most analogous Guideline.)

**§ 2X5.1 (Other Offenses):**

United States v. Ferrara, 334 F.3d 774 (8th Cir. 2003) (WOLLMAN,* MAGILL, BEAM). (Defendant was caught operating fraudulent schemes and entered into consent agreement with government requiring him to comply with disclosure requirements. He violated that agreement and was convicted of contempt of court. District Court properly determined that § 2F1.1 was most analogous Guideline.), cert. denied, 124 S. Ct. 1127 (2004).

United States v. Allard, 164 F.3d 1146 (8th Cir. 1999) (RICHARD S. ARNOLD, JOHN R. GIBSON,* FAGG). (This is companion case to United States v. Osborne. Like Osborne, Allard pleaded guilty to vehicular battery, and District Court held that involuntary manslaughter was most analogous Guideline. Reviewing de novo, this Court agrees with District Court that involuntary manslaughter is sufficiently analogous to vehicular battery: both contemplate defendant did not have specific intent to cause harm, and differing elements of death versus serious bodily injury do not make involuntary manslaughter Guideline insufficiently analogous–by definition, analogous Guidelines do not and need not perfectly match defendant's crime. Reviewing with due deference, this Court cannot say District Court erred in choosing involuntary Guideline as most analogous (i.e., between aggravated assault and involuntary manslaughter) given Allard's reckless conduct and seriousness of victim's injury. Nevertheless, this Court reverses because District Court improperly added specific offense characteristics of aggravated assault to base offense level for involuntary manslaughter. If increase in Allard's sentence was necessary, District Court was required instead to consider appropriate upward departure.)

United States v. Osborne, 164 F.3d 434 (8th Cir. 1999) (RICHARD S. ARNOLD, JOHN R. GIBSON,* FAGG). (General rule: in case of first impression in this circuit, this Court outlines steps to be followed in applying section 2X5.1: (1) District Court must determine whether any Guidelines are sufficiently analogous to defendant's crime, and if there are none, defendant is to be sentenced under 18 U.S.C. § 3553(b); and (2) if more than one Guideline is analogous, District Court must choose most analogous from among them, looking not merely to definition of offenses but also to defendant's actual conduct. Application here: Osborne pleaded guilty to vehicular manslaughter, in violation of 18 U.S.C. §§ 7, 13, and 1152, which assimilate state criminal law for offenses by non-Indians on Indian lands. At sentencing, Court applied Guideline for aggravated assault. Rejecting Osborne's argument regarding apparent differences between state of mind required for aggravated assault under federal law and that required for vehicular battery under state law, this Court agrees with District Court that aggravated-assault Guideline is sufficiently analogous to vehicular battery. In step two, this Court concludes, based on circumstances of offense--the considerable amount of alcohol Osborne had ingested, his refusal to heed warning not to drive, and fact that he was driving trailer filled with loose cinder blocks well in excess of 65 miles per hour--that Osborne's conduct fits well within purview of aggravated-assault Guideline.)

## CHAPTER THREE:
## ADJUSTMENTS

### Part A. Victim-Related Adjustments

**§ 3A1.1 (Hate Crime Motivation or Vulnerable Victim/Standard of Review):**

United States v. Moskal, 211 F.3d 1070 (8th Cir. 2000) (RICHARD S. ARNOLD, BEAM,* CONMY). (District Court's determination that vulnerable victim enhancement is deserved turns on factual finding subject to review for clear error.)

United States v. Hogan, 121 F.3d 370 (8th Cir. 1997). (A District Court s determination vulnerable victim adjustment is warranted turns on factual finding subject to clearly erroneous standard of review.)

United States v. Stover, 93 F.3d 1379 (8th Cir. 1996). (This Court reviews for clear error District Court s finding there was vulnerable victim in case).

**§ 3A1.1 (Hate Crime Motivation or Vulnerable Victim):**

United States v. McDermott, 29 F.3d 404 (8th Cir. 1994). (The McDermotts were convicted and sentenced for conspiring to violate civil rights, 18 U.S.C. § 241. They challenge upward adjustments based on "vulnerable victim." District Court found victims were unusually vulnerable: few blacks living in north end of city were racially isolated and particularly susceptible to threats, victims were vulnerable on basis of their young age (14-16), and one 14-year-old victim was physically disabled. This Court rejects McDermotts argument that enhancement is duplicative because blacks are typical victims of § 241 crime; rejects argument that victims young ages cannot support finding of vulnerability because McDermotts were only few years older; and rejects contention that McDermotts did not target handicapped girl based on her handicap and that she cannot be vulnerable victim because she is white (evidence showed she was harassed because of her friendship with blacks).

United States v. Callaway, 943 F.2d 29 (8th Cir. 1991). (Though record showed defendant s granddaughter was victim and was both young and handicapped, record did not support finding that defendant chose granddaughter as "target" for crime because of her youth and physical handicaps. This Court reversed and remanded because of clear error in upward adjustment.)

**§ 3A1.1(a) (Hate Crime):**

United States v. Pospisil, 186 F.3d 1023 (8th Cir. 1999) (WOLLMAN,* LOKEN, JACKSON). (Barney argues jury was required to make special finding that he intentionally selected victim because of race. But jury instructions expressly incorporated language about race of victims and jury found he took part in conspiracy to intimidate victims or interfere with their rights "on account of their race, color, or national origin." This was sufficient basis for § 3A1.1(a) increase.),

cert. denied, 529 U.S. 1089 (2000).

**§ 3A1.1(b)(1) (Vulnerable Victim):**

United States v. Anderson, 349 F.3d 568 (8th Cir. 2003) (LOKEN,* McMILLIAN, HANSEN). (District Court's vulnerable-victim determinations are reviewed for clear error. Here, although many victims were elderly, it is not obvious that they were unusually vulnerable to investment fraud because older persons are often more experienced investors. In other cases, such as violent crimes or telemarketing scams, such age-based vulnerability may be obvious. This Court remands for reconsideration because District Court did not make sufficient findings to support enhancement.)

United States v. Brings Plenty, 335 F.3d 732 (8th Cir. 2003) (LOKEN, BRIGHT, SMITH CAMP*). (For defendant convicted of burglary in nighttime, District Court did not err in applying vulnerable-victim enhancement for sleeping victim. Although there may often be sleeping victims during nighttime burglaries, neither victim's presence in structure nor victim's sleeping status are elements of offense, and being asleep renders one particularly vulnerable.)

United States v. Evans, 285 F.3d 664 (8th Cir. 2002) (LOKEN, RICHARD S. ARNOLD,* FAGG). (Despite some commonality between victim in instant case and typical underage Mann Act victim, District Court did not clearly err in applying vulnerable-victim enhancement based on defendant's targeting of victim who had been underage, runaway, and resident of juvenile facility without parental guidance), cert. denied, 123 S. Ct. 1257 (2003).

United States v. Evans, 272 F.3d 1069 (8th Cir. 2001) (LOKEN, RICHARD S. ARNOLD,* FAGG). (District Court did not clearly err in applying vulnerable-victim enhancement based on defendant's targeting of minor victim; although victim's age was incorporated into base-offense level calculation under § 2G2.1 (sexual exploitation of minor), District Court did not clearly err based on evidence that she was more vulnerable than average minor victim.

District Court did not clearly err in applying vulnerable-victim enhancement where victim was incarcerated and was addicted to drugs and alcohol, and where defendant furnished drugs and alcohol to victim upon her release from prison.), cert. denied, 535 U.S. 1029 (2002).

United States v. Washington, 255 F.3d 483 (8th Cir. 2001) (McMILLIAN, BOWMAN, BOGUE*). (District Court did not err in applying vulnerable victim enhancement during sentencing for defendants' mail fraud scheme to bilk land owners of value of their lumber. There was evidence that defendants targeted elderly victims in need of money and out-of-state landowners who could not check on their land as frequently. Morevoer, defendants gained victims' trust through long high-pressure conversations, during which victims revealed their age, infirmities, and vulnerabilities.)

United States v. Moskal, 211 F.3d 1070 (8th Cir. 2000) (RICHARD S. ARNOLD, BEAM,* CONMY). (District Court did not clearly err in assessing 2-level vulnerable-victim enhancement where defendant, prominent attorney, stole money from clients, including mentally retarded adult, car accident victim, third client who was disabled, at least eight minors, eight deceased persons,

twelve persons over age sixty, two seriously ill clients, and one homeless person. Moskel's contention that Court failed to show nexus between vulnerability and criminal conduct may have had some force under Guideline in effect prior to 1995, but Guidelines no longer require that defendant target his victims because of their vulnerability.)

United States v. Pospisil, 186 F.3d 1023 (8th Cir. 1999) (WOLLMAN,* LOKEN, JACKSON). (In cross-burning incident at Costas' home, Dennis referred to Costas as "little niglets," and District Court correctly concluded this demonstrated Dennis's knowledge that young children resided at Costa home. Also, Dennis was aware victims were particularly vulnerable because they were new in town. Thus, enhancement was properly applied as to Dennis. However, this Court reverses enhancement as to Barney because District Court did not find he knew or should have known Costas were vulnerable: District Court did not find he used term "niglet," that term was used in his presence, or that he was aware Costas had just moved to town.), cert. denied, 529 U.S. 1089 (2000).

United States v. Hernandez-Orozco, 151 F.3d 866 (8th Cir. 1998). (District Court did not clearly err in finding Hernandez knew or should have known victim was unusually vulnerable: she was 15 years old when she was kidnapped, she had never traveled more than four-hour drive from her small and rural village, Hernandez was physically larger and stronger than victim, he used his physical advantage to kidnap her, and she did not speak English, which rendered her more vulnerable in United States (country to which she was taken) since she could not as easily seek assistance.)

United States v. Cain, 134 F.3d 1345 (8th Cir. 1998). (District Court imposed two-level increase for each defendant for exploiting one particular victim s "religious vulnerability," § 3A1.1(b), on its own motion and without prior notice to defendants. Application notes to Guidelines were amended after September 1993 (when relevant victim was defrauded) to remove requirement that victim was made target because of his or her vulnerability. This Court agrees with defendants that application of amendment to their cases would violate constitutional guarantee against ex post facto laws. Under pre-amendment version requiring "targeting" of victim, evidence was insufficient to sustain finding victim in question was "unusually vulnerable." Pre-amendment version is relevant one for sentencing purposes, § 1B1.1(b)(1). No evidence in record that would sustain factual finding particular victim at issue was made target because of her vulnerability to sales pitch that included singing of hymns, reading and gift of religious poem to her, and representations both defendants were ministers. This Court reverses imposition of two-level increase.)

United States v. Whatley, 133 F.3d 601 (8th Cir.) (District Court s imposition of enhancement, § 3A1.1(b), had sufficient basis in record: defendants targeted elderly and those who were known to be susceptible to sort of operation Whatleys ran, e.g., evidence that Mr. Whatley described customers as "dupes," lists of "response leads" purchased to obtain customers who would "buy from anyone and everyone that has sales ability."), cert. denied, 524 U.S. 940 and 524 U.S. 945 (1998).

United States v. Hogan, 121 F.3d 370 (8th Cir. 1997). (While parties agree 1993 Guidelines

apply because that version was in force at time of Hogan s criminal activity, Hogan contends District Court erroneously applied 1995 version, pointing to District Court s judgment which cites 1995 Guidelines. Application note 1 of 1993 commentary explains adjustment applies only when defendant "targets" vulnerable victim; 1995 version eliminates targeting requirement, merely requiring showing defendant knew or should have known of victim s unusual vulnerability. (§ 3A1.1(b)). While this Court would normally remand for clarification, it concludes it unnecessary because record does not support upward adjustment under 1993 version. Government failed to meet burden of proof; although evidence indicates some of Hogan s victims were unusually vulnerable and he knew or should have known of their financial situations, record cannot support finding Hogan targeted victims because of their vulnerability. Rather, Hogan indiscriminately took advantage of variety of investors, both young and old, including relatives, friends, and strangers. Court comments that while evidence might suffice under current version of Guidelines, it does not meet more stringent "targeting" of 1993 Guidelines.)

United States v. Drapeau, 110 F.3d 618 (8th Cir. 1997). (District Court did not err by applying vulnerable victim provision, § 3A1.1(b), and enhancing two levels where as one year old child, victim did not have physical ability to protect himself, and Drapeau knew child would not be able to identify him as child could not talk and did not have mental ability to identify him otherwise.)

United States v. Stover, 93 F.3d 1379 (8th Cir. 1996). (Defendants argue District Court erred in giving them two-level upward adjustment under vulnerable victim provision: Court based its decision upon financial vulnerability of victims; even if clients desire to adopt was powerful, no evidence clients judgment was particularly impaired and no evidence defendants targeted victims vulnerabilities; and defendants had every intention of placing child with each client so no fraud based upon deliberately false promises (i.e., both requirements for enhancement missing: no unusual vulnerability or particular susceptibility of victim and no targeted exploitation of that weakness). Subsequent to defendants sentencing, but before appeals were submitted to this Court, § 3A1.1 became § 3A1.1(b). Despite Sentencing Commission labeling amendment "clarification," commentary to § 3A1.1 is "law" for purposes of engaging in ex post facto analysis. This Court declines to apply new commentary which removes/clarifies targeted victim issue. This case does not deal with type of victim vulnerability expressly enumerated in § 3A1.1. Rather, it results from sense of desire or desperation presumably created by circumstances--inability to conceive child--beyond their control; clients willingness to spend large sums of money made them more likely to fall victim to defendants fraud but did not create extra need for societal protection which § 3A1.1 is designed to address. Without intending to discount pain and disappointment suffered by victims, this Court holds District Court s vulnerable victim finding, clearly erroneous. As to government s main argument it was, more specifically, infertility of victims that made them particularly susceptible to fraud, no evidence defendants offered their services selectively rather than to general public at large; government did not demonstrate defendants actions in some way exploited or took advantage of victims infertility or that any of victims were chosen for that reason. Thus, vulnerable victim enhancement was not justified.)

United States v. Bordeaux, 84 F.3d 1544 (8th Cir. 1996). (Two-level increase was not clearly erroneous where District Court could readily infer from evidence White Horse targeted

victim because of his handicap: because of victim s limp and leg brace, he was unable to run away during beatings; there was testimony White Horse told driver to pull over when they first saw victim, White Horse was first person to hit victim, and at one point victim tried to get up and White Horse kicked him in leg and caused him to fall back down.)

United States v. Cron, 71 F.3d 312 (8th Cir. 1995). (Cron argues District Court s two-point enhancement was clearly erroneous because nothing in record indicates he specifically targeted vulnerable victims. District Court did not err in holding Cron to his stipulation and plea agreement that vulnerable victim enhancement should apply to his case. Moreover, most of victims were elderly and record indicated Cron knew or should have known his targets of wire fraud were elderly persons.)

United States v. Janis, 71 F.3d 308 (8th Cir. 1995). (Janis challenges vulnerable victim enhancement, § 3A1.1(b), as Court relied on age difference and element of offense is age difference between victim and defendant. Janis also stated various teachers believed victim s IQ higher than reflected in PSR; and questioned Court s mention of victim living with his family as he did not have custody over her. No error in District Court s application of guideline: it did not improperly double-count victim s age because it relied on number of factors related to victim s mental disabilities or susceptibility to criminal conduct. At least three psychological evaluations in record concluded victim had IQ of 65 or less; Janis did not challenge victim s diagnosis of fetal alcohol syndrome, severe attention deficit, and hyperactivity disorder. District Court s reliance on these factors added to regular contact between victim and Janis due to their living situation, support finding she was particularly vulnerable to illegal conduct.)

United States v. Coates, 996 F.2d 939 (8th Cir. 1993). (Coates contended that District Court s use of age of victim to apply vulnerable victim adjustment after using victim s age as basis for four-level increase under § 2A4.1(b)(5) which provided enhancement if defendant kidnapped victim to facilitate commission of another crime was erroneous. This Court addressed issue whether § 2A4.1 "specifically incorporated" same ground of vulnerability used by District Court to enhance Coates s base offense level under § 3A1.1. Because neither crime to which Coates pleaded guilty (kidnapping) nor kidnapping guideline (§ 2A4.1(a)) contained any reference to age, computation of Coates s initial base offense level did not specifically incorporate age as factor. As to Coates s argument that "other offense" conduct of § 2A4.1(b)(5) was sexual abuse of minor, age was per se factored into four-level enhancement. This Court states that although Coates s victim happened to be young, it was that Coates abducted his victim for additional criminal purpose, and not victim s youth, that triggered four-level enhancement.

District Court s assessment of adjustment for presence of vulnerable victim was proper where reported facts demonstrated that Coates selected his victims based in part upon their age and small physical size when contrasted with his own; he admitted preying on naivete of his child victims; and he intimidated each of his three child victims partly by taking advantage of his superior size.)

United States v. Ravoy, 994 F.2d 1332 (8th Cir. 1993). (This Court reverses two-point assessment where District Court found defendants preyed on victims "distressed financial

circumstances." District Court clearly erred as sellers [to defendant buyers] were not "otherwise susceptible to criminal conduct" nor were they targeted because of their age or any physical or mental handicaps they may have had. Sellers did not have particularized vulnerability adjustment requires.)

United States v. Paige, 923 F.2d 112 (8th Cir. 1991). (Paige passed falsified money orders, targeting stores staffed by young Caucasian clerks whom he considered "inexperienced and naive." This Court opines Paige s choice of victims did not show extra measure of criminal depravity § 3A1.1 intends to punish more severely and remands for resentencing, as District Court s finding as to vulnerability was without factual basis.)

United States v. Cree, 915 F.2d 352 (8th Cir. 1990). (This Court reversed enhancement where though Cree knew victim had been drinking, which could make it more difficult to avoid oncoming car, jury had concluded Cree had not targeted anyone when it acquitted him of second degree murder. Moreover, there was no evidence Cree knew extent of victim s intoxication or that this "vulnerability" played role in Cree s decision-making.)

United States v. Boult, 905 F.2d 1137 (8th Cir. 1990). (Where victim who was defrauded of $12,900. over four-month period of time, was chosen because defendant knew him and chose him because he would be easy target (relative size difference, mental condition, vulnerability tested), District Court was not clearly erroneous in its findings warranting two-level increase.)

**§ 3A1.2 (Official Victim):**

United States v. Hampton, 346 F.3d 813 (8th Cir. 2003) (LOKEN, HEANEY,* RICHARD ARNOLD). (In attempting to elude one police car, defendant lost control of his vehicle and struck another police car. No evidence showed that defendant intended to hit second police car, and hitting police car was not necessary consequence of high-speed chase. While enhancement may have been proper under § 3C1.2, it was not proper under this section.)

United States v. Waldman, 310 F.3d 1074 (8th Cir. 2002) (MURPHY,* JOHN GIBSON, SMITH). (Official-victim enhancement applies when, during course of offense, defendant assaults law enforcement officer, creating substantial risk of serious bodily injury, and knowing victim's status as law enforcement officer. Defendant's pointing cocked and loaded gun at officer's head for extended period of time and threatening to kill him was proper basis for enhancement.)

United States v. Goolsby, 209 F.3d 1079 (8th Cir. 2000) (McMILLIAN, FAGG, ROSENBAUM) (per curiam). (District Court erred by enhancing defendant s sentence on drug offenses based on his conduct in assaulting corrections officers during his escape from federal custody while awaiting sentencing: offenses of conviction (the drug crimes) were not targeted at corrections officer and relevant conduct provision, U.S.S.G. § 1B1.3, is inapplicable to official-victim enhancement under § 3A1.2. However, life sentence was still required after enhancement was removed, and thus application of enhancement was harmless error.)

United States v. Drapeau, 188 F.3d 987 (8th Cir. 1999) (McMILLIAN, HANSEN,* KYLE). (This Court affirms application of enhancement as to defendant who pleaded guilty to unlawfully making firearm, after he and friends made firebombs and attempted to use them to destroy tribal police officer's car. This Court rejects defendant's argument that there is no "victim" of offense of making firebomb. Defining "victim" as "object" or "aim or purpose" of offense, this Court concludes that harming officer was aim or purpose of constructing firebombs, and that to be victim, person need not be harmed by offense or even be aware that he is target.)

United States v. Drapeau, 121 F.3d 344 (8th Cir. 1997). (Drapeau argues District Court erred in enhancing his sentence by three points, § 3A1.2(a), because of Officer Sazue s status as government official. While this Court agrees with District Court Officer Sazue was victim of Drapeau s conduct--thus rejecting Drapeau s argument firebombing was crime against property, specifically automobile--this Court nevertheless concludes District Court erred as matter of law in enhancing Drapeau s sentence under this Guideline. Sentencing transcript reveals District Court enhanced Drapeau s sentence because of his conduct after he constructed firebombs, specifically, Drapeau s attempt to commit arson against Officer Sazue s property. Section 3A1.2(a) explicitly provides enhancement for status of victim as government official is proper only where offense of conviction is motivated by victim s status. This Court believes textual clarity of § 3A1.2(a) and application note 1 is plain: enhancement proper only where government official is victim of defendant s offense of conviction; thus, District Court erred in considering other relevant conduct under § 1B1.3(a). In circumstances of this case, Drapeau s sentence may be enhanced only if Officer Sazue was victim of unlawful making of firearm (§ 5861(f)), question of fact District Court in first instance; accordingly, this Court remands.)

United States v. Miner, 108 F.3d 967 (8th Cir.) (District Court properly increased Miner s offense level for assaulting police officer where Miner had rammed his car into police roadblock, § 3A1.2(b).), cert. denied, 522 U.S. 904 (1997).

United States v. Iron Cloud, 75 F.3d 386 (8th Cir. 1996). (Issue on appeal: whether District Court clearly erred in finding Iron Cloud was accountable for driver of car--Wilson s actions in attempting to flee, which led to assault on officer, who was struck by car door. This Court holds in order for conduct of others to be attributable to defendant, § 3A1.2(b), there must be evidence of causation on part of defendant: that is, defendant expressly or impliedly ordered, encouraged, or in some way assisted in assailant s conduct. Iron Cloud did not engage in such conduct (e.g., Iron Cloud was intoxicated and beginning to exit car with his hands raised when Wilson started car and threw it into reverse; Iron Cloud s responsibility for Wilson s conduct, if any, ended once he attempted to surrender himself to authorities. Thus, District Court clearly erred in finding Iron Cloud accountable for Wilson s conduct in attempting to flee.

This Court also rejects government s contention that Iron Cloud s own conduct in resisting arrest was independent basis for imposing three-level enhancement. This Court concludes Iron Cloud clearly did not assault officer in manner creating substantial risk of serious bodily harm. While record indicates during initial stop, officer had to pull his gun to get Iron Cloud to get his hands up and had to use strength to place Iron Cloud under arrest, nothing suggests Iron Cloud ever struck, threatened, or otherwise assaulted any officer in manner creating significant risk. Case

remanded for resentencing.)

United States v. Stewart, 20 F.3d 911 (8th Cir. 1994). (At conclusion of hearing on civil action filed by Stewart, he punched deputy director of Arkansas Department of Correction who suffered severely broken nose. Stewart was indicted for and convicted by jury of assault; he was sentenced to 70 months imprisonment. District Court adjusted his offense level upward 3 levels because victim of assault was "official victim." This Court rejects Stewart s contention that guideline applies only to officers of federal government, not to officers of state government.)

United States v. Fleming, 8 F.3d 1264 (8th Cir. 1993). (Fleming contended that being felon-in-possession of firearm has no official victim as victim is society in general. Three-level increase was appropriate where District Court found that during course of offense, Fleming was quite aware that person he was involved with was law enforcement officer and in fact, he did assault such officer in manner that created substantial risk of serious bodily injury.)

United States v. Dykstra, 991 F.2d 450 (8th Cir.) (Application of "official victim" three level adjustment was not precluded as neither elements of offense (26 U.S.C. § 7212(a)) nor applicable sentencing guideline (§ 2J1.2) incorporated official status of victims.), cert. denied, 510 U.S. 880 (1993).

United States v. Rosnow, 981 F.2d 970 (8th Cir. 1992). (The Court s upward adjustment was not clearly erroneous where defendants allegedly filed false 1099 forms in effort to cause tax problems for individuals involved in repossessing real estate and other property following defendants default on various loans. Victims included creditors, attorneys, judges, sheriffs, law enforcement officials, and IRS agents.)

United States v. Hildebrandt, 961 F.2d 116 (8th Cir.) (Because IRS investigates any discrepancy between amounts reported on 1099 forms and individual s tax forms, Hildebrandt s sending of forms made these individuals (whom he said had received substantial amounts of non-wage income when, in fact, they had not) his victims. District Court properly interpreted scope of guideline.), cert. denied, 506 U.S. 878 (1992).

United States v. Telemaque, 934 F.2d 169 (8th Cir. 1991). (Application of Guideline not clearly erroneous where fraudulent 1099 s claiming payment of over billion dollars were sent to victims of conspiracy who included bankruptcy judge, congressman, and Commissioner of IRS.)

United States v. Dugan, 912 F.2d 942 (8th Cir. 1990). (Official victim enhancement might have been unlawful double counting combined with increase in points for threat of force, had District Court not departed downward to compensate for effect of combination.)

**§ 3A1.3 (Restraint of Victim):**

United States v. Long Turkey, 342 F.3d 856 (8th Cir. 2003) (MORRIS ARNOLD, HANSEN,* SMITH). (It is not double-counting to apply enhancement to defendant convicted of

aggravated sexual abuse because victim restraint is neither element of sexual abuse statute nor taken into account by use-of-force enhancement in sexual abuse Guideline. Defendant's conduct, holding victim down by her arms and hair and pinning her beneath him during intercourse, constituted victim restraint.)

United States v. Brings Plenty, 335 F.3d 732 (8th Cir. 2003) (LOKEN, BRIGHT, SMITH CAMP*). (District Court did not err in applying restraint enhancement where defendant dragged victim off bed and through house. This conduct was not part and parcel of underlying offense.)

United States v. Hampton, 260 F.3d 832 (8th Cir. 2001) (WOLLMAN,* HANSEN, SCHREIER). (District Court did not err in assessing two level enhancement for victim restraint. "Physically restrained," as defined by § 1B1.1 comment. (n.1(i)) means "forcible restraint of victim such as being tied, bound, or locked up." Child pornography tapes revealed that child was "entirely encased in pillow case," and victim so encased is as restrained as one who is tied. This Court rejected defendant's argument that child's participation was willing.), cert. denied, 535 U.S. 1058 (2002).

United States v. Waugh, Jr., 207 F.3d 1098 (8th Cir. 2000) (RICHARD S. ARNOLD, BEAM, CONMY*). (Two-level enhancement for "restraint" was supported by credible evidence: defendant taunted assault victim, encouraged her to try to escape, locked doors to residence in which he assaulted her, and pinned her with her arms behind her back. Adding two levels for restraint is permissible as use of restraint is not element of assault offense itself, and although District Court mistakenly referred to U.S.S.G. § 5K2.0 as authority for added levels, confusion between departure and enhancement and use of wrong citation appears harmless error.)

United States v. Kime, 99 F.3d 870 (8th Cir. 1996). (Bell contests two-level increase for physical restraint of victim in course of offense on basis Jojola was not victim, but fellow drug dealer and co-conspirator. Bell also challenged section s applicability because there is no evidence he and cohorts tied Jojola up or forced him into van where he was robbed and beaten. While Jojola may have initially entered van willingly, once Bell and others initiated robbery and began beating and torturing Jojola, he ceased to be co-conspirator and became victim. Section 1B1.1(i) contains illustrative examples and does not limit type of conduct that may constitute physical restraint. This Court affirms finding Bell physically restrained Jojola based on Jojola s testimony Bell and another pulled him into back of van, beat him severely, held gun to his head, and held him down while Bell attempted to cut off his finger with pair of wire cutters.), cert. denied, 519 U.S. 1141 (1997).

United States v. Arcoren, 929 F.2d 1235 (8th Cir.) (Where Arcoren repeatedly pushed \and grabbed two victims of sexual abuse, preventing them from leaving bedroom on numerous occasions, there was sufficient basis to conclude they were "physically restrained." Note 1 recites mere illustrative examples and does not limit type of conduct that may constitute physical restraint. Moreover, "physically restrained" is not specific offense characteristic of criminal sexual abuse.), cert. denied, 502 U.S. 913 (1991).

**Part B. Role in Offense**

United States v. Zimmer, 299 F.3d 710 (8th Cir. 2002) (McMILLIAN, BEAM, HANSEN*). (Apprendi v. New Jersey, 530 U.S. 466 (2000), does not require that aggravating-role enhancement be charged in indictment), cert. denied, 537 U.S. 1146 (2003).

United States v. Coon, 187 F.3d 888 (8th Cir. 1999) (LOKEN,* HANSEN, MORRIS SHEPPARD ARNOLD). (Aggravating-role enhancement is applied to RICO offense by looking at overall RICO conspiracy and all of its relevant conduct.)

**§ 3B1.1(a) (Organizer/Leader--5 or More Participants or Otherwise Extensive/ Standard of Review):**

United States v. Frank, 354 F.3d 910 (8th Cir. 2004) (LOKEN, HEANEY, MORRIS ARNOLD*). (District Court's assessment of enhancement is reviewed for clear error. Government has burden to prove enhancement is warranted.)

United States v. Mendoza, 341 F.3d 687 (8th Cir. 2003) (LOKEN, HANSEN,* RILEY). (District Court's factual findings underlying its determination that defendant was leader or organizer are reviewed for clear error.)

United States v. Zimmer, 299 F.3d 710 (8th Cir. 2002) (McMILLIAN, BEAM, HANSEN*). (This Court reviews for clear error District Court's determination that defendant was organizer or leader. Government bears burden of proving defendant's role by preponderance of evidence), cert. denied, 537 U.S. 1146 (2003).

United States v. Vasquez-Rubio, 296 F.3d 726 (8th Cir. 2002) (MORRIS S. ARNOLD, HEANEY, MURPHY*). (District Court's factual findings, including its determination of defendant's role in offense, are reviewed for clear error. Its application of law to facts is reviewed de novo. Aggravating-role enhancement must be supported by preponderance of evidence.)

United States v. Sarabia-Martinez, 276 F.3d 447 (8th Cir. 2002) (WOLLMAN, HANSEN, FENNER*). (District Court's determination of defendant's role in offense is reviewed for clear error. Defendant need only have directed one other participant to warrant enhancement.)

United States v. Evans, 272 F.3d 1069 (8th Cir. 2001) (LOKEN, RICHARD S. ARNOLD,* FAGG). (Because defendant did not object at sentencing, review of District Court's application of this Guideline is for plain error.), cert. denied, 535 U.S. 1029 (2002).

United States v. Ross, 210 F.3d 916 (8th Cir.) (McMILLIAN, LAY,* FAGG). (Absent mistake of law, District Court s factual findings regarding defendant s role in offense will be reversed only if clearly erroneous. This Court gives due deference to District Court s application of Guidelines to facts and will reverse only if left with definite and firm conviction mistake has been made.), cert. denied, 531 U.S. 969 (2000).

United States v. Payne, 119 F.3d 637 (8th Cir.) (This Court reviews for clear error District Court s factual determinations made in consideration of this sentencing enhancement. This Court reviews de novo, however, District Court s application of section of sentencing Guidelines to particular case.), cert. denied, 522 U.S. 987 (1997).

**§ 3B1.1(a) (Organizer/Leader--5 or More Participants or Otherwise Extensive):**

United States v. Underwood, Nos. 03-1543/1982/2716/2901 (8th Cir. 2004) (MURPHY,* HEANEY, SMITH). (District Court did not clearly err in applying enhancement to defendant who directed others in cooking methamphetamine, getting precursors, and burying sludge.)

United States v. Frank, 354 F.3d 910 (8th Cir. 2004) (LOKEN, HEANEY, MORRIS ARNOLD*). (District Court did not clearly err in applying enhancement where defendant directed his employee in writing, depositing, and cashing checks; defendant approached several automobile dealers to use their names and licenses to buy and sell used cars illegally; defendant recruited two individuals to fabricate story about fictitious debt; and defendant instructed two individuals to lie to grand jury.)

United States v. Mendoza, 341 F.3d 687 (8th Cir. 2003) (LOKEN, HANSEN,* RILEY). (Individual need not be charged to be "participant." Defendant need not be present during entire conspiracy period and need not have been original leader or organizer. Enhancement properly applied where defendant hired individuals to drive him around and watch his back, weigh and package drugs, and deliver drugs and collect money.)

United States v. Eis, 322 F.3d 1023 (8th Cir. 2003) (WOLLMAN, RICHARD ARNOLD, MURPHY) (per curiam). (Enhancement was supported by evidence that there were five or more participants and that defendant gave directions to more than one of them, because defendant need only have directed one other participant to warrant enhancement.)

United States v. Antillon-Castillo, 319 F.3d 1058 (8th Cir. 2003) (MORRIS ARNOLD,* RILEY, SMITH). (Defendant conceded at change-of-plea hearing that conspiracy involved five participants, that he "made arrangements" to have drugs transported from Texas to Missouri, that there were multiple trips involving total of at least 500 grams of methamphetamine and five kilograms of cocaine, that he "coordinated these arrangements," and that he traveled from Texas to Missouri to "monitor" shipments. Evidence at sentencing corroborated defendant's concessions and showed that he gave orders and made plans. Based on these facts, District Court's finding that defendant was "leader" was not clear error; decision making is strong evidence of organizer/leader status, and there may be more than one leader in single conspiracy.)

United States v. Zimmer, 299 F.3d 710 (8th Cir. 2002) (McMILLIAN, BEAM, HANSEN*). (Defendant need not be only organizer or leader of criminal enterprise to qualify for enhancement, and need not have organized or led all other participants. Defendant who recruits accomplices and directs their activities is organizer or leader. In this case, defendant organized and set into motion conspiracy, recruited two accomplices, arranged transportation and residence for accomplices,

provided accomplices with methamphetamine recipe, and claimed thirty-percent share of proceeds generated by conspiracy), cert. denied, 537 U.S. 1146 (2003).

United States v. Vasquez-Rubio, 296 F.3d 726 (8th Cir. 2002) (MORRIS S. ARNOLD, HEANEY, MURPHY*). (Because neither party challenged District Court's finding that defendant had at least supervisory role in criminal enterprise, only question on appeal was whether criminal activity involved five or more participants. Participant is person criminally responsible for commission of offense. Unobjected-to facts in PSR and at sentencing showed seven people handled methamphetamine for which defendant was arrested. Because five people pleaded guilty to same conspiracy count, District Court was bound to conclude that there were not multiple conspiracies, and any conclusion to contrary would have been clear error.)

United States v. Tucker, 286 F.3d 505 (8th Cir. 2002) (BOWMAN, RICHARD S. ARNOLD,* WOLLMAN). (Enhancement was not clearly erroneous where bank-fraud defendant admitted he was responsible for actions of two others; one participant testified to at least four others involved in scheme; and defendant's telephone records suggested he was in contact with six participants on same day they cashed checks at issue in scheme.)

United States v. Evans, 285 F.3d 664 (8th Cir. 2002) (LOKEN, RICHARD S. ARNOLD,* FAGG). (District Court did not clearly err in finding that defendant was "leader" where he and four other defendants were part of large-scale prostitution ring, and defendant received money and hired another person to drive prostitutes on calls), cert. denied, 123 S. Ct. 1257 (2003).

United States v. Gravatt, 280 F.3d 1189 (8th Cir. 2002) (McMILLIAN, FAGG,* RILEY). (District Court did not clearly err in finding defendant was organizer or leader of criminal activity involving five or more participants, including himself. Evidence at trial showed he was "guru" of criminal enterprise and pulled all parties together. Also, his conviction under continuing-financial-crimes-enterprise statute, 18 U.S.C. § 225, required proof beyond reasonable doubt that he managed, supervised, or organized at least four other people.)

United States v. Ross, 279 F.3d 600 (8th Cir. 2002) (BYE,* LAY, J. R. GIBSON). (District Court did not err where it adjusted money-laundering count based on defendant's leadership role in underlying fraud offense. Wire-fraud convictions were based on facsimile transmissions of loan documents to potential borrowers; money-laundering conduct convictions arose from related acts of depositing wire-fraud proceeds.)

United States v. Sarabia-Martinez, 276 F.3d 447 (8th Cir. 2002) (WOLLMAN, HANSEN, FENNER*). (Enhancement was properly applied where evidence showed that defendant decided what drugs to bring from out of state, when to bring them, and how to transport them; directed driver of car what route to take when transporting drugs; fronted drugs to another participant; and enlisted others' help in furthering drug activity.)

United States v. Evans, 272 F.3d 1069 (8th Cir. 2001) (LOKEN, RICHARD S. ARNOLD,* FAGG). (No plain error occurred in District Court's finding that defendant was "leader" where all

five defendants were part of criminal activity and where defendant hired driver to take victim on prostitution calls, thereby satisfying requirement that he be organizer, leader, manager, or supervisor of one or more other participants.

Unobjected-to enhancement was not plain error, because evidence showed that defendant supervised victim who served as trainer for minor victim.), cert. denied, 535 U.S. 1029 (2002).

United States v. Sherman, 262 F.3d 784 (8th Cir. 2001) (WOLLMAN,* HAMILTON, MURPHY). (Although defendant need not directly control his intermediaries in order to be leader or organizer, he must do more than sell for resale. This Court affirms application of enhancement where defendant had ultimate control over supply of drugs and manner in which they were distributed, and directed actions of individuals as to exchange of drugs and money.)

United States v. Washington, 255 F.3d 483 (8th Cir. 2001) (McMILLIAN, BOWMAN, BOGUE*). (Four-level enhancement is proper if defendant was organizer or leader of criminal activity that involved five or more participants or was otherwise extensive. Factors to be considered for organizer or leader enhancement are decision-making authority, nature of participation, recruitment of accomplices, claimed right to large share of fruits of crime, degree of participation in planning and organizing, nature and scope of activity, and degree of control over others. This Court upholds District Court's assessment of enhancement: "otherwise extensive" provision was "easily met" because defendants had at least two other participants and utilized eleven logging companies to defraud at least forty-one families in thirteen states for over $800,000 over three years.)

United States v. Lashley, 251 F.3d 706 (8th Cir. 2001) (WOLLMAN, HANSEN,* JONES). (This Court rejects Lashley's argument that District Court erred in applying four-level enhancement for his role as leader or organizer. In deciding whether defendant exercised leadership position, District Court examines factors such as person's decision-making authority, type of participation, nature and scope of crime, and degree of control or authority over others. Defendant can be organizer or leader by supplying drugs to others without directly controlling other conspirators, but his status as distributor, standing alone, does not warrant enhancement. This Court has broadly interpreted "organizer" and "leader" for purposes of enhancement, and has held that defendant need not be only organizer or leader, and he need not have been organizer or leader for all participants. Even assuming another participant was leader, District Court did not err by applying enhancement where evidence showed that Lashley directed where drugs would be manufactured, paid property owners in drugs for use of their property, directed and financed purchase of ingredients necessary for cooking methamphetamine, and fronted methamphetamine for resale to others.)

United States v. Howard, 235 F.3d 366 (8th Cir. 2000) (McMILLIAN, RICHARD S. ARNOLD,* BOWMAN). (There was sufficient evidence in record to show defendant Robinson had controlling role in acquisition of funds for investments in Guaranteed Insurance Contracts (GICs). He solicited investments, entered into agreements with investment firm, and opened account into which he directed another person to have investors deposit money. Moreover, close link to source of product that is underlying basis of criminal activity is evidence that defendant is organizer or leader, as is decision-making authority. Defendant ordered party to give cashiers's check to two

others, provided information on source of GICs for marketing brochure, opened account, contacted third party (Walker) and directed him to have investors deposit money into opened account, and sent letters to Walker stating profits from GIC transactions would be deposited into Equity Action account and that Walker was responsible for making payments to investors. Defendant (and two others) also agreed to wire funds from Equity Action account to another account, and told others he had relationship with issuing insurance companies necessary to purchase GICs.)

United States v. Ross, 210 F.3d 916 (8th Cir.) (McMILLIAN, LAY,* FAGG). (Government argues District Court erred in failing to impose 4-level enhancement. District Court s remarks at sentencing leave no doubt that it found defendant was organizer or leader of criminal activity, and there was ample record evidence to support such finding given trial testimony that defendant controlled virtually every aspect of operation. Court s comments evidence finding that other individuals were also responsible and such finding is supported by record, but it sheds no light on number of participants or extensiveness of operation. Because District Court is best suited to make such finding and did not do so, and because record does not clearly indicate requisite finding, this Court reverses and remands to permit District Court to make necessary finding.), cert. denied, 531 U.S. 969 (2000).

United States v. Thompson, 210 F.3d 855 (8th Cir. 2000) (WOLLMAN,* F. GIBSON, MURPHY) (Rejecting defendant s argument that there was insufficient evidence from which District Court could conclude he was organizer or leader of conspiracy involving drugs and money laundering. Thompson played key role in both channeling of vast quantities of drugs into Kansas City and distribution of drugs to various dealers within city. He traveled to Texas to recruit supplier, regularly organized transport of large drug shipments from Texas, and often received and stored shipments. He also provided drugs to dealers on credit so they could sell without first buying drugs themselves, recruited at least one person to deliver cocaine to those dealers, and controlled price of drugs he sold.), cert. denied, 532 U.S. 996 (2001).

United States v. Womack, 191 F.3d 879 (8th Cir. 1999) (McMILLIAN, MORRIS SHEPPARD ARNOLD, NANGLE*). (District Court's findings that five people were involved in conspiracy with Womack, and that Womack was leader in conspiracy, were not clearly erroneous: at least four people sold drugs for Womack, three people helped him get drugs from sources, Womack set price for drugs and tried to control and create territories for sale of drugs, and he also attempted to recruit new coconspirators.)

United States v. Pospisil, 186 F.3d 1023 (8th Cir. 1999) (WOLLMAN,* LOKEN, JACKSON). (Affirming enhancement where, in cross-burning incident, there was evidence Dennis built cross, led pre-burning meeting, and actually burned cross in victims' yard, and it was undisputed that criminal activity involved at least 5 participants.), cert. denied, 529 U.S. 1089 (2000).

United States v. Guel, 184 F.3d 918 (8th Cir. 1999) (RICHARD S. ARNOLD, HANSEN,* PERRY). (Ample evidence supports District Court's conclusion that Guel was manager or supervisor in drug offense. One witness testified Guel provided her with drugs for resale, set price

for drugs, and received proceeds from her drug sales; her son testified he assisted Guel in collecting money from his mother's customers; and third witness testified Guel supplied him with drugs for resale, and with digital scale.)

United States v. Brockman, 183 F.3d 891 (8th Cir. 1999) (RICHARD S. ARNOLD, LOKEN, BYRNE*). (Kruger and Brockman defrauded lenders and investors out of millions while representing they were developing numerous business projects that would result in broader availability of alternative health resources and would be quite lucrative to those who assisted in bringing projects to fruition. Affirming as not clearly erroneous District Court's findings, in assessing 4-level role enhancement as to Kruger, that (1) 4 specific people appeared to be participants and other "con men" were brought in to give legitimacy to Kruger's business; and (2) $5.8 million, 13-year scheme, in which number of people had been used to make scheme work, was "otherwise extensive" for purposes of section 3B1.1(a).

Court also rejects argument that enhancing sentence under §§ 2F1.1 and 3B1.1 constitutes impermissible double-counting.), cert. denied, 528 U.S. 1080 (2000).

United States v. Johnson, 169 F.3d 1092 (8th Cir.) (BOWMAN, MURPHY,* ALSOP). (Affirming enhancement. More than five individuals testified they were involved in conspiracy, and District Court found Johnson was "CEO" of operation; directed co-conspirators' crack-selling and drug-debt-collection activities, as well as kidnaping and sexual assault of co-conspirator; packaged and cooked crack; and had others cook and test crack for him. Findings were supported by testimony, and were not clearly erroneous.), cert. denied, 528 U.S. 857 (1999).

United States v. Jones, 160 F.3d 473 (8th Cir. 1998) (WOLLMAN,* HEANEY, BRIGHT). (Reversing enhancement where nothing in record supported conclusion that Cashaw did anything other than provide drugs for resale. He did not have any involvement in resales, and there is no evidence that he controlled his buyers in their resale.)

United States v. Brown, 156 F.3d 813 (8th Cir. 1998). (Affirming increase where there was testimony that Brown had network of dealers working under him; while not all were working for him at same time, and some might have been merely buying for themselves, District Court reasonably could have found that at various times during conspiracy Brown had at least four helpers or underlings, and that Brown was their leader.)

United States v. Simmons, 154 F.3d 765 (8th Cir. 1998). (Affirming enhancement as not clearly erroneous where testimony at trial showed Simmons was heavily involved with organizing schemes alleged in indictment. Although much of Simmons's argument relies on her assertion that second party was in control and at times directed her actions, this argument ignores Sentencing Guidelines' comment that there can be more than one person who qualifies as leader or organizer. Emphasis on organizational or leadership role of second person does not diminish fact that, on several occasions, it was Simmons who organized meetings between herself, second person, and various corporations--meetings which enabled her to continue bribery scheme.)

United States v. Milton, 153 F.3d 891 (8th Cir. 1998). (Both Milton and government

objected to PSR's recommendation for role enhancement, but District Court overruled both parties' objections after finding sufficient evidence of Milton's role as leader. Although government did not present further evidence as to role, nothing in Guidelines prevents District Court from using its discretion to determine sufficient evidence exists to support enhancement when it is recommended in PSR; in this case Court made proper findings required by Guidelines to apply enhancement.), cert. denied, 525 U.S. 1165 (1999).

United States v. Jordan, 150 F.3d 895 (8th Cir. 1998). (Jordan contended he worked merely as employee of co-conspirator Hurd, and typically received only one-third of sale proceeds from counterfeit money while Hurd received two-thirds. Held: District Court's determination that Jordan was leader or organizer was not clearly erroneous; Jordan recruited third person to distribute counterfeit money and knew such person was selling it to others. More importantly, Jordan exercised decision-making authority over counterfeiting operation by making counterfeit money and enforcing quality standards, shredding money he felt was of low quality despite Hurd's feelings to contrary.), cert. denied, 526 U.S. 1010 (1999).

United States v. Brown, 148 F.3d 1003 (8th Cir. 1998). (As author, administrator, and overlord of sophisticated interstate drug-distribution conspiracy, Hewitt was precisely sort of "leader" to which enhancement was intended to apply.), cert. denied, 525 U.S. 1169 (1999).

United States v. Puckett, 147 F.3d 765 (8th Cir. 1998). (No clear error in sentence enhancement where trial testimony established Harper oversaw whole operation, directed procurement of drugs, received proceeds of drug sales by co-conspirators, and recruited another to sell crack for him, and co-conspirator had to go through Harper before he could make any decisions for conspirators.)

United States v. Coleman, 138 F.3d 344 (8th Cir.) (While Whitehurst disputes four-level increase for leadership role, evidence at trial amply showed Whitehurst s direction of conspiracy s activities. In particular, his decisionmaking authority over procurement of equipment, supplies, and chemical ingredients demonstrated his leadership role in conspiracy.), cert. denied, 525 U.S. 899 (1998).

United States v. Bond, 135 F.3d 1247 (8th Cir.) (Plea agreement specifically informed Bond District Court at time of sentencing would decide whether enhancement applied. Bond argues government failed to prove he was organizer or leader. Terms "organizer" and "leader" are to be broadly interpreted, and District Court did not err in imposing four-level enhancement, § 3B1.1(a). At sentencing hearing, undercover officer testified Bond was at top, with individuals underneath distributing methamphetamine; officer noted Bond fronted drugs, maintained control over proceeds, required distributors to pair up for safety, and directed activities of mule. District Court s finding Bond was organizer or leader is supported by evidence.), cert. denied, 524 U.S. 961 (1998).

United States v. Dierling, 131 F.3d 722 (8th Cir. 1997). (Dierling challenges four-level leader or organizer enhancement, § 3B1.1(a). Ample evidence showed Dierling was leader and organizer of methamphetamine manufacturing and distribution conspiracy involving five or more

people, § 3B1.1 comment. (n.4): he exercised decision making authority for conspiracy as director of distribution scheme; his idea to kill Craig, he put out contract on his life, and he induced others to beat Craig; witnesses testified others dealt drugs under Dierling s direction; he gave firearm to one acting on behalf of conspiracy believing it was necessary for her protection; he recruited members of conspiracy and supervised procurement of drug manufacturing materials; he brought others together to manufacture drug and set up manufacturing laboratory on his property.), cert. denied, 523 U.S. 1054, 523 U.S. 1066 and 524 U.S. 922 (1998).

United States v. Sobrilski, 127 F.3d 669 (8th Cir. 1997). (District Court increased Sobrilski s offense level by four based on its determination government proved there were at least six individuals who Sobrilski supervised. Sobrilski challenges on ground record does not show he was supervisor (or leader) of six people involved in criminal activity. While § 3B1.1(a) need involve only five persons for enhancement to apply, record supports District Court s determination criminal enterprise here involved six participants. While District Court appeared to indicate four-level enhancement was because there were at least six persons whom Sobrilski "supervised" (under Guidelines, "supervisor" receives only three-level enhancement), this Court looks at context to determine District Court meant to say Sobrilski was leader who supervised six persons and affirmed four-level enhancement based on record support.), cert. denied, 522 U.S. 1152 (1998).

United States v. Ortiz, 125 F.3d 630 (8th Cir. 1997). (Eric Ortiz challenges four-level enhancement, § 3B1.1(a), contending District Court s findings in support were insufficiently specific. This Court disagrees. At Eric Ortiz s sentencing hearing, government summarized relevant testimony of three co-conspirator witnesses. District Court found testimony both credible and sufficient to establish Eric led drug conspiracy involving six others besides himself; findings were specific enough to support four-level enhancement.), cert. denied, 522 U.S. 1132 (1998).

United States v. Rodgers, 122 F.3d 1129 (8th Cir. 1997). (District Court imposed four-level upward adjustment and Rodgers argues adjustment was inappropriate because there was insufficient evidence he acted as "leader or organizer," claiming those who aided and abetted him were friends who did so sua sponte and without coordination. Here, government easily met its burden of proving by preponderance of evidence facts necessary to establish Rodgers s role. Record is replete with evidence Rodgers was driving force behind murder attempt, he had most to gain from it, he recruited others to assist him, and he organized and directed their every move as they executed plan which he had conceived. Thus, District Court did not clearly err in imposing four-level enhancement, § 3B1.1(a), on Rodgers.), cert. denied, 522 U.S. 1061 (1998).

United States v. Drapeau, 121 F.3d 344 (8th Cir. 1997). (Drapeau challenges enhancement of his sentence for role as organizer or leader of criminal enterprise involving five or more persons, § 3B1.1(a). District Court did not err in finding Drapeau organizer or leader as it was Drapeau who first proposed "getting" Officer Sazue based on Drapeau s personal motives, and he formulated plan to construct firebombs to destroy officer s vehicle. Drapeau did more than merely proffer suggestions: it was he who directed friends to obtain ingredients for firebombs, and friends obeyed Drapeau s commands. Drapeau instructed friends in craft of constructing firebombs; he directed friends to test firebombs; and he ordered friends to use firebombs against officer s property.)

United States v. Payne, 119 F.3d 637 (8th Cir.) (Payne argues District Court erred in giving him four-level enhancement for being leader of criminal activity that involved five or more participants, § 3B1.1(a). While Payne s argument focused on his lack of control over three participants, in this Circuit four-level adjustment applies where evidence shows defendant is leader or organizer of illegal enterprise that involved five or more participants even if defendant s leadership role did not encompass all participants. Payne conceded he organized two participants. As to whether illegal enterprise involved five or more participants, participation of four was conceded by Payne; as to fifth person, Payne concedes he was involved in conspiracy, but argues he was more joint-venturer, rather than mere participant. Guidelines define participant as one who is criminally responsible for commission of offense; fifth person s testimony indicates he was involved in same conspiracy and thus, District Court did not err in finding Payne was leader or organizer in this conspiracy and that conspiracy involved at least five participants.), cert. denied, 522 U.S. 987 (1997).

United States v. McFarland, 116 F.3d 316 (8th Cir.) (McFarland challenge to four-level increase, § 3B1.1(a), of his offense level for organizing or leading criminal activity involving five or more participants is without merit.), cert. denied, 522 U.S. 961 (1997).

United States v. Guerra, 113 F.3d 809 (8th Cir. 1997). (This Court concludes District Court s four-level enhancement based upon finding Guerra was leader or organizer of criminal activity involving five or more participants, § 3B1.1(a), was not clearly erroneous where evidence at trial established Guerra did more than sell for resale. Government introduced testimony Guerra exercised control in sale of methamphetamine, testimony indicated Guerra was "main man" who could supply 30-40 pounds of methamphetamine, and on day of buy-bust, Guerra, who drove car, accompanied co-conspirator because he was shepherding amount of money involved.)

United States v. Rodriguez, 112 F.3d 374 (8th Cir. 1997). (Rodriguez challenges District Court s determination he was organizer or leader in crime that involved five or more participants or was otherwise extensive, § 3B1.1(a). Noting five- participant requirement does not necessarily mean five participants under Rodriguez s direction, but, instead, five persons--including Rodriguez--involved in overall crime, only one of whom need have been under Rodriguez s direction, this Court believes evidence sufficient to sustain finding Rodriguez was organizer or leader (e.g., District Court could infer that at one time or another during conspiracy period, Rodriguez was in charge of at least four houses where people could order heroin by phone; at Rodriguez s direction, runners would then deliver drugs to customer at some other place; Rodriguez acted in concert with another to arrange shipment of drugs to various people in St. Louis, who received some packages of two to three ounces of heroin, amount from which Court could easily infer intent for or knowledge of, on part of Rodriguez, further distribution by recipient of drugs.) Rodriguez is therefore not eligible for imposition of sentence below statutory minimum, 18 U.S.C. § 3553(f)(4), as among criteria for imposition of sentence below statutory minimum is requirement defendant was not organizer or leader in crime.)

United States v. Larson, 110 F.3d 620 (8th Cir. 1997). (Application of four-level increase, § 3B1.1(a), was proper where as head of business, Larson s role in illegal fossil-related activities

was that of organizer or leader of five or more participants or was otherwise extensive. DISSENT: While District Court did name five conspirators, only Larson and his girlfriend were present for actual customs violations. District Court does not address issue, but asserts leadership enhancement was appropriate because Larson was principal of Institute.)

United States v. Garin, 103 F.3d 687 (8th Cir. 1996). (Garin asserts District Court erred in finding his leadership role warranted four-level enhancement, 3B1.1(a). District Court s findings are supported by record: evidence at trial sufficiently established Garin organized and led conspiracy to distribute methamphetamine, supplied large amounts of methamphetamine to others for distribution, and reaped profits from conspiracy--and Court did not clearly err in assessing leadership role enhancement.), cert. denied, 520 U.S. 1148 (1997).

United States v. Choate, 101 F.3d 562 (8th Cir. 1996). (Choate attacks District Court s factual conclusion he was leader of criminal activity that involved five or more participants; he argues there was no showing other participants were criminally responsible and therefore requirements of § 3B1.1(a) have not been met. This Court concludes Choate waived argument by his assertions in response to PSR. Choate argued three-level increase (§ 3B1.1(b)), rather than four, would be appropriate. Both sections require defendant oversaw activity involving five or more participants or otherwise extensive. Therefore, by arguing he came within § 3B1.1(b) (manager or supervisor), Choate conceded there were five or more participants. Question was not disputed at sentencing and therefore, government did not introduce proof on issue; Choate cannot resurrect factual issue on appeal, conceded below.)

United States v. Williams, 97 F.3d 240 (8th Cir. 1996). (Williams argues District Court should not have enhanced his sentence for leadership role in conspiracy under § 3B1.1(a). This Court concludes issue is not reviewable because Williams s sentence still represents downward departure from sentence that would have resulted if he had prevailed on this point. In any event, argument fails on merits: Williams clearly directed or procured aid of underlings and was responsible for organizing others for purpose of carrying out crimes. Williams himself admitted he was one of "big players" in drug conspiracy. Distinctions between leaders and other co-conspirators are not always clear; here, District Court specifically found Williams had more than dozen subordinates.)

United States v. Knight, 96 F.3d 307 (8th Cir. 1996). (District Court properly assessed four-point enhancement; this Court has broadly interpreted terms "organizer" and "leader." Knight maintained control over drugs and had keys to shed where drugs were stored. He negotiated drug transactions, set price, and had others deliver drugs to agent. At least five people were involved and Knight gave co-defendant approval to sell drugs for certain price to agent, showing Knight organized or led co-defendant.), cert. denied, 520 U.S. 1180 (1997).

United States v. Delpit, 94 F.3d 1134 (8th Cir. 1996). (Malone and Saunders each objected to four-level "leadership role" enhancements for murder-for-hire counts and drug-trafficking counts. This Court has broadly defined terms "organizer" and "leader"; Court concedes line between being organizer or leader on one hand and "manager or supervisor" on other is not always clear.

Regarding Malone s role in drug-trafficking offense group, evidence showed he directed or procured aid of underlings and was responsible for organizing others for purpose of carrying out crimes, e.g., jury found Malone organized and coordinated several juveniles drug-dealings. Saunders complained District Court gave him enhancement but offered neither at sentencing nor in written statement additional findings of facts to support conclusion. District Court relied on trial testimony and found Sanders was convicted for his role in drug conspiracy involving at least five others and played organizing and leadership role, e.g., he sent co-conspirator to LA to procure procaine for manufacture of crack cocaine.

This Court finds error in District Court s imposition of four-level enhancements for murder-for-hire offense group based on Court s counting two co-conspirators as "participants" when they were not criminally responsible for Saunders s and Malone s § 1958(a) violations as these federal crimes were complete before other two were recruited. Not necessary to remand Malone s case for resentencing because even if he had received no enhancement for his role in group I offenses, he would still be facing mandatory life sentence. Saunders s case is remanded: no guarantee he won t again receive four-level enhancement as enhancement is also permitted when defendant is leader or organizer of criminal activity "otherwise extensive.")

United States v. Miller, 91 F.3d 1160 (8th Cir. 1996). (Miller challenges four-level enhancement, § 3B1.1(a), for being organizer or leader of criminal activity that involved five or more participants. This Circuit acknowledges it has broadly interpreted terms "organizer" and "leader"; defendant need not directly control his intermediaries. But, to give terms their ordinary meaning, defendant must do more than sell for resale. Miller was not organizer or leader of conspiracy. Although he sold large enough quantities of methamphetamine that it is reasonable to infer he knew drugs were being resold, no evidence he controlled his buyers in their resale of methamphetamine. This Court rejects government s contention four-level enhancement should apply because Miller supplied drugs that his co-conspirators later resold; leader s or organizer s actions must control or influence other people. District Court should not have applied four-level enhancement on record before it.)

United States v. Scott, 91 F.3d 1058 (8th Cir. 1996). (Scott challenged four-level enhancement for aggravated role in conspiracy. District Court correctly determined maximum enhancement for Scott s leadership role in conspiracy involving five or more participants was appropriate where Scott recruited accomplices, supervised their sales, and retained large share of profits.)

United States v. McMullen, 86 F.3d 135 (8th Cir. 1996). (McMullen claimed he should not have received four-level leadership enhancement because he simply sold drugs to individuals for their personal use. This Court disagrees with McMullen s characterization of evidence where government s evidence supported District Court s conclusion: both special agent and patrolman testified McMullen employed several distributors to sell drugs for him and their testimony rebutted McMullen s claims other participants in enterprise were merely drug users; District Court did not clearly err in accepting this testimony as true.)

United States v. Reeves, 83 F.3d 203 (8th Cir. 1996). (Danny Ray s BOL was increased

four levels, § 3B1.1(a), based upon finding he was leader and organizer of criminal activity (business of receiving and selling stolen property). Danny Ray argues both § 2B6.1(b)(2) (finding he was in business of receiving and selling stolen property) and § 3B1.1(a) increases were premised on same conduct--his ownership of body shop. This Court agrees Danny Ray s position as owner also facilitated his leadership role in conspiracy, it did not require such role, e.g., he could have run illegal retagging operation in which stolen vehicles were received and sold without directing his employees to steal vehicles that he would later sell. Court concludes enhancement does not double-count, but rather merely holds Danny Ray accountable for conduct beyond that considered under § 2B6.1(b)(2).)

United States v. Jackson, 67 F.3d 1359 (8th Cir. 1995). (This Court affirms four-level adjustment for Jackson s role as organizer or leader of criminal activity involving five or more participants where each of seven co-conspirators testified Jackson was leader of conspiracy, responsible for recruitment of new members, for distribution, transportation, conversion, repackaging, and resale of drugs; and for securing, maintaining, and fortifying various apartments.), cert. denied, 517 U.S. 1192 (1996).

United States v. Valencia, 61 F.3d 616 (8th Cir. 1995). (District Court applied four-level enhancement under § 3B1.1(a). Valencia argues cooperating government witness, Talkington, was leader of conspiracy and therefore, enhancement was not justified by evidence presented at trial. District Court correctly recognized Valencia s leadership role and did not err in assigning four-level enhancement where Talkington and number of other government witnesses testified to leadership role played by Valencia; he was sole supplier of cocaine involved in conspiracy; he controlled important aspects of conspiracy including what drugs would be sold, where drugs would be distributed, what quantities of drugs would be distributed, and he determined price.)

United States v. Logan, 54 F.3d 452 (8th Cir. 1995). (Logan challenged four-level enhancement, § 3B1.1(a). In examining whether defendant exercised leadership position, District Court examines factors such as person s decision-making authority, type of participation in offense, nature and scope of crime, and degree of control or authority over others. This Court finds no clear error in District Court s determination Logan was "leader" or "organizer" of conspiracy: no dispute over five persons were involved; District Court which heard all evidence at trial stated record indicated Logan was "most culpable" in conspiracy; she was major supplier of heroin to co-conspirator who distributed drug to many people; she arranged "turn around" trips for co-conspirator to pick up heroin in Chicago and return to St. Louis; and she allowed co-conspirator to defer payment until heroin had been resold. She recruited her teenage daughter to curry heroin and furnished her grandson to be co-conspirator s driver when co-conspirator came to Chicago to buy heroin from Logan.)

United States v. Rice, 49 F.3d 378 (8th Cir.) (Washington asserted District Court erroneously increased his BOL as leader, § 3B1.1(a). District Court s decision was not clearly erroneous where government presented sufficient evidence of Washington s leadership role (e.g., testimony established Washington decided what quantity of drugs to order, shipping destination of such drugs, which individual would serve as courier for particular trip).), cert. denied, 515 U.S. 1168

(1995).

United States v. Johnson, 47 F.3d 272 (8th Cir. 1995). (Johnson challenged District Court s four-level enhancement for his aggravating role as leader or organizer, § 3B1.1(a). This Court has broadly interpreted terms "organizer" and "leader" and definition does not necessarily include direct control over others in conspiracy. This Court concludes District Court s determination of Johnson s leadership role in offense was not clearly erroneous where there was ample evidence Johnson was instrumental in receiving and paying for large amounts of cocaine and organizing drugs for redistribution, and where he admitted he recruited at least seven different women to store and deliver drugs for him.)

United States v. Dijan, 37 F.3d 398 (8th Cir. 1994). (Each appellant argued he was not leader or organizer, § 3B1.1(a). Record supports trial Court s findings: criminal activity involved more than five people; appellants operated and led conspiracy; decision to go ahead with bribe rested with both appellants; and criminal activity was otherwise extensive.)

United States v. Freeman, 30 F.3d 1040 (8th Cir. 1994). (Freeman asserted District Court did not make finding about number of participants in offense or Freeman s role in offense for purposes of enhancement under § 3B1.1(a). PSR identified seven persons as participating in Freeman s crime and described Freeman as their organizer or leader. Rather than objecting to PSR s factual allegations, Freeman asserted section did not apply because jury acquitted him of conspiring with his co-defendant and others to transport and store hazardous wastes illegally. District Court properly rejected Freeman s legal challenge to application of § 3B1.1(a); acquittal of conspiring with others does not preclude sentencing finding of organizing or leading others in criminal activity. Although seven persons named in PSR were not indicted or tried, they were criminally responsible for Freeman s crime of transporting hazardous waste without permit and thus, they qualified as participants under § 3B1.1(a).)

United States v. Maxwell, 25 F.3d 1389 (8th Cir.) (District Court did not clearly err by determining Maxwell was leader or organizer and imposing four-level enhancement. Maxwell was Majied s source of cocaine; Majied then supplied four others with cocaine they distributed in housing project. In addition, many intercepted telephone conversations were calls from Maxwell to Majied to determine whether Majied had encountered any problems.), cert. denied, 513 U.S. 1031 (1994).

United States v. Bowers, 21 F.3d 843 (8th Cir. 1994). (On appeal, following his resentencing as result of remand from this Court, Bowers argued District Court erred in applying four-level enhancement, § 3B1.1(a). This Court rejected Bowers s argument on his first appeal and thus it is barred by law of case doctrine.)

United States v. Trupiano, 11 F.3d 769 (8th Cir. 1993). (Trupiano argued District Court double-counted for factor of "five or more participants" as essential element of offense under which he was charged is illegal gambling business involved five or more persons. This Court holds enhancement was not impermissible based upon conduct coterminous with conduct for which

Trupiano was convicted as adjustment was not made because there were five or more persons involved in crime, but rather because Trupiano was organizer or leader of criminal activity. Judge had more than sufficient information on which to base sentencing decision as Trupiano was able to develop fully testimony of four of seven witnesses as to his "non-supervisory" role in illegal gambling business.)

United States v. Hoffman, 9 F.3d 49 (8th Cir. 1993). (Though Hoffman contended there was insufficient evidence to show he was organizer or leader, he had described himself in sworn statement as ringleader and stipulated he planned scheme. Thus, District Court s increase under this section was not clearly erroneous.), cert. denied, 510 U.S. 1203 (1994).

United States v. Kenyon, 7 F.3d 783 (8th Cir. 1993). (Kenyon challenged for first time on appeal his increase by four levels as organizer or leader of drug conspiracy. This Court deems Kenyon s argument meritless: four other co-defendants were convicted and sentenced for crimes related to criminal activity of which Kenyon is guilty and Kenyon himself is counted as participant in criminal activity--thus five persons constituted criminal organization and Kenyon s criminal activity was sufficiently extensive to allow four-level increase. Record demonstrated several ways Kenyon organized and lead criminal activity, e.g., when conspiracy started, only Kenyon knew cocaine supplier; Kenyon traveled to Colorado five times to obtain cocaine but no co-defendant was present on more than three of these five trips; and co-defendants called Kenyon ringleader. Thus, District Court did not commit plain error in increasing Kenyon s offense level by four levels.)

United States v. Matthews, 5 F.3d 1161 (8th Cir. 1993). (Matthews argued District Court erred in imposing four-level enhancement on basis of his leadership role in other relevant conduct and not on basis of offense of conviction. Evidence introduced at sentencing hearing established Matthews played leadership role in criminal activity involving five or more persons; activity involved distribution of cocaine base which constituted primary source of $125,000 of laundered money that formed basis of Matthews s guilty plea. Thus, this Court concludes Matthews s leadership role in distribution fell within acts that "furthered crime" of conviction within meaning of § 3B1.1 (extensive reference to U.S. v. Sutera).)

United States v. Ortiz-Martinez, 1 F.3d 662 (8th Cir. 1993). (District Court s decision to increase Santana s offense level by four was not clearly erroneous as he was leader of entire conspiracy; conspiracy s principal supplier who was involved until his arrest; and for duration of conspiracy, vast amount of money was sent by other conspirators to Santana; his beeper served as common link among all conspirators; evidence supported inference Santana directed activities of four others, one of whom was recruited into conspiracy by Santana; and at one point, Santana represented himself as leader of conspiracy and boasted about profit opportunities present.

Nor did District Court clearly err in enhancing Rodriguz s offense level by three as he played significant role in management of conspiracy. He was referred to as "big boss" and was dispatched to St. Louis to "straighten everything up" and await nine kilogram cocaine shipment.)

United States v. Willis, 997 F.2d 407 (8th Cir. 1993). (The District Court increased Willis s offense level by four which Willis challenges on grounds that it double-counted conduct that District

Court used to support two-level adjustment for more than minimal planning under § 2F1.1(b)(2). This Court disagrees with Sixth Circuit case on point. Two sections considered different aspects of defendant s conduct: § 2F1.1(b)(2) increases punishment where crime evidenced planning and forethought, showing disregard for rule of law; section 3B1.1 recognizes additional culpability defendant should bear for being leader or organizer. Leaders or organizers tend to profit more and present greater danger to public. District Court did not clearly err where it found that Willis was dominating force in conspiracy, he exercised control over financial affairs at two places and directed proceeds from nominee loans to avoid detection and to keep businesses afloat. Moreover, he was actively involved in recruiting most of nominee borrowers.), cert. denied, 510 U.S. 1050 (1994).

United States v. Greene, 995 F.2d 793 (8th Cir. 1993). (Greene contested four level enhancement, claiming proof established only that he sold to multiple buyers and there was no proof of organization operated by him. Finding was not clearly erroneous where evidence presented both at trial and sentencing showed Greene distributed marijuana in large amounts, hundreds of pounds over several years, directly or through intermediary to four persons who further networked drug.)

United States v. Edwards, 994 F.2d 417 (8th Cir. 1993). (Evidence at trial established conspiracy was extensive and had at least five participants; large amounts of cash were found in McGee s home; and McGee always arranged drug transactions and dictated minimum quantities dealers must purchase. District Court s specific finding of McGee s leadership role under these circumstances justified four level enhancement.

District Court s determination that Mason played leadership or supervisory role was not clearly erroneous where though her son was acquitted of conspiracy, he accompanied Mason on at least one delivery and attempted to hide cocaine they were delivering at time of their arrest.), cert. denied, 510 U.S. 1048 (1994).

United States v. Mills, 987 F.2d 1311 (8th Cir.) (Mills objected to four-level increase on basis that there was insufficient evidence Waggoner and Collier were "participants" in fraudulent scheme. This Court concluded sentencing judge s explicit findings, based on his presiding at Mills s trial and counsel s arguments, that both Waggoner and Collier participated in fraudulent scheme were supported by sufficient evidence and § 3B1.1(a) enhancement was appropriate.), cert. denied, 510 U.S. 953 (1993).

United States v. Nichols, 986 F.2d 1199 (8th Cir. 1993). (Where this Court had already affirmed trial Court s findings that certain acts were relevant conduct, seven people involved in those acts involving distribution for resale of cocaine and marijuana were properly counted as participants when trial Court imposed increase where defendant was organizer or leader of criminal activity that involved five or more participants.)

United States v. Adipietro, 983 F.2d 1468 (8th Cir. 1993). (District Court s findings were not clearly erroneous where Court based attribution of manager or supervisor status to Adipietro based on evidence produced at trial and sentencing: Adipietro recruited and managed activities of co-conspirator and at times directed activities of two others; and conspiracy consisted of at least five members and was otherwise extensive.

In rejecting Sanchez s argument that it is improper to apply section to him because he had no control over other co-conspirators or over marijuana once he supplied it, this Court emphasizes broad definition of terms. It affirms four-level enhancement where evidence of record supported leader/organizer status: Sanchez controlled supply side of conspiracy; he recruited another party as supplier when his supply ran out; he performed transportation duties on distribution side when partner/"co-leader" was unavailable.)

United States v. Alexander, 982 F.2d 262 (8th Cir. 1992). (District Court received adequate evidence to identify Roberts as leader of conspiracy: more than five individuals were involved in conspiracy and they served as subordinates to Roberts; some participants identified Roberts as boss, some worked as drivers for him, some collected payments for him. Roberts established price paid for marijuana and purchased house to serve as transfer point for marijuana.), cert. denied, 512 U.S. 1244 (1994).

United States v. Jagim, 978 F.2d 1032 (8th Cir. 1992). (District Court did not clearly err in applying § 3B1.1(a) to increase Ziebarth s level where initial idea for shelter was his; he willingly helped recruit more than five participants, several of whom were his relatives; there was evidence Ziebarth received bulk of gains from scam and was slated to receive larger share than others in later conspiracy with IRS agent.)

United States v. Moore, 977 F.2d 1227 (8th Cir. 1992). (At sentencing, counsel objected to four-level increase for Moore s leadership role (Moore denied actual leadership or control). District Court referred to various parts of PSR and catalogued some five individuals over which report found that Moore had exercised leadership role, and it made four level adjustment. This Court reverses for resentencing. PSR is not evidence and when parties object to it, District Court must make findings as to controverted issues under Federal Rule of Criminal Procedure 32(c)(3)(D).)

United States v. Hale, 977 F.2d 455 (8th Cir. 1992). (This Court rejects Hale s argument that District Court misapplied guideline by considering individuals involved in conduct collateral to charged offense. He also claimed District Court violated his rights under Confrontation Clause by relying on hearsay statements of confidential informant--in light of Wise, this claim fails. Moreover, District Court s determination Hale was leader of criminal activity involving five or more participants was not clearly erroneous where Court could properly infer four other participants were involved in offense of conviction.)

United States v. Grady, 972 F.2d 889 (8th Cir. 1992). (District Court s finding Grady was organizer or leader not clearly erroneous where Grady had sole access to essential ingredient of crime, money orders (which he stole, and altered along with co-conspirators); his position allowed him to control timing and amount of money orders stolen and altered during conspiracy, and his role made him most responsible for crime.)

United States v. Holt, 969 F.2d 685 (8th Cir. 1992). (Holt and Perfetto both objected to four

level enhancement. District Court did not err in failing to conduct hearing on enhancement as it would have been repetitive based on evidence presented at trial on CCE count. This Court declares Holt s argument wholly without merit; evidence as to Perfetto, sufficient. District Court was not clearly erroneous where Perfetto conceded he "organized" his girlfriend; he fronted cocaine to subdealer and daily monitored her progress in selling it while using her house to store and cut up large amounts of cocaine; he threatened two subdealers who failed to pay him on time and taught one how to cut cocaine to earn larger profit; and District Court did not clearly err in finding two other subdealers were organized by Perfetto as each bought cocaine from him on regular basis, which was then resold.)

United States v. Simmons, 964 F.2d 763 (8th Cir.). (District Court did not clearly err by adjusting Bowers s sentence to reflect his leadership role where evidence before Court indicated Bowers served as leader of one co-defendant and two witnesses and several non-testifying, unindicted subdistributors.), cert. denied, 506 U.S. 1011 (1992).

United States v. Blumberg, 961 F.2d 787 (8th Cir. 1992). (District Court did not commit clear error in finding Blumberg organizer or leader (term given broad definition) of criminal activity that involved at least five participants (those criminally responsible, but not necessarily convicted) and activity was otherwise extensive (considering everyone involved during course of offense). Under guideline in effect at time, Court was not to consider collateral conduct. Blumberg s role in possession of stolen property count amply supported four level increase where Blumberg stole thousands of books worth more than $5 million over fifteen year period from 150 institutions; he had help from others in moving books over state lines and interstate; two people participated in some thefts and one guarded house where books were kept.)

United States v. Summerfield, 961 F.2d 784 (8th Cir. 1992). (District Court did not err in giving four-level enhancement. Though Summerfield argued he and Clark were partners and remaining defendants were merely purchasers, jury convicted all nine of Summerfield s co-defendants of participating in conspiracy that Summerfield led.

United States v. Harry, 960 F.2d 51 (8th Cir. 1992). (Substantial evidence in record for finding that Harry was organizer of extensive drug distribution network involving at least five persons. Harry himself was participant and District Court s findings were not clearly erroneous where he exercised some decision-making authority, he was high up in chain of distribution, he received profit on every pound of marijuana he sold, he and another planned ordering, storage, and redistribution of cocaine and marijuana. Leadership and organizational roles are broadly defined; defendant need not have directly controlled others.)

United States v. Flores, 959 F.2d 83 (8th Cir.) (Any person who is criminally responsible for commission of offense, whether convicted or not, is included in determining number of participants. In determining whether criminal activity is extensive, all persons involved during course of entire activity are to be considered. Addition of four points for Flores s role warranted where he organized sale on credit of marijuana and introduced cocaine into existing marijuana distribution scheme in which he had substantial responsibilities, and he exercised authority over

others.), cert. denied, 506 U.S. 976 (1992).

United States v. Jarrett, 956 F.2d 864 (8th Cir. 1992). (Jarrett was convicted of three counts of knowingly transporting minors and two counts of knowingly transporting adults in interstate commerce with intent that they engage in prostitution. District Court applied enhancement, but made no finding that females transported assisted in unlawful transportation of others. Requisite number of five could not be reached without counting minors and woman (the "victims" of crimes) transported; this would be violation of Application Notes, 4 to § 2G1.1 and 1 to § 2G1.2. This Court remands for resentencing.)

United States v. Comeaux, 955 F.2d 586 (8th Cir.) (District Court was not clearly erroneous in finding that trial testimony established Wilson s leadership role in conspiracy.), cert. denied, 506 U.S. 845 (1992).

United States v. Blandino, 954 F.2d 1436 (8th Cir. 1992). (At sentencing, Blandino conceded he had controlled four participants in cocaine distribution conspiracy, but maintained two others acted independently. District Court s finding that Blandino controlled two, through another participant, was not clearly erroneous. Footnote acknowledges authority from other circuits that defendant may be included among participants in offense for purposes of this section.)

United States v. Capps, 952 F.2d 1026 (8th Cir. 1991). (Capps challenged District Court s finding as to three participants, claiming they were merely customers of conspiracy. This Court finds no error as testimony from sentencing hearing indicated one of disputed participants travelled with Capps when she bought cocaine and was present when Capps sold drugs from her home, and other two distributed LSD for Capps and accompanied her on LSD-purchasing trips. Sentencing record supported District Court s express finding that Capps was organizer of extensive conspiracy.), cert. denied, 504 U.S. 990 (1992).

United States v. Riascos, 944 F.2d 442 (8th Cir. 1991). (Sentence would not be affected where sentencing ranges with and without enhancement for being organizer or leader, overlap at exact point of Riascos s sentence; and District Court explicitly noted it would sentence same without challenged enhancement.)

United States v. Fuller, 942 F.2d 454 (8th Cir.) (This Court concluded four level increase was warranted and District Court s findings of fact were not clearly erroneous where Leon directed distribution of drugs, organized two co-conspirators to manufacture methamphetamine, and coordinated sale of drugs, thus supporting finding Leon was center of scheme and he had organized at least five people to produce and distribute methamphetamine. This Court agrees drug distributor does not have to be main supplier in geographical area in order to adjust offense level upward under § 3B1.1.), cert. denied, 502 U.S. 914 (1991) and 501 U.S. 1039 (1992).

United States v. ABC, Inc., 952 F.2d 155 (8th Cir.) (Four level enhancement for leadership role affirmed where Swanson was active president of defendant companies.), cert. denied, 502 U.S. 866 (1991).

United States v. Sutera, 933 F.2d 641 (8th Cir. 1991). (A Court may consider leadership role over acts either that were part of crime of conviction or that furthered that crime (§ 1B1.3(a)(1)). District Court correctly concluded Sutera had used interstate wire facilities (18 U.S.C. § 1084(a)) to obtain wagering information for his own betting operation, supporting four point enhancement of base offense level.)

United States v. Contreras, 927 F.2d 1058 (8th Cir.) (Evidence supported trial Court s determination Contreras was organizer and leader of criminal activity where he supplied cocaine to numerous individuals for resale; used several bank accounts of friend to conceal proceeds of cocaine trafficking and instructed drug customers on using certain names on checks; used others names and identification for purchases.), cert. denied, 502 U.S. 929 (1991).

United States v. Ojeda, 923 F.2d 95 (8th Cir. 1991). (District Court s findings Ojeda acted as organizer or leader and Cloud as manager or supervisor were not clearly erroneous.)

United States v. Wiegers, 919 F.2d 76 (8th Cir. 1990). (District Court correctly added four levels to offense level where in his capacity as connection between St. Louis and Chicago, Weigers brought other participants together, set up locale of cocaine deal, flew to Chicago and arranged for hotel rooms, cut part of cocaine, communicated between groups of dealers, participated in drug sale to FBI.)

United States v. Yerks, 918 F.2d 1371 (8th Cir. 1990). (District Court s finding Yerks was organizer or leader not clearly erroneous where there was testimony Yerks fronted crack to one person, sold it to three others who then resold it, and provided drug to fifth person in exchange for registering vehicle in his name rather than Yerks s.)

United States v. Dyer, 910 F.2d 530 (8th Cir.) (There were at least five participants for Guidelines purposes even if government informant and two unnamed persons who sold drugs to members of conspiracy were not counted.), cert. denied, 498 U.S. 907 and 498 U.S. 949 (1990).

United States v. Morphew, 909 F.2d 1143 (8th Cir. 1990). (Offense level properly raised four levels where District Court s finding Morphew was organizer in extensive criminal scheme was not clearly erroneous. She and more experienced partner received broker fees to procure venture capital for entrepreneurs. They received over $250,000, but never obtained loan for customer nor did they return any fees.)

United States v. Wayne, 903 F.2d 1188 (8th Cir. 1990). (Substantial evidence in record for finding enhancement as organizer or leader was warranted; finding not clearly erroneous.)

United States v. Williams, 902 F.2d 675 (8th Cir. 1990). (Williams contended District Court erred in upwardly departing based on his role as leader/organizer of check stealing/forging/cashing operation. This Court reviewed under clearly erroneous standard and agreed with District Court analysis that Williams maintained control over principal instrumentality of criminal scheme throughout conspiracy.)

United States v. Haynes, 881 F.2d 586 (8th Cir. 1989). (Acquittal of CCE charges does not bar government from alleging defendant was organizer or leader of criminal activity that involved five or more participants or was otherwise extensive.), cert. denied, 506 U.S. 898 (1992).

**§ 3B1.1(b) (Manager/Supervisor--5 or More Participants or Otherwise Extensive/Standard of Review):**

United States v. Gelinas, 299 F.3d 978 (8th Cir. 2002) (MURPHY, HEANEY,* BRIGHT). (This Court reviews for clear error District Court's determination of defendant's role in offense because it is factual finding. Interpretation and application of Guidelines is question of law reviewed de novo.)

United States v. Zimmer, 299 F.3d 710 (8th Cir. 2002) (McMILLIAN, BEAM, HANSEN*). (District Court's determination that defendant was manager or supervisor is reviewed for clear error), cert. denied, 537 U.S. 1146 (2003).

United States v. Barrett, 173 F.3d 682 (8th Cir. 1999) (LOKEN,* HEANEY, MORRIS SHEPPARD ARNOLD). (This Court reviews for clear error District Court's determination to impose adjustment.)

**§ 3B1.1(b) (Manager/Supervisor--5 or More Participants or Otherwise Extensive):**

United States v. Gelinas, 299 F.3d 978 (8th Cir. 2002) (MURPHY, HEANEY,* BRIGHT). (District Court did not clearly err in applying enhancement because evidence showed that defendant did more than recruit others: he solicited others to finance and distribute drugs, explained to couriers how to carry methamphetamine on their bodies, asked others to buy hand cleaner for him to use in packing methamphetamine for shipment, encouraged coconspirators to use false names and addresses when wiring money, and asked others to obtain ingredients for making methamphetamine. CONCURRENCE: Guidelines are unfair.)

United States v. Zimmer, 299 F.3d 710 (8th Cir. 2002) (McMILLIAN, BEAM, HANSEN*). (Manager or supervisor need only have managed or supervised one other participant in conspiracy, and management activity may be limited to single transaction. Defendant directed activity of coconspirator on thirty or more occasions in cooking methamphetamine, directed another coconspirator in procurement of significant amount of ephedrine, taught another coconspirator how to extract ephedrine from precursor drugs and how to set up methamphetamine lab, and created videotape instructing others how to manufacture methamphetamine), cert. denied, 537 U.S. 1146 (2003).

United States v. Frazier, 280 F.3d 835 (8th Cir.) (HANSEN,* HEANEY, TUNHEIM). (Defendant was properly classified as manager or supervisor because he established one distribution location, recruited other participants to operate it, and was one of only two conspirators who mixed, packaged, and stored heroin there.), cert. denied, 537 U.S. 911 (2002).

United States v. Lalley, 257 F.3d 751 (8th Cir. 2001) (MORRIS SHEPPARD ARNOLD, J. R. GIBSON,* GOLDBERG). (Defendant argues District Court erred in imposing increase because he did not control or supervise any offense participant. District Court's finding goes to extensiveness of operation but does not demonstrate that defendant was manager or supervisor of one or more other participants; accordingly, necessary factual predicate for increase has not been established. Because District Court failed to make essential finding that defendant exercised necessary control over one other person, this Court must remand. District Court may, if it deems it appropriate, consider whether upward departure is warranted under Application Note 2.)

United States v. Scott, 243 F.3d 1103 (8th Cir. 2001) (McMILLIAN, BOWMAN, LOKEN*). (Defendant argues he was merely low-level manager and thus deserved only 2-level enhancement. However, this Court has repeatedly held that Guidelines do not authorize such compromise adjustment: if criminal activity involved 5 or more participants (as defendant stipulated), § 3B1.1 permits either 4- or 3-level adjustment, or no adjustment at all. District Court's finding that defendant was manager or supervisor is not clearly erroneous because lead investigator of conspiracy testified at sentencing that defendant was clearly leader of gang in Minnesota; he ran all narcotics activities of gang, he set prices, and he directed actions of numerous individuals in conspiracy. This testimony was based on numerous intercepted telephone conversations and extensive interviews and dealings with other conspirators, and testimony was corroborated by testimony at another trial.)

United States v. Hyatt, 207 F.3d 1036 (8th Cir. 2000) (BEAM, HEANEY, KYLE*). (Although defendant argues evidence does not show he supervised anyone, he admitted at sentencing that he paid one of his customers to drive him around so he could distribute drugs, and defendant s former girlfriend testified he directed her and another person to buy drugs from defendant s supplier after defendant was arrested. Evidence exists from which District Court could reasonably conclude adjustment was warranted.)

United States v. Barrett, 173 F.3d 682 (8th Cir. 1999) (LOKEN,* HEANEY, MORRIS SHEPPARD ARNOLD). (To warrant § 3B1.1(b) increase, defendant need only have managed or supervised one other participant. Sentencing-hearing evidence sufficiently supported finding that Barrett exercised enough control over at least one other conspirator to warrant increase where FBI Special Agent testified Barrett had controlled his sister and Clarence Brooks when they assisted Barrett in distributing high-priced form of marijuana; although Barrett denied connection with Brooks he admitted giving his sister drugs, and supervising or assisting her in selling drugs.)

United States v. Jasper, 169 F.3d 1109 (8th Cir. 1999) (McMILLIAN, LAY, HALL) (per curiam). (Affirming as not clearly erroneous District Court's determination that Jasper was manager or supervisor. Sentencing hearing testimony demonstrated Jasper (1) recruited Antonio Rodrigo to sell crack, make deliveries, and collect money, in exchange for financial support from Jasper; (2) determined price of crack Rodrigo sold, instructing him to accept only cash; (3) instructed Rodrigo where to sell, to whom he should sell, and how to deal with best customers; (4) gave others drugs in return for bringing him customers; and (5) taught another drug dealer crack-cooking technique.)

United States v. Garrison, 168 F.3d 1089 (8th Cir. 1999) (RICHARD S. ARNOLD,* FAGG, DAWSON). (Evidence supported finding that Batey acted as manager or supervisor given testimony from courier that she received instructions from Batey; defendant need only have supervised one or more other participants to be subject to manager/supervisor enhancement; and enhancement may apply even if management activity was limited to single transaction.)

United States v. Cooper, 168 F.3d 336 (8th Cir. 1999) (BOWMAN, MURPHY,* VIETOR). (While defendant's status as distributor did not per se warrant enhancement under § 3B1.1(b), government presented evidence that conspiracy involved five others and that defendant specifically gave instructions to three of five co-conspirators regarding transporting, purchasing, and/or selling drugs; he also ordered one co-conspirator to tell authorities he owned drugs found during particular search.)

United States v. Loveless, 139 F.3d 587 (8th Cir. 1998). (Loveless argues District Court erred in determining he was manager or supervisor of conspiracy because evidence at trial showed he only sold drugs to Reber. Considering record as whole, this Court finds District Court s determination was not clearly erroneous where e.g., Loveless recruited Reber to distribute methamphetamine; fronted drugs to Reber, thus assuming financial risk for some drug sales; and most importantly--Loveless exercised great deal of control over Reber and sales Loveless made to him (Loveless decided where sales were to take place, price for methamphetamine, and method of payment).)

United States v. Ayers, 138 F.3d 360 (8th Cir.) (Williams claims District Court erred in enhancing his sentence by three levels based on finding he was manager or supervisor in criminal activity involving more than five participants. No clear error where Williams admitted to being involved in conspiracy to distribute crack involving six other individuals; Williams recruited co-conspirator to come to Cedar Rapids to sell drugs for conspiracy, set price of crack sold by him, and determined to whom he would sell crack; and Williams was source of crack for Cedar Rapids conspiracy, and could therefore, control amount of crack sold by conspirators.), cert. denied, 525 U.S. 895 (1998).

United States v. Del Toro-Aguilera, 138 F.3d 340 (8th Cir. 1998). (Although PSR noted Del Toro s role in large distribution ring was not clear, it recommended three-level enhancement, which Court imposed (raising Del Toro s offense level to 43 requiring imposition of life sentence). On appeal, Del Toro argues insufficient evidence to support enhancement. This Court agrees, though defendant may have fronted drugs, without additional evidence showing control over another participant, § 3B1.1 enhancement inappropriate. This Court rejects government attempts to argue there was "something more": status as distributor standing alone does not warrant enhancement; amount of drugs distributed already reflected in BOL; and number of phone calls between Del Toro and customers does not show Del Toro s control, especially as there was no evidence on content of calls. Remanded for resentencing.)

United States v. Padilla-Pena, 129 F.3d 457 (8th Cir. 1997). (Ana Rosa argues District Court incorrectly applied § 3B1.1(b) as her role could not be fairly characterized as manager or supervisor;

she did no more than perform errands when directed by brothers, and she denies there were large sums of money or quantities at her house--she was little more than "gofer." This Court easily affirms District Court s determination Ana Rosa was central member of conspiracy, not mere "gofer"; district judge who presided at trial found Ana Rosa was "bank" for both money and heroin. He also found Ana Rosa to be principal supplier of methamphetamine which another defendant transported from California to Omaha. This Court finds closer question as to whether Ana Rosa managed or supervised other participants in conspiracy as opposed to managing only property or activities (if evidence does not support finding Ana Rosa managed or supervised other participants, her offense level could only be increased by means of departure, and not by means of adjustment, § 3B1.1, application note 3). Based on record, this Court holds there is enough evidence to find Ana Rosa managed and supervised at least one other in conspiracy. From combination of both autonomy and control over assets, District Court could reasonably infer Ana Rosa had leverage and discretion necessary to direct other participants; there is evidence she actually exercised discretion by directing both other defendant and another appellant by determining where transactions would take place, and when question arose as to ownership of money, Ana Rosa decided issue in instructions to another appellant who accepted Ana Rosa s authority. No clear error.), cert. denied, 524 U.S. 905 and 524 U.S. 906 (1998).

United States v. Tran, 122 F.3d 670 (8th Cir. 1997). (District Court did not clearly err by increasing Tran s offense level by three, § 3B1.1(b), concluding Tran was one of ring leaders in conspiracy and recruited three "passers," tried to recruit another, and recruited one "driver." District Court noted Tran never appeared at any bank to cash any checks, but was always around. Tran contends fact his share of conspiracy proceeds was only five percent, same as that of "drivers," and less than fifteen percent "passers" received, is inconsistent with finding he was manager or supervisor. Mere mathematical percentage of Tran s share may not be proper measure of his compensation as record suggests he may have received five percent of proceeds generated by each person he had recruited. In any event, his allegedly low share of proceeds does not outweigh other evidence in record supporting finding he was manager or supervisor.)

United States v. Fairchild, 122 F.3d 605 (8th Cir. 1997). (Fairchild argues upward adjustment for his role as manager or supervisor was improper. This Court concludes three-point upward adjustment was not clearly erroneous where Fairchild concedes he served as president of highly structured and hierarchical organization, and evidence showed Fairchild was upper level distributor of methamphetamine for his subordinates in local chapter and controlled supply.), cert. denied, 522 U.S. 1131 (1998).

United States v. Logan, 121 F.3d 1172 (8th Cir. 1997). (District Court imposed three-level increase, § 3B1.1(b), and Logan challenges conclusion he was manager or supervisor. While one witness testified Logan did sometimes "front" methamphetamine to him, terms were witness would pay Logan only fixed amount--there was no splitting of profits. This Court does not believe such evidence is enough to sustain finding Logan was manager or supervisor of witness; government cites no other candidate as potential participant managed or supervised by Logan. Status as distributor by itself not sufficient to justify Logan as manager or supervisor. This Court reverses finding Logan was manager or supervisor.)

United States v. Grajales-Montoya, 117 F.3d 356 (8th Cir.) (Where District Court stated that based on all evidence before it and reasonable inferences derived therefrom, it was firmly convinced Delucas were managers and organizers and leaders of this entire matter--they put it together, manipulated it, implemented it, and organized numerous other people to participate in scheme--this Court believes District Court made findings sufficient to support enhancement based on Mr. Deluca s role in offense.), cert. denied, 522 U.S. 983 and 522 U.S. 1007 (1997).

United States v. Rodriguez, 112 F.3d 374 (8th Cir. 1997). (Glaus challenges District Court s imposition of three-level increase for being manager or supervisor in criminal activity that involve five or more participants or was otherwise extensive, § 3B1.1(b). Glaus contends there was no evidence showing his management or supervision of any other participant in conspiracy. This Court views argument as bordering on frivolous. No clear error in District Court s determination Glaus managed or supervised at least one other participant where two police officers and government informant testified at trial, government informant set up methamphetamine purchase by paging Glaus, who instructed government informant about specifics of how and who would be making delivery and that person subsequently arrived according to Glaus s description.)

United States v. Bryson, 110 F.3d 575 (8th Cir. 1997). (District Court increased Bryson s BOL by three, § 3B1.1(b), stating she was main person in St. Louis and had several people working under her, and received large quantities of drugs. Bryson argues finding she was manager or supervisor is clearly erroneous. This Court recognizes Bryson was receiving such large amounts of methamphetamine, intent to distribute could easily be inferred; there is no record evidence, however, about sales by Bryson to subordinate dealers or to anyone other than government informant. This Court agrees with Seventh Circuit: status as distributer, standing alone, does not warrant enhancement under § 3B1.1. No record evidence Bryson had greater degree of responsibility than any co-defendant for putting together drug operation or particular deal. Moreover, Bryson s status as mid-level distributor is already reflected in BOL, figure based on amount of drugs she was responsible for distributing. Without additional evidence demonstrating she exercised leadership role in offense, enhancement under § 3B1.1 is inappropriate. This Court cannot find sufficient evidence to affirm three-level enhancement, and therefore remands case for resentencing.

Furnish challenges District Court s application to him of four-level increase, § 3B1.1(a). At sentencing, Court made no specific findings, but merely overruled Furnish s objection to increase. Furnish argues Court s finding is clearly erroneous. This Court reviews elements to be considered in imposing enhancement. Court observes evidence against Furnish is nothing resembling type of control over one or more other participants necessary to support enhancement for being leader or organizer in absence of other evidence of leadership or organization. While Furnish was involved in buyer/seller relationship with co-defendant and possibly another co-defendant, and may even have fronted methamphetamine to them, there is no evidence Furnish regularly made decisions as to when drugs should be transported, hired transporters, recruited distributors, or directed activity of any subordinate. Furnish s case remanded for resentencing.)

United States v. Brown, 91 F.3d 1109 (8th Cir. 1996). (Brown challenges three-level enhancement, § 3B1.1(b), finding she was manager or supervisor in criminal activity involving at

least five participants. Finding not clearly erroneous based on trial testimony to effect, e.g., Brown appeared to be "a boss" of others who were also selling crack cocaine in apartment.)

United States v. Flores, 73 F.3d 826 (8th Cir.) (Flores claimed District Court error in assessment of three-level upward adjustment, § 3B1.1(b), after determining he was manager or supervisor within single conspiracy charged in indictment. Flores also argued error in failing to grant him two-level downward adjustment, § 3B1.2(b), for being minor participant. District Court did not clearly err in imposing three-level enhancement where facts illustrated Flores solicited substantial buyer on behalf of drug ring, helped finance trip, played integral and extensive role in planning transaction, determined price for quantity of marijuana sold along with arranging for sizable portion of quantity to be "fronted," and personally managed and ensured $200,000 deal got done. Thus, District Court s failure to award two-level reduction for minor participation was not clearly erroneous.), cert. denied, 518 U.S. 1027 (1996).

United States v. Cheek, 69 F.3d 231 (8th Cir. 1995). (District Court s finding Cheek was manager or supervisor of criminal activity involving five or more people (§ 3B1.1(b)) is not clearly erroneous where stipulated facts contained in plea agreement and testimony at Cheek s sentencing show Cheek directed actions of other family members who participated in criminal activity, e.g., Cheek asked her sister to conceal true identity of Cheek s husband after he went into hiding, Cheek requested her son to rent storage lockers to hold some assets Cheek hid from her creditors. In addition, government did not breech any promise to Cheek by requesting enhancement as plea agreement is silent on issue of role enhancement and does not indicate Cheek will receive any specific sentence.)

United States v. Pena, 67 F.3d 153 (8th Cir. 1995). (Pena argued District Court error in assessment of three-level enhancement; he argued he was not manager or supervisor of conspiracy because co-conspirator was Des Moines ringleader, and Pena, mere seller of drugs in separate transactions to independent parties. Government s evidence clearly proved Pena overstepped mere seller s role; he retained financial risk of distribution by fronting or consigning drugs to co-conspirator and Des Moines network; after March shipment was intercepted, Pena took personal control of April shipment, arranging transportation and following drugs to Des Moines destination. Finding Pena was manager or supervisor is not clear error where Pena controlled co-conspirator, organized April shipment (control and organization key factors in determining management or supervisor authority), and retained financial risk of distribution. Pena also argued there were not at least five people involved in conspiracy because one was government informant. Co-conspirator turned informant had participated in conspiracy by receiving and distributing first drug shipment supplied by Pena; she may be counted because of this activity prior to her cooperation with police. Thus, District Court s finding conspiracy included five participants was not clear error; Court properly imposed three level aggravating role enhancement.)

United States v. McFarlane, 64 F.3d 1235 (8th Cir. 1995). (District Court increased McFarlane s offense level by three levels and under facts of case, sentence increase would have to be by means of upward departure as McFarlane did not organize, lead, manage, or supervise another participant, but exercised management responsibility over property, assets, or activities of

criminal organization (Amendment 500). This Court upholds District Court s finding evidence was not adequate to show McFarlane controlled five or more participants. District Court, however, referred to "adjustment," and not to "departure." Adjustment is mandated if District Court concludes defendant has managed or supervised one or more participants in criminal enterprise involving five or more participants; upward departure may be warranted if District Court concludes defendant merely exercised managerial role over property/assets/activities of criminal enterprise involving five or more participants. Where District Court imposed minimum sentence at McFarlane s BOL/criminal history category I and expressed empathy for McFarlane, this Court cannot state with confidence District Court was clearly aware it had authority to not increase McFarlane s offense level; accordingly, case remanded for resentencing.)

United States v. Smith, 62 F.3d 1073 (8th Cir. 1995). (Smith contended District Court s finding she was manager or supervisor of conspiracy involving five or more individuals was unsupported by record which indicated four people participated in scheme. District Court s finding was supported as to number of participants by testimony which included Smith s indicating she had recruited about six "mules."), cert. denied, 516 U.S. 1098 (1996).

United States v. Skorniak, 59 F.3d 750 (8th Cir.) Factors District Court should consider in making determination include nature of defendant s role in offense, recruitment of accomplices, and degree of participation in planning or organizing offense. Skorniak challenged three-level upward adjustment, attributing role of organizer or leader to unindicted co-conspirators and arguing insufficient evidence existed to show he played aggravating role in offense. Skorniak does not dispute number of participants in offense and PSR set forth numerous drug transactions Skorniak arranged for other members of conspiracy and did some instruction as to which supplier should be dealt with, and he loaned funds to other members of conspiracy for additional cocaine purchases and for business operation. District Court s factual determinations Skorniak was manager or supervisor under § 3B1.1(b) not clearly erroneous.), cert. denied, 516 U.S. 980 (1995).

United States v. Escobar, 50 F.3d 1414 (8th Cir. 1995). (Keeper argued District Court error in three-level upward adjustment based upon determination he was manager or supervisor. This Court lists factors District Court should consider in making determination under section. It holds District Court did not clearly err given its conclusion based on trial evidence Keeper established wholesale distribution network in St. Louis.)

United States v. Karam, 37 F.3d 1280 (8th Cir. 1994). (El Hani argued District Court erred in assessing three-level increase (which resulted in sentencing range of 210-262 months). Where El Hani was subject to mandatory 20-year minimum under 21 U.S.C. § 841(b)(1)(A) and was sentenced to it, role in offense adjustment had no impact on his sentence and any error in that determination cannot be basis of appeal. Nevertheless, this Court s independent review convinced it adjustment was correctly applied.)

United States v. McMurray, 34 F.3d 1405 (8th Cir. 1994). (S. Lomax contended she was not manager or supervisor in conspiracy and should not have received three-level enhancement. This Court decides there was ample evidence from which District Court could have found S. Lomax was

manager or supervisor: e.g., she handled transactions; directed and paid someone to retrieve crack from bushes; orchestrated shipments of cocaine from California to Omaha, sewed cocaine into stuffed animal before flight to deliver cocaine, made numerous wire transfers involving large sums of money. No clear error.), cert. denied, 513 U.S. 1179 (1995).

United States v. Reedy, 30 F.3d 1038 (8th Cir. 1994). (Reedy contested three-level upward adjustment, § 3B1.1(b) contending District Court erred in interpreting guideline to encompass management or supervision of "business" of conspiracy. Reedy pointed to application note 2--which became effective after he was sentenced--to support his contention he must have supervised or managed "one or more participants." District Court was correct in considering sentencing range and Guidelines manual in effect on day Reedy was sentenced. This Court rejects Reedy s contention he was seeking only application of new explanatory note defining meaning of unamended guideline. Further, this Court finds ample evidence in record to support District Court s inferential finding Reedy supervised and managed both "one or more participants" and "business" of conspiracy.)

United States v. Tangeman, 30 F.3d 950 (8th Cir.) (No clear error in three-level upward adjustment, § 3B1.1(b), where one of Tangeman s associate s testimony and some of Tangeman s taped admissions support contention that Tangeman exercised control over cocaine sales and that she negotiated for purchase of cocaine in Texas.), cert. denied, 513 U.S. 1009 (1994).

United States v. Johnson, 28 F.3d 1487 (8th Cir. 1994). (Three-point increase in two defendants offense levels based on finding they were managers or supervisors in enterprise, § 3B1.1(b), not clearly erroneous.), cert. denied, 513 U.S. 1098 (1995).

United States v. Frieberger, 28 F.3d 916 (8th Cir. 1994). (This Court rejects Frieberger s argument District Court improperly made finding regarding his level of culpability in conspiracy without hearing evidence on this disputed fact issue. Court heard from government witness, DEA agent; although Frieberger was not precluded from submitting evidence, he proffered none. Thus, his contentions were not born out by record.

Frieberger argued testimony of DEA agent which provided much of factual support for enhancement, was based on statements made by Frieberger that were obtained in violation of his Fifth Amendment right against self-incrimination. This Court concludes such argument was not properly before it as following recommended denial of Frieberger s suppression motion, Frieberger entered unconditional guilty plea.

Alternatively, Frieberger argued agent s testimony was insufficient to sustain three-level enhancement. This Court decides stipulation of facts relative to sentencing and testimony of DEA agent revealed ample evidence to support finding Frieberger acted as manager or supervisor in criminal activity involving five or more participants and finding was not clearly erroneous: he participated in conspiracy with more than five others; he admitted to distributing methamphetamine directly to co-defendant and to others and he introduced his sister to co-defendant so she could supply another conspirator with methamphetamine to complete chain of distribution; Frieberger acknowledged he received compensation for arranging system of distribution.), cert. denied, 513 U.S. 1097 (1995).

United States v. Fetlow, 21 F.3d 243 (8th Cir. 1994). (Fetlow argued that other than PSR, government offered no evidence there were five or more participants involved in offense, which is requirement of three-level enhancement for defendant s role as manager or supervisor. This Court concludes it was not clearly erroneous for District Court to find enhancement applied where government had introduced evidence that Fetlow was key member of cocaine distribution ring that involved at least five participants in course of trial of three of his co-defendants and same sentencing judge presided over those trials. This Court holds in determining whether government has met evidentiary burden which applies when District Court elects to make finding on issue disputed at sentencing phase, District Court may consider, without rehearing, evidence introduced at trial of co-defendant if evidence is relevant to issue disputed at sentencing phase, and if sentencing judge also presided over co-defendant s trial.)

United States v. Rosnow, 16 F.3d 1228 (8th Cir. 1993). (Carlson contended that reversal of conspiracy conviction precluded use of underlying conduct supporting that conviction for purposes of sentence enhancement. His related contention was there was no basis for imposing § 3B1.1 increase unless offense of conviction involved more than one participant. This Court concluded trial Court did not err in reimposing 3-level increase, stating Carlson s reliance on Williams was misplaced as D.C. Circuit discussed clarifying amendment to Guidelines in U.S. v. Caballaro. D.C. Circuit had concluded that § 3B1 allowed sentencing judge to look to contours of underlying scheme, rather than only elements of charged offense.)

United States v. Miller, 995 F.2d 865 (8th Cir. 1993). (Under this Court s standard of review, Miller s argument challenging three level enhancement was nearly frivolous as District Court had found Miller recruited individuals for conspiracy, advanced money for marijuana purchases, advanced money to obtain counsel for marijuana drivers who were arrested, and received commission for providing contacts to drug-sources.)

United States v. Montoya, 979 F.2d 136 (8th Cir. 1992). (Montoya waived any error District Court may have committed in increasing his offense level by failing to raise issue in his first appeal. Despite mention of three conspirators in another context, law of case does not extend to issues not decided in earlier appeal. Moreover, Montoya conceded if he were counted (despite "supervisory" status), there were five participants in conspiracy.)

United States v. England, 966 F.2d 403 (8th Cir.) (It was not clearly erroneous for District Court to infer defendants were managers or supervisors where one of defendants secured alternative source of methamphetamine, one provided drugs for resale, one participated in negotiations to buy two pounds of methamphetamine and made downpayment, one directed three men to drive methamphetamine from Missouri to Arkansas.), cert. denied, 506 U.S. 1025 (1992).

United States v. Schwarck, 961 F.2d 121 (8th Cir. 1992). (Given broad definition of those who are subject to enhanced sentences under this guideline, this Court could not say District Court erred in finding Schwarck acted as manager or supervisor as he shared in profits of cocaine he purchased from large dealers and sold; he decided when he would sell cocaine and to whom.)

United States v. Wichmann, 958 F.2d 240 (8th Cir. 1992). (This Court affirms three level enhancement where Wichmann possessed and sold ninety percent pure cocaine (purity of drugs, appropriate factor to consider) to about seventy-five customers in quantities up to one-half ounce; and he recruited others to help finance his cocaine purchases. Wichmann did not dispute involvement of five or more in conspiracy.)

United States v. Duckworth, 945 F.2d 1052 (8th Cir. 1991). (District Court s finding that Duckworth played leadership role in offense not clearly erroneous where there was evidence Duckworth supplied several mid-level drug dealers and had extended credit to at least some of those dealers for their drug purchases.)

United States v. Apfel, 945 F.2d 236 (8th Cir. 1991). (District Court did not clearly err in determining Apfel was manager or supervisor where Apfel admitted knowledge of his two suppliers, several of Apfel s customers testified they bought drugs from Apfel, and other evidence included five other people who ran drugs and collected money for Apfel.)

United States v. West, 942 F.2d 528 (8th Cir. 1991). (West pleaded guilty, along with his father, to selling adulterated meat products from West Meat Co. with intent to defraud. District Court increased offense level because eight employees knowingly or unknowingly participated in instant offense of which West was leader. West argues other employees were not participants because they had no criminal responsibility for their acts; consequently, enhancement was not applicable to West. He challenged application/construction of guideline, question this Court reviews de novo. District Court did not err in determining criminal activities in this case "otherwise extensive." Because both West and his father pleaded guilty to participation in same fraud, § 3B1.1 would cover West s case whether or not this Court interpreted guideline to require more than one participant. DISSENT: PSI premised its recommendation on existence of five or more participants, and West objected to recommendation. District Court should have made clear and precise finding as to number of actors involved and their level of criminal responsibility before enhancing West s sentence under this section.)

United States v. Telemaque, 934 F.2d 169 (8th Cir. 1991). (Increase for role as manager or supervisor was not clearly erroneous where evidence established Telemarque was one of core members of conspiracy to impede collection of tax, and chiefly responsible for manufacture and distribution of many of fraudulent documents.)

United States v. Sutera, 933 F.2d 641 (8th Cir. 1991). (District Court s finding Sutera supervised or led five or more participants in gambling enterprise was not clearly erroneous where there was sufficient evidence of record to show five or more persons who accepted bets from others and turned them over to Sutera.)

United States v. Andersen, 928 F.2d 243 (8th Cir. 1991). (District Court s factual determination Andersen was manager or supervisor was not clearly erroneous though charge standing alone did not indicate more than one person was involved. Andersen s participation in security fraud scheme included being first to join, understanding details, recruiting others, being

entitled to half of proceeds from checks she cashed and one-third from checks issued to third parties.)

United States v. Turpin, 920 F.2d 1377 (8th Cir. 1990). (District Court s finding that Turpin was manager or supervisor (three level increase) was not clearly erroneous where five or more participants were involved, Turpin encouraged Lewis to permit use of her apartment as base for criminal activity, and she had responsibility for handling proceeds from drug sales.), cert. denied, 499 U.S. 953 (1991).

United States v. Lawrence, 918 F.2d 68 (8th Cir. 1990). (Lawrence did not object at sentencing to three point assessment; thus, issue not properly preserved for appeal. In any event, evidence showed Lawrence managed and profited from extensive drug dealings with several persons over five-year period. Management of co-conspirators is not necessary showing.), cert. denied, 499 U.S. 941 (1991).

United States v. Russell, 913 F.2d 1288 (8th Cir. 1990). (District Court correctly adjusted Russell s offense level for his role as manager or supervisor as record showed he initiated transactions, negotiated prices, recruited individuals and was characterized as spokesperson for group.), cert. denied, 500 U.S. 906 (1991).

United States v. Pierce, 907 F.2d 56 (8th Cir. 1990). (District Court s finding Pierce was manager or supervisor (thus increasing his offense level by three) not clearly erroneous. Pierce was key link between California source of supply and Iowa distributors and customers and he set price for methamphetamines. His role was not diminished by his bowing out of picture after meeting with undercover agent and setting up deal with suppliers. No difference between subsection (b) and (c) s use of terms manager or supervisor.)

United States v. Johnson, 906 F.2d 1285 (8th Cir. 1990). (Finding that defendant functioned as organizer does not necessarily mean he directly controlled other individuals. Here, record showed Ramirez recruited, directed deliveries, supplied distribution scheme.)

United States v. Figueroa, 900 F.2d 1211 (8th Cir.) (Court reviews District Court s finding that defendants performed managerial roles in offense under clearly erroneous standard. Assertion that Court erred in this finding was meritless where record revealed both defendants were present to monitor drug sales, both recruited accomplices, one defendant managed financial aspects of drug venture, and other defendant actively participated in negotiations.), cert. denied, 496 U.S. 942 (1990).

United States v. Murphy, 899 F.2d 714 (8th Cir. 1990). (Testimony of government agents regarding size of drug distribution network and defendant s supervisory role within operation supported finding he was manager or supervisor within extensive drug trafficking operation.)

**§ 3B1.1(c) (Other Organizer, Leader, Manager, or Supervisor/Standard of Review):**

United States v. Placensia, 352 F.3d 1157 (8th Cir. 2003) (BYE,* GIBSON, MELLOY). (District Court's factual findings regarding aggravating role are reviewed for clear error. Government has burden to prove that defendant acted in enhanced role.)

United States v. Yerkes, 345 F.3d 558 (8th Cir. 2003) (MORRIS ARNOLD, HANSEN, SMITH*). (Enhancement is based on findings of fact which this Court reviews for clear error.)

United States v. Leonos-Marquez, 323 F.3d 679 (8th Cir.) (WOLLMAN,* HEANEY, MELLOY). (Enhancement is based on findings of fact, which this Court reviews for clear error. District Court considers factors including defendant's decision-making authority, nature of his participation in crime, whether he recruited accomplices, degree of his participation in organizing offense, and his control and authority over others. Terms "organizer" and "leader" are construed broadly; defendant must have done more than just sell drugs, but need not have controlled co-conspirators directly.), cert. denied, 124 S. Ct. 304 (2003).

United States v. Johnson, 278 F.3d 749 (8th Cir.) (McMILLIAN, BEAM, HANSEN*). (This Court reviews for clear error District Court's decision to assess sentencing enhancement based upon defendant's role in offense, and government has burden to prove that such increase is warranted.), cert. denied, 536 U.S. 949 (2002).

United States v. Lim, 235 F.3d 382 (8th Cir. 2000) (HANSEN,* MURPHY, BYE). (District Court's findings of historical fact are reviewed for clear error, and its conclusions of law are reviewed de novo. While ultimate determination of application of aggravating-role enhancement may be mixed question of fact and law, this Court gives due deference to District Court's inferences properly drawn from facts.)

United States v. Ervasti, 201 F.3d 1029 (8th Cir. 2000) (BOWMAN,* LAY, BEAM). (As District Court is in far better position than this Court to observe and evaluate evidence, this Court reverses determination of defendant's role in offense only if clearly erroneous.)

United States v. Matlock, 109 F.3d 1313 (8th Cir.) (This Court reviews District Court s finding of number of persons involved in criminal activity for clear error.), cert. denied, 522 U.S. 872 (1997).

United States v. Braun, 60 F.3d 451 (8th Cir. 1995). (This Court rejects government s argument that "plain error" standard governs appeal and decides Braun preserved issue for appeal; consequently, this Court reviews District Court s assessment of Braun s role in offense under clearly erroneous standard.)

**§ 3B1.1(c) (Other Organizer, Leader, Manager, or Supervisor):**

United States v. Bewig, 354 F.3d 731 (8th Cir. 2003) (RILEY, RICHARD ARNOLD,* MELLOY). (Defendant need only have managed or supervised one other participant in single transaction in criminal conspiracy. Here, defendant was solely responsible for ordering

pseudoephedrine from distributor, and he authorized his employee to sell more than three units allowed by protocol to co-conspirator.)

United States v. Placensia, 352 F.3d 1157 (8th Cir. 2003) (BYE,* GIBSON, MELLOY). (District Court did not clearly err in applying enhancement where witness testified that defendant approached him and offered $5,000 to transport methamphetamine, gave him instructions, and oversaw unloading of drugs.)

United States v. Yerkes, 345 F.3d 558 (8th Cir. 2003) (MORRIS ARNOLD, HANSEN, SMITH*). (District Court did not clearly err in applying enhancement where evidence showed defendant managed at least two other participants. At defendant's request, one participant obtained precursors for defendant to use in manufacturing methamphetamine. At defendant's request, other participant purchased precursors and titled three vehicles in participant's name. Control of only one participant is required for enhancement.)

United States v. Leonos-Marquez, 323 F.3d 679 (8th Cir.) (WOLLMAN,* HEANEY, MELLOY). (Enhancement was not clearly erroneous where defendant exerted control over stash house, and where defendant took payment for drug orders and then sent another participant to make drug deliveries.), cert. denied, 124 S. Ct. 304 (2003).

United States v. Brown, 315 F.3d 929 (8th Cir. 2003) (BOWMAN, RICHARD ARNOLD, LOKEN*). (Defendant's recruitment of store clerk to accept counterfeit bills, and his payment of compensation to clerk after he did so, justified two-level enhancement.)

United States v. Brown, 311 F.3d 886 (8th Cir. 2002) (HANSEN, RICHARD ARNOLD, LOKEN*). (Application of aggravating-role enhancement was not clear error where police testified that defendant appeared to be leader and his cellmate testified that defendant told him he had organized numerous trips to transport drugs cross-country and paid others to serve supporting functions.)

United States v. Johnson, 278 F.3d 749 (8th Cir.) (McMILLIAN, BEAM, HANSEN*). (District Court erred in assessing two-level enhancement, having determined that there were five or more participants, and that defendant was organizer, leader, manager, or supervisor; only lawful choices were four-level enhancement, three-level enhancement, or no enhancement at all. Error was harmless, however. It did not prejudice government that defendant did not receive three-level or four-level enhancement because defendant's sentence was capped by Apprendi. It did not prejudice defendant because he would have properly received either three-level or four-level enhancement: evidence showed that leader of conspiracy placed defendant in charge when he was unavailable.), cert. denied, 536 U.S. 949 (2002).

United States v. Hetherington, 256 F.3d 788 (8th Cir.) (McMILLIAN, J. R. GIBSON,* LAUGHREY). (Defendant was convicted of wire fraud, securities fraud, and engaging in monetary transaction in criminally derived property. District Court imposed offense-level increase for both fraud and monetary-transaction counts under § 3B1.1(c). District Court found that evidence

established defendant (1) gave direction to and approved conduct by third person that constituted part of scheme to defraud, and (2) supervised another party's involvement in engaging in financial transaction in criminally derived property by having cash wire-transferred to him in care of that party's ex-husband. These findings are not clearly erroneous, and thus District Court did not err by imposing increases.), cert. denied, 534 U.S. 1050 (2001).

United States v. Austin, 255 F.3d 593 (8th Cir. 2001) (BOWMAN, BOGUE, MAGNUSON*). (Where District Court made no finding that defendant's criminal activity involved five or more participants, it could not apply two-level enhancement under § 3B1.1(a) or three-level enhancement under § 3B1.1(c), only two-level enhancement under § 3B1.1(c). Application of enhancement did not violate Apprendi because defendant was not sentenced above statutory maximum.)

United States v. Lim, 235 F.3d 382 (8th Cir. 2000) (HANSEN,* MURPHY, BYE). (District Court's conclusion that defendant was manager or supervisor was not clearly erroneous where defendant himself acknowledged in deposition that someone placed fraudulent orders for him, and that someone held goods for him. Manager/supervisor enhancement applies if defendant supervised even one other participant, or managed even single transaction.)

United States v. Alatorre, 207 F.3d 1078 (8th Cir. 2000) (McMILLIAN, BRIGHT, RICHARD S. ARNOLD) (per curiam). (No clear error in crediting testimony that defendant had stated two persons worked for him in his drug business. (This Court affirms enhancement).)

United States v. Ervasti, 201 F.3d 1029 (8th Cir. 2000) (BOWMAN,* LAY, BEAM). (Defendant and his wife were convicted for offenses arising out of misappropriation of over $5.7 million of impounded tax monies from over 100 clients of their payroll processing corporation. District Court found defendant was not just corporation's CEO but was its leader in all respects, and concluded defendant was fully in charge and was running operation, which operated according to his will and whim. Recognizing that District Court is in far better position than this Court to observe and to evaluate all of evidence, and having reviewed record carefully, this Court cannot say District Court clearly erred in enhancing defendant's offense level for playing supervisory role.)

United States v. Pitts, 173 F.3d 677 (8th Cir. 1999) (McMILLIAN,* LAY, HALL). (Affirming increase where appellant (who was found guilty of conspiracy and substantive drug offenses) controlled supply of cocaine, and told confidential informant he would be receiving large shipment soon; arranged sale to confidential informant and received $550 in payment, of which he apparently kept $500 for himself; and recruited his co-conspirator to deliver cocaine base to confidential informant. Fact that appellant did not control his co-conspirator's every move does not defeat finding that he played leadership role.)

United States v. Hernandez-Orozco, 151 F.3d 866 (8th Cir. 1998). (District Court did not clearly err in enhancing Hernandez's sentence because he managed one or more other participants in kidnapping. There was evidence that one of his brothers helped seize kidnapping victim, stayed with her when they crossed border, and watched her; moreover victim testified about person other

than Hernandez who drove van in which she was kidnapped and about other individual who served as "coyote" to bring her across border. Victim also testified about involvement of second brother of Hernandez's, as well as second brother's wife, and Hernandez's father and sister.)

United States v. Van Chase, 137 F.3d 579 (8th Cir. 1998). (Van Chase argues he received improper two-level enhancement for leadership role as there was no evidence he ordered LaVallie to do anything he was not otherwise willing to do. District Court did not err in imposing enhancement where there was considerable evidence to support finding Van Chase gave directions to LaVallie during commission of crimes, e.g., Van Chase repeatedly instructed LaVallie to punch LaFountain, to run errands, to hide his gun.)

United States v. Ngo, 132 F.3d 1231 (8th Cir. 1997). (Enhancement for leadership role in criminal enterprise must be based on control of other participants in offense (§ 3B1.1 n.2). District Court found transcripts of Ngo s phone conversations from jail showed leadership role in check counterfeiting scheme: during conversations, Ngo repeatedly instructed others on how to tell their stories to police and Court; he also made several statements about killing individual who had not done what he wanted, and he threatened prosecution witnesses if he ever got out of jail; cohorts appear deferential to Ngo and his instructions. These recorded conversations support finding Ngo directed counterfeiting enterprise because they show planning, organization, and his position as dominant member (§ 3B1.1 n.4). Record supports Court s finding Ngo directed other participants at time of offense and continued in that role after men were arrested and charged (e.g., checks and proceeds were tied directly to him, Ngo s fingerprints were found on several checks and on brochure showing location and hours of banks where checks were passed, Ngo took charge of proceeds and hid some in his shirt cuff).)

United States v. Mayer, 130 F.3d 338 (8th Cir. 1997). (Eleni challenges imposition of two-level sentencing adjustment, § 3B1.1(c), contending stipulated facts, as incorporated in plea agreement, fail to support enhancement (in this case characterized by District Court as greater role than ordinary person; she was manager in criminal activity; could not have been done if she was not in charge). This Court has construed definition of leadership or organizational role broadly; even if defendant did not exercise control, enhancement may apply so long as criminal activity involves more than one participant and defendant played coordinating or organizing role. This Court holds District Court did not err in imposing enhancement as stipulation when considered as whole, demonstrates Eleni s coordinating role in enterprise, particularly her fraudulent transaction involving nephew, in which acting as Fidelity administrator, she attempted to deceive fiscal intermediary auditors and defraud Medicare. Given Eleni s husband s minor role, it is highly doubtful such complex scheme could have succeeded without Eleni s close supervision.)

United States v. Matlock, 109 F.3d 1313 (8th Cir.) (Notwithstanding government s stipulation to two-level enhancement, District Court increased both Matlock s and Howze s offense levels by four for their leadership roles in conspiracy, § 3B1.1(a). Matlock and Howze challenge Court s decision and argue Court clearly erred when it found five or more persons were involved in criminal activity. It was not clearly erroneous for Court to have found at least five persons were involved: participant is person who is criminally responsible for commission of

offense, but need not have been convicted; person being sentenced is counted as participant; participants also include intermediaries who sell drugs on behalf of defendant), cert. denied, 522 U.S. 872 (1997).

United States v. Edwards, 91 F.3d 1101 (8th Cir. 1996). (Edwards contends District Court erred by applying two-level adjustment for role as manager or supervisor, § 3B1.1(c). Government has burden of proving by preponderance of evidence facts supported increase. District Court was entitled to rely on hearsay evidence contained in PSR as to post-arrest statements of Edwards s co-defendants where Edwards was given opportunity to rebut statements at sentencing proceeding, and he declined. Government sustained its burden with respect to Edwards s supervisory role where his co-defendants made post-arrest statements indicating they were working under Edwards's direction, one stating he was on "dope run" for Edwards and another.)

United States v. Black, 88 F.3d 678 (8th Cir. 1996). (District Court did not err in imposing two-level increase (§ 3B1.1(c)) because Black was supervisor of drug operation involving three or more individuals.), cert. denied, 519 U.S. 1132 (1997).

United States v. Atkinson, 85 F.3d 376 (8th Cir. 1996). (Atkinson argued District Court erred in imposing two-level adjustment, § 3B1.1(c). District Court s determination Atkinson was manager or supervisor is not clearly erroneous as government s evidence clearly showed Atkinson overstepped mere seller s role with his co-conspirator; tape-recorded conversations between co-conspirator and Atkinson made clear Atkinson supervised co-conspirator. Atkinson retained financial risk of distribution by fronting or consigning drugs.)

United States v. Hazelett, 80 F.3d 280 (8th Cir.) (Hazelett contends sentence enhancement for managerial role (§ 3B1.1(c)) is error because it rests solely on either PSR or statements of drug couriers which were not in evidence at second trial. While sentence enhancement may not rest on recommendation of PSR alone and if defendant raises objection to element of PSR, District Court must take evidence on that issue, District Court s finding defendant was manager or supervisor will not be overturned unless clearly erroneous. Here, enhancement was not clearly erroneous where there was sufficient evidence from which District Court could conclude Hazelett s role in enterprise included supervision of at least one person, drug courier: there was substantial testimony in second trial from police and DEA agents regarding actions of both Hazelett and courier which officers observed; there was also testimony regarding typical role of drug couriers in illegal drug distribution.), cert. denied, 519 U.S. 974 (1996).

United States v. Wonderly, 70 F.3d 1020 (8th Cir. 1995). (Wonderly argues District Court erred as record does not support finding she was organizer, supervisor, manager, or leader of criminal conspiracy. Even assuming Wonderly later withdrew from transactions, her leadership role is not diminished as from victims perspective she was one who solicited their business and made false representations that convinced them to turn over their funds. No reversible error.), cert. denied, 517 U.S. 1146 (1996).

United States v. Braun, 60 F.3d 451 (8th Cir. 1995). (In sentencing Braun after his plea of

guilty to wire fraud and interstate transportation of funds obtained by fraud, District Court applied two-level increase under § 3B1.1(c). Braun argues enhancement was inappropriate because he was participant in criminal activity. While he admitted employing several individuals at Gold Standard, he argued none of them benefitted from his illegal activity nor took part in diversion of funds or investment in commodities market. Nor were any employees charged with criminal activity. Record supports District Court s finding Braun s employees both knowingly and unknowingly aided him in commission of instant offenses: solicitation of new members to cover ongoing commodity market losses; sending fraudulent invoices to existing members; some were aware as early as 1982 Braun was fraudulently diverting members funds into commodities market (e.g., office manager confronted Braun regarding fact she was mailing false monthly statements when, in fact, there was no money in those members accounts). No clear error in District Court s finding Braun was leader or organizer of multi-participant criminal activity.)

United States v. Peters, 59 F.3d 732 (8th Cir. 1995). (In making determination, District Court should consider such factors as nature of defendant s role in offense, recruitment of accomplices, degree of participation in planning or organizing offense. Here, District Court did not err in applying two-level enhancement where testimony indicated Peters came up with plan, recruited others to participate, and continued to provide substantial direction during life of plan. It was undisputed Peters was responsible for preparing and submitting forms bearing false claims.)

United States v. Rodamaker, 56 F.3d 898 (8th Cir. 1995). (District Court enhanced John Rodamaker s offense level by two, § 3B1.1(c), because facts showed he was organizer, supervisor, manager of fraudulent scheme. Despite government statement of its belief that Mr. and Mrs. Rodamaker were pretty much equally involved in scheme, District Court s determination he was manager and leader was not clearly erroneous: he previously had operated similar insurance fraud for which he had been convicted; he applied for and obtained HIPs involved, was person hospitalized, filed insurance claims, received policy proceeds; and he stated at plea-sentencing hearing his wife did what he ordered her to do and withdrew money from their accounts at his demand.)

United States v. Alexander, 53 F.3d 888 (8th Cir. 1995). (O Brien objected to two level increase, § 3B1.1(c). O Brien took degree of responsibility for distribution business warranting two-level increase where he was Alexander s lieutenant, delivered drugs to middlemen and picked up money, transported marijuana from Arizona without Alexander s supervision, made debt collection call on middleman who was in jail, and helped break 100 pound quantity into wholesale quantities for distribution to other dealers.)

United States v. Makes Room For Them, 49 F.3d 410 (8th Cir. 1995). (District Court found Makes Room was leader because he was driver of car, older than other participants, and he was showing occupants of car others could fight back. This Court reverses two-level enhancement and remands for resentencing where sentencing judge relied upon PSR in granting enhancement rather than receiving evidence on objected to portions and making finding based on preponderance of evidence. Because sentencing judge did not preside over trial and no transcript of trial was before sentencing judge, evidence introduced at trial could not justify enhancement. Government failed

to carry its burden to justify enhancement. This Court also takes opportunity to question application of section to activity that sentencing judge noted might be described as "small mob rather than organized activity.")

United States v. Smith, 49 F.3d 362 (8th Cir. 1995). (District Court determined McMillan was organizer of criminal activity within meaning of § 3B1.1(c) and enhanced his sentence by two levels. This Court concludes that because overall conspiracy involved more than five participants, District Court was limited to assigning McMillan four-level enhancement under § 3B1.1(a). Guideline does not provide for delineation of degrees of aggravating roles within extensive conspiracy other than those found in subsections (a) and (b). Plain meaning of guideline and application note 2 are definitive. Because finding McMillan was organizer or leader warranting sentencing enhancement was not clearly erroneous, this Court remands to District Court for resentencing commensurate with finding.)

United States v. Ballew, 40 F.3d 936 (8th Cir. 1994). (District Court s finding Ballew was organizer or leader (warranting two-level increase, § 3B1.1(c)) not clearly erroneous where Court found Ballew was moving force and most culpable of all parties involved; moreover, he stood to gain most: ownership of truck free from loan, new engine for same truck from another stolen truck, and new trucks for his farming business. In addition, Ballew enlisted two others to assist him in theft and concealment of trucks. Truck thefts were part of scheme to defraud.), cert. denied, 514 U.S. 1091 (1995).

United States v. Cotton, 22 F.3d 182 (8th Cir. 1994). (This Court rejects Cotton s contention there was insufficient evidence she was leader or supervisor warranting increase of two levels. She was observed conducting transactions and expressing approval when crack was sold to confidential informant and admitted drugs and money belonged to her. District Court determined unidentified persons were involved in selling illegal narcotics at Cotton s residence; Court s finding that Cotton was leader of these individuals was not clearly erroneous.)

United States v. Morris, 18 F.3d 562 (8th Cir. 1994). (This Court agreed with government s argument that District Court s determination Morris was not organizer or leader was clearly erroneous. Two-level increase was in fact warranted where Morris exercised direct control over operations of bank, causing subordinates to perform acts designed to perpetuate and conceal her fraudulent activities. Also, Morris recruited another to write insufficient fund checks and directed him in opening and maintenance of overdrawn account in bank she controlled.)

United States v. Tran, 16 F.3d 897 (8th Cir. 1994). (Control or management of co-conspirators activities not necessary: it is sufficient that facts show defendant managed criminal activity. Evidence supported District Court s finding that Luu was manager or supervisor, e.g., on most occasions Luu conducted transactions with Schrader which resulted in sale of crack cocaine, Luu attempted to recruit Schrader to sell crack for him, Luu was observed in possession of large amounts of currency and he was principle negotiator for purchase of machine gun. As factual finding of district judge was not clearly erroneous, there was no error in enhancement of Luu s sentence.)

United States v. Clay, 16 F.3d 892 (8th Cir. 1994). (District Court imposed two-level enhancement after finding Clay "organized" criminal activity of extortion and "recruited" Vitale to assist him. While Clay argued that only evidence supporting finding came from Vitale s trial testimony which Clay claimed was inherently unreliable, this Court finds taped conversations showing Clay demanding money from Michels and Michels s testimony provided ample support for District Court s enhancements.)

United States v. Kirkeby, 11 F.3d 777 (8th Cir. 1993). (This Court agrees with government s premise for appeal, that because it was undisputed five or more participants were involved in criminal activity for which Kirkeby was convicted, and because trial Court found some enhancement in offense level was merited for Kirkeby s aggravating role in offense, trial Court had option of enhancing Kirkeby s offense by either 3 or 4 levels, but not by 2. District Court had quoted from background comment to § 3B1.1 and stated that criminal activity at issue was relatively small enterprise and not otherwise extensive--this Court disagrees that comment gave trial Court adequate basis for applying only 2-level enhancement. This Court concludes Guidelines consider any criminal activity with five or more participants to be extensive as matter of law and holds trial Court erred in applying § 3B1.1(c) in circumstances of this case. Court instructs that upon remand trial Court should be more explicit about aggravating role Kirkeby played and whether enhancement under § 3B1.1(a) or § 3B1.1(b) is appropriate. DISSENT: dissents from Court s direction that District Court chose between 3 or 4 level enhancement on remand, rather than 0 or 3 level enhancement.)

United States v. Flores, 9 F.3d 54 (8th Cir. 1993). (Flores did not object to factual allegations in PSR; indeed, he relied on them to support his argument against enhancement. District Court did not err in making determination, based on application of Guidelines to uncontested facts, Flores was organizer, leader, manager, or supervisor. Flores recruited couriers and coordinated shipments of large amounts of marijuana. Fact that two couriers later independently supplied marijuana does not diminish Flores s role in offense.)

United States v. Horne, 4 F.3d 579 (8th Cir. 1993). (Franklin argued District Court erred in enhancing his sentence by two levels based on his leadership or organizational role in conspiracy. Noting that definition of leadership or organizational role is broad and does not require that defendant had direct control over others in conspiracy, this Court did not find District Court s factual finding clearly erroneous.), cert. denied, 510 U.S. 1138 (1994).

United States v. Sileven, 985 F.2d 962 (8th Cir. 1993). (District Court s finding that Sileven played leadership role was not clearly erroneous. Finding was based on trial record and revealed Sileven formed AFS and served as president, he admitted Canadian accountant worked for him, and he conducted seminars promoting AFS s activities.)

United States v. Bruce, 984 F.2d 928 (8th Cir.) (In light of trial evidence, District Court s two-level enhancement not clearly erroneous where government presented considerable evidence Bruce had organized and operated first conspiracy along with another with whom he split conspiracy s profits.), cert. denied, 510 U.S. 901 (1993).

United States v. Harris, 982 F.2d 317 (8th Cir. 1992). (District Court s determination Harris was manager in offense was supported by record: Harris recruited person into cocaine conspiracy; he was key link between supply in Florida and distribution in Iowa; he was able to supply large quantities of cocaine during course of conspiracy and to set prices for it.)

United States v. Furlow, 980 F.2d 476 (8th Cir. 1992) (en banc). (Furlow acted alone in forging checks at three different banks in Cape Girardeau, Missouri area. Furlow recruited another individual to perpetrate identical fraud scheme in Georgia and this Court affirms by equally divided Court District Court s application of organizer/leader enhancement for Furlow s conduct in Georgia. Guideline was amended on November 1, 1990, but prior to amendment and to Furlow s sentencing, this circuit held section to be enhancement for defendant s role in offense of conviction, not his role in collateral conduct.), cert. denied, 508 U.S. 914 (1993).

United States v. Pedroli, 979 F.2d 116 (8th Cir. 1992). (District Court did not err in finding Pedroli was organizer or supervisor of bank robbery where government witness testified Pedroli recruited him to commit crime, provided him with means of disguise and demand note, and organized bank robbery.)

United States v. Rowley, 975 F.2d 1357 (8th Cir. 1992). (Where District Court based two level organizer enhancement (§ 3B1.1(c)) on sophistication of Rowley s "farm" and his use of cousin s address to receive some growing equipment (with no finding cousin knew what items were), this Court holds enhancement was clearly erroneous and reverses. Evidence of conspiracy itself was thin and there was no evidence Rowley had underlings to control and supervise.)

United States v. Johnston, 973 F.2d 611 (8th Cir. 1992). (District Court s imposition of two-level upward adjustment was not clearly erroneous where Johnston apparently owned farm upon which marijuana-growing occurred, had only set of keys to barn where growing apparatus was kept, and was to receive fifty percent of illicit proceeds.), cert. denied, 506 U.S. 1068 (1993).

United States v. Briggs, 969 F.2d 689 (8th Cir. 1992). (Evidence supported District Court s two-point increase where there was testimony Briggs was involved with other heroin dealers, and sold co-conspirator heroin and knew she was reselling it.)

United States v. Bost, 968 F.2d 729 (8th Cir. 1992). (District Court was not clearly erroneous in determining Bost played leadership role in offense where Bost s attorney conceded Bost set price for one of drug transactions and might be considered most culpable because he was chemically dependent during time of heroin transactions. Bost s arguments that all but one of charged co-conspirators were cleared leaving him and equal participant, were unavailing.)

United States v. Lincoln, 956 F.2d 1465 (8th Cir.) (District Court did not commit clear error by increasing Lincoln s offense level for his leadership/organizational role where District Court chose to accept Anderson s testimony which portrayed Lincoln as initiator of scheme, composer of Anderson s perjury and author of every decision regarding its presentation to law enforcement and jury.), cert. denied, 506 U.S. 891 (1992).

United States v. Roberts, 953 F.2d 351 (8th Cir.) (District Court finding that Roberts was leader was not clearly erroneous where Roberts sold cocaine to undercover officers; conducted negotiations; admitted he lived on second floor of apartment where police found guns, cocaine, and over $8000 in cash; and another person in apartment stated he was helping Roberts sell drugs.), cert. denied, 505 U.S. 1210 (1992).

United States v. Martinez, 951 F.2d 887 (8th Cir. 1991). (Decision to enhance was not clearly erroneous where evidence, including testimony of informant, showed Martinez travelled to Miami to acquire cocaine and brought it back to Minnesota; he was source of cocaine distributed by him and his co-conspirators; he kept possession of cocaine; and he kept money from his sale of cocaine.), cert. denied, 503 U.S. 944 (1992).

United States v. Maejia, 928 F.2d 810 (8th Cir. 1991). (Record supported finding Maejia was organizer of conspiracy to distribute cocaine as he hired person to drive truck containing cocaine, recruited person to follow truck, controlled keys and movements of truck, paid driver $2000 for two days of services, had been under investigation in two states for extensive, high-volume cocaine trafficking.)

United States v. Olesen, 920 F.2d 538 (8th Cir. 1990). (District Court found Olesen controlled pricing and distribution of cocaine and that profits indicated he performed aggravating role in conspiracy; amount Olesen sold to individuals made it reasonable to conclude some buyers were reselling that cocaine. Where District Court s explanation of its conclusion that Olesen was organizer, leader, or supervisor was not clearly erroneous, though not every reasonable person would reach same conclusion, this Court affirms.)

United States v. Keene, 915 F.2d 1164 (8th Cir. 1990). (This Court holds District Court correctly added two levels where it found Keene brought other participants together, set up methamphetamine lab in his basement, sought advice from informant on improving manufacturing process, and introduced one co-defendant to drug for first time.), cert. denied, 498 U.S. 1102 (1991).

United States v. Manuel, 912 F.2d 204 (8th Cir. 1990). (Findings supporting enhancement for leadership role not clearly erroneous; Manual was given ample opportunity to explain and rebut evidence.)

United States v. Streeter, 907 F.2d 781 (8th Cir. 1990). (While enhancement does not apply where defendant is sole participant in offense, here, District Court did not err in finding defendant acted with others and was leader of scheme to cultivate marijuana plants.)

United States v. Collar, 904 F.2d 441 (8th Cir. 1990). (This Court acknowledges broad definition of "leadership and organizational role." Scope of robberies and nature of defendant s participation--he entered banks, demanded and received money--allowed District Court to resolve issue by applying two-level increase, which was not clearly erroneous.)

United States v. O Meara, 895 F.2d 1216 (8th Cir.) (Because defendant s sentence of 57

months fell within same range both with upward adjustment and without upward adjustment, issue was moot.), cert. denied, 498 U.S. 943 (1990).

**§ 3B1.2 (Mitigating Role/Standard of Review):**

United States v. Brubaker, No. 03-2310 (8th Cir. 2004) (BYE, HEANEY,* HOVLAND). (Decision to grant or deny mitigating-role reduction is reviewed for clear error because evaluation of participant's status in offense involves factual determination. Defendant has burden to establish eligibility for reduction.)

United States v. Stanley, No. 03-2851 (8th Cir. 2004) (BYE, HEANEY,* HOVLAND). (Decision to grant or deny mitigating-role reduction is reviewed for clear error because evaluation of participant's status in offense involves factual determination. Defendant has burden to establish eligibility for reduction.)

United States v. Benford, 360 F.3d 913 (8th Cir. 2004) (RILEY,* McMILLIAN, MELLOY). (Defendant bears burden of proving entitlement to mitigating-role reduction. Defendant's qualification for reduction is question of fact reviewed for clear error.)

United States v. Johnson, 358 F.3d 1016 (8th Cir. 2004) (BYE, HEANEY, HOVLAND*). (District Court's determination of whether defendant was minor participant may be reversed only if clearly erroneous. Defendant has burden to prove entitlement.)

United States v. Speller, 356 F.3d 904 (8th Cir. 2004) (RILEY,* BEAM, SMITH). (Whether defendant qualifies for role reduction is question of fact reviewed for clear error. Defendant has burden to prove entitlement.)

United States v. Johnston, 353 F.3d 617 (8th Cir. 2003) (LOKEN, HEANEY, MORRIS ARNOLD) (per curiam). (District Court's decision regarding role reduction is factual and reviewed for clear error.)

United States v. Bush, 352 F.3d 1177 (8th Cir. 2003) (BYE, GIBSON,* MELLOY). (Determination whether defendant played minor role in offense is question of fact reviewed for clear error. Defendant has burden to prove entitlement to reduction.)

United States v. Camacho, 348 F.3d 696 (8th Cir. 2003) (MORRIS ARNOLD, HANSEN,* SMITH). (Defendant has burden to establish entitlement to minor-role reduction, and District Court's determination is reviewed for clear error.)

United States v. Winborn, 344 F.3d 766 (8th Cir. 2003) (BOWMAN, BEAM, RILEY) (per curiam). (Whether defendant was minor participant is factual question reviewed for clear error.)

United States v. Rumbo-Rosendiz, 340 F.3d 598 (8th Cir. 2003) (McMILLIAN,* GIBSON, BYE). (District Court's determination of defendant's role in offense is reviewed for clear error.

Defendant has burden to prove that reduction is warranted.)

United States v. Nambo-Barajas, 338 F.3d 956 (8th Cir. 2003) (BOWMAN, HEANEY, BYE*). (Whether defendant qualifies for role reduction is question of fact reviewed for clear error.)

United States v. Yirkovsky, 338 F.3d 936 (8th Cir. 2003) (HANSEN,* HEANEY, MORRIS ARNOLD). (Defendant has burden to prove entitlement to reduction, and this Court reviews District Court's decision to grant reduction for clear error.)

United States v. Snoddy, 139 F.3d 1224 (8th Cir. 1998). (This Court reviews District Court s factual findings at sentencing for clear error, and interpretation and construction of Federal Sentencing Guidelines review is de novo. In this case, denial of reduction was based on sentencing judge s interpretation of § 3B1.2, not factual determination, and this Court s review is de novo.)

United States v. McCarthy, 97 F.3d 1562 (8th Cir. 1996). (This Court reviews District Court s factual determinations regarding participant s role in offense for clear error. This Court considers District Court s determination of whether two- or four-level adjustment is appropriate for abuse of discretion.), cert. denied, 519 U.S. 1139 and 520 U.S. 1133 (1997).

**§ 3B1.2 (Mitigating Role):**

United States v. Stanley, No. 03-2851 (8th Cir. 2004) (BYE, HEANEY,* HOVLAND). (District Court did not clearly err in denying mitigating-role reduction where defendant distributed methamphetamine many times to several different people; helped a co-conspirator obtain, transport, and store methamphetamine; and attempted to procure methamphetamine from sources outside conspiracy. Courier was but one of many different duties defendant undertook on behalf of conspiracy.)

United States v. Brubaker, No. 03-2310 (8th Cir. 2004) (BYE, HEANEY,* HOVLAND). (District Court did not clearly err in denying mitigating-role reduction where defendant allowed his apartment to be used to store large quantity of methamphetamine so that he could purchase some at discount, defendant admitted being drug dealer, and defendant admitted ownership of additional smaller quantities of methamphetamine found in apartment that were packaged for redistribution.)

United States v. Underwood, Nos. 03-1543/1982/2716/2901 (8th Cir. 2004) (MURPHY,* HEANEY, SMITH). (District Court did not clearly err in denying minor-role reduction to defendant who was aware of extent of operation, participated in methamphetamine cooks, and operated her own methamphetamine production.)

United States v. Benford, 360 F.3d 913 (8th Cir. 2004) (RILEY,* McMILLIAN, MELLOY). (District Court did not clearly err in denying mitigating-role reduction on basis that defendant, although merely street dealer, had distributed more than two kilograms of crack cocaine over long period of time.)

United States v. Johnson, 358 F.3d 1016 (8th Cir. 2004) (BYE, HEANEY, HOVLAND*). (District Court did not clearly err in denying reduction where defendant supplied crack for each of two controlled buys and negotiated with undercover agent about trading drugs for guns in future.)

United States v. Speller, 356 F.3d 904 (8th Cir. 2004) (RILEY,* BEAM, SMITH). (District Court did not clearly err in denying reduction. Entire conspiracy involved 1.5 kilograms of crack, 5.2 kilograms of powder cocaine, and 21.5 kilograms of marijuana. However, when setting her base offense level, District Court held Speller responsible only for 50 grams of crack she personally distributed. Because same conduct must be used in determining base offense level as is used in determining any adjustments, she was not entitled to mitigating-role reduction, because she was fully culpable as to those 50 grams of crack.)

United States v. Johnston, 353 F.3d 617 (8th Cir. 2003) (LOKEN, HEANEY, MORRIS ARNOLD) (per curiam). (District Court did not clearly err where defendant acted as go-between for several drug buys and knew full extent of conspiracy.)

United States v. Bush, 352 F.3d 1177 (8th Cir. 2003) (BYE, GIBSON,* MELLOY). (While relative culpability of co-conspirators is indubitably relevant, merely being less culpable is not enough if defendant was deeply involved in offense. District Court did not clearly err in finding that defendant did not play minor role because she allowed her house to be used for cooking crack, she bought baking soda to be used in cooking process, she sold small amounts of crack, she was paid in crack for her assistance, and she used crack to pay relatives for services. However, District Court erred in basing its decision whether to grant or deny adjustment on its effect on defendant's sentencing range, and case is therefore remanded for resentencing.)

United States v. Camacho, 348 F.3d 696 (8th Cir. 2003) (MORRIS ARNOLD, HANSEN,* SMITH). (District Court did not clearly err in denying minor-role reduction where defendant's computer software consulting business was essential part of co-defendant's scheme to defraud Blue Cross, defendant knew that co-defendant's scheme was occurring, and defendant's business was direct recipient of diverted funds.)

United States v. Winborn, 344 F.3d 766 (8th Cir. 2003) (BOWMAN, BEAM, RILEY) (per curiam). (District Court did not clearly err in denying defendant's request for minor-role reduction. Defendant was arrested on what he admitted was his sixth trip transporting narcotics in bulk. In addition to transporting as much as thirty kilograms of drugs on those trips, he also collected payment for drugs when he delivered them, and he admitted he was aware of at least four other individuals transporting similar drug amounts in furtherance of conspiracy.)

United States v. Rumbo-Rosendiz, 340 F.3d 598 (8th Cir. 2003) (McMILLIAN,* GIBSON, BYE). (District Court did not clearly err in finding defendant to be average participant. Defendant was found in possession of much more cash than codefendant, and he was observed taking precautions to conceal his identity when transferring several kilograms of methamphetamine from one vehicle to another.)

United States v. Nambo-Barajas, 338 F.3d 956 (8th Cir. 2003) (BOWMAN, HEANEY, BYE*). (District Court did not clearly err in denying reduction where evidence showed defendant was integral part of conspiracy. Co-conspirator would not have been able to deliver drugs if defendant had not first supplied them.)

United States v. Yirkovsky, 338 F.3d 936 (8th Cir. 2003) (HANSEN,* HEANEY, MORRIS ARNOLD). (District Court clearly erred in granting minimal-role reduction to defendant convicted of firearms possession. Defendant's conduct fully satisfied elements of offense, she possessed firearms for week rather than mere moments, and some of her relevant conduct (possession of drugs, presence of other weapons, fact that firearms were loaded and readily accessible, and fact that shotgun was sawed-off) went beyond minimum necessary to be guilty of firearms possession. She was entitled only to minor-role reduction recommended in PSR and not objected to by government. DISSENT: majority oversteps its appellate role and essentially reviews issue de novo while purporting to review for clear error.)

United States v. Preciado, 336 F.3d 739 (8th Cir. 2003) (LOKEN, BRIGHT, MURPHY*). (District Court did not clearly err in denying reduction where defendant delivered half-pound of methamphetamine and collected cash payment of $3,500, and participated in another drug deal involving five pounds of methamphetamine.), cert. denied, 124 S. Ct. 1110 (2004).

United States v. Yager, 328 F.3d 1008 (8th Cir. 2003) (WOLLMAN, RICHARD ARNOLD,* SMITH). (Reversing District Court because it erroneously believed that defendant, who was sole person charged in possession-with-intent case, could not receive mitigating-role reduction. Such reduction may be available if there were other participants in defendant's relevant conduct.)

United States v. Weiss, 328 F.3d 414 (8th Cir. 2003) (WOLLMAN,* RICHARD ARNOLD, SMITH). (Record supports District Court's finding that defendant was average participant in burglary and assault. She illegally entered home, wielding baseball bat, and attacked victim.)

United States v. Gutierrez-Manzanarez, 323 F.3d 613 (8th Cir. 2003) (WOLLMAN,* HEANEY, MELLOY). (District Court did not clearly err in discrediting defendant's testimony that his role was limited to storing drugs in apartment in exchange for $200 in rent and help in obtaining driver's license, based on evidence including witness testimony and plea agreement.)

United States v. Santos-Garcia, 313 F.3d 1073 (8th Cir. 2002) (McMILLIAN,* LAY, RILEY). (Status as mere courier for single transaction does not entitle defendant to automatic mitigating-role reduction. Moreover, evidence suggests he organized and supervised criminal activity.)

United States v. Monk, 312 F.3d 389 (8th Cir. 2002) (McMILLIAN,* LAY, RILEY). (Where defendant offered no evidence showing that he was less culpable in his relevant conduct than his co-conspirators in that conduct were, he failed to meet his burden to show entitlement to mitigating-role reduction.)

Ponce v. United States, 311 F.3d 911 (8th Cir. 2002) (McMILLIAN, SMITH, LONGSTAFF*). (Defendant bears burden of proving that he was minor participant, and it is not enough to show that he was less culpable than other participants, that he was merely courier, or that his sentence was harsher than his codefendants' sentences (due to factors such as acceptance-of-responsibility reductions, substantial-assistance downward departures, safety-valve relief, and criminal history category). Defendant in this case was deeply involved in offense in that he supplied at least twenty-seven kilograms of methamphetamine, cocaine, and heroin; gave instructions to other participants; and had $62,457 in drug proceeds.)

United States v. Boksan, 293 F.3d 1056 (8th Cir. 2002) (McMILLIAN,* MURPHY, BATTEY). (Defendants argue that District Court erred in determining that they were minor rather than minimal participants. District Court did not clearly err in concluding that defendants were not minimal participants because, although they were less involved than other conspirators, they played central role in conspiracy. While they were misled about scope of conspiracy by supplier, they recruited and supervised courier. Role reduction for minimal participation was intended to be used infrequently.)

United States v. Fellers, 285 F.3d 721 (8th Cir. 2002) (WOLLMAN,* LAY, RILEY). (District Court did not clearly err in denying reduction because there was sufficient evidence that defendant had larger role in conspiracy than being mere user), cert. granted, 123 S. Ct. 1480 (2003).

United States v. Thurmon, 278 F.3d 790 (8th Cir. 2002) (LOKEN, LAY, HEANEY*). (Once District Court determines defendant's relevant conduct for purposes of base offense level, it must use same relevant conduct for purposes of enhancements or reductions. Here, District Court discredited government witness testimony that defendant participated in large-scale conspiracy, holding him responsible only for lesser drug quantity he personally sold. District Court therefore erred in granting three-level mitigating-role reduction, because it compared his conduct with conduct of other participants in large-scale conspiracy.)

United States v. Carrasco, 271 F.3d 765 (8th Cir. 2001) (BOWMAN, RICHARD S. ARNOLD, HANSEN*). (Defendant failed to establish his entitlement to limited role reduction where he had introduced codefendants to undercover officer and was present when sale was planned.)

United States v. Lopez-Arce, 267 F.3d 775 (8th Cir. 2001) (BYE, LAY,* JOHN R. GIBSON). (District Court did not clearly err in finding that defendant was average participant. Record shows he was willing participant in conspiracy and was source of at least some drugs: codefendant came to defendant's residence immediately before three drug deals; codefendant once entered defendant's residence without coat and returned shortly thereafter, apparently attempting to hide something under coat; and defendant was only charged coconspirator who was in possession of "buy money.")

United States v. Beeks, 266 F.3d 880 (8th Cir. 2001) (LOKEN, RICHARD S. ARNOLD, FAGG) (per curiam). (District Court did not clearly err in classifying defendant as minimal rather

than minor participant where trial testimony showed he knew of extent of conspiracy and handled $5,000 in drug money.)

United States v. Lalley, 257 F.3d 751 (8th Cir. 2001) (MORRIS SHEPPARD ARNOLD, J. R. GIBSON,* GOLDBERG). (Affirming denial of reduction where record supports finding that defendant convicted of money-laundering conspiracy was integrally involved in conspiracy with another party for several years and retained sizable percentages of checks he cashed.)

United States v. Ray, 250 F.3d 596 (8th Cir. 2001) (WOLLMAN, MURPHY,* CARMAN). (Ray argues District Court should have found him minimal participant because there was evidence others in conspiracy did not trust him. District Court did not clearly err, as evidence showed Ray sold marijuana he had acquired from coconspirator on credit on several occasions, and coconspirator trusted Ray to help buy and transport large drug shipment.), cert. denied, 535 U.S. 980 (2002).

United States v. Ortiz, 242 F.3d 1078 (8th Cir. 2001) (HANSEN, MORRIS SHEPPARD ARNOLD, BYE) (per curiam). (This Court concludes, without deciding whether defendant played greater or lesser role in offense than his codefendant, that District Court did not clearly error in applying enhancement, as evidence that both men were responsible for transporting illegal aliens and that defendant drove van suggested that he was "deeply involved.")

United States v. White, 241 F.3d 1015 (8th Cir. 2001) (McMILLIAN,* BOWMAN, LOKEN). (Defendant bears burden of proof regarding whether he is entitled to minor participant reduction. Propriety of reduction is determined by comparing acts of each participant in relation to relevant conduct for which participant is held accountable and by measuring each participant's individual acts and relative culpability against elements of offense. Because District Court concluded from evidence that defendant understood scope of enterprise and played central role in conspiracy (he was conspiracy's out-of-state drug source), this Court holds District Court did not clearly err in finding he was not minor participant.)

United States v. Ortiz, 236 F.3d 420 (8th Cir. 2001) (MORRIS SHEPPARD ARNOLD,* J. R. GIBSON, GOLDBERG). (District Court did not clearly err in refusing to grant 2- or 4-level reduction. Notwithstanding Ortiz's argument that at most he played only small part in sale of cocaine to police, District Court determined he was driver of vehicle used for transporting cocaine and seemed to be quite aware of what was happening during drug sale.)

United States v. Spears, 235 F.3d 1150 (8th Cir. 2001) (McMILLIAN, RICHARD S. ARNOLD,* BOWMAN). (Defendant deserved neither minor- nor minimal-role reduction where he participated in and hosted planning sessions for crime, helped recruit another participant, served as lookout, and concealed fruits of crime.)

United States v. Alverez, 235 F.3d 1086 (8th Cir. 2000) (WOLLMAN,* BEAM, MORRIS SHEPPARD ARNOLD). (Role as courier does not automatically entitle defendant to mitigating-role reduction; affirming denial of reduction where defendant was aware of substantial drug quantity in car, consistent with possession with intent to distribute.), cert. denied, 532 U.S. 1031 (2001).

United States v. Griffin, 215 F.3d 866 (8th Cir. 2000) (BOWMAN, LOKEN,* ALSOP). (Affirming denial of reduction, and noting defendant failed to prove his claim that he was mere employee in elaborate food-stamp scheme; instead, evidence established defendant ran his own small retail meat operation, selling food stamps he received to another person. District Court's finding that defendant was equally culpable to his buyer was not clearly erroneous.)

United States v. O Dell, 204 F.3d 829 (8th Cir. 2000) (BOWMAN, LOKEN, ALSOP*). (Although defendant may have been less culpable than another participant, he nevertheless was "deeply involved" in illegal conduct (conspiracy to commit money laundering, money laundering, and distribution of controlled substances): defendant stored drugs at his house, transported them, helped manufacture and "cut" methamphetamine, arranged for payment of drugs, and helped count drug proceeds. His role is better described as substantial.)

United States v. Davidson, 195 F.3d 402 (8th Cir. 1999) (McMILLIAN, MURPHY,* TUNHEIM). (Assuming minor-role-reduction issue was sufficiently raised in District Court (Davidson did not move for minor-role reduction, but instead for downward departure), District Court s finding that she was not less culpable than most other participants was not clearly erroneous: evidence showed she was associated with operation of three different methamphetamine labs and had taken substantial steps to aid manufacture at fourth lab.), cert. denied, 528 U.S. 1180 and 529 U.S. 1093 (2000).

United States v. Jones, 195 F.3d 379 (8th Cir. 1999) (BEAM, HEANEY, FAGG*). (Even if Jones is less culpable than his coconspirators, evidence at sentencing showed he was deeply involved in conspiracy for several years as seller of drugs. Thus, he failed to meet his burden of proving his eligibility for role reduction.)

United States v. Jankowski, 194 F.3d 878 (8th Cir. 1999) (BOWMAN,* MORRIS SHEPPARD ARNOLD, BOGUE). (Affirming denial of reduction where District Court did not clearly err in finding that appellant Sylwia Jankowski helped to recruit coconspirator to rob armored car, and fully understood nature and extent of planned robbery: she first mentioned idea of robbery to coconspirator Bell, she relayed information to him regarding possible location for robbery, she provided gym bag for money, and she told Bell on day of robbery, "It's time.")

United States v. Christmann, 193 F.3d 1023 (8th Cir. 1999) (RICHARD S. ARNOLD,* BRIGHT, LOKEN). (Affirming denial of reduction. Christmann--who drove actual bank robber to bank for both robberies in question, and shared in robbery proceeds both times--was less culpable than actual robber; however, he was more culpable than third participant, who helped steal car used in second robbery and shared in proceeds of only that robbery. Because Christmann's culpability ranks in middle of three participants, he cannot be said to be less culpable than "most" participants.), cert. denied, 529 U.S. 1044 (2000).

United States v. Ramos-Torres, 187 F.3d 909 (8th Cir.) (FAGG, LAY,* WOLLMAN). (Torres argued that his only role in conspiracy was helping arrange shipment of package and tracking down another; and that he had to be compared to others in conspiracy and in doing so

District Court should have determined he had substantially smaller role than coconspirators. However, Torres was not sentenced upon entire conspiracy but only upon his own actions. District Court found he was average participant in conspiracy and held him responsible only for cocaine in two packages with which he had contact, and not for total amount of drugs transported or sold by conspiracy; accordingly, further reduction for his role in offense was not warranted.), cert. denied, 528 U.S. 1055 (1999).

United States v. Pospisil, 186 F.3d 1023 (8th Cir. 1999) (WOLLMAN,* LOKEN, JACKSON). (Affirming enhancement where, although Barney may have played smaller role in cross-burning incident than did Dennis, Barney played critical part in making cross flammable, and he gave white-power speech to crowd shortly before cross burning; this Court cannot say Barney's involvement was "an isolated unsubstantial assistance."), cert. denied, 529 U.S. 1089 (2000).

United States v. Ramirez, 181 F.3d 955 (8th Cir. 1999) (RICHARD S. ARNOLD, HANSEN,* STROM). (District Court properly denied minor-participant reduction because Ramirez was held responsible only for amount of drugs involved in single episode of his arrest and not those related to greater reach of conspiracy. In relation to relatively small amount of drugs for which he was held accountable, Ramirez was not minor actor (§ 3B1.2, application note 4). This Court rejects Ramirez s argument that application note 4 is not applicable because he was convicted of conspiracy, most serious charge he faced. Note 4 applies not only when defendant is convicted of less serious offense, but also when defendant faces lower base offense level. Also, plea agreement belies Ramirez s argument that 2-level reduction would not provide him double benefit. Government agreed not to charge him with any other offense and stipulated that he would be held accountable only for drugs found in his car.)

United States v. Surratt, 172 F.3d 559 (8th Cir.) (McMILLIAN, JOHN R. GIBSON, HANSEN*). (No error in finding defendant was average participant in charged conduct; government presented evidence that defendant possessed package of crack prior to time police stopped vehicle in which he was riding, officers saw defendant attempting to dispose of crack, and officers found about $600, mostly in small denominations, in defendant's possession at time of arrest.), cert. denied, 528 U.S. 910 (1999)

United States v. Garrison, 168 F.3d 1089 (8th Cir. 1999) (RICHARD S. ARNOLD,* FAGG, DAWSON). (Affirming denial of enhancement. Even if Batey was not among most culpable in conspiracy, she was involved in conspiracy to transport cocaine from California and to deliver money there from St. Louis, and she managed or supervised at least one other participant.)

United States v. Martinez, 168 F.3d 1043 (8th Cir. 1999) (MURPHY,* JOHN R. GIBSON, MAGILL). (During traffic stop, appellant provided inconsistent answers concerning his purchase of car he was driving and finally admitted he did not know seller's name. During consensual search of car, state trooper noticed trunk was clean except for few metal shavings under carpet; trooper went on to discover metal plate and wires running behind car's back seat, and two nylon gym bags containing 16 pounds of methamphetamine tucked into compartment built between trunk wall and back seat. Appellant challenges denial of sentencing reduction under § 3B1.2. Role as courier or

mule does not entitle person to reduction. Transportation is necessary part of illegal drug distribution, and facts of case are critical in considering reduction. Here it was not error to deny adjustment given appellant's demeanor and statements, appearance of inside of trunk, manner in which drugs were secreted in car, and large amount found.)

United States v. Correa, 167 F.3d 414 (8th Cir. 1999) (McMILLIAN, LAY,* HALL). (This Court disagrees with Correa's contention that he was entitled to 4-level rather than 2-level reduction because he was merely courier and lacked knowledge of scope and structure of drug scheme involved. District Court found there were several incidents in which jury had concluded Correa was involved, and Court's finding is not clear error; also Correa did more than simply hand over drugs--he helped negotiate price.)

United States v. Nichols, 151 F.3d 850 (8th Cir. 1998). (There was no basis for mitigating-role adjustment where Nichols was involved in virtually all acts undertaken in furtherance of conspiracy to commit bank robbery (regardless whether or to what extent she would have participated in actual robbery) and involvement was not isolated unsubstantial instance. Sentencing judge's remark that he wished he had had basis for downward departure in Nichol's case would not be construed as expressing mistaken belief that Court lacked authority to depart.)

United States v. Hildebrand, 152 F.3d 756 (8th Cir.) (Affirming minor-participant reduction awarded to parties who were not directly involved with conspiracy's banking operations, and whose claim-writing activities were significantly less extensive than other prosecuted claims writer; and although one party given reduction was extensively involved in conspiracy's banking efforts, his efforts were largely ministerial and he received little compensation for work.), cert. denied, 525 U.S. 1033 (1998).

United States v. Alaniz, 148 F.3d 929 (8th Cir.) (Cuevas argues he should have received sentence reduction for minimal or minor role in conspiracy. Evidence at sentence showed Cuevas was important in expanding conspiracy to include distribution of methamphetamine. Because his involvement was not isolated unsubstantial instance, he was not entitled to reduction simply because his culpability was less than some others involved in conspiracy.), cert. denied, 525 U.S. 1047 (1998).

United States v. Jones, 145 F.3d 959 (8th Cir.) (Neither Sykes nor his attorney requested reduction under § 3B1.2(b) for being minor participant. This Court does not find plain error resulting in miscarriage of justice where Sykes did not object to conclusion in PSR he was ranked sixth to eighth in culpability amount 21 co-defendants; he did not dispute he helped prepare heroin for retail sale, stored heroin, packing materials, and money at his residence, or that he met with his cousin for purpose of obtaining heroin and making payments for heroin previously supplied. This Court finds it clear Sykes was "deeply involved" in criminal acts of drug conspiracy. DISSENT: Nothing in PSR supports government s attempt to paint Jones anymore than unintelligent low-level drug seller. Fact that Jones joined conspiracy near beginning indicates nothing as to his role in conspiracy.), cert. denied, 525 U.S. 988 (1998).

United States v. Velasquez, 141 F.3d 1280 (8th Cir.) (Both appellants contend District Court erred in concluding neither was minor participant in relevant offense. Defendant charged with drug-related crime may not successfully argue his participation in offense was minor in comparison to others involved in drug activity well beyond particular offense in question; relevant Sentencing Guideline directs judge to decide whether defendant is minor participant based on defendant s role in offense and District Court correctly rejected Juan Velasquez s § 3B1.2 argument on these precise grounds. Even when comparing each appellant s participation with his co-appellants, this Court cannot conclude District Court s finding was clearly erroneous.), cert. denied, 525 U.S. 897 (1998).

United States v. Belitz, 141 F.3d 815 (8th Cir. 1998). (Propriety of minimal or minor role downward adjustment is determined by comparing acts of each participant in relation to relevant conduct for which participant is held accountable, and by measuring each participant s individuals acts and relative culpability against elements of offense. Belitz argues entitlement to reduction because he was unaware of scope of criminal enterprise and even unaware of most of drugs stored in his house. Where District Court agreed Belitz could not have foreseen full amount of drugs in his home or scope of enterprise, Court held him accountable only for amount of narcotics Belitz knew was being stored or at least, amount Belitz assumed risk his friend would store. Although he was not convicted of less serious offense, Belitz s BOL was based not on full amount of methamphetamine found in his home, but upon only 380 grams. In relation to this small amount for which he was held accountable, Belitz was not minimal or minor actor (§ 3B1.2, application note 4). This Court cannot conclude District Court erred in determination Belitz s voluntary and knowing storage of substantial amount of methamphetamine was sufficient to preclude decrease for minor role. Though Belitz did not profit from arrangement, he played significant role in conspiracy as he provided friend safe haven to store drugs and place for same friend to store proceeds from drug distribution.)

United States v. Snoddy, 139 F.3d 1224 (8th Cir. 1998). (Snoddy pleaded guilty to possession of marijuana with intent to distribute after being caught with truckload of controlled substance, claims his role as "mule" was minor compared to other players in marijuana distribution scheme. Despite government s agreement to "minor participant" reduction in plea agreement, and Snoddy s uncontested evidence of minor role offered at sentencing, sentencing judge concluded Snoddy could not receive reduction because he was charged with sole-participant offense, rather than conspiracy. In light of present language of Guideline and application notes, this Court adopts two-prong test and holds defendant convicted of "sole participant" offense may nonetheless be entitled to reduction for mitigating role, § 3B1.2, if defendant shows (1) relevant conduct within meaning of § 1B1.3(a)(1) for which defendant would otherwise be accountable involves more than one participant as defined in § 3B1.1 (application note 1); and defendant s culpability for such conduct was relatively minor compared to that of other participant(s). Court notes reduction in offense level may not be appropriate as application notes provide where defendant has received lower offense level by virtue of being convicted of offense significantly less serious than warranted by actual criminal conduct because such defendant is not substantially less culpable than defendant whose only conduct involved less serious offense. In abundance of caution, this Court remands to District Court for specific factual determinations of Snoddy s role and resentencing under correct construction of § 3B1.2, rather than simply reversing and imposing different sentence.)

United States v. Coleman, 138 F.3d 344 (8th Cir.) (Three defendants argue their offense levels should have been decreased, but District Court s failure to grant mitigating role adjustments was not clear error in light of each defendant s involvement in drug operation. Coleman was distributor of methamphetamine and enforcer of conspiracy, collecting currency for leader; Gessaman helped purchase ingredients and cook methamphetamine; Ward made propane tank and stainless steel container used to cook methamphetamine. Record supports District Court s determination of each defendant s role in conspiracy and evaluation that none was minor or minimal participant.), cert. denied, 525 U.S. 899 (1998).

United States v. Coleman, 132 F.3d 440 (8th Cir.) (All defendants argue District Court erred in denying them mitigating role reduction. This Court holds District Court s denial of these reductions is unreviewable because each defendant received sentence below applicable Guidelines range with or without requested reduction.), cert. denied, 525 U.S. 846 (1998).

United States v. Hafiz, 129 F.3d 1011 (8th Cir. 1997). (Hafiz asserts District Court should have adjusted his offense level at least two levels (adjustment for "minor participant"). District Court did not commit clear error in refusing to adjust Hafiz s offense level under § 3B1.2 where record shows Hafiz plotted robbery with Samuels, drove him to bank knowing he intended to rob it, provided him with gun and duffle bag to use in robbery, and then split robbery proceeds with him.)

United States v. Padilla-Pena, 129 F.3d 457 (8th Cir. 1997). (Michael argues District Court erred in declining to classify him as either minimal or minor participant as evidence indicates he was merely aware of conspiracy, and there is little evidence against him in comparison to other defendants. Mere fact defendant is less culpable than co-defendants does not entitle him to minor participant status. Whether downward adjustment is warranted is determined not only by comparing acts of each participant in relation to relevant conduct for which participant is held accountable, but also by measuring each participant s individual acts and relative culpability against elements of offense. Amount of evidence against defendant does not necessarily correspond to defendant s level of culpability. While amount of evidence against Michael is small as compared to other defendants, this Court is not convinced he is plainly among least culpable of those involved or clearly less culpable than most other participants. Evidence was presented which demonstrated Michael not only had knowledge of conspiracy, but actively participated in heroin distribution. Distribution of heroin with another defendant in Seattle is relevant conduct for purposes of determining Michael s sentence. In addition to distributing heroin, evidence was presented Michael discussed with another appellant his debts in family heroin business. Determination Michael was neither minimal nor minor participant in conspiracy was not clearly erroneous.), cert. denied, 524 U.S. 905 and 524 U.S. 906 (1998).

United States v. Holloway, 128 F.3d 1254 (8th Cir. 1997). (District Court did not err in finding that Holloway--who admitted his involvement with others in attempt to smuggle heroin into penitentiary in which he was inmate--was not minor participant.)

United States v. Wells, 127 F.3d 739 (8th Cir. 1997). (District Court did not clearly err in

its determination Russell was in charge of day-to-day affairs of company and appellants were minor participants in conspiracy.)

United States v. Beltran, 122 F.3d 1156 (8th Cir. 1997). (This Court rejects Beltran s argument District Court erred by denying his requests for mitigating role in offense. Because Beltran is undisputably career offender (§ 4B1.1), offense level reductions providing for mitigating role in offense simply do not apply in career offender context.)

United States v. Chatman, 119 F.3d 1335 (8th Cir.) (Chatman contends he was merely "mule" and "minor participant, § 3B1.2(b)," compared to suppliers of drugs. Chatman argues he is being unfairly denied reduction based on fact suppliers have not been identified. This Court finds no clear error where District Court based decision on several factors including fact Chatman was using his own vehicle; amount of narcotics found in vehicle indicated drugs were intended for distribution; lack of luggage or clothing for trip suggested to Court Chatman intended to underwrite expenses of entire trip.), cert. denied, 522 U.S. 976 (1997).

United States v. Grajales-Montoya, 117 F.3d 356 (8th Cir.) (Montoya asserts District Court erred as factual matter by not granting him two-level decrease as minor participant. This Court concludes trial Court did not clearly err in determining Montoya was not minor participant, § 3B1.2(b).), cert. denied, 522 U.S. 983 and 522 U.S. 1007 (1997).

United States v. Van Brocklin, 115 F.3d 587 (8th Cir. 1997). (Hastings s PSR recommended she receive four-level reduction, § 3B1.2(a), and Hastings alternatively argued she is entitled to at least two-level reduction, § 3B1.2(b), as minor participant. District Court declined to apply either reduction. Denial of four-level adjustment not clearly erroneous where Hastings was high-ranking bank officer and member of board, knew of scheme, and concealed co-defendant s conduct from board and Office of Thrift Supervision; Hastings was present when co-defendant received $750,000 in bribe money and personally participated in transferring funds that were subject of her money laundering convictions. Whether Hastings should have received two-level reduction as minor participant is closer question: Hastings did not receive any direct share of proceeds of loan sales, and it is clear co-defendants were masterminds of deal. However, given other facts, this Court cannot conclude District Court clearly erred in denying two-level reduction.), cert. denied, 523 U.S. 1122 (1998).

United States v. Gjerde, 110 F.3d 595 (8th Cir.) (District Court did not clearly err in denying Gjerde s motion for reduction for being minor participant, § 3B1.2(b). Gjerde bears burden of proving he is entitled to reduction; he cannot meet burden simply by proving he is less culpable than co-conspirators. Record demonstrates Gjerde was key player in conspiracy, and although he may have been less culpable in some sense than Field brothers, Gjerde simply cannot show--on this record--he was merely minor participant.), cert. denied, 522 U.S. 949 (1997).

United States v. Field, 110 F.3d 587 (8th Cir. 1997). (Richard Field contends District Court erred in calculating his sentence by not granting him four-level reduction for his claimed minimal role, or two-level reduction for claimed role as minor participant. District Court denied any

reduction for Richard s role, concluding he was average participant. Richard argues although he committed certain criminal acts, he was ignorant of fact he was breaking law. Such assertion is contrary to guilty verdicts entered against him as well as his guilty plea. District Court found Richard s brother was impetus behind scheme, but Richard was deeply involved (e.g., he incorporated and was officer of one corporation and president of another; vehicles through which schemes to defraud were carried out, and all critical documents, bore his signature). As to Richard s assertion he is entitled to reduction because he is less culpable than his brother, Richard played integral part and one defendant can be less culpable than another participant without necessarily qualifying for reduction as minor participant. District Court did not clearly err in determining Richard was average participant in offense.)

United States v. Wilson, 102 F.3d 968 (8th Cir. 1996). (Watkins argues he was entitled to two-level minor participant reduction (§ 3B1.2(b)) because he was less culpable than co-conspirator. Defendant who is concededly less culpable is not entitled to minor participant reduction if that defendant was equally involved in criminal acts. Watkins was deeply involved; testimony indicated he was at co-conspirator s side during each transaction serving as co-conspirator s "right-hand man" or bodyguard. Also, Watkins drove co-conspirator to at least three of drug transactions and importance of his role as driver was demonstrated during chase. Participants in conspiracy to distribute drugs often have distinct roles; differences are not always relevant in determining sentences.)

United States v. Uder, 98 F.3d 1039 (8th Cir. 1996). (Uder argued District Court erred in failing to give him two-level reduction on ground he was minor participant. He conceded District Court properly limited its factual considerations to unlawful activities involved in "swing"; he argues his role in that process as whole was minor because it was limited to doing only some of body work. This Court agrees Uder was not less culpable than most of other participants involved in "swing"--he was at least average participant. District Court s finding was not clearly erroneous. Relevant aspects of Uder s Guidelines calculation were solely based upon operations related to "swing" so application of guideline was correct.)

United States v. McCarthy, 97 F.3d 1562 (8th Cir. 1996). (Ness contended District Court erred in failing to grant him either two- or four-level downward adjustment for being minor or minimal participant. Ness argues his allegedly de minis role in context of extensive conspiracy entitles him to reduction. Evidence at trial indicated overall conspiracy imported and attempted to distribute in excess of 5000 pounds of marijuana; however, District Court did not hold Ness accountable for entire amount chargeable to conspiracy, but rather attributed to Ness 220 pounds of marijuana which is actual amount Court determined Ness obtained and distributed. Ness would have this Court attribute only 220 pounds to him in calculating BOL and yet consider entire 5000 pounds attributable to conspiracy in determining his role in offense. This would be contrary to Guidelines. Same relevant conduct for sentencing purposes (§ 1B1.3) is used not only in determining defendant s BOL but also for any role in offense adjustments made pursuant to Chapter III. Evidence reveals Ness was principle actor in Minnesota distributions and accordingly he was not entitled to benefit of downward adjustment for being minor or minimal participant in relevant conduct for which he is being held accountable at sentencing, even though same relevant

contact was sufficient for jury to find him guilty of much larger conspiracy charged in another count. His case is example of difference between "sentencing accountability" and criminal liability determined by substantive criminal law (here, conspiracy). No error in District Court s refusal to adjust downward.

District Court granted McCarthy two-level "minor participant" reduction; McCarthy argues he should have received four-level adjustment for being "minimal participant." McCarthy actively aided and abetted marijuana manufacturing process which took place over course of week. His conduct was not so limited that granting him only two-level reduction was abuse of discretion.), cert. denied, 519 U.S. 1139 and 520 U.S. 1133 (1997).

United States v. McGrady, 97 F.3d 1042 (8th Cir. 1996). (McGrady argues he was minor or minimal participant and District Court erred in not granting him either four- or two-point reduction; he contends he was merely courier who played small role in drug deals. District Court did not err in denying him minor or minimal status reduction where District Court found McGrady was essential to commission of crimes and they would not have occurred without his participation. Evidence supports findings McGrady played significant role in carrying out drug transactions.)

United States v. Crosby, 96 F.3d 1114 (8th Cir. 1996). (Record supports District Court s determination Crosby was more than minimal or minor participant in conspiracy; he is not entitled to decrease in his BOL merely because his co-conspirators were ringleaders and received less severe sentences.)

United States v. Shaw, 94 F.3d 438 (8th Cir. 1996). (Scott and Shaw argued District Court erred by denying their request for minor role reduction. This Court agrees neither Scott nor Shaw appears to have played major role in overall drug conspiracy, as opposed to their counts of conviction for using communication facility to facilitate drug crime. District Court did not err, however, by declining to grant Scott and Shaw minor role adjustments as they used telephone to negotiate drug transaction, making them neither more nor less culpable than average person who commits same offense. With respect to fact quantities of drugs involved in transactions were small, Guidelines already account for this.), cert. denied, 519 U.S. 1100 (1997).

United States v. Carrazco, 91 F.3d 65 (8th Cir. 1996). (Carrazco argued he should have received decrease in BOL because he was just "mule." Carrazco had burden of proving eligibility for decrease in BOL. This Court finds no error as District Court did not have to believe Carrazco s testimony he was just "mule," and its rejection is implicit in finding Carrazco had not carried his burden of proof. Even if Carrazco was just "mule," downward departure not necessarily warranted (although there was evidence to suggest others may have been paying Carrazco to carry drugs, record reveals no evidence establishing he was any less culpable than those unidentified actors whose roles were unknown). Also, Carrazco was apprehended in possession of very substantial amount of drugs, circumstance tending to suggest his participation in criminal enterprise was itself very substantial.)

United States v. Tauil-Hernandez, 88 F.3d 576 (8th Cir. 1996). (Mordan argued District Court erred in finding he was "minor" rather than "minimal" participant. Mordan claims he was

least culpable member of conspiracy because he joined later than others and only participated as courier. District Court found Mordan made several trips to New York to purchase more than small amount of cocaine for more culpable conspirators. Conduct does not warrant minimal participant finding (§ 3B1.2, comment. (n.2)). Court s findings as to Mordan s role were not clearly erroneous and two-level reduction, affirmed.), cert. denied, 520 U.S. 1121 (1997).

United States v. Darden, 70 F.3d 1507 (8th Cir. 1995). (Darden contends District Court should have granted him downward departure from applicable sentencing range because of his allegedly minor role in enterprise. Issue is not reviewable by this Court as Darden does not contend District Court was unaware of its authority to grant him departure and record reveals Court was in fact aware of this authority.), cert. denied, 517 U.S. 1149 (1996).

United States v. Ali, 63 F.3d 710 (8th Cir. 1995). (Ali argued he was substantially less culpable than average participant and plainly less culpable of two participants (based upon assumption facts were as Ali claims, i.e., unbeknownst to him driver had gun in pocket and shoved it under Ali s leg just moments before officers came upon car). District Court did not clearly err in finding Ali s role was neither minimal nor minor in light of jury s finding Ali knowingly possessed loaded semi-automatic weapon.)

United States v. Fregoso, 60 F.3d 1314 (8th Cir. 1995). (Brown argued he was entitled to four-level reduction, § 3B1.2(a) (as opposed to minor participant reduction given by District Court) because he was minimal participant; he claimed he was least culpable member of conspiracy because extent of his involvement was that he bought cocaine aggressively--he contends he never sold, supplied, weighed, cut, brokered, or packaged cocaine. Brown did not present rare circumstance (§ 3B1.2, comment. (n.2)) as District Court found Brown s actions spanned entire time period of conspiracy and involved numerous cocaine transactions among himself and three others. District Court also determined Brown loaned money to participant for bail and also served as de facto guarantor of her drug debts.)

United States v. Thompson, 60 F.3d 514 (8th Cir. 1995). (Thompson argues his role in conspiracy was relatively minor compared to that of his drug suppliers. This Court concludes Thompson did not meet his burden of proving his entitlement to this reduction. Participants in distribution of drugs often have distinct and independently significant roles. While Thompson apparently had upstream drug suppliers, record reveals no evidence establishing he was any less culpable than those unidentified actors whose actual roles were unknown. Moreover, defendant who is concededly less culpable than his co-defendants is not entitled to minor participant reduction if that defendant was deeply involved in criminal acts. Thompson was highly culpable offender deeply involved in drug distribution scheme.)

United States v. Rodamaker, 56 F.3d 898 (8th Cir. 1995). (Kaye Rodamaker challenged District Court s refusal to give her two-level downward adjustment for being minor participant, § 3B1.2(b). She contended she was denied due process because Court failed to give her advance notice it contemplated denying adjustment which PSR had recommended. Rodamaker was fairly on notice based on language in plea agreement that although PSR recommended downward

adjustment and government would not oppose it, District Court sua sponte might deny adjustment. Although Rodamaker may have been less culpable than her husband, that did not necessarily make her minor participant and Court s finding she was not minor participant was not clearly erroneous: she had major role in scheme; paid majority of premiums on many HIPs; handled insurance payments received and invested them; after IRS informed her husband he was under investigation, she liquidated investment accounts and, with daughter s help, established multiple bank accounts from which most of cash withdrawn was in amounts slightly below $10,000 (her daughter stated Rodamaker had instructed her to keep withdrawals below $10,000).)

United States v. Alexander, 53 F.3d 888 (8th Cir. 1995). (Kvamme argued he was minor participant, entitled to reduction. Though Kvamme was not ringleader, he failed to show his involvement was less culpable than most other participants.)

United States v. Smith, 49 F.3d 475 (8th Cir. 1995). (Smith argued District Court erred in denying his request for reduction because his role in offense qualified him as minor participant; he contended Court failed to consider relevant conduct of all participants, specifically Moore. Evidence supports denial of Smith s request for minor participant reduction because it showed Smith was equally as culpable as Moore and "deeply involved" in offense.)

United States v. Rice, 49 F.3d 378 (8th Cir.) (Rice asserted District Court improperly refused to grant him two-point reduction as minor participant (§ 3B1.2(b)). This Court upholds District Court s refusal to grant minor participant status based on large quantity of drugs with which Rice had direct involvement; courier status does not automatically entitle Rice to reduction; however, Rice s duties in conspiracy exceeded that of courier (e.g., he went to meetings, rented several beepers in another s name, paid bills, addressed many packing labels).), cert. denied, 515 U.S. 1168 (1995).

United States v. Logan, 49 F.3d 352 (8th Cir. 1995). (Logan argued District Court erred in refusing to award him two-level reduction because he was "minor participant" under § 3B1.2(b). Here, record supported determination Logan was not minor participant. Determination whether defendant is minor participant turns on his culpability, not his status as courier. District Court did not commit clear error where it found Logan had complete understanding of magnitude of overall criminal activity, he was at times responsible for transporting cocaine to Kansas City, delivering it to distributors, and returning proceeds to California.)

United States v. Crouch, 46 F.3d 871 (8th Cir. 1995). (Mandacina contended District Court should have adjusted his sentence downward for minor or minimal participation in bank robberies. District Court did not commit clear error in denying adjustment: even though Mandacina did not actively participate in robberies, he repeatedly supplied guns to bank robbers, completely financed and armed one of robberies, and later shared in robbery s proceeds.)

United States v. Copeland, 45 F.3d 254 (8th Cir. 1995). (Copeland argued for first time on appeal he was entitled to four-level reduction for minimal participant, particularly given large scope of conspiracy. This Court finds no error given Copeland s sentencing stipulation (two-level

reduction for minor participant) and his failure to present any evidence on issue, other than reference to large scope of conspiracy; no plain error.

Cole argued other defendants (such as Copeland) who were listed as "equally culpable" to him had been held responsible for much larger amounts of crack. This Court notes Cole s offense level was calculated based only on money-laundering conduct to which he pleaded guilty. He cannot have both benefit of smaller immediate offense in calculating his base offense level and benefit of larger conspiracy in determining his role. Moreover, District Court did not clearly err in finding Cole s numerous wire transactions involving drug proceeds showed more substantial involvement than Cole s one-time service as money transporter s bodyguard.)

United States v. McCoy, 36 F.3d 740 (8th Cir. 1994). (McCoy argued District Court erred in not granting him downward adjustment for being minor participant, § 3B1.2(b). District Court did not clearly err in denying reduction based on evidence of McCoy s active and extensive participation in fraud scheme (e.g., his check-cashing role was integral to scheme).)

United States v. Ray, 35 F.3d 354 (8th Cir. 1994). (This Court finds utterly meritless Ray s argument he should have been sentenced as minor or minimal participant based on evidence against him especially that which came from government s undercover agent and from two co-conspirators of Ray.)

United States v. Behr, 33 F.3d 1033 (8th Cir. 1994). (Behr argued District Court erred in not discounting four offense levels for his minimal role; this Court finds no error in decision to award Behr three-level reduction for role somewhere in between "minor" and "minimal.")

United States v. Duncan, 29 F.3d 448 (8th Cir. 1994). (Lois contended District Court erred in refusing to decrease her offense level based on her minimal or minor role in offense. She asserted Court ignored lack of evidence that she performed anything more than administrative duties and clerical work. District Court did not err in declining to reduce her offense level based upon its findings that she was in charge of managing investors money and handling finances of company; and she was also involved with selling leases to many investors and was party to numerous misrepresentations made to them.)

United States v. Wyatt, 26 F.3d 863 (8th Cir. 1994). (District Court did not clearly err in denying Wyatt two-level minor participant reduction, § 3B1.2(b), as Wyatt participated in harvesting marijuana--an essential task in marijuana growing operation--and he was to receive one-half of marijuana he picked.)

United States v. Olson, 22 F.3d 783 (8th Cir. 1994). (This Court rejects government s contention of District Court error in decreasing Masica s and Mampel s offense levels for minor participation, § 3B1.2(b) and in decreasing Olson s offense level for being minimal participant, § 3B1.2(a). This Court cannot say these findings are clearly erroneous where after presiding over six-month trial, District Court found Greenwood was major participant in criminal activity and remaining appellants played lesser roles as Greenwood s soldiers.)

United States v. Turk, 21 F.3d 309 (8th Cir. 1994). (District Court refused to give decrease for minimal participation but gave Turk two-level reduction for her role in conspiracy as minor participant. District Court s conclusion was not clearly erroneous as it could not find Turk s level of participation minimal in light of commentary which explains such participation is exception intended to be used infrequently.)

United States v. Magee, 19 F.3d 417 (8th Cir. 1994). (District Court s finding that Magee was minor participant was not clearly erroneous. He was less culpable than other participants, but his role was not minimal. Trial Court s finding that Brown s role in drug conspiracy was not minor is not clearly erroneous, § 3B1.2(b).)

United States v. Lucht, 18 F.3d 541 (8th Cir.) (This Court agreed that Lee and Egan were not among "least culpable" or "less culpable" than most other participants as jury found Lee and Egan guilty on same count of conspiracy and 25 substantive counts as their co-conspirators who went to trial.

Mauseth and Morford entered conditional guilty pleas and government conditionally dismissed superseding multi-count indictment as it pertained to them. At sentencing, District Court denied them downward adjustments for mitigating roles and noted that under their plea agreements, each was allowed to plead guilty to amount of controlled substances with which they were directly involved and were not held accountable for total amount of drugs involved in conspiracy. Mauseth and Morford contended Court erred in not taking into account activities of larger conspiracy charged in deciding whether they were minor or minimal participants. This Court holds District Court correctly applied Guidelines. Although determination of defendant s role is to be made on basis of all relevant conduct and not solely on act cited in count of conviction, if defendant has received lower offense level by virtue of being convicted of offense significantly less serious than warranted by his actual criminal conduct, reduction for mitigating role ordinarily is not warranted. Taking larger conspiracy into account and setting defendants base offense levels and awarding them maximum four-level reduction for minimal roles would have likely produced result of increasing their offense levels and sentencing range exposures.), cert. denied, 513 U.S. 949 (1994).

United States v. Casares-Cardenas, 14 F.3d 1283 (8th Cir.) (Higuera argued District Court error in failure to accord him minor role status with its two point reduction. Higuera failed to prevail on clearly erroneous standard where he was convicted of conspiracy to transport narcotics. District Court found he was transporter because he was arrested while driving car in which drugs were being carried; in this role he was integral to advancement of purpose of conspiracy.), cert. denied, 513 U.S. 849 (1994).

United States v. Hammer, 3 F.3d 266 (8th Cir. 1993). (Hammer took issue with District Court s refusal to grant him two-level reduction for being minor participant. He argued his activity in conspiracy was significantly less than that of one of his co-defendants and PSR confirmed that drug amounts with which he was involved were substantially less than those of his co-defendants. District Court did not clearly err in finding Hammer was not substantially less culpable than co-defendant where statements from Hammer himself indicated he was involved with larger amounts of drugs than he pleaded guilty to and co-defendant directed other customers to Hammer for

narcotics and obtained narcotics from Hammer herself to distribute to other customers.)

United States v. Jones, 2 F.3d 827 (8th Cir. 1993). (This Court rejects Jones s contention his sentence is excessive because he played minor role in conspiracy where his sentence was at low end of Guidelines range and consecutive sixty-month sentence for firearm conviction was mandated by statute.)

United States v. Rayner, 2 F.3d 286 (8th Cir. 1993). (District Court did not clearly err by denying Rayner two point minor participant reduction where Rayner failed to carry his burden of proof. Though his involvement in conspiracy was not as great as some other participants, it entailed far more that one isolated drug sale and possession of 26 grams of PCP, as he asserted.)

United States v. Hale, 1 F.3d 691 (8th Cir. 1993). (Waller argued that District Court erred by not granting him downward adjustment for being minor participant in drug transaction because he acted merely as "steerer," individual who directs potential drug purchaser to seller. District Court did not clearly err in denying Waller reduction where Waller brought purchaser with specific demand to furtive seller who could fulfill that demand and he did more than inform potential buyer where he could purchase drugs--he entered purchaser s car, accompanied him to apartment, and signaled for seller.)

United States v. Ortiz-Martinez, 1 F.3d 662 (8th Cir. 1993). (This Court rejects contention by Fuentez, Ramirez, and Rodriguez that District Court erred in refusing to reduce their offense levels. Minimal participant exception is to be used infrequently; given their extensive participation in enterprise, any argument that Fuentez, Ramirez, or Rodriguez qualified for this exception is without merit. Similarly, minor participant reduction (for one less culpable than most other participants) was precluded by Fuentez s extensive participation in conspiracy, Rodriguez s role as manager who directed activities of other conspirators; and Court s refusal to grant Ramirez s reduction was not clearly erroneous.)

United States v. Abanatha, 999 F.2d 1246 (8th Cir. 1993). (Katherine argued that District Court erred in finding she was not minor participant. She claimed while she knew about drug dealing, benefitted from it, and occasionally helped her husband, she was not full partner. This Court did not find District Court error in light of evidence, including testimony from witnesses who said Katherine was active participant in drug dealing.), cert. denied, 511 U.S. 1035 (1994).

United States v. Wilson, 955 F.2d 547 (8th Cir. 1992). (This Court could not say District Court committed clear error in denying Wilson and Cuezze minor participant s reduction where they sold property stolen by boosters, sales activity is what drove Bradley operation and each sold property for Bradley knowing at least some was stolen. Participants in complex conspiracies may have distinct and independently significant roles that do not necessarily reflect substantially less culpability. This Court could not conclude decision to deny Bobadilla reduction was clearly erroneous where she received stolen property from boosters and stored it at her house for Bradley on at least four to six occasions over four month period. This Court reviews this issue under clearly erroneous standard of review.)

United States v. Meyers, 990 F.2d 1083 (8th Cir. 1993). (District Court did not err in granting minor participant reduction rather than "minimal" where Meyers testified he not only knew of marijuana-growing operation on property, but contributed $600 month to finance it.)

United States v. Coleman, 990 F.2d 419 (8th Cir. 1993). (While defendant is not entitled to minor participant reduction simply because he is less culpable than co-defendant, here Court is unable to discern from record why District Court denied Coleman s request for reduction, and remands.)

United States v. Nelson, 988 F.2d 798 (8th Cir.) (District Court did not err in denying Heinen "mitigating role" reduction merely because others in scheme were more culpable.), cert. denied, 510 U.S. 914 (1993).

United States v. Norquay, 987 F.2d 475 (8th Cir. 1993). (District Court s refusal to reduce offense conduct by two levels for minor participant role was not clearly erroneous where Norquay also raped victim three times in period of hours.)

United States v. Pardue, 983 F.2d 835 (8th Cir.) (Authoring Judge s Commentary: In grandfather/grandson conspiracy murder case reinstating guilty verdict against grandson, notes district judges have right to consider mitigating factors and role played by offender in offense, e.g., § 5K2.12.), cert. denied, 509 U.S. 925 (1993).

United States v. Johnson, 977 F.2d 1297 (8th Cir. 1992). (DISSENT: Where 23-year old black male with criminal history category of zero received 235-month sentence for being courier of 793.1 grams of crack cocaine from Los Angeles to Kansas City, Dissent would remand for District Court consideration of factual question, whether or not Johnson should be given reduction as minimal or minor participant.), cert. denied, 507 U.S. 947 (1993).

United States v. Harris, 974 F.2d 84 (8th Cir. 1992). (This Court rejects Harris s claim that he was only minor participant, "a mere middleman" in distribution scheme. District Court did not clearly err where Harris personally dealt with undercover narcotics detective in arranging for each of eight separate distributions of cocaine, negotiated purchase price to be paid by detective, guided detective to apartment where cocaine for some of transactions was obtained, handled cash for transactions, and delivered cocaine to detective.)

United States v. Westerman, 973 F.2d 1422 (8th Cir. 1992). (This Court holds to extent District Court measured Westerman s role in offense in limited context of arson conspiracy, as opposed to broader context of mail fraud conspiracy, and to extent it considered either risk of injury or amount of potential dollar loss as factors indicating greater role in offense (factors pertinent to relevant conduct), determination of role was based on misapplication of Guidelines as matter of law. This Court s review of facts clearly indicated Westerman s role was minimal (Application Note 1--he was plainly among least culpable of those involved in conduct of group). He lacked knowledge or understanding of scope of enterprise and of activities of others. Westerman entitled to additional two point reduction, case remanded. DISSENT: Fact that Westerman, who knew

purpose of arson was to collect insurance proceeds, did not participate in other aspects of conspiracy does not necessarily make him substantially less culpable. Consideration of relevant conduct is necessary to determine Westerman s level of culpability in mail fraud conspiracy, and thus, District Court s determination of Westerman s minor role, based on documentation and its own knowledge of circumstances of case, was not clearly erroneous.)

United States v. Hall, 949 F.2d 247 (8th Cir. 1991). (Hall argued entitlement to three-level, rather than two-level, reduction because her participation fell between "minor" and "minimal" role in offense. This Court sees no reason to conclude District Court clearly erred in finding Hall to be minor participant based on Hall s participation in financial side of her boyfriend/former co-defendant s drug activities, her knowledge of drug distribution scheme, her handling of financial and other transactions which called for I.D., and her connections with drug activities (e.g., items found at Hall s apartment at time of her arrest).)

United States v. Laird, 948 F.2d 444 (8th Cir. 1991). (District Court s denial of reduction was not clearly erroneous where Laird initiated drug transaction with undercover agent, had previously distributed drugs, and had weapon to protect himself.)

United States v. West, 942 F.2d 528 (8th Cir. 1991). (District Court did not err in denying West "mitigating role" reduction simply because his father was more culpable in same fraud scheme.)

United States v. Nunn, 940 F.2d 1128 (8th Cir. 1991). (District Court s finding that Nunn was not minor or minimal participant was not clearly erroneous where among other things, Nunn had constructive possession of 20 kilograms of cocaine, made calls to members of conspiracy demanding payment for drugs, made deliveries and counted proceeds from drug sales.)

United States v. Rogers, 939 F.2d 591 (8th Cir.) (Taking evidence as whole, this Court could not say District Court s decision to refuse downward departure was clearly erroneous where District Court found DeLinda involved in all aspects of drug manufacturing and distribution process with primary responsibility for packaging and addressing drugs for shipment.), cert. denied, 502 U.S. 991 (1991).

United States v. Regan, 940 F.2d 1134 (8th Cir. 1991). (Maintaining he was merely courier, Regan challenged District Court s failure to apply minor participant decrease to his offense level. This Court finds no error in denial where evidence indicated Regan was deeply involved in transportation and handling of large quantity of drugs and cash with his co-conspirators and he received substantial economic benefits from his involvement in conspiracy.)

United States v. Hutchinson, 926 F.2d 746 (8th Cir. 1991). (Where District Court noted its knowledge through hearing testimony in two trials, Hutchinson argued District Court clearly erred in not giving him 2-4 level reduction and it failed to provide particularized factual basis for disallowance. Finding not clearly erroneous based on stipulated quantity of cocaine involved and

Hutchinson s participation throughout transaction as reported in PSI.)

United States v. Hoelscher, 914 F.2d 1527 (8th Cir. 1990). (District Court s finding Hoelscher s role in conspiracy was not minimal was not clearly erroneous as he was major distributor for drug ring and busied himself trying to find additional supply sources.), cert denied, 498 U.S. 1090 (1991).

United States v. Phillippi, 911 F.2d 149 (8th Cir.) (District Court did not err in denying "courier" Phillippi reduction as minor participant as she handled large quantity of cocaine, was responsible for delivering and exchanging cash for cocaine on her own, had personal acquaintance with leader of organization.), cert. denied, 408 U.S. 1036 (1990).

United States v. Garvey, 905 F.2d 1144 (8th Cir. 1990). (Participant status is factual determination, not legal conclusion. Quantity of drugs with which defendant was involved may be considered in determining role in offense. Finding that defendant, courier, was minor rather than minimal participant was not clearly erroneous.)

United States v. Follett, 905 F.2d 195 (8th Cir.) (District Court s finding that Follett was not minor participant is subject to review under clearly erroneous standard; here record adequately supports finding.), cert. denied, 501 U.S. 1204 (1990).

United States v. Figueroa, 900 F.2d 1211 (8th Cir.) (Defendant s argument that District Court should have reduced his offense level because he performed minimal role in offense was untenable in light of Court s finding he played aggravating role; failure to depart downward is nonreviewable.), cert. denied, 496 U.S. 942 (1990).

United States v. Snover, 900 F.2d 1207 (8th Cir. 1990). (District Court did not err in refusing to lower offense level where defendant argued she was entitled to § 3B1.2 reduction because her co-defendant s offense level was increased for aggravating role as leader under § 3B1.1(c).)

United States v. Foote, 898 F.2d 659 (8th Cir. 1990). (Refusal to grant 2-level reduction for being minor participant was not clearly erroneous where defendant participated in two sales of crack in which he was armed and was seen selling crack when police raided apartment which contained cocaine and firearm.)

United States v. Ellis, 890 F.2d 1040 (8th Cir. 1989). (Defendant s contentions that he should have been found to be minor participant because he did not profit from drug transaction and only arranged it as favor to relative, rejected. Whether defendant s role is minor for purposes of § 3B1.2 is factual determination; here, Court s finding was not clearly erroneous.)

United States v. Williams, 890 F.2d 102 (8th Cir. 1989). (Defendant s status as courier did not necessarily mean he was less culpable than other participants in drug operation so as to qualify

as minor participant. Sentencing judge s finding was not clearly erroneous based on all evidence.)

United States v. Walker, 885 F.2d 1353 (8th Cir. 1989). (Participant in conspiracy pleading guilty to charge of distribution of 150 pounds of marijuana not found to be "minor participant.")

United States v. Williams, 879 F.2d 454, 458 (8th Cir. 1989). (No reduction for minor roles played in events collateral to offense charged, even if such collateral events form basis for upward adjustment.)

United States v. Jones, 875 F.2d 674, 676 (8th Cir. 1989). (No reversible error in finding defendant was not minor participant because he arranged ultimate sale, handled cash, and delivered product.), cert. denied, 493 U.S. 862 (1989).

United States v. Nunley, 873 F.2d 182 (8th Cir. 1989). (Cocaine courier not given minimal role adjustment; sentencing judge not clearly erroneous in concluding no one else involved despite defendant s behavior in airport as if she was expecting to meet someone.)

**§ 3B1.3 (Abuse of Position of Trust/Use of Special Skill/Standard of Review):**

United States v. Shevi, 345 F.3d 675 (8th Cir. 2003) (LOKEN,* FAGG, MURPHY). (District Court's finding that defendant occupied position of private trust is reviewed for clear error.), cert. denied, 124 S. Ct. 1182 (2004).

United States v. Bush, 252 F.3d 959 (8th Cir. 2001) (LOKEN, J. R. GIBSON, MORRIS SHEPPARD ARNOLD*). (This Court gives "great deference" to District Court's factual determinations regarding use of special skill and reviews those findings for clear error.)

United States v. Covey, 232 F.3d 641 (8th Cir. 2000) (WOLLMAN, LOKEN, MURPHY*). (District Court's factual determination that defendant used special skills is reviewed for clear error.), cert. denied, 534 U.S. 814 (2001).

United States v. Baker, 200 F.3d 558 (8th Cir. 2000) (RICHARD S. ARNOLD, LOKEN,* SIPPEL). (Appropriate standard of review for issue whether defendant occupies position of trust is not well settled. This inquiry has both legal and factual component, and in general, this Court reviews District Court s interpretation of Guidelines de novo and its findings of fact for clear error.)

United States v. Jankowski, 194 F.3d 878 (8th Cir. 1999) (BOWMAN,* MORRIS SHEPPARD ARNOLD, BOGUE). (Stating application of this enhancement is reviewed for clear error, but noting that, while two cases in this Circuit state application of § 3B1.3 is factual finding reviewed for clear error, those cases turned on wholly factual determination whether abuse "significantly facilitated" offense. Since commentary to § 3B1.3 was amended in 1993 to include thorough legal definition of "position of public or private trust," determination whether defendant occupied position of trust has become more akin to mixed question of law and fact, for which factual

findings are reviewed for clear error and legal application of Guidelines to facts is reviewed de novo. Under either standard, District Court erred in applying enhancement here.)

United States v. Gjerde, 110 F.3d 595 (8th Cir.) (This Court reviews District Court s factual determination of participant s role in offense for clear error.), cert. denied, 522 U.S. 949 (1997).

**§ 3B1.3 (Abuse of Position of Trust/Use of Special Skill):**

United States v. Anderson, 349 F.3d 568 (8th Cir. 2003) (LOKEN,* McMILLIAN, HANSEN). (We review de novo legal component of enhancement and review for clear error District Court's factual findings. District Court did not clearly err in applying enhancement to defendant, who was insurance salesman who used his position to establish relationships with clients before convincing them to exchange their legitimate investments for his fraudulent "private tender offers.")

United States v. Shevi, 345 F.3d 675 (8th Cir. 2003) (LOKEN,* FAGG, MURPHY). (District Court did not clearly err in finding that defendant occupied position of private trust where he served as trustee of social security benefits received by his minor niece and nephew. In this capacity, he was acting like professional trustee or financial advisor, not merely family member.), cert. denied, 124 S. Ct. 1182 (2004).

United States v. Goings, 313 F.3d 423 (8th Cir. 2002) (McMILLIAN, FAGG, BYE) (per curiam). (One defendant ran tribal payroll office and other defendant was supervisor there. They obtained multiple payroll advances and did not repay them. District Court did not err in applying enhancement for abusing position of trust because evidence showed that defendants held such positions, exercised significant managerial responsibility, were relied on by elected tribal officials, and defendants' abuse of trust contributed significantly to facilitating their commission and concealment of offense.)

United States v. Bush, 252 F.3d 959 (8th Cir. 2001) (LOKEN, J. R. GIBSON, MORRIS SHEPPARD ARNOLD*). (Bush's argument that no special skill was required to sell unregistered promissory notes and that even unskilled person could have carried out transactions, is meritless; legal question is not whether task could be performed by person without special skills but whether defendant's special skills aided him in performing task. District Court reasoned that Bush's extensive training and experience allowed him to draw victims in his fraud more easily than someone without his skills, and that his understanding of intricacies of executing and collateralizing promissory notes helped him establish scheme; thus, District Court did not clearly error.)

United States v. Trice, 245 F.3d 1041 (8th Cir. 2001) (RICHARD S. ARNOLD, FAGG, MONTGOMERY) (per curiam). (Victim of defendant's offense of making fraudulent statement was United States: Trice was president of non-profit corporation formed to build housing complex for handicapped, and he made false statement in seeking federal funding from United States Department of Housing and Urban Development. Trice was not in position of trust vis-a-vis United States, however, so it was error to apply enhancement. Relationship between Trice and United States was

nothing more than "arm's length business relationship." Accordingly, case is remanded for resentencing.)

United States v. Covey, 232 F.3d 641 (8th Cir. 2000) (WOLLMAN, LOKEN, MURPHY*). (Sentencing judge, who presided at defendant's trial and had opportunity to hear and see witnesses and make credibility assessments, determined defendant used special skills as CPA to effectuate money-laundering scheme: defendant had been CPA since 1972, had skills and experience in accounting and finance, had prepared amortization schedule and other financial documents, and had used multiple bank accounts to carry out scheme. This Court holds District Court did not clearly err. This Court also rejects defendant's argument that, because general public can prepare loan documents and amortization tables, special skill was not used. Legal question is not whether task could be performed by person without special skills, but whether defendant's special skills helped him in performing task (as defendant's CPA skills did here); and there is no requirement in Guidelines that enhancement for use of special skills be used only for complex tasks. DISSENT: Majority understates government's burden. Guidelines require proof that defendant used special skill in manner that significantly facilitated commission or concealment of offense. Court ignored uncontroverted evidence that defendant either did not have, or did not use, special CPA skills to significantly facilitate offense and thus impermissibly broadened § 3B1.3 to increase defendant's sentence based on his mere status as CPA.), cert. denied, 534 U.S. 814 (2001).

United States v. Baker, 200 F.3d 558 (8th Cir. 2000) (RICHARD S. ARNOLD, LOKEN,* SIPPEL). ((1) Defendant received insurance-premium payments from several elderly clients and represented she would use money to purchase policies or annuities, but instead she converted money to her own use. PSR noted defendant was sole proprietor of insurance agency, had total control over insurance or annuity purchases, and would have check made out to her personally or to her agency. Probation officer concluded defendant held position of private trust and used it to facilitate her crimes. At sentencing, over defendant s objection, Court found she had held position of trust and adopted finding of PSR in imposing 2-level adjustment. Defendant argues Court failed to make supporting findings as required, but this Court disagrees: having tried case, District Court may base sentencing findings on trial record, PSR included lengthy explanation of probation officer s recommendations, and this Court s review of trial record confirms that facts enumerated in PSR were amply supported. Thus, District Court s findings, though cryptic, were sufficient.

(2) Defendant also argues she did not occupy position of trust. However, defendant was insurance agent who persuaded her elderly clients to give her personal control over their premium payments and then misappropriated those monies. After noting unsettled nature of standard of review on this issue, this Court concludes: (1) as matter of law, licensed insurance agent with control over client funds *may* occupy position of trust; and (2) as matter of fact, District Court s finding that defendant occupied position of private trust in this case was not clearly erroneous.)

United States v. Jankowski, 194 F.3d 878 (8th Cir. 1999) (BOWMAN,* MORRIS SHEPPARD ARNOLD, BOGUE). (Addressing question whether position of messenger of armored car constitutes "position of public or private trust." Reviewing commentary to § 3B1.3 (as amended in 1993), this Court finds clearly erroneous District Court s determination that this position is "more like that of postal employee, who is trusted with delivery of mail than it is that of bank teller

who only handles small amount of cash." Although amended commentary mentions postal employee as exception to general definition of position of public or private trust--as described in first paragraph of commentary--postal-employee exception was meant only to protect delivery of mail, not to create general exception for positions involving similar tasks. Position of armored car messenger is not characterized by professional or managerial discretion, and falls short of requiring sort of judgment exercised in positions found to qualify as positions of trust since 1993 amendment reformulating definition of position of trust took effect (and thus pre-1993 case law is not particularly helpful).)

United States v. Wadena, 152 F.3d 831 (8th Cir. 1998). (Clark and Wadena assert District Court erred in application of Guidelines when it applied two-level enhancement to offense level of Counts 10 - 18, as government presented no evidence they abused position of trust to deposit checks referenced in Counts 10 - 18 or to conceal deposit of those checks. District Court did not err in applying two-level increase as Clark and Wadena failed to acknowledge money laundering offenses for which jury convicted them involved more than mere deposit of checks: their respective positions of trust significantly aided them in obtaining criminally-derived property and using such property to engage in monetary transactions in violation of statute.), cert. denied, 526 U.S. 1050 (1999).

United States v. Hawkey, 148 F.3d 920 (8th Cir. 1998). (Hawkey s argument that he did not use his position as sheriff to conceal his activity is unpersuasive because § 3B1.3 is not limited to concealment. District Court did not clearly err as substantial evidence supports conclusion Hawkey abused his position as sheriff in manner that significantly facilitated commission of offense.)

United States v. O Hagan, 139 F.3d 641 (8th Cir. 1998). (O Hagan argues District Court s enhancement by two levels for abuse of position of trust was erroneous as abuse of trust is already included in offense of securities fraud itself under misappropriation theory. This Court disagrees: O Hagan occupied position of special trust (application note 1 to insider trader guideline (§ 2F1.2 comment. n.1)), and District Court committed no error in applying two-level enhancement where O Hagan s status as senior partner who specialized in securities law contributed to another partner s willingness to confide in him that partner was working for client who was trying to take over Pillsbury, and to seek O Hagan s views as to whether representation should continue.)

United States v. Noske, 117 F.3d 1053 (8th Cir.) (District Court made no mistake in adding two levels to Joan Noske s BOL for abuse of position of trust. Addition applies because of Joan s position as financial planning advisor and tax preparer, even though she did not become CPA until later.), cert. denied, 522 U.S. 922, 522 U.S. 959 (1997), and 522 U.S. 1119 (1998).

United States v. Gjerde, 110 F.3d 595 (8th Cir.) (District Court did not clearly err in finding Gjerde abused position of trust in committing crime. He was entrusted by bank s board of directors to conduct bank affairs in forthright manner and to assure compliance with bank policies and federal regulations. His position allowed him to structure loan with little or no scrutiny. (Situation exactly what Commission had in mind for enhancement for abuse of position of trust).), cert. denied, 522 U.S. 949 (1997).

United States v. Baker, 82 F.3d 273 (8th Cir.) (This Court agrees Baker s conduct was most egregious use of position of public trust. However, if abuse of trust is so central to crime that abuse would be included in calculating crime s BOL, it would be impermissible double-counting. Here, after cross-referencing from § 2C1.1 to § 2J1.2, District Court further increased Baker s BOL by three levels based on Baker s substantial interference with administration of justice, § 2J1.2(b)(2). Issue presents as whether there is double-counting within meaning of § 3B1.3 and application note 3 to § 2C1.1, if § 3B1.3 enhancement is added to this specific application of § 2J1.2. Because of fact intensive nature of issue, this Court concludes it should be addressed in first instance by District Court, and remands.), cert. denied, 519 U.S. 1020 (1996).

United States v. Fitzhugh, 78 F.3d 1326 (8th Cir.) (Fitzhugh argues District Court erred in imposing enhancement because he did not abuse any trust but instead performed legal services at client s direction. Fitzhugh admitted at change of plea hearing he allowed CMS president to pass money through his client s corporations on promise of getting loans for clients and also charging client fees for doing it; Fitzhugh knew these were "just past-through loans." Licensed Arkansas attorney holds position of public trust and Model Rules state lawyer should not assist client in conduct that lawyer knows is criminal or fraudulent, including participation in sham transaction. Here, Fitzhugh s status as attorney shrouded transactions with presumption of regularity and thus contributed significantly to facilitating commission of fraud and his offense harmed legal system. In these circumstances, District Court did not err in imposing enhancement.), cert. denied, 519 U.S. 902 (1996).

United States v. Roggy, 76 F.3d 189 (8th Cir.) (Roggy claims District Court erred when it increased his BOL by two for use of special skill. Roggy was licensed as master pesticide applicator. His knowledge of pesticides led him to switch unapproved brand for approved brand because he believed such switch could not be detected. This Court finds Roggy s claim he did not use his skill as pesticide applicator when he submitted fraudulent invoices to General Mills unpersuasive. This Court has held use of special skill does not have to be directly related to offense of conviction; because Roggy used his expertise in selection and application of pesticides to facilitate fraud on General Mills, this Court finds enhancement was proper.), cert. denied, 517 U.S. 1200 (1996).

United States v. Graham, 60 F.3d 463 (8th Cir. 1995). (District Court increased Graham s offense level two points based on its finding Graham drew on his skills as trust and estate lawyer to create fraudulent trust document to remove his only asset from bankruptcy estate and in establishing fraudulent date trust was created. Graham does not dispute he is lawyer or possesses special skill, but rather argues his special skill did not facilitate commission of offense because making false statement did not require special skill. District Court did not err as Graham was familiar with trust instruments and use of trusts to exclude trust property from bankruptcy estate belies his claim he did not use special skill as [trust and estate] lawyer to facilitate commission of offense.)

United States v. Garfinkel, 29 F.3d 451 (8th Cir. 1994). (Government cross-appealed District Court s refusal to enhance Garfinkel s sentence by two levels for abuse of special skill.

This Court applies clearly erroneous standard; whether enhancement applies is factual determination. District Court s finding Garfinkel s special skills as psychiatrist were not abused to perpetrate crimes (rather, his managerial skills were abused), was not clearly erroneous.)

United States v. Post, 25 F.3d 599 (8th Cir. 1994). (Post, then licensed attorney was involved in extensive insurance fraud scheme in which he recruited participants, helped to orchestrate "accidents" involving them, and then filed claims on their behalf with various insurance companies. Some participants were Post s clients, and he excused their legal bills in exchange for their participation. Court imposed two-level enhancement for abuse of both public and private trust. Post argued he did not occupy position of trust with regard to victims because attorneys do not have fiduciary relationship with opposing-party insurance companies. He argued public-trust enhancement should apply to public official as opposed to private individual; government agreed with this argument. This Court concludes Post s status as licensed Arkansas attorney placed him in position of public trust. This Court referred to Arkansas Model Rules of Professional Conduct and stated that license to practice law accords recipient certain powers and privileges not available to general public; with this privilege comes responsibility to honor state licensing requirements. When Post filed fraudulent insurance claims on behalf of others, he abused his position of public trust. Moreover, his status as licensed attorney shrouded claims with presumption of regularity, and thus contributed significantly to facilitating commission of fraud. This Court does not reach issue of whether Post also abused position of private trust.)

United States v. Olson, 22 F.3d 783 (8th Cir. 1994). (This Court agrees with government contention that District Court committed legal error in refusing to increase Masica s, Mampel s, and Olson s offense levels for abusing positions of private trust. Masica and Mampel conceded they occupied positions of private trust at Midwest, and Olson s position as vice-president in charge of corporate lending division was similarly position of trust. Record amply supports finding three appellants used their positions significantly to facilitate commissions of their crimes and to conceal criminal activity. This Court is left with firm conviction mistake has been committed and concludes District Court s findings that appellants did not abuse positions of private trust, clearly erroneous.)

United States v. Reetz, 18 F.3d 595 (8th Cir. 1994). (Reetz argued that imposition of enhancement for both "more than minimal planning" (§ 2F1.1(b)(2)) and "abuse of position of trust" resulted in impermissible double-counting. This Court applies analysis it outlined in U.S. v. Willis and concludes that District Court properly enhanced Reetz s sentence for both. Concern behind abuse of position of trust focuses on relationship between defendant and his victims, different concern than that behind "more than minimal planning.")

United States v. Morris, 18 F.3d 562 (8th Cir. 1994). (District Court did not abuse its discretion by increasing offense level by two points as at time offenses were committed Morris was chief executive officer and chair of board of directors of bank. She occupied position of trust at bank and used position to commit offenses charged as well as to conceal her criminal conduct: she approved payment of insufficient funds checks and by reason of her position, did so orally; and used position to keep overdraft status of account concealed from board. Whether other employees could

have accomplished crimes is irrelevant. Evidence established that Morris was only person at bank who could have committed fraud to such extent.)

United States v. Johns, 15 F.3d 740 (8th Cir. 1994). (Johns challenged adjustment for abuse of his position as spiritual advisor. Enhancement was justified--he abused his position as spiritual advisor by using religious ceremonies as occasions for sexual activity and justifying his behavior to victim in spiritual terms; he used his roles as parent and spiritual advisor and close relationship with victim that accompanied those roles to gain victim s compliance and assure her silence; and abuse of trust factor was not already included as part of base offense level or specific offense characteristic for charged offenses.)

United States v. Muzingo, 999 F.2d 361 (8th Cir.) (District Court s award of two-point enhancement because Muzingo had used special skill to effect his crime was justified where he had broken into his former wife s safe deposit boxes and stolen their contents by manufacturing keys to lock boxes, skill he acquired during employment with company that manufactures safe deposit boxes and keys. Moreover, testimony indicated Muzingo had in his possession technical drawings illustrating manner of making keys to kinds of boxes that belonged to his former wife and he bragged he had "little gadget" that enabled him to determine profile of keys that he required.), cert. denied, 510 U.S. 1002 (1993).

United States v. Armstrong, 992 F.2d 171 (8th Cir. 1993). (Armstrong s position as drill instructor at Boot Camp constituted position of public trust. District Court s finding Armstrong used his position of public trust to facilitate counterfeiting scheme was not clearly erroneous where record reflected Armstrong used his supervisory position to interact with inmates and to solicit their help in obtaining counterfeit currency. And at least, Armstrong gained access to information he used later when he left his employment.)

United States v. Brelsford, 982 F.2d 269 (8th Cir. 1992). (This Court rejects Brelsford s request that Lange dissent be adopted as majority position. Moreover, Brelsford was not ordinary bank teller, but supervisor employed by bank to monitor other tellers. Bank trusted her to review daily reports, to conduct regular audits, to assign teller drawers, and to safeguard keys to idle teller drawers. Record shows Brelsford held position of private trust. Uniqueness of job is not relevant for determining whether employee holds position of trust.

District Court s finding Brelsford used responsibility to facilitate offense is not clearly erroneous. Her carelessness (keys to drawer 703 were left lying around bank) does not negate fact that as teller supervisor she was responsible for key to drawer 703.

District Court s conclusion Brelsford used her position to conceal her offense is not clearly erroneous where she falsified her reports by omitting shortages in drawer 703 and to ensure drawer was not assigned to teller who might discover funds were missing.)

United States v. Claymore, 978 F.2d 421 (8th Cir. 1992). (Tribal police officer convicted of sexual abuse of minor, contended that because public opinion of police is so poor, no one trusts them and thus, they cannot abuse their position. This Court explains it is not community attitude which counts, but nature of Claymore s position. Increase was proper where Claymore used his

position as police officer to detain victim and he raped her in his patrol car.)

United States v. Culver, 929 F.2d 389 (8th Cir. 1991). (Increase for Culver s special skill as pilot warranted as skills were required to plan for fuel, devise flight plans, prepare aircraft for flight--skill extends to more than actually flying aircraft.)

United States v. Lange, 918 F.2d 707 (8th Cir. 1990). (Government appealed District Court s failure to enhance offense level for abuse of position of public trust. This Court holds it was error not to add two level enhancement where defendant had direct access to express and certified mail which was probably more likely to carry valuable items; postal employees in general did not have same opportunity as defendant to steal from this kind of mail. DISSENT: Lange s thefts from mail differ in no meaningful way from embezzlement by ordinary bank teller, i.e., opportunity was provided and thus, enhancement not warranted.)

**§ 3B1.4 (Using Minor to Commit Crime):**

United States v. Warner, 204 F.3d 799 (8th Cir. 2000) (LOKEN, FAGG, HANSEN) (per curiam). (District Court did not clearly err in crediting police officers testimony that defendant offered to leave his minor daughter with them while he took their money and went to obtain ephedrine for them, although his offer could not be heard on audiotape recording of incident. Court did not abuse discretion in excluding from evidence transcript of audiotape, where audiotape itself was played and admitted into evidence. Although issue was not raised on appeal, this Court indicated in footnote that defendant s offer to leave his daughter qualified as attempted use of minor to which § 3B1.4 enhancement applied.)

United States v. Pospisil, 186 F.3d 1023 (8th Cir. 1999) (WOLLMAN,* LOKEN, JACKSON). (Affirming enhancement where, in cross-burning incident, Barney gave speech about "white power" shortly before burning and it was undisputed minors were present during speech, and where, when group of boys attempted to leave place where speech was being given, Barney threw beer can and joined in calling them "nigger lovers" and "pussies."), cert. denied, 529 U.S. 1089 (2000).

United States v. Pharis, 176 F.3d 434 (8th Cir. 1999) (McMILLIAN, MORRIS SHEPPARD ARNOLD, SACHS*). (District Court correctly denied 2-level increase, concluding enhancement for "attempt[] to use [minor]" was inapplicable where Pharis s communications were with two officers and not, actual minor; rule of lenity required resolution in Pharis s favor of patent ambiguity namely, whether language was satisfied by Pharis s abstract intent or whether actual person meeting description must exist.)

United States v. Johnson, 169 F.3d 1092 (8th Cir.) (BOWMAN, MURPHY,* ALSOP). (No error in assessing enhancement based on testimony that individual sold crack for Johnson, and that he was aware of her age as she had told him about it when he helped secure her release from juvenile detention facility.), cert. denied, 528 U.S. 857 (1999).

**Part C. Obstruction**

**§ 3C1.1 (Obstruction of Justice/Standard of Review):**

United States v. Mendoza-Gonzalez, No. 03-2321 (8th Cir. 2004) (MURPHY,* HEANEY, SMITH). (We review District Court's factual findings underlying obstruction-of-justice enhancement for clear error, and review its construction and application of Guidelines de novo.)

United States v. Flores, Nos. 03-2116/2118 (8th Cir. 2004) (BYE, GIBSON,* MELLOY). (We review District Court's factual findings in support of obstruction-of-justice enhancement for clear error, and review application of Guidelines to those facts de novo. Government bears burden of proving facts necessary to support enhancement by preponderance of evidence.)

United States v. Stolba, 357 F.3d 850 (8th Cir. 2004) (MORRIS ARNOLD,* HEANEY, RILEY). (We review District Court's factual findings relating to enhancement for clear error, but we review de novo District Court's legal determination that conduct falls within scope of § 3C1.1.)

United States v. Frank, 354 F.3d 910 (8th Cir. 2004) (LOKEN, HEANEY, MORRIS ARNOLD*). (District Court's imposition of enhancement is reviewed for clear error, and this Court extends great deference to District Court's decision.)

United States v. Harris, 352 F.3d 362 (8th Cir. 2003) (RILEY, BEAM,* SMITH). (Whether defendant committed perjury is factual finding reviewed for clear error.)

United States v. Gary, 341 F.3d 829 (8th Cir. 2003) (MELLOY,* HANSEN, SMITH). (District Court's factual findings regarding obstruction of justice are reviewed for clear error.), cert. denied, 124 S. Ct. 1128 (2004).

United States v. Sanders, 341 F.3d 809 (8th Cir. 2003) (BOWMAN, MURPHY, BYE*). (Factual finding underlying enhancement for obstruction of justice is reviewed for clear error, while application of Guidelines to that finding is reviewed de novo.), cert. denied, 124 S. Ct. 1525 (2004).

United States v. Pena, 339 F.3d 715 (8th Cir. 2003) (BOWMAN, RILEY, MELLOY*). (This Court reviews for clear error imposition of obstruction enhancement.)

United States v. Swick, 334 F.3d 784 (8th Cir. 2003) (HANSEN, RICHARD ARNOLD, BYE*). (District Court's factual findings underpinning obstruction enhancement are reviewed for clear error, and its application of Guidelines to those facts is reviewed de novo.)

United States v. Aguilar-Portillo, 334 F.3d 744 (8th Cir. 2003) (MORRIS ARNOLD,* HANSEN, SMITH). (This Court reviews for clear error District Court's factual findings supporting its decision whether to apply obstruction enhancement, and reviews de novo application of Guidelines to those facts.)

United States v. Orchard, 332 F.3d 1133 (8th Cir. 2003) (LOKEN, BRIGHT, MURPHY*). (District Court's application of obstruction-of-justice enhancement is reviewed for clear error.)

United States v. Leonos-Marquez, 323 F.3d 679 (8th Cir.) (WOLLMAN,* HEANEY, MELLOY). (Determination whether defendant committed perjury is factual finding; accordingly, District Court's refusal to apply obstruction enhancement will be reversed only for clear error.), cert. denied, 124 S. Ct. 304 (2003).

United States v. Kessler, 321 F.3d 699 (8th Cir. 2003) (WOLLMAN,* HEANEY, MELLOY). (Whether defendant committed perjury and in so doing obstructed justice is factual finding which this Court reviews for clear error.)

United States v. Washington, 318 F.3d 845 (8th Cir.) (BOWMAN, LAY, JOHN GIBSON*). (Factual findings supporting obstruction enhancement are reviewed for clear error. Government bears burden to prove perjury, not merely jury's disbelief of defendant's testimony at trial.), cert. denied, 124 S. Ct. 209 and 124 S. Ct. 251 (2003).

United States v. Farmer, 312 F.3d 933 (8th Cir. 2002) (WOLLMAN, HEANEY,* BYE). (This Court reviews for clear error District Court's application of obstruction-of-justice enhancement. District Court must review evidence and make finding of perjury by preponderance of evidence.)

United States v. Eagle, 133 F.3d 608 (8th Cir. 1998). (This Court s review of whether Eagle s conduct warrants obstruction enhancement is de novo as it involves legal interpretation of Guideline term.)

United States v. Alexander, 53 F.3d 888 (8th Cir. 1995). (When appellant argues District Court error in finding facts warranted enhancement, this Court reviews under clearly erroneous standard. Where Alexander also argued section is not applicable by its terms to situation in this case, this Court reviews legal question de novo.)

**§ 3C1.1 (Obstruction of Justice):**

United States v. Mendoza-Gonzalez, No. 03-2321 (8th Cir. 2004) (MURPHY,* HEANEY, SMITH). (District Court must make independent finding that defendant wilfully gave false testimony concerning material matter. Here, District Court compared transcripts of suppression hearing to evidence District Court personally heard at trial and determined that defendant had lied at suppression hearing about important aspects of search. Finding of perjury was not clear error.)

United States v. Flores, Nos. 03-2116/2118 (8th Cir. 2004) (BYE, GIBSON,* MELLOY). (District Court cannot apply enhancement simply because defendant testifies on own behalf and jury disbelieves him; District Court must make independent finding of perjury. Here, by saying that "I know of no reason why I should disagree with the jury's finding in this case," District Court failed to exercise its independent judgment rather than rely on verdict, and case is remanded for

resentencing.)

United States v. Warren, 361 F.3d 1055 (8th Cir. 2004) (BYE, SMITH, COLLOTON*). (It was plain error for District Court to apply obstruction-of-justice enhancement to defendant whose offense level was calculated under career-offender Guideline. Other than acceptance-of-responsibility reduction, no other Chapter Three adjustments apply.)

United States v. Stolba, 357 F.3d 850 (8th Cir. 2004) (MORRIS ARNOLD,* HEANEY, RILEY). (District Court erred in applying enhancement because no official investigation was underway when defendant directed his office manager to delete computer files.)

United States v. Frank, 354 F.3d 910 (8th Cir. 2004) (LOKEN, HEANEY, MORRIS ARNOLD*). (District Court did not clearly err in applying enhancement based on findings that defendant encouraged two individuals to testify falsely before grand jury, he told another individual not to disclose any information to authorities, he lied to authorities regarding his assets several times during investigation, and he took steps to conceal his assets that were subject of investigation. It was not impermissible double-counting to apply enhancement to money-laundering counts where obstructive conduct was other than money laundering itself.)

United States v. Harris, 352 F.3d 362 (8th Cir. 2003) (RILEY, BEAM,* SMITH). (District Court specifically found that defendant perjured himself at trial and cited his testimony about particular material matters. Record supported finding inasmuch as defendant's testimony was contradicted by police officer's testimony; thus, District Court did not clearly err.)

United States v. Gary, 341 F.3d 829 (8th Cir. 2003) (MELLOY,* HANSEN, SMITH). (Based on trial testimony, District Court determined that police officer and defendant's cellmate told truth about defendant's ownership of gun, and defendant lied and suborned perjury from others regarding his ownership of gun. Enhancement affirmed because District Court's credibility findings are virtually unreviewable on appeal.), cert. denied, 124 S. Ct. 1128 (2004).

United States v. Sanders, 341 F.3d 809 (8th Cir. 2003) (BOWMAN, MURPHY, BYE*). (At suppression hearing, police officer testified that defendant consented to search, and defendant denied consenting. Although District Court credited police officer for purposes of denying suppression motion, at sentencing, it did not make finding that defendant perjured himself and thus did not clearly err in declining to apply obstruction enhancement.), cert. denied, 124 S. Ct. 1525 (2004).

United States v. Pena, 339 F.3d 715 (8th Cir. 2003) (BOWMAN, RILEY, MELLOY*). (District Court presided at trial and formed belief that defendant lied. Although District Court did not make specific findings of materiality and wilfulness, these matters are clear from trial transcript. Even if it could be double-counting for District Court to use defendant's perjury both to impose obstruction enhancement and to select higher sentence within Guidelines range, it is not clear that such double-counting occurred here.)

United States v. Swick, 334 F.3d 784 (8th Cir. 2003) (HANSEN, RICHARD ARNOLD,

BYE*). (District Court erred in refusing to apply enhancement in case of defendant who initially pleaded guilty and admitted offense at change-of-plea colloquy, but then withdrew his guilty plea and denied offense at trial. One of these two diametrically opposed statements had to be wilfully false.)

United States v. Aguilar-Portillo, 334 F.3d 744 (8th Cir. 2003) (MORRIS ARNOLD,* HANSEN, SMITH). (Defendant denied material matters at trial. District Court declined to apply obstruction enhancement, noting contradictory testimony by other witnesses, probable lie by one prosecution witness, lengthy jury deliberations, defendant's non-evasive demeanor, and defendant's unembellished denials. Although there is no such thing as "exculpatory no" exception to obstruction enhancement, District Court was entitled to decline to find defendant's denials to be wilful perjury despite jury verdict finding defendant guilty and District Court's denial of defendant's motions for acquittal and new trial.)

United States v. Orchard, 332 F.3d 1133 (8th Cir. 2003) (LOKEN, BRIGHT, MURPHY*). (District Court did not clearly err in applying obstruction-of-justice enhancement where facts of case--defendant's wife caught him attempting to use GHB to rape babysitter, and defendant later threw away GHB container and barricaded house--showed defendant probably knew an official investigation was underway.)

United States v. Leonos-Marquez, 323 F.3d 679 (8th Cir.) (WOLLMAN,* HEANEY, MELLOY). (Government alleged that defendant committed perjury by submitting false allegations of prosecutorial misconduct in letter to District Court in support of motion for new trial, and by calling relative to testify in support of allegations, but District Court's finding that defendant's allegations were erroneous rather than wilful perjury was not clear error.), cert. denied, 124 S. Ct. 304 (2003).

United States v. Eis, 322 F.3d 1023 (8th Cir. 2003) (WOLLMAN, RICHARD ARNOLD, MURPHY) (per curiam). (Defendant's attempt to have fellow inmate pin blame for defendant's crime on third party warranted obstruction-of-justice enhancement, even though inmate did not take conversation seriously and did not follow through.)

United States v. Calderon-Avila, 322 F.3d 505 (8th Cir. 2003) (WOLLMAN, RICHARD ARNOLD, MELLOY) (per curiam). (Defendant moved to dismiss indictment on basis that he was seventeen when he committed offense. In support, he called his sister to testify as to birthdate that would make him seventeen. Government put on medical evidence to show he was older, and evidence that defendant had furnished birthdate to law enforcement in past that would have made him about six years older than he now claimed. District Court believed government as to defendant's age and later imposed obstruction-of-justice enhancement for calling sister to testify falsely. Enhancement was proper because defendant did not merely put government to its proof as to his age, he suborned perjury.)

United States v. Kessler, 321 F.3d 699 (8th Cir. 2003) (WOLLMAN,* HEANEY,

MELLOY). (In trial testimony, defendant denied using or manufacturing methamphetamine. Extensive physical and testimonial evidence directly linked him to methamphetamine-manufacturing conspiracy, and jury found him guilty. District Court in effect made independent finding of perjury when it referred to inculpatory trial evidence supporting jury's verdict of guilt beyond reasonable doubt and saying "I heard the trial testimony" in imposing obstruction enhancement.)

United States v. Washington, 318 F.3d 845 (8th Cir.) (BOWMAN, LAY, JOHN GIBSON*). (Enhancement was proper upon District Court's finding that defendant's trial testimony regarding his whereabouts on morning of murders was not believable, was material, was contradicted by bulk of other evidence, and was knowing lie.), cert. denied, 124 S. Ct. 209 and 124 S. Ct. 251 (2003).

United States v. Johnson, 316 F.3d 818 (8th Cir.) (BOWMAN,* RILEY, SMITH). (It was not clear error to impose obstruction enhancement based on attempt to suborn perjury where defendant wrote letter to witness he wanted to testify at sentencing in support of diminished-capacity downward departure, somewhat ambiguously directing witness how he should testify. DISSENT: government did nothing to prove that testimony requested by defendant in letter would have been untrue.), cert. denied, 124 S. Ct. 139 (2003).

United States v. Stapleton, 316 F.3d 754 (8th Cir. 2003) (HANSEN,* RICHARD ARNOLD, LOKEN). (Defendant's obstructive conduct that occurs at resentencing hearing can be used as basis for obstruction-of-justice enhancement when defendant is resentenced, unlike post-original-sentencing rehabilitation, which cannot be used as basis for acceptance-of-responsibility reduction when defendant is resentenced.)

United States v. Young, 315 F.3d 911 (8th Cir.) (BOWMAN,* RICHARD ARNOLD, LOKEN). (Defendant's wilful failure to appear at plea and sentencing hearings--remaining at large for five months until he was identified at traffic stop--justified application of obstruction enhancement.), cert. denied, 123 S. Ct. 2108 (2003).

United States v. Santos-Garcia, 313 F.3d 1073 (8th Cir. 2002) (McMILLIAN,* LAY, RILEY). (District Court did not clearly err in applying obstruction enhancement based on testimony that defendant attempted to bribe witness into claiming responsibility for drugs. Apprendi requirements did not apply because enhancement did not increase defendant's sentence above statutory maximum.)

United States v. Tirado, 313 F.3d 437 (8th Cir. 2002) (BYE, LAY, RILEY*). (Although it could not be proven that defendant knew for certain that investigation was underway when he tried to make informant lift his shirt to reveal whether he was wearing wire, and thereafter chased informant when he fled, District Court did not clearly err in applying obstruction-of-justice enhancement based on finding that defendant had correctly suspected that investigation was underway.)

United States v. Farmer, 312 F.3d 933 (8th Cir. 2002) (WOLLMAN, HEANEY,* BYE). (Reversing application of obstruction-of-justice enhancement where defendant was convicted of

being felon in possession of firearm, having testified at trial that he did not possess gun, where government did not introduce physical evidence of defendant's possession of gun (gun, gun cleaning kit, holster, ammunition, and ammunition clip), merely police inventory report listing these items. DISSENT: evidence that was good enough to support conviction was also good enough to support finding of perjury.)

United States v. Brown, 311 F.3d 886 (8th Cir. 2002) (HANSEN, RICHARD ARNOLD, LOKEN*). (Despite absence of specific findings by District Court of perjury--only general statement that defendant's trial testimony was untruthful--it was enough that defendant's testimony squarely conflicted with government witness's incriminating testimony and with jury's guilty verdict, because record left no doubt that defendant's false testimony was wilful rather than result of confusion, mistake, or faulty memory.)

United States v. Stulock, 308 F.3d 922 (8th Cir. 2002) (WOLLMAN,* HEANEY, BYE). (Defendant who wilfully gives false testimony under oath regarding material matter has committed perjury subjecting him to obstruction-of-justice enhancement. After reviewing evidence, District Court must make independent finding of perjury by preponderance of evidence. District Court did not clearly err in disbelieving defendant's testimony that, although he had ordered child pornography and specifically asked for girls aged seven to fourteen, he did not actually expect to receive child pornography because his experience had been that most of what was advertised as child pornography on Internet was simulated by young-looking adults.)

United States v. Titlbach, 300 F.3d 919 (8th Cir. 2002) (LOKEN, JOHN R. GIBSON,* GOLDBERG). (Defendant commits perjury if he testifies falsely under oath with regard to material matter and does so willfully, rather than due to confusion, mistake, or faulty memory. Defendant denied at trial that she was involved in cleaning glassware, taking out garbage, collecting money, and driving coconspirator to get methamphetamine ingredients. This testimony is contrary to that of other witnesses, and matters are material because they relate to methamphetamine manufacturing. District Court specifically found that defendant committed perjury, that her denial of involvement was willful, and that matter was material), cert. denied, 537 U.S. 1137 (2003).

United States v. Esparza, 291 F.3d 1052 (8th Cir. 2002) (BOWMAN, RILEY,* MELLOY). (Defendant is subject to obstruction-of-justice enhancement if he testifies falsely under oath in regard to material matter and does so wilfully rather than out of confusion or mistake. If defendant objects to enhancement, District Court must review evidence and make independent finding that defendant perjured himself. Here, District Court neglected to make any finding of perjury. However, remand is unnecessary in this "exceptional case" because defendant's statement that he did not know there were drugs in his trailer is obviously material and plainly inconsistent with jury's guilty verdict, and this Court's review of trial transcript leaves it with no doubt that defendant's decision to testify falsely was wilful.)

United States v. Vaca, 289 F.3d 1046 (8th Cir. 2002) (WOLLMAN,* LOKEN, MURPHY). (District Court's imposition of obstruction-of-justice enhancement was not clearly erroneous where Court found that defendant and associates had beaten witness and threatened witness's brother to

intimidate them.)

United States v. Williams, 288 F.3d 1079 (8th Cir. 2002) (McMILLIAN, MORRIS SHEPPARD ARNOLD,* RILEY). (District Court's refusal to apply enhancement affirmed where only hindrance that government proved resulted from defendant's giving false identity information was that indictment had to be dismissed and superseding one filed. Application Note 5(a) specifically states providing false name or identification document at arrest is not grounds for enhancement except where such conduct actually resulted in "significant hindrance" to investigation or prosecution of instant offense. Government could have, but did not, produce evidence regarding amount of time it expended in effort to resolve identity question, and defendant's limited hindrance was not significant one as matter of law.)

United States v. Simms, 285 F.3d 1098 (8th Cir.) (McMILLIAN,* MURPHY, BATTEY). (District Court did not clearly err in giving obstruction-of-justice enhancement for perjury where defendant's trial testimony was flatly contradicted by unequivocal testimony of co-conspirators and Court found defendant had given false testimony on "pretty critical issues." District Court's failure to make willfulness finding did not warrant remand because there was no doubt that defendant's denials were result of willful intent to deceive jury; denials could not have been result of confusion, mistake, or faulty memory. November 1997 amendment to section removed language requiring District Court to view testimony in light most favorable to defendant.), cert. denied, 537 U.S. 1058 (2002).

Hayes v. United States, 281 F.3d 724 (8th Cir. 2002) (BOWMAN, RICHARD S. ARNOLD,* WOLLMAN). (Absconding from halfway house, in violation of conditions of pretrial release, is escaping from custody within meaning of Application Note 4(e), supporting obstruction-of-justice enhancement.)

United States v. Thurmon, 278 F.3d 790 (8th Cir. 2002) (LOKEN, LAY, HEANEY*). (District Court applied obstruction-of-justice enhancement because defendant made "inconsistent statements at his plea hearing and at sentencing." This Court reverses because, having reviewed record, statements amount to no more than "accidental inconsistency" that does not rise to level of obstruction of justice.)

United States v. Gomez, 271 F.3d 779 (8th Cir. 2001) (McMILLIAN, FAGG,* MORRIS SHEPPARD ARNOLD). (Enhancement was supported by unobjected-to portions of presentence report. Defendant attempted to warn other conspiracy members of government investigation, which is sufficient to support enhancement.)

Ortega v. United States, 270 F.3d 540 (8th Cir. 2001) (RILEY, ROSS,* BEAM). (Defendant seeking mitigating-role reduction followed District Court's "suggestion" to take polygraph examination. Without taking any evidence (testimonial or otherwise), Court granted obstruction enhancement after government informed it that defendant had failed test as to knowledge of drugs in car. This Court reversed, because government, which bore burden of proving facts necessary to support enhancement, produced no evidence whatsoever that defendant lied in hopes of receiving

role reduction. District Court--which had indicated that only after hearing defendant's testimony and evidence regarding examiner's qualifications, training, etc., would it determine what weight, if any, would be given to test results--did not carry out its assurances, and government failed to offer examiner's report or call examiner to testify. Further, defendant's alleged test "failure" related to her guilt, not to her role in offense. Indeed, District Court granted minor-role reduction.)

United States v. Martinez, 234 F.3d 1047 (8th Cir. 2000) (RICHARD S. ARNOLD, HANSEN, BYE) (per curiam). (Enhancement affirmed where defendant, who had cooperated during interview process, subsequently absconded from halfway house prior to bond-revocation hearing and failed to appear for hearing.)

United States v. Robinson, 217 F.3d 560 (8th Cir.) (BOWMAN,* HANSEN, CARMAN). (District Court agreed with PSR that defendant obstructed justice because his testimony was not truthful, and Court stated additionally that defendant's "testimony was not truthful regarding material facts in this case." District Court implicitly adopted finding of PSR, and finding was adequately supported by record: defendant's statements of his intention to use money for other purposes and not to buy methamphetamine could not have been result of confusion, mistake, or faulty memory; rather, such false statements could only have been result of willful intent to deceive jury and obstruct judicial process. District Court's finding was not clearly erroneous.), cert. denied, 531 U.S. 999 (2000).

United States v. Amsden, 213 F.3d 1014 (8th Cir. 2000) (McMILLIAN, F. R. GIBSON, MORRIS SHEPPARD ARNOLD*). (While serving time in state prison on assault and burglary convictions, defendant wrote threatening letters to victim and to another woman. District Court found that defendant indirectly attempted to influence one recipient not to testify at defendant's sentencing hearing by sending her post-plea letter in which he stated that upon his release he would sexually assault her minor daughter. This Court remands, finding District Court mistakenly determined letter was attempt to obstruct justice; far more likely, letters were continuation of illegal conduct for which defendant was convicted. Additionally, this Court notes that letter did not refer, directly or indirectly, to testimony or even to any Court proceeding, and nothing in record indicated that defendant believed victim might testify at sentencing.)

United States v. Thompson, 210 F.3d 855 (8th Cir. 2000) (WOLLMAN,* F. GIBSON, MURPHY). (Enhancement affirmed where defendant directed acts of intimidation toward two prosecution witnesses. Prior to trial, defendant telephoned one witness and demanded witness swear on lives of his children that he had not cooperated with authorities; defendant also warned witness he could expect visit from defendant once he was released from jail. At trial, defendant directed similar threats to second witness, calling him derogatory names and making throat-cutting gesture during witness s testimony. District Court interpreted these acts as attempts impermissibly to influence or intimidate and this Court cannot say such finding was clearly erroneous.), cert. denied, 532 U.S. 996 (2001).

United States v. Shepard, 207 F.3d 455 (8th Cir. 2000) (RICHARD S. ARNOLD,* FAGG, HANSEN). (Upholding as not clearly erroneous District Court s finding that defendant obstructed

justice by attempting to persuade his former girlfriend and estranged wife not to speak to investigating agents; defendant argued his only intent was to see his children and make sure former girlfriend--who he believed also was under investigation--would not talk to agent before consulting counsel. These points depend on interpretation of notes made of telephone conversation with defendant, and District Court s interpretation of those notes was reasonable, even if benign interpretation urged by defendant would also have been reasonable.)

United States v. Taylor, 207 F.3d 452 (8th Cir. 2000) (WOLLMAN, F. GIBSON,* MURPHY). (District Court provided separate and clear findings that defendant s trial testimony, in which he denied knowing cocaine was in his vehicle, was both false and material. District Court s conclusion is not only supported by, but is implicit in, jury s finding of guilt for knowing possession of cocaine. While overt willfullness finding regarding perjurious testimony would have been preferable, its omission is failure in form alone, insufficient to warrant remand; after careful review of record, this Court has no trouble concluding defendant s false trial testimony was product of calculation.)

United States v. O Dell, 204 F.3d 829 (8th Cir. 2000) (BOWMAN, LOKEN, ALSOP*). (District Court found defendant committed perjury when he testified before magistrate judge in bond revocation hearing. At hearing, magistrate judge found defendant s testimony concerning simulated methamphetamine found in defendant s jacket entirely uncredible (defendant testified he had mistakenly put on someone else s jacket and knew nothing of simulated drugs in pocket).

(1) District Court made its own independent finding that defendant had committed perjury, and this Court cannot conclude District Court clearly erred in so doing.

(2) Defendant argues that perjury must be material to underlying offense. However, this Court has repeatedly upheld enhancement where perjury did not go to underlying charge, but to issue being decided. Here, issue under determination was whether defendant s pretrial release should be revoked, and his perjurious testimony had potential to influence or affect that determination.)

United States v. Herr, 202 F.3d 1014 (8th Cir. 2000) (WOLLMAN, ROSS,* LOKEN). (In addition to pleading guilty to drug offense, defendant pleaded guilty to assaulting federal officer, in violation of 18 U.S.C. § 111(a), but under Guidelines multi-count grouping rules, § 111(a) offense (spitting at DEA officer who was placing defendant in his cell after his initial appearance) was disregarded in calculating adjusted offense level. District Court did not err in assessing § 3C1.1 adjustment based on its conclusion that § 111(a) conviction was one for obstructive conduct: § 111 was intended both to protect federal officers and to prevent hindrance of federal functions. Court also noted § 3C1.1 enhancement could be imposed without advance notice and did not constitute impermissible double-counting.)

United States v. Baker, 200 F.3d 558 (8th Cir. 2000) (RICHARD S. ARNOLD, LOKEN,* SIPPEL). ((1) Defendant argues her false statements were not material to and did not significantly impede investigation. However, jury found false statement during interview with postal inspector was material to his investigation, and other false statement--a fictitious home address--contributed to investigators inability to find defendant for period of time. Thus District Court s findings as

to materiality and significant impediment were not clearly erroneous.

(2) Defendant also argues false statement was essentially denial of guilt and as such cannot form basis for obstruction adjustment. However, Supreme Court recently eliminated legal basis for this argument and related commentary in Application Note 2 when it held that prohibition in 18 U.S.C. § 1001 includes false "exculpatory no." But putting aside impact of Supreme Court s decision, defendant s argument is rejected because her false statement was far more than mere denial of guilt: her exculpatory version of dealings with defrauded client caused postal inspector to investigate financial activity in defendant s bank accounts which demonstrated defendant s statement was false.

(3) Finally, defendant argues application of adjustment constitutes impermissible double-counting for false statement that also violated § 1001 (the basis for two of counts for which she was convicted). This Court disagrees. Total offense level for defendant s grouped offenses was offense level for underlying fraud offense, and fraud was completed before she obstructed justice. Thus obstruction offenses were "counted" only once, through obstruction adjustment.)

United States v. McKnight, 186 F.3d 867 (8th Cir. 1999) (McMILLIAN, BRIGHT, FAGG) (per curiam). (Probation officer recommended two-level adjustment for obstruction of justice based on alleged attempt by McKnight to suborn perjury of government witness; McKnight objected and government withdrew claim for enhancement. Nevertheless Court held no hearing regarding obstruction of justice relating to co-defendant and made no findings relating to that assertion by prosecuting attorney. This Court finds it apparent from record that District Court assumed obstruction-of-justice enhancement applied to McKnight. Because no actual evidence was presented or otherwise supported claim for suborning perjury, and because enhancement resulted in offense level resulted in mandatory life sentence, this Court **remands** for hearing on enhancement relating to whatever discussion McKnight had with co-defendant and for reconsideration of whether sentence less than life should be imposed.)

United States v. Bell, 183 F.3d 746 (8th Cir. 1999) (LOKEN,* HANSEN, MORRIS SHEPPARD ARNOLD). (Bell pleaded guilty to (1) aiding and abetting possession of cocaine base with intent to distribute, (2) using minor in drug trafficking offense, and (3) failing to appear. District Court grouped three offenses; determined base offense level was 32 under U.S.S.G. § 2D1.2(a)(1), Guideline for drug offenses involving underage individuals; added 2 levels for obstruction of justice, based on Bell's failure to appear; and subtracted 3 levels for acceptance of responsibility. This Court rejects Bell's argument that impermissible double-counting occurred: use-of-a-minor crime was counted once by using § 2D1.2 as base offense level, and failure-to-appear crime was counted once when Bell received obstruction-of-justice adjustment--an adjustment expressly required when failure-to- appear offense is grouped in this fashion under U.S.S.G. § 2J1.6, comment. (n.3) and 3C1.1, comment. (n.8). Obstruction adjustment was not based on conduct that was part of crime itself, because obstruction of justice was independent of Bell's drug-trafficking crimes.)

United States v. Brooks, 174 F.3d 950 (8th Cir. 1999) (RICHARD S. ARNOLD, BRIGHT,* F.R. GIBSON). (Reversing enhancement where District Court failed to make sufficient factual findings to justify increase, and record failed to support imposition of enhancement. Government

failed to meet its burden of proving that defendant perjured himself about existence of trust documents created to evade taxes. Record suggested that either trust documents did not exist and defendant credulously accepted trustee's word as to their existence, or that documents did exist and government failed to unearth them.)

United States v. Molina, 172 F.3d 1048 (8th Cir.) (HANSEN,* LAY, MURPHY). (Rejecting argument that District Court did not make specific factual findings to support enhancement where District Court (1) noted Fraga had submitted notarized affidavit to it and had testified he was only defendant involved in drug transactions, and (2) found such testimony was contrary to overwhelming evidence adduced at trial, which unequivocally demonstrated involvement of others. This Court finds sufficient basis in evidence for District Court's finding that Fraga provided false testimony willfully intended to deceive fact finder.), cert. denied, 528 U.S. 893 (1999).

United States v. Hunt, 171 F.3d 1192 (8th Cir. 1999) (WOLLMAN,* LOKEN, MORRIS SHEPPARD ARNOLD). (Hunt tried to persuade jury that cooperating individual forced Hunt to manufacture methamphetamine; District Court found this testimony constituted perjury, finding this Court cannot say is clearly erroneous.)

United States v. Johnson, 169 F.3d 1092 (8th Cir.) (BOWMAN, MURPHY,* ALSOP). (No error in assessing enhancement based on co-conspirator's testimony that defendant tried to have him sign false affidavit.), cert. denied, 528 U.S. 857 (1999).

United States v. Brown, 169 F.3d 531 (8th Cir. 1999) (BOWMAN, LOKEN, HAND*). (Affirming enhancement where Brown opened confidential informant's (CI's) shirt as if looking for wire and warned there would be " hell to pay from his brothers " if anything happened to Brown; warned CI during another transaction that people would be " getting even " if anything happened to Brown; and passed or showed CI handwritten note again indicating " hell to pay " if CI were working for government. Although Brown argues he could not have obstructed justice as he did not have actual knowledge of ongoing criminal investigation, District Court did not clearly err in finding that Brown held belief investigation was probably under way.)

United States v. Garrison, 168 F.3d 1089 (8th Cir. 1999) (RICHARD S. ARNOLD,* FAGG, DAWSON). (Affirming enhancement where record contained evidence that defendant threatened drug courier couple of days before her cooperation with government.)

United States v. Boyd, 168 F.3d 1077 (8th Cir.) (FAGG, HANSEN, ROSENBAUM). (Affirming enhancement which was based on Boyd's presentation of perjured testimony that he was elsewhere at time of robbery.), cert. denied, 528 U.S. 851 (1999).

United States v. Gomez, 165 F.3d 650 (8th Cir. 1999) (McMILLIAN, HANSEN, KYLE*). (District Court's determination that Gomez committed perjury was not clearly erroneous, and District Court also articulated separate and independent ground to support obstruction-of-justice enhancement: after he was arrested, Gomez had threatened person who was present during altercation underlying burglary conviction.)

United States v. Billingsley, 160 F.3d 502 (8th Cir. 1998) (HANSEN, LAY,* MURPHY). (Billingsley was arrested with drugs in his apartment; offered to cooperate, and began to do so; and then two or three weeks later, backed out of cooperation agreement and left jurisdiction without informing police. District Court imposed enhancement for obstruction of justice. Issue: does post-arrest, pre-indictment flight of defendant who is not in custody fall within scope of § 3C1.1? Held: Enhancement was proper. Billingsley was clearly aware of investigation and prosecution of case against him; he also was aware that he had to keep in contact with police during tenure of his cooperation agreement, or he would be indicted; and he impeded investigation and prosecution of his case.)

United States v. Brekke, 152 F.3d 1042 (8th Cir. 1998). (No clear error in assessing enhancement based on perjury: much of testimony in question conflicted with other evidence at trial.)

United States v. Holt, 149 F.3d 760 (8th Cir. 1998). (While awaiting trial, Holt attempted to deliver note to his brother which was intercepted by jailor; note recites version of brothers crime varying substantially from James s prior statements to authorities and from Holt s own incriminating statements. Holt claimed two-level enhancement for obstruction was error because note stated facts as he believed them to be. Finding this incredible, District Court determined letter was written in attempt to commit perjury and manufacture testimony. As District Court was in best position to make credibility determination about Holt s motives and veracity, and based upon review of record, this Court is convinced District Court did not err.)

United States v. Valdez, 146 F.3d 547 (8th Cir. 1998). (Government moved to enhance sentences on ground defendants attempted to harm witness, bank president. District Court heard evidence and found Johnson and Valdez willfully attempted to have bank president harmed. Several witnesses testified about Johnson s and Valdez s attempts to have bank president harmed. Johnson and Valdez claimed witnesses testimony was not credible, but District Court s creditability determinations are virtually unreviewable on appeal. Based on witnesses testimony, this Court concludes government satisfied its burden and District Court did not clearly err in finding defendants attempted to have bank president harmed. This conduct is sufficient as matter of law to warrant enhancement for obstruction of justice.)

United States v. Sykes, 144 F.3d 564 (8th Cir. 1998). (Government cross-appeals District Court s denial of upward adjustment. Sykes was target of controlled buy of crack cocaine, conducted by federal drug task force agents. He signed plea agreement with federal prosecutors and agreed to cooperate with agents. Sykes s last interview (where he made candid admissions about his involvement in drug trafficking) was conducted 10/10/89. In February 1990, Sykes was scheduled to be tried in Iowa state Court on state drug trafficking charges; however, Sykes moved to Saudi Arabia, and remained abroad for approximately five years. When he re-entered U.S. in 1995, he was arrested on federal warrant. Based on record, this Court finds no error in District Court s determination Sykes s conduct in connection with his absence from U.S. did not warrant obstruction-of-justice adjustment.)

United States v. Norman, 143 F.3d 375 (8th Cir. 1998). (District Court appropriately grouped 25 counts on which Norman was convicted; proper procedure when counts are grouped is to use offense level of counts that carry most severe sentence (here, money laundering charges). District Court enhanced offense level on these counts by two levels based upon Court s finding Norman perjured himself during his testimony at trial. Norman argues on appeal procedure was improper and two-level enhancement should not have been applied because his perjury related only to wire fraud and interstate-transportation counts, and had nothing to do with laundering counts. This Court affirms obstruction-of-justice enhancement as perjury was relevant to money laundering counts; 18 U.S.C. § 1956(a)(1)(B)(i) requires defendant to know financial transaction at issue involves proceeds of unlawful activity. District Court found Norman lied about his understanding of ownership of money in Florida bank account, among other things. This information was relevant to jury s determination of whether Norman was guilty of money laundering, and Norman s perjury was obstruction of justice during prosecution of instant offense.)

United States v. O Hagan, 139 F.3d 641 (8th Cir. 1998). (This Court rejects government s contention District Court erred by not increasing O Hagan s offense level by two, based on obstruction of justice. While government claims O Hagan gave false and misleading testimony to SEC during investigation of O Hagan s trading in Pillsbury securities, this Court holds District Court did not abuse its discretion in finding any false or misleading testimony by O Hagan did not rise to level required for obstruction.)

United States v. Moss, 138 F.3d 742 (8th Cir. 1998). (Moss argues District Court erred in imposing two-level enhancement. At sentencing hearing, two U.S. Marshals testified that during trial recess, Moss knocked on Courtroom door to get witness s attention and made "cutthroat" gesture in witness s direction by drawing his hand across his throat. Howell s testimony continued after incident, but marshals testified witness was noticeably disturbed. Moss argues his conduct does not amount to § 3C1.1 requirement. District Court interpreted Moss s cutthroat gesture as attempt to influence or intimidate witness, and this Court finds no fault with interpretation. Although witness continued to testify after incident, attempt to intimidate or threaten witness--even if unsuccessful--is sufficient to sustain two-level enhancement.)

United States v. Coleman, 138 F.3d 344 (8th Cir.) (Enhancement applies when defendant has participated in destroying or concealing material evidence. Three defendants rely on Guidelines further direction that if such conduct occurs contemporaneously with defendant s arrest, enhancement does not apply unless it resulted in material hindrance to investigation, prosecution, or sentencing. This Court agrees with District Court that even if defendants burning of farmhouse could be considered contemporaneous with their arrest, total destruction of both farmhouse and substantial amount of potential evidence constituted material hindrance within meaning of Guidelines. Further, District Court followed grouping approach to closely related counts and enhancement did not represent double counting, but was properly applied.), cert. denied, 525 U.S. 899 (1998).

United States v. Eagle, 133 F.3d 608 (8th Cir. 1998). (After his arrest, Eagle was transported to Aberdeen and taken to hospital by authorities; Eagle told authorities he would check himself into

hospital and come to Court next morning. He did not check into hospital, nor did he appear in Court next day. Instead, Eagle went to another town and was arrested four days later. Eagle "willfully" (comment 3(e) to § 3C1.1) failed to appear at judicial proceeding and therefore, Court properly applied two-point enhancement.)

United States v. Dierling, 131 F.3d 722 (8th Cir. 1997). (Dierling challenges sentence enhancement of four levels for obstruction of justice for burning his property and for his flight from law enforcement officials. Sufficient evidence to support enhancement: evidence Dierling set fire to his property at time he knew he was target of investigation into production and distribution of methamphetamine (e.g., he knew police had searched his property only days before fire, he told another inmate while two were in jail that he set fire to his property to destroy remnants of methamphetamine laboratory). There was enough evidence to show Dierling consciously acted with purpose of obstructing justice.

Dierling argues Court improperly assessed two-level enhancement because of his flight and shooting deputy; he says deputy was attempting to arrest him on warrants for violation of protective order and so flight should not be attributed to any awareness of investigation of drug activities. There was evidence, however, Dierling knew he was suspected of drug dealing and intended to evade capture and protect illegal operation, sufficient to support obstruction ruling.), cert. denied, 523 U.S. 1054, 523 U.S. 1066 and 524 U.S. 922 (1998).

United States v. Rodgers, 122 F.3d 1129 (8th Cir. 1997). (Rodgers fled to England where he was subsequently arrested and placed in jail while he resisted extradition. Government presented evidence at sentencing Rodgers had attempted to escape from custody in Britain, and District Court found he had done so. Rodgers claims District Court clearly erred in finding escape attempt occurred, and record does not support imposition of enhancement. Government has burden of proving fact of escape attempt by preponderance of evidence. Here, evidence of escape was limited to testimony of one witness who testified Rodgers called her from jail and informed her that on his way from jail to Court there would be escape attempt, and he also informed her he had recruited guard to help him and he would flee to South America. This Court agrees evidence regarding escape attempt was not overwhelming, but finds District Court s determination government had met its burden not clearly erroneous; finding was based in large part on credibility determinations and testimony was not contradicted by extrinsic evidence: no clear error. While escaping or attempting to escape from custody before trial constitutes one type of conduct to which § 3C1.1 may be applied, District Court additionally considered Rodgers s illegal emigration from U.S. using false identification, and Rodgers s failure to appear for Court appearance. All such behavior involves willful obstruction of justice, and this Court concludes District Court correctly applied enhancement. This Court finds meritless Rodgers s argument that adjustment is unfairly counted twice as § 5G1.2 grouping resolved any such theoretical issue.), cert. denied, 522 U.S. 1061 (1998).

United States v. Pompey, 121 F.3d 381 (8th Cir. 1997). (Pompey wrote several letters to his sister urging her not to testify against him and indicating he could not be convicted without her testimony; he argues this conduct did not amount to obstruction. While Pompey made no threats, he repeatedly urged his sister and co-conspirator not to testify against him. This Court characterizes action as clear attempt to impede his sister s testimony and thus impede administration of justice.

Public is entitled to truthful testimony of citizens who witness crimes; Pompey s letters can easily be read as encouraging his sister to make herself unavailable when her testimony was needed.

Pompey argues he did no more than lawyer might have done in advising client to invoke Fifth Amendment right to remain silent. Having already pleaded guilty, Pompey s sister would no longer be entitled to protection of Fifth Amendment.), cert. denied, 522 U.S. 1133 (1998).

United States v. Drapeau, 121 F.3d 344 (8th Cir. 1997). (Drapeau argues District Court erred in enhancing his sentence based on intimidation of witnesses. He argues evidence relied on by District Court--hearsay--was untrustworthy. In this case, Heth testified during his own sentencing hearing Drapeau had sent Heth suggestive letters regarding Heth s possible decision to testify, and Drapeau spoke with Heth and threatened to assault Ross because Ross cooperated with government. Heth testified because of Drapeau s size, family connections, and Heth s history with Drapeau, these threats against Ross intimidated Heth. Ross asserted Drapeau s threats against Ross eventually reached Ross and intimidated Ross. No error in two-point enhancement for attempted obstruction of justice where District Court did not err in crediting Heth s and Ross s hearsay as Court presided at Heth s sentencing and was in best position to observe demeanor of witness and to assess credibility of Heth s testimony. Ross s affidavit is consistent with Heth s testimony and such internal consistency lends substantial indicia of reliability to testimony (§ 6A1.3(a)).)

United States v. Grajales-Montoya, 117 F.3d 356 (8th Cir.) (Deluca challenges sufficiency of trial Court s findings with respect to enhancement. Here, District Court noted it was not basing enhancement on Deluca s guilt, and it was absolutely convinced Deluca perjured himself. While Court did not explicitly list particular statements by Deluca it believed to be false, and this Court has indicated preference District Court state specific instances of perjury on which it seeks to base enhancement, it is enough that it make independent and specific finding defendant committed perjury; moreover, this Court must give due regard to trial Court s finding defendant lied to jury. In these circumstances, this Court holds trial Court s findings regarding Deluca s perjury are sufficiently specific.), cert. denied, 522 U.S. 983 and 522 U.S. 1007 (1997).

United States v. Rodriguez, 112 F.3d 374 (8th Cir. 1997). (After discussion with lawyers for government and for Rodriguez in which they argued about both extent of "deceit" associated with Rodriguez s trial testimony and contradictions between his testimony and cooperating co-defendant s testimony, Court simply denied objection to two-level increase. Ordinarily, in considering whether defendant obstructed justice, this Court believes it preferable for Court to make specific findings with respect to instances of perjury by defendant. Nature and extent of discussion in this case, however, sufficient for this Court to hold District Court s decision to impose increase is not clearly erroneous.)

United States v. Gjerde, 110 F.3d 595 (8th Cir.) (Gjerde argues District Court improperly enhanced his sentence for obstruction on basis he perjured himself at trial. District Court s decision was not clearly erroneous as it found Gjerde testified falsely in attempt to affect outcome of his case. Gjerde testified in direct conflict with evidence and this Court agrees enhancement was appropriate.), cert. denied, 522 U.S. 949 367 (1997).

United States v. Moore, 108 F.3d 878 (8th Cir. 1997). (Moore contends District Court did not make requisite findings to support application of enhancement, and claims enhancement was clearly erroneous. This Court will not address question because it is mooted by Court's finding District Court did not err in sentencing Moore as armed-career criminal; reversal of 3C1.1 enhancement would not affect Moore's BOL of 34 and therefore, would not affect his sentence.)

United States v. Lank, 108 F.3d 860 (8th Cir. 1997). (No error in imposition of enhancement where not only did Lank s suppression hearing testimony conflict with that of four law enforcement officers, it also conflicted with his statements under oath at his guilty plea hearing.)

United States v. Garin, 103 F.3d 687 (8th Cir. 1996). (District Court s finding Garin lied to jury and persuaded another to do so is amply supported by record, and Court s assessment of obstruction enhancement is not clearly erroneous.), cert. denied, 520 U.S. 1148 (1997).

United States v. Kime, 99 F.3d 870 (8th Cir. 1996). (Bell challenges District Court s two-level enhancement for perjuring himself at trial. Bell argues enhancement is inapplicable because reasonable jury could have believed him and his alibi witnesses. This Court finds no error where District Court s findings include 12 specific instances where Bell s alibi testimony was flatly contradicted by either his own subsequently disavowed confession or unequivocal testimony of his former co-conspirators or other witnesses.), cert. denied, 519 U.S. 1141 (1997).

United States v. Crosby, 96 F.3d 1114 (8th Cir. 1996). (Crosby argues District Court simply relied on jury s rejection of his testimony, without making express finding he committed perjury. This Court concludes District Court s finding Crosby had testified falsely was properly based on Court s independent evaluation of Crosby s trial testimony (sentencing transcript shows District Court expressly found Crosby had lied about his involvement in drug conspiracy and Court documented each element of alleged perjury). This Court takes opportunity to recommend sentencing judges make clear they have evaluated defendant s testimony in light most favorable to defendant.)

United States v. Thomas, 93 F.3d 479 (8th Cir. 1996). (Here, District Court found Thomas had obstructed justice by testifying falsely under oath. It is well accepted perjury at trial amounts to obstruction. District Court must decide by preponderance of evidence perjury was committed. District Court was not clearly erroneous in concluding Thomas had committed perjury where trial Court found that at minimum, several of Thomas s statements under oath were lies and those matters were material to charges before Court. Moreover, Thomas s testimony was undermined by another witness s account of events and police observations.)

United States v. Scott, 91 F.3d 1058 (8th Cir. 1996). (A defendant s testimony should be evaluated in light most favorable to him. District Court concluded Scott s testimony under oath constituted perjury both as to money in his possession when he arrived in Lincoln and as to his involvement in sale of crack. Scott s testimony concerned material matter and nothing suggests it was given out of confusion or mistake. District Court s finding is supported by review of record as whole.)

United States v. Iversen, 90 F.3d 1340 (8th Cir. 1996). (Government cross-appeals District Court s refusal to enhance Iversen s sentence as it argues Iversen committed perjury by testifying she had been robbed at ranger station--testimony which both jury and judge rejected. Iversen argues Court s refusal to find perjury under preponderance of evidence standard shows evidence was not sufficient to convict her under beyond reasonable doubt standard. District Court properly applied guideline and found although neither jury nor Court believed Iversen in this case, reasonable trier of fact could have believed her testimony. This Court also rejects Iversen s contention as fact that reasonable trier of fact could have believed Iversen s testimony does not mean other reasonable triers of fact--including jury and judge in her case--were not free to disbelieve her. There are number of reasons trial Court could decline to impose enhancement on defendant whom Court nonetheless disbelieves.)

United States v. Black, 88 F.3d 678 (8th Cir.) (District Court did not err in imposing two-level increase where Black had given false name to police officers.), cert. denied, 519 U.S. 1132 (1997).

United States v. Caldwell, 88 F.3d 522 (8th Cir.). (No error in District Court s addition of two levels to Caldwell s BOL for obstruction, because it found Caldwell attempted to intimidate witness.), cert. denied, 519 U.S. 1048 (1996).

United States v. Berndt, 86 F.3d 803 (8th Cir. 1996). (Asmussen believed Court should not have relied on testimony of his co-conspirator; and Court s findings in regard to perjury were insufficient. Government bears burden of proving facts necessary to support enhancement; enhancement cannot be given simply because jury does not believe defendant--Court must find defendant committed perjury. District Court did not clearly err where Asmussen testified he had no knowledge of odometer tampering. Jury believed Asmussen had lied and trial judge also believed testimony was knowingly and materially false.)

United States v. Hang, 75 F.3d 1275 (8th Cir. 1996). (District Court imposed enhancement because of harassment perpetrated by Hang s friends and family against government witnesses. Hang claims two-point enhancement was improper because government did not introduce sufficient evidence to show he willfully impeded administration of justice by masterminding this odious scheme. This Court acknowledges there is no evidence suggesting Hang himself directly tormented government witnesses. This Court could not say District Court committed clear error when it found Hang engaged in conduct justifying enhancement as testimony provided adequate foundation from which District Court could logically infer Hang was directing nefarious activity of his confederates and guideline makes Hang chargeable for conduct he aided, counseled, willfully caused (comment. n.7).)

United States v. Big Crow, 74 F.3d 163 (8th Cir. 1996). (District Court increased Big Crow s offense level two levels finding he had testified falsely at trial by denying he had assaulted victim and by saying he had seen another assault victim. District Court s finding was not clearly erroneous where it made independent finding Big Crow had committed perjury; in making finding,

Court placed substantial reliance upon eyewitness testimony and finding assault victim s testimony to be credible.)

United States v. Thomas, 72 F.3d 92 (8th Cir. 1995). (This Court concludes District Court properly assessed enhancement because Thomas absconded from supervision.)

United States v. Darden, 70 F.3d 1507 (8th Cir. 1995). (District Court applied enhancement to Darden s BOL for both his aggregated drug offenses and his attempted murders; Darden contends evidence is insufficient to support enhancement. District Court found Darden committed perjury at trial when he denied any involvement in attempted murder of Bartlett. Darden argues because other evidence arguably corroborates his testimony, evidence does not support finding. This Court disagrees, pointing to testimony from eyewitnesses to shooting and other testimony that Darden himself described his role in crime. Jury found government had proven attempt to murder Bartlett beyond reasonable doubt; District Court also chose to credit same testimony. In determining Darden falsely asserted his innocence of crime, Court found by preponderance of evidence exactly what jury found beyond reasonable doubt. Not clearly erroneous as evidence establishes Darden committed attempted murder on behalf of drug conspiracy and perjury justifies enhancement applied to both Bartlett s attempted murder and aggregated drug offenses.), cert. denied, 517 U.S. 1149 (1996).

United States v. Wonderly, 70 F.3d 1020 (8th Cir. 1995). (Wonderly argues District Court s findings are not supported by record and are clearly erroneous; Court failed to make necessary findings she committed perjury and placed undue emphasis on jury s disbelief of her testimony. While specific findings of false statements are preferable, absence thereof does not render enhancement invalid where District Court sufficiently indicates it considered trial testimony in light of factual predicates for perjury finding.), cert. denied, 517 U.S. 1146 (1996).

United States v. Anderson, 68 F.3d 1050 (8th Cir. 1995). (Providing materially false information to probation officer in course of presentence investigation (PSI) for Court constitutes willful obstruction of justice; merely providing incomplete or misleading information--not amounting to material falsehood--to probation officer does not support enhancement. Here, District Court assessed two-level enhancement finding Anderson, in continuing effort to conceal assets from creditors, intentionally failed to provide financial information U.S. probation officer expressly requested during PSI. District Court did not clearly err in assessing enhancement where Anderson attempted to hinder PSI by intentionally failing to provide requested information, providing highly incomplete information, and referring probation officer to persons who could not provide information when he could have provided information himself. Moreover, Anderson s intentional conduct rose above merely providing incomplete information because while feigning cooperation, he was attempting to minimize and conceal his assets.)

United States v. Jackson, 67 F.3d 1359 (8th Cir. 1995). (Record supports two-level adjustment where District Court concluded Jackson testified falsely on material matter when he stated phrase “three O s” did not refer to three ounces of drugs.), cert. denied, 517 U.S. 1192 (1996).

United States v. Pena, 67 F.3d 153 (8th Cir. 1995). (Pena argued District Court improperly enhanced his sentence based upon Pena s perjury at trial. Finding of trial perjury supports obstruction enhancement. This Court affirms enhancement where District Court identified specific instances in which Pena had falsely denied knowledge of or involvement in drug trafficking, with intent to cause jury to find him not guilty; these findings are sufficient under U.S. v. Dunnigan and are not clearly erroneous.)

United States v. Lambros, 65 F.3d 698 (8th Cir. 1995). (Lambros argued District Court s finding of perjury and resulting obstruction enhancement was improper because Court did not specifically find perjury to have been willful. While it would have been preferable for District Court to make overt willfulness finding, review of record shows unequivocally Lambros s trial testimony was insincere, cynical and calculated--willful perjury of most odious sort.), cert. denied, 516 U.S. 1082 (1996).

United States v. Otto, 64 F.3d 367 (8th Cir. 1995). (District Court s finding Otto s statements to law enforcement officers significantly obstructed or impeded investigation, was not clearly erroneous. By creating false evidence, Otto attempted to obstruct or impede investigation; this Court need not consider whether attempt had any actual effect on investigation. Otto also argued enhancement was improper because none of his obstructive acts were directly related to "instant offense" (possession of unregistered firearm). Otto s involvement in harassment incidents was relevant to determining appropriate sentence for "instant offense"; Otto sought to conceal evidence relevant to determining whether it was necessary to depart upward from normal guideline sentence for unregistered firearm conviction--sufficient relationship to support enhancement.), cert. denied, 516 U.S. 1133 (1996).

United States v. Cardona-Rivera, 64 F.3d 361 (8th Cir. 1995). (Patino challenged enhancement, claiming false statements he made to presentence officer were not material because they did not impede government s investigation, prosecution, or sentencing, and did not affect outcome of his bond hearing or sentencing. As even government conceded, Patino s case is like U.S. v. Yell: Patino retracted his false statements prior to sentencing; PSR before District Court contained correct information (it stated false statements did not hinder prosecution of offense); and government stated false statements did not impede investigation. Thus, false statements made by Patino could not be considered material for § 3C1.1 enhancement purposes. Patino s sentence reversed and cause remanded for resentencing.)

United States v. Smith, 62 F.3d 1073 (8th Cir. 1995). (Smith objected to District Court s finding she obstructed justice by fleeing after being questioned, contending enhancement does not apply to mere flight to avoid arrest. District Court has discretion to apply section to broad range of conduct and it did not abuse that discretion under circumstances in which Smith answered questions and offered to cooperate during post-arrest interview with secret service agents, but gave false address, retrieved and sold fraud proceeds, and fled. She adopted aliases and was located through police investigation almost three years later.), cert. denied, 516 U.S. 1098 (1996).

United States v. Walcott, 61 F.3d 635 (8th Cir. 1995). (Walcott argues his conduct following

filing of indictment constituted mere avoidance of, or flight from, arrests--impermissible grounds to support enhancement. While individual components of Walcott s conduct alone may not constitute obstruction, when viewed cumulatively, this Court concludes totality of Walcott s conduct warranted enhancement as it constituted more than merely avoiding or fleeing from arrest. This Court rejects Walcott s contention he did not know he was wanted by authorities until very late in game: following preliminary contact with Walcott himself, agents contacted number of sources with ample access to Walcott and apprised them of serious situation. Prior to final standoff, Walcott changed his residence, employed use of additional alias, and attempted to change his appearance, nor would Walcott surrender when authorities finally caught up with him. Walcott willfully and deliberately engaged in conduct over considerable amount of time calculated to mislead and deceive authorities.), cert. denied, 516 U.S. 1132 (1996).

United States v. Cohen, 60 F.3d 460 (8th Cir. 1995). (Cohen did not dispute he lied to FBI and probation officer. Rather, he contended his falsehoods did not impede investigation and thus were not material as defined in application note 5. While providing false background information (aliases, social security numbers, date, country of birth) is not always cause for obstruction enhancement, given nature of Cohen s crimes, such background information was vital to investigating officials. Financial records of kind Cohen s scams involved are classified by information like name, social security number, and birth facts--the same things Cohen admits having lied about. District Court properly found Cohen deserved obstruction enhancement.)

United States v. Pereira-Munoz, 59 F.3d 788 (8th Cir. 1995). (Pereira-Munoz was stopped on highway by state trooper which led to search and eventually, conditional plea of guilty to possession with intent to distribute cocaine. District Court imposed enhancement because it determined Pereira-Munoz provided false resident alien identification card to probation officer in respect to presentence investigation; Pereira-Munoz presented no evidence to contrary. District Court did not err in finding he submitted false identification. Pereira-Munoz also argued his failure to reveal his true identity did not impede investigation of offense or sentencing process. His failure to provide truthful identity hampered preparation of PSR and precluded determination as to whether Pereira-Munoz had criminal history. District Court was not clearly erroneous; moreover, even if Pereira-Munoz did not succeed in actually obstructing administration of justice, his use of alias constituted attempted obstruction, warranting enhancement.)

United States v. Irons, 53 F.3d 947 (8th Cir. 1995). (This Court rejects Irons s assertion that increasing his offense level for perjury unconstitutionally infringed on his right to testify, put forth his factual defense, or appeal his conviction. This Court concludes there was sufficient record evidence to support Court s finding of perjury where Irons s testimony directly contradicted another witness s that car crash was staged and accident reconstructionist s testimony car crash could not have occurred way Irons described it.)

United States v. Alexander, 53 F.3d 888 (8th Cir. 1995). (District Court imposed two-level increase based on finding Alexander had helped cohort to flea. District Court s finding of obstruction not clearly erroneous where cohort was enmeshed in legal difficulties and obviously in position where he was likely to benefit from cooperation with police. Cohort had knowledge of

Alexander s crimes and for Alexander to finance cohort s flight supports inference that Alexander meant to prevent cohort from telling police what he knew.

Alexander argued financing witness s flight is not type of activity covered by § 3C1.1. Acts qualified as obstruction not because Alexander helped cohort to flea justice, but because he attempted to put cohort out of government s reach as witness. Thus, this Court holds Alexander s acts fall within § 3C1.1.

Kvamme also argued District Court erred in finding he obstructed justice in assisting cohort to flea. Based upon same rationale, enhancement was appropriate as it was based not on keeping cohort from answering to justice, but because Kvamme sought to keep him from cooperating with government against Kvamme.)

United States v. Escobar, 50 F.3d 1414 (8th Cir. 1995). (Escobar argued two-level increase was improper because no evidence was presented establishing his specific intent to threaten witness into refusing to testify. No clear error where District Court found credible witness s testimony that Escobar threatened him and his family if he testified and Escobar made witness write letter that retracted his prior statements to police, claiming statements were result of police coercion.)

United States v. Hare, 49 F.3d 447 (8th Cir.) (District Court applied enhancement finding Hare had agreed to cooperate in investigation but then fled to Canada, told another target of investigation that FBI would be coming, and took with him some criminally derived funds. Hare contended factual findings were clearly erroneous because his trip to Canada was not for purpose of flight but to seek new legal representation. District Court s findings of fact not clearly erroneous where record is clear Hare went to Canada with substantial amount of money and before he left, called target of investigation and told him FBI would be coming to see him soon. Hare also pointed to commentary which states avoiding or fleeing from arrest does not warrant enhancement. In this case Hare s trip to Canada was willful breach of agreement to cooperate in investigation and not instinctive pre-arrest flight. Obstruction enhancement was not error.), cert. denied, 516 U.S. 879 (1995).

United States v. Rice, 49 F.3d 378 (8th Cir.) (Washington challenged two-level increase. Basis for increase was Washington allegedly made threatening phone calls to father of major government witness. There was conflicting evidence from father as to whether calls were of harassing nature. In view of conflicting evidence, District Court made credibility determination and choice between two permissible views of evidence cannot be clearly erroneous.), cert. denied, 515 U.S. 1168 (1995).

United States v. Hall, 46 F.3d 855 (8th Cir. 1995). (On cross-appeal, government challenged District Court s refusal to increase Hall s sentence for obstruction. PSR had recommended enhancement based on barroom confrontation between Hall and his brother and witness; PSR stated witness feared Halls would carry out threat. District Court denied enhancement, attributing incident to political and power struggles historically present between families on reservation. District Court did not make finding as to whether Hall made disputed threat, apparently concluding even if Hall had threatened witness, it would not be appropriate to enhance sentence. This Court vacates sentence and remands to District Court to find whether Hall threatened witness, and if he did, to

enhance sentence by two levels: Guidelines did not give District Court discretion to refuse to take threat into account in sentencing.)

United States v. Chadwick, 44 F.3d 713 (8th Cir. 1995). (At suppression hearing, Chadwick claimed not to have read his own confession before he signed it--which directly contradicted District Court s finding Chadwick knew what was in confession when he signed it. Defendant is subject to obstruction enhancement if he testifies falsely under oath in regard to material matter and does so willfully rather than out of confusion or mistake. Such enhancement is warranted if perjury occurs at suppression hearing. Thus, no clear error in District Court s finding Chadwick committed perjury at suppression hearing and two-point enhancement was warranted.)

United States v. Has No Horse, 42 F.3d 1158 (8th Cir. 1994). (This Court holds reversal of conviction on other grounds does not limit ability of sentencing judge to consider defendant s conduct prior to reversal in determining sentence on remand. In this case on remand, Has No Horse pleaded guilty to lessor charge of sexual abuse of minor and District Court sentenced him to three years and one month; sentence included enhancement under § 3C1.1 for obstruction during first trial, expressly adopting District Court s earlier finding of perjury. This Court affirms.)

United States v. St. James, 38 F.3d 987 (8th Cir. 1994). (While Nance conceded he gave federal authorities false name, social security number, and date of birth at various points in investigation and prosecution of his case, he argued enhancement does not apply to him based on note 4(a) because his deceptive conduct did not significantly hinder investigation or prosecution. This Court finds Nance s reliance on note 4(a) misplaced as his conduct was more like that listed in note 3: after his arrest, he lied to FBI, pretrial services officer, and magistrate judge. Nance s identity was material fact. Also, Nance provided materially false information to pretrial services officer who was investigating Nance s pretrial release for Court.)

United States v. McCoy, 36 F.3d 740 (8th Cir. 1994). (District Court did not clearly err in finding investigation of bank fraud was significantly hindered where McCoy s use of alias upon his arrest occasioned added investigation and delay; this Court rejects both McCoy s arguments that arresting officers should have taken steps to confirm his identity when he was arrested and that his attempt to cash counter check was not part of "instant offense" when he stipulated that attempt to cash that check was in furtherance of fraud scheme. Court also rejects as meritless McCoy s argument his use of alias was attempt to avoid or flee from arrest.)

United States v. Cabbell, 35 F.3d 1255 (8th Cir. 1994). (Cabbell argued both his testimony and determinations made by jury demonstrated he did not obstruct justice. This Court agrees. District Court found Cabbell committed perjury because he lied about extent of his drug dealing. No enhancement should be imposed based on defendant s testimony if reasonable trier of fact could find testimony true. During trial, Cabbell made number of admissions--involvement in prostitution business, use of drugs at his home, purchase of crack from numerous drug dealers--and given these admissions and findings of jury, District Court did not evaluate Cabbell s testimony in light most favorable to him as required by § 3C1.1, application n.1.)

United States v. Patel, 32 F.3d 340 (8th Cir. 1994). (District Court s finding of perjury was not clearly erroneous: it made independent determination Patel perjured himself when he testified he did not know RTC was government agency. Among factors causing Court to reach this conclusion were Patel had materials in his briefcase describing RTC; he was familiar with certifications that CFR required purchasers of RTC property to sign; he compared his arrangement with government official to method of doing business with government officials in India; and he acknowledged he and official could go to jail and took steps to avoid anyone finding out about transaction.)

United States v. Evans, 30 F.3d 1015 (8th Cir. 1994). (District Court did not err in assessing two-level increase based on perjury.), cert. denied, 514 U.S. 1028 (1995).

United States v. McCormick, 29 F.3d 352 (8th Cir. 1994). (District Court applied two-level enhancement after expressly finding McCormick perjured himself at trial. District Court did not clearly err in adding enhancement where both trial testimony and tape recordings of telephone conversations provided substantial evidence that McCormick s statements at trial were false.)

United States v. Duranseau, 26 F.3d 804 (8th Cir.) (District Court enhanced Duranseau s offense level by 2, having found Duranseau had suborned perjury of one of his alibi witnesses; Court determined alibi witness perjured herself in order to bolster her alibi testimony. Duranseau argues government failed to produce evidence of nexus between witness s perjured testimony and Duranseau s procurement of that testimony. Parties did not dispute witness perjured herself. District Court found Duranseau and his relatives provided alibi testimony for one another; there was evidence these prior alibi testimonies were false. Further, there was evidence Duranseau sent letter to another witness asking him to find documents that would jog his memory as to Duranseau s whereabouts at time of burglary. Majority of panel found evidence supported District Court s findings there was nexus between alibi testimonies and Duranseau s procurement of testimony. DISSENT: District Court relied on evidence that Duranseau had, in past, testified for some of his relatives and relatives had, in past, testified and provided alibis for him. History was insufficient evidence for District Court to conclude Duranseau s suborned alibi witnesses perjury.), cert. denied, 513 U.S. 939 (1994).

United States v. Adediran, 26 F.3d 61 (8th Cir. 1994). (Adediran contended District Court erred in imposing two-point enhancement based on Adediran s failure to provide his true identity to police, his momentary refusal to submit to fingerprinting, and his failure to appear for state Court proceedings in January 1992. This Court s discussion focused on Adediran s failure to appear which he argued should be excused because it involved state rather than federal Court, because it found it dispositive. Application note 3(e) provides that willfully failing to appear, as ordered, for judicial proceeding warrants obstruction enhancement; Guidelines make no distinction between state and federal authorities or proceedings. Connection between obstructed state proceedings and investigation of federal offense was easily satisfied here as Adediran s misrepresentation of his social security account number was intimate part of conduct for which local police arrested him. This Court concluded that this circuit does not prohibit obstruction enhancements in federal prosecutions merely because state entities were involved. It cited Eighth Circuit opinions upholding

enhancements even when obstruction involved state authorities and looked to Ninth Circuit case of United States v. Lato for its persuasive reasoning on issue.)

United States v. Maxwell, 25 F.3d 1389 (8th Cir.) (This Court rejects Maxwell s challenge to obstruction enhancement. After reviewing all evidence concerning Maxwell s involvement in distribution of cocaine, District Court found Maxwell had committed perjury by testifying he had never possessed or distributed cocaine. Upon review of record, this Court did not find District Court s credibility determination clearly erroneous.), cert. denied, 513 U.S. 1031 (1994).

United States v. Gleason, 25 F.3d 605 (8th Cir.) (Two-level enhancement was appropriate and District Court s findings were not clearly erroneous where it found Gleason lied under oath at suppression hearing about his consent to search, issue he knew was material, and he used his experience as police officer to attempt to manipulate course of proceedings.), cert. denied, 513 U.S. 911 (1994).

United States v. Blanc, 24 F.3d 1029 (8th Cir.) (Blanc contended District Court erred because it failed to make specific findings of untruthful testimony when finding that he committed perjury at trial. Based on record, this Court finds District Court did make such findings and record established solid basis for perjury enhancement; testimony given at trial can provide basis for upward adjustment.), cert. denied, 513 U.S. 909 (1994).

United States v. McIntosh, 23 F.3d 1454 (8th Cir.) (District Court enhanced McIntosh s sentence by two levels based on agent s testimony that he overheard McIntosh tell his wife on phone from jail to "take care of" two individuals McIntosh suspected told police he sold drugs. McIntosh argued that because his wife did not actually carry out threat, enhancement was unjustified. This Court finds McIntosh s argument meritless.), cert. denied, 513 U.S. 935 (1994).

United States v. Turk, 21 F.3d 309 (8th Cir. 1994). (District Court stated it was convinced defendant s denial of any involvement in drug dealing was not rationally consistent with truth. Turk contended Court did not make specific findings of particular false statements and support by something more than guilty verdict. This Court rejects Turk s argument as judge stated he examined Turk s testimony and was convinced she committed perjury by denying any involvement in drug conspiracy, representing Court s specific finding that Turk lied when she testified she was not involved in drug conspiracy.)

United States v. Rimell, 21 F.3d 281 (8th Cir.) (PSR recommended increase because Rimell provided false information to and concealed information from bankruptcy Court in matters relating to bank fraud. While District Court could not assess enhancement on counts which charged Rimell with bankruptcy fraud because of his conduct in bankruptcy Court as it would result in double-counting, Court could assess enhancement on count which charged Rimell with false bank entry. Finding that Rimell s conduct in bankruptcy proceeding impeded investigation or prosecution of false bank entry count is not clearly erroneous and hence two-level enhancement applied to grouped Guidelines counts.), cert. denied, 513 U.S. 976 (1994).

United States v. Zerba, 21 F.3d 250 (8th Cir. 1994). (Zerba was convicted of harboring fugitive. District Court s findings were not clearly erroneous as Zerba aided and abetted co-conspirator to evade law for approximately two-month period.)

United States v. Magee, 19 F.3d 417 (8th Cir. 1994). (Trial Court made specific finding that Friends s testimony was false. Based on transcript of sentencing hearing, finding was not clearly erroneous and imposition of two-level increase under those circumstances is not improper.)

United States v. Yell, 18 F.3d 581 (8th Cir. 1994). (District Court assessed two-point increase based on allegedly false statement Yell made to his probation officer regarding quantity of his drug distribution. This Court concludes District Court erred in applying enhancement. Although Yell may have minimized drug quantity to his probation officer, it is clear he truthfully informed Court on several occasions prior to sentencing he had sold two kilograms of cocaine, amount for which he was ultimately found to be responsible. Under these facts, Yell s single comment did not constitute materially false information in light of his subsequent effort to correct inconsistency in his statements prior to sentencing. Because District Court was accurately apprised of amount of cocaine involved at time of its sentencing determination, comment to probation officer was not materially false as required for sentencing enhancement under application note 3. DISSENT: Finds no error in awarding enhancement as Yell admitted he at first did not tell probation officer truth about amount of cocaine and amount of drugs that he dealt is single most important datum in determination of sentence for drug dealing.)

United States v. Clay, 16 F.3d 892 (8th Cir. 1994). (District Court found as perjured testimony Clay's statements that Michels first approached him and offered money for purpose of helping citys residents, and Clay distributed $3000 to others for purposes of guarding clean-up cite. Government s witnesses and tape-recorded conversations provided substantial evidence supporting Court s finding that these statements were false; moreover, Clay s own trial testimony supported Court s findings, e.g., Clay was unable to name any of several persons to whom he allegedly distributed $3000.)

United States v. Casares-Cardenas, 14 F.3d 1283 (8th Cir.) (District Court found Casares perjured himself on stand at trial, noting Casares s denials and evidence in contradiction. Findings were not clearly erroneous and supported upward adjustment for obstruction.), cert. denied, 513 U.S. 849 (1994).

United States v. Behler, 14 F.3d 1264 (8th Cir.) (Behler s attempts to intimidate witness, as found by both magistrate judge and District Court, merited obstruction enhancement.), cert. denied, 513 U.S. 960 (1994).

United States v. Oakie, 12 F.3d 1436 (8th Cir. 1993). (Oakie argued record did not support District Court s finding he committed perjury at trial and enhancement undermines his right to testify in his own behalf. In its sentencing memorandum, District Court reviewed contradictions between Oakie s testimony and that of other witnesses and concluded "testimony of other witnesses supports probation officer s finding . . . [Oakie] perjured himself at trial, and, thus, obstructed

justice." Because sentencing judge also heard trial testimony in question, findings were sufficiently specific to support enhancement and ultimate perjury determination was not clear error.)

United States v. Olunloyo, 10 F.3d 578 (8th Cir. 1993). (This Court reviews de novo District Court s conclusion Olunloyo s violation of 18 U.S.C. § 111 is separate count of conviction for obstructive conduct (Court had grouped two drug offenses pursuant to § 3D1.2(d) and forcible interference conviction was treated as obstruction adjustment to offense level applicable to drug offenses). Language of statute encompasses conduct that properly may be deemed obstructive and § 111 conviction may be considered obstruction conviction for Guidelines purposes because of Congress s aim in enacting statute, protecting federal officers and preventing hindrances of federal functions. Olunloyo s plea necessarily included admission as to each element of § 111 offense including that he acted willfully. Olunloyo s argument that his conduct in fleeing from DEA agents was mere instinctive flight is rejected because of separate count of conviction for obstructive conduct. This Court rejects Olunloyo s "double-counting" argument because conduct supporting enhancement, i.e., assaulting DEA agents and resisting arrest, was not coterminous with conduct upon which drug convictions were based, i.e., trafficking heroin. Enhancement was appropriate way of dealing with § 111 conviction pursuant to grouping rules set forth in Guidelines. This Court also applies concurrent sentence doctrine and declines to address any issue concerning 36-month concurrent sentence.)

United States v. Ransom, 9 F.3d 707 (8th Cir. 1993). (As result of his participation in shadow-car scheme, Ransom pleaded guilty to conspiracy to commit mail and bank fraud. Based upon state police officer s testimony, District Court concluded Ransom had obstructed justice by concealing evidence (i.e., removing normal identification numbers and hiding Mazda truck used in scheme) material to official investigation or judicial proceeding. This Court concludes District Court s finding was not clearly erroneous and also rejects Ransom s double-counting argument as insurance scam did not require Ransom to abandon higher value vehicle after fraudulently obtaining insurance proceeds.)

United States v. Emmert, 9 F.3d 699 (8th Cir. 1993). (Government cross-appealed. This Court concludes District Court properly declined government s requested adjustment and agreed statements were somewhat ambiguous: Shannon commented to government witness just outside Courtroom "stay strong" and "be quiet.")

United States v. Ryan, 9 F.3d 660 (8th Cir. 1993) (en banc op. issued 10/31/94). (Ryan argued that District Court must make particularized findings he perjured himself in testifying he was innocent. District Court analysis does not call for specific findings but does call for independent evaluation and determination by Court that Ryan s testimony was false. Government urged enhancement based upon two excerpts of trial testimony wherein Ryan denied setting fires and denied using accelerants. Question of Ryan s perjury lies within sound discretion of District Court; this Court gives due regard to that Court s observation and judgments of credibility--no question enhancement in this case was based upon Court s independent and express finding that Ryan lied to jury.), cert. denied, 514 U.S. 1082 (1995).

United States v. Shinder, 8 F.3d 633 (8th Cir. 1993). (While Shinder was released on her own bond following her drug conviction, she fled to California. Her flight was sufficient grounds to find she had obstructed justice.)

United States v. Kenyon, 7 F.3d 783 (8th Cir. 1993). (Kenyon challenged two-level adjustment based on finding he obstructed justice when he flushed cocaine down toilet, for first time on appeal. He argued his conduct was contemporaneous with his arrest and did not materially hinder judicial process. This Court holds District Court correctly adjusted Kenyon s offense level as he could have had no other intent than to hinder his potential prosecution when he destroyed evidence of his criminal wrongdoing. Thus, agents did not have physical evidence of Kenyon s drug trafficking activities until they arrested him at party some months later. Thus, Kenyon s destruction of evidence caused four-month delay in investigation.)

United States v. Allen, 5 F.3d 345 (8th Cir. 1993). (Allen was initially arrested for conspiring to distribute methamphetamine; at his initial appearance and bond hearing, he testified his father owned and supplied money to purchase two houses located in North Little Rock. When he made these statements, Allen had not been charged with laundering money. Later, Allen recanted his previous testimony and admitted he purchased houses and titled them in his father s name. On appeal, Allen argued against two-level increase because he had not been indicted for money laundering when he committed perjury and therefore, his statement could not have impeded investigation of "instant offense." He also alleged he did not impede government s investigation because property was seized without opposition. This Court concludes that District Court did not clearly err in finding Allen s perjury impeded government s investigation where special agent had testified he had to change his investigation efforts after Allen denied purchasing properties. Offense of conviction may or may not be offense which initially attracted attention of police.)

United States v. Sykes, 4 F.3d 697 (8th Cir. 1993). (Sykes, who had pleaded guilty to unlawfully possessing four checks previously stolen from postal vehicle, tore stolen checks into pieces while in police car and holding cell. Where Sykes tore up checks after he was in custody and there was no evidence his actions were spontaneous, limited exception provided in n.3(d) does not apply. District Court did not clearly err in determining conduct resulted in material hindrance and in imposing enhancement; act of tearing checks resulted in delay and expense because investigators were forced to send check pieces to government crime lab to be reassembled.)

United States v. Mabry, 3 F.3d 244 (8th Cir. 1993). (This Court rejects David Edwards's argument that there was no evidence that he and his twin Daniel's attempt to confuse people by using each other's names, significantly hindered investigation or prosecution of conspiracy. District Court did not err in imposing enhancement. Although providing false name at arrest does not necessarily warrant obstruction enhancement, David engaged in concerted, and to some extent successful, effort to obstruct justice by playing his twin s name off against his own. Although fleeing from arrest alone does not warrant enhancement, Edwards destruction of incriminating evidence while fleeing does.)

United States v. Ball, 999 F.2d 339 (8th Cir. 1993). (Ball s conduct in attempting to escape from county jail constituted obstruction of investigation of offenses of conviction (manufacturing amphetamine) and District Court properly enhanced sentence. Ball was in custody in county jail on assault charge when federal agents began investigation of his drug laboratory. Prior to escape attempt, Ball had cooperated with federal officials in their investigation of drug manufacturing activities. Because Ball was facing federal drug charges at time, his attempt to escape from custody constituted not only attempt to obstruct state assault proceedings, but also attempt to obstruct investigation of his federal offenses.)

United States v. Oppedahl, 998 F.2d 584 (8th Cir. 1993). (During course of dealing with major LSD customer, Oppedahl remarked he would kill customer if he ever "narked" on his supplier. Unbeknownst to Oppedahl or customer, they were under suspicion and investigation. Upon government appeal, this Court affirms District Court s declination to apply enhancement where Oppedahl was unaware of investigation when he made culpable threat. Court is influenced by rule of lenity and belief that "willfully" should be reserved for more serious case where misconduct occurs with some knowledge of investigation; deterring effect of Guideline is thus advanced.)

United States v. Grady, 997 F.2d 421 (8th Cir.) (The District Court enhanced Grady s sentence based on its finding that Grady and others under his control threatened government witness while Grady was out on bail. This finding was not clearly erroneous where there had been testimony at Grady s bond revocation hearing and he had chance to present and cross-examine witnesses regarding threat.), cert. denied, 510 U.S. 958 (1993).

United States v. Willis, 997 F.2d 407 (8th Cir. 1993). (Willis argued that District Court s reasons for imposing obstruction enhancement were insufficient. This Court disagreed. District Court had relied on evidence it had heard at trial and its factual findings were not clearly erroneous where it found Willis had given perjurious testimony during course of trial and trial testimony had shown that Willis had sent kick-back check in name of fictitious company to avoid detection.), cert. denied, 510 U.S. 1050 (1994).

United States v. Wiley, 997 F.2d 378 (8th Cir.) (Where District Court believed witnesses testimony that Wiley threatened them with physical harm if they testified, enhancement was not clearly erroneous.), cert. denied, 510 U.S. 1011 (1993).

United States v. Armstrong, 992 F.2d 171 (8th Cir. 1993). (Solicitation of false testimony may constitute basis for enhancement. District Court did not clearly err in enhancing where it discredited Armstrong s testimony and believed co-conspirators who testified Armstrong offered them money to take responsibility for scheme.)

United States v. Marx, 991 F.2d 1369 (8th Cir.) (Perjury has been held to constitute obstruction of justice. District Court did not clearly err in making credibility finding that conflicts between Marx s testimony and that of other witnesses concerning creation of false documents were

result of purposeful deception by Marx.), cert. denied, 510 U.S. 1018 (1993).

United States v. Ransom, 990 F.2d 1011 (8th Cir. 1993). (While presented with several different factors upon which to base enhancement, District Court relied only upon Ransom s lies before grand jury. PSR is not evidence. This Court reverses and remands where District Court failed to point to any specific alleged acts of perjury and government did not accept invitation to point out other instances. Moreover, Court was not familiar with grand jury transcript nor was there trial giving judge opportunity to observe Ransom as witness.)

United States v. Neal, 990 F.2d 355 (8th Cir. 1993). (District Court s two-level upward adjustment was not clearly erroneous where Court specifically found Neal s testimony constituted perjury and noted that upon arrest, Neal denied he was being arrested by law enforcement officers and even denied he was in clearly marked U.S. Marshal s office.)

United States v. Mills, 987 F.2d 1311 (8th Cir.) (Mills contended government failed to prove he "willfully" obstructed justice. District Court found willful obstruction on basis of arguments made during sentencing and its familiarity with what had occurred at trial and this Court concludes record demonstrated Mills used forged documents at trial and testified falsely about them.), cert. denied, 510 U.S. 953 (1993).

United States v. Yankton, 986 F.2d 1225 (8th Cir. 1993). (Government appealed denial of increase premised upon Yankton s initial denial to tribal investigator of sexual intercourse with victim, his alleged perjurious testimony under oath, and repetition of these statements to probation officer. District Court s refusal to make obstruction adjustment was not clear error: Yankton s statement was general denial of guilt not made under oath; his testimony was not admitted to be, or held to be, perjury--rather, it represented disagreement as to facts.)

United States v. Cox, 985 F.2d 427 (8th Cir. 1993). (This Court concludes government failed to meet its burden to prove that Cox obstructed justice during investigation of instant offense and reverses enhancement. Alleged discrepancies between information Cox gave investigating officers and lesser amount he gave grand jury had no impact on government s prosecution of Cox. Perjury may not be inferred.)

United States v. Womack, 985 F.2d 395 (8th Cir. 1993). (Obstruction enhancement proper in this case where District Court found Womack had committed perjury at trial (which alone would have justified enhancement) and he had provided drivers license obtained under alias to law enforcement officer which impeded investigation.), cert. denied, 510 U.S. 902 (1994).

United States v. Adipietro, 983 F.2d 1468 (8th Cir. 1993). (District Court s finding not clearly erroneous where government proved by preponderance of evidence that Sanchez had attempted to procure bodily injury of prosecution witness in order to prevent him from testifying. District Court based finding on nature of what Sanchez said in his jail communications, his tone of voice in saying it, and roundabout way he said it; Court expressly found testimony of communication-recipient credible.)

United States v. Schenk, 983 F.2d 876 (8th Cir. 1993). (Where Court made adjustment based on its own finding that Schenk committed perjury and was never charged with separate perjury offense, Schenk cannot raise double jeopardy argument.)

United States v. Lamere, 980 F.2d 506 (8th Cir. 1992). (Mark was convicted of passing counterfeit one hundred dollar bill; obstruction enhancement was applied for his role in directing his brother to conceal $39,600 in counterfeit found in attic. This Court rejects Mark s contention concealment was unrelated to offense for which he was convicted. $39,600 Mark sought to conceal was material to disproving his claim of innocent possession of one hundred dollar bill and proving his intent to defraud by passing bill. Accordingly, District Court did not err by enhancing.

On other hand, John had pleaded guilty to possessing or concealing falsely made counterfeit obligation of United States. Here, obstruction enhancement was based upon conduct that was coterminous with conduct for which he was convicted--such enhancement would amount to double-counting. Thus, District Court erred; portion of decision reversed.)

United States v. Larson, 978 F.2d 1021 (8th Cir. 1992). (While Larson explained letter to friend was asking him to contact people involved in incident to determine whether they would tell truth and Larson could use them as defense witnesses, District Court disbelieved Larson s explanation and found Larson attempted to manufacture testimony--a finding not clearly erroneous. Moreover, although Larson did not convey his solicitation directly to its targets, guideline covers indirect attempts.)

United States v. Claymore, 978 F.2d 421 (8th Cir. 1992). (Criminal defendant has option of testifying, but not of committing perjury with impunity. Two point increase allowable where record contained ample evidence to support District Court s explicit finding that Claymore committed perjury (testimony from victim and defendant s fellow officer and genetic evidence.)

United States v. Hale, 977 F.2d 455 (8th Cir. 1992). (This Court rejects Hale s argument enhancement was improperly applied to him as he threw cocaine and money out window to protect himself from what he thought was robbery; therefore, his conduct could not have been found to be willful. District Court did not believe Hale, finding because police had knocked on door, announced themselves, and stated they had search warrant, Hale acted to obstruct justice.)

United States v. Penn, 974 F.2d 1026 (8th Cir. 1992). (District Court did not clearly err in finding Penn s initial denial of ownership of duffel bag constituted materially false statement to law enforcement officer that significantly obstructed or impeded justice. Penn did not admit bag belonged to him until after FBI polygraphist had been flown in to administer polygraph. Penn s initial false statement necessitated second interview which caused delay and expense thus obstructing and impeding investigation.)

United States v. Patino-Rojas, 974 F.2d 94 (8th Cir. 1992). (This Court upholds enhancement where noting that jury clearly believed witness s contrary testimony concerning source of laundered funds, District Court expressly found Patino-Rojas willfully attempted to obstruct justice by giving false testimony at trial--a finding not clearly erroneous.), cert. denied, 507

U.S. 974 (1993).

United States v. Johnston, 973 F.2d 611 (8th Cir. 1992). (District Court s finding Johnston attempted to obstruct justice not clearly erroneous where after he became aware police knew of his marijuana-growing activity, Johnston destroyed many of his marijuana plants and fled state, and he tried to get both his father wife to provide false alibi for him.), cert. denied, 506 U.S. 1068 (1993).

United States v. Allmon, 972 F.2d 244 (8th Cir. 1992). (District Court could consider both Allmon s greater-than-ten-years-old-felony convictions because Rules of Evidence do not apply at sentencing hearings, and DEA agent s truthful testimony in other proceedings in crediting agent s testimony over Allmon s. Allmon argued obstruction (threatening DEA agent), assuming it occurred, took place after investigation of instant offense was complete--Allmon had already been indicted on firearms charge at time he threatened agent. Prosecution of that charge, however, was still going on at time of threats, two weeks after indictment. Moreover, threats obstructed investigation of possible forfeitures which might be consequence of drug offenses joined in same indictment with firearms charge. In any event, Allmon did not raise legal interpretation of section 3C1.1 in District Court; this Court declines to reach it.)

United States v. Thompson, 972 F.2d 201 (8th Cir. 1992). (Thompson argued his use of alias on affidavit of financial status provided to parole officer was not materially false statement and thus, imposition of enhancement was improper. Here, increase was appropriate--police did not know Thompson s true identity.)

United States v. Swinney, 970 F.2d 494 (8th Cir.) (Adjustment not unlawfully applied where District Court found Willis committed perjury. Specifically, Willis s testimonial statements regarding his whereabouts were in direct contradiction to co-conspirator s testimony and records entered in evidence which were believed by jury.), cert. denied, 506 U.S. 1011 (1992).

United States v. Briggs, 969 F.2d 689 (8th Cir. 1992). (District Court concluded upward adjustment appropriate because Briggs testified untruthfully at trial. Briggs argues Court did not make findings of perjury; he only denied allegations in indictment; and thus, adjustment effectively punished him for testifying at trial. Briggs s testimony that he never sold heroin to co-conspirator alone supports adjustment where it directly contradicted co-conspirator s testimony and is inconsistent with jury verdict.)

United States v. Holt, 969 F.2d 685 (8th Cir. 1992). (Holt objected to two level enhancement and allegations in PSR (threat to do harm to government witnesses, perjury at trial). This Court vacates enhancement and remands for evidentiary hearing where District Court simply adopted PSR findings without requiring government to produce evidence on issue at sentencing hearing, without conducting evidentiary hearing, and without making specific finding on issue. PSR is not evidence. Court suggests to District Courts, when applying enhancement on basis of perjury, that they make specific findings of particular false statements.)

United States v. Davila, 964 F.2d 778 (8th Cir.) (No clear error in District Court s

conclusion that Davila threatened co-conspirator to keep her from going to authorities.), cert. denied, 506 U.S. 964 (1992).

United States v. Todd, 963 F.2d 207 (8th Cir. 1992). (District Court did not base enhancement on jury s rejection of Todd s explanation of his trip and possession of drugs, but rather expressly found Todd s testimony unbelievable; this finding was not clearly erroneous.)

United States v. Johnson, 962 F.2d 1308 (8th Cir. 1992). (This Court s review of record finds no clear error in District Court s determination George Woodards testimony was blatantly untruthful and thus, he was deserving of enhancement.)

United States v. Benson, 961 F.2d 707 (8th Cir. 1992). (Enhancement may not be based solely upon Benson s failure to convince jury of his innocence (he testified kidnapping victim went with him willingly), but may be based on experienced trial judge s finding. Judge s finding does not call for specific fact finding, but requires independent evaluation and determination by Court that Benson s testimony was false. Case remanded where Court s finding, which essentially adopted jury s finding, was insufficient (despite extensive record evidence of victim s unwillingness to go with Benson.)

United States v. Noland, 960 F.2d 1384 (8th Cir. 1992). (District Court found Noland solicited false testimony from her two minor children. Judge s determination to increase offense level was based upon credibility of Noland and her children; he had opportunity to observe character and demeanor and record supports findings. Solicitation of false testimony generally may be viewed as obstruction; additionally, record was replete with inconsistent and unsupported statements by Noland upon which judge could have found obstruction.)

United States v. Lyon, 959 F.2d 701 (8th Cir. 1992). (The District Court did not err by applying two level increase where Lyon did more than simply avoid or flee arrest. He left jurisdiction and remained fugitive for about year under false identity in order to avoid testifying against his co-defendants. He also violated conditions of his state probation.)

United States v. Flores, 959 F.2d 83 (8th Cir.) (A defendant s lying during his sentencing hearing in order to obtain lighter sentence constitutes obstruction of justice. District Court finding that defendant lied must be accepted unless clearly erroneous. Record supports District Court s sua sponte addition to Flores s offense level where Flores minimized his involvement in criminal activity, and his testimony varied from that of government s witnesses in several material respects.), cert. denied, 506 U.S. 976 (1992).

United States v. Seabolt, 958 F.2d 231 (8th Cir. 1992). (Ruling granting enhancement was not clearly erroneous where District Court judge made clear-cut finding that Seabolt perjured himself and suborned perjury of his father-in-law, based on witnesses demeanor and evidence presented at trial.), cert. denied, 507 U.S. 971 (1993).

United States v. Morton, 957 F.2d 577 (8th Cir. 1992). (District Court properly enhanced

Morton s sentence because during investigation, Morton produced cancelled checks with altered or eliminated vehicle identification numbers. Application note 3(c) indicates enhancement clearly applies.)

United States v. Capps, 952 F.2d 1026 (8th Cir. 1991). (Upward adjustment warranted. District Court s finding Capps attempted to obstruct justice was not clearly erroneous where Capps communicated violent threat against key government informant at critical point in investigation and in manner that frightened bartender into reporting it to authorities.), cert. denied, 504 U.S. 990 (1992).

United States v. Amos, 952 F.2d 992 (8th Cir. 1991). (Government contended District Court erred in refusing two level increase for obstruction. Based on record, this Court concludes District Court s finding that although Amos s trial testimony differed from his statement to police that consensual sexual contact did occur, general tenor was similar, was not clearly erroneous.), cert. denied, 503 U.S. 1010 (1992).

United States v. ABC, Inc., 952 F.2d 155 (8th Cir.) (District Court applied two level increase because at time of his arrest and throughout ensuing prosecution, Swanson used his alias rather than his birth name. (It is noted November 1990 Application Note 4(a) announced providing false name at arrest except where conduct actually resulted in hindrance to investigation/prosecution, does not warrant obstruction enhancement).), cert. denied, 502 U.S. 866 (1991).

United States v. Sparks, 949 F.2d 1023 (8th Cir. 1991). (Sparks s offense level was increased by two levels for obstructing justice by throwing down bag of cocaine base and warning of arrival of police. He argued increase should not apply because these actions did not materially hinder investigation or prosecution of case. When Sparks was sentenced on October 19, 1990, Guidelines did not require defendant s conduct to result in "material hinderance" for obstruction increase to apply.)

United States v. Ogbeifun, 949 F.2d 1013 (8th Cir. 1991). (Panel persuaded two point enhancement was based on District Court s explicit finding that Ogbeifun committed perjury in his trial testimony and not merely on his failure to convince jury of his innocence, and that finding is not clearly erroneous. Opinion rejects Fourth Circuit view expressed in United States v. Dunnigan. CONCURRENCE: Enhancement penalizes defendants for exercising their right to testify on their own behalf. Court should consider en banc whether this enhancement is appropriate where defendant testifies at trial and determination is made his testimony was not truthful.)

United States v. Loyd, 947 F.2d 339 (8th Cir. 1991). (Where District Court enhanced Lloyd s sentence for bankruptcy fraud convictions, based on Lloyd s conduct in concealing assets from bankruptcy Court officers and committing perjury during bankruptcy proceedings, this Court reverses. Section 3C1.1 does not apply to conduct that is part of crime itself.)

United States v. Johnson, 944 F.2d 396 (8th Cir.) (Untruthful testimony at trial warranted

two-level enhancement. Johnsons s assertion that he lied because of threats against himself and his family did not provide basis for reversing District Court. This Court rejected Brooks s argument that section is impermissible burden on his right to testify.), cert. denied, 502 U.S. 1008 (1991).

United States v. Hill, 943 F.2d 873 (8th Cir. 1991). (This Court affirms enhancement where Hill continually attempted to telephone 13 year-old Dobbins collect two or three times week after he was in custody. DISSENT: Government failed to meet preponderance of evidence standard where there was not evidence in record that calls were made to intimidate Dobbins, as Dobbins household did not accept any of calls.)

United States v. Miller, 943 F.2d 858 (8th Cir. 1991). (Though evidence of attempted escape was weak where Miller, chained and shackled, was seen standing with his hands on emergency door, District Court findings were not clearly erroneous; based on findings, there was no abuse of discretion in applying enhancement.)

United States v. Willis, 940 F.2d 1136 (8th Cir. 1991). (This Court satisfied District Court applied correct standard and finding regarding Willis s testimony was not clearly erroneous. District Court found Willis s testimony false, at least in part, based on its review of evidence pertinent to whole conspiracy as well as to Ellis.), cert. denied, 507 U.S. 971 (1993).

United States v. Nunn, 940 F.2d 1128 (8th Cir. 1991). (This Court agreed that Nunn s telephone conversation with unindicted co-conspirator was implicit threat to him about what could happen to him should he turn against co-conspirators. Threats made by defendants to others, including informants, are sufficient to constitute obstruction of justice.)

United States v. Watts, 940 F.2d 332 (8th Cir. 1991). (District Court enhanced Watts s offense level because he threw package of cocaine out car window while car was being closely followed by police in unmarked vehicle, flashing its headlights. In response to Watts s assertion he did not consciously act with purpose of obstructing justice because he did not know he was being followed by police or was under investigation, this Court acknowledges close case question. Nevertheless, District Court made reasonable inference. New commentary to § 3C1.1 added after Watts s sentencing, provides attempt to conceal evidence during arrest alone does not warrant enhancement.)

United States v. Duke, 935 F.2d 161 (8th Cir. 1991). (Finding of District Court that Duke obstructed justice was not clearly erroneous and not inconsistent with Court s denial of government s motion to withdraw from plea agreement when it concluded Duke had been less than forthright in providing as part of his plea agreement information about narcotics activity of which he was aware.)

United States v. Hankins, 931 F.2d 1256 (8th Cir.) (Hankins was convicted of bank robbery and escape. Conduct in escaping from custody warranted 3C1.1 enhancement to bank robbery offense. District Court incorrectly added two levels to Hankins s combined adjusted offense level

on rationale Hankins s escape from custody constituted obstruction of administration of justice on bank robbery. District Court should have grouped bank robbery and escape (§ 3D1.2) to avoid double-counting. Remand for resentencing.), cert. denied, 502 U.S. 886 (1991).

United States v. Nash, 929 F.2d 356 (8th Cir. 1991). (This Court holds two point enhancement was correctly applied where there was unrebutted testimony that defendant threatened his co-defendants.)

United States v. Dortch, 923 F.2d 629 (8th Cir. 1991). (Tossing plastic bag of cocaine out of window of vehicle was deliberate attempt to conceal or destroy material evidence from police within meaning of section (to which 1990 amendment did not apply). Dortch argued error in increase for obstruction because at time he tossed cocaine, "instant offense" under investigation was traffic violation. Tossing object out of window was very act that precipitated "instant offense" or offense of conviction, possession with intent to distribute cocaine.)

United States v. Paige, 923 F.2d 112 (8th Cir. 1991). (Where Paige endangered others lives during car chase and destroyed incriminating evidence while highway patrol was in hot pursuit, this Court finds adequate support for District Court s finding of obstruction under section in effect on date of Paige s offense and sentencing.)

United States v. Turpin, 920 F.2d 1377 (8th Cir. 1990). (Misleading investigators as to identity of accomplices justifies enhancement for obstruction of justice.), cert. denied, 499 U.S. 953 (1991).

United States v. Shortt, 919 F.2d 1325 (8th Cir. 1990). (District Court s refusal to enhance not clear error when District Court correctly viewed defendant s statements in light most favorable to him.)

United States v. Yerks, 918 F.2d 1371 (8th Cir. 1990). (Even if Yerks did not succeed in actually obstructing administration of justice by using aliases to arresting officers, and on financial status affidavit at first appearance before magistrate, section covers attempted obstruction and does not require success.)

United States v. Lange, 918 F.2d 707 (8th Cir. 1990). (Government appealed District Court s failure to assess additional points for obstruction of justice. This Court holds it was error not to add two-level enhancement where U.S. Postal Service mail handler deliberately lied about material fact, value of property stolen from express and certified mail, to Probation Office and at his guilty plea, knowing truth would adversely affect his status under Guidelines. DISSENT: Government was not misled by Lange s statement of value of stolen property and it only sought enhancement after Lange recanted. District Court s application of Guidelines represented careful consideration of appropriate factors. Majority is insisting on mechanical adherence. New sentence will mandate imprisonment for non-violent first offender.)

United States v. Lawrence, 918 F.2d 68 (8th Cir. 1990). (Two-level enhancement

appropriate where government proved that, after he entered guilty plea, Lawrence lied on several occasions concerning extent of his past drug dealings to investigators and probation officer, told different story in Court. DISSENT: Government had option of withdrawing plea agreement. Government did not meet burden of proving Lawrence s statements to Court or probation office contained material falsehoods. Enhancement fundamentally unfair where Lawrence pleaded guilty and government conceded his assistance had been helpful.), cert. denied, 499 U.S. 941 (1991).

United States v. Dyer, 910 F.2d 530 (8th Cir.) (Wife testified husband had nothing to do with crimes, which was lie. Perjury amounts to obstruction of justice.), cert. denied, 498 U.S. 907 and 498 U.S. 949 (1990).

United States v. Morphew, 909 F.2d 1143 (8th Cir. 1990). (District Court was not plainly erroneous in finding Morphew and co-defendant willfully impeded proceedings by seeking delay in trial based on false claims of co-defendant s ill health.)

United States v. Baker, 907 F.2d 53 (8th Cir. 1990). (Baker s pre-arrest attempt to destroy cocaine justified upward adjustment for obstruction of justice.)

United States v. Blackman, 904 F.2d 1250 (8th Cir. 1990). (Defendant used alias during detention hearing and pre-bail interview. This Court holds defendant s use of alias qualified him for increase regardless of whether authorities were actually foiled by his false identification; § 3C1.1 specifically encompasses intent. Where defense counsel failed to object at sentencing hearing to factual findings relevant to increase, defendant waived right to challenge basis for findings on appeal. Furthermore, defendant s intent could be inferred from repeated use of aliases and therefore no evidentiary hearing was required. (Dissent opines majority s holding is too broad; Commission intended to punish only material falsehoods and proportionality here is defeated.)

United States v. O Meara, 895 F.2d 1216 (8th Cir.) (Court could justifiably increase defendant s sentence for obstruction of justice when it concluded defendant lied at trial where confession of co-defendant contradicted his testimony.), cert. denied, 498 U.S. 943 (1990).

United States v. Penson, 893 F.2d 996 (8th Cir. 1990). (Regardless of standard of proof employed, there was sufficient evidence to support enhancement for obstruction of justice where defendant threatened witness and attempted to mislead Secret Service agents as to focus of investigation.)

United States v. Patterson, 890 F.2d 69 (8th Cir. 1989). (Court rejected Burton s argument that false statements can be considered obstruction of justice under § 3C1.1 only when made during judicial proceeding or to probation officer. Section 3C1.1 applies to obstruction during investigation of instant offense. Burton also argued that government did not make showing that it had lost time and expended additional money and manpower due to his use of false name and that his name was not material to establishing guilt or imposing proper punishment for offense. Court found that prejudice to government is not essential element for adjustment and that Burton s name was material because it would have resulted in inaccurate criminal history calculation which would have

produced lower applicable sentencing range under Guidelines.)

United States v. Williams, 879 F.2d 454 (8th Cir. 1989). (Conduct pertaining to dismissed count can be considered in determining whether defendant obstructed justice. Finding of obstruction of justice not clearly erroneous where defendant stipulated to threatening informant both verbally and in writing. Evidence that defendant aided and abetted her husband in threatening informant not clearly erroneous where defendant participated in argument between informant and her husband, expressing belief that informant had gone to police.)

United States v. Brett, 872 F.2d 1365 (8th Cir.) (Proper to increase offense level by 2 under § 3C1.1 for giving authorities false name at time of arrest.), cert. denied, 493 U.S. 932 (1989).

**§ 3C1.2 (Reckless Endangerment During Flight/Standard of Review):**

United States v. Cook, 356 F.3d 913 (8th Cir. 2004) (RILEY,* BEAM, SMITH). (We review for clear error factual findings underlying enhancement.)

United States v. Moore, 242 F.3d 1080 (8th Cir. 2001) (MURPHY,* LAY, BYE). (District Court's factual determinations are reviewed for clear error, and its application of Guidelines is reviewed de novo. Where there are two possible views of evidence, District Court's choice of one cannot be clearly erroneous.)

United States v. Taylor, 207 F.3d 452 (8th Cir. 2000) (WOLLMAN, F. GIBSON,* MURPHY). (This Court reviews District Court s factual findings in support of enhancement for clear error.)

United States v. O Dell, 204 F.3d 829 (8th Cir. 2000) (BOWMAN, LOKEN, ALSOP*). (This Court reviews District Court s factual findings in support of obstruction of justice enhancement for clear error and its application of Guidelines to facts de novo.)

United States v. Rice, 184 F.3d 740 (8th Cir. 1999) (McMILLIAN, MORRIS SHEPPARD ARNOLD,* NANGLE). (This Court reviews for clear error District Court's findings respecting reckless endangerment during flight.)

United States v. Valdez, 146 F.3d 547 (8th Cir. 1998). (This Court reviews District Court s finding of recklessness for clear error.)

**§ 3C1.2 (Reckless Endangerment During Flight):**

United States v. Cook, 356 F.3d 913 (8th Cir. 2004) (RILEY,* BEAM, SMITH). (District Court did not clearly err in applying enhancement where defendant engaged in high-speed flight from police in residential area while intoxicated, crossed intersection through oncoming cross-traffic, abandoned his car, charged into house where mother and seven children were present, and had to be subdued at gunpoint.)

United States v. Powell, 283 F.3d 946 (8th Cir.) (LOKEN,* HEANEY, RILEY). (District Court did not engage in double counting when it imposed § 3C1.2 enhancement after including damage to property during defendant's escape in calculating loss. Enhancements for theft of getaway car and for endangering others during getaway punish different conduct and different harms. Additionally, although Application Note 1 directs that § 3C1.2 enhancement is inapplicable where Chapter Three adjustment results in *equivalent or greater increase* in offense level solely on basis of same conduct, including property damage to van struck by defendant's getaway car increased robbery offense level by one, which is less than two-level increase for reckless endangerment.), cert. denied, 537 U.S. 868 (2002).

United States v. Moore, 242 F.3d 1080 (8th Cir. 2001) (MURPHY,* LAY, BYE). (Challenge to application of enhancement, premised on defendant's contention that he was unaware he was being pursued by police, rejected where District Court credited testimony that police officers identified themselves, wore vest marked "police," and used flashing lights while in pursuit; and that defendant raced down highway, ran lights, and threw scale from car.)

United States v. Goolsby, 209 F.3d 1079 (8th Cir. 2000) (McMILLIAN, FAGG, ROSENBAUM) (per curiam). (District Court properly applied enhancement where defendant pushed minor child, in his sole care and custody, into path of oncoming police car as he fled from law enforcement officers attempting to execute search warrant on his home.)

United States v. Rice, 184 F.3d 740 (8th Cir. 1999) (McMILLIAN, MORRIS SHEPPARD ARNOLD,* NANGLE). (Rice argues enhancement for recklessly endangering lives of police officers was wrongly assessed because he did not attempt to flee and his encounter with police was too brief to constitute resisting arrest. This Court affirms, based on sentencing testimony that officer who executed search warrant and his colleagues were all wearing uniforms or badges clearly identifying them as police when they entered Rice's house; they repeatedly shouted "Police!" and "Search warrant!"; Rice came into living room carrying loaded semiautomatic rifle that he began to level at officers; and when Rice was told officers had warrant, he replied, "I don't care. Get out of my house.")

United States v. Valdez, 146 F.3d 547 (8th Cir. 1998). (Johnson and Valdez contend District Court erred in enhancing their sentences for reckless endangerment during flight from police. District Court found they recklessly endangered lives of other motorists and at least three state troopers. Agent s trial testimony was that Valdez admitted to waving shotgun during car chase hoping to deter pursuer and Valdez presented no evidence to contrary. Thus, Valdez aided and abetted Johnson who was driving, during course of chase.

Johnson and Valdez claimed conduct fell short of recklessness because flight took place in daylight, occurred on county roads in rural area, and no other vehicles or pedestrians were encountered. District Court did not err where it found officers involved in chase and motorists and pedestrians in area were placed at substantial risk as Johnson attempted to flee by driving 70 - 80 mph on gravel road for at least four miles with officer in pursuit.)

United States v. Miner, 108 F.3d 967 (8th Cir.) (District Court properly increased Miner s

offense level for his chase-related conduct that created risk of serious injury to other drivers and pedestrians.), cert. denied, 522 U.S. 904 (1997).

United States v. Sykes, 4 F.3d 697 (8th Cir. 1993). (Sykes argued that he did not knowingly flee from law enforcement officials, rather he was merely fleeing from unidentified pair of individuals. District Court, however, found more credible law enforcement official s testimony as to officer having identified himself and that red rotating beacon was on dash of officer s car. District Court s decision to impose enhancement was not clearly erroneous; credibility determinations are virtually unreviewable; District Court found officer s description of chase more credible scenario.)

**Part D. Multiple Counts**

**§ 3D1.1 (Determining Offense Level on Multiple Counts):**

United States v. Bellrichard, 62 F.3d 1046 (8th Cir. 1995). (District Court applied multiple count adjustment, § 3D1.1(a), resulting in two-level increase in Bellrichard s offense level. Communications which were basis for counts 1-12 of indictment in present case were also used as basis for two-level "obstruction of justice" enhancement at Bellrichard s sentencing on his earlier convictions. Bellrichard contends District Court s reliance upon counts based on same conduct prior judge relied upon in giving him two-level obstruction enhancement at 1991 sentencing places him in double jeopardy. This Court looked to Supreme Court s opinion in Witte v. U.S., rejecting same argument advanced by Bellrichard. Consideration of relevant conduct in determining defendant s sentence within legislatively authorized punishment range does not constitute punishment for that conduct and thus does not violate double jeopardy clause prohibition against imposition of multiple punishments.)

United States v. Ziglin, 964 F.2d 756 (8th Cir. 1992). (Ziglin objected to two PSR s being prepared (bribery; conspiracy) instead of one report that would have grouped two convictions. It was noted sentences were to comply with grouping provisions and to run concurrently. Where Ziglin received same 24 month sentence he would have received had two convictions been covered in one PSR, there was no prejudicial error.)

**§ 3D1.2 (Groups of Closely Related Counts/Standard of Review):**

United States v. Bellrichard, 62 F.3d 1046 (8th Cir. 1995). (This Court reviews District Court s interpretation and application of guideline terminology to particular set of facts de novo.)

United States v. Reetz, 18 F.3d 595 (8th Cir. 1994). (This Court reviews de novo District Court s grouping of offenses for sentencing.)

United States v. Rugh, 968 F.2d 750 (8th Cir. 1992). (This Court reviews de novo District Court s determination on grouping of offenses.)

**§ 3D1.2 (Groups of Closely Related Counts):**

United States v. Weasel Bear, 356 F.3d 839 (8th Cir. 2004) (MURPHY,* LAY, FAGG). (Sentencing Commission has expressly excluded § 2B3.1(c)(1) from grouping rules. Killing and robbery do not inflict substantially same harm to victim.)

United States v. Shevi, 345 F.3d 675 (8th Cir. 2003) (LOKEN,* FAGG, MURPHY). (Defendant's mail-fraud offenses were properly not grouped with his tax-fraud offenses. Victims of mail fraud were defendant's minor niece and nephew whose social security benefits he took, while victim of tax fraud was United States Treasury. His mail fraud was not used to adjust his offense level for tax-fraud counts. Although defendant's offenses were both largely based on same amount of harm or loss, tax fraud and mail fraud are not offenses of same general type.), cert. denied, 124 S. Ct. 1182 (2004).

United States v. Ross, 279 F.3d 600 (8th Cir. 2002) (BYE,* LAY, J. R. GIBSON). (Grouping money laundering and fraud counts together under § 3D1.2(c) is appropriate where defendant receives § 3B1.1 adjustment to money laundering count based solely on leadership role in fraud offense. District Court should have grouped fraud and money laundering counts after using fraud conduct to adjust money-laundering offense level, not before doing so. Affirming, however, because defendant failed to challenge grouping decision on appeal.)

United States v. Riza, 267 F.3d 757 (8th Cir. 2001) (LOKEN,* JOHN R. GIBSON, MURPHY). (Defendant's argument that District Court erred in refusing to group money-laundering and embezzlement offenses is foreclosed by this Court's prior decisions.)

United States v. Hetherington, 256 F.3d 788 (8th Cir.) (McMILLIAN, J. R. GIBSON,* LAUGHREY). (Defendant was convicted of wire fraud, securities fraud, and engaging in monetary transaction in criminally derived property. He argues District Court should have grouped monetary-transaction count with fraud counts under § 3D1.2(c). This Court understands defendant to be arguing that his knowledge that funds were derived from securities fraud was treated as specific offense characteristic of monetary-transaction count and thus embodied conduct from another count. This Court is persuaded, however, by First Circuit's opinion in United States v. Lombardi, 5 F.3d 568 (1st Cir. 1993), where Court held that § 3D1.2(c) did not apply because conduct embodied in mail-fraud counts were various acts constituting frauds, coupled with requisite intent to deceive; specific offense characteristic of § 2S1.2(b)(1)(B) was knowledge that laundered funds are proceeds of mail fraud. Thus, defendant Hetherington's knowledge of origin of funds was not conduct embodied in securities-fraud count and District Court did not err by refusing to group monetary-transaction count with fraud counts. This Court notes contrary authority from other circuits.), cert. denied, 534 U.S. 1050 (2001).

United States v. Waugh, 207 F.3d 1098 (8th Cir. 2000) (RICHARD S. ARNOLD, BEAM, CONMY*). (Where offenses involve different victims, are separated in time, and involve dissimilar conduct, grouping is not appropriate and Court retains discretion to sentence either consecutively

or concurrently: imposition of consecutive sentences is not "departure" although sentence may, as here, vary from PSR. In this case defendant was convicted of involuntary manslaughter (as result of car crash he caused in which other driver was killed), and assault with dangerous weapon (as after crash he went home and beat his house mate). Here consecutive sentences were within discretionary power of District Court and were supported by appropriate evidence.)

United States v. Lewis, 200 F.3d 1177 (8th Cir. 2000) (WOLLMAN, LAY, BOWMAN) (per curiam). (Defendant was convicted of two counts of harboring illegal alien and one count of conspiring to do so. This Court finds all three counts should be grouped because they involve substantially same harm: all three involved same victim, substantially same time frame (1994 through 1997), and same conduct--the concealment and harboring of victim in South Dakota. This Court reverses and remands because it is clear District Court did not group offenses and instead treated each separately (as Court imposed three consecutive sentences), despite possibility that District Court may reimpose same sentence after recalculation. Further, sentence may change on recalculation because number of other challenges raised in this appeal (which this Court does not reach) may be resolved by that recalculation.)

United States v. O Kane, 155 F.3d 969 (8th Cir. 1998). (Reversing where District Court erred in grouping O'Kane's separate offenses of fraud and money laundering under § 3D1.2(b) (requiring grouping when counts involve same victim and two or more acts or transactions connected by common criminal objective or constituting part of common scheme or plan). Here victims were not same: while fraud offense harms defrauded, money laundering harms society. This Court was unpersuaded by O'Kane's argument that grouping was appropriate because he used truck purchased with fraudulently obtained funds to haul stolen property: O'Kane began fraud one year before buying truck, and does not claim truck purchase was for sole or even primary purpose of continuing fraud.

Grouping also was not appropriate under § 3D1.2(d) (stating in relevant part that grouping is required when offense level is determined largely on basis of total amount of harm or loss). This is because fraud and money laundering were not so closely related as to allow loss and value grouping under § 3D1.2, and offense level for money laundering in this case was not determined largely based on total harm or loss, but instead on significantly higher starting base offense level.)

United States v. Whatley, 133 F.3d 601 (8th Cir.) (Mrs. Whatley appeals District Court s finding of total amount of money she laundered. This Court concludes it need not review finding as amount of money laundered does not affect her sentence. Offense level calculated for Whatley s conspiracy conviction was greater, and higher offense level applies to calculate sentence for both convictions, § 3D1.2(d), so even were this Court to find Whatley laundered less money than District Court concluded, her sentencing range would not be affected.), cert. denied, 524 U.S. 940 and 524 U.S. 945 (1998).

United States v. Nattier, 127 F.3d 655 (8th Cir. 1997). (Nattier argues his sentences on false statement counts were incorrectly determined, and he should have been sentenced on counts at lower offense levels which false statement counts standing alone would generate. Absent showing of plain error, Nattier cannot be heard to complain as he made no objection to grouping of all counts of

conviction for sentencing purposes as proposed in PSR. Nattier cannot show plain error because grouping was correct, § 3D1.2(d); furthermore, District Court s sentencing order was in full compliance with § 5G1.2. Twenty-year statutory maximum on money laundering counts accommodate Guidelines range of 78-97 months determined to be total punishment for Nattier s conduct, and sentence of 78 months was imposed on Nattier s money laundering convictions. Because false statement counts carried five-year statutory maximum, 60-month sentences on those counts were also in compliance.), cert. denied, 523 U.S. 1065 (1998).

United States v. Heath, 122 F.3d 682 (8th Cir.) (Heath argues District Court improperly refused to group two counts of conviction (5-wire fraud resulting from incident where Heath contacted liability insurer by telephone for purpose of seeking monetary settlement for staged slip and fall accident; 9-obtaining controlled substances by fraud from medical staff at Mercy Hospital by falsely claiming to have been injured in slip and fall accident). District Court had concluded counts were two distinct offences and applied multiple count analysis resulting in adjustment of +1. Heath argues conduct leading to conviction in 9 was used to adjust sentence he received in 5. He asserts two-level enhancement in wire fraud for defrauding more than one victim, § 2F1.1(b)(2), necessarily resulted from considering 9 victim, Mercy Hospital. This Court disagrees. Victim in obtaining controlled substances was just one of many victims alleged to have been defrauded by Heath, and District Court did not have to rely upon 9 victim in order to enhance sentence under multiple victim provision. Heath also argues District Court considered monetary loss associated with 9 when determining total amount of relevant conduct loss for wire fraud offense, thereby serving as adjustment to another count of conviction and requiring grouping of 5 and 9. Although hospital admission corresponding to 9 is reflected in exhibit, no monetary loss is associated with 9, and no monetary loss associated with that hospital admission was included in final loss figure calculated for 5. Therefore, District Court did not double count by refusing to group 5 and 9.), cert. denied, 522 U.S. 975 (1997).

United States v. Davis, 103 F.3d 660 (8th Cir. 1996). (Davis contends District Court abused its discretion by running his sentences for armed bank robbery and using firearm during and in relation to crime of violence, consecutively. District Court properly treated each of three robbery counts as single count group, comment. (n.7).), cert. denied, 520 U.S. 1258 (1997).

United States v. Nguyen, 46 F.3d 781 (8th Cir. 1995). (District Court committed harmless error when it attributed higher range than it deserved to one of counts. Section 3D1.3(a) requires District Court to impose sentence for most serious of counts comprising group, i.e., highest offense level among counts in group.)

United States v. Lopez, 42 F.3d 463 (8th Cir. 1994). (Winemiller challenged District Court s quantity findings on marijuana count; he argued Court erred in holding him accountable for 765.22 kilograms of marijuana seized in raid on warehouse. This Court holds Winemiller waived argument; after Court announced its finding, Winemiller s counsel told Court he had no argument with assessment less than 1,000 kilos. Moreover, no plain error present.

Following its vacation of methamphetamine conviction, this Court notes section expressly excludes grouping simple possession offense with conspiracy offense under this subsection, but not

necessarily others. Winemiller may raise propriety of grouping offenses on remand.

Because of its possible relevance on remand, this Court addresses Winemiller s argument District Court erred in finding he possessed 4.1 grams of methamphetamine. Winemiller contended finding was unsupported because of lack of trial testimony as to weight. At sentencing, Winemiller stipulated chemist would have testified methamphetamine weighed 4.1 grams. In this case, quantity was relevant at trial as circumstantial evidence of intent, it was not element of offense of possession with intent to deliver or simple possession. For sentencing purposes, Court, not jury, determines quantity.)

United States v. Reetz, 18 F.3d 595 (8th Cir. 1994). (Reetz argued District Court improperly failed to group together his failure to appear, contempt of Court, and use of false passport counts, and this improper grouping resulted in impermissible double-counting. District Court grouped together, without objection from government, Reetz s contempt of Court and use of false passport counts because they were connected by common criminal objective. Government acknowledged that failure to appear also relates generally to Reetz s conduct in jumping bond. This Court holds District Court improperly failed to group contempt, failure to appear, and use of false passport counts together where government failed to object to any distinction among three counts based on victim of crime.)

United States v. Greene, 995 F.2d 793 (8th Cir. 1993). (This Court ordered entry of acquittal on manufacturing count, and observed conduct in remaining counts involved substantially same harm; thus, relevant guideline range not affected. As trial Court might have sentenced Greene at different point in range absent this conviction, Court remands for resentencing.)

United States v. Gordon, 974 F.2d 97 (8th Cir. 1992). (This Court remands for resentencing as it could not conclude District Court would have imposed same sentence had it not mistakenly believed Gordon was subject to sentence of 27 to 33 months on each count, rather than aggregate amount of heroin involved in both sales (§ (13)).)

United States v. Rugh, 968 F.2d 750 (8th Cir. 1992). (Where two child pornography charges against Rugh stemmed from receipt in mails of two pictures depicting two different children on two separate occasions from same source, crimes were separate and not appropriate for grouping. This Court rejects Rugh s contention that primary victim was society, not children; thus, victim(s) were not same in each charge.)

United States v. Lincoln, 956 F.2d 1465 (8th Cir.) (An obstruction offense may be grouped with another offense if former represented attempt to impede course of justice in latter. If obstruction offense has been used to adjust sentence for related offense, then in sentencing for obstruction offense, Court is required to group that offense with related offense even when two were separately charged and separately tried and are being separately sentenced. Nevertheless, District Court did not err by refusing to group offenses (mail fraud, subornation of perjury) as Lincoln did not receive obstruction adjustment on mail fraud charge; consequently, Lincoln s obstruction of justice was not doubly-counted.), cert. denied, 506 U.S. 891 (1992).

United States v. Williams, 935 F.2d 1531 (8th Cir. 1991). (Williams was convicted of selling cattle and timber that had been pledged to FmHA as collateral. After enhancing offense level on basis of Williams s attempt to influence two jurors, District Court sentenced him to 24 months imprisonment. Williams was then tried for and convicted of jury tampering. District Court did not impose additional sentence (33 months) because of prior enhancement, but did impose four month sentence because Williams committed jury tampering while on bond (18 U.S.C. § 3147). This Court remands for resentencing with instructions to vacate 24 month sentence in cattle case, add 33 months to four month sentence for jury tampering, resulting in single 37 month sentence for "group."), cert. denied, 502 U.S. 1101 (1992).

United States v. Fire Thunder, 908 F.2d 272 (8th Cir. 1990). (District Court did not abuse discretion by making sentences consecutive (e.g., not same victim, one offense not lesser included charge of other, neither offense is sentencing characteristic of other, offense levels for these offenses not determined on basis of total harm or loss).)

United States v. Egson, 897 F.2d 353 (8th Cir. 1990). (Refusal to group offenses under § 3D1.2 not error because offenses involved separate and distinct societal interests (defendant exchanged drugs for food stamps and was convicted for cocaine distribution and illegal acquisition of food stamps).)

United States v. Moore, 877 F.2d 651, 652 (8th Cir. 1989). (District Court did not err in refusing to treat three separate robberies of same financial institution as single offense.)

**§ 3D1.3(a) (Most Serious of Grouped Counts):**

United States v. Kroeger, 229 F.3d 700 (8th Cir. 2000) (BOWMAN, MAGILL, HANSEN*). (When closely related counts are grouped, offense level is set by most serious count's offense level; "most serious" means count with highest offense level of grouped counts, regardless of which count carries greatest statutory maximum.)

United States v. Pennington, 168 F.3d 1060 (8th Cir. 1999) (BEAM, LAY, LOKEN*). (Where defendant was convicted of aiding and abetting mail fraud and aiding and abetting money laundering, District Court properly began with higher base offense level for money laundering.)

**§ 3D1.3(b) (Aggregated Quantity):**

United States v. Pennington, 168 F.3d 1060 (8th Cir. 1999) (BEAM, LAY, LOKEN*). (Court properly aggregated proceeds from twelve money-laundering counts of conviction in determining value of proceeds laundered, because offense level applicable to group is offense level corresponding to aggregated quantity.)

**§ 3D1.4 (Determining Combined Offense Level):**

United States v. Courtney, No. 02-4083 (8th Cir. 2004) (LOKEN, McMILLIAN,

HANSEN*). (Background to § 3D1.4 expressly authorizes upward departure when application of grouping rules results in significantly more than five units but caps enhancement at five levels. Regardless of whether defendant had twenty-six or thirty-four units (depending on how they are counted), three-level upward departure was justified.)

United States v. Barber, 272 F.3d 1067 (8th Cir. 2001) (MORRIS SHEPPARD ARNOLD, BRIGHT,* KYLE). (District Court erred in increasing offense level by 5; given that 2 counts of conviction had been grouped together, combined offense level should have been increased by only 4 levels.), cert. denied, 535 U.S. 978 (2002).

United States v. Chmielewski, 218 F.3d 840 (8th Cir. 2000) (RICHARD S. ARNOLD,* BEAM, COMNY). (Defendant was properly sentenced within Guidelines range for his currency-structuring convictions; his convictions for currency structuring and filing false tax returns were grouped and combined with his convictions for making false statements.)

United States v. Davis, 103 F.3d 660 (8th Cir. 1996). (District Court correctly applied § 3D1.4 to determine combined offense level which was then used to sentence Davis on each of three robbery counts to 130 months imprisonment, to be served concurrently.), cert. denied, 520 U.S. 1258 (1997).

**§ 3D1.5 (Determining Total Punishment):**

United States v. Miller, 295 F.3d 824 (8th Cir. 2002) (WOLLMAN,* BOWMAN, STAHL). (It does not violate grouping rules to impose consecutive sentences on grouped counts. This sentence structure is required if statutory maximum on any one count is too low to achieve total punishment determined by Guidelines range.)

**Part E. Acceptance of Responsibility**

**§ 3E1.1 (Acceptance of Responsibility/Standard of Review):**

United States v. Sypolt, 346 F.3d 838 (8th Cir. 2003) (MORRIS ARNOLD,* BEAM, BYE). (District Court's denial of acceptance-of-responsibility reduction is reviewed for clear error and will not be reversed unless it is without foundation.), cert. denied, 124 S. Ct. 1484 (2004).

United States v. Nguyen, 339 F.3d 688 (8th Cir. 2003) (MORRIS ARNOLD, HANSEN, SMITH*). (District Court's factual determination whether defendant has demonstrated acceptance of responsibility is entitled to great deference and will be reversed only if so clearly erroneous as to be without foundation. It is defendant's burden to demonstrate acceptance of responsibility.)

United States v. Greger, 339 F.3d 666 (8th Cir. 2003) (LOKEN, BRIGHT, SMITH CAMP*). (District Court's factual findings regarding acceptance of responsibility are reviewed for clear error.

Given District Court's unique position to evaluate defendant, its decision is given great deference.)

United States v. Yirkovsky, 338 F.3d 936 (8th Cir. 2003) (HANSEN,* HEANEY, MORRIS ARNOLD). (This Court reviews de novo defendant's eligibility for reduction where, as here, it turns on legal question whether defense asserted at trial relates to factual guilt.)

United States v. Dyck, 334 F.3d 736 (8th Cir. 2003) (HANSEN,* WOLLMAN, BYE). (Given District Court's unique position to evaluate defendant's acceptance of responsibility, its decision to grant or deny reduction will be reviewed only for clear error.)

United States v. Vaca, 289 F.3d 1046 (8th Cir. 2002) (WOLLMAN,* LOKEN, MURPHY). (This Court reviews for clear error District Court's factual findings in denying acceptance-of-responsibility reduction. Findings turn largely on credibility assessments, which District Court is in far better position to make.)

United States v. Colbert, 172 F.3d 594 (8th Cir. 1999) (RICHARD S. ARNOLD,* HANSEN, STROM). (Determination is entitled to great deference and should be reversed only if so clearly erroneous as to be without foundation. Judgment is essentially moral one, best entrusted to trial judge who can personally observe defendant and gauge quality of his repentance.)

United States v. Ponec, 163 F.3d 486 (8th Cir. 1998) (RICHARD S. ARNOLD,* WOLLMAN, MORRIS SHEPPARD ARNOLD). (Decision is highly fact-intensive, and addresses itself to sound discretion of District Court, which necessarily will have much better feel of circumstances of case and attitude of defendant than does this Court.)

United States v. Atlas, 94 F.3d 447 (8th Cir. 1996). (This Court reviews de novo question of guideline application here, whether presentence deportment may be used as factor in determining if defendant qualifies for reduction under § 3E1.1.), cert. denied, 520 U.S. 1130 (1997).

United States v. Barris, 46 F.3d 33 (8th Cir. 1995.) (This Court reviews de novo issues concerning application of particular sentencing Guidelines.)

United States v. Furlow, 980 F.2d 476 (8th Cir. 1992) (en banc). District Court is in unique position to evaluate defendant s acceptance of responsibility. For consistency, Court will now use clearly erroneous standard ("without foundation" should no longer be used.), cert. denied, 508 U.S. 914 (1993).

United States v. Miller, 951 F.2d 164 (8th Cir. 1991). (Sentencing Commission s deletion of "without foundation" in commentary and replacement with "great deference on review" interpreted as reflection of Commission s view that clearly erroneous standard applies to District Court s factual determination on acceptance of responsibility.)

**§ 3E1.1 (Acceptance of Responsibility):**

United States v. Campos, No. 03-1329 (8th Cir. 2004) (BYE, HANSEN,* MELLOY). (Defendant received obstruction-of-justice enhancement for perjuring himself at trial by denying intent to distribute methamphetamine. District Court reasoned that defendant was nonetheless entitled, under Application Note 4, to acceptance-of-responsibility reduction for admitting other elements of that drug offense and for pleading guilty to separate firearm offense. This was clear error under test set out in United States v. Honken.)

United States v. Muro, 357 F.3d 743 (8th Cir. 2004) (WOLLMAN, LAY, HANSEN) (per curiam). (Applying Application Note 4, pertaining to acceptance of responsibility for defendants who have obstructed justice, this Court concludes that District Court did not clearly err in denying reduction. Defendant fled while on presentencing release because he felt his life was in danger. He did not inform authorities or his family. He was apprehended seven months later. Defendant wilfully chose to obstruct justice rather than contact authorities to report threat. His case was not "exceptional" within meaning of Application Note 4.)

United States v. Chapman, 356 F.3d 843 (8th Cir. 2004) (MORRIS ARNOLD,* BOWMAN, MURPHY). (Exceptional post-offense rehabilitation can, in rare cases, support downward departure even when defendant is not eligible for acceptance-of-responsibility reduction. In practice, defendant who goes to trial on issues relating to factual guilt faces near-absolute bar to receiving acceptance-of-responsibility reduction, no matter how exceptional his post-offense rehabilitation. However, such defendant may nonetheless receive downward departure if his post-offense rehabilitation is atypical and truly extraordinary. Acceptance of responsibility may lend support to genuineness of rehabilitation, but it is not prerequisite.)

United States v. Johnston, 353 F.3d 617 (8th Cir. 2003) (LOKEN, HEANEY, MORRIS ARNOLD) (per curiam). (Reduction does not often apply to defendants who go to trial. This defendant put government to its proof and challenged his factual guilt by going to trial to dispute drug quantity.)

United States v. Sypolt, 346 F.3d 838 (8th Cir. 2003) (MORRIS ARNOLD,* BEAM, BYE). (Defendant's post-apprehension conduct of confessing, consenting to searches, and returning stolen money did not entitle him to reduction where he went to trial and put government to its proof.), cert. denied, 124 S. Ct. 1484 (2004).

United States v. Abfalter, 340 F.3d 646 (8th Cir. 2003) (MORRIS ARNOLD,* HANSEN, SMITH). (Defendant's argument, that she went to trial and denied making false statements in buying firearms only because she was afraid that her codefendant boyfriend's family would not take care of her children if she pleaded guilty, did not qualify her for acceptance-of-responsibility reduction because her defense at trial was challenge to factual guilt.), cert. denied, 124 S. Ct. 1112 (2004).

United States v. Nguyen, 339 F.3d 688 (8th Cir. 2003) (MORRIS ARNOLD, HANSEN, SMITH*). (In extremely rare "extraordinary cases," defendant may receive both obstruction-of-justice enhancement and acceptance-of-responsibility reduction. This is not such case: defendant's

obstruction was ongoing, he did not voluntarily turn himself in, he used his brother's identification on two occasions to avoid arrest, he did not accept responsibility for or recant his obstructive behavior, and he did not plead guilty until four days before trial was scheduled to begin.)

United States v. Greger, 339 F.3d 666 (8th Cir. 2003) (LOKEN, BRIGHT, SMITH CAMP*). (Although record showed conflicting explanations of defendant's purpose in going to trial--either to contest his factual guilt, or to render confidential informant of no further use to government by making him testify in open court--District Court did not clearly err in denying reduction because defendant contested offense conduct and relevant conduct at trial.)

United States v. Yirkovsky, 338 F.3d 936 (8th Cir. 2003) (HANSEN,* HEANEY, MORRIS ARNOLD). (Defendant convicted of firearms possession was ineligible for reduction because her defense at trial, that she did not constructively possess firearms, was challenge to factual guilt. DISSENT: defendant's trial defense was that facts alleged did not constitute crimes charged, so she was eligible for reduction.)

United States v. Dyck, 334 F.3d 736 (8th Cir. 2003) (HANSEN,* WOLLMAN, BYE). (District Court clearly erred in granting acceptance reduction to defendant who proceeded to trial and asserted defense that he did not wilfully reenter United States. Although this was not valid defense because wilfulness is not element of illegal reentry, it was nonetheless challenge to factual guilt and thus precluded reduction. Examples of challenges other than to factual guilt are insanity, claim of constitutionally protected conduct, or defense that conduct falls outside statute's ambit.)

United States v. Ortiz-Monroy, 332 F.3d 525 (8th Cir. 2003) (WOLLMAN, BEAM, NANGLE*). (District Court did not clearly err in denying acceptance-of-responsibility reduction where defendant repeatedly insisted during sentencing hearing that he had no knowledge of drugs found in spare tire seized from his car.)

United States v. Calderon-Avila, 322 F.3d 505 (8th Cir. 2003) (WOLLMAN, RICHARD ARNOLD, MELLOY) (per curiam). (Defendant received obstruction-of-justice enhancement because he suborned perjury at pretrial hearing on motion to dismiss indictment. His subsequent guilty plea and cessation of obstructive conduct were insufficient to make this "extraordinary case" under Application Note 4 and United States v. Honken qualifying him for acceptance-of-responsibility reduction.)

United States v. Boettger, 316 F.3d 816 (8th Cir. 2003) (WOLLMAN, MURPHY,* GRITZNER). (Denial of acceptance-of-responsibility reduction was not error where defendant hid after being accidentally released from jail, fled when he was going to be taken back into custody, and continued to use methamphetamine while awaiting trial.)

United States v. Young, 315 F.3d 911 (8th Cir.) (BOWMAN,* RICHARD ARNOLD, LOKEN). (Defendant who receives obstruction enhancement may receive acceptance reduction only in extraordinary case, and circumstances of defendant doubting his attorney's loyalty and being concerned by his codefendants' flight do not make this such case.), cert. denied, 123 S. Ct. 2108

(2003).

United States v. Waldman, 310 F.3d 1074 (8th Cir. 2002) (MURPHY,* JOHN GIBSON, SMITH). (In general, defendants who proceed to trial on insanity defense may be eligible for acceptance-of-responsibility reductions, but this Court cannot say that District Court clearly erred in finding this particular defendant had not met his burden to prove entitlement to reduction in this case.)

United States v. Montano-Gudino, 309 F3.d 501 (8th Cir. 2002) (WOLLMAN, RICHARD S. ARNOLD, LOKEN*). (When defendant contests essential elements of crimes at trial, it is only rare case where his pretrial statements and conduct nonetheless demonstrate acceptance of responsibility. Defendant was not entitled to acceptance-of-responsibility reduction because he contested his guilt before, during, and after trial.)

United States v. Stoltenberg, 309 F.3d 499 (8th Cir. 2002) (HANSEN, HEANEY, MORRIS S. ARNOLD) (per curiam). (Defendant received obstruction-of-justice enhancement but sought acceptance-of-responsibility reduction under "extraordinary case" application note. District Court denied reduction because defendant had distributed methamphetamine several times to women under age twenty-one while he was on pretrial release, constituting non-cessation of his criminal conduct and ongoing obstruction of justice that terminated only when defendant was arrested. This Court affirms because it is clear from record that District Court weighed defendant's acceptant conduct against his obstructive conduct in manner consistent with United States v. Honken. Weight assigned to any one factor is within District Court's discretion.)

United States v. Zimmer, 299 F.3d 710 (8th Cir. 2002) (McMILLIAN, BEAM, HANSEN*). (Defendant did not qualify for reduction because, at trial, he argued that he was not part of conspiracy and that he did not move to Minnesota to manufacture methamphetamine. These issues clearly related to defendant's factual guilt), cert. denied, 537 U.S. 1146 (2003).

United States v. Arellano, 291 F.3d 1032 (8th Cir. 2002) (LOKEN, HEANEY, MURPHY*). (Defendant assisted police in execution of search warrant, fully admitted his role in instant offense, and provided information regarding others involved in criminal activity. Although authorities regarded his information as truthful, it did not lead to development of other cases. District Court denied defendant's request for acceptance-of-responsibility reduction because, while in presentence custody, he struck and knocked over correction officer. This Court affirms because defendant did not withdraw from criminal activity and behaved poorly in jail.)

United States v. Vaca, 289 F.3d 1046 (8th Cir. 2002) (WOLLMAN,* LOKEN, MURPHY). (District Court did not clearly err in denying acceptance-of-responsibility reduction where Court found defendant had lied at change-of-plea hearing. Guilty plea does not necessarily entitle defendant to reduction.)

United States v. Thurmon, 278 F.3d 790 (8th Cir. 2002) (LOKEN, LAY, HEANEY*). (District Court commented that defendant "had done everything any judge or defense lawyer could

ask" to demonstrate his acceptance of responsibility, but nonetheless denied reduction, reasoning that it was precluded from granting reduction because it had applied obstruction-of-justice enhancement. Given that application of enhancement was error, and having reviewed record, this Court concludes that denial of reduction was also error.)

United States v. Sweesy, 272 F.3d 581 (8th Cir. 2001) (BYE, BRIGHT, RICHARD S. ARNOLD) (per curiam). (District Court did not abuse its discretion in denying reduction where defendant pleaded not guilty and went to trial, and he denied two essential elements of crime. While this not "absolute bar" to reduction, it is primarily for district judge, person on spot, to make moral judgment as to defendant's level of contrition. DISSENT: Application Note 2 provides that defendant may demonstrate acceptance of responsibility for his criminal conduct even though he goes to trial; here, defendant admitted his conduct and disputed only inferences to be drawn from that conduct, i.e., whether he intended to manufacture methamphetamine.)

United States v. Carrasco, 271 F.3d 765 (8th Cir. 2001) (BOWMAN, RICHARD S. ARNOLD, HANSEN*). (District Court did not clearly err in finding that defendant had attempted to mislead and minimize his involvement prior to second sentencing hearing; hence, reduction was properly denied.)

United States v. Perez, 270 F.3d 737 (8th Cir. 2001) (McMILLIAN, BEAM, HANSEN*). (District Court properly considered all relevant circumstances and was not precluded from determining that nature of defendant's obstructive conduct, i.e., encouraging witnesses to lie about their knowledge of his criminal conduct, outweighed other relevant factors in his favor.), cert. denied, 535 U.S. 945 (2002).

United States v. Lalley, 257 F.3d 751 (8th Cir. 2001) (MORRIS SHEPPARD ARNOLD, J. R. GIBSON,* GOLDBERG). (Affirming denial of reduction where evidence indicates defendant was less than forthright to jury about his involvement in offense, position inconsistent with his claim that he accepted responsibility for his actions.)

United States v. Gonzalez-Rodriguez, 239 F.3d 948 (8th Cir. 2001) (HANSEN,* MURPHY, BYE). (According to Application Note 2, defendant who proceeded to trial may only be entitled to acceptance-of-responsibility reduction in rare instance when issues for trial did not relate to factual guilt. District Court's denial of acceptance-of-responsibility reduction was not clearly erroneous because defendant denied any connection to quantity of methamphetamine from pretrial to sentencing.)

United States v. Lim, 235 F.3d 382 (8th Cir. 2000) (HANSEN,* MURPHY, BYE). (District Court did not clearly err in denying acceptance-of-responsibility reduction where, although defendant pleaded guilty and truthfully admitted all relevant conduct, he refused to assist in recovering fraudulently obtained property, and indicated defiance and arrogance rather than remorse.)

United States v. Martinez,234 F.3d 1047 (8th Cir. 2000) (RICHARD S. ARNOLD,

HANSEN, BYE) (per curiam). (Upholding denial of acceptance-of-responsibility reduction where defendant, who had cooperated during interview process, subsequently absconded from halfway house prior to bond-revocation hearing and failed to appear for hearing.)

United States v. Searcy, 233 F.3d 1096 (8th Cir. 2000) (WOLLMAN, LAY, BRIGHT*). (District Court did not clearly err in denying additional one-level reduction to defendant who immediately confessed crime, admitted culpability, and indicated intent to plead guilty, because defendant had caused trial date to be set back, initially pleaded guilty three days prior to rescheduled trial, caused government to withdraw first plea agreement, and ultimately entered into new plea agreement. Defendant's plea agreement came too late to save government and Court from preparing for trial.)

United States v. Edwards, 225 F.3d 991 (8th Cir. 2000) (BOWMAN, LOKEN,* BYE). (Post-sentencing rehabilitative conduct is not relevant at resentencing and is not basis for acceptance-of-responsibility reduction.), cert. denied, 531 U.S. 1100 (2001).

United States v. Amsden, 213 F.3d 1014 (8th Cir. 2000) (McMILLIAN, F. R. GIBSON, MORRIS SHEPPARD ARNOLD*). (Rejecting defendant's argument that District Court engaged in double counting by relying on his threatening post-plea letters both to refuse defendant § 3E1.1 reduction and to support increase in criminal history category under § 4A1.3. No double counting occurred because District Court could have concluded defendant's letters, which included threats of sexual assault and murder, were not fully accounted for solely by denying § 3E1.1 reduction, and also supported increase in criminal history score. Therefore, this Court needs not address whether Sentencing Commission drafted two pertinent Guidelines provisions to serve distinct purposes so that double counting would have been permissible in any event.)

United States v. Ervasti, 201 F.3d 1029 (8th Cir. 2000) (BOWMAN,* LAY, BEAM). (While this Court agrees with defendant that attempting to plead guilty may provide some evidence of acceptance of responsibility, it is not guarantee of receiving adjustment. When defendant denies having requisite mental state for crime for which he was convicted, it is well within Court s discretion to determine defendant has failed clearly to demonstrate acceptance of responsibility for his offense. At trial, defendant repeatedly denied intent to defraud clients and claimed entitlement to impounded tax monies; and at sentencing, while he stated that he apologized, he expressly limited his regret to not having found investor to bail out scheme; in any event, District Court was not required to accept defendant's bare claims of remorse. Although this Court has remanded where it appeared District Court failed fully to consider defendant's attempt to plead guilty, it is not logically inconsistent for District Court both to deny defendant's attempt to plead guilty and to determine later, at sentencing, that defendant failed to sufficiently accept responsibility to merit reduction. Defendant's willingness to plead guilty may be motivated by myriad factors, and may not necessarily be attended by clear acceptance of guilt. There is no basis for saying District Court clearly erred in making its core determination that defendant's remorse did not meet standards of § 3E1.1.)

United States v. Goings, 200 F.3d 539 (8th Cir. 2000) (WOLLMAN,* HEANEY, LOKEN). (Affirming denial of reduction where defendant convicted of alcohol-related offense failed to complete alcohol treatment program, indicating he did not appreciate gravity of his offense; moreover, premature exit from program violated Court order and served as grounds for termination of conditional release, leading to rearrest. Also noting District Court was not bound by terms of plea agreement, and defendant is not automatically entitled to reduction on basis of guilty plea.)

United States v. Adams, 197 F.3d 1221 (8th Cir. 1999) (McMILLIAN, RICHARD S. ARNOLD, HANSEN) (per curiam). (While on pretrial release, defendant (who was indicted on bank fraud charges) submitted change-of-address form requesting mail sent to him at former address be sent to new address; he opened checking account using former address and false social security number, and then deposited four checks in name of third person which were ultimately returned due to insufficient funds; and he wrote checks exceeding balance in account. District Court denied reduction because defendant engaged in illegal conduct similar to conduct forming basis of charges against him. Denial of reduction affirmed because District Court did not clearly err.)

United States v. Kind, 194 F.3d 900 (8th Cir. 1999) (RICHARD S. ARNOLD, LOKEN,* BYRNE). (Kind argues adjustment was warranted because he stipulated to essential elements of one count, and admitted elements of other two, in his opening statement and while testifying at trial. However, District Court s determination--that King's taking case to trial and his trial testimony did not constitute acceptance of responsibility--is consistent with Guidelines commentary and is not clearly erroneous: defendant who maintains innocence, blames others, and expresses regret only for consequences of criminal conduct does not accept responsibility.), cert. denied, 528 U.S. 1180 (2000).

United States v. Honken, 184 F.3d 961 (8th Cir.) (McMILLIAN,* JOHN R. GIBSON, HANSEN). (Reversing grant of reduction to defendant who pleaded guilty to drug offenses and received obstruction-of-justice adjustment. District Court concluded that if defendant who has pleaded guilty to underlying offense commits no further obstruction of justice between his guilty plea and sentencing hearing, then case is "extraordinary" one in which adjustments should be given both for acceptance of responsibility and obstruction of justice. This is inconsistent with plain language of applicable commentary and prior decisions. "Extraordinary" should be given its ordinary meaning and examples of how Commission uses word "extraordinary" confirms that Commission means situation that is extremely rare and highly exceptional. District Court must inquire into such matters as duration and character of obstructive conduct. Here reasonable fact finder could easily conclude defendant caused disappearance of one or more persons, including prospective prosecution witnesses; attempted to kill witnesses while on pre-trial release; attempted to kill another cooperating witness and to escape from county jail; and procured another person to conceal material evidence. Only after his extended efforts at obstruction failed and trial date approached did defendant agree to plead guilty. Defendant also refused to admit his obstructive conduct, and disclosed little information about his criminal activities. Acceptance-of-responsibility reduction was not warranted here.), cert. denied, 528 U.S. 1056 (1999).

United States v. Molina, 172 F.3d 1048 (8th Cir.) (HANSEN,* LAY, MURPHY). (Rejecting contention that defendant was entitled to reduction because he admitted his involvement in drug transactions before trial. District Court found reduction was inconsistent with obstruction-of-justice enhancement; such finding was not clear error, and this Court finds no extraordinary circumstances warranting reduction despite enhancement.), cert. denied, 528 U.S. 893 (1999).

United States v. Colbert, 172 F.3d 594 (8th Cir. 1999) (RICHARD S. ARNOLD,* HANSEN, STROM). (Upholding denial of reduction. After stipulating to his conduct and pleading guilty, defendant wrote to District Court, denying--contrary both to stipulation and plea--ever striking victim of assault underlying defendant's offense of conviction.)

United States v. Ponec, 163 F.3d 486 (8th Cir. 1998) (RICHARD S. ARNOLD,* WOLLMAN, MORRIS SHEPPARD ARNOLD). (Noting (in case being remanded for resentencing because convictions on various counts were vacated), that at sentencing, defendant conceded he had done acts alleged, but attempted to blame whole thing on his wife; District Court could reasonably have determined defendant did not truly accept responsibility for crime.)

United States v. Mohamed, 161 F.3d 1132 (8th Cir. 1998) (BOWMAN,* RICHARD S. ARNOLD, MORRIS SHEPPARD ARNOLD). (Mohamed refused to repay estate of her ex-husband certain life insurance proceeds after judgment awarding her proceeds was reversed; she failed to comply with Court orders intended to enforce judgment in favor of estate; and she filed for bankruptcy, and failed to disclose cash and other assets. She argues District Court erroneously denied her reduction relying on disputed allegations of wrongdoing respecting life-insurance proceeds. This Court finds no clear error as (1) Mohamed did not offer evidence that she had identified her stepson as victim of her crimes; and (2) she did not seek promptly to reveal additional assets, or to repay estate after judgment was rendered against her more than four years ago.)

United States v. Brown, 156 F.3d 813 (8th Cir. 1998). (Acceptance-of-responsibility reduction properly denied because Brown put government to its burden of proof at trial by denying essential factual elements of trial and only then admitted guilt and expressed remorse.)

United States v. Griffin, 154 F.3d 762 (8th Cir. 1998). (Affirming denial of reduction. Even though Griffin is to be commended for avoiding second trial by pleading guilty, for voluntarily surrendering his law license, and for publicly apologizing to his constituents, Griffin did not admit his wrongdoing until after his first trial, at which he strongly denied wrongdoing.)

United States v. Hildebrand, 152 F.3d 756 (8th Cir.) (Disagreeing with appellant that assertion of First Amendment defense at trial is rare circumstance in which defendant who goes to trial may nonetheless receive acceptance-of-responsibility reduction; appellant's defense was that he lacked requisite criminal intent, and record does not reflect he ever accepted responsibility.), cert. denied, 525 U.S. 1033 (1998).

United States v. Alaniz, 148 F.3d 929 (8th Cir.) (Entry of guilty plea alone does not entitle Cuevas to acceptance because he continued to deny his involvement after there was substantial

evidence of his participation, § 3E1.1, comment. (n.3).

This Court need not consider Henry s claims of error because his sentence of 76 months was less than applicable Guideline range of 77-96 months if he had been granted acceptance of responsibility.), cert. denied, 525 U.S. 1047 (1998).

United States v. Hawkey, 148 F.3d 920 (8th Cir. 1998). (District Court s decision to disallow reduction is not without foundation where Hawkey has yet to acknowledge he wrongfully appropriated charity s funds; on appeal, he continues to characterize misappropriate funds as loan.)

United States v. Chevre, 146 F.3d 622 (8th Cir. 1998). (Where defendant claimed entrapment, he failed to demonstrate recognition and affirmative responsibility for offense.)

United States v. Eads, 144 F.3d 1151 (8th Cir. 1998). (Where Eads did not object to PSR recommendation against reduction, this Court reviews only for plain error. District Court did not plainly err in rejecting reduction on this record. While Eads initially confessed involvement in conspiracy, he later fought to suppress confession and fled from custody during jury deliberation, remaining at large for almost six months and committing another felony during that time; after again admitting involvement at plea hearing, Eads attempted to minimize his role.)

United States v. Ngo, 132 F.3d 1231 (8th Cir. 1997). (District Court found Ngo s story conscious attempt to mislead and to minimize his involvement, thus inconsistent with reduction. Denial was not clearly erroneous where Ngo told Court he participated in scheme for fun and to make some money, but only held money because of someone else s instructions; physical evidence indicated greater involvement. District Court was also entitled to consider Ngo s subsequent driving conduct because continued criminal conduct, even if minor and unrelated to offense of conviction, can make sentence reduction inappropriate. Moreover, District Court had opportunity to observe Ngo s demeanor and evaluate his credibility at guilty plea and again at sentencing hearing.)

United States v. Cole, 125 F.3d 654 (8th Cir. 1997). (This Court affirms denial of adjustment as it is undisputed Cole repeatedly tested positive for methamphetamine while he was released on bond following his arrest for manufacturing methamphetamine.)

United States v. Chatman, 119 F.3d 1335 (8th Cir.) (District Court granted Chatman two-level reduction; Chatman appeals denial of additional one-level decrease, § 3E1.1(b)(2), arguing entitlement because he provided sufficient notice of intention to plead guilty. Both parties agree Chatman stated on several occasions prior to trial he intended to plead guilty. However, Chatman did not actually sign plea agreement until day of trial and delay in actually executing plea agreement forced government to prepare for trial.), cert. denied, 522 U.S. 976 (1997).

United States v. Rodriguez, 112 F.3d 374 (8th Cir. 1997). (Trial testimony of Rodriguez and co-defendant who pleaded guilty and testified for government were in conflict. It was trial Court s prerogative, however, to credit testimony of co-defendant and to discount that of Rodriguez. In doing so, trial Court necessarily also determined Rodriguez was not completely truthful about his

actions in support of crime and accordingly that Rodriguez had not accepted responsibility for those actions. No clear error in that determination.)

United States v. Guerrero-Cortez, 110 F.3d 647 (8th Cir.) (Soler argues entitlement to three-level reduction because his uncontradicted testimony indicates that shortly after indictment he twice attempted to plead guilty for his involvement with two kilograms of cocaine; government refused to accept offer because Soler would not accept responsibility for conspiracy to distribute five or more kilograms. Following jury trial and arguments at sentencing hearing, District Court made factual finding Soler s involvement was limited to two kilograms and denied points for acceptance because timing of acceptance was at time of sentencing and not at time of trial. This Court concludes District Court clearly erred when it denied reduction, § 3E1.1, comment. (n.2). Soler was at all times ready to plead guilty to two kilograms; government refused to accept plea which was not five kilograms. By refusing to accept plea, government gave Soler no choice but to go to trial. Ultimately, District Court found Soler responsible for only two kilograms, amount for which Soler was at all times willing to plead guilty. This case fits within commentary and case law to effect conviction by trial does not automatically prevent defendant from receiving reduction for acceptance of responsibility. This Court remands for District Court to reconsider reduction for acceptance of responsibility and orders correction of BOL given to Soler.), cert. denied, 522 U.S. 1017 (1997).

United States v. Field, 110 F.3d 592 (8th Cir. 1997). (Clark contends his is rare situation where he can demonstrate acceptance even though he exercised right to trial as he exercised right only to make constitutional challenge or challenge applicability of statute to his conduct. He asserts preindictment voluntary payment of substantial amount of restitution indicates acceptance, and he denies statement about "satisfying bureaucrats" was attempt to blame others for his conduct, insisting he merely offered honest explanation for his motive. This Court concludes District Court did not clearly err. PSR did not recommend reduction and record reveals Clark went to trial contesting factual elements of guilt with no stipulation of guilty conduct eliminating factual elements of guilt or limiting trial to constitutional or statutory challenge. District Court s conclusion Clark s attempt to minimize his role, to maintain his illegal actions were in city s best interest, and to blame conduct on pressure of satisfying bureaucrats is inconsistent with true acceptance--conclusion is not without foundation. Mere expression of remorse does not warrant reduction. While voluntary payment of restitution prior to adjudication of guilt is legitimate consideration, in light of Clark s other actions and statements, this Court concludes District Court did not abuse its discretion by denying reduction.)

United States v. Field, 110 F.3d 587 (8th Cir. 1997). (Richard asserts District Court erred in concluding he had not accepted responsibility, because he pleaded guilty before start of bifurcated trial on charges arising from Bonanza Valley conspiracy. Richard went to trial on two counts arising out of his activities in Twin Valley conspiracy, and denied factual elements of his guilt. Only after jury found him guilty on those counts did he enter plea of guilty to Bonanza Valley conspiracy, and then not until first day of second trial. District Court did not clearly err in denying reduction where Richard was not timely in his notification to government of his intent to plead guilty.)

United States v. Schaffer, 110 F.3d 530 (8th Cir. 1997). (Schaffer argues District Court

should have further reduced § 924(c)(1) sentence either as adjustment or departure. Schaffer refers to § 5G1.2(a) and contends acceptance of responsibility adjustment which District Court applied to drug count at sentencing, should also be applied independently to gun count. District Court was correct not to adjust Schaffer s § 924(c)(1) conviction for acceptance of responsibility as adjustments set forth in Chapter Three are to be applied to BOL (§ 1B1.4(c)-(e)); implication from this instruction is adjustments are not to be applied to mandatory statutory sentences.)

United States v. Triplett, 104 F.3d 1074 (8th Cir.) (Steven Triplett argues District Court inadvertently neglected to grant him downward departure in light of his guilty plea to § 922(g) charge. Change of plea hearing seems to indicate government suggested, and District Court agreed, Steven was entitled to two-level departure, but sentence imposed does not reflect adjustment was made. This Court has no way of knowing whether omission was deliberate or inadvertent; on remand, District Court should explicitly exercise its discretion as to whether downward departure for acceptance is warranted.), cert. denied, 520 U.S. 1236 and 520 U.S. 1270 (1997).

United States v. Knight, 96 F.3d 307 (8th Cir. 1996). (District Court s refusal to give Knight any credit for acceptance is not clearly erroneous. At plea hearing, Knight acknowledged criminal activity involving more than 50 grams of cocaine base, but later filed motion to withdraw his plea asserting he was not guilty. At sentencing, Knight again denied involvement with cocaine base. Contrary to Knight s contention, District Court did not penalize him for refusing to volunteer self-incriminating information, but instead did not give him benefit extended to defendants who accept responsibility for their wrongs.

Backstrom asserted Court should have reduced his offense level by three instead of two; he asserted entitlement to additional one-level reduction because he timely provided complete information to government concerning his own involvement in offense. No clear error in District Court s implicit finding Backstrom did not provide government with complete information about his involvement: at sentencing, Backstrom denied involvement in cocaine base transaction even though District Court found he was involved in sale and Backstrom also refused to elaborate on other uncontested cocaine sales.), cert. denied, 520 U.S. 1180 (1997).

United States v. Atlas, 94 F.3d 447 (8th Cir. 1996). (Presentence deportment is factor that may be considered in applying acceptance of responsibility reduction; this circuit has previously held District Court may consider conduct not similar to charged conduct in order to determine if defendant is truly sorry for crimes for which he has been convicted. Atlas s behavior in jail while awaiting sentencing is valid factor under § 3E1.1. District Court erred, however, in amount of reduction it awarded. Under § 3E1.1, defendant s offense level may be decreased by total of three levels: two for acceptance of responsibility and one additional level for timely acceptance of responsibility. In granting two-level reduction, District Court noted Atlas had not fully accepted responsibility; this Court infers District Court awarded one level under § 3E1.1(a) and other under § 3E1.1(b). District Court may not award one level reduction under § 3E1.1(a) for partial acceptance of responsibility. This Court remands for resentencing: if Atlas has not fully accepted responsibility, he is not entitled to any reduction; if he has accepted responsibility, he is entitled to two-level reduction and may also be entitled to further one-level reduction (§ 3E1.1(b)).), cert. denied, 520 U.S. 1130 (1997).

United States v. Thomas, 93 F.3d 479 (8th Cir. 1996). (Burden rests with defendant to establish he accepted responsibility. Here, District Court reasonably refused to find Thomas had accepted responsibility as, except for crack police found hidden in his hat, Thomas continued to deny any connection to drugs (nor did he voluntarily terminate criminal conduct or voluntarily surrender to authorities promptly after commission of offense or voluntarily assist authorities in recovering fruits of offense).)

United States v. Johnigan, 90 F.3d 1332 (8th Cir. 1996). (Johnigan argues he should have received three-level reduction because he twice admitted guilt and prior to first guilty plea, he provided timely information about his involvement in underlying offense and even helped arrange drug transaction. He argues his circumstances are analogous to commentary example (§ 3E1.1, comment. (n.2)) because he withdrew his first guilty plea only to preserve Fourth Amendment challenge to airport stop and subsequent hotel room search. District Court declined to give downward adjustment, observing there was scant support for Johnigan s acceptance of responsibility other than fact he pleaded guilty and obviated need for trial, though not entirely because Court at least once went through process of empaneling jury to try case. This Court holds there was ample support for District Court s finding Johnigan did not genuinely accept responsibility for his acts; District Court s finding was not clearly erroneous.)

United States v. Weise, 89 F.3d 502 (8th Cir. 1996). (District Court properly denied request for acceptance of responsibility adjustment, where although Weise admitted stabbing victim, he never accepted responsibility for second degree murder, but rather consistently denied he acted with malice aforethought.)

United States v. Campos, 87 F.3d 261 (8th Cir.) (Campos argues he took responsibility for his actions by pleading guilty and admitting to distribution of 3.5 kilograms of cocaine. Guilty plea does not entitle defendant to reduction as matter of right and acceptance credit can properly be denied where defendant minimizes his role in drug activities. This Court affirms District Court s decision to deny reduction as District Court reasonably determined Campos accepted responsibility for less than all his criminal conduct.), cert. denied, 519 U.S. 1019 (1996).

United States v. Diggs, 82 F.3d 195 (8th Cir.) (Diggs argues he was entitled to reduction because he admitted he possessed gun and was convicted felon. District Court did not err in finding Diggs s claim he was justified in possessing gun reflected failure to clearly accept responsibility.), cert. denied, 519 U.S. 951 (1996).

United States v. Sandow, 78 F.3d 388 (8th Cir. 1996). (Sandow asserts trial Court improperly denied two- or three-point decreases authorized by Guidelines. Based on its reading of sentencing transcript, this Court decides trial Court s decision not to grant any decrease was not clearly erroneous.)

United States v. Hawkins, 78 F.3d 348 (8th Cir.) (Hawkins argues entitlement to reduction because he admitted substantive offense. Voluntarily admitting involvement in offense charged does not automatically entitle defendant to reduction. Here, District Court made specific finding--relying

on PSR--Hawkins had not cooperated with government. As District Court is in unique position to evaluate defendant s credibility, this Court cannot say there was no foundation for District Court s denial of reduction and thus will not disturb decision.), cert. denied, 519 U.S. 844 (1996).

United States v. Byrd, 76 F.3d 194 (8th Cir. 1996). (Byrd pleaded guilty to assault with dangerous weapon; while on release pending sentencing, he tested positive for marijuana. Byrd claims District Court erred in denying him three-point adjustment because government failed to sustain burden of proving he did in fact smoke marijuana while on post-plea release and Court considered conduct unrelated to offense of conviction. Mere act of pleading guilty does not entitle defendant to reduction. Burden of proof is on defendant with respect to mitigating factors: Byrd failed to meet burden, e.g., by disputing test results, by witness testimony contradicting results, or by evidence positive test was caused by ingestion of legal prescription. Byrd admitted to testing positive which he attributed to his having resided at home of friends who smoked marijuana. District Court decided Byrd had engaged in criminal conduct based on totality of circumstances. As to whether District Court can base denial on criminal conduct unrelated to underlying offense, issue of first impression, this Court joins four other circuits in declining to find § 3E1.1 contains restriction against considering unrelated criminal conduct in denying reduction. It concludes section does not preclude sentencing judge, in exercise of discretion, from considering unlawful conduct unrelated to offense of conviction in determining whether defendant qualifies for adjustment. Defendant s engagement in later, undesirable behavior does not necessarily prove he is not sorry for earlier offense, but could shed light on sincerity of claims of remorse.)

United States v. Roggy, 76 F.3d 189 (8th Cir.) (Roggy argues District Court s refusal to grant him reduction was based solely on his exercise of right to proceed to trial. This Court holds District Court did not err in finding Roggy had not clearly accepted responsibility. When first questioned by FDA investigator, Roggy denied using unapproved pesticide; although he eventually admitted making switch, he continued to assert his actions did not amount to fraud. PSR indicated Roggy still claims substitution was generic equivalent for approved pesticide; because Roggy continues to deny fraud, he is not entitled to reduction. Moreover, mere expression of remorse does not warrant reduction. Here, record reflects District Courts informed, conscientious, considered exercise of authority granted to it.), cert. denied, 517 U.S. 1200 (1996).

United States v. Thomas, 72 F.3d 92 (8th Cir. 1995). (After pleading guilty and being released on bond, Thomas tested positive for various controlled substances. District Court did not clearly err by denying him reduction given his continued drug use.)

United States v. Cron, 71 F.3d 312 (8th Cir. 1995). (Cron argues § 3E1.1 provides for only two or three-level reduction and District Court erred in granting him one-level reduction. While argument accords with guideline interpretations, this Court need not remand for resentencing as government did not cross-appeal; 50-month imprisonment sentence is within correct range regardless of one point credit (41-51/46-57) and Court convinced District Court would consider same factors upon resentencing as it did in original sentencing--thus, any error was harmless. If Court deemed error prejudicial to Cron, Court would remand for correction of sentence.)

United States v. Janis, 71 F.3d 308 (8th Cir. 1995). (Janis pleaded guilty to sexual abuse of minor and argues on appeal he is entitled to reduction because he admitted to attempted sexual abuse and there was no evidence of completed rape. He also argues he is entitled to specific performance of plea agreement which he claims bound government to support reduction. District Court s finding Janis did not accept responsibility was not clearly erroneous: although he admitted to attempted sexual abuse, he told probation officer he never touched victim. Medical records reflected excoriation of victim s posterior commissure supporting Court s finding sexual act occurred. Janis s statements do not show truthful admission of conduct underlying offense of conviction and thus do not constitute acceptance of responsibility. No merit to argument Janis was entitled to specific performance where agreement specifically states government need not recommend Janis accepted responsibility if significant evidence is disclosed in PSI to contrary. During PSI, Janis told probation officer he never touched victim and only pleaded guilty because family members would have testified against him. Based on this information, government was not obligated to recommend reduction and therefore did not breach agreement.)

United States v. Keester, 70 F.3d 1026 (8th Cir. 1995). (District Court denied Keester reduction based on its finding Keester inflicted serious injury but did not secure immediate help for victim, did not accompany victim to hospital, and had extended history of domestic abuse against victim. This Court concludes District Court did not clearly err and additionally noted victim previously had been hospitalized due to Keester s abuse, Keester previously had failed to attend domestic abuse classes as ordered by trial Court, Keester s mother and sister did not get victim to hospital until afternoon following night she was beaten, and Keester changed his story to law enforcement officials several times during investigation.)

United States v. Wonderly, 70 F.3d 1020 (8th Cir. 1995). (District Court did not clearly err in denying reduction where evidence at trial, procedural history of case, and Wonderly s continued insistence upon her innocence amply support District Court s determination.), cert. denied, 517 U.S. 1146 (1996).

United States v. Anderson, 68 F.3d 1050 (8th Cir. 1995). (Commentary provides this reduction is not warranted where defendant is assessed enhancement for obstruction of justice except in extraordinary cases. This Court does not consider Anderson s to be extraordinary case within meaning of commentary. Therefore, in light of this Court s determination District Court did not clearly err by assessing enhancement for obstruction of justice, it concludes District Court did not err by refusing to grant reduction for acceptance of responsibility.)

United States v. Ali, 63 F.3d 710 (8th Cir. 1995). (Ali claims he accepted responsibility and points to recommendation in PSR that downward adjustment be given (reasoning: Ali accepted responsibility by admitting at trial gun was touching his leg and basis for his disclaimer of responsibility was his reasonable interpretation of application of law to facts (assuming facts were as Ali claimed)). Ali argued denial of adjustment was logically inconsistent as, on one hand, he has been held accountable for voluntarily admitting gun was touching his leg, yet, he gets no credit at sentencing for judicial admission. District Court correctly noted Ali has never accepted responsibility for possessing gun and continued to claim prosecution was motivated not by

substantial evidence but by Ali s race.)

United States v. Walter, 62 F.3d 1082 (8th Cir. 1995). (While entering guilty plea and admitting offense conduct constitutes significant evidence of accepting responsibility, this may be outweighed by conduct of defendant inconsistent with such acceptance. Here, Walter was arrested for crack-related crime and released on personal recognizance subject to terms which included agreement to refrain from unlawful use or possession of narcotic drug or other controlled substance and to report for random urinalysis. Walters plea agreement provided for three-level reduction, but government reserved right to resist if between signing agreement and sentencing hearing, Walter were to engage in conduct inconsistent with acceptance. It was undisputed Walter tested positive for controlled substance (marijuana) on at least ten occasions during pre-trial release. District Court denied reduction; Walter argued this was error based on his use of marijuana while on pre-trial release. Although marijuana was not drug of offense of conviction, it is controlled substance and this was controlled substance offense. Nothing in section prohibits taking this conduct into account and sentencing judge s determination is entitled to great deference on review.)

United States v. Cohen, 60 F.3d 460 (8th Cir. 1995). (This Court s conclusion that District Court properly found Cohen deserved obstruction enhancement defeated Cohen s claim to acceptance-of-responsibility reduction because, barring extraordinary circumstances not extant here, obstruction enhancement precludes claim to acceptance reduction.)

United States v. Skorniak, 59 F.3d 750 (8th Cir.) (Skorniak argued District Court erred in failing to grant him reduction as he accepted responsibility as evidenced by his guilty plea, albeit after over two weeks of trial. District Court did not err as it determined Skorniak denied responsibility for certain relevant conduct making up his offense of conviction.), cert. denied, 516 U.S. 980 (1995).

United States v. Rodamaker, 56 F.3d 898 (8th Cir. 1995). (Here, John Rodamaker did not challenge facts in PSR (which would have necessitated evidentiary hearing); rather, he disputed inference to be drawn from those facts. District Court could draw appropriate inferences from facts and was in best position to judge credibility of Rodamaker s claim his numerous hospitalizations were medically necessary. District Court s finding Rodamaker had not truthfully admitted conduct comprising offense of conviction and thus, was not entitled to reduction was not clearly erroneous where facts in PSR indicated for example, Rodamaker had previously been convicted of mail fraud for same type of multiple hospital indemnity insurance policy scheme, he advised individual to use staged slips and falls because they were difficult to refute.)

United States v. Irons, 53 F.3d 947 (8th Cir. 1995). (Irons contends District Court should have decreased his BOL by two because he settled his civil lawsuit with insurance company before his criminal trial and made full restitution to company under settlement agreement. District Court did not clearly err in finding Irons did not demonstrate acceptance of responsibility: paying restitution to settle civil lawsuit does not reveal remorse or willingness to obey law; adjustment not intended to apply to defendant who puts government to its burden of proof at trial by denying essential factual elements of guilt; Irons maintained throughout trial he had not staged collision and

his disability was genuine; and Irons failed to cooperate in government investigation, obstructed justice at his trial, and never expressed remorse for his crimes. District Court did not weigh Irons s intent to appeal against him when it was considering whether to adjust his BOL.)

United States v. Nguyen, 52 F.3d 192 (8th Cir. 1995). (After his arrest, Nguyen confessed to his involvement in counterfeit credit card scheme; in plea agreement, government agreed Nguyen was entitled to two-level reduction for acceptance of responsibility. Then while on bond, Nguyen was arrested after he was observed making purchases with counterfeit credit cards at various Omaha stores. At sentencing, District Court denied him two-point reduction; he argues he is entitled to reduction because he acknowledged facts which supported government s allegations and acknowledged illegality of those acts. Defendant who enters guilty plea is not entitled to adjustment under section as matter of right. Key issue is whether defendant has shown recognition and affirmative responsibility for offense and sincere remorse. Difficult to imagine any behavior more inconsistent with acceptance than commission of same type of offense while on bond; this Court has consistently denied reduction to defendants whose conduct belies their claims of contrition. No clear error in District Court s denial.)

United States v. Evans, 51 F.3d 764 (8th Cir. 1995). (No clear error in District Court s conclusion Evans failed to demonstrate acceptance of personal responsibility where Court doubted truth of Evans s account of her role in offense and concluded she knew more about drug activities than she had admitted.

District Court found Kemp not entitled to reduction because he failed to timely acknowledge past crimes committed under alias. Kemp argued acknowledgment of criminal history is not relevant in determining whether he accepted responsibility for most recent criminal conduct. District Court referred to Kemp s failure to acknowledge as attempt to deceive probation office and Court--proper consideration for determination of acceptance of personal responsibility. This Court comments even if Kemp had acknowledged his criminal history, record contained ample evidence he failed to accept personal responsibility for his role in instant offense.

District Court denied Jackson s request for reduction based on substantial discrepancies between information he supplied to probation officer and that contained in his plea agreement; Court also noted Jackson gave statements to probation officer minimizing his role in drug activities. On appeal, Jackson argued his statements were misstatements made out of fear and ignorance. This Court finds denial of reduction amply supported by record.)

United States v. Makes Room For Them, 49 F.3d 410 (8th Cir. 1995). (Makes Room argued because he offered to plead guilty to charge of assault and did not contest underlying facts giving rise to offense, he is entitled to reduction. Makes Room admitted he did charged acts but denied he acted with malice aforethought and consistently denied he acted with required mens rea and therefore denied responsibility for second degree murder. While his insistence upon trial does not automatically preclude reduction, here there was no clear error in District Court s conclusion Makes Room had not clearly demonstrated acceptance of responsibility for his offense. Moreover, as District Court properly denied § 3E1.1(a) reduction, it properly denied § 3E1.1(b)(1) reduction as well.)

United States v. Smith, 49 F.3d 362 (8th Cir. 1995). (Where District Court had based its refusal to grant Bobo decrease for acceptance of responsibility on his unwillingness to admit his role in conspiracy, this Court remands in light of discredited testimony and vacation of one count of conviction.)

United States v. Newson, 46 F.3d 730 (8th Cir. 1995). (Newson argued he was entitled to three-level reduction because he admitted his role in offense charged and stipulated to facts submitted by government, regardless of his subsequent attempt to withdraw plea and rely on defense of entrapment. He also urged de novo review by this Court of proposition that defendant who asserts entrapment is not entitled to acceptance of responsibility reduction. District Court made specific finding Newson had not demonstrated acceptance because he continued to contend he committed offense only for reason somebody else tricked him into doing it; judge s denial of reduction was based on particular facts of Newson s case--District Court correctly applied § 3E1.1 and its decision was not clear error.)

United States v. Poplawski, 46 F.3d 42 (8th Cir.) (While this Court acknowledged Poplawski s guilty plea and cooperation with law enforcement officers are evidence of acceptance of responsibility, Poplawski s related criminal conduct while free on bond awaiting disposition of case may be considered in determining acceptance. Here, Poplawski pleaded guilty to conspiracy to manufacture and distribute methamphetamine; he twice tested positive for drug use while released on bond and continued use of drug is related to offense of conspiring to manufacture and distribute that drug.), cert. denied, 515 U.S. 1109 (1995).

United States v. Barris, 46 F.3d 33 (8th Cir. 1995.) (Defendant who goes to trial on insanity defense, thus advancing issue that does not relate to his factual guilt, may qualify for acceptance-of-responsibility reduction. Thus, this Court holds defendant s assertion of insanity defense does not as matter of law preclude reduction. This Court emphasizes, when defendant goes to trial to assert and preserve issues that do not relate to factual guilt, determination that defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct. Sentence vacated and case remanded for resentencing.)

United States v. Smith, 40 F.3d 933 (8th Cir. 1994). (Based upon his partial confession and willingness to plead guilty to bank larceny (though he went to trial on element of intimidation), Smith requested reduction. District Court denied request in part because Smith forced government to go to trial. Smith argued by denying reduction, Court wrongfully punished him for exercising constitutional right to jury trial. Section 3E1.1 does not punish defendant for exercising constitutional right to jury trial, however, acceptance-of-responsibility reduction is simply not intended to apply to defendant who puts government to its burden of proof at trial by denying factual elements of guilt. This was not "rare situation" in which defendant demonstrated acceptance after exercising his constitutional right.)

United States v. Karam, 37 F.3d 1280 (8th Cir. 1994). (Haro put government to its proof by going to trial and this Court agrees with District Court s assessment that this is not one of rare cases described in comment. (n.2) when reduction is appropriate for defendant who has gone to trial.

District Court s declination to grant reduction was also based on fact Haro refused to discuss his criminal conduct with probation officer, indication he did not fully accept responsibility for his action.)

United States v. King, 36 F.3d 728 (8th Cir. 1994). (King claimed District Court erred in determining he was not entitled to reduction, as he confessed to possession with intent to distribute charge on day he was arrested and later pleaded guilty to that offense (on second day of trial). Trial Court denied reduction on basis that King s guilty plea to Count I did not alleviate government s burden because Count II required much same proof required in Count I. Based on record, this Court could not say decision to deny King reduction was without foundation or clearly erroneous. While putting government through rigors of trial is not per se bar to reduction, trial Court enjoys wide latitude in this area. Practical effect of King s guilty plea had little effect on quantum of evidence government was required to present. Government was not bound by King s guilty plea to refrain from presenting evidence regarding drug count. Nothing to show King was entitled to acceptance of responsibility on Count II.)

United States v. Behr, 33 F.3d 1033 (8th Cir. 1994). (District Court did not err in declining to give reduction where it found Behr at no time admitted that any of his actions were wrong.)

United States v. Farmer, 32 F.3d 369 (8th Cir. 1994). (No clear error in denying reduction given fact Farmer admitted, for sentencing purposes, physical assault on victim but steadfastly denied sexual attack.)

United States v. Whitfield, 31 F.3d 747 (8th Cir. 1994). (This Court concludes District Court did not clearly err in finding Whitfield undeserving of adjustment: reduction not intended to apply to defendant who requires government to meet its burden of proving guilt beyond reasonable doubt and then admitting guilt after conviction. This Court rejects Whitfield s argument that adjustment was denied on basis of pre-offense conduct as District Court found Whitfield never had admitted that letters he sent constituted threat and Court observed that Whitfield played games with Court on witness stand.)

United States v. Gleason, 25 F.3d 605 (8th Cir.) (Gleason asserted District Court error in denying him reduction as he admitted his conduct, voluntarily assisted authorities in locating weapon used in robbery, and entered guilty plea. This Court defers to District Court s finding and affirms denial of reduction where District Court termed Gleason s acceptance of responsibility "halfhearted" and noted reduction would be inconsistent with finding of obstruction of justice as Gleason chose to lie at suppression hearing and try to manipulate system.), cert. denied, 513 U.S. 911 (1994).

United States v. Blanc, 24 F.3d 1029 (8th Cir.) (This Court has generally reviewed rehabilitative efforts in context of acceptance of responsibility. Here, while Court agrees Blanc s participation in methadone program in attempt to conquer his drug addiction is laudable pursuit, Blanc s denial of any involvement in drug transaction at issue does not support acceptance-of-responsibility reduction. Furthermore, downward departure is within sound discretion of District

Court; this Court lacks authority to review exercise of this discretion.), cert. denied, 513 U.S. 909 (1994).

United States v. Haversat, 22 F.3d 790 (8th Cir. 1994). (Record clearly indicated District Court denied reduction; this Court denies Haversat s and Gibson s request to allow District Court to reexamine question on remand. Moreover, District Court s decision was not clearly erroneous; nolo contendere plea does not admit responsibility and they have continued to minimize their role in conspiracy throughout proceedings.), cert. denied, 516 U.S. 938 (1995).

United States v. Wyatt, 19 F.3d 1283 (8th Cir. 1994). (No clear error for denial of reduction when at sentencing, Wyatt denied he engaged in prior crack transactions assessed against him as relevant conduct.)

United States v. Ford, 19 F.3d 1271 (8th Cir.) (This Court remands to District Court for clarification or resentencing where comments made by sentencing judge suggested decision to grant downward departure might have been based in part on disaffection with Guidelines. District Court construed Ford s concession that he "was probably there" as acceptance of responsibility; this Court was unable to determine whether trial judge grounded this finding on his observations of Ford s demeanor and familiarity with Ford s patterns of speech or if he simply disapproved of Guidelines.), cert. denied, 513 U.S. 1085 (1994).

United States v. Magee, 19 F.3d 417 (8th Cir. 1994). (This Court rejects MCrary s challenge to trial Court s refusal to grant reduction; based on transcript of sentencing hearing, Court s finding was not clearly erroneous.)

United States v. Reetz, 18 F.3d 595 (8th Cir. 1994). (Reetz argued District Court error when it failed to grant adjustment as he pleaded guilty and cooperated by meeting with government and private attorneys in attempt to aid in recovery of funds for his victims. District Court s denial of adjustment not clearly erroneous as facts of case, including Reetz s flight from custody, support Court s decision.)

United States v. Yell, 18 F.3d 581 (8th Cir. 1994). (Yell challenged District Court s refusal to grant him two-level decrease. Acceptance is factual question which depends largely on credibility assessments by District Court. Entry of guilty plea does not entitle defendant to reduction for acceptance of responsibility as matter of right. Here, there was ample foundation for Court s decision to deny reduction where Yell did not timely provide complete information to government concerning his own involvement in offense and did not timely notify authorities of his intention to enter guilty plea which would have allowed government to avoid trial preparation and Court to allocate its resources efficiently.)

United States v. Lucht, 18 F.3d 541 (8th Cir.) (Lee argued entitlement to two-level reduction because she expressed post-trial remorse for her actions in statement included in her revised PSR. This Court rejects contention as this reduction is not intended to apply to defendant who put government to its burden of proof at trial by denying essential factual elements of guilt, was

convicted, and only then admitted guilt and expressed remorse.), cert. denied, 513 U.S. 949 (1994).

United States v. Rosnow, 16 F.3d 1228 (8th Cir. 1993). (On remand for resentencing on all substantive counts without regard to vacated count of conspiracy, law-of-the-case doctrine barred District Court from revisiting question of acceptance of responsibility, unless Roger and Dennis Sands produced substantially different evidence or demonstrated prior decision was clearly erroneous and involved manifest injustice. This Court agrees with District Court that Sandses presented no new evidence sufficient to warrant reconsideration of issue, although they had opportunity to do so at resentencing hearing.)

United States v. Warren, 16 F.3d 247 (8th Cir. 1994). (Warren argued that recent amendment to Guidelines, § 3E1.1(a), should allow him to stack adjustments for acceptance of responsibility, i.e., instead of decreasing his total offense level by two points, District Court should have decreased it by twelve points--two points for each of six counts. This Court states that application instruction, § 1B1.1(e) explicitly precludes stacking this adjustment as adjustment is to be applied only after requisite offense level includes all grouped offenses.)

United States v. Trupiano, 11 F.3d 769 (8th Cir. 1993). (District Court s refusal to grant reduction was not clearly erroneous where Trupiano did not admit to any of essential elements of operating illegal gambling business. In spite of substantial evidence amassed by government against him, Trupiano at no time before, during, or after trial admitted to any of conduct government sought to prove. At sentencing, Trupiano stated he was being convicted of crime that in his heart he knew he did not commit.)

United States v. Olunloyo, 10 F.3d 578 (8th Cir. 1993). (Olunloyo did not contend his case presented factors so extraordinary that he should receive credit for acceptance of responsibility despite obstruction of justice enhancement. Thus, this Court s holding District Court did not err in applying § enhancement moots his appeal on acceptance-of-responsibility issue.)

United States v. Shinder, 8 F.3d 633 (8th Cir. 1993). (Despite Shinder s drug conviction, trial Court permitted her to be released on her own bond. At one of her required appearances before pretrial services, she tested positive for drugs. She then stopped reporting to pretrial services and subsequently abandoned her family of five children and fled to California. This Court holds Shinder s flight to California, after her conviction and prior to her sentencing, was sufficient grounds to deny reduction for acceptance of responsibility.)

United States v. Franik, 7 F.3d 811 (8th Cir. 1993). (District Court did not clearly err in finding record did not show acceptance of responsibility where Franik testified at trial, denying he possessed firearm on night in question, and did not admit truth until after jury had convicted him.)

United States v. Matthews, 5 F.3d 1161 (8th Cir. 1993). (Matthews argued District Court erroneously declined to grant him reduction because he refused to accept responsibility for offenses other than those to which he pleaded guilty. Matthews noted he had pleaded guilty to only two counts, provided statement to Court before sentencing in which he accepted blame for offense of

conviction, and stated to Court he had voluntarily withdrawn from drug business before agents executed search warrant. Where District Court refused to reduce Matthews s offense level because Matthews had not admitted to selling cocaine base to number of government s witnesses and because he had refused to divulge identity of "really big drug dealer," this Court directs District Court to reconsider issue in light of 1992 amendment which recognizes defendant s ability to obtain reduction in face of his silence in respect to relevant conduct beyond offense of conviction.)

United States v. Mabry, 3 F.3d 244 (8th Cir. 1993). (District Court did not err in finding Edwards was not entitled to reduction where even after being convicted, he refused to accept responsibility for his crimes, telling presentence investigator that he was only small-time hustler. His post-conviction statement that he accepted responsibility for conspiracy and his actions were unconvincing--securing reduction is not simply matter of incanting appropriate litany of remorse. The fact that plea agreement was late in coming and not accepted or worked out is not reason to award two-point reduction.)

United States v. Abanatha, 999 F.2d 1246 (8th Cir. 1993). (Mark argued his entitlement to reduction because he pleaded guilty to conspiring to possess 42 pounds of marijuana. District Court did not abuse its discretion in denying reduction where District Court found testimony of courier which involved Mark with three times amount of marijuana to which he was willing to admit.), cert. denied, 511 U.S. 1035 (1994).

United States v. Ball, 999 F.2d 339 (8th Cir. 1993). (Because Ball failed to assert below that he was entitled to three level reduction, this Court will not reverse unless there is plain error resulting in fundamental miscarriage of justice. This Court concludes there was no fundamental miscarriage of justice in this instance.)

United States v. Welna, 998 F.2d 599 (8th Cir. 1993). (Welna pleaded guilty to manufacturing marijuana plants. Welna argued that applicable standard for determining whether defendant has accepted responsibility did not require far-reaching affirmative acceptance for all conduct. Welna asserted Court erred in finding he intended to distribute marijuana and in denying reduction because he failed to accept responsibility for distribution which was neither conduct comprising offense of conviction nor relevant conduct. When Welna pleaded guilty, he admitted to planting seeds but stated that he produced plants for personal use. Scales, packaging materials, cash, and amounts of marijuana on Welna s property supported Court s determination that Welna intended to distribute marijuana. Making false statements at plea hearing in regard to any action, relevant criminal conduct or otherwise, is conduct that is inconsistent with acceptance of responsibility. District Court did not err in denying request for reduction.)

United States v. Hipolito-Sanchez, 998 F.2d 594 (8th Cir. 1993). (This Court concludes District Court did not abuse its discretion in denying reduction where although Hipolito-Sanchez testified at his sentencing hearing he was willing to accept responsibility for his action, he continued to state--contrary to statements in PSR--that he had personally delivered only 13 or 14 grams of cocaine. His voluntary admission of participation in crime plus his willingness to cooperate with government in further investigations do not automatically entitle him to reduction.)

United States v. Bald Eagle, 997 F.2d 1234 (8th Cir. 1993). (Bald Eagle contended District Court could not deny him reduction based on his denial of guilt at presentencing interview because his attorney was not present. District Court s decision to deny reduction was not clearly erroneous where Bald Eagle s statements at interview and at sentencing amply supported denial and he did not allege or show that he requested his attorney s presence or that his attorney was excluded from interview.)

United States v. Jones, 994 F.2d 456 (8th Cir. 1993). (District Court properly denied reductions where it found Jones took photos of minor girl and his wife was present when he did so, yet both denied conduct.)

United States v. Termini, 992 F.2d 879 (8th Cir. 1993). (In reversing Termini s conviction on Count II, this Court reminds District Court to revisit whether section applies as defendant who proceeds to trial to challenge applicability of statute to his conduct may still qualify for reduction for acceptance of responsibility.)

United States v. Speck, 992 F.2d 860 (8th Cir. 1993). (Long before Speck s arrest for this crime, he got his job back, reconciled with his mother, and convinced employer and halfway house supervisors he was on way to successful rehabilitation. Nevertheless, Speck consistently denied responsibility for cocaine conspiracy and distribution crimes of which he was convicted. Moreover, Speck s own words and actions make it clear that his 1990 decision to end his crime spree did not manifest acceptance of responsibility for drug crimes at issue. Defendant who maintains innocence, blames others, and expresses regret only for consequences of criminal conduct does not accept responsibility within meaning of § 3E1.1. This Court reverses as without foundation grant of reduction.)

United States v. Armstrong, 992 F.2d 171 (8th Cir. 1993). (In light of finding Armstrong obstructed justice, District Court properly denied reduction. Furthermore, record supports findings that Armstrong was not completely truthful in regard to his involvement in conspiracy and in regard to location of counterfeit currency in his home.)

United States v. Marx, 991 F.2d 1369 (8th Cir.) (It was appropriate for District Court to deny reduction where Marx perjured himself at trial.), cert. denied, 510 U.S. 1018 (1993).

United States v. Little, 990 F.2d 1090 (8th Cir. 1993). (This Court rejects Little s argument he should have gotten reduction because he gave voluntary statement to FBI, pled guilty, did not hesitate in admitting illegal conduct, and accepted responsibility. District Court did not clearly err in finding Little had not "clearly" accepted responsibility as record revealed Little conveyed his conduct was justified (e.g., bankruptcy trustee suffered no loss, he was entitled to offset amounts trustee owed.)

United States v. Ransom, 990 F.2d 1011 (8th Cir. 1993). (District Court had sufficient basis for denying reduction where among its findings were Ransom s reference to government prosecution as "witch hunt" and his statement about being forced into position in which he "had no

choice but to go this long.")

United States v. Neal, 990 F.2d 355 (8th Cir. 1993). (Neal s "attitude" was proper consideration for District Court when evaluating whether decrease for acceptance of responsibility was warranted in light of obstruction enhancement.)

United States v. Thomas, 989 F.2d 277 (8th Cir. 1993). (District Court properly denied reduction where Thomas continued his criminal activity while released on bond pending trial for two other offenses. Defendant who pleads guilty is not entitled to acceptance of responsibility reduction as matter of right.)

United States v. Nelson, 988 F.2d 798 (8th Cir.) (Appellants admission they switched labels and also made restitution does not necessarily translate into acceptance of responsibility in light of denial of criminal conduct, downplaying of role in scheme.), cert. denied, 510 U.S. 914 (1993).

United States v. Villegas, 987 F.2d 1362 (8th Cir. 1993). (District Court did not clearly err in denying reduction where despite his plea of guilty, Villegas offered "incredible" testimony for determining amount of cocaine and did not clearly demonstrate acceptance of responsibility.)

United States v. Yankton, 986 F.2d 1225 (8th Cir. 1993). (District Court did not err in denying reduction where though Yankton professed remorse for consequences of his actions, he still maintained on appeal that he did not forcibly rape victim.)

United States v. Aldridge, 985 F.2d 960 (8th Cir.) (District Court s refusal to reduce Aldridge s offense level was not clearly erroneous where during and after trial, Aldridge denied her guilt and asserted law enforcement officers lied at trial.), cert. denied, 508 U.S. 967 (1993).

United States v. Cox, 985 F.2d 427 (8th Cir. 1993). (In light of this Court s reversal of obstruction of justice enhancement, possible § 3E1.1 reduction should be reconsidered as case for credit would no longer have to be "extraordinary.")

United States v. Passmore, 984 F.2d 933 (8th Cir. 1993). (Although it would have been better for District Court to have explicated its grounds for denial of reduction, Passmore s attempt to withdraw his guilty plea because of Court s announcement it intended to depart upward was inconsistent with clear recognition and affirmative acceptance of personal responsibility for criminal conduct. DISSENT: Acknowledging that Passmore s abortive attempt to withdraw guilty plea may indicate he had not genuinely accepted responsibility, district should state why it denied reduction in light of PSR recommendation and Passmore s initial timely plea and cooperation.)

United States v. Adipietro, 983 F.2d 1468 (8th Cir. 1993). (This Court affirms District Court s refusal to give Adipietro reduction where Adipietro s admission to involvement was not timely, he admitted only facts brought out at trial, and never volunteered information relating to his involvement in conspiracy.)

United States v. Lublin, 981 F.2d 367 (8th Cir. 1992). (District Court s denial of reduction was not clearly erroneous where Court made credibility determination: Lublin was not sincere in accepting responsibility for his crime; probation officer noted Lublin did not give any reasonable indication of acceptance of responsibility; Lublin was not truthful during presentence investigation; he did not voluntarily withdraw from offense; and he did not assist authorities during investigation of offense. (Court declined to reach Lublin s Fifth Amendment argument.).)

United States v. Furlow, 980 F.2d 476 (8th Cir. 1992) (en banc). (Furlow asserted District Court mistakenly thought guilty plea by itself was insufficient to justify reduction. This Court acknowledges close issue, but expresses satisfaction District Court recognized it could grant credit where Court explicitly accepted government s argument which acknowledged acceptance might be proper upon guilty plea alone (but went on to dispute whether Furlow had done more than plead guilty and whether he had truly accepted responsibility for his actions). While there was evidence in record to support Furlow s alternative argument that he did far more than tender guilty plea, there was also evidence to contrary. And District Court was not clearly erroneous in denying credit.), cert. denied, 508 U.S. 914 (1993).

United States v. Rodriguez, 979 F.2d 138 (8th Cir. 1992). (Denial of reduction was not clearly erroneous where Rodriguez had repeatedly reentered country and despite his plea of guilty, did not meet his burden of showing sincere remorse and personal acceptance of responsibility.)

United States v. Jagim, 978 F.2d 1032 (8th Cir. 1992). (Depew s plea of guilty and testimony for government at trials of two of his cohorts did not entitle him to reduction as matter of right. Decision to deny reduction was not clearly erroneous where Depew suborned perjury and perjured himself before grand jury, raised frivolous claim of immunity in effort to withdraw his guilty plea, expressed no remorse for his illegal acts, and obstructed justice.)

United States v. Lewis, 978 F.2d 453 (8th Cir. 1992). (Although sentencing judge did not preside at Lewis s guilty plea hearing, he did have opportunity to observe and listen to Lewis, before concluding Lewis s actions were not indicative of acceptance of responsibility. Record suggests Lewis realized he had done something unlawful before he was arrested, but made no affirmative attempt to rectify his actions. Moreover, there were inconsistencies in testimony and Court implicitly credited pawnshop owner.)

United States v. Peery, 977 F.2d 1230 (8th Cir. 1992). (Peery claimed that because prior to trial he cooperated with Compact Commission to gather his assets for liquidation and because purpose of trial was to test applicability of statute to his conduct, he should have been granted reduction. This Court affirms where though one of Peery s defense theories hinged on applicability of statute, he also argued he possessed good faith belief he was authorized to spend Commission s money in manner he did.), cert. denied, 507 U.S. 946 (1993).

United States v. Rosnow, 977 F.2d 399 (8th Cir. 1992). (Though three defendants contended they took responsibility for their actions and should receive appropriate sentencing credit, record

indicated each defendant testified at trial and showed no remorse for his actions. Thus, this Court affirmed District Court s decision not to invoke departure.)

United States v. Rowley, 975 F.2d 1357 (8th Cir. 1992). (No abuse of discretion in District Court s denying reduction where Rowley continued to deny existence of conspiracy for which he was convicted.)

United States v. Johnston, 973 F.2d 611 (8th Cir. 1992). (District Court s finding that Johnston was not entitled to adjustment was not clearly erroneous where Court noted Johnston s acceptance of responsibility was eleventh-hour jailhouse conversion and Johnston did not voluntarily terminate his criminal activity. Moreover, it takes extraordinary case for application of sections and 3E1.1.), cert. denied, 506 U.S. 1068 (1993).

United States v. Wollenzien, 972 F.2d 890 (8th Cir. 1992). (Denial of reduction was well within District Court s discretion as under Court s view of evidence, Wollenzien did not own up to anything close to degree of violence which he perpetrated. Moreover, district judge noted he would have imposed same sentence even if he had granted reduction.)

United States v. Hernandez, 972 F.2d 885 (8th Cir. 1992). (This Court rejects Hernandez s argument that denial of two point reduction based on his declination, on advice of counsel, to discuss offense with probation officer penalized him for exercising his Fifth Amendment right to remain silent.), cert. denied, 507 U.S. 922 (1993).

United States v. Edgar, 971 F.2d 89 (8th Cir. 1992). (Prior to being found guilty by jury, Edgar denied any intent to defraud creditors. District Court did not clearly err in denying reduction based on Edgar s refusal to admit essential element of bankruptcy fraud before his conviction.)

United States v. Stockton, 968 F.2d 715 (8th Cir. 1992). (District Court did not abuse its discretion in denying reduction where, though Stockton admitted at his sentencing hearing to purchasing 75 pounds of precursor chemicals, he only admitted to partial involvement in conspiracy and only to limited portion of methamphetamine manufactured. He also had denied being in Kansas City to negotiate purchases of lab equipment, in contrast to evidence adduced at trial.)

United States v. Unzueta-Gallarso, 966 F.2d 390 (8th Cir. 1992). (District Court did not clearly err in denying Unzueta-Gallarso adjustment where though he was forthright about his transgressions--unlawful entry into U.S. and use of another s social security number to obtain welfare benefits--when interviewed by INS and probation officer, he went to trial (putting government to its burden of proving essential factual elements of offenses) and did not express remorse to District Court. Moreover, his continuing illegal use of social security number after admissions to INS agents was inconsistent with genuine acceptance of responsibility.)

United States v. Jones, 965 F.2d 1507 (8th Cir.) (Roulette argued that because he confessed shortly after police arrested him and gave statements that aided police, he should have gotten reduction. This Court observed that Roulette clearly did not qualify for reduction as he never

pleaded guilty and did not cease illegal activities voluntarily.), cert. denied, 506 U.S. 924 (1992).

United States v. Davila, 964 F.2d 778 (8th Cir.) (No clear error in District Court s denial of reduction where it appeared Davila s primary motive in cooperating with government was to obtain reduction in sentence, not sense of remorse over his past conduct; moreover, Davila also put government to its burden of proof by pleading not guilty to all counts.), cert. denied, 506 U.S. 964 (1992).

United States v. Todd, 963 F.2d 207 (8th Cir. 1992). (In light of enhancement for obstruction of justice, District Court did not commit clear error in denying Todd reduction for acceptance of responsibility.)

United States v. Sawyers, 963 F.2d 157 (8th Cir.) Because Richardson took none of actions listed in commentary to § 3E1.1, this Court did not find District Court was clearly erroneous in holding he did not demonstrate recognition and affirmative acceptance of personal responsibility for his criminal conduct.), cert. denied, 506 U.S. 1006 (1992).

United States v. Waloke, 962 F.2d 824 (8th Cir. 1992). (While Waloke asserted his admission that he committed assault constituted acceptance of responsibility, he contended throughout judicial process he is not criminally responsible at all because he committed assault in self-defense. District Court did not abuse its discretion in refusing departure as Waloke never admitted his guilt or demonstrated sincere remorse.)

United States v. Kloor, 961 F.2d 1393 (8th Cir. 1991). (District Court s ruling was not clearly erroneous. Though Kloor pleaded guilty, stipulated to facts of his offense, and expressed realization of his wrong doing at sentencing, he also fled from authorities, attempted to hide express mail package, and consistently refused to expound on facts of his offense.)

United States v. Olderbak, 961 F.2d 756 (8th Cir.) (District Court s refusal to decrease Olderbak s base offense level affirmed where his only indication of acceptance of responsibility for his criminal conduct was his testimony at trial, during which he made certain admissions.), cert. denied, 506 U.S. 959 (1992).

United States v. Lyon, 959 F.2d 701 (8th Cir. 1992). (No reason to disturb District Court s finding Lyon did not merit decrease where Lyon fled jurisdiction and remained fugitive for year under false identity in order to escape testifying against his co-defendants, or cooperating.)

United States v. Flores, 959 F.2d 83 (8th Cir.) (There was ample foundation for District Court s denial of reduction where District Court specifically stated its decision was not based on fact Flores testified untruthfully (and thereby obstructed justice) but based on its firm conviction Flores did not accept responsibility for conduct to which he pleaded guilty.), cert. denied, 506 U.S. 976 (1992).

United States v. Askew, 958 F.2d 806 (8th Cir. 1992). (This Court rejects Glasco s

argument District Court improperly punished him for exercising his right to trial where PSR recommended reduction and Court denied it. District Court noted any acceptance of responsibility was untimely because it did not occur until after Glasco was convicted in absentia after fleeing his trial (warranting § enhancement); moreover, Glasco was amply rewarded for his cooperation after his post trial arrest.)

United States v. Wichmann, 958 F.2d 240 (8th Cir. 1992). (District Court did not abuse its discretion in denying reduction despite Wichmann s guilty plea; Court was entitled to consider fact Wichmann failed to appear for trial as well as untimeliness of plea. Moreover, Wichmann did not voluntarily stop criminal conduct or associations, did not pay restitution prior to adjudication of guilt, did not make voluntary admissions about his crimes, and did not voluntarily surrender.)

United States v. Morton, 957 F.2d 577 (8th Cir. 1991). (Because District Court enhanced Morton s sentence for obstruction of justice, it properly denied him reduction for acceptance of responsibility.)

United States v. Lincoln, 956 F.2d 1465 (8th Cir.) (Lincoln did not meet burden of showing his entitlement to reduction. Combination of Lincoln s initial evasiveness regarding his participation in perjury with absence of any expression of remorse or admission of responsibility, gives District Court s decision foundation this Court is not empowered to ignore.), cert. denied, 506 U.S. 891 (1992).

United States v. Earles, 955 F.2d 1175 (8th Cir. 1992). (Whether defendant has accepted responsibility is factual question which depends largely on credibility assessments by District Court. Here, record supports denial.)

United States v. Comeaux, 955 F.2d 586 (8th Cir.) (District Court was not clearly erroneous in refusing to grant two point reduction. As District Court noted, Wilson did not accept responsibility, but only admitted past drug use.), cert. denied, 506 U.S. 845 (1992).

United States v. Ulrich, 953 F.2d 1082 (8th Cir. 1991). (This Court gives great deference to District Court s determination of acceptance of responsibility. Here, record clearly supported District Court s conclusion that Ulrich believed world was wrong and he had right to grow marijuana on his land.)

United States v. Amos, 952 F.2d 992 (8th Cir. 1991). (This Court agrees with government s contention District Court erred in granting decrease. Fact that Amos admitted to crime and accepted responsibility when he entered his guilty plea became irrelevant once he proceeded to trial and denied offense, maintaining no sexual contact took place.), cert. denied, 503 U.S. 1010 (1992).

United States v. Burnett, 952 F.2d 187 (8th Cir. 1991). (At his guilty plea hearing, Burnett offered number of reasons for his failure to appear including his fear of prison, car problems, death threats, temporary insanity, and misinformation from his attorney. Subsequently, he wrote letter to Court stating that nobody but himself was responsible for not appearing. This Court found

Burnett s assertion that guilty plea and letter entitled him to reduction, without merit.)

United States v. Miller, 951 F.2d 164 (8th Cir. 1991). (Miller s guilty plea did not guarantee her reduction and District Court could properly deny reduction despite Miller s profession of regret. District Court s rejection of reduction clearly supported by record where PSR contained information that Miller withheld credit bureau report from probation officer, refused to discuss her involvement in offense, and stated she signed plea agreement under protest without having read it.)

United States v. Garlich, 951 F.2d 161 (8th Cir. 1991). (A defendant s voluntary payment of restitution before adjudication of guilt is factor considered for reduction, as is guilty plea before trial.)

United States v. Laird, 948 F.2d 444 (8th Cir. 1991). (This Court holds District Court was not clearly erroneous in denying reduction where though Laird alleged he voluntarily terminated his criminal activity, provided truthful admissions, and assisted authorities, his acceptance of responsibility was equivocal; at one point, he claimed his source made him commit offense.)

United States v. Patterson, 946 F.2d 1371 (8th Cir. 1991). (This Court agrees with Patterson s argument that District Court should state its reasons for imposing particular sentence, in context of District Court s failure to make specific findings on Patterson s request for acceptance of responsibility reduction. This Court rejects claim, however, that remand is required when, as in this case, record supports rejection of this reduction. CONCUR/DISSENT: Majority reads United States v. Dortch too broadly. Specific factual findings are required by statute, 18 U.S.C. § 3553(c). District Courts will interpret opinion to counsel silence, greater likelihood to be reversed for giving improper reason).

United States v. Drapeau, 943 F.2d 27 (8th Cir. 1991). (District Court s denial of reduction upheld; foundation for determination was Drapeau s statement to probation officer that he was intoxicated at time of rape, did not recall what actually happened, and had difficulty believing he committed offense CONCURRENCE: Thinks District Court made mistake in sentencing Drapeau near top of range, but acknowledges broad discretion given district judge and standard of review.)

United States v. Willis, 940 F.2d 1136 (8th Cir. 1991). (District Court concluded Willis had not sincerely accepted responsibility for his role in overall conspiracy. This Court notes this was not extraordinary case meriting adjustment for acceptance of responsibility in light of enhancement for obstruction of justice.), cert. denied, 507 U.S. 971 (1993).

United States v. Eberspacher, 936 F.2d 387 (8th Cir. 1991). (In denying two-level reduction for acceptance of responsibility, Eberspacher contended District Court unfairly considered his refusal to name his source of drugs (which he claimed was based on fear for his family s safety). This Court affirms denial, noting its limited review and ample support in record for denial, namely, his bordering on perjuring himself at plea hearing and testing positive for cocaine use in violation of his bond.)

United States v. Duke, 935 F.2d 161 (8th Cir. 1991). (While Duke s plea of guilty and his agreement to cooperate with government are factors to be considered, District Court s decision not to grant two point reduction was not without foundation, especially in light of Court s decision to apply obstruction of justice enhancement, and was not abuse of discretion.)

United States v. Clair, 934 F.2d 943 (8th Cir. 1991). (District Court s determination that Clair did not accept responsibility is not without foundation where though he met with government agents and gave full statement of his activities, he subsequently refused to cooperate further; he admitted his acts, but denied he did anything wrong and expressed no remorse. District Court had chance to observe demeanor.)

United States v. Hibbert, 929 F.2d 434 (8th Cir. 1991). (Record supported District Court s denial of reduction based on Hibbert s continued criminal conduct. This decision did not result in Hibbert s being punished twice for committing offense while on bond because denial of reduction was based on continued criminal conduct, and not his release status.)

United States v. Charger, 928 F.2d 818 (8th Cir. 1991). (This Court remands for resentencing where trial Court refused two level reduction. Omission from Charger s original statement of factual account of accident does not merit punishment where her later explanation did not contradict earlier account. Rejection of reduction may not be based solely on defendant s choice to go to trial nor finding that her remorse came after conviction. DISSENT: Not proper for appellate judges to substitute their own view of live witness s credibility when District Court indicated it found Charger s testimony about involvement of one of her passengers incredible.)

United States v. Contreras, 927 F.2d 1058 (8th Cir.) (Proper foundation supported District Court s refusal to find Contreras accepted responsibility for his conduct following his plea of guilty, where record indicated Contreras steadfastly refused to admit his extensive involvement in drug distribution scheme despite evidence and testimony to contrary.), cert. denied, 502 U.S. 929 (1991).

United States v. Youmans, 926 F.2d 747 (8th Cir. 1991). (Youmans argued District Court s finding he had not accepted responsibility was clearly erroneous and government abrogated its part of plea agreement by not moving for 2-level decrease. Although government did not clearly state reason for failing to recommend adjustment, Youmans waived claim because he did not object before District Court and he is not requesting withdrawal of his plea.)

United States v. Dortch, 923 F.2d 629 (8th Cir. 1991). (Though District Court made no express factual findings as it should have, it was implicit in sentence actually imposed that District Court rejected Dortch s arguments. At time Dortch was sentenced in June 1989, Guidelines provided no reduction under § 3E1.1 if adjustment was made under § 3C1.1.)

United States v. Morales, 923 F.2d 621 (8th Cir. 1991). (Morales argued entitlement to reduction as he never wavered in his willingness to inform government of identity of his source. This Court states District Court did not err in determining Morales s statements, which essentially blamed others (belief source of drugs must have been informant), fell short of establishing clear,

voluntary, and affirmative acceptance of responsibility. DISSENT: District Court erroneously believed defendant lied to authorities. In light of government concession that District Court was mistaken, case should be remanded for reevaluation in light of government s candid appraisal of record.)

United States v. Stuart, 923 F.2d 607 (8th Cir.) (This Court finds no error in District Court s exercise of discretion to deny reduction, rejecting Stuart s argument that statements by him acknowledging guilt in PSR and during allocation at sentencing, entitled him to adjustment.), cert. denied, 499 U.S. 967 and 502 U.S. 847 (1991).

United States v. Payne, 923 F.2d 595 (8th Cir.) (This Court will reverse failure to award two-level reduction for acceptance of responsibility only when District Court s decision is "without foundation," which Court did not believe was case here. Court also rejected defendant s claim District Court failed to grant reduction because he asserted his constitutional right to trial.), cert. denied, 501 U.S. 1219 (1991).

United States v. Paige, 923 F.2d 112 (8th Cir. 1991). (Paige did not present extraordinary case in which downward departure may be proper notwithstanding upward adjustment for obstruction of justice.)

United States v. Cox, 921 F.2d 772 (8th Cir. 1990). (Cox s escape from detention center clearly showed he did not accept responsibility for his criminal conduct.)

United States v. Lawrence, 918 F.2d 68 (8th Cir. 1990). (Lawrence cannot raise denial of reduction on appeal where he did not ask District Court for adjustment, nor did he object at sentencing to probation officer s recommendation that adjustment be denied.), cert. denied,499 U.S. 941 (1991).

United States v. Toirac, 917 F.2d 11 (8th Cir. 1990). (Where Toirac did not specifically object to recommendation in PSI report that he receive no downward adjustment for acceptance of responsibility on failure to appear offense, District Court was not required to make specific finding of fact on issue where it implicitly adopted recommendation by not granting downward adjustment. Also, Toirac failed to properly preserve issue for appeal.)

United States v. Casal, 915 F.2d 1225 (8th Cir.) (District Court properly denied acceptance of responsibility reduction when Casal was apprehended only after having "been chased down in middle of snowstorm with guns."), cert. denied, 499 U.S. 941 (1990).

United States v. Keene, 915 F.2d 1164 (8th Cir. 1990). (District Court s determination is entitled to great deference and should not be disturbed unless it is without foundation. Here, District Court determined Keene testified in untruthful manner and attempted to justify his conduct with lame excuses.), cert. denied, 498 U.S. 1102 (1991).

United States v. Cree, 915 F.2d 352 (8th Cir. 1990). (No basis for disturbing District Court s finding that Cree had not accepted responsibility for offense of involuntary manslaughter as Cree admitted only that his behavior was "mistake.")

United States v. Russell, 913 F.2d 1288 (8th Cir. 1990). (Government claimed District Court error in its grant of two point reduction as defendants merely offered guilty pleas. This Court will disturb District Court s decision only if it is without foundation. Fact that defendant only pleads guilty is not conclusive in determining acceptance of responsibility; Guidelines do not require finding defendant exhibits any specific listed objective acts.), cert. denied, 500 U.S. 906 (1991).

United States v. Dugan, 912 F.2d 942 (8th Cir. 1990). (Though Dugan pleaded guilty, showed some remorse and claimed her actions were due to domination of her husband, District Court did not make any clearly erroneous finding of fact nor did it commit error of law in denying her two-point reduction. Pleading guilty is not of itself enough; Dugan showed no particular indicia of acceptance; and Dugan not entitled to moral credit as her decision to plead guilty was based on husband s wishes.)

United States v. Hill, 911 F.2d 129 (8th Cir. 1990). (Where Hill did not express sorrow or state he wished he had not committed crime, District Court properly denied downward adjustment for acceptance of responsibility.), cert. denied, 504 U.S. 975 (1991).

United States v. Dyer, 910 F.2d 530 (8th Cir.) Blanche s perjury on witness stand, which was not by itself followed by any signs of repentance, sufficient for District Court to refuse reduction.), cert. denied, 498 U.S. 907 and 498 U.S. 949 (1990).

United States v. Anspach, 910 F.2d 524 (8th Cir. 1990). (District Court s decision in denying two-level reduction is entitled to great deference upon review. Here, record revealed no reason to disturb decision. Also, sentence was within range Anspach could have received had he been granted reduction.)

United States v. Carroll, 908 F.2d 340 (8th Cir. 1990). (This Court affirms District Court s refusal to grant reduction where use of weapon was essential element of crimes to which Carroll pleaded guilty and his repeated refusals to acknowledge he used gun during course of his crimes demonstrated his refusal to personally accept responsibility for crimes charged. CONCURRENCE: Defendant should not be penalized for exercise of constitutional right. District Court changed its mind as to giving credit after Carroll attempted to withdraw guilty plea.)

United States v. Sands, 908 F.2d 304 (8th Cir. 1990). (This Court gives great deference to District Court s denial of reduction for acceptance of responsibility and reverses only if denial is without foundation.)

United States v. Streeter, 907 F.2d 781 (8th Cir. 1990). (Sentencing judge in unique position to assess appropriateness of granting this adjustment and is entitled to great deference. District

Court did not err in considering Streeter s refusal to cooperate with law enforcement officials.)

United States v. Baker, 907 F.2d 53 (8th Cir. 1990). (Case did not present "extraordinary circumstance" warranting downward adjustment for acceptance of responsibility in face of enhancement for obstruction, where Baker refused to supply information about others, failed to acknowledge sizeable quantity of drugs, and attempted to justify drug-dealing on need to support children.)

United States v. Johnson, 906 F.2d 1285 (8th Cir. 1990). (Government appealed, claiming asserted insufficient evidence of acceptance of responsibility to warrant downward departure and misallocation of burden of proof on government. District Court finding not clearly erroneous where Johnson was unwilling to accept responsibility for totality of jury verdict, but did admit substantial involvement.)

United States v. Sklavenitis, 905 F.2d 1166 (8th Cir. 1990). (Fact that defendant only pleads guilty is not conclusive in determining whether defendant did or did not accept responsibility. Case remanded for resentencing, citing Knight, as District Court appeared not to realize defendant need not necessarily do something in addition to pleading guilty to warrant reduction.)

United States v. Williams, 905 F.2d 217 (8th Cir. 1990). (Guidelines in place at time defendant was sentenced did not allow career offenders reductions for acceptance of responsibility.), cert. denied, 498 U.S. 1030 (1991).

United States v. Knight, 905 F.2d 189 (8th Cir. 1990). (This Court reverses and remands where plea agreement stipulated that defendant was entitled to two-point reduction for acceptance of responsibility and District Court denied it because plea was not accompanied by "some further affirmative act." That view of § 3E1.1 is unduly narrow; reduction is warranted when defendant s plea demonstrates recognition and affirmative responsibility for offense, sincere remorse. (Dissent interprets Application Note 3 to require some additional factor to plea.).)

United States v. Green, 902 F.2d 1311 (8th Cir.) (District Court did not have authority to grant two-point reduction for acceptance of responsibility prior to effective date (Nov. 1, 1989) of amendment to § 4B1.1 career offender provision.), cert. denied, 498 U.S. 943 (1990).

United States v. Figueroa, 900 F.2d 1211 (8th Cir.) (This Court deferred to District Court s judgment on issue of defendant s acceptance of responsibility where District Court found defendant s apology after his conviction and before sentencing was untimely and insincere.), cert. denied, 496 U.S. 942 (1990).

United States v. Grimes, 899 F.2d 731 (8th Cir.) (Defendant provided information on source of cocaine but was denied acceptance of responsibility reduction. Court affirmed concluding that District Court is in unique position to assess acceptance of responsibility and "we will reverse only if Court s ruling is without foundation."), cert. denied, 498 U.S. 986 (1990).

United States v. Big Crow, 898 F.2d 1326 (8th Cir. 1990). (Although defendant could not remember whether he had intentionally assaulted and injured victim, he readily admitted that his behavior caused assault and injuries and expressed strong remorse and sincere desire to refrain from future use of alcohol. Therefore, this Court found adequate foundation supported District Court s grant of reduction for acceptance of responsibility.)

United States v. Cardenas, 896 F.2d 317 (8th Cir. 1990). (No error to deny request for acceptance of responsibility reduction even when parties stipulated defendant had accepted responsibility for his offense because PSI stated defendant did not voluntarily surrender and said firearm belonged to another person who forced him to carry it.)

United States v. Evidente, 894 F.2d 1000 (8th Cir.) (In determining whether defendant accepted responsibility, his past failure to accept responsibility for his criminal conduct and his demonstrated propensity for flight could properly be considered by District Court in evaluating his present claim of contrition. Court properly considered conduct during commission of his escape from federal custody because it showed defendant did not voluntarily withdraw from his criminal conduct. Defendant s plea and letter of remorse written four days prior to sentencing was insufficient to overcome District Court s determination not to grant reduction.), cert. denied, 499 U.S. 922 (1990).

United States v. Drew, 894 F.2d 965 (8th Cir.) (Defendant s attempt to murder government witness (which constitutes attempt to obstruct proceedings (§ )) precluded reduction for acceptance of responsibility.), cert. denied, 494 U.S. 1089 (1990).

United States v. Wivell, 893 F.2d 156 (8th Cir. 1990). (Court did not err in finding defendant not entitled to acceptance of responsibility reduction based solely on his guilty plea. Defendant was arrested for possession with intent to distribute cocaine while awaiting trial.)

United States v. Smitherman, 889 F.2d 189 (8th Cir.) (Guilty plea does not guarantee reduction for acceptance of responsibility as matter of right. Notwithstanding defendant s profession of regret, judge s determination that defendant had not accepted responsibility is entitled to great deference and should not be disturbed unless it is without foundation.), cert. denied, 494 U.S. 1036 (1989).

United States v. White, 888 F.2d 1252 (8th Cir. 1989). (Court rejected White s argument that plea agreement promised reduction for acceptance of responsibility by its language where language was discretionary and White s counsel argued at guilty plea hearing that reduction was discretionary.)

United States v. Johnson, 879 F.2d 331, 335 (8th Cir. 1989). (No abuse of discretion where Court declined to reduce defendant s offense level for acceptance of responsibility as recommended by probation officer because defendant fled, hid and did not voluntarily surrender.)

United States v. Thompson, 876 F.2d 1381 (8th Cir.) (Court concluded defendant failed to

demonstrate acceptance of responsibility because he did not voluntarily terminate illegal conduct or surrender himself to authorities before his arrest.), cert. denied, 493 U.S. 868 (1989).

United States v. Young, 875 F.2d 1357, 1360 (8th Cir. 1989). (Defendant was not improperly penalized for exercising his right to trial where Court refused to adjust sentence downward.)

United States v. Jones, 875 F.2d 674, 676 (8th Cir.) (No reversible error in denying defendant reduction for acceptance of responsibility because he testified falsely.), cert. denied, 493 U.S. 862 (1989).

United States v. Nunley, 873 F.2d 182 (8th Cir. 1989). (Though defendant ultimately admitted purse containing cocaine was hers and she was carrying drug for distribution, denial of acceptance of responsibility deduction upheld where defendant initially feigned ignorance about narcotics, did not voluntarily terminate illegal conduct or surrender before arrest.)

**§ 3E1.1(b) (Additional One-Level Reduction/Standard of Review):**

United States v. Preciado, 336 F.3d 739 (8th Cir. 2003) (LOKEN, BRIGHT, MURPHY*). (District Court's decision to deny reduction is reviewed for clear error.), cert. denied, 124 S. Ct. 1110 (2004).

United States v. Holt, 149 F.3d 760 (8th Cir. 1998). (This Court gives due deference to District Court s refusal to grant reduction and will reverse only for clear error.)

United States v. Patterson, 11 F.3d 824 (8th Cir. 1993). (This Court gives due deference to District Court s refusal to grant reduction for acceptance of responsibility under § 3E1.1(b) and will reverse only for clear error.)

**§ 3E1.1(b) (Additional One-Level Reduction):**

United States v. Preciado, 336 F.3d 739 (8th Cir. 2003) (LOKEN, BRIGHT, MURPHY*). (Under PROTECT Act of 2003, additional one-level reduction is available only upon motion by government. In this pre-Act case, District Court did not clearly err in denying reduction. District Court rejected defendant's initial attempt to plead guilty because he was evasive and did not admit to adequate factual basis, causing government to have to prepare for trial, and defendant only successfully pleaded guilty after jury was empaneled.), cert. denied, 124 S. Ct. 1110 (2004).

United States v. Ervasti, 201 F.3d 1029 (8th Cir. 2000) (BOWMAN,* LAY, BEAM). (District Court properly denied § 3E1.1(a) reduction as to Mr. Ervasti and thus it properly denied § 3E1.1(b) reduction as well. Mrs. Ervasti, who received 2-level reduction, claims entitlement to full 3-level reduction because she twice attempted to plead guilty before trial. If all of conditions of subsection (b) are met, defendant is entitled to additional 1-level reduction. But here, it seems likely that Mrs. Ervasti's plea attempts--one occurring one month and other two weeks before trial,

nearly one and one-half years after indictment, and following flurry of pretrial motions--would be considered untimely insofar as they did not serve interests of judicial economy. It was appropriate for District Court to refuse additional 1-level reduction to defendant who fails to offer acceptable plea; having not presented Court with adequate plea, Mrs. Ervasti did not permit either government or Court to avoid trial and thus did not meet requirements of § 3E1.1(b)(2).)

United States v. Holt, 149 F.3d 760 (8th Cir. 1998). (District Court granted Holt two-level reduction and Holt argues he was entitled to three levels under § 3E.1.1(b). This Court finds no error where District Court noted it was "close question" whether to grant any reduction at all, remarking that obtaining Holt s cooperation was "like pulling teeth"; moreover, Holt s cooperation must have been offered in timely manner and District Court held offer to plead and cooperate on morning of trial was not timely.)

United States v. Brown, 148 F.3d 1003 (8th Cir. 1998). (Hewitt argued he was entitled to supplemental one-level reduction under § 3E1.1(b), because although his plea was entered at last minute, government was preparing similar cases involving substantially same facts against Hewitt's co-defendants, and his last-minute plea effectively shortened trial. These arguments are rejected: preparation of trial against Hewitt nonetheless consumed substantial time, energy, and resources of government, and District Court--like government--had to proceed on assumption that case would be tried, and thus had to schedule its docket accordingly.), cert. denied, 525 U.S. 1169 (1999).

United States v. Ayers, 138 F.3d 360 (8th Cir.) (District Court granted Williams two-level decrease (§ 3E1.1(a)), but declined to grant him additional one-level decrease (§ 3E1.1(b)(2)). This Court easily concludes District Court did not err in denying Williams additional one-level decrease where Williams did not plead guilty until morning of his first day of trial, by which time government had prepared for trial, jury was waiting to serve, and District Court had set aside two weeks on its docket for trial.), cert. denied, 525 U.S. 895 (1998).

United States v. Toledo, 70 F.3d 988 (8th Cir. 1995). (Toledo did not qualify for additional one-level reduction as he did not plead guilty until after government participated in preliminary hearing and hearing on Toledo s motion to dismiss and spent three months preparing for Toledo s trial. District Court s findings Toledo did not assist government in investigation or timely enter his guilty plea, were not clearly erroneous findings.), cert. denied, 517 U.S. 1114 (1996).

United States v. Thompson, 60 F.3d 514 (8th Cir. 1995). (Thompson argues he was entitled to additional one-level reduction based on both his alleged timely provision of complete information to government concerning his role in offense and alleged timely notification of his intent to plead guilty. No clear error in denying additional point where Thompson did not provide government information regarding his role until after he had both pleaded guilty and received use immunity (at that point, investigation and Thompson s prosecution were effectively completed). Thompson did not plead guilty until morning of his scheduled trial date and did not notify government of his intent to do so until previous Friday--such notice did not allow government to avoid having to prepare for trial, nor did it allow District Court to effectively allocate its resources.)

United States v. Stoneking, 60 F.3d 399 (8th Cir. 1995). (Stoneking argued District Court should have granted him additional point, for three-point reduction under Amendment 459, § 3E1.1(b). District Court did not err in refusing to apply Amendment 459 retroactively as Amendment is not listed in § 1B1.10 as eligible for retroactive consideration under 18 U.S.C. § 3582(c)(2) and this Court has held it does not apply retroactively.), cert. denied, 516 U.S. 1119 (1996).

United States v. Vue, 38 F.3d 973 (8th Cir. 1994). (Both Vues received two-level reduction; each contended he was entitled to additional one-level reduction because of timely notice to government he would plead guilty. Even though each pleaded guilty within about three months of reversal of conviction on initial appeal, government was not saved much effort since bulk of preparation by government was for initial trial and could relatively easily have been applied to second trial; under these circumstances, no clear error in District Court s refusal to grant additional reduction.)

United States v. Walsh, 26 F.3d 75 (8th Cir. 1994). (In July 1991, after granting Walsh two-level reduction, District Court sentenced him to 57 months imprisonment for bank robbery. In January 1993, Walsh moved for resentencing, requesting additional one-level reduction based on amendment, § 3E1.1(b), effective November 1992. District Court recalculated Walsh s offense level and resentenced him to 51 months imprisonment. Government appealed; applying U.S. v. Dowty to this case, this Court concludes District Court improperly reduced Walsh s sentence.

Walsh contended District Court deviated from policy statement § 1B1.10 and therefore could not have misapplied Guidelines or acted in violation of law and thus this was not reviewable matter under 18 U.S.C. § 3742(b). This Court disagrees, stating Congress has made policy statements set forth in § 1B1.10 applicable law for determining whether District Court has authority to reduce sentence in this situation, 18 U.S.C. § 3582(c)(2). Commentary and policy statements interpreting guideline or prohibiting District Court from taking specified action are binding on Courts. This Court holds policy statements promulgated in § 1B1.10 were binding on District Court and therefore matter is reviewable on appeal. District Court erred in retroactively applying 1992 amendment to § 3E1.1(b); case remanded with directions to reinstate original 57-month sentence.)

United States v. Ridl, 26 F.3d 73 (8th Cir. 1994). (In September 1991, District Court sentenced Ridl to 51 months imprisonment after he pleaded guilty to armed bank robbery. In December 1992, he filed motion to reduce his sentence requesting additional one-level decrease in his base offense level under 1992 amendment, § 3E1.1(b), effective November 1992. District Court granted Ridl s motion for reduction and reduced his sentence to 46 months imprisonment. This Court agrees with government that District Court erred in applying § 3E1.1(b) retroactively. This Court sees no purpose in remanding for resentencing; prior judgment in which Court sentenced Ridl at bottom of Guidelines range already exits and this Court remands matter with directions to reinstate Ridl s original sentence.)

United States v. Hernandez, 18 F.3d 601 (8th Cir. 1994). (Hernandez moved to reduce his sentence under 18 U.S.C. § 3582(c)(2), arguing he should receive benefit of November 1, 1992 amendment to section which established additional one-level reduction for acceptance of

responsibility. He conceded § 1B1.10 failed to list § 3E1.1 amendment as among those that were retroactive, but urged that § 1B1.10 should be ignored as it was contrary to congressional intent. This Court cites 28 U.S.C. § 994(u) as basis of its decision that retroactivity decision here was left to Sentencing Commission s discretion, seeing nothing in statutes, legislative history, or guideline commentary cited by Hernandez supporting his argument that Commission ran afoul of congressional intent when it decided to make amended § 3E1.1 non-retroactive.)

United States v. Patterson, 11 F.3d 824 (8th Cir. 1993). (Patterson argued District Court erred when it denied her reduction of additional level. No clear error where Patterson lied to government about source of crack found in her apartment and initially claimed Los Angeles transaction was her first drug-related trip to California. Record also showed Patterson did not plead guilty or file her plea agreement until scheduled trial date, after denial of her numerous pretrial motions.)

United States v. McQuay, 7 F.3d 800 (8th Cir. 1993). (In response to McQuay s argument that District Court erred in denying him additional one-level reduction under § 3E1.1(b), this Court takes opportunity to focus on what is meant by "timely" under subsections (b)(1) and (b)(2). As to (b)(1), District Court did not clearly err in finding McQuay did not "timely" provide complete information to authorities concerning his involvement: he initially entered plea of not guilty; he did not volunteer any information to government in time for it to be useful in investigation; he proceeded to trial which lasted two days before ending in mistrial; Court rescheduled second trial and McQuay did not plead guilty until day before second trial; furthermore, he did not disclose information concerning his own involvement until PSI interview. As to when McQuay notified government of his intent to enter plea of guilty--the operative point of (b)(2) in marking timeliness--McQuay notified government he intended to plead to two charges on day before second trial. Although he insisted he notified government of his intent to enter into plea agreement within week of receiving discovery materials that should have been disclosed prior to first trial. Assistant U.S. Attorney s preparation had been completed in anticipation of first trial. McQuay s last minute decision to plea did not contribute to efficient trial calendar scheduling. Given context, District Court did not clearly err in denying McQuay additional one-level reduction.)

United States v. Nomeland, 7 F.3d 744 (8th Cir. 1993). (Nomeland alleged for first time on appeal that District Court erred in failing to consider three-level downward adjustment authorized in November 1992 guideline amendments which went into effect just before he was sentenced. Increased adjustment is not automatic. Nomeland did not plead guilty until eve of trial and there is no showing he timely provided complete information as to his involvement in offense; thus, denial of additional one-point adjustment was not plain error.)

United States v. Cassidy, 6 F.3d 554 (8th Cir. 1993). (Cassidy claimed entitlement to additional one-level reduction under § 3E1.1(b)(2) for notifying government of his intent to plead guilty before government was forced to prepare for trial. District Court refused to grant additional level because Cassidy entered into plea agreement before November 1, 1992, effective date of amendment. This Court reverses as District Court erred when it used date Cassidy entered into his

plea agreement to determine applicable Guidelines. District Court should have used date Cassidy was sentenced (November 17, 1992), at which time § 3E1.1(b)(2) was in full force and effect.)

United States v. Schau, 1 F.3d 729 (8th Cir. 1993). (Monte claimed he should have been given three-level, rather than two-level, decrease based on his confessions to government. Record showed authorities had recovered stolen money and government had already prepared for trial before Monte confessed and pleaded guilty. Because he did not timely assist authorities, District Court did not commit clear error in denying additional one-level decrease.)

United States v. Dowty, 996 F.2d 937 (8th Cir. 1993). (This Court holds that 1992 amendment to § 3E1.1 providing for additional one-level reduction for acceptance of responsibility (§ 3E.1.1(b)) does not apply retroactively. Retroactive application would be inconsistent with § 1B1.10(a), p.s. and, thus, not authorized by 18 U.S.C. § 3582(c)(2); this was not one of enumerated amendments specified by Guidelines as exceptions to general rule that amendments are not to be applied retroactively even when appellate review has not been concluded.)

**§ 3E1.1(b)(2) (Additional One-Level Reduction):**

United States v. Ortiz, 242 F.3d 1078 (8th Cir. 2001) (HANSEN, MORRIS SHEPPARD ARNOLD, BYE) (per curiam). (Finding no error in District Court's determination that, as defendant had communicated to government his intention to proceed to trial after petitioning to plead guilty, he caused government to prepare for trial against him, even though he later changed his mind and pleaded guilty.)

United States v. Rice, 184 F.3d 740 (8th Cir. 1999) (McMILLIAN, MORRIS SHEPPARD ARNOLD,* NANGLE). (Government concedes Rice pleaded guilty before government began its trial preparations. However, District Court gave Rice only two-level reduction "to punish him little bit" for not being candid with probation officer who prepared PSR. Language of this subsection is mandatory; if Court finds defendant accepted responsibility for offense and entered timely guilty plea, Court has no discretion to deny extra one-level reduction. Although District Court may have concluded Rice did not fully accept responsibility, § 3E1.1 does not permit partial reduction for partial acceptance of responsibility. Therefore, this Court reverses for resentencing.)

## CHAPTER FOUR:
## CRIMINAL HISTORY AND CRIMINAL LIVELIHOOD

### Part A. Criminal History

**§ 4A1.1 (Criminal History Category/Standard of Review):**

United States v. Rodriguez-Arreola, 313 F.3d 1064 (8th Cir. 2002) (BOWMAN, RICHARD ARNOLD, LOKEN*). (District Court's identity finding, i.e., whether this defendant was person who committed prior offenses, is reviewed for clear error.)

United States v. Lopez-Arce, 267 F.3d 775 (8th Cir. 2001) (BYE, LAY,* JOHN R.

GIBSON). (This Court reviews for clear error application of Chapter Four of Guidelines to facts.)

United States v. Levi, 229 F.3d 677 (8th Cir. 2000) (WOLLMAN, MURPHY,* BYE). (District Court's criminal history findings are factual determinations and are reviewed for clear error. District Court could discredit defendant's statement at sentencing that he did not serve time for particular offense, and conclude that offense was countable.)

United States v. Charles, 209 F.3d 1088 (8th Cir. 2000) (McMILLIAN, HEANEY,* BOGUE). ((1) Prior convictions at issue. On March 9, 1994, defendant entered convenience store and took property. Nine days later he re-entered convenience store to take property and was arrested. He was charged with commercial burglary and theft of property for March 22 incident (counts one and two), and with commercial burglary for March 31 incident (count three). He pleaded guilty to all three counts, they were consolidated for sentencing, and he was sentenced to 15 days imprisonment and 5 years probation. His probation was later revoked, and he was sentenced to 2 years imprisonment.

(2) Effect at later federal sentencing on possession-of-stolen-firearm charge. Defendant did not have at least two prior qualifying felony convictions for purposes of establishing base offense level of 24 under § 2K2.1(a)(2), because his three sentences for prior convictions ran concurrently (sentencing judge could have delineated on order that sentences were to run consecutively, but did not); and charges against him were consolidated for sentencing. Thus they are treated as single sentence and are not counted separately. Accordingly, commercial burglary convictions are not two prior felony convictions and he does not qualify for base offense level of 24. Accordingly, reversal is warranted.

(3) Criminal history points. Defendant argues he should receive 3, not 4, criminal history points for three convictions on basis that his original sentence should have been added to sentence he received upon probation revocation and counted as single sentence. When calculating criminal history points, original term of imprisonment (15 days) is added to any sentence imposed on revocation (2 years) which equals 2 years and 15 days for each charge. See U.S.S.G. § 4A1.2(k)(1). Because charges were consolidated for sentencing, they are treated as single sentence yielding total of 3 criminal history points under § 4A1.1(a). However, under § 4A1.1(f), 1 additional point must be added because 3-point enhancement was justified without considering counts two and three, and count three occurred on different day than count two.)

United States v. Holland, 195 F.3d 415 (8th Cir. 1999) (LOKEN, HANSEN,* MORRIS SHEPPARD ARNOLD). (This Court reviews de novo District Court s construction and interpretation of Chapter Four of Guidelines, and reviews for clear error District Court s application of Chapter Four to facts.), cert. denied, 529 U.S. 1077 (2000).

United States v. Loveless, 139 F.3d 587 (8th Cir. 1998). (This Court reviews District Court s determination for clear error.)

United States v. Jones, 87 F.3d 247 (8th Cir.) (This Court reviews de novo District Court s construction and interpretation of Chapter Four and reviews for clear error District Court s application of Chapter Four to facts.), cert. denied, 519 U.S. 956 (1996).

United States v. Allen, 64 F.3d 411 (8th Cir. 1995). (While this Court reviews District Court s application of § 4A1.1 to facts for clear error, its construction or interpretation of terms of relevant guideline(s) is subject to de novo review.)

**§ 4A1.1 (Criminal History Category):**

United States v. Rodriguez-Arreola, 313 F.3d 1064 (8th Cir. 2002) (BOWMAN, RICHARD ARNOLD, LOKEN*). (Government sufficiently proved that defendant was person who committed prior offenses (under alias quite different from his actual name) by introducing photographs and fingerprints of person who committed prior offenses, and FBI rap sheet listing defendant's aliases.)

United States v. Evans, 285 F.3d 664 (8th Cir. 2002) (LOKEN, RICHARD S. ARNOLD,* FAGG). (Defendant's unsupported assertion that he was not represented by counsel in connection with prior convictions did not demonstrate plain error in District Court's failure to exclude those convictions from criminal history calculation. Any error on part of District Court in counting convictions under subsection (c) was harmless, because correcting alleged error would still have resulted in defendant receiving maximum of four allowable points), cert. denied, 123 S. Ct. 1257 (2003).

United States v. Lopez-Arce, 267 F.3d 775 (8th Cir. 2001) (BYE, LAY,* JOHN R. GIBSON). (Defendant argued his criminal history "was calculated without sufficient information and evidence" as required by Guidelines. After reviewing PSR, this Court was at loss as to what additional information or evidence ought to have been evaluated.)

United States v. Roberts, 253 F.3d 1131 (8th Cir. 2001) (McMILLIAN,* RICHARD S. ARNOLD, BOWMAN). (District Court committed plain error by assigning Roberts four criminal history points based upon convictions which occurred before his eighteenth birthday and more than five years before commencement of instant offense.)

United States v. Roach, 164 F.3d 403 (8th Cir. 1998) (HANSEN, LAY, MURPHY*). (Rejecting argument that two state Court convictions were insufficiently documented and thus improperly counted. Local clerk's office no longer had record of Jackson's 1988 petty theft conviction, although it was contained in records of both police department and division of state criminal investigation; and clerk's office could produce computer record of 1990 marijuana possession conviction, but not supporting file. However, absence of such records was not enough to create presumption of invalidity. Moreover, Jackson did not deny he was convicted of misdemeanors, and he gave no reason to believe they were unconstitutionally obtained.), cert. denied, 528 U.S. 845 (1999).

United States v. Valdez, 146 F.3d 547 (8th Cir. 1998). (Johnson argues District Court erred by including prior, uncounseled juvenile adjudication for burglary and criminal mischief in his criminal history score. Johnson claims his right to counsel was violated because his waiver of counsel at juvenile proceeding was not voluntary. This Court finds no support in record for Johnson s bare assertions his waiver was involuntary; District Court did not clearly err in

concluding Johnson failed to establish waiver of counsel was invalid; and it was proper for District Court to use Johnson s juvenile adjudication in determining his criminal history category.)

United States v. Loveless, 139 F.3d 587 (8th Cir. 1998). (Loveless argues District Court improperly enhanced his criminal history by three points for May 1993 California state conviction for possession of controlled substance; Loveless contends conviction is part of instant offense. Conduct is not part of instant offense when it is severable distinct offense; District Court should consider temporal and geographical proximity, common victims, and common criminal plan. This Court finds no clear error in determination California state conviction was prior sentence of imprisonment exceeding one year, as conviction occurred after Loveless s last contact with Reber; no evidence indicating Loveless intended to distribute these drugs to Reber or anyone in Nebraska; and government neither offered any evidence related to this conviction to prove Nebraska conspiracy nor referenced conviction in its case in chief.)

United States v. Coleman, 138 F.3d 344 (8th Cir.) (Where government conceded Coleman should have been placed in criminal history category I for sentencing purposes, this Court remands for resentencing using correct category.), cert. denied, 525 U.S. 899 (1998).

United States v. Patrick, 117 F.3d 375 (8th Cir. 1997). (Patrick was convicted of two counts of mailing threatening communications. He argues his criminal history score should have been category II instead of III because three points should not have been added for his Arizona sentence. He argues Arizona sentence was not prior sentence because his conduct in that case was relevant to Missouri charges and thus became part of "instant offense" in Missouri case. Patrick s actions in this case constitute distinct and severable offense from his actions in prior case because although his offenses had common victim, they did not have requisite temporal or geographical proximity. Patrick s prior offense consisted of faxing threats from Arizona to victim six and eight months before he wrote and sent two letters giving rise to present prosecution. District Court did not err in overruling Patrick s objection to his criminal history calculation.)

United States v. Garin, 103 F.3d 687 (8th Cir. 1996). (Garin argues District Court erred in calculating criminal history: Garin was sentenced to 60 days with credit for time served of two days; Garin argues prior sentence thus was for 58 days as he received two days credit which would qualify him for one-point assessment (4A1.1(c)) rather than two points (4A1.1(b)). This Court agrees Garin s prior sentence was for 60 days and assessment of two criminal history points was correct.), cert. denied, 520 U.S. 1148 (1997).

United States v. Scott, 91 F.3d 1058 (8th Cir. 1996). (Scott argues District Court incorrectly calculated criminal history score by assessing one point each for his two previous convictions for aggravated battery and aggravated assault; he was sentenced to fine ranging from $250 to $500 on each conviction. Non-imprisonment sentences, such as imposition of fine only, are counted as prior sentence unless crime is misdemeanor or other petty offense similar to listed excluded offense. Scott s crimes of aggravated assault or battery are not excluded. District Court s assessment was proper.)

United States v. Jones, 87 F.3d 247 (8th Cir.) (This Court agrees with District Court that Jones s two unrelated convictions did not become related by virtue of probation revocation and concurrent sentencing. Thus, District Court properly assessed three points for each conviction, § 4A1.1(a), § 4A1.2(a)(1) and (2).), cert. denied, 519 U.S. 956 (1996).

United States v. Risch, 87 F.3d 240 (8th Cir. 1996). (Risch argued District Court incorrectly calculated his criminal history category by double-counting related offenses reported in his PSR. PSR inaccurately reported both convictions occurred on one day and arose out of same facts. This Court instructs District Court to direct correction of these errors, but affirms District Court s criminal history calculation as state prosecution charging documents and subsequent Court orders recording Risch s convictions reflect these two prior convictions reference two separate incidents with two separate case numbers and separate sentencing dates.)

United States v. Byrne, 83 F.3d 984 (8th Cir. 1996). (District Court excluded prior conviction and sentence and calculated Byrne s criminal history category at level IV (110-137 months); Court sentenced Byrne to 137 months imprisonment because of her past involvement in criminal activity. Because sentence falls within applicable guideline range at category V (130-162 months), Byrne argued 137 month sentence indicates District Court improperly considered prior conviction and effectively sentenced her at criminal history level V. This Court disagrees and characterizes Byrne s analysis as speculative and not supported by record.)

United States v. Mason, 74 F.3d 890 (8th Cir.) (Mason received one point for prior violation of local ordinance banning marijuana possession, § 4A1.1(c), § 4A1.2(c)(1), and two points for committing present offense of bank robbery during two-year unsupervised probation term for ordinance violation, § 4A1.1(d). Mason contends violations of local ordinances are not crimes under Missouri law and thus he should not have received one criminal history point. This Court has held violations of local ordinances, even if not crimes under state law, do count for sentencing purposes so long as probation term of at least one year was imposed, because effect of local violations for sentencing purposes is matter of federal law. In Mason s case, probation term of two years was imposed for ordinance violation. Mason also argues assessment of two points because bank robbery was committed during term of probation was erroneous as his probation was unsupervised. This argument is foreclosed as § 4A1.1(d) encompasses both supervised and unsupervised probation.), cert. denied, 517 U.S. 1239 (1996).

United States v. Toledo, 70 F.3d 988 (8th Cir. 1995). (District Court correctly refused to hear Toledo s collateral attack on earlier state conviction used to enhance Toledo s federal sentence, because Toledo was represented by counsel when he pleaded guilty to earlier offense in state Court; Toledo may not collaterally attack state conviction by arguing state Court counsel was ineffective or Toledo could not understand guilty plea because his English skills were poor.), cert. denied, 517 U.S. 1114 (1996).

United States v. Jackson, 64 F.3d 1213 (8th Cir. 1995). (Jackson contended he should have been given only five criminal history points rather than nine assigned, resulting in criminal history category of III/guideline range of 33-41 months instead of category IV/range of 210-262 months.

This Court finds it unnecessary to consider merits of claim as District Court was required to impose, at very least, mandatory minimum sentence of 240 months, which it did--sentence imposed by District Court did not exceed mandatory minimum and assignment of category IV was thus of no consequence.), cert. denied, 516 U.S. 1137 (1996).

United States v. Allen, 64 F.3d 411 (8th Cir. 1995). (Allen challenged addition of two points under § 4A1.1(e) for committing instant offense less than two years after release from imprisonment on sentence counted under § 4A1.1(b). He argued his sentence as juvenile was "sentence to confinement" at training school rather than sentence of "imprisonment" or "incarceration." This Court concludes District Court correctly assessed points: whether or not Allen is correct that juvenile "confinement" differs from adult "imprisonment," juvenile sentences are considered in calculating criminal history and Allen committed instant offense less than two years after his release from "confinement" on sentence properly counted under § 4A1.1(b).)

United States v. Graham, 60 F.3d 463 (8th Cir. 1995). (Graham was found guilty of two counts of making false statement, 18 U.S.C. § 152. For reversal, Graham argued District Court erred in denying his motion to dismiss as multiplicitous two of three counts of making false statement. PSR calculations included three points, two of which were based on false statement committed in November 1992 while Graham was on probation for misdemeanor offense. Because this Court is reversing convictions, it remands for resentencing with direction to government to elect false statement count it wishes to leave in effect.)

United States v. Johnson, 58 F.3d 356 (8th Cir.) (Johnson argued District Court erred in increasing his criminal history score because he committed present offense while under prior criminal justice sentence, § 4A1.1(d). However, Johnson conceded resolution of issue could not affect his mandatory minimum sentence of 120 months; therefore, any sentencing error was harmless.), cert. denied, 516 U.S. 936 (1995).

United States v. Maxim, 55 F.3d 394 (8th Cir.) (Maxim was convicted of being felon in possession of firearm and illegally possessing machine gun, both continuing offenses. Maxim argues District Court erred in assessing him one point increase under § 4A1.1(c) and two point increase under § 4A1.1(d) because he committed instant offenses prior to his 1993 assault conviction and its accompanying probation. This Court rejects Maxim s argument District Court may consider only acts occurring prior to, but not during, defendant s commission of continuing offense for purposes of calculating defendant s criminal history. Rather, District Court must consider entire period during which continuing offense occurred for purposes of applying §§ 4A1.1(c) and (d)--an approach consistent with Congress s decision to criminalize unlawful possession of firearms as continuing offense and this Court s prior decisions holding continuing offense, by its very nature, does not terminate until date of indictment or voluntary termination of illegal activity; also consistent with § 4A1.1 s purpose of accurately reflecting defendant s criminal history and adding measure of recency to sentencing calculus.), cert. denied, 516 U.S. 903 (1995).

United States v. Alexander, 53 F.3d 888 (8th Cir. 1995). (This Court rejects as meritless Alexander s argument District Court erred in assessing two criminal history points under

§ 4A1.1(e) as Alexander does not dispute he was shown to have engaged in conspiracy for which he was convicted within two years of his release from prison. While Alexander argued District Court should have departed downward because his criminal history category overrepresented seriousness of his crimes, this Court may not review District Court s exercise of discretion not to depart downward.)

United States v. French, 46 F.3d 710 (8th Cir. 1995). (On cross-appeal, government challenged District Court s failure to include French s perjury conviction when calculating his criminal history. Because District Court considered French s perjury in divorce Court in setting offense level, it properly excluded conviction from criminal history calculation.)

United States v. Copeland, 45 F.3d 254 (8th Cir. 1995). (Ivy argued under § 4A1.1(c), his second misdemeanor sentence should have been assigned one point rather than two because sentence for that conviction was "fully and totally" suspended. Criminal history points are based on sentence pronounced, not length of time actually served (§ 4A1.2). This Court agrees Ivy s sentence merited two points under § 4A1.1(b) rather than one point under § 4A1.1(c): sentence pronounced for second offense was suspended sentence with probation requirement that Ivy spend 100 days in county jail.)

United States v. Johnson, 43 F.3d 1211 (8th Cir. 1995) (WOLLMAN, HEANEY, HANSEN*). (Johnson argued District Court erred in assigning one criminal history point to him under §§ 4A1.1(c) and 4A1.2(c)(1) based on misdemeanor conviction for which he received straight stay of imposition of sentence without accompanying term of probation. This Court reversed and remanded. Stay of imposition of Johnson's state-court sentence was "sentence" within meaning of § 4A1.2(c)(1), as dictated by section 4A1.2(a)(3). However, sentence was not "countable," because § 4A1.2(c)(1) requires that sentence have been accompanied by at least one year of probation.)

United States v. Saffeels, 39 F.3d 833 (8th Cir. 1994). (Prior history omitted). (Saffeels contended District Court impermissibly double-counted his criminal history points by using three prior felony convictions to enhance his sentence under 18 U.S.C. § 924(e)(1) as well as to calculate his criminal history score which further enhanced his sentence. This Court characterizes use of felonies as "triple-counting," but holds it permissible on premise that base offense inquiry reflects seriousness of offense and criminal history score assesses offender and need to deter him from further criminal activity (§ 924(e)(1) prescribes penalty based on number of defendant s prior felony convictions and § 4A1.1 assesses defendant s propensity for recidivism and need for future deterrence). This Court finds §§ 922(g) and 924(e)(1) and § 4A.1.1 unambiguous and requiring consideration of prior felony convictions with no exception to this requirement in Guidelines or accompanying commentary. Thus, District Court did not impermissibly triple-count Saffeels s prior felony convictions.)

United States v. Severe, 29 F.3d 444 (8th Cir. 1994). (Severe claimed District Court error when it considered three prior uncounseled misdemeanor convictions in determining criminal history score. At sentencing, Severe also sought to attack collaterally those misdemeanor convictions. Prior convictions had not been ruled constitutionally invalid and Severe s claim is foreclosed by Supreme

Court s decision in Nichols v. U.S. and this Court s decision in United States v. Hewitt.), cert. denied, 513 U.S. 1096 (1995).

United States v. Frieberger, 28 F.3d 916 (8th Cir. 1994). (Frieberger argued District Court erred by assessing two criminal history points rather than one because sentence imposed was not "prior sentence of imprisonment." While District Court sentenced Frieberger to one-year suspended sentence and two years of probation with special condition of six-months work release in "jail-type institution," sentence need not be interpreted as Frieberger s probation was revoked and suspension of one-year sentence lifted before he was sentenced in instant case. Thus, Frieberger s one-year sentence became prior sentence to which § 4A1.1(b) properly applies.

Frieberger s argument that District Court improperly assessed additional criminal history point under § 4A1.1(e) for committing instant offense less than two years following release from custody was also rejected as it was based on Frieberger s argument that prior drug conviction did not involve confinement (see above) and it constituted double-counting, § 4A1.1(e), comment. (n.5).), cert. denied, 513 U.S. 1097 (1995).

United States v. Roach, 28 F.3d 729 (8th Cir. 1994). (Roach challenged two-point addition to his criminal history category, claiming he was not on parole at time he was arrested. Finding of District Court that Roach was on parole on date he was arrested not clearly erroneous where documents accompanying Roach s parole transfer from California to Arkansas show he was not to be released from parole until October 1994 and his parole officer testified that he considered Roach to be under parole supervision during time in question even though Roach had not reported for supervisory meetings.)

United States v. Wyatt, 19 F.3d 1283 (8th Cir. 1994). (Wyatt challenged one criminal history point for state misdemeanor conviction, criminal damage to property. He did not believe he had pleaded guilty because he thought state prosecutor had otherwise "resolved" matter after he agreed to pay damage. Court did not clearly err in finding Wyatt had pleaded guilty to offense where government introduced certified state conviction and judgment and Wyatt s signed name appeared twice on these documents.)

United States v. Trupiano, 11 F.3d 769 (8th Cir. 1993). (This Court rejects Trupiano s argument that trial Court s imposition of 3 points to his criminal history category under § 4A1.1(d)(e) for committing instant offense while on parole for another offense is double-counting. Parole revocation is fundamentally different and altogether separate process from that of imposition of new sentence for new crime.)

United States v. Urbizu, 4 F.3d 636 (8th Cir. 1993). (Urbizu argued that sentence imposed by Texas federal Court, for which he served approximately five months in half-way house and five years on probation, merited only one criminal history point under subdivision c, not two points under subdivision b. This Court decides nature of Urbizu s prior confinement by how sentence was pronounced rather than how sentence was actually served. It believes that relying on language in District Court s judgment will better promote purposes of chapter IV, i.e., guideline range should reflect defendant s record of past criminal conduct rather than vagaries of executive branch s

implementation of sentence; judicial efficiency is promoted when District Court can rely on prior Court s written judgment to determine nature of defendant s prior sentence. Because Texas federal Courts specified "jail-type institution" for first part of Urbizu s split sentence, this Court assumes that Court did not intend Urbizu be confined in "treatment institution," which at that time was commonly equated with term "half-way house.")

United States v. Wajda, 1 F.3d 731 (8th Cir. 1993). (District Court did not err in assessing one criminal history point for 1982 assault conviction (§ 4A1.1(d)) without first conducting evidentiary hearing to determine whether charge actually resulted in conviction where Wajda s objection to assessment, if one was made at all, was not clear and specific. As Wajda failed to object properly to assessment, he carried burden of proving plain error. Wajda did not produce any evidence showing that document relied on by probation officer was incorrect and that assault charge was actually dismissed.

Likewise, Wajda failed to object to PSR s assessment of one criminal history point for committing instant offenses less that two years following his release on parole and failed to show plain error. He provided no documentation showing, as he asserted, that proper application of parole Guidelines would have resulted in his release more than two years prior to date he committed instant offense. Even if he had made such showing, it would not amount to plain error. Sentencing Commission s purpose in promulgating § 4A1.1(e) was to punish more severely those who commit crimes after recent release from confinement for prior offense. "Recency" of commission of instant offenses, rather than length of confinement for past offenses, is focus of guideline: Wajda s actual release date is proper point from which "recency" factor is calculated.)

United States v. Abanatha, 999 F.2d 1246 (8th Cir. 1993). (Katherine argued that government did not present sufficient evidence to support District Court s addition of two points for her committing this offense while on probation for prior felony. This Court rejects argument based on government s introduction of certified copy of burglary judgment and conviction which in 1987 placed Katherine on probation for five years; Abanathas conspiracy continued through June 1991.), cert. denied, 511 U.S. 1035 (1994).

United States v. Ramsey, 999 F.2d 348 (8th Cir. 1993). (Ramsey argued that PSR incorrectly increased his offense level one point pursuant to § 4A1.1(c) and § 4A1.2(a)(3) and (4). Ramsey had previously pleaded guilty in assault case and received suspended sentence; government had subsequently agreed to dismiss that charge after he testified in unrelated case. Conviction that has been set aside for reasons unrelated to innocence or errors of law will be counted in determining criminal history category (Commentary Note 6 to § 4A1.2), and Court applied proper guideline.)

United States v. Rayner, 996 F.2d 946 (8th Cir. 1993). (The District Court correctly imposed two additional points under § 4A1.1(d) because Rayner committed drug offense while under sentence of probation.)

United States v. Harris, 982 F.2d 317 (8th Cir. 1992). (District Court did not clearly err in assigning category II because Harris committed offense while on probation. While there was some testimonial evidence of actual distribution on certain date, offense to which Harris pleaded guilty was conspiracy to distribute.)

United States v. Pedroli, 979 F.2d 116 (8th Cir. 1992). (Pedroli argued because his sentence under Youth Corrections Act was indeterminate, he was not given sentence exceeding one year and one month. No error in application of § 4A1.1(a) where maximum sentence Pedroli faced was six years and maximum exceeded requirement under § 4A1.2. Neither did Court err in adding one point under § 4A1.1(c). Although Pedroli claimed he was charged with reckless driving, he offered no evidence; Court properly relied on county Court documents indicating charge of DUI violation.)

United States v. Claymore, 978 F.2d 421 (8th Cir. 1992). (Given finding that Claymore had ten previous convictions in tribal Court, District Court was not clearly erroneous in increasing his criminal history category to II.)

United States v. Flores, 959 F.2d 83 (8th Cir.) (At sentencing, Flores offered no objection to two-point addition for committing instant offense while under criminal justice sentence. Thus, Flores waived issue and criminal history determination, even if erroneous, did not result in miscarriage of justice.), cert. denied, 506 U.S. 976 (1992).

United States v. Renfrew, 957 F.2d 525 (8th Cir. 1992). (Renfrew argued he was not under criminal justice sentence for purposes of § 4A1.1(d) when he committed robbery because his one-year probation for prior Minnesota crime had expired two days before robbery. This Court looks to state law and reasons that because Minnesota Court had revoked Renfrew s probation and issued warrant for his arrest pursuant to Minn. Stat. § 609.14, he was still subject to Court s jurisdiction for his assault conviction and was therefore "under" that criminal justice sentence on day he committed robbery. Court notes commentary to § 4A1.1(d) has been recently amended to clarify just such situations.)

United States v. Bailey, 955 F.2d 28 (8th Cir. 1992). (Bailey contested addition of two points under § 4A1.1(d) based on unsupervised nature of probation term he was serving at time of his offense. This Court notes § 4A1.1(d) makes no distinction between supervised and unsupervised probation and it does not find lack of distinction between two forms of probation for present purposes, arbitrary.

United States v. Burnett, 952 F.2d 187 (8th Cir. 1991). (Burnett argues that assessment of three points under § 4A1.1(a) for offense for which he failed to appear (mail and wire fraud in connection with sales of vending machines) constitutes impermissible double-counting, reasoning that his conviction was necessary element of offense of failure to appear for service of sentence. Guideline does not contain exception for failure to appear for service and criminal history is calculated independently of offense level. Moreover, assignment of points under both § 4A1.1(a) and § 4A1.1(d) does not have effect of prescribing greater punishment than Guidelines intended.)

United States v. Garlich, 951 F.2d 161 (8th Cir. 1991). (Criminal history categories account for defendant s lack of criminal record.)

United States v. Gassler, 943 F.2d 909 (8th Cir. 1991). (District Court took into account Gassler s previous convictions which were clearly set out in record, involved use or possession of firearms which was not taken into account in criminal history score. This Court deemed 60-month

sentence (when range was 30-37 months) eminently reasonable given Gassler s violent history and possession of shotgun sawed off both at barrel and stock with remaining stock taped so it wouldn t take fingerprints; and it was well within statutory maximum.)

United States v. Hewitt, 942 F.2d 1270 (8th Cir. 1991). (Hewitt contested use of misdemeanor conviction for possession of less than 35 grams of marijuana against him as information was obtained solely through his own statements. Court explains § 1B1.8 permits Court to use information obtained post-plea from defendant, in calculation of criminal history category.)

United States v. Drake, 942 F.2d 517 (8th Cir. 1991). (Because Drake could not post bail for theft charge, he spent 78 days in county jail awaiting trial. State judge sentenced him to 78 days with credit for time served. By affidavit, judge indicated he would have sentenced Drake to only 20 days if he had been free on bond. Drake argues his 78-day sentence was imposed as detention in lieu of bail, not upon adjudication of guilt. This Court affirms District Court s award of two criminal history points and its looking to plain wording of actual sentence imposed as reflected in state Court judgment.)

United States v. Thomas, 930 F.2d 12 (8th Cir. 1991). (This circuit aligns itself with others in holding (d) and (e) can be applied to persons convicted of escape. Statutory interpretation indicates Commission intended enhancement provisions were to apply where crime is committed by person who was incarcerated. Due process and double jeopardy clauses not offended as Guidelines give fair notice of punishment and defendant is being punished for only one crime with sentence affected by prior criminal conduct.)

United States v. Thompson, 925 F.2d 234 (8th Cir. 1991). (Where state sentence was not suspended, either in imposition or execution, addition of two points (d) was properly assessed as sentence qualified as "criminal justice sentence.")

United States v. Stephenson, 924 F.2d 753 (8th Cir. 1991). (Nowhere in Guidelines or Commentary thereto is sentence of probation excepted from provisions of 4A1.1(c). One point added under (c) merely addressed prior criminal conduct generally; two points added under (d) addressed additional consideration of recency of prior criminal activity.)

United States v. Knighten, 919 F.2d 80 (8th Cir. 1990). (District Court properly added two points to Knighten s criminal history score because his present drug-related offense was committed two months after he had been placed on unsupervised probation for fourth degree burglary offense arising from domestic matter.)

**§ 4A1.1(b) (Prior Sentence of Imprisonment of at Least 60 Days):**

United States v. Lewchuk, 958 F.2d 246 (8th Cir. 1992). (The District Court properly assessed two criminal history points for each of three matters where although state Court disposed of cases on same day, it imposed consecutive sentences under different docket numbers, and there was no formal order of consolidation.)

**§ 4A1.1(d) (Commission of Instant Offense While Under Any Criminal Justice Sentence):**

United States v. Evans, 285 F.3d 664 (8th Cir. 2002) (LOKEN, RICHARD S. ARNOLD,* FAGG). (This Court finds no plain error in District Court's conclusion that defendant committed instant offense while under criminal justice sentence. Defendant had not shown that he did not commit relevant conduct during period of stayed sentences, and stayed sentences are like form of unsupervised probation and therefore subject to § 4A1.1(d)), cert. denied, 123 S. Ct. 1257 (2003).

United States v. Lopez-Arce, 267 F.3d 775 (8th Cir. 2001) (BYE, LAY,* JOHN R. GIBSON). (Despite fact that sentence for driving without license was imposed nearly five years after offense was committed and presumably led to defendant's later parole violation, Guidelines make it clear that driving offense is separate from drug offense for which defendant was on parole.)

United States v. Davis, 251 F.3d 765 (8th Cir. 2001) (BOWMAN, HANSEN, MORRIS SHEPPARD ARNOLD) (per curiam). (District Court properly assessed 2 criminal history points, because defendant committed instant offense while under "criminal justice sentence.")

United States v. Johnson, 962 F.2d 1308 (8th Cir. 1992). (Johnson challenged two point addition on basis juvenile Court sentence of "intensive supervision" was not criminal justice sentence. District Court correctly applied section where Johnson did not dispute adjudication included finding of guilt nor that it was criminal justice sentence under § 4A1.2.)

**§ 4A1.1(e) (Commission of Instant Offense Within 2 Years of Prior Imprisonment):**

United States v. Dixon, 360 F.3d 845 (8th Cir. 2004) (BYE,* LAY, SMITH). (Defendant was sentenced to prison for state convictions for murder, armed criminal action, and robbery. In 2001, his murder and armed criminal action convictions were set aside via post-conviction motion because of prosecutorial misconduct. He was released from prison immediately because his robbery sentence had expired in 1993. In 2002, defendant committed federal offense of being felon in possession of ammunition. District Court assessed two criminal history points on basis that he had committed instant offense less than two years after release from imprisonment. Reviewing de novo, this Court reverses. Under Application Note 6 to § 4A1.2, sentences from invalidated convictions are not to be counted, and invalidated convictions were those for which he had been released from imprisonment in 2001.)

United States v. Davis, 251 F.3d 765 (8th Cir. 2001) (BOWMAN, HANSEN, MORRIS SHEPPARD ARNOLD) (per curiam). (Declining to address defendant's argument challenging assessment of additional criminal history point, as omission of this point would not have affected defendant's criminal history category and consequently, would not have altered applicable Guidelines range. DISSENT: Although § 4A1.1(e) enhancement did not result in change to defendant's criminal history category, and thus District Court's sentence lay within correct sentencing range, error was not harmless because District Court might have sentenced defendant at different point in range if it had correctly calculated his criminal history points.)

**§ 4A1.2 (Definitions and Instructions/Standard of Review):**

Buford v. United States, 532 U.S. 59 (2001). (District Court's determination whether convictions were related by virtue of having been consolidated for sentencing is reviewed "deferentially" (which appears equivalent to Eighth Circuit clear-error standard of review.)

United States v. Stone, 325 F.3d 1030 (8th Cir. 2003) (WOLLMAN, FAGG, RILEY*). (Whether prior conviction was relevant conduct to instant conviction, excluding it from assessment of criminal history points, is fact-intensive inquiry reviewed for clear error.)

United States v. Symonds, 260 F.3d 934 (8th Cir. 2001) (HANSEN,* HEANEY, TUNHEIM). (This Court reviews for clear error District Court's determination whether government has proven that defendant's prior crimes are unrelated.)

United States v. Strange, 102 F.3d 356 (8th Cir. 1996). (This Court reviews de novo District Court s construction and interpretation of Chapter Four and reviews for clear error District Court s application of Chapter Four to facts.)

United States v. Maza, 93 F.3d 1390 (8th Cir. 1996). (This Court reviews de novo District Court s legal interpretation of § 4A1.2(a)(2). It reviews for clear error District Court s determination of whether government has proven defendant s prior crimes were unrelated.), cert. denied, 519 U.S. 1138 (1997).

United States v. Copeland, 45 F.3d 254 (8th Cir. 1995). (In making determination as to whether conduct is part of instant offense or prior sentence, District Court should consider factors including temporal and geographical proximity, common victims, and common criminal plan intent--then, this Court reviews for clear error.)

United States v. Bobo, 994 F.2d 524 (8th Cir.) (This Court reviews District Court s finding of validity of guilty plea under clearly erroneous standard.), cert. denied, 510 U.S. 891 (1993).

**§ 4A1.2 (Definitions and Instructions):**

Nichols v. United States, 511 U.S. 738 (1994). (It does not violate 6th Amendment right to counsel or 14th Amendment right to due process to count in criminal history score uncounseled misdemeanor conviction for which no prison term was imposed. Consistent with United States v. Thomas, 20 F.3d 817 (8th Cir.) (en banc)., cert. denied, 513 U.S. 828 (1994).)

United States v. Dixon, 360 F.3d 845 (8th Cir. 2004) (BYE,* LAY, SMITH). (Defendant was sentenced to prison for state convictions for murder, armed criminal action, and robbery. In 2001, his murder and armed criminal action convictions were set aside via post-conviction motion because of prosecutorial misconduct. He was released from prison immediately because his robbery sentence had expired in 1993. In 2002, defendant committed federal offense of being felon in possession of ammunition. District Court assessed two criminal history points on basis that he had committed instant offense less than two years after release from imprisonment. Reviewing de novo,

this Court reverses. Under Application Note 6 to § 4A1.2, sentences from invalidated convictions are not to be counted, and invalidated convictions were those for which he had been released from imprisonment in 2001.)

United States v. Stone, 325 F.3d 1030 (8th Cir. 2003) (WOLLMAN, FAGG, RILEY*). (Defendant was convicted in state court of driving while intoxicated on marijuana, and in federal court of methamphetamine conspiracy spanning time period that included DWI conviction. Defendant's argument, that he was on his way to get methamphetamine as part of conspiracy when he was stopped for DWI, convinced neither District Court nor this Court that DWI was relevant conduct. Therefore, criminal history points were properly assessed for DWI conviction.)

United States v. Piggie, 316 F.3d 789 (8th Cir.) (BOWMAN,* LAY, MURPHY.) (For purposes of determining whether prior convictions were separated by intervening arrest, arrest merely means lawful detention, not taking into custody pursuant to formal charge. For purposes of determining whether prior convictions are related, if there was no formal order of consolidation and cases proceeded to sentencing under separate docket numbers, they are not treated as related.), cert. denied, 124 S. Ct. 157 (2003).

United States v. Stapleton, 316 F.3d 754 (8th Cir. 2003) (HANSEN,* RICHARD ARNOLD, LOKEN). (Once government meets its initial burden to prove existence of prior convictions, burden shifts to defendant to prove by preponderance of evidence that he was convicted without benefit of counsel. Here, evidence showed that defendant was denied right to counsel when he was convicted of prior assault charges because he and his lawyer meant to enter written guilty plea to traffic and drug charges only, but state court judge mistakenly applied guilty plea to assault charges as well.)

United States v. Sun Bear, 307 F.3d 747 (8th Cir. 2002) (WOLLMAN, RILEY,* MELLOY). (Because it was impossible to tell whether defendant's Nebraska conviction for attempted escape was felony or misdemeanor, it could not be counted as felony crime of violence. However, defendant still had two predicate felonies triggering career-offender status. Nebraska felony conviction for attempted burglary was crime of violence because this circuit has categorically held that burglary of commercial building is crime of violence. Utah felony conviction for attempted theft of operable vehicle was crime of violence, this Court holds for first time, because it presents risk of confrontation as great or greater than that present in burglary of commercial property. DISSENT: attempted auto theft should not be deemed crime of violence, creating conflict with Fifth and Sixth Circuits.), cert. denied, 123 S. Ct. 2275 (2003).

United States v. Coleman, 284 F.3d 892 (8th Cir.) (WOLLMAN, BOWMAN,* STAHL). (Misdemeanor convictions may be counted in criminal history), cert. denied, 537 U.S. 935 (2002).

United States v. Weiland**,** 284 F.3d 878 (8th Cir. 2002) (McMILLIAN, MURPHY,* BATTEY). (Defendant's 1988 drug conviction was not severable and distinct offense from charged conspiracy for which he was convicted in 2001: both offenses had temporal and geographic proximity and involved same criminal scheme, and same type of drugs were involved in both convictions. Thus, District Court did not abuse its discretion by treating former conviction as relevant conduct.)

United States v. Symonds, 260 F.3d 934 (8th Cir. 2001) (HANSEN,* HEANEY, TUNHEIM). (Even though defendant was sentenced at same time for certain offenses and received concurrent sentences, crimes were unrelated because they occurred on different occasions, were not part of common scheme, and were not consolidated.)

United States v. Wadlington, 233 F.3d 1067 (8th Cir. 2000) (RICHARD S. ARNOLD, HEANEY, MAGNUSON*). (District Court's consideration of defendant's two prior drug felonies did not constitute impermissible double counting. Those convictions were prior sentences under § 4A1.2(a)(1) because they occurred outside scope of second superseding indictment.), cert. denied, 534 U.S. 1023 (2001).

United States v. Strange, 102 F.3d 356 (8th Cir. 1996). (Strange requested District Court treat his past convictions which had been consolidated for sentencing, as related cases; Court denied request based on 1991 amendment, prior sentences not considered related if they were for offenses that were separated by intervening arrest. Strange does not deny previous sentences were for offenses separated by intervening arrests. Strange s assertion pre-1991 version of Guidelines should be used is untenable. District Court should apply Guidelines in effect at time of sentencing unless Court determines application would violate Ex Post Facto Clause. Here, relevant provisions remain same from time Strange committed crime, summer 1993, until date of his sentencing (that prior offenses occurred before 1991 is irrelevant).

Strange did not have legal representation in 1989 when Missouri convicted him for possession of under 35 grams of marijuana; he protests he did not make knowing and intelligent waiver of counsel in case and thus, District Court committed error when it assessed criminal history point for that offense. Generally, defendants not permitted to use federal sentencing proceeding as forum to challenge prior conviction; constitutionally mandated exception where defendant claims previous conviction was obtained following constitutionally unsound waiver of counsel. Strange failed to carry burden of demonstrating his state Court conviction was constitutionally infirm and this Court rejects on merits this ground for reversal. State Court s imposition of fine does not remove offense from criminal history score as it is covered by § 4A1.1(c).

Strange challenged addition of criminal history point for state Court sentence for driving motor vehicle with excessive blood alcohol content. Such offenses are not minor traffic infractions within meaning of § 4A1.2(c); contrary to Strange s characterization of Missouri law, driving motor vehicle with excessive blood alcohol content is absolutely not lesser included offense of driving while intoxicated.)

United States v. Maza, 93 F.3d 1390 (8th Cir. 1996). (District Court did not err in finding Maza s prior convictions to be unrelated: two crimes occurred on different occasions almost six months apart; drug sales took place in different states and involved different customers. This Court agrees with Second Circuit: as matter of common sense, single common scheme or plan involves something more than simply repeated pattern of conduct. Nor were crimes consolidated for trial or sentencing because no formal order of consolidation was issued and cases proceeded to sentencing under separate docket numbers. Therefore, District Court properly sentenced Maza as career offender.), cert. denied, 519 U.S. 1138 (1997).

United States v. Nicolace, 90 F.3d 255 (8th Cir. 1996). (Nicolace argued District Court erred

in using prior federal narcotics conviction which had been set aside pursuant to FYCA, 18 U.S.C. § 5021 (repealed), in calculating his criminal history; he contended term "set aside" is synonymous with "expungement" and therefore his prior conviction should not have been considered. Convictions which have been "set aside" however, are included in calculating criminal history score, § 4A1.2, comment. (n.10).)

United States v. Crawford, 83 F.3d 964 (8th Cir.) (Crawford argued juvenile sentence he received for assault which resulted in sentence of probation and fifteen hours community service was diversionary disposition and should not be counted under § 4A1.2(f). This Court rejects Crawford s argument as record reflects District Court s finding based on PSR, conviction was not diversionary: Crawford had completed probation and community service and thus discharged sentence imposed.), cert. denied, 519 U.S. 903 (1996).

United States v. Early, 77 F.3d 242 (8th Cir. 1996). (Early challenges inclusion of two uncounseled juvenile convictions in calculating his criminal history. In 1989 and 1990, Early was convicted as juvenile of simple robbery and motor vehicle theft. Juvenile sentences may be considered in calculating criminal history (§ 4A1.2(d)(2)). This Court will only exclude use of uncounseled juvenile convictions if there is some particularized defect in juvenile proceedings. For sentencing purposes, once government has carried initial burden of proving fact of conviction, it is defendant s burden to show prior conviction was not constitutionally valid. Here, only evidence Early offered was he did not recall waiving right of counsel in two juvenile proceedings. In such circumstances, this Court finds District Court did not clearly err in finding waiver on basis of general rule and practice in Minnesota Courts making counsel available to indigent juveniles.)

United States v. Williams, 74 F.3d 872 (8th Cir. 1996). (After pleading guilty to conspiring to distribute heroin and cocaine, Williams was sentenced to 27-months imprisonment. Williams contends District Court erred in determining two of his prior convictions (burglary of liquor store and stealing horse several days after burglary) were not related within meaning of § 4A1.2. If convictions had been found "related," Williams would have criminal history category V instead of VI. This Court concludes Williams s sentence not reviewable as sentence imposed falls within Guidelines range urged by Williams; clear from sentencing transcript sentencing judge would have imposed same sentence regardless of whether Williams s argument for lower guideline range prevailed. Thus, any error in calculating guideline range is deemed harmless.)

United States v. Torres-Diaz, 60 F.3d 445 (8th Cir.) (Mardini challenged District Court s application of §§ 4A1.1(a) and 4A1.2, arguing his California state convictions for transportation and sale of marijuana and cocaine and possession of marijuana for sale are related to offense of maintaining stash house (to which he pleaded guilty) and should therefore be considered part of offense rather than criminal history. This Court disagrees and explains distinction in relevant conduct (§ 1B1.3 and § 4A1.2). Here, although there was temporal and geographical proximity, stash house offense occurred over extended period of time; Mardini not entitled to merge all criminal activities simply because they occurred over single span of time or out of common base of operations. Victims of stash house violation and distribution violations are distinct. Mardini s plan and intent in maintaining stash house appears to have been to enable himself and friends to "party" with adequate supply of cocaine; this differs entirely from intent accompanying narcotics sale.

Thus, distribution activity cannot be said to be in furtherance of stash house offense and District Court did not clearly err in concluding Mardini s distribution activities are not relevant conduct with respect to stash house offense and considering sentence stemming from distribution activities to be prior sentence. Moreover, this Court holds any error by District Court was harmless given Mardini s 21-month sentence falling within both relevant Guidelines ranges and District Court s refusal to depart downward.), cert. denied, 516 U.S. 971 (1995).

United States v. Aguilera, 48 F.3d 327 (8th Cir.) (Aguilera s PSR revealed six convictions for operating motor vehicle while driver s license was suspended and one conviction for writing bad check. Aguilera argued these prior offenses should be deemed "related cases." Offenses were correctly given separate weight where offenses described involved separate arrests; although matters were consolidated for sentencing, analysis does not change. Offenses are considered unrelated if they were for offenses separated by intervening arrest.), cert. denied, 516 U.S. 837 (1995).

United States v. Copeland, 45 F.3d 254 (8th Cir. 1995). (Shields argued 1988 conviction for carrying concealed weapon in vehicle was related to instant offense and should not be included in his criminal history category. This Court finds no clear error given firearm possession involved different firearm, incident was not charged in indictment as act in furtherance of drug conspiracy, and it was not part of conduct of conspiring to distribute crack to which Shields pleaded guilty.)

United States v. Thomas, 20 F.3d 817 (8th Cir.) (en banc). (This Court decides that under Supreme Court s Baldasar decision, one cannot be sent to jail because of prior, uncounseled misdemeanor conviction, either upon initial conviction or be cause of convictions later use in subsequent sentencing, but if subsequent sentence to imprisonment is already required as consequence of subsequent crime, prior conviction may be used as factor to determine its length. CONCURRENCE: Sentencing commission did not exceed Congress s constitutional authority in promulgating background commentary to § 4A1.2. If necessary to reach question, judge would hold District Court calculating defendant s criminal history score is required to follow that commentary in deciding whether to count prior, uncounseled misdemeanor conviction. DISSENT: Supreme Court majority adopted principle that uncounseled conviction cannot serve as basis for incremental deprivation of liberty. Believes remand is necessary in any event as Court cannot tell if this sentence was in violation of law unless District Court tells what it would have done if uncounseled conviction had not been employed in its calculus.), cert. denied, 513 U.S. 828 (1994).

United States v. Patterson, 20 F.3d 801 (8th Cir.) (Patterson was sentenced to 330 months imprisonment, to run concurrently with 300-month sentence imposed in another case. He argued District Court erred in calculating his criminal history as VI. Specifically, he argues District Court should have counted some of his prior sentences as resulting from "related" rather than "unrelated" cases under § 4A1.2(a)(2). Where 330-month sentence imposed in present case represents downward departure from applicable guideline range (360 months-life at Patterson s offense level of 42), regardless of Patterson s criminal history category, sentence is not reviewable. Thus, this Court need not reach question of whether District Court erred in application of § 4A1.2(a)(2).), cert. denied, 513 U.S. 845 (1994).

United States v. Wyatt, 19 F.3d 1283 (8th Cir. 1994). (Wyatt argued state misdemeanor

conviction for criminal damage to property should be excluded. Wyatt failed to raise argument below; in any event, argument fails because he received one year probationary sentence and criminal damage offense is unlike offenses that never earn criminal history points.)

United States v. Ford, 19 F.3d 1271 (8th Cir. 1994). (Ford claimed only 2, rather than 3, points should have been assigned his 1977 burglary conviction because he served only 10 months of his 3-year sentence. As Ford s term of incarceration for burglary was 3 years, and sentence was not suspended, Court correctly added 3 points to criminal history score, § 4A1.2(b)(2).

Ford argued District Court error when it added 1 point under § 4A1.2(c) for 1988 conviction for driving under influence, because record did not show whether Ford had counsel. Despite feelings of some on panel that uncounseled misdemeanor conviction should not be counted when calculating criminal history score, panel is bound by contrary conclusion in U.S. v. Thomas. District Court did not err in adding 1 criminal history point for this conviction.

This Court need not address Ford s argument as to assessment of 1 point for 1991 petty misdemeanor conviction for marijuana possession as even deducting this point, Ford would remain in same category and thus in same range of imprisonment.), cert. denied, 513 U.S. 1085 (1995).

United States v. Porter, 14 F.3d 18 (8th Cir. 1994). (Porter argued Guidelines gave District Court discretion to exclude uncounseled misdemeanor convictions from criminal history scores; he argues alternatively that he has constitutional right to collaterally attack prior conviction in federal sentencing hearing. Because Porter has not demonstrated that collateral attack on his facially valid prior conviction is necessary to prevent erosion of right to counsel or that he was sentenced with misinformation of constitutional magnitude, District Court properly included prior uncounseled misdemeanor conviction in calculation of Porter s criminal history category. This Court notes Porter s collateral attack fails on merits as well (Porter read preprinted form explaining his constitutional rights, and he waived them by signing forms; plea hearing transcript revealed state trial judge asked Porter if he understood his rights and knew he was waiving them, and Porter answered that he did). CONCURRENCE: Under current state record, no reasonable fact finder could have concluded Porter did not waive his right to counsel prior to pleading guilty to misdemeanor charge in California.)

United States v. Klein, 13 F.3d 1182 (8th Cir.) (District Court did not err in treating three prior concurrent sentences for burglary as unrelated where state Court records reflect each burglary charge had separate docket number, charges involved burglaries of three different premises on three different days in 1980, and there was no order consolidating three cases.), cert. denied, 512 U.S. 1226 (1994).

United States v. Johnson, 12 F.3d 760 (8th Cir. 1993). (Ash argued District Court erred in assessing him criminal history point for adult conviction in Virginia state Court for possessing drug paraphernalia; Ash committed offense when he was 17 years old. Though Ash assumed false identity of adult when he committed crime and when he pleaded guilty, he argues that adult conviction is void as matter of law. Whether prior sentence counts for criminal history purposes is question of federal law. As Ash s adult sentence was imposed within five years of instant offenses, District Court properly added one criminal history point for conviction.), cert. denied, 512 U.S. 1211 (1994).

United States v. Rayner, 2 F.3d 286 (8th Cir. 1993). (This Court rejects Rayner s contention that it should look to state law to determine whether prior sentence counts for criminal history purposes. Whether classification of offense is within or without ambit of § 4A1.2(c) is question of federal law in keeping with promoting uniformity under Sentencing Reform Act. Though Rayner argued that his violations of municipal ordinances were civil proceedings and could not constitute criminal justice sentences, this Court concludes District Court correctly assigned Rayner one criminal history point for each of those convictions. Rayner s 1988 and 1990 disturbing peace convictions, for which he received two separate sentences of two years probation, fall squarely within provision.)

United States v. McComber, 996 F.2d 946 (8th Cir. 1993). (McComber was assigned 14 criminal history points for five prior California State Court sentences. He argued that he should have been placed in criminal history category II instead of category VI because these California sentences should be treated as one sentence under § 4A1.2(a)(2). While McComber s five California sentences were imposed at single sentencing proceeding, sentences resulted from different offenses committed over lengthy period of time. They were imposed on same day because sentencing for some had been postponed to allow restitution while sentencing for others followed revocation of probation. District Court did not err in treating these sentences as unrelated where most of final sentences were made concurrent, but cases remained under separate docket numbers and no order of consolidation was entered.)

United States v. Williams, 994 F.2d 1287 (8th Cir. 1993). (Where attorney referred to criminal history calculation in opposing § 4A1.2 enhancement, he did not preserve for appeal argument that his criminal history should be recalculated because two offenses were related.)

United States v. Bobo, 994 F.2d 524 (8th Cir.) (It was not clearly erroneous for District Court to use Bobo s 1986 counseled guilty plea to burglary to enhance his sentence; Bobo failed to meet his burden of proving by preponderance of evidence prior conviction could not be used.), cert. denied, 510 U.S. 891 (1993).

United States v. Elliott, 992 F.2d 853 (8th Cir. 1993). (While acknowledging that some circuits allow challenges to prior convictions at sentencing despite Application Note 6 (not counting convictions previously ruled constitutionally invalid) this Court continues to follow Hewitt and concludes Application Note 6 passes constitutional muster. This Court considers itself bound to follow plain meaning of amended Note 6 except when Constitution requires that collateral attack at sentencing be permitted. Elliot did not argue collateral attack he sought was necessary to prevent "erosion" of Pate v. Robinson nor that his sentence was based on misinformation of constitutional magnitude; thus, Elliot failed to demonstrate Note 6 unconstitutional as applied in his case. DISSENT: This case is not distinguishable on any principled basis from Norquay (Sixth Amendment prohibits use of uncounseled misdemeanor convictions as basis for enhancing sentence). Plea of guilty entered by incompetent is of questionable reliability. Where circumstances raise reasonable doubt as to defendant s competence before trial, conviction obtained without competency hearing is beyond power of government: Due Process Clause does not permit such procedure.), cert. denied, 511 U.S. 1130 (1994).

United States v. Jenkins, 989 F.2d 979 (8th Cir. 1993). (This Court rejects Jenkins s argument that three marijuana possession convictions should not be included in his criminal history score because they were merely infractions under Nebraska law. State s view of offense does not determine how Guidelines view that offense. Jenkins s marijuana possession offenses are not among those on exclusionary list nor can they be considered similar to them. Jenkins also argued convictions should have been excluded because Court documents failed to show he was represented by counsel. However, Jenkins failed to produce prior ruling invalidating marijuana convictions.)

United States v. Mahler, 984 F.2d 899 (8th Cir. 1993). (This Court will not consider/review Mahler s challenge to District Court s discretionary refusal to depart downward because of alleged staleness and minor nature of Mahler s three DWI convictions which added four points to his base offense level score.)

United States v. Lublin, 981 F.2d 367 (8th Cir. 1992). (District Court s finding that prior convictions were not related was not clearly erroneous. Even if Lublin stole automobile to transport handguns, he also changed vehicle identification number and registration transfer stub, and sold auto to another person. Lublin s federal and state offenses occurred on different dates, were factually distinct, and involved selling handguns and auto to different people.)

United States v. Blumberg, 961 F.2d 787 (8th Cir. 1992). (This Court concludes District Court s finding that 1973 burglary conviction was not part of offenses of conviction not clearly erroneous where 1973 burglary was severable, had occurred before conduct charged in instant indictment, targeted different victim, and involved different accomplice.)

United States v. Griebe, 959 F.2d 714 (8th Cir. 1992). (District Court made three point addition for Griebe s Iowa conviction for second degree criminal mischief for which he was sentenced to five years, with credit for time served. Griebe maintained he had not actually served any time on sentence and therefore it did not fall within definition of "sentence of imprisonment." Record indicates Griebe did serve period of time (one night) which would be credited. Thus, Court s finding was not clearly erroneous.)

United States v. Ulrich, 953 F.2d 1082 (8th Cir. 1991). (Trial Court s decision to credit Forest Service agents testimony as to 110 marijuana plants instead of 71 posed by Ulrich was not clearly erroneous.)

United States v. Simpkins, 953 F.2d 443 (8th Cir.) (Where resisting arrest charge was part of conduct of instant offense (i.e., resisting arrest charge arose out of arrest leading to Simpkins s conviction in this case), it could not be counted as "prior sentence." It could be taken into account elsewhere in Guidelines (e.g., obstruction of justice).), cert. denied, 504 U.S. 928 (1992).

United States v. Watson, 952 F.2d 982 (8th Cir. 1991). (District Court did not err in assessing three points each for theft and possession of cocaine where Tracy was convicted in two separate proceedings by different Courts having separate jurisdictions. Tracy s theft and cocaine offenses were not committed on single occasion, nor was there evidence suggesting they were part

of common scheme or plan. Cases did not become "related" because sentences were made concurrent.), cert. denied, 503 U.S. 994 (1992).

United States v. Watts, 950 F.2d 508 (8th Cir. 1991). (Luter s assertion that use of prior offenses in preparing report and recommendation was improper, was insufficient to raise specific questions about accuracy of report or effect of information on outcome of sentencing where there was some evidence of prior offenses in record and Luter s assertion was ambiguous.), cert. denied, 503 U.S. 911 (1992).

United States v. Day, 949 F.2d 973 (8th Cir. 1991). (Before Day s sentencing, but after his conviction, guideline was amended to exclude only convictions that defendant shows to have been previously ruled constitutionally invalid. This Court held Day was not prohibited from collaterally challenging convictions underlying his section 924(e)(1) sentence. Court reverses because District Court incorrectly interpreted law governing Day s challenges. Court remands for District Court determination as to whether record before California judges who accepted Day s three challenged guilty pleas should have raised doubt about his competency sufficient to require those judges to hold competency hearing sua sponte.), cert. denied, 511 U.S. 1130 (1994).

United States v. Manuel, 944 F.2d 414 (8th Cir. 1991). (Manuel was sentenced to 15 months for failure to appear for sentencing on federal forgery conviction. District Court did not err in assessing three points based on Manuel s state forgery offense. Forgeries occurred months apart; involved U.S. Treasury checks (federal) and personal check (state) which were not part of common scheme or plan; convictions involved two different law enforcement agencies, pleas before different tribunals governing different jurisdictions; convictions were not consolidated for sentencing nor were sentences imposed in same proceeding. District Court s assessment of two criminal history points for failure to appear while under criminal justice sentence was error, but harmless as Manual was subject to same range of imprisonment under Guidelines without two points.)

United States v. LaFrombois, 943 F.2d 914 (8th Cir. 1991). LaFrombois argued prior convictions should have been excluded because he did not knowingly and intelligently waive counsel; and he was not advised of possible penalties, right to jury trial and right to remain silent. District Court s determination that LaFrombois s waiver was voluntary and knowing was not clearly erroneous; transcript showed state Court explained right to counsel and LaFrambois s prior experience and conduct at hearing indicate he was aware of possible consequences.)

United States v. Hewitt, 942 F.2d 1270 (8th Cir. 1991). (Hewitt contested use of DUI conviction; though he has waived counsel and pleaded guilty, Hewitt argued its constitutional invalidity under Boykin v. Alabama. This Court holds Note 6 authorizes inclusion of DUI as Hewitt made no showing conviction was "previously ruled constitutionally invalid.")

United States v. Fuller, 942 F.2d 454 (8th Cir.) (This Court rejects Leon s contention. His criminal history category overrepresented his past criminal behavior because of inclusion of two 1982 Operation of Motor Vehicle While Intoxicated violations. These are not minor traffic infractions and District Court s refusal to depart downward is nonreviewable.), cert. denied, 502

U.S. 914 (1991) and 501 U.S. 1039 (1992).

United States v. Mitchell, 941 F.2d 690 (8th Cir. 1991). (This Court remands for resentencing because it agreed with Mitchell that prior conviction for fictitious license was not "similar to" drug charge for which he was being sentenced. While Mitchell s fictitious license offense was "closely related" to his drug dealing, two offenses of drug dealing and driving with false license plates are not remotely related to each other. Thus, District Court misapplied § 4A1.2(c)(1) in calculating Mitchell s criminal history category.)

United States v. Frank, 932 F.2d 700 (8th Cir. 1991). (Where Frank pleaded guilty to possession of marijuana, and Minnesota state Court stayed adjudication and put Frank on probation, sentence was properly included in calculation of Frank s criminal history category. Frank s guilty plea to state charge was admission of guilt. No violation of Tenth Amendment as Minnesota maintains nonpublic record for use by Courts in determining proceedings involving same person.)

United States v. Lowe, 930 F.2d 645 (8th Cir. 1991). (No trial Court error in determining six prior convictions for crimes (passing bad checks) with similar modi operandi were unrelated for purposes of computing criminal history points. Lowe argued all her prior offenses were part of single common scheme or plan; she used same method to commit forgeries against different financial institutions and her motive for each was to obtain money to support her drug habit. Nevertheless, crimes were committed over course of two years, involved different victims, occurred in different locations, and were not consolidated for trial or sentencing.)

United States v. Thompson, 925 F.2d 234 (8th Cir. 1991). (Thompson argued as he was never picked up to serve his 18 month state sentence, it should not qualify as "sentence of imprisonment" for determining criminal history points. Actual incarceration is not required in order to qualify as "criminal justice sentence"; sentences for all felony offenses are counted unless state takes affirmative action to relieve person of penal obligations.)

United States v. Knighten, 919 F.2d 80 (8th Cir. 1990). (District Court properly added two points to Knighten s criminal history score because his present drug-related offense was committed two months after he had been placed on unsupervised probation for fourth degree burglary offense arising from domestic matter.)

United States v. Russell, 913 F.2d 1288 (8th Cir. 1990). (Where Russell submitted no authority for provisions of 4A1.1(c). One point added under (c) merely addressed prior criminal conduct generally; two points added under (d) addressed additional consideration of recency of prior criminal activity.), cert. denied, 500 U.S. 906 (1991).

United States v. Dickens, 879 F.2d 410, 411-12 (8th Cir. 1989). (In determining whether prior conviction, which was several years old and no guilty plea transcript existed, was constitutionally invalid because defendant alleged his guilty plea was not knowingly and voluntarily made, evidence of custom and practice of trial attorneys and judges was used to refute defendant s assertion.)

**§ 4A1.2(a) (Prior Sentence Defined/Standard of Review):**

United States v. Contreras, 341 F.3d 791 (8th Cir. 2003) (BOWMAN,* BEAM, BYE). (District Court's determination of relatedness of defendant's prior convictions is reviewed for clear error.)

United States v. Paden, 330 F.3d 1066 (8th Cir. 2003) (HANSEN,* BEAM, SMITH). (District Court's determination whether prior offenses were part of common scheme or plan is reviewed for clear error.)

United States v. Berry, 212 F.3d 391 (8th Cir.) (BOWMAN, LOKEN,* ALSOP). (This Court reviews for clear error District Court's finding on whether his prior sentences were related because they were part of common scheme or plan.), cert. denied, 501 U.S. 907 (2000).

United States v. Bartolotta, 153 F.3d 875 (8th Cir. 1998). (This Court reviews for clear error District Court's determination whether government has proven that defendant's prior crimes were unrelated.), cert. denied, 525 U.S. 1093 (1999).

**§ 4A1.2(a) (Prior Sentence Defined):**

United States v. Contreras, 341 F.3d 791 (8th Cir. 2003) (BOWMAN,* BEAM, BYE). (Defendant's two convictions for drug trafficking and possessing stolen scales resulted from single arrest and resulted in concurrent sentences. However, they were not related for purposes of assessing criminal history points. They were not part of common scheme or plan, they had separate docket numbers, and there was no formal judicial order of consolidation.)

United States v. Perez-Guerrero, 334 F.3d 778 (8th Cir. 2003) (HANSEN,* LOKEN, SMITH). (District Court did not err in counting defendant's prior marijuana conviction toward his criminal history. It was not part of instant methamphetamine conspiracy because it lacked geographical proximity, involved different drug, and involved different co-conspirators.)

United States v. Ferrara, 334 F.3d 774 (8th Cir. 2003) (WOLLMAN,* MAGILL, BEAM). (District Court did not err in counting defendant's driving-while-intoxicated convictions for which he received suspended impositions of sentence and one year of probation.), cert. denied, 124 S. Ct. 1127 (2004).

United States v. Paden, 330 F.3d 1066 (8th Cir. 2003) (HANSEN,* BEAM, SMITH). (Prior convictions for armed criminal action, assault, and use of weapon were not related because they occurred five days apart, were not part of common scheme or plan, had different elements (despite presence of gun in each), and proceeded under separate docket numbers and were never formally consolidated (although pleas were entered on same day and sentences were made concurrent). This Court declines to adopt "functional consolidation" approach to relatedness of prior offenses.)

United States v. Nastase, 329 F.3d 622 (8th Cir. 2003) (BYE, RICHARD ARNOLD,* HANSEN). (Defendant's instant conviction was for methamphetamine conspiracy spanning from

1999 through 2001. During this period, she had been convicted of two marijuana possession offenses. District Court did not clearly err in treating those two convictions as past offenses contributing to her criminal history score, rather than as part of instant offense. Defendant offered no evidence showing connection between offenses, and marijuana possession is not inherently part of methamphetamine trafficking.)

United States v. Evans, 285 F.3d 664 (8th Cir. 2002) (LOKEN, RICHARD S. ARNOLD,* FAGG). (District Court did not commit plain error by treating two convictions as unrelated, as there was intervening arrest between two convictions), cert. denied, 123 S. Ct. 1257 (2003).

United States v. Peltier, 276 F.3d 1003 (8th Cir.) (WOLLMAN, FAGG,* RILEY). (At least four of defendant's eighteen burglaries were unrelated, and thus properly counted separately, because they were separated by intervening arrests. There is no merit to defendant's argument that full faith and credit statute, 28 U.S.C. § 1738, required District Court to treat offenses as related because state court consolidated them for sentencing.), cert. denied, 537 U.S. 862 (2002).

United States v. Nicholson, 231 F.3d 445 (8th Cir. 2000) (RICHARD S. ARNOLD,* LAY, FAGG). (Convictions which are informally consolidated for sentencing, but are sentenced under separate docket numbers and are never consolidated by formal order, are counted separately for purposes of § 4A1.2(a)(2).), cert. denied, 532 U.S. 912 (2001).

United States v. Berry, 212 F.3d 391 (8th Cir.) (BOWMAN, LOKEN,* ALSOP). (In December 1996, arrest warrant was issued after police saw Berry throw small bag containing crack cocaine and found crack and drug paraphernalia in his house. In November 1997, police executing search of Berry's uncle stopped Berry and found cocaine on his person. Berry was charged with drug trafficking on both occasions--in two cases--and received concurrent suspended sentences. He argues sentences were related because they "were part of single common scheme or plan," and he suggests phrase "common scheme or plan" in Application Note 3 to § 4A1.2 has same broad meaning that it has under relevant conduct provision, § 1B1.3(a)(2). Held: broad definition of "common scheme or plan" in Application Note 9 to § 1B1.3 is not suitable in determining whether sentences are "related" for purposes of § 4A1.2(a)(2). However, § 1B1.3 definition of "common scheme or plan" is relevant to another issue under § 4A1.2: whether previously imposed sentence punished "conduct not part of instant offense." See § 4A1.2(a)(1) & comment.(n.1).), cert. denied, 501 U.S. 907 (2000).

United States v. Davidson, 195 F.3d 402 (8th Cir. 1999) (McMILLIAN, MURPHY,* TUNHEIM). (Issue: are sentences for possessing methamphetamine in October 1995 and February 1996 sentences "previously imposed . . . for conduct not part of [defendant's] instant offense," in this case, conspiring to manufacture methamphetamine between April and December 1996? No, because neither possession conviction took place during commission of conspiracy offense, and neither was connected to conspiracy: no common plan or victim linked them, and simple possession of amount of methamphetamine consistent with personal use is not by itself preparation of furtherance of conspiracy to manufacture methamphetamine (applying § 1B1.3(a)(1)(A)). District Court thus did not err in considering them in calculating defendant's criminal history), cert.denied,

528 U.S. 1180 and 529 U.S. 1093 (2000).

United States v. Milton, 153 F.3d 891 (8th Cir. 1998). (Milton's contention that two prior felony convictions were not separate has no merit even though offenses, which were committed more than one year apart, were joined for purpose of probation revocation proceeding.), cert. denied, 525 U.S. 1165 (1999).

United States v. Bartolotta, 153 F.3d 875 (8th Cir. 1998). (District Court did not err in determining two prior sentences were unrelated sentences under U.S.S.G. § 4A1.2(a)(2), because Bartolotta's prior offenses did not occur on same occasion, nor were they part of single plan; furthermore, crimes were not consolidated because no formal order of consolidation was issued and cases proceeded to sentencing under separate docket numbers.), cert. denied, 525 U.S. 1093 (1999).

United States v. Waloke, 962 F.2d 824 (8th Cir. 1992). (Waloke was not entitled to one point reduction where judgment in state case showed he was sentenced to 90 days imprisonment and fined $150 and was remanded to sheriff to be incarcerated in jail; thus, his sentence was not totally suspended or stayed.)

United States v. Mau, 958 F.2d 234 (8th Cir. 1992). (This Court rejects Mau s contentions that his two predicate offenses used for career offender status were part of common scheme or plan because they both involved distribution of controlled substance and occurred within one-year period or that his prior offenses were related because they were combined for sentencing.)

**§ 4A1.2(c) (Sentences Counted and Excluded):**

United States v. Tiger, 223 F.3d 811 (8th Cir. 2000) (RICHARD S. ARNOLD, HEANEY, MAGNUSON*) (Defendant argued District Court erred in assigning one criminal history point for prior misdemeanor conviction for driving motorcycle without being authorized to do so, because it should have been considered minor traffic infraction and assigned no points. Defendant argued that even though criminal history category would have remained same without disputed point, District Court did not expressly state it would have imposed same sentence. This Court found any error was harmless because (1) defendant's Guideline range would have remained same regardless of whether point was excluded; (2) this is not case involving two overlapping Guidelines ranges; and (3) District Court's comments at sentencing lead this Court to conclude comfortably that same sentence would have been imposed.)

United States v. Webb, 218 F.3d 877 (8th Cir. 2000) (WOLLMAN,* HANSEN, MORRIS SHEPPARD ARNOLD). (Defendant contended District Court erred in assigning one criminal history point to his prior state misdemeanor conviction for offense of "prohibitions"--a charge based on his possession of alcohol when he was nineteen years old--because it was juvenile status offense and because it was similar to public intoxication, crimes not counted for criminal history purposes under Guidelines.
Juvenile status offenses. This Court adopts First Circuit's three-part test that crime constitutes juvenile status offense only if defendant committed crime as juvenile, defendant's conduct would have been lawful if engaged in by adult, and crime is not serious. This Court holds defendant's

prohibitions conviction cannot be considered juvenile status offense because he was not juvenile when he committed offense.
Offense not similar to excluded offenses. This Court also holds that defendant's prohibitions offense is not similar to public intoxication, or other offenses normally excluded from criminal history calculation. Review of plain meaning of statute and comparison of offenses leads Court to believe prohibitions offense is more similar to driving without valid license, or fishing or gaming violation: like those offenses, prohibitions involves affirmatively violating regulatory scheme, rather than merely being offense based on offender's current state or status, i.e., legal actions gone awry. DISSENT (in part): Court's rationale omits to notice that some offenses which are violations of regulatory schemes, such as minor traffic offenses, are never counted because Guideline specifically excludes them. Differential between offenses counted under Guidelines is not artificial distinction between regulatory and status crimes, but rather seriousness of offense conduct; because prohibitions offense is trivial, it bears close resemblance to offense of public intoxication, which is excluded. Also, defendant is entitled to have dispute resolved in his favor under protection of rule of lenity.), cert. denied, 531 U.S. 1131 (2001).

United States v. Johnson, 43 F.3d 1211 (8th Cir. 1995). (Johnson claimed District Court erred in assigning one criminal history point to his criminal history score for prior Minnesota State misdemeanor conviction for obstructing legal process (§ 4A1.1(c)). He contended conviction should not be used because due to nature of stay of imposition of sentence, he never actually received sentence for this conviction or alternatively, assuming one-year period is considered to be sentence in itself, such sentence does not fall within meaning of "probation" as that term is found in § 4A1.2(c)(1). Johnson s argument that his stayed sentence is not "a prior sentence" under Guidelines is answered by Guidelines themselves, § 4A1.2(a)(3). Thus, this Court goes on to determine whether sentence is "countable" under Guidelines and proceeds to analyze whether disposition falls within meaning of "probation." On basis of unique Minnesota sentencing scheme, Minn. Stat. Ann. § 609.135(1), which grants sentencing judge discretion to impose term of supervised or unsupervised probation as condition of stay of imposition of sentence, this Court holds straight stay of imposition of sentence without accompanying term of probation of any kind is not sentence of probation under § 4A1.2(c)(1). This Court concludes District Court erred in assessing one point to Johnson s criminal history score and reverses and remands for resentencing. Court takes opportunity to distinguish U.S. v. Lloyd situation.)

United States v. Lloyd, 43 F.3d 1183 (8th Cir. 1994). (Lloyd contended District Court erred in assessing one point (§ 4A1.1(c)) for prior misdemeanor conviction for driving while his license was suspended. He argued sentence imposed was not conviction within meaning of § 4A1.2(c)(1); Lloyd was convicted in Illinois state Court of "driving while license suspended" for which he received sentence of "conditional discharge" with "18 months inactive supervision." Determining scope of term requires careful scrutiny of state law at issue. This Court has previously held that "supervised" and "unsupervised" probation are treated as equivalent under § 4A1.1(d). This Court holds term "probation" contained in § 4A1.2(c)(1) encompasses sentence of "conditional discharge" as defined in Illinois law. Thus, District Court did not err in adding one point to Lloyd s criminal history score.)

United States v. Ziglin, 964 F.2d 756 (8th Cir. 1992). (Where Ziglin s prior offenses of

exhibiting deadly weapon in threatening manner and petty theft are not on exclusionary lists nor are they similar to exclusions, they were properly counted when determining Ziglin s criminal history category.)

**§ 4A1.2(d) (Offenses Committed Before Age 18/Standard of Review):**

United States v. Lublin, 981 F.2d 367 (8th Cir. 1992). (The District Court s determination is factual one and this Court reviews it for clear error.)

**§ 4A1.2(d) (Offenses Committed Before Age 18):**

United States v. Peltier, 276 F.3d 1003 (8th Cir.) (WOLLMAN, FAGG,* RILEY). (District Court erred in assessing two criminal history points because defendant was under eighteen when he committed theft offense, he received sentence of less than one year, and offense occurred more than five years before instant offense. Error was harmless, however, because District Court failed to assess other criminal history points; when properly assessed, defendant's criminal history category was actually higher, and his resulting Guidelines range remained same. Additionally, District Court departed downward under § 4A1.3, its comments do not suggest that it would have departed less if presented with correct criminal history, and government does not cross-appeal.), cert. denied, 537 U.S. 862 (2002).

United States v. Holland, 195 F.3d 415 (8th Cir. 1999) (LOKEN, HANSEN,* MORRIS SHEPPARD ARNOLD). (Holland argues that state drug conviction, based on conduct that occurred when he was 17, and which resulted in suspended imposition of sentence (SIS) and placement on probation for five years, should not be counted under § 4A1.2(d)(2)(B) because no sentence was "imposed" within five years of commencement of instant offense. This Court reads § 4A1.2(d)(2)(B) together with § 4A1.2(a)(3), under which Holland s state SIS conviction is considered "prior sentence," and also considers § 4A1.2(a)(4), and § 4B1.2, comment. (n.1), to conclude that even where imposition of sentence has been suspended, one criminal history point is assessed for conviction.), cert. denied, 529 U.S. 1077 (2000).

United States v. Watts, 950 F.2d 508 (8th Cir. 1991). Ritcherson argued prior juvenile offense was used to improperly increase his criminal history score by five points (offense involved three years incarceration and he had been on parole less than two years at time of instant offense). He contended Guidelines unfair as applied because he would not have served as long as adult and he would have been off parole. This Court concludes Ritcherson s circumstances do not present compelling basis warranting departure.), cert. denied, 503 U.S. 911 (1992).

**§ 4A1.2(e)(2) (Applicable Time Period):**

United States v. Rosenkrans, 236 F.3d 976 (8th Cir. 2001) (LOKEN,* LAY, MORRIS SHEPPARD ARNOLD). (Application Note 8 states that "[a]s used in § 4A1.2(d)(2) and (3), term 'commencement of instant offense' includes any relevant conduct." And according to commentary to § 1B1.1, "the instant offense" (as opposed to "the offense of conviction") means offense of conviction and all relevant conduct. Because this commentary is not plainly erroneous or

inconsistent with Guidelines that it interprets, it must be followed. Thus, usual meaning of "instant offense" should be used in determining criminal history time period under § 4A1.2(e).)

**§ 4A1.2(h) (Foreign Sentences):**

United States v. Levi, 229 F.3d 677 (8th Cir. 2000) (WOLLMAN, MURPHY,* BYE). (Although foreign convictions may not be used to calculate defendant's criminal history score, they may be considered as basis for upward departure.

**§ 4A1.3 (Adequacy of Criminal History Category/Standard of Review):**

United States v. Parks, No. 03-1286 (8th Cir. 2004) (RILEY, BEAM, SMITH*). (Discretionary refusal to depart downward is not reviewable under 18 U.S.C. § 3553. It is clear that District Court recognized its authority to depart, and simply chose not to, where it said defendant's criminal history was not overstated "either in terms of whether it accurately describes the true offense behavior, or the likelihood of the predictive value of recidivism.")

United States v. Gonzales-Ortega, 346 F.3d 800 (8th Cir. 2003) (BOWMAN,* BEAM, BYE). (PROTECT Act's standard of review applies to defendants sentenced prior to effective date of Act whose appeals remain pending on effective date of Act.)

United States v. Archambault, 344 F.3d 732 (8th Cir. 2003) (MORRIS ARNOLD, HANSEN, SMITH*). (Under PROTECT Act, this Court reviews de novo whether District Court based its departure on permissible factor, reviews for clear error District Court's factual findings, and reviews for abuse of discretion reasonableness of District Court's departure.)

United States v. Walterman, 343 F.3d 938 (8th Cir. 2003) (BOWMAN, HEANEY,* BYE). (Where District Court denied defendant's downward-departure motion because of his lengthy criminal history, this indicated District Court's awareness of its authority to depart, making its denial of his motion unreviewable.)

United States v. Long Turkey, 342 F.3d 856 (8th Cir. 2003) (MORRIS ARNOLD, HANSEN,* SMITH). (Under PROTECT Act, this Court reviews de novo whether District Court based its departure on permissible factor, reviews for clear error District Court's factual findings supporting its departure, and reviews for abuse of discretion reasonableness of District Court's departure.)

United States v. Williams, 340 F.3d 563 (8th Cir. 2003) (BOWMAN,* BYE, ERICKSEN). (District Court's statement that it would depart "if I thought it wasn't an abuse of discretion" to do so showed District Court's recognition of its authority to depart, making its discretionary decision not to depart unreviewable.)

United States v. Greger, 339 F.3d 666 (8th Cir. 2003) (LOKEN, BRIGHT, SMITH CAMP*). (This Court has jurisdiction to review extent of District Court's downward departure where District Court mistakenly believed it lacked authority to depart further.)

United States v. Flores, 336 F.3d 760 (8th Cir. 2003) (LOKEN, BRIGHT, MURPHY*). (Under PROTECT Act of 2003, this Court reviews de novo whether District Court's basis for departure is permissible, reviews for clear error factual findings underpinning departure, and reviews for abuse of discretion reasonableness of departure.)

United States v. Kelly, 329 F.3d 624 (8th Cir. 2003) (WOLLMAN, RICHARD ARNOLD, MELLOY*). (District Court's denial of motion for downward departure is unreviewable unless District Court mistakenly thought it lacked authority to depart. Here, District Court determined defendant was career offender, knew of circumstances surrounding his allegedly overstated prior conviction, and elected not to exercise its discretion to depart.)

United States v. Thornberg, 326 F.3d 1023 (8th Cir. 2003) (HANSEN, LOKEN, MURPHY*). (District Court's upward departure is reviewed under unitary abuse-of-discretion standard.)

United States v. Leaf, 306 F.3d 529 (8th Cir. 2002) (WOLLMAN, RILEY,* MELLOY). (District Court's decision to depart upward and extent of its departure are reviewed for abuse of discretion. Factual findings used to support departure are reviewed for clear error.)

United States v. Butler, 296 F.3d 721 (8th Cir. 2002) (WOLLMAN, RICHARD S. ARNOLD,* LOKEN). (This Court reviews for abuse of discretion District Court's departure from Guidelines. Abuse of discretion occurs when relevant factor that should have been given significant weight was not considered, when irrelevant or improper factor is considered and given significant weight, or when District Court commits clear error of judgment in weighing proper factors), cert. denied, 123 S. Ct. 1366 (2003).

United States v. Lopez-Arce, 267 F.3d 775 (8th Cir. 2001) (BYE, LAY,* JOHN R. GIBSON). (While driving without license is relatively minor infraction, this Court is without authority to review refusal to grant downward departure unless District Court determined it lacked authority to consider particular mitigating factor, and nothing indicates Court believed it lacked authority to depart.)

United States v. Lim, 235 F.3d 382 (8th Cir. 2000) (HANSEN,* MURPHY, BYE). (District Court's discretionary denial of downward-departure motion is unreviewable unless District Court determined that it lacked authority to consider particular factor. There was no indication in record that District Court was unaware of authority to depart where defendant specifically referenced § 4A1.3, District Court did not state belief that it lacked authority, and District Court commented that defendant's criminal history was not overrepresented.)

United States v. Levi, 229 F.3d 677 (8th Cir. 2000) (WOLLMAN, MURPHY,* BYE). (District Court's decision to depart from Guidelines is reviewed for abuse of discretion. District Court is not required to compare defendant explicitly to other offenders in his criminal history category before departing upward.)

United States v. Shepard, 207 F.3d 455 (8th Cir. 2000) (RICHARD S. ARNOLD,* FAGG, HANSEN). (Defendant asked Court to depart downward on basis that his criminal history category greatly overstated seriousness of his criminal record and that his commission of crime was caused or influenced by mental illness; District Court refused to depart downward based on these facts, singly or in combination. This Court declines to review because District Court simply declined to exercise its discretion in defendant s favor; in addition, there was nothing unreasonable or amounting to abuse of discretion in what District Court did.)

United States v. Goings, 200 F.3d 539 (8th Cir. 2000) (WOLLMAN,* HEANEY, LOKEN). (This Court reviews departure under unitary abuse-of-discretion standard, which, although "unitary," is also nuanced: while departure questions are fact-intensive, appellate Courts owe no deference to District Courts concerning issues such as mathematical errors in applying Guidelines, or consideration of facts Guidelines classify as irrelevant.)

United States v. Hall, 7 F.3d 1394 (8th Cir. 1993). (Hall claimed that Category III overrepresented his criminal history and District Court should have departed downward. This Court focuses on issue of whether District Court s refusal to depart under § 4A1.3 is reviewable on appeal. It acknowledges seeming conflict in circuit s case law and follows U.S. v. Evidente line of cases as it discerned no distinction as far as § 3742 is concerned between refusals to depart under § 5K2.0 and those under § 4A1.3. Evidente considered whether Congress granted appellate Court power to review refusals to depart, whereas U.S. v. Justice line of cases merely assumes jurisdiction was proper. Thus, this Court concludes that it does not have jurisdiction to review District Court s failure to depart under § 4A1.3 where that Court is aware of its authority to do so. Here, record showed Court recognized it had power to reduce Hall s criminal history category and so Hall s claim of District Court error is nonreviewable.)

**§ 4A1.3 (Adequacy of Criminal History Category):**

Burns v. United States, 501 U.S. 129 (1991). (District Court may not depart upward from Guidelines range without first notifying parties that it intends to depart.)

United States v. Underwood, Nos. 03-1543/1982/2716/2901 (8th Cir. 2004) (MURPHY,* HEANEY, SMITH). (District Court did not err by departing upward from Category III to Category IV where defendant had been recidivist criminal since 1978, had several juvenile convictions for which she had not received criminal history points, and had two adult convictions for second-degree murder.)

United States v. Gonzales-Ortega, 346 F.3d 800 (8th Cir. 2003) (BOWMAN,* BEAM, BYE). (District Court properly departed upward by five offense levels for defendant with Category VI criminal history. Defendant had thirty-one criminal history points and thirty adult convictions, showed habit of being deported and reentering illegally to commit further crimes, exhibited recent trend toward violent crime, and had not been deterred by ten probation revocations or by spending much of his adult life in prison. District Court's methodology of departing by one level for every three excess criminal history points was not impermissibly mechanistic.)

United States v. Archambault, 344 F.3d 732 (8th Cir. 2003) (MORRIS ARNOLD, HANSEN, SMITH*). (Category I criminal history did not adequately reflect seriousness of defendant's past criminal conduct where one of two instant arson charges was dismissed and, during presentence investigation interview, defendant admitted to abusing drugs, selling marijuana, and stealing approximately $1,000 per week.)

United States v. Long Turkey, 342 F.3d 856 (8th Cir. 2003) (MORRIS ARNOLD, HANSEN,* SMITH). (Upward departure from Category III to Category V was proper for defendant convicted of aggravated sexual abuse. His prior convictions for burglary, drug possession, and DWI were too old to be assessed criminal history points but were properly taken into account in departing: drug and alcohol offenses were minor but similar to instant alcohol-fueled offense, and burglary was dissimilar but serious. His prior tribal convictions for public intoxication and DWI were not assessed criminal history points but were properly taken into account in departing because they showed defendant's pattern of drinking to excess and breaking law without regard for consequences. Two-year prison sentence defendant received for recent prior conviction for abusive sexual contact was properly taken into account as very lenient sentence for serious offense, where facts of prior offense were that defendant restrained and raped young girl, and sentence failed to deter him from committing similar instant offense few years later.)

United States v. Collins, 340 F.3d 672 (8th Cir. 2003) (LOKEN, RILEY, SMITH*). (Absent government motion under 18 U.S.C. § 3553(e), District Court lacked authority to depart below statutory minimum.)

United States v. Hutman, 339 F.3d 773 (8th Cir.) (BOWMAN, HEANEY, BYE*). (District Court departed downward, concluding that career-offender-based Category VI overrepresented seriousness of defendant's criminal history. Such departure may be appropriate for relatively young defendant with only brief criminal career, but it was error here. Defendant has six convictions spanning four decades of his life, committed career-offender predicate felonies well into his adult years, repeatedly violated probation, and has serious conviction for sexual assault. Defendant was properly classified as career offender because burglary of commercial structure is crime of violence, and case is remanded for District Court to impose sentence within range generated by career offender Guideline.), cert. denied, 124 S. Ct. 842 (2003).

United States v. Greger, 339 F.3d 666 (8th Cir. 2003) (LOKEN, BRIGHT, SMITH CAMP*). (Where defendant was classified as career offender and District Court found that his predicate felonies were overrepresented, District Court had authority to depart both horizontally along criminal history axis and vertically along offense level axis.)

United States v. Flores, 336 F.3d 760 (8th Cir. 2003) (LOKEN, BRIGHT, MURPHY*). (District Court properly departed from Category IV to Category VI, and by six offense levels after that, where defendant's criminal history score did not account for large number of violent offenses that resulted in dispositions which for one reason or another did not accrue criminal history points. CONCURRENCE: Guidelines are often inadequately flexible, and District Court in this case did exceptional job of explaining and justifying departure.)

United States v. Dyck, 334 F.3d 736 (8th Cir. 2003) (HANSEN,* WOLLMAN, BYE). (District Court improperly departed downward where defendant's prior offense was attempting to import almost ninety pounds of marijuana, and he committed instant offense only six months after being released from prison and while on supervised release.)

United States v. Chesborough, 333 F.3d 872 (8th Cir. 2003) (BOWMAN,* BYE, ERICKSEN). (District Court properly departed upward from Category II to Category V where defendant's four burglary convictions, two firearm convictions, seven theft convictions, four motor-vehicle convictions, two assault convictions, and one fraud conviction were not counted due to their age. Defendant's lengthy and unabated criminal history showed high likelihood of recidivism.)

United States v. Agee, 333 F.3d 864 (8th Cir. 2003) (HANSEN,* LOKEN, SMITH). (District Court properly departed upward from Category III to Category V where two drug-trafficking convictions that were not counted due to their age were serious crimes similar to defendant's relevant conduct in instant case, and three other convictions that were not counted due to their age were minor and dissimilar to instant offense but nonetheless showed defendant's incorrigibility and likelihood of recidivism.)

United States v. Tarantola, 332 F.3d 498 (8th Cir.) (HANSEN,* RILEY, MELLOY). (District Court properly departed upward from Category V to Category VI where two violent offenses were not counted due to their age, three violent offenses were counted but their violence was underrepresented, defendant had spent 2/3 of his adult life in prison and would likely have committed even more crimes had he been free, and defendant had committed many violent and disruptive rule violations while in prison. Defendant also sent threatening letter to judge and made threatening remarks to prosecutor. This history showed defendant's incorrigibility and likelihood of recidivism.), cert. denied, 124 S. Ct. 855 (2003).

United States v. Aguilar-Lopez, 329 F.3d 960 (8th Cir. 2003) (LOKEN, BRIGHT, MURPHY*). (District Court's upward departure from criminal history Category VI (by one offense level) was justified where defendant had sixteen criminal history points, three juvenile convictions that did not receive points, and one pending charge, and had reentered illegally after deportation twice. This history showed that none of defendant's previous convictions, sentences, or deportations had deterred him from committing further crimes.)

United States v. Thornberg, 326 F.3d 1023 (8th Cir. 2003) (HANSEN, LOKEN, MURPHY*). (District Court did not abuse its discretion in departing upward from Category III to Category V in sentencing defendant convicted of wire fraud and money laundering for scheme to sell non-existent ethanol-powered vehicles. Unobjected-to facts in PSR showed that defendant was recidivist con-man, i.e., he had previously been convicted of seventeen counts of mail fraud, had failed to appear in two states on charges of theft and embezzlement, had run many other businesses that owed millions of dollars to unsecured creditors, had run foundation that was shut down for fraudulent misrepresentation and deceptive practices, had lied about his military service, had used at least six false social security numbers and numerous aliases, and had been operating another deceptive business at time of his arrest on instant charges. If District Court had not departed upward, defendant would have received sentence shorter than he received for previous mail fraud

convictions. Upward departure was not impermissible double-counting even though many of these facts were also used as basis for offense level enhancements for use of sophisticated means and false identification, because these facts were relevant to both considerations. District Court was not required to state why it passed over Category IV because it adequately explained and supported departure.)

United States v. Fletcher, 322 F.3d 508 (8th Cir. 2003) (BOWMAN, MORRIS ARNOLD,* RILEY). (Defendant was separately convicted of federal tax fraud in Arkansas and Montana. At sentencing, Arkansas District Court departed upward based on two prior civil adjudications against defendant relating to his provision of tax services. Fact that District Court in Montana had used these civil adjudications as basis for upward departure when sentencing defendant did not preclude District Court in Arkansas from again using them as basis for upward departure in this case.)

United States v. Vagenas, 318 F.3d 819 (8th Cir. 2003) (LOKEN,* MORRIS ARNOLD, WEBBER). (District Court's upward departure to thirty-month sentence from Guidelines range of twelve to eighteen months was not abuse of discretion where defendant had fifteen criminal history points, defendant repeatedly committed mail theft within months of being released from prison, and instant offense involved mail theft involving at least sixteen victims. Without upward departure, sentence within Guidelines range would have been no longer than sentence defendant had received for immediately prior mail-theft convictions--for which he was on supervised release at time of instant mail-theft offense--thwarting need for incrementally greater punishment to deter recidivism.)

United States v. Leaf, 306 F.3d 529 (8th Cir. 2002) (WOLLMAN, RILEY,* MELLOY). (Defendant pleaded guilty to manslaughter after running her boyfriend over with her car. District Court used four instances of uncharged prior criminal conduct--running over and fatally injuring her previous boyfriend, stabbing her ex-husband, stabbing another ex-boyfriend, and attempting to stab another woman--in departing upward by equivalent of eleven criminal history points. District Court's factual findings, based on four-day evidentiary hearing, were not clearly erroneous. Extent of departure was not abuse of discretion because four incidents were only tip of iceberg of extensive history of uncharged violence.)

United States v. Butler, 296 F.3d 721 (8th Cir. 2002) (WOLLMAN, RICHARD S. ARNOLD,* LOKEN). (District Court has authority to depart downward from applicable Guideline range if defendant's criminal history category significantly overrepresents seriousness of his past criminal conduct. Here, District Court departed from range established by career offender Guideline because defendant committed one of predicate crimes of violence--robbery--at age seventeen, during daytime, after making sure house was unoccupied, and took only three items. District Court abused its discretion in departing because defendant's other predicate crime of violence--first-degree sexual assault--was particularly serious and violent, and defendant had lengthy criminal history from age thirteen through age thirty, interrupted only by incarceration for sexual assault. District Court should consider defendant's entire criminal history), cert. denied, 123 S. Ct. 1366 (2003).

United States v. Peltier, 276 F.3d 1003 (8th Cir.) (WOLLMAN, FAGG,* RILEY). (Prior to granting § 4A1.3 downward departure, District Court failed to assess certain criminal history points; when properly assessed, defendant's criminal history category was actually higher, but his

resulting Guidelines range remained same. This Court finds no need for remand because District Court's comments do not suggest that it would have departed less if presented with correct criminal history, and government does not cross-appeal.), cert. denied, 537 U.S. 862 (2002).

United States v. Sheridan, 270 F.3d 669 (8th Cir. 2001) (WOLLMAN, BEAM,* HANSEN). (District Court abused its discretion in departing downward based on defendant's minimal criminal history. Absence of criminal history does not provide basis for departure., nor does defendant's abiding by law between conviction and sentencing.)

United States v. Langmade, 236 F.3d 931 (8th Cir. 2001) (McMILLIAN, FAGG, MURPHY) (per curiam). (Downward departure under § 4A1.3 is merely departure from Guidelines, not actual deletion of criminal history points; defendant with three criminal history points is ineligible for safety-valve relief regardless of downward departure which treated him as if his criminal history category were I.)

United States v. Heilmann, 235 F.3d 1146 (8th Cir. 2001) (LOKEN, LAY, MORRIS SHEPPARD ARNOLD*). (Defendant's lack of criminal history can never be basis for downward departure. This Court reverses District Court's departure from Guidelines range established by Category II criminal history to below Guidelines range established by Category I criminal history.)

United States v. Levi, 229 F.3d 677 (8th Cir. 2000) (WOLLMAN, MURPHY,* BYE). (Foreign convictions may be considered as basis for upward departure. Even offenses which are minor and dissimilar to instant offense may be considered as evidence of obvious incorrigibility, and hence demonstrative of defendant's risk of recidivism. Defendant's extensive criminal history spanning thirty years, including convictions for fraud similar to instant offense, showed his disrespect for law and that leniency was ineffective.)

United States v. Webb, 218 F.3d 877 (8th Cir. 2000) (WOLLMAN,* HANSEN, MORRIS SHEPPARD ARNOLD). (District Court did not err in denying defendant safety-valve relief for having more than one criminal history point. District Court had departed downward from Category III criminal history (based on four criminal history points) to Category I because it found Category III overstated seriousness of his criminal history, but departure did not result in defendant receiving only one criminal history point: departure under § 4A1.3 does not delete previously assessed criminal history points for purposes of safety-valve analysis. Although § 4A1.1 may be "mechanistic," this Court is bound by words of Guidelines.), cert. denied, 531 U.S. 1131 (2001).

United States v. Amsden, 213 F.3d 1014 (8th Cir. 2000) (McMILLIAN, F. R. GIBSON, MORRIS SHEPPARD ARNOLD*). (Rejecting defendant's argument that District Court engaged in double counting by relying on his threatening post-plea letters both to refuse defendant § 3E1.1 reduction and to support increase in criminal history category under § 4A1.3. No double counting occurred because District Court could have concluded defendant's letters, which included threats of sexual assault and murder, were not fully accounted for solely by denying § 3E1.1 reduction, and also supported increase in criminal history score. Therefore, this Court needs not address whether Sentencing Commission drafted two pertinent Guidelines provisions to serve distinct purposes so that double counting would have been permissible in any event.)

United States v. Waugh, 207 F.3d 1098 (8th Cir. 2000) (RICHARD S. ARNOLD, BEAM, CONMY*). (Affirming departure from Category IV to VI based on uncounted tribal convictions; at times such convictions are based on uncounseled guilty pleas, entered for purpose of leaving jail, and should not be counted; where, however, as here, incidence of alcohol-inspired assaultive behavior is frequent, District Court may properly consider these convictions in its decision to depart upwardly.)

United States v. Herr, 202 F.3d 1014 (8th Cir. 2000) (WOLLMAN, ROSS,* LOKEN). (Affirming upward departure where defendant had at least 14 convictions excluded in calculation of criminal history category because they did not result in imprisonment or at least one year probation. Defendant also had convictions for failure to appear and resisting arrest. These repeated violations show disrespect for law, and that leniency has not been effective.)

United States v. Goings, 200 F.3d 539 (8th Cir. 2000) (WOLLMAN,* HEANEY, LOKEN). (Defendant was convicted of involuntary manslaughter after he lost control of vehicle in Indian country; at time of offense, he had blood-alcohol level well above legal limit. There was no abuse of discretion in departing from Category III to IV where, before his indictment for involuntary manslaughter, defendant had been convicted of various crimes on seven prior occasions for which he had received less than 60 days' imprisonment in each case, and thus had received only four criminal history points for all seven offenses under U.S.S.G. § 4A1.1(c). Six of seven offenses involved drugs or alcohol, indicating serious, longstanding, but unaddressed, substance abuse problem. Because of similarity of defendant's past offenses and current offense, and chronic nature of substance abuse, District Court was justified in concluding "capped" criminal history did not adequately reflect likelihood of reoffense.)

United States v. Villar, 184 F.3d 801 (8th Cir. 1999) (WOLLMAN,* BEAM, MURPHY). (This section does not authorize departure below statutory minimum.)

United States v. Juvenile PWM, 121 F.3d 382 (8th Cir. 1997). (PWM, 16-year-old, admitted to being juvenile delinquent because he had stolen firearms from firearms dealer, and had possessed and sold stolen firearms; he later admitted to being juvenile delinquent based on charge of failing to appear at his sentencing hearing. In sentencing PWM, District Court recognized firearms case Guideline range for adult would have been 4-10 months, and for failure to appear, 6-12 months; Court departed upward, sentencing PWM to custody until he reached age 21-in both cases. While this Court agrees with government juvenile does not have to receive same sentence adult who committed corresponding offense would receive and Supreme Court holding did not require plenary application of Guidelines to juvenile delinquents, this Court requires District Court to follow procedures set out in U.S. v. Day for sentencing adult, i.e., proceed along criminal history axis of sentencing matrix, comparing defendant s criminal history with criminal histories of other offenders in each higher category, in order to fix and justify extent of departure. This is required because otherwise juvenile s maximum possible sentence would not be same as that of similarly situated adult, results statute was enacted to avoid (§ 5037(c)(1)(B)). Furthermore, in departing upward, District Court considered not just nine tribal Court adjudications outlined in PSR, but also three charges that were pending in tribal Court. As PWM did not admit underlying conduct, it was

error for District Court to take it into account in determining whether and how much to depart (charges merely pending against defendant may not be counted as part of defendant s criminal history unless defendant admits to criminal conduct underlying charge). Sentence is vacated, remanded for resentencing, directing District Court to utilize procedures established in Day to determine appropriate Guideline for PWM, without reference to charged conduct to which he has not admitted or which government does not prove by preponderance of evidence, in order to fix upper limit of sentence for which he is eligible.)

United States v. Drapeau, 110 F.3d 618 (8th Cir. 1997). (Where Drapeau had been convicted in tribal Court four times for assault and battery and once for violence to police officer, and these offenses were not factored into calculation of criminal history category II, District Court appropriately applied upward departure to category III to reflect Drapeau s tribal offenses. Moreover, PSR provided sufficient notice of possible departure as PSR indicated calculation of category II based on state convictions and that tribal conviction could support upward departure to category III. Any error in calculating criminal history would be harmless as Court could have sentenced Drapeau to 63 months imprisonment even without departure.)

United States v. Washington, 109 F.3d 459 (8th Cir. 1997). (District Court did not abuse its sentencing discretion in departing upward from category IV to VI where Washington had many serious offenses prior to 1975 which were excluded in determining criminal history category (§ 4A1.2(e)); he had been incarcerated one-half of his adult life for wide variety of serious offenses and resumed criminal activity promptly upon each release from prison, committing instant offense and earlier offenses while on parole (seemingly, only incarceration kept criminal history as low as category IV).)

United States v. Lank, 108 F.3d 860 (8th Cir. 1997). (District Court did not abuse its discretion in granting government s motion to depart upward where Court noted Lank s criminal history score of 19 was well above 13-point threshold for category VI (the highest criminal history category); Lank s offenses, which range from forgery to armed bank robbery, had increased in seriousness; [and] Lank had used drugs while in custody awaiting trial--in sum, District Court concluded there was no way Lank would ever "straighten out.")

United States v. Collins, 104 F.3d 143 (8th Cir. 1997). (Collins claims upward departure was wrong because it essentially double counted his state convictions. District Court s decision to depart was not abuse of discretion; there was ample evidence Collins s criminal history category did not reflect seriousness of his criminal activity. Uncharged conduct can properly be considered when departing under § 4A1.3; Collins participated in approximately 16 burglaries for which neither federal nor state charges were ever brought.

Collins also complains District Court jumped over several categories in departing upward. District Court departed by treating Collins s criminal history category as IV instead of I. Though this Court has indicated District Court should proceed step-by-step in deciding on degree of departure and here, Court did not specifically mention it had considered each intermediate criminal history category, its findings were adequate to explain and support departure in this particular case.)

United States v. LeCompte, 99 F.3d 274 (8th Cir. 1996). (The District Court invoked its

inherent authority to depart upward because of aggravating circumstances not adequately taken into consideration by sentencing commission. In § 4A1.3, however, sentencing commission has specifically prescribed how upward departure should be imposed when criminal history category significantly underrepresents seriousness of defendant s criminal history or likelihood defendant will commit further crimes. Here, record suggests District Court did not follow prescribed method of calculating upward departure (i.e., proceed along criminal history axis of sentencing matrix, comparing defendants criminal history with criminal histories of other offenders in each higher category, etc.). Though circuit s prior cases do not make compliance with § 4A1.3 "ritualistic exercise" record must reflect this guideline has been properly applied.)

United States v. Poe, 96 F.3d 333 (8th Cir. 1996). (District Court did not abuse its discretion by granting government s request for upward departure where Poe s criminal history category does not include Poe s most recent threatening letters to state officials and where Poe does not deny telling his probation officer he plans to send more threatening letters to victims in this case.)

United States v. Grey Cloud, 90 F.3d 322 (8th Cir. 1996). (District Court departed upward from guideline range (188-235 months) and sentenced Grey Cloud to life imprisonment based on extreme conduct, § 5K2.8, and inadequacy of criminal history category, § 4A1.3. On appeal, Grey Cloud argues District Court erred by departing upward from recommended range. Because District Court did not err in finding it had authority to depart and facts of case warranted departure, and because extent of departure was reasonable, this Court rejects claim.)

United States v. McNeil, 90 F.3d 298 (8th Cir.) (Government cross-appealed Court s downward departure for overstated criminal history. Because nothing about McNeil s long and continuing criminal career was overstated by application of career offender guideline to him, this Court concludes District Court abused its discretion in departing on this basis. Court goes on to recount McNeil s lengthy criminal history, his first encounter with juvenile authorities at age 8. McNeil s criminal career has been neither brief nor minor in nature. His criminal history score at 18 points is five more than it ordinarily takes to reach category VI (without resorting to career offender guideline). McNeil s extensive record shows he is recidivist of first water. Seriousness of his criminal conduct escalated as he grew older. Probation has not deterred him from commission of further crimes nor have periods of incarceration nor granting of parole. Most recent state Court convictions demonstrate he is capable of violent crime. Factual circumstances relied on by District Court for departure do not accurately reflect record in this case and District Court committed clear error of judgment by departing on this basis. This Court vacates McNeil s sentence and remands for resentencing within 151-188 month range established by correct application of career offender guideline to McNeil.), cert. denied, 519 U.S. 1034 (1996).

United States v. Joshua, 40 F.3d 948 (8th Cir. 1994). (District Court increased Joshua s criminal history category from I to II. As Joshua did not dispute PSR s rendition of his criminal history, facts therein stand as admitted. District Court may consider prior sentences, prior similar civilly-adjudicated misconduct, and prior similar adult criminal conduct not resulting in conviction. Prior arrest record standing alone, however, cannot be considered. Juvenile conduct can be used as basis for departure, particularly if it is similar, or dissimilar but serious conduct. This Court concludes only certain incidents in Joshua s criminal history may be used to establish past criminal

conduct. Where PSR recites charges, i.e., Joshua allegedly did these things, not that he in fact did them, it is merely record of arrest. Guidelines do not allow District Court to consider pending charges unless conduct underlying those charges is admitted. This Court unable to determine whether District Court relied on pending charges in concluding Joshua s criminal record was both serious and inadequate. Pre-trial diversions may be used to enhance sentence on basis defendant s criminal history is inadequately rated, for they may be evidence that leniency has not been effective. As it did not appear District Court confined its consideration of Joshua s criminal history to crimes for which PSR provided admitted facts, this Court remands case for reconsideration of sentence.)

United States v. Saffeels, 39 F.3d 833 (8th Cir. 1994). (Prior history omitted). (District Court based upward departure (180-month mandatory minimum to 300 months imprisonment) on Saffeels s extensive criminal history and its conclusion Saffeels was incorrigible and thus needed to be deterred from future criminal activity. This Court holds as matter of law factors considered by District Court formed appropriate basis for upward departure. It found no error in District Court s implicit finding factors it considered did indeed exist, i.e., Saffeels s 26 criminal history points, two uncounted prior juvenile convictions, two uncounted adult convictions, and six pending armed robbery charges--all matters which were documented. This Court agrees 300-month sentence was not unreasonably high departure as sentence was well within maximum of life imprisonment authorized by § 924(e)(1). Also, Saffeels s 26 criminal history points are double number required to reach highest criminal history category contained in Guidelines; none of numerous periods of incarceration seem to have had any dampening effect on Saffeels s willingness to engage in criminal activity; subsequent Guidelines provide useful touchstone in making determination of reasonableness and under those Guidelines, Saffeels s offense level would have been 34 and he would have been sentenced to minimum of 300 months.)

United States v. Frieberger, 28 F.3d 916 (8th Cir. 1994). (Frieberger argued District Court should be collaterally estopped from assessing one point each for three prior offenses because another federal District Court, in sentencing Frieberger on previous drug conviction, concluded no points should be assessed. District Court did not err in assessing challenged criminal history points as previous District Court had done same assessment, but departed downward. District Court here assessed exactly same number of points but declined to depart downward: Frieberger by this time had committed yet another offense.), cert. denied, 513 U.S. 1097 (1995).

United States v. Goff, 20 F.3d 918 (8th Cir.) (HEANEY, FAGG, LOKEN*). (As matter of law, absence of prior convictions is improper basis for departure where defendant's criminal history category is I.), cert. denied, 513 U.S. 987 (1994).

United States v. Maul-Valverde, 10 F.3d 544 (8th Cir. 1993). (District Court misapplied Guidelines when it departed on rationale 16-level enhancement based on Maul-Valverde s 1977 burglary conviction significantly overrepresented seriousness of his criminal history. If fourteen-year-old conviction results in 16-level enhancement (§ 2L1.2(b)(2)) and 3-point criminal history increase (§ 4A1.1(a)), § 4A1.3 would permit departure from resulting criminal history category, but not from resulting base offense level. Criminal history section is designed to punish likely recidivists more severely while § 2L1.2 enhancement is designed to deter aliens who have been convicted of felony from reentering U.S.)

United States v. Gayles, 1 F.3d 735 (8th Cir. 1993). (District Court assigned Gayles criminal history category for career offenders (§ 4B1.1) relying on his 1979 armed robbery conviction and related crimes committed during same criminal episode when he was 21 years old, and recent state drug conviction for which he served less than six months in prison; most of Gayles s other skirmishes with law were misdemeanor offenses. This Court declares District Court may depart downward under § 4A1.3 even if defendant is § 4B1.1 career offender. Here, Gayles only raised § 4A1.3 issue obliquely in written "position with respect to sentencing" and District Court did not acknowledge its power to depart from applicable Guidelines range under § 4A1.3. This Court remands to give District Court unity to consider whether downward departure is appropriate. CONCUR: Without career offender designation, Guidelines recommend sentence of 100-125 months, roughly 20-year reduction in sentence. Points out approval of downward departure based on similar circumstances in U.S. v. Senior.)

United States v. Day, 998 F.2d 622 (8th Cir. 1993). (Day s PSR indicated category V was applicable. District Court departed upward and imposed sentence of 60 months. Day asserts that District Court failed to consider next most serious criminal history category, VI. Record showed District Court did consider whether Day should be sentenced within category VI where District Court stated that whether category was V or VI, it did not adequately reflect seriousness of Day s past criminal conduct and likelihood he would commit other crimes. This Court found application of § 4A1.3 was proper: neither text of section nor circuit s case law requires mechanical discussion of each criminal history category that Court rejects in route to category it selects. Moreover, upward departure to 60 months was reasonable.

Day also contended that District Court erred in relying on two constitutionally invalid convictions to justify § 4A1.3 departure. District Court stated it was considering conduct underlying two invalid convictions, not convictions themselves. Day did not deny he committed acts in question and thus District Court did not err in applying § 4A1.3.), cert. denied, 511 U.S. 1130 (1994).

United States v. Norquay, 987 F.2d 475 (8th Cir. 1993). (Schoenborn challenged use of his tribal Court convictions as basis for departing upward because he was not represented by counsel for those convictions. This Court states tribal Court conviction for assault need not be reached as conduct itself had been properly considered. As to other conviction for assault and one for theft, trial Court had only information from PSR and government offered no independent testimony about incidents which led to convictions. Trial Court made no findings as to whether tribal Court convictions were uncounseled; thus, there may be Sixth Amendment violation. And because use of criminal history points that would be associated with those convictions moved Schoenborn two criminal history categories higher, this Court reverses Schoenborn s sentence and remands.)

United States v. Sweet, 985 F.2d 443 (8th Cir. 1993). (District Court s upward departure was based on specific factual findings, supported by record: Sweet s criminal history point total did not adequately reflect her past conduct in part because she had been arrested for number of offenses that did not result in criminal convictions; she had received benefit of two deferred prosecutions; and Court found there was substantial likelihood Sweet would commit future crimes. District Court relied on facts sufficient to justify upward departure; additional nine months was reasonable--no abuse of discretion.)

United States v. Morse, 983 F.2d 851 (8th Cir. 1993). (District Court did not abuse its discretion in finding Morse s criminal history score did not adequately reflect seriousness of his prior criminal history specifically based on previous convictions not counted in Morse s score, failure of previous sentences to deter Morse (two reasons which majority is careful to point out, would have justified increase in sentence), and pending charges. DISSENT: Use of pending charges is mistake; it is unlike "uncharged conduct." Person charged is still entitled to presumption of innocence. Pending charges are government accusations, not evidence to establish guilt by preponderance. It is not apparent District Court would have imposed same sentence absent consideration of pending charges.)

United States v. Carlin, 983 F.2d 106 (8th Cir. 1992). (District Court did not abuse its discretion by denying Carlin s request for departure. His failure to appear to serve sentence in drug case indicates Court, at earlier sentencing, may have underestimated seriousness of Carlin s criminal background and likelihood he would commit further crimes. Moreover, when Court sentenced Carlin for failing to appear, he had committed two federal felonies within six-month period.)

United States v. Lara-Banda, 972 F.2d 958 (8th Cir. 1992). (District Court considered appropriate factors and followed proscribed procedure in finding criminal history category (V) did not adequately reflect seriousness of Lara-Banda s past criminal conduct or his high rise of recidivism, when departing horizontally to VI.)

United States v. Cook, 972 F.2d 218 (8th Cir. 1992). (Circumstances could not be said not to warrant two level increase where District Court was clearly permitted to consider Cook s significant history of violent episodes; use of weapons; continuing pattern of disrespect for, flight from and assault upon police officers; and Cook s capacity for future violence and recidivism, based upon threatening statements he made to his probation officer.), cert. denied, 506 U.S. 1058 (1993).

United States v. Lloyd, 958 F.2d 804 (8th Cir. 1992). (This Court finds neither offense level nor Lloyd s criminal history category fully took into account his propensity to use firearm.)

United States v. Andrews, 948 F.2d 448 (8th Cir. 1991). (Andrews argued District Court departed upward for conduct adequately addressed by Guidelines. This Court holds District Court did not abuse its discretion in concluding Andrews s criminal history score significantly underrepresented seriousness of his past criminal conduct. Convictions excluded from criminal history score because of their age may be used for departures.)

United States v. Fawbush, 946 F.2d 584 (8th Cir. 1991). (District Court properly relied on Fawbush s earlier sexual abuse of his daughters for upward departure as this conduct was not reflected by criminal history because he escaped conviction for those acts.)

United States v. Payne, 940 F.2d 286 (8th Cir. 1991). (This Court reviews for abuse of discretion and agrees ten month upward departure warranted as criminal history score assigned to Cuellar did not adequately reflect severity of her past illicit activity.)

United States v. Carlisle, 929 F.2d 1324 (8th Cir. 1991). (No abuse of discretion in District Court s denial of downward departure where Carlisle argued his criminal history category overstated seriousness of his previous criminal history category viewed his eight convictions for theft which netted only few hundred dollars, as well-entrenched history of continuous criminal behavior.)

United States v. Franklin, 926 F.2d 734 (8th Cir.) (Franklin argued District Court had discretion to depart downward from Category I on basis of his lack of criminal history. District Court was correct in stating it could not depart below lowest level.), cert. denied, 502 U.S. 881 (1991).

United States v. Matha, 915 F.2d 1220 (8th Cir. 1990). (No abuse of discretion in upward departure where trial Court found Matha s criminal history significantly under-represented seriousness of his criminal history and he was likely to commit further crimes. Noteworthy was indication in PSI report Matha had committed federal drug offense for which he was being sentenced while awaiting trial in state Court on four-count drug charge.)

United States v. Thomas, 914 F.2d 139 (8th Cir. 1990). (Though this Court s review of sentence would have been aided by indication from District Court of which Guideline it was departing under and specific selection of appropriate criminal history category, under three-part test, this Court finds that District Court properly considered combination of aggravating circumstances not adequately taken into account by Guidelines: "assaultive-nature" of 1983 conviction, nature of firearms possessed by Thomas-Bey, and fact firearms were loaded.)

United States v. Hill, 911 F.2d 129 (8th Cir. 1990). (District Court did not abuse its discretion in departing from guideline range based on Hill s extensive criminal history; PSI stated Hill s criminal history category would have been IX or X if Guidelines were extended (beyond VI).), cert. denied, 504 U.S. 975 (1991).

United States v. Jones, 908 F.2d 365 (8th Cir. 1990). (This Court affirmed District Court s seven-fold upward adjustment where District Court had resolved ambiguity in favor of Jones (two charges on which Jones had not been sentenced could not be counted in determining whether Jones was career offender), but reasonably departed upward as Jones s own conduct prevented sentencing.)

United States v. Lang, 898 F.2d 1378 (8th Cir. 1990). (Adopting First Circuit three-step analysis for reviewing sentence departing from Guidelines range, United States v. Diaz-Villafane, 874 F.2d 43, 49 (1st Cir.), cert. denied, 110 S. Ct. 117 (1989), this Court found District Court properly departed because circumstances relied upon (defendant had committed series of crimes for which he had received probation or other lenient treatment; prior charges had been reduced through plea bargaining on two separate occasions) were not adequately taken into consideration by Commission and degree of departure was reasonable within meaning of 18 U.S.C. § 3742(e).)

United States v. Carey, 898 F.2d 642 (8th Cir. 1990). (Upward departure for defendant s prior criminal history and incorrigibility were sufficient reasons to justify upward departure.)

United States v. Anderson, 886 F.2d 215 (8th Cir. 1989). (In considering upward departure based on past criminal conduct, District Court must compare seriousness of defendant s criminal history with that of offenders in each higher category and then select category that most closely resembles defendant s history.)

United States v. Justice, 877 F.2d 664 (8th Cir. 1989). (No abuse of discretion where Court rejected defendant s assertion that his criminal history was substantially overstated and declined to depart downward.), cert. denied, 493 U.S. 958 (1989).

**Part B. Career Offenders and Criminal Livelihood**

**§ 4B1.1 (Career Offender/Standard of Review):**

United States v. Abernathy, 277 F.3d 1048 (8th Cir.) (LOKEN, BYE,* BOGUE). (This Court reviews de novo District Court's determination that defendant's prior offense constitutes crime of violence.), cert. denied, 535 U.S. 1089 (2002).

United States v. Kriens, 270 F.3d 597 (8th Cir. 2001) (BOWMAN, HEANEY, BYE*). (District Court's determination whether offense is crime of violence is reviewed de novo.), cert. denied, 535 U.S. 1008 (2002).

United Sates v. Gonzales, 220 F.3d 922 (8th Cir. 2000) (BOWMAN, F. R. GIBSON, MORRIS SHEPPARD ARNOLD*). (This Court reviews District Court's factual determinations for clear error and its interpretation of Guidelines de novo.)

Moore v. United States, 178 F.3d 994 (8th Cir.) (RICHARD S. ARNOLD,* HANSEN, STROM). (Whether defendant has validly waived constitutional right to counsel is question involving application of constitutional principles to facts as found, and is reviewed de novo.), cert. denied, 528 U.S. 943 (1999).

United States v. Stevens, 149 F.3d 747 (8th Cir.) (District Court s determinations with respect to offenses in criminal history computation are factual determinations subject to clearly erroneous standard of review.), cert. denied, 525 U.S. 1009 (1998).

United States v. Hascall, 76 F.3d 902 (8th Cir.) (As Hascall challenged District Court s findings under second and third requirements of § 4B1.1, this Court reviews de novo District Court s application of sentencing Guidelines.), cert. denied, 519 U.S. 948 (1996).

United States v. Consuegra, 22 F.3d 788 (8th Cir. 1994). (This Court reviews de novo whether career offender Guidelines reasonably comply with 28 U.S.C. § 994(h)(2)(B).)

**§ 4B1.1 (Career Offender):**

Taylor v. United States, 495 U.S. 575 (1990). (Adopting generic definition of burglary--any crime, regardless of its exact definition or label, having basic elements of unlawful or unprivileged

entry into, or remaining in, building or structure, with intent to commit crime--for purposes of determining whether particular state-law burglary offense constitutes crime of violence. Courts may look only to statutory definition of prior offense, not to particular facts underlying conviction.**)**

United States v. Warren, 361 F.3d 1055 (8th Cir. 2004) (BYE, SMITH, COLLOTON*). (It was plain error for District Court to apply obstruction-of-justice enhancement to defendant whose offense level was calculated under career-offender Guideline. Other than acceptance-of-responsibility reduction, no other Chapter Three adjustments apply.)

United States v. Wright, 340 F.3d 724 (8th Cir. 2003) (HANSEN, GIBSON,* LOKEN). (Burglary of unoccupied residence is crime of violence.)

United States v. Alvarez, 320 F.3d 765 (8th Cir. 2002) (BOWMAN, RICHARD ARNOLD, LOKEN) (per curiam). (Apprendi did not overrule Almendarez-Torres, so its requirements do not apply to predicate offenses determining career-offender status.)

United States v. Zimmer, 299 F.3d 710 (8th Cir. 2002) (McMILLIAN, BEAM, HANSEN*). (Even if District Court erred in determining that defendant was career offender, issue was moot because defendant's otherwise applicable offense level was higher than career-offender-determined offense level. (No mention of impact on defendant's criminal history category)), cert. denied, 537 U.S. 1146 (2003).

United States v. Butler, 296 F.3d 721 (8th Cir. 2002) (WOLLMAN, RICHARD S. ARNOLD,* LOKEN). (To be career offender, defendant must be at least eighteen years old at time of commission of instant offense, instant offense must be crime of violence, and defendant must have two prior felony convictions for crimes of violence), cert. denied, 123 S. Ct. 1366 (2003).

United States v. Luersen, 278 F.3d 772 (8th Cir.) (BOWMAN, FAGG, MORRIS SHEPPARD ARNOLD) (per curiam). (Escape is categorically crime of violence, as this Court first held in United States v. Nation, 243 F.3d 467 (8th Cir. 2001). It is not ex post facto or due process violation to apply rule retroactively to defendant convicted before Nation was decided, however, because Nation was not unforeseeable judicial interpretation of Guidelines.), cert. denied, 535 U.S. 1105 (2002).

United States v. Abernathy, 277 F.3d 1048 (8th Cir.) (LOKEN, BYE,* BOGUE). (Escape is categorically crime of violence, even where defendant "merely walked away from his place of incarceration."), cert. denied, 535 U.S. 1089 (2002).

United States v. Kriens, 270 F.3d 597 (8th Cir. 2001) (BOWMAN, HEANEY, BYE*). (Iowa offense of attempted second-degree burglary is crime of violence. Once government presented evidence that defendant committed offense, burden shifted to defendant to prove by preponderance of evidence that his conduct did not meet generic burglary definition of Taylor v. United States, 495 U.S. 575, 599 (1990).), cert. denied, 535 U.S. 1008 (2002).

United States v. Nation, 243 F.3d 467 (8th Cir. 2001) (WOLLMAN,* RICHARD S. ARNOLD, HANSEN). (Escape is categorically crime of violence as defined in § 4B1.2. Guidelines direct Court to examine nature of expressly charged conduct rather than particulars of defendant's behavior, and here criminal information charged defendant with being convicted felon who escaped from correctional facility. Every escape, even "walkaway" escape, involves potential risk of injury to others. Thus District Court incorrectly calculated defendant's base offense level under § 2K1.3(a).)

United States v. Boyles, 235 F.3d 1057 (8th Cir. 2000) (LOKEN, HEANEY, FAGG) (per curiam). (When determining whether defendant's earlier offenses were committed on separate occasions, District Court is not limited to documents charging offenses, and statutes defining offenses; District Court may consider facts underlying convictions. Two second-degree criminal sexual conduct convictions were for separate offenses because they involved different victims and occurred on different dates.), cert. denied, 532 U.S. 952 (2001).

United States v. Nicholson, 231 F.3d 445 (8th Cir. 2000) (RICHARD S. ARNOLD,* LAY, FAGG). (District Court did not err in classifying defendant as career offender when defendant argued prior felony conviction occurred during course of present conspiracy; neither side presented evidence that defendant was involved in present conspiracy earlier than 1997 and defendant was convicted of prior state offense in 1997. Although jury's general verdict in this case implicated defendant in present conspiracy, which began in 1994, verdict does not prove when defendant's own involvement in this conspiracy began.), cert. denied, 532 U.S. 912 (2001).

United States v. Gonzales, 220 F.3d 922 (8th Cir. 2000) (BOWMAN, F. R. GIBSON, MORRIS SHEPPARD ARNOLD*). ((1) Defendant contends District Court erred by sentencing him as career offender, because he had not yet been sentenced on his 1996 guilty plea in New Mexico state Court. This Court concludes that unsentenced guilty plea is "prior conviction" under § 4B1.1. (2) Defendant alternatively argues that he is not career offender because actual conduct leading to his New Mexico guilty plea did not involve controlled substance sale, but rather involved sale of brick and telephone book to undercover officer. This Court rejects his argument because he pleaded guilty to two different offenses in New Mexico; one offense was marijuana distribution, which, according to presentence report, involved approximately two pounds of marijuana.)

United States v. Peters, 215 F.3d 861 (8th Cir. 2000) (BEAM, JOHN R. GIBSON, PRATT*). (United States appealed District Court's decision not to assign defendant, bank robber, career offender status. United States had argued below that defendant's prior Minnesota first-degree burglary conviction served as second requisite prior felony conviction for purposes of § 4B1.1. Defendant had been initially charged with receiving stolen property but later was additionally charged with three counts of burglary; charges were consolidated for sentencing, and he was sentenced to concurrent terms on all four charges. These prior sentences were therefore deemed to be related cases and treated as one sentence, pursuant to Guidelines. Defendant argues that probation office erred in not listing these related offenses in his PSR in same order in which they were charged; if they had been, he could not be deemed career offender, as receiving stolen property (the first charge) is not crime of violence, and burglaries (which were related to stolen-property charge and thus could have received only one point each under § 4A1.1(f)) would not have been

considered prior felonies. District Court did not make finding on whether burglary charges--which actually had been listed first in PSR--constituted prior felony convictions. This Court reverses and remands case because District Court may have overlooked burglary offenses and should be given first opportunity to apply Guidelines to facts of case. Neither Guidelines nor caselaw addresses issue of how crimes should be listed in either PSR or by District Court.)

Moore v. United States, 178 F.3d 994 (8th Cir.) (RICHARD S. ARNOLD,* HANSEN, STROM). (Moore claimed prior conviction was obtained in violation of his Sixth Amendment rights because his waiver of counsel was not knowing and voluntary. Although defendants may not collaterally attack prior convictions used for sentencing enhancements, limited exception exists where prior conviction was obtained in violation of defendant's right to counsel; government has initial burden of proving fact of conviction and defendant must then show conviction was constitutionally infirm. Transcript indicates state trial judge engaged in fairly extensive colloquy with Moore and his co-defendant regarding their decision to waive counsel, and Moore's failure to respond to one question concerning whether defendants were able to make judgments and decisions on that day was not enough to overcome presumption of validity accompanying prior convictions: there was no other indication that Moore's responses were not knowingly and intelligently given; he had stated he was not taking any medication or was otherwise under influence of any drugs or alcohol, and was able to hear and understand questions; and state judge had warned Moore about danger of self-representation.), cert. denied, 528 U.S. 943 (1999).

United States v. Stevens, 149 F.3d 747 (8th Cir.) (Stevens asserts third-degree burglary committed in Iowa should not have been considered in assigning career-offender status as burglary involved commercial building and no actual violence was involved. This Court rejects argument as foreclosed by cases holding burglary of non-residential property qualifies as crime of violence. Court rejects Stevens s attempt to distinguish cases on ground that those cases dealt with convictions for second-degree burglary, as Court has adopted "generic definition of burglary" for purposes of applying § 4B1.1. Fact that Iowa has chosen to designate Stevens s offense of burglary as third degree does not change generic elements of crime; nor does designation of third degree and "potential for episodic violence" which motivated case decisions. Court finds Stevens s third-degree burglary conviction is qualifying offense under career-offender Guideline.), cert. denied, 525 U.S. 1009 (1998).

United States v. Eads, 144 F.3d 1151 (8th Cir. 1998). (Eads contended his earlier guilty plea to conspiracy to possess methamphetamine with intent to distribute should not be used to make him career offender because his lawyer at time later became involved in criminal activity with Eads and surrendered his license. This plea was entered over five years before lawyer s fall, and Eads did not show he was disqualified at time or did not provide competent representation. Nor is Eads s sentence invalidated merely because it was greater than those of his co-conspirators.)

United States v. Covington, 133 F.3d 639 (8th Cir. 1998). (Covington contends District Court erred by sentencing him as career offender, arguing he was not imprisoned for two prior qualifying offenses within 15-year period ending when he committed instant offenses, § 4B1.2, comment. (n.4). For Covington, career offender qualification did not result in offense level being increased, but resulted in increase of criminal history category from IV to VI. PSR was unclear as

to whether Covington was imprisoned for burglary offense or firearm offenses (which were not considered crimes of violence) during period between December 1979 firearm arrest and his release. Despite Covington s proper objection at sentencing hearing, government did not introduce evidence of any sentence ever being imposed on Covington for burglary parole violation, but District Court found Covington was imprisoned for burglary recommitment after June 1981, and it sentenced Covington as career offender. Conclusion in PSR did not provide District Court with required preponderance of evidence Covington was imprisoned for burglary, rather than for firearm offenses, after his return to custody in December 1979. Therefore, District Court clearly erred and this Court remands for resentencing.)

United States v. Stelivan, 125 F.3d 603 (8th Cir. 1997). (Stelivan pleaded guilty to one count of conspiracy to distribute cocaine, and one count of interstate transportation of stolen property. Stelivan claims District Court should not have applied career offender guideline because 18 U.S.C. § 371 (statute under which he pleaded guilty) is conspiracy offense rather than controlled substance offense. Stelivan pleaded guilty to conspiring to distribute cocaine and under Guidelines, term "controlled substance offense" includes offenses of aiding and abetting, conspiring, and attempting to commit such offenses (§ 4B1.2, application note 1). District Court properly determined Stelivan should be sentenced as career offender; this Court notes under lower criminal history category, Stelivan still would have been sentenced to maximum term of 120 months for two counts of violating § 371.)

United States v. Robinson, 119 F.3d 663 (8th Cir. 1997). (Robinson argues District Court erred in holding enhanced statutory maximum penalty was proper basis for applying career offender guideline because Amendment 506 to § 4B1.1 is valid and requires use of unenhanced statutory maximum. This Court clearly rejected same argument in United States v. Fountain (Amendment 506 is invalid because it conflicts with plain language of 28 U.S.C. § 994(h)) and there is no reason to reconsider issue.)

United States v. Arnold, 115 F.3d 621 (8th Cir. 1997). (When Arnold was sentenced to 360 months imprisonment for various drug crimes, maximum term, referred to as "offense statutory maximum," had been interpreted to mean maximum of enhanced sentencing range, not unenhanced range. Sentencing Commission later amended guideline to define offense statutory maximum as statutory maximum exclusive of any enhancement based on prior criminal record (§ 4B1.1, comment. (n.2)). Arnold filed motion to reduce his sentence; District Court applied amendment and reduced Arnold s sentence to 262 months. Supreme Court in United States v. LaBonte rejected Commission s approach as at odds with plain language of 18 U.S.C. § 994(h). Because statute, and not amended guideline controls, "maximum term authorized," must be read to include all applicable statutory sentencing enhancements. Case reversed and remanded.)

United States v. Knight, 96 F.3d 307 (8th Cir. 1996). (Backstrom contended District Court committed clear error in finding him career offender, arguing his state drug delivery conviction cannot be counted as earlier conviction because state conviction is related to his federal drug conspiracy conviction in this case. This Court rejects Backstrom s contention as his sentence for state delivery conviction is unrelated to sentence for federal drug conspiracy because he was arrested for state delivery before federal conspiracy even began. This Court also rejects Backstrom s

assertions his career offender sentence constitutes cruel and unusual punishment under Eighth Amendment.), cert. denied, 520 U.S. 1180 (1997).

United States v. Maza, 93 F.3d 1390 (8th Cir. 1996). (It was not error to sentence Maza as career offender--it was proper to count his two prior felony convictions separately under provisions of § 4A1.1.), cert. denied, 519 U.S. 1138 (1997).

United States v. McNeil, 90 F.3d 298 (8th Cir.) (District Court was correct in concluding McNeil was career offender; each of his prior North Carolina state Court felony convictions for breaking and entering dwellings qualifies as predicate crime of violence (§ 4B1.2(1)(ii)). This Court rejects McNeil s argument 1982 conviction should not be used as predicate offense because he was committed as "youthful offender." While McNeil was only 17 at time of 1982 conviction, he was charged as adult, convicted as adult, and sentenced to three-year term of imprisonment. Here, District Court correctly counted 1982 conviction as predicate offense (§ 4A1.2(d)(1)). McNeil s argument that conviction for conspiracy to distribute cocaine base does not qualify him for sentencing as career offender is foreclosed by en banc decision in Mendoza-Figueroa. Because District Court correctly determined McNeil to be career offender, his objections to other determinations are moot.), cert. denied, 519 U.S. 1034 (1996).

United States v. Nicolace, 90 F.3d 255 (8th Cir. 1996). (District Court properly included Nicolace s drug conspiracy in determining career offender status based on Circuit s prior holding Sentencing Commission had not exceeded its statutory authority by including drug conspiracy offenses in definition of predicate offenses for career offender status.)

United States v. Jones, 87 F.3d 247 (8th Cir.) (District Court properly classified Jones as career offender where he had two prior qualifying felony convictions (which were not related).), cert. denied, 519 U.S. 956 (1996).

United States v. Fountain, 83 F.3d 946 (8th Cir. 1996). (Fountain challenged District Court s finding he was career offender, contending two convictions should not have been counted as predicates. He claimed burglary should not count as "crime of violence" because he burglarized garage, not dwelling. This Court finds incident involved conduct presenting serious potential risk of physical injury to another as homeowner, off-duty police officer, discovered burglary in process. Fountain pointed loaded revolver at homeowner and homeowner fired his weapon at burglars and they fled. Fountain also contended his 1989 guilty plea to drug charge was not voluntary because he was not informed felony conviction could later be used to enhance sentence. Court is not required to inform defendant of possibility of being sentenced as recidivist for plea to be valid.

The government cross-appealed to challenge Amendment 506 whereby Sentencing Commission added language to application note 2 of § 4B1.1 defining term "offense statutory maximum" to mean statutory maximum prior to any enhancement based on prior criminal record. Purpose of rule is to avoid unwarranted sentencing disparities. On issue of first impression in this Circuit, Court decided that based upon plain language of § 994(h) Amendment conflicts with statute and is therefore invalid. Court views statute as recidivist statute clearly aimed at category of adult repeat violent felons and adult repeat drug felons and because "maximum term authorized" for categories for recidivist defendants is necessarily enhanced statutory maximum, there is no

ambiguity in statute. This Court believes Commission s current interpretation of statute effectively nullifies criminal history penalties carefully enacted in statutes like § 841. Argument that rejection of amendment transfers discretion from judge to prosecutor is not element of decision. This Court invalidates Amendment 506 and notes any amelioration of severity of Guidelines treatment of recidivist drug offenders is for Congress to remedy.), cert. denied, 520 U.S. 1253 (1997).

United States v. Hazelett, 80 F.3d 280 (8th Cir.) (Hazelett argues abuse of discretion for trial judge to sentence him as career offender as one of predicate offenses used to establish status was California conviction for possession of PCP when he was juvenile. Although Hazelett was 17 at time of offense, he was tried and sentenced as adult, as California law permitted; Hazelett now contends conviction was defective because no hearing was held to determine whether he was fit to be tried as adult, which he contends California law required. Defendant may not use proceeding for sentencing as career offender to launch collateral attack on previous conviction; fact that Hazelett was tried and sentenced as adult is dispositive for this purpose.), cert. denied, 519 U.S. 974 (1996).

United States v. Hascall, 76 F.3d 902 (8th Cir.) (Hascall appealed 262-month sentence he received after pleading guilty to conspiracy to distribute methamphetamine. He argues on appeal District Court erred in finding him career offender; he challenges determination conspiracy to distribute is controlled substance offense and contends District Court improperly labeled two prior second-degree burglary convictions as crimes of violence when they involved commercial properties. This Court cites Mendoza-Figueroa which recently held drug conspiracy is included in career offender provisions of Guidelines, second requirement of § 4B1.1.

Hascall committed second-degree burglary in Iowa when he entered tire store by kicking out front door; subsequently, he pleaded guilty to second-degree burglary after he entered business with intent to remove items not belonging to him. As burglary of commercial buildings are not "burglaries of dwellings," issue narrows to whether they otherwise involve conduct presenting serious potential risk of physical injury to another. This Court has previously held generally that second-degree burglary qualifies as crime of violence under § 4B1.2. "Otherwise" clause of § 4B1.2 is identical to "otherwise" clause of § 924(e) and there is no reason to believe second-degree burglary in context of Guidelines poses lesser risk of physical injury than it does under § 924(e). This Court goes on to acknowledge other circuits are divided on whether burglary of commercial building is crime of violence under Guidelines, but adopts reasoning of First Circuit which held burglary of commercial building poses potential for episodic violence so substantial as to be crime of violence. Moreover, this Court declines to adopt reading of § 4B1.2 inconsistent with identically worded "otherwise" clause in § 924(e), done by circuits adopting opposite view.), cert. denied, 519 U.S. 948 (1996).

United States v. Jackson, 67 F.3d 1359 (8th Cir. 1995). (Jackson s argument he should not be sentenced as career offender is foreclosed by U.S. v. Mendoza-Figueroa: Sentencing Commission did not exceed its statutory mandate by providing that persons convicted of drug conspiracies can be sentenced as career offenders. Thus, application of § 4B1.1 to Jackson was proper.), cert. denied, 517 U.S. 1192 (1996).

United States v. Lambros, 65 F.3d 698 (8th Cir. 1995). (Lambros objected to applying career offender provision to conspiracy crime; Mendoza-Figueroa makes clear conspiracy can trigger

career offender treatment. Lambros also objected to application of provision on grounds applicable 1987 version required offense being sentenced be for "trafficking in controlled substance," and his convictions of cocaine possession with intent to distribute did not amount to trafficking. This Court explains Sentencing Commission added clarifying (rather than substantive) change: to trigger § 4B1.1, crime must be "a controlled substance offense." As amendment wrought no fundamental change in Guidelines, career offender provision can be applied to Lambros.), cert. denied, 516 U.S. 1082 (1996).

United States v. Mendoza-Figueroa, 65 F.3d 691 (8th Cir. 1995) (en banc). (After Mendoza-Figueroa pleaded guilty to conspiracy to distribute marijuana, District Court sentenced him as career offender because of his two prior drug convictions. Divided panel reversed, holding Sentencing Commission exceeded statutory underpinnings of career offender provisions by including drug conspiracy offenses in definition of offenses that qualify defendant for career offender enhancement. En banc Court concludes § 4B1.2, comment. (n.1) is reasonable interpretation of career offender Guidelines, well within Sentencing Commission s statutory authority; because commentary interprets § 4B1.2 as including drug conspiracies, District Court properly determined Mendoza-Figueroa should be sentenced as career offender. Panel opinion s analysis which comported with D.C. Circuit s Price conflicts with principles in Stinson. Commission s intent is relevant, Court concludes Commission s intent in defining career offenders cannot be derived solely from background commentary to § 4B1.1 (unreasonable to conclude Commission intended to base § 4B1.1 on limited authority of § 994(h), particularly because interpretive commentary to § 4B1.2 are contrary). Even if Commission did intend to base its career offender Guidelines only on § 994(h), that statute is ample authority to include drug conspiracy as qualifying offense as statute does not define only crimes for which Commission may specify at or near maximum--it merely declares enumerated crimes must be so treated. DISSENT: Majority treats clear statement (i.e., § 4B1.1 implements 28 U.S.C. § 994(h)) as one of intent, rather than grounds for guideline and commentary. Section 994(h) enumerates three statutes which define substantive offenses, and makes no reference to conspiracy). Sentencing Commission exceeded its mandate by including conspiracy as predicate offense for career offender purposes.), cert. denied, 516 U.S. 1125 (1996).

United States v. Douglas, 64 F.3d 450 (8th Cir. 1995). (Douglas argued Amendment 433 (firearm possession not crime of violence and thus cannot trigger application of career offender provision) designated "clarifying change" rather than substantive one, appropriate for retroactive use, should be applied to him on resentencing. District Court had refused to apply amendment retroactively, holding change was substantive rather than clarifying. This Court looks to Stinson standard: inquiry is not whether purportedly clarifying amendment conflicts with preexisting Court interpretation of Guidelines, but whether amendment conflicts with Guidelines themselves. Sentencing Commission s decision changes are clarifying and suitable for retroactive use is not at odds with Guidelines. Allowing each Court to decide whether commentary amendment represented substantive change from its own precedent would create cacophony of regional rules with result antithetical to Sentencing Reform Act. This Court notes when provisions like Amendment 433 are designated for retroactive use, Commission expects substantial sentence reductions to result. Douglas entitled to relief he seeks: resentencing wholly under Guidelines version employed by original District Court (that is, not applying Amendment 469 raising BOL for felon in possession), but in light of retroactive amendment clarifying Court applied wrong provision of that version.)

United States v. Hazelett, 32 F.3d 1313 (8th Cir. 1994). (Hazelett contended District Court erred in sentencing him as career offender because Court considered prior offense which occurred when Hazelett was 17; he argued conviction which resulted should not be considered adult conviction (§ 4B1.2). District Court properly considered Hazelett s prior conviction in determining whether he should be sentenced as career offender: Hazelett was tried and convicted as adult for offense in question, fact which is dispositive.)

United States v. Ghent, 29 F.3d 416 (8th Cir. 1994). (Ghent challenged District Court s finding he is career offender, alleging one of predicate crimes was not crime of violence; specifically, he contends 1991 Arkansas conviction for burglary of vacant home was not burglary because vacant home was not "occupiable structure." This Court may not review this claim because Ghent impermissibly attempts to collaterally attack his state conviction. Because Court affirms Ghent s career offender status, it need not consider his arguments regarding District Court s calculation of drug quantity: guideline assigns offense levels based upon statutory maximum for particular offense committed.)

United States v. Jones, 28 F.3d 69 (8th Cir. 1994). (Jones challenged one of two convictions used to establish his career offender status, asserting [Nebraska] conviction was unconstitutional because his Nebraska attorney had conflict of interest. Where Jones s Nebraska conviction had not been reversed or vacated or ruled constitutionally invalid in prior case, District Court properly counted conviction toward career offender status. Because Jones was represented by counsel when he pleaded guilty to Nebraska crime, he cannot collaterally attack Nebraska conviction used to establish his career offender status. Even if he could collaterally attack conviction, he failed to produce evidence showing conviction was unconstitutional.)

United States v. Consuegra, 22 F.3d 788 (8th Cir. 1994). (Consuegra pleaded guilty to conspiracy to possess with intent to distribute cocaine; at sentencing, District Court decided Consuegra was career offender under §§ 4B1.1 and 4B1.2 because he had two earlier state-Court convictions for selling cocaine; Court sentenced him to 188 months imprisonment. Consuegra argues Sentencing Commission exceeded its congressional directive in 28 U.S.C. § 994(h) by including convictions for state drug offenses towards career offender status. This Court concludes § 994(h)(2)(B) authorizes Sentencing Commission to define career offender as person with earlier state law convictions for conduct that could have been charged under listed federal statutes. Sentencing Commission was sufficiently reasonable in its interpretation as it is supported by statute s language, purpose, and legislative history, and federal sentencing laws goal of sentencing uniformity; thus, Commission did not exceed its congressional directive.)

United States v. McMurray, 20 F.3d 831 (8th Cir. 1994). (McMurray argued he deserves new trial because government failed to file pretrial information disclosing what prior convictions it would rely on in seeking increased punishment. This Court follows its decision in U.S. v. Wallace despite McMurray s urging to reconsider case. Notice requirement of § 851(a)(1) is limited to situations in which convicted defendant s statutory minimum or maximum penalty is enhanced and not to situations in which defendant is assigned Guidelines base offense level and receives increased sentence, which is within statutory range. Here, McMurray was assessed Guidelines enhancement within his statutory maximum.)

United States v. Baker, 16 F.3d 854 (8th Cir. 1994). (This Court addressed issue of whether Baker s 21 U.S.C. § 856 conviction for managing or controlling drug premises is predicate drug distribution offense (§ 4B1.2(2)) justifying career offender sentence. Here, verdict was ambiguous, not clarifying whether Baker was convicted of possession § 856 offense or distribution § 856 offense. Trial evidence would have supported jury finding that Baker made his house available either for distribution of crack or merely for its use. When defendant is convicted by ambiguous verdict susceptible of two interpretations for sentencing purposes, he may not be sentenced based upon alternative producing higher sentencing range. Here, government failed to charge Baker with aiding and abetting distribution offense, and failed to ask District Court to submit special interrogatory that would have clarified factual premise for jury s § 856 conviction. In these circumstances, Baker s § 856 conviction may not be considered "controlled substance offense" for purposes of § 4B1.2(2) and he may not be sentenced as career offender. Case remanded for resentencing.)

United States v. Carpenter, 11 F.3d 788 (8th Cir. 1993). (Carpenter argued his two prior convictions, conspiracy to commit second degree burglary and attempted breaking and entering, were not crimes of violence. This Court rejects Carpenter s contentions. Second degree burglary under Iowa law, qualifies as "generic burglary" under Taylor definition. Commentary to Guidelines provides conspiracy to commit burglary is equivalent of burglary for purposes of § 4B1.2; commentary is authoritative and must be followed. Carpenter contended he was not convicted of burglary, but for attempted breaking and entering, and there was no violent act during attempt. He attempted to rely on Tenth Circuit case of U.S. v. Permenter. Permenter, however, involved enhancement of defendant s sentence under 18 U.S.C. § 924. Commentary to Guidelines expressly includes attempts within definition of crime of violence and Carpenter s career offender status was based on interpretation of § 4B1.1, not § 924. This Court holds under Guidelines, attempt is same as commission of substantive offense.), cert. denied, 511 U.S. 1043 (1994).

United States v. Kenyon, 7 F.3d 783 (8th Cir. 1993). (Kenyon challenged District Court s determination that because of his prior convictions for drug offenses, Kenyon was career offender. He argued his most recent state Court conviction should not be scored for criminal history purposes. This Court recognizes conduct for which Kenyon was convicted in state Court comprised part of conduct alleged in count to which he pleaded guilty in this case. Kenyon s state Court offense was part of same criminal scheme, and was committed within same time period as this offense. Thus, his state Court conviction for possession of cocaine does not constitute "conduct not part of instant offense" (§ 4A1.2(a)(1)) and thus, District Court erred when it included sentence imposed by state Court for criminal history purposes. This Court remands for resentencing with instructions to District Court to reconsider whether Kenyon may properly be sentenced as career offender in that simple possession of controlled substance may not be used to satisfy requirements of § 4B1.1.)

United States v. Abanatha, 999 F.2d 1246 (8th Cir. 1993). (Mark argued he should not have been classified as career offender because government failed to follow procedures required by 21 U.S.C. § 851. This Court labels argument irrelevant: all that is required of government under Guidelines is that it prove by preponderance of evidence that Mark had two prior felony convictions. Government offered Mark s prior convictions, as referred to in PSR, to carry its burden and Mark did not challenge them. He did not carry his burden of either disproving convictions or if he was

improperly convicted, challenging their validity.), cert. denied, 511 U.S. 1035 (1994).

United States v. Bauer, 990 F.2d 373 (8th Cir. 1993). (This Court rejects Bauer s argument that statutory rape (which was consensual) is not "crime of violence" and cannot be used as predicate offense to trigger career offender provision. Whether statutory rape is violent crime is legal determination which is reviewed de novo. Court does not look to underlying facts. United States v. Rodriguez dictates finding that sexual intercourse with female child under 16 years of age, in violation of Iowa Code § 698.1 is crime of violence for enhancement purposes.)

United States v. Graham, 982 F.2d 315 (8th Cir. 1992). (District Court did not clearly err in sentencing Graham as career offender. "Burglary of dwelling" is crime of violence within meaning of section and structure used as shelter for weekend fishing retreats fall within definition of dwelling.)

United States v. Cornelius, 968 F.2d 703 (8th Cir. 1992). (District Court correctly refused to consider new evidence relating to Cornelius s sentence enhancement (he contended convictions for arson and extortion are "related cases" under Guidelines and thus cannot be considered separate convictions for purposes of applying § 4B1.1) on remand because that determination was not before District Court under circuit s mandate.)

United States v. Leeper, 964 F.2d 751 (8th Cir. 1992). (Leeper argued his manslaughter conviction could not be predicate felony because crime did not require element of intent. "Crimes of violence" are not limited to intentional acts. Manslaughter qualifies as crime of violence, focusing on elements of crime or offense s underlying facts (Leeper shot someone through head at close range). As for predicate robbery convictions, this Court has held because robbery cannot be committed without violence within meaning of section 4B1.1, Courts cannot examine facts underlying each robbery. Though Leeper argued his instant offense (possession of firearm) was not crime of violence, District Court considered facts underlying conviction and did not clearly err in determining Leeper committed crime of violence where he was convicted after he fired three live rounds from Colt .45 into occupied residence.)

United States v. Baker, 961 F.2d 1390 (8th Cir. 1992). (Baker challenged one of requisite prior felony convictions used to establish his career offender status, arguing 1974 California conviction was misdemeanor when robbery was committed and he was sentenced to California Youth Authority. Classification of conviction under state law as misdemeanor or felony or as adult or juvenile crime is not controlling (§ 4B1.2, note 3) nor does it matter Baker was sentenced to Youth Authority. Guidelines apply age distinction of eighteen (§ 4A1.2, note 7). Baker was nineteen, adult, at time of commission of armed robbery; District Court properly considered 1974 California conviction as prior adult felony conviction.)

United States v. Page-Bey, 960 F.2d 724 (8th Cir. 1992). (While quantity of narcotics involved is matter for sentencing judge, not jury, quantity was not issue where Page-Bey was sentenced as career offender. Moreover, which of two substances was object of conspiracy did not require special interrogatory to jury as it would have made no difference--career offender guideline only requires offense of conviction be controlled substance offense without regard to specific

substance involved.)

United States v. Nimrod, 940 F.2d 1186 (8th Cir. 1991). (Because of Nimrod s prior second degree burglary convictions in Missouri, he was designated career offender. He claimed second degree burglary is not violent felony as defined by Missouri law and therefore should not have been considered in assigning career offender status. This Court found position without merit in light of Taylor v. United States.), cert. denied, 502 U.S. 1079 (1992).

United States v. Adams, 938 F.2d 96 (8th Cir. 1991). (Adams contended District Court erred in sentencing him as career offender because government failed to give him notice it intended to urge enhancement under 4B1.1 provisions. This Court affirms, noting government filed section 851 information, PSR clearly set forth Adams s prior convictions and stated § 4B1.1 was applicable to him, that he fell within category of career criminal and that status resulted in imprisonment range of 360 months to life. Moreover, Adams had at least two prior final felony drug convictions.), cert. denied, 502 U.S. 1075 (1992).

United States v. Senior, 935 F.2d 149 (8th Cir. 1991). (Government appeal of District Court s departure, at hearing convened on its own motion, below career-offender Guideline range based on its belief defendant s criminal history (§ 4A1.3) was overrepresented. This Court assessed departure as reasonable considering facts of defendant s criminal career including his age when he committed offenses, proximity in time of robberies and drug offenses, and state s assessment of seriousness of his crimes. This Court found sentence reasonable as District Court based its sentence on Guideline range which would have applied absent overstatement of defendant s criminal history (§ 4A1.3).)

United States v. Cornelius, 931 F.2d 490 (8th Cir. 1991). (After jury convicted Cornelius of being felon in possession of firearm (18 U.S.C. § 922(g)), District Court sentenced him to 120 months, determining his conviction was for crime of violence. Crime of violence defined at § 4B1.2. This Court joins emerging consensus and holds Courts should look beyond mere statutory elements of crime when determining whether offense is crime of violence. Here, District Court s finding Cornelius s actions presented serious potential risk of physical injury to another was not clearly erroneous where Cornelius entered estranged wife s home late at night without permission, with sawed-off gun after having threatening conversation with her earlier that evening.)

United States v. Lenfesty, 923 F.2d 1293 (8th Cir. 1991). (How state views offense does not determine how Guidelines view offense. Nature of Smith s prior crimes properly determined his career offender status.)

United States v. Auman, 920 F.2d 495 (8th Cir. 1990). (Where Auman pleaded guilty to violation of 21 U.S.C. § 841 (and his statutory maximum penalty under statute was not enhanced), plea agreement provided actual notice of government s intent to seek enhancement based upon criminal history. As Auman did not contest validity of previous convictions nor did he claim he was not person convicted, consideration of criminal history did not violate 21 U.S.C. § 851.)

United States v. Ybabez, 919 F.2d 508 (8th Cir. 1990). (Ybabez entered plea agreement to

obtain government recommendation of sentence. Ybabez s claims that career offenders constitute socioeconomic class and career offender provisions are fundamentally unfair, violate Equal Protection Clause and constitute cruel and unusual punishment, were not raised in District Court and this Court finds no likelihood of miscarriage of justice.), cert. denied, 499 U.S. 940 (1991).

United States v. Ford, 918 F.2d 1343 (8th Cir. 1990). (Ford s sentence reversed and remanded for determination of acceptance of responsibility, where his trial counsel was ineffective for failing to object to presentence report which indicated two point reduction was not possible because Ford was career offender, when month prior to Ford s sentencing, guideline had bee amended to permit Court to reduce career offender s base offense level.)

United States v. Hester, 917 F.2d 1083 (8th Cir. 1990). (Hester asserted he was sentenced improperly as career offender because conviction relied on by District Court was misdemeanor. Though California classified Hester s conviction for selling counterfeit controlled substance misdemeanor, it must be treated as felony for federal sentencing purposes as potential punishment exceeded one year. DISSENT: Government did not adequately shoulder burden of proving factual prerequisites for career offender enhancement where its documentation "fell woefully short" of proving California considered offense felony, "qualifying Hester for prison warehousing as career offender.")

United States v. Brunson, 915 F.2d 392 (8th Cir. 1990). (Brunson contended two Missouri convictions for second degree burglary should not have been used to find him career offender; he argued burglaries were not crimes of violence because he entered dwellings when no one was present. This Court concludes Brunson s convictions were for crimes of violence, based on commentary to § 4B1.2, and noting Commission s later clarification in form of amending guideline.), cert. denied, 498 U.S. 1106 (1991).

United States v. Dyer, 910 F.2d 530 (8th Cir.) (1970 robbery conviction not too old to be counted where Cephus was incarcerated until December 1973 and instant offense occurred before December 1988 passage of 15 years.), cert. denied, 498 U.S. 907 and 498 U.S. 949 (1990).

United States v. Smith, 909 F.2d 1164 (8th Cir.) (Second degree burglary is appropriately considered for career offender status as crime carries with it distinct risk of injury to person.) (Where appellant pleaded guilty to violating general conspiracy statute when caught selling LSD, his conviction is nevertheless for drug-related offense. Undisputed facts of crime are determinative, not name of statute under which he was sentenced.), cert. denied, 498 U.S. 1032 (1990).

United States v. Williams, 905 F.2d 217 (8th Cir. 1990). (Procedure employed by District Court in which government presented evidence of Williams s prior robbery convictions and Williams was afforded opportunity to rebut, recognized government has burden of proving applicability of Guidelines sections that would enhance offense level. This Court agreed at least two valid convictions were proved making Williams career offender under Guidelines.), cert. denied, 498 U.S. 1030 (1991).

United States v. Brown, 903 F.2d 540 (8th Cir. 1990). (This Court remands for District

Court to consider downward departure based on § 4A1.3 (defendant s criminal history category significantly overrepresents seriousness of his criminal history) where District Court did not believe it had discretion to consider mitigating circumstances relevant to downward departure and it did have such authority. District Court had expressed concerns about proportionality where Guidelines required 20-year-old defendant to receive seventeen-year sentence and co-defendants, about two years.)

United States v. Green, 902 F.2d 1311 (8th Cir.) (This Court construes 28 U.S.C. § 994(h) to allow two prior felony convictions to satisfy career offender status to be two of violence, two of drug, or one of each. In answer to Green s due process challenge, this Court applied Brittman reasoning, noting that District Courts retain fair measure of discretion.), cert. denied, 498 U.S. 943 (1990).

United States v. Left Hand Bull, 901 F.2d 647 (8th Cir. 1990). ("Crime of violence" is defined, for purposes of § 4B1.1, in § 4B1.2(1), which states that term is defined under 18 U.S.C. § 16. Defendant pleaded guilty to mailing threatening letter in violation of 18 U.S.C. § 876 which falls squarely within definition of crime of violence contained in 18 U.S.C. § 16. Crime of violence definition does not require person conveying threat to be contemporaneously able to act upon it.)

United States v. Wallace, 895 F.2d 487 (8th Cir. 1990). (Government is not required to file information under 21 U.S.C. § 851 when defendant s prior offenses subject him to career offender classification.)

United States v. Thomas, 894 F.2d 996 (8th Cir.) (Defendant was properly classified as career offender because instant offenses of conspiracy and distribution involved controlled substances; he had distribution offense which occurred prior to instant offenses; and he had prior conviction for assault with intent to inflict serious bodily injury which District Court found to be prior felony pursuant to Guidelines because he was sentenced for term exceeding one year even though state classification of offense was aggravated misdemeanor.), cert. denied, 495 U.S. 909 (1990).

**§ 4B1.2 (Definitions):**

United States v. Underwood, Nos. 03-1543/1982/2716/2901 (8th Cir. 2004) (MURPHY,* HEANEY, SMITH). (Iowa conviction for "going armed with intent" is crime of violence.)

United States v. Warren, 361 F.3d 1055 (8th Cir. 2004) (BYE, SMITH, COLLOTON*). (Burglary of storage unit is burglary of commercial structure and thus qualifies as crime of violence. Although Missouri second-degree burglary statute also encompasses ships, trailers, sleeping cars, and airplanes, it is clear from unobjected-to facts in PSR that this defendant broke into storage unit.)

United States v. Walterman, 343 F.3d 938 (8th Cir. 2003) (BOWMAN, HEANEY,* BYE). (Defendant's predicate felony for possessing lithium with intent to manufacture methamphetamine was not "controlled substance offense." It was not conviction for manufacturing, importing, exporting, distributing, or dispensing controlled substance; nor conviction for possessing controlled

substance with intent to manufacture, import, export, distribute, or dispense; nor conviction for possessing listed chemical with intent to manufacture controlled substance; nor conviction for possessing prohibited flask or equipment with intent to manufacture controlled substance. DISSENT: majority misreads Guidelines definition of "controlled substance offense.")

United States v. Gary, 341 F.3d 829 (8th Cir. 2003) (MELLOY,* HANSEN, SMITH). (Walkaway escape from custody is crime of violence, even if there is no use or threat of force or violence, because escape inherently involves potential risk of physical injury to others.), cert. denied, 124 S. Ct. 1128 (2004).

United States v. Johnson, 326 F.3d 934 (8th Cir. 2003) (WOLLMAN,* RICHARD ARNOLD, SMITH). (Iowa crime of first-degree theft does not have use of force as element, and could be committed with or without violence. Therefore, Court looks to facts of offense, and defendant's state PSR recited that he knocked victim off bicycle, kicked him in ribs and face, and punched him during course of committing theft.)

United States v. Blahowski, 324 F.3d 592 (8th Cir.) (WOLLMAN, BRIGHT, JOHN GIBSON*). (Reaffirming holding of United States v. Hascall that burglary of commercial building categorically is crime of violence for purposes of career-offender enhancement. Amendment 568 does not undermine Hascall or require inquiry into particular facts of prior burglary offense. DISSENT: this Court should seize this opportunity to reconsider its categorical approach, which is shared by no other circuit.), cert. denied, 124 S. Ct. 356 (2003).

United States v. Deroo, 304 F.3d 824 (8th Cir. 2002) (MURPHY,* HEANEY, BRIGHT). (To qualify as predicate offenses, each conviction must be separate and distinct criminal episode, rather than part of continuous course of conduct. Even if defendant was correct that three predicate burglaries occurred within one hour of each other, they were separate offenses because they involved breaking into three separate homes owned by unrelated victims who suffered individual losses.)

United States v. Luersen, 278 F.3d 772 (8th Cir.) (BOWMAN, FAGG, MORRIS SHEPPARD ARNOLD) (per curiam). (Escape is categorically crime of violence, as this Court first held in United States v. Nation, 243 F.3d 467 (8th Cir. 2001). It is not ex post facto or due process violation to apply rule retroactively to defendant convicted before Nation was decided, however, because Nation was not unforeseeable judicial interpretation of Guidelines.), cert. denied, 535 U.S. 1105 (2002).

United States v. Abernathy, 277 F.3d 1048 (8th Cir.) (LOKEN, BYE,* BOGUE). (Escape is categorically crime of violence, even where defendant "merely walked away from his place of incarceration."), cert. denied, 535 U.S. 1089 (2002).

United States v. Peltier, 276 F.3d 1003 (8th Cir.) (WOLLMAN, FAGG,* RILEY). (Burglary of commercial building is crime of violence. There is no merit to defendant's argument that full faith and credit statute, 28 U.S.C. § 1738, required District Court to treat offense as nonviolent because state court did.), cert. denied, 537 U.S. 862 (2002).

United States v. Newton, 259 F.3d 964 (8th Cir. 2001) (WOLLMAN, HANSEN, SCHREIER*). (Newton argued that District Court erred in finding him to be career offender based on prior convictions for involuntary manslaughter and controlled-substance offense. This Court holds that involuntary-manslaughter conviction counted toward Newton's career-offender status because Newton's conduct--speeding and colliding with rear end of another car, killing two occupants and injuring others--presented serious risk of physical injury, and because Application Note 1 lists "manslaughter" as crime of violence and term encompasses involuntary manslaughter. Newton's convictions for transportation of controlled substance and possession of controlled substance counted as "controlled substance offenses" under § 4B1.2(b), because uncontested facts in PSR showed that he attempted to sell two ounces of methamphetamine for $1600 and use proceeds to buy half-pound of methamphetamine for $2800.)

United States v. Jernigan, 257 F.3d 865 (8th Cir. 2001) (LOKEN, HALL, MORRIS SHEPPARD ARNOLD) (per curiam). (Conviction under Arkansas law for negligent homicide while operating vehicle while intoxicated or under influence qualifies as "crime of violence" under § 4B1.2(a). This Court concludes "otherwise" clause in § 4B1.2(a)(2) and "other offenses" sentence in Application Note 1 make it clear that crimes of violence listed in Note 1 are not intended to be all-inclusive. When considering prior felony offense that is not specifically listed, issue is whether conduct underlying offense "presents serious potential risk of physical injury to another"; driving while intoxicated or under influence of alcohol presents well-known risk of automobile accident, which in this case resulted in felony conviction for seriously injuring or killing another person. This Court leaves unanswered issue whether DWI offense that does not result in injury or death is crime of violence.)

United States v. Nation, 243 F.3d 467 (8th Cir. 2001) (WOLLMAN,* RICHARD S. ARNOLD, HANSEN). (Escape is categorically crime of violence as defined in § 4B1.2. Guidelines direct Court to examine nature of expressly charged conduct rather than particulars of defendant's behavior, and here criminal information charged defendant with being convicted felon who escaped from correctional facility. Every escape, even "walkaway" escape, involves potential risk of injury to others. Thus District Court incorrectly calculated defendant's base offense level under § 2K1.3(a).)

United States v. Peters, 215 F.3d 861 (8th Cir. 2000) (BEAM, JOHN R. GIBSON, PRATT*). (United States appealed District Court's decision not to assign defendant, bank robber, career offender status. United States had argued below that defendant's prior Minnesota first-degree burglary conviction served as second requisite prior felony conviction for purposes of § 4B1.1. Defendant had been initially charged with receiving stolen property but later was additionally charged with three counts of burglary; charges were consolidated for sentencing, and he was sentenced to concurrent terms on all four charges. These prior sentences were therefore deemed to be related cases and treated as one sentence, pursuant to Guidelines. Defendant argues that probation office erred in not listing these related offenses in his PSR in same order in which they were charged; if they had been, he could not be deemed career offender, as receiving stolen property (the first charge) is not crime of violence, and burglaries (which were related to stolen-property charge and thus could have received only one point each under § 4A1.1(f)) would not have been considered prior felonies. District Court did not make finding on whether burglary charges--which

actually had been listed first in PSR--constituted prior felony convictions. This Court reverses and remands case because District Court may have overlooked burglary offenses and should be given first opportunity to apply Guidelines to facts of case. Neither Guidelines nor caselaw addresses issue of how crimes should be listed in either PSR or by District Court.)

United States v. Charles, 209 F.3d 1088 (8th Cir. 2000) (McMILLIAN, HEANEY,* BOGUE). ((1) Prior convictions at issue. On March 9, 1994, defendant entered convenience store and took property. Nine days later he re-entered convenience store to take property and was arrested. He was charged with commercial burglary and theft of property for March 22 incident (counts one and two), and with commercial burglary for March 31 incident (count three). He pleaded guilty to all three counts, they were consolidated for sentencing, and he was sentenced to 15 days imprisonment and 5 years probation. His probation was later revoked, and he was sentenced to 2 years imprisonment.

(2) Effect at later federal sentencing on possession-of-stolen-firearm charge. Defendant did not have at least two prior qualifying felony convictions for purposes of establishing base offense level of 24 under § 2K2.1(a)(2), because his three sentences for prior convictions ran concurrently (sentencing judge could have delineated on order that sentences were to run consecutively, but did not); and charges against him were consolidated for sentencing. Thus they are treated as single sentence and are not counted separately. Accordingly, commercial burglary convictions are not two prior felony convictions and he does not qualify for base offense level of 24. Reversal is warranted.

(3) Criminal history points. Defendant argues he should receive 3, not 4, criminal history points for three convictions on basis that his original sentence should have been added to sentence he received upon probation revocation and counted as single sentence. When calculating criminal history points, original term of imprisonment (15 days) is added to any sentence imposed on revocation (2 years) which equals 2 years and 15 days for each charge. See U.S.S.G. § 4A1.2(k)(1). Because charges were consolidated for sentencing, they are treated as single sentence yielding total of 3 criminal history points under § 4A1.1(a). However, under § 4A1.1(f), 1 additional point must be added because 3-point enhancement was justified without considering counts two and three, and count three occurred on different day than count two.)

United States v. Allegree, 175 F.3d 648 (8th Cir.) (McMILLIAN, LOKEN, MURPHY*). (Conviction for possession of sawed-off shotgun qualifies as crime of violence because such weapons are inherently dangerous and lack usefulness except for violent and criminal purposes; Guidelines define crime of violence as offense punishable by more than one year imprisonment that involves conduct presenting serious potential risk of physical injury to another.), cert. denied, 518 U.S. 958 (1999).

United States v. Fields, 167 F.3d 1189 (8th Cir.) (RICHARD S. ARNOLD, FAGG, DAWSON*). (In 1992 Fields was convicted of state felony of unlawful use of weapon, which was described in indictment as knowingly exhibiting pistol in presence of others in angry or threatening manner. He later pleaded guilty to federal drug offense, and District Court held that 1992 state weapon offense was "violent felony" for purposes of career offender Guideline. District Court was correct. Under commentary, District Court need analyze only conduct set forth in and/or expressly charged in indictment or information, and indictment here clearly reflected conduct presenting serious potential risk of physical injury to one or more persons, which falls within definition of §

4B1.2(2).), cert. denied, 526 U.S. 1140 (1999).

United States v. Maggard, 156 F.3d 843 (8th Cir. 1998). (Appellant argues prior conviction for second-degree burglary of unoccupied residence should not be considered in assessing career-offender status; however, it is well-settled that second-degree burglary is considered "crime of violence" for career-offender status.), cert. denied, 525 U.S. 1170 and 526 U.S. 1058 (1999).

United States v. Milton, 153 F.3d 891 (8th Cir. 1998). (Milton's contention that two prior felony convictions were not separate has no merit even though offenses, which were committed more than one year apart, were joined for purpose of probation revocation proceeding.), cert. denied, 525 U.S. 1165 (1999).

United States v. Juvenile G.Z., 144 F.3d 1148 (8th Cir. 1998). (G.Z. contends District Court improperly ordered full restitution without examining his financial resources. G.Z. does not dispute he pleaded guilty to crime of violence and in these circumstances, restitution is mandatory, not discretionary, § 4B1.2(a). Although G.Z. s plea agreement recommended District Court order restitution under section 3663, section makes clear discretionary restitution is not available for crimes of violence and section 3663A applies to these offenses; District Court applied law correctly.)

United States v. Reynolds, 116 F.3d 328 (8th Cir. 1997). (Reynolds challenged classification of his second-degree burglary conviction. This Court reaffirms previous pronouncements: second-degree burglary is "crime of violence" for sentencing purposes under § 4B1.2(1)(ii); it is generic elements of burglary that matter--unlawful entry into building to commit crime--not details of particular state statutes or special circumstances of individual cases. No case should be read as disavowing generic or per se approach. "Crime of violence" includes conduct that presents serious potential risks of physical injury to another. Even considering particulars of Reynolds s underlying conduct in present case, that no one was injured when Reynolds burglarized commercial structure is not dispositive; breaking into building by its very nature involves "serious potential risks of physical injury," either to someone who happens to be in building or to someone who happens to pass by while crime is being committed. Reynolds could not know no one was in building or that no one would happen upon him.)

United States v. Hawkins, 102 F.3d 973 (8th Cir. 1996). (Hawkins challenges his sentence as career offender: whether prior conviction was for conspiracy to deliver cocaine, career offender predicate offense, or for possession of controlled substance (4B1.2(2)). Where government placed in evidence numerous documents confirming conviction was for conspiracy to deliver cocaine--including plea transcript, signed plea statement, trial judge s docket sheet, judgment and commitment order, Arkansas Department of Correction admission summary--and Hawkins countered with prosecutor s file jacket which contains notation Hawkins pleaded guilty to possession of cocaine, District Court s findings on this record that conviction was for career offender predicate offense is not clearly erroneous. This Court has previously ruled that conspiracy is controlled substance offense for purposes of § 4B1.2(2).), cert. denied, 520 U.S. 1179 (1997).

United States v. Ghent, 29 F.3d 416 (8th Cir. 1994). (Ghent alleged Court should look

beyond statutory definition of burglary to determine whether it was crime of violence. To extent Ghent alleges unoccupied residence was not dwelling, this Court rejects argument. Moreover, this Court cannot say illegal entry of home to commit crime, even if its occupants are not currently present, does not involve conduct posing serious potential risk of physical harm to another.)

United States v. Mendoza-Figueroa, 28 F.3d 766 (8th Cir. 1994). (Application note 1 states that "conspiring" to commit such offenses are controlled substance offenses. Commission exceeded statutory underpinnings of career offender provisions (28 U.S.C. § 994(h)).)

United States v. Kenyon, 7 F.3d 783 (8th Cir. 1993). (A prior felony conviction must be able to be counted separately for criminal history purposes before it can be predicate felony offense for career offender guideline. Where conduct for which Kenyon was convicted in state Court comprised part of conduct alleged in count to which he pleaded guilty in this case, District Court erred in including it for criminal history purposes.)

United States v. Henderson-Durand, 985 F.2d 970 (8th Cir. 1993). (Arnold s violation of state law which specifically prohibited certain drug activity was distinguishable from "criminal facilitation.")

United States v. Wright, 957 F.2d 520 (8th Cir.) (This Court joins circuits holding robbery is crime of violence under § 4B1.2(1)(i). When deciding whether offense is crime of violence under subsection (i), Courts must focus their inquiry on elements of offense rather than facts underlying offense. Because use or threatened use of force is element of robbery, person convicted of robbery has been convicted of crime of violence. Contrast, in deciding whether offense involves conduct which presents serious risk of physical injury to another under subsection (ii), Courts may examine facts underlying conviction to determine whether offense is crime of violence.), cert. denied, 506 U.S. 856 (1992).

United States v. Williams, 905 F.2d 217 (8th Cir. 1990). (Government bears burden of factually supporting sentence enhancement; defendant bears burden of sentence reduction. Here, government established by preponderance of evidence defendant s robbery convictions should be counted separately.), cert. denied, 498 U.S. 1030 (1991).

**§ 4B1.3 (Criminal Livelihood):**

United States v. Morse, 983 F.2d 851 (8th Cir. 1993). (District Court did not err in increasing base offense level to 13 where it was evident from vast number of credit cards, cash cards, and driver s licenses in Morse s possession he had devised extensive scheme to use these cards to fraudulently obtain money. Furthermore, his previous convictions for forgery, possession of stolen property, and theft by check dating back to 1981, established long pattern of fraudulent activity. Where at least $12,000 could be attributed to Morse s conduct and given deference this Court gives to District Court s findings of fact concerning amount of loss, Court held District Court did not err in its determination. Furthermore, District Court found no indication Morse had done anything else to attain steady form of income.)

United States v. Manuel, 912 F.2d 204 (8th Cir. 1990). (Government conceded on appeal that there was no evidence Manuel earned more than minimum wage over course of year to make guideline concerning criminal livelihood applicable, as required by Nolder.)

United States v. Oliver, 908 F.2d 260 (8th Cir. 1990). (Court expresses skepticism as to applicability of Guideline, but remands to give District Court opportunity to reexamine evidence. Criminal history alone is not sufficient to warrant enhancement. Rather, using definitions found in dangerous special offender statutes, District Court must find defendant engaged in pattern of criminal conduct from which he derived substantial portion of income and determine whether present offense is related to part of that pattern.)

United States v. Hearrin, 892 F.2d 756 (8th Cir. 1990). (Record supported Court s conclusion that offense was part of pattern of criminal conduct engaged in as livelihood based on extent of defendant s involvement over eight-month time period and amount of income per month received from fraudulent scheme.)

United States v. Nolder, 887 F.2d 140 (8th Cir. 1989). (District Court applied criminal livelihood Guideline because $450.00 of defendant s $1525.00 annual income was from criminal activities. Court held that § 4B1.3 did not apply when annual income was less than minimum wage. Opinion discusses legislative history of section. J. Gibson s concurrence states he would remand only because of concession of United States in plea agreement and rejects minimum wage analysis.)

United States v. Ehret, 885 F.2d 441, 445 (8th Cir. 1989). (Criminal livelihood Guideline used to determine criminal history has no effect in cases where criminal offense level is higher than 13.), cert. denied, 493 U.S. 1062 (1990).

**§ 4B1.4 (Armed Career Criminal/Standard of Review):**

United States v. Griffith, 301 F.3d 880 (8th Cir. 2002) (MORRIS S. ARNOLD, HEANEY,* MURPHY). (This Court reviews de novo District Court's determination that prior offense constitutes crime of violence), cert. denied, 123 S. Ct. 1339 (2003).

**§ 4B1.4 (Armed Career Criminal):**

United States v. Long, 320 F.3d 795 (8th Cir. 2003) (BOWMAN,* RICHARD ARNOLD, BYE). (Where defendant pleaded guilty to three counts of delivery of controlled substance, each based on separate deliveries, he had three prior convictions for purposes of armed career criminal enhancement; convictions did not "merge" into one even though he pleaded guilty to all counts during single proceeding, had single offense date listed on written judgment of conviction, and received single sentence for all charges.)

United States v. Griffith, 301 F.3d 880 (8th Cir. 2002) (MORRIS S. ARNOLD, HEANEY,* MURPHY). (Defendant subject to enhanced sentence under 18 U.S.C. § 924(e) is armed career criminal. Here, defendant was previously convicted of conspiring to take property valued in excess of $1,000. District Court properly looked to criminal complaint, which charged defendant with

second-degree conspiracy to commit theft and second-degree robbery. This Court concludes that crime of theft from person is violent felony as matter of law because it involves conduct presenting serious risk that person may be physically injured), cert. denied, 123 S. Ct. 1339 (2003).

United States v. Peltier, 276 F.3d 1003 (8th Cir.) (WOLLMAN, FAGG,* RILEY). (Defendant's prior convictions qualifying him as armed career criminal need not be submitted to jury under Apprendi v. New Jersey, 530 U.S. 466 (2000).), cert. denied, 537U.S. 862 (2002).

United States v. McClain, 171 F.3d 1168 (8th Cir. 1999) (FAGG, HEANEY,* WOLLMAN). (Reviewing for plain error and reversing, concluding McClain was improperly classified as armed career criminal, because two of predicate violent felonies--Missouri convictions for "felony resisting arrests"--were actually misdemeanor offenses and McClain thus was improperly charged and convicted of felony in each case. Specifically, resisting arrest is felony offense under Missouri law only if underlying offense is felony; here, first arrest attempt was for parole violation, but there was no indication parole violation was felony, and second resisting-arrest charge was based on arrest for first resisting-arrest charge.)

United States v. Maddix, 96 F.3d 311 (8th Cir. 1996). (Maddix argues District Court erred in finding he was armed career criminal for purposes of sentence enhancement; he concedes government proved he has four prior felony convictions but argues it failed to prove convictions involved violent felonies. District Court is not restricted to looking solely at fact of conviction and statutory definition of offense but may also consider charging paper and jury instructions. In this situation, whether Court focuses on elements of arson in second degree or crime s underlying facts as set forth in information, arson in second degree involves conduct that presents serious potential risk of physical injury to another and thus qualifies as violent felony for purposes of sentence enhancement (§ 4B1.2(1)).

Maddix argues District Court erred in finding he possessed firearm in connection with crime of violence, § 4B1.4(b)(3)(A). Maddix argues unlawful possession of firearm is not itself crime of violence. Requisite crime of violence is not unlawful possession of firearm but instead associated criminal conduct. Here, two crimes of violence were committed in connection with unlawful possession: robbery and cutting victim s hand with utility knife (§ 4B1.2(1)(i)).)

United States v. Gray, 85 F.3d 380 (8th Cir.) (Gray was convicted of being felon in possession of firearm, and because he had three previous burglary convictions, qualified for enhancement in Armed Career Criminal Act and § 4B1.4(a). Gray contended only one, or at most two, of his convictions can serve as predicate felonies. Discrete criminal episodes, rather than dates of convictions, trigger enhancement. Thus, because Gray was not sentenced, punished, or rehabilitated and released before being convicted of second and third offenses, is not determinative. Gray also argued because he burgled two houses on same day--25 minutes apart--that should be one. Multiple burglaries committed on same day count as separate offenses under Act.), cert. denied, 519 U.S. 907 (1996).

United States v. Demint, 74 F.3d 876 (8th Cir.) (District Court did not err in sentencing Demint as armed career criminal because Demint s three previous convictions constituted "violent felonies." Demint argued his 1980 Louisiana conviction for burglary of camp should not be

counted. As Louisiana statute defines burglary more broadly than generic definition in Taylor, District Court properly referred to charging paper and text of Demint s guilty plea to determine whether Demint s plea was to charge meeting generic definition, which it did as under Louisiana law camp is considered structure. Demint argued 1979 Florida conviction for attempted burglary was not violent felony. This Court concludes Florida s attempted burglary law punishes only conduct that presents serious potential risk of physical injury of another and therefore, District Court properly concluded Demint s conviction falls within "catch-all" provision of § 924(e)(2)(B)(ii).), cert. denied, 519 U.S. 951 (1996).

United States v. Adail, 30 F.3d 1046 (8th Cir.) (Although maximum statutory penalty for crime to which Adail pleaded guilty is 120 months, District Court sentenced Adail to enhanced 204-month sentence. Adail contends sentence violates his due process rights because government did not notify him before he pleaded guilty which of his earlier convictions triggered enhanced sentence. This Court decides argument lacks merit. Record showed government informed Adail of its intent to seek statutory (§ 924(e)(1)) enhancement before he pleaded guilty to violating § 922(g)(1). Following his plea, Adail received notice in PSR of his earlier convictions and in addendum to PSR informed him three violent felony convictions mentioned in PSR permitted enhanced sentence. Further, any deficiency in notice would be harmless because Adail did not challenge any of his violent felony convictions or deny he committed offenses in his written objections to PSR, at his sentencing hearing, or on appeal.), cert. denied, 513 U.S. 1051 (1994).

United States v. Petty, 1 F.3d 695 (8th Cir. 1993). (Petty challenged District Court s reliance on three of prior felonies used to enhance his sentence: homicide committed while he was juvenile as proof beyond reasonable doubt was not required; and restoration of his civil rights when he was released from prison upon commutation of his sentences on Missouri convictions of attempted first degree robbery and manslaughter. Though Petty raised juvenile adjudication issue in his written objections to PSR, he waived any objection to use of juvenile adjudication as prior conviction for violent felony for purposes of armed career criminal classification. He did not raise commutation issue at all and so there was not decision on those issues by District Court. Finding no plain error in sentence as imposed nor result which would constitute "a gross miscarriage of justice," this Court affirmed 212 months imprisonment sentence.)

United States v. Washington, 992 F.2d 785 (8th Cir.) (Section applies to anyone who is subject to 18 U.S.C. § 924(e)(1).), cert. denied, 510 U.S. 936 (1993).

## CHAPTER FIVE:
## DETERMINING SENTENCE

### Part A. Sentencing Table

United States v. Gibson, 928 F.2d 250 (8th Cir. 1991). (Where this Court affirmed 180-month sentence imposed for unlawful firearms possession count which overlaps both sentence actually imposed by District Court and longer sentence sought by government, Court will not reach issues concerning Guidelines §§ 2D1.1(b)(1) and 4A1.2.)

United States v. Yerks, 918 F.2d 1371 (8th Cir. 1990). (Though close question is presented as to whether record supports base offense level of 36 or 34 based upon additional 460 grams of cocaine for which Yerks was not charged, applicable guideline would remain same (360 months to life), so dispute need not be resolved.)

United States v. Brett, 872 F.2d 1365 (8th Cir.) (Sentencing table in Guidelines, § 5A; for drug-related crimes, base offense level proportionate to type and quantity of drugs involved; most serious controlled substance determines categorization of entire quantity.), cert. denied, 493 U.S. 932 (1989).

**Part B. Probation**

United States v. Barrett, 937 F.2d 1346 (8th Cir.) (The mandate for consideration by District Court of history and characteristics of defendant (18 U.S.C. 3553(a)(1)) was met by pre-sentence report on Barrett. While Congress authorized availability of probation for Class C felonies, of which Barrett was convicted (sexual abuse), it did not require probation to be made available.), cert. denied, 502 U.S. 916 (1991).

United States v. Von Washington, 915 F.2d 390 (8th Cir. 1990). (Upon revocation of his probation, District Court sentenced Von Washington to term within statutory maximum. This Court follows Eleventh Circuit in holding District Court, on resentencing after revoking probation, must sentence defendant within guideline range applicable to offense of conviction. This Court rejects government s argument that this is what Congress intended and remanded for resentencing. Conduct that caused revocation may be considered for certain purposes in resentencing.)

**§ 5B1.1 (Imposition):**

United States v. Byrd, 984 F.2d 251 (8th Cir. 1993). (District Court did not err in refusing probation alternative where Byrd had extensive criminal history and Court complied with section 3553(a)(2)(D) as evidenced by its recommendation Byrd be incarcerated in location where he had been undergoing medical treatment so he could continue treatment with same medical personnel.)

United States v. Wollenzien, 972 F.2d 890 (8th Cir. 1992). (While District Court did not need to explicitly reject use of probation, this Court remands for specific consideration of probation route where PSR did not refer to probation option because adjustments suggested (but rejected by Court) would have brought guideline range beyond that for which probation might be appropriate.)

**§ 5B1.3 (Conditions/Standard of Review):**

United States v. Ashland, Inc., 356 F.3d 871 (8th Cir. 2004) (LOKEN, HEANEY, MORRIS ARNOLD*). (Conditions of probation are reviewed for abuse of discretion.)

United States v. Iversen, 90 F.3d 1340 (8th Cir. 1996). (As Iversen did not object to two conditions at time of sentencing, this Court reviews for plain error or miscarriage of justice.)

**§ 5B1.3 (Conditions):**

United States v. Ashland, Inc., 356 F.3d 871 (8th Cir. 2004) (LOKEN, HEANEY, MORRIS ARNOLD*). (Corporation pleaded guilty to endangering its workers and making false statement to regulators. District Court abused its discretion in setting conditions of probation by making defendant corporation responsible for future conduct of another company not under its control that had taken over refinery where accident occurred. This Court excises inappropriate conditions and affirms as modified.)

United States v. Iversen, 90 F.3d 1340 (8th Cir. 1996). (Iversen argues District Court erred by imposing home detention. No plain error as home detention is expressly authorized for offenses within Zone A, § 5B1.1. Fact that home detention may be imposed only as substitute for imprisonment, § 5F1.2, does not mean home detention is form of imprisonment which cannot be coupled with probation under 18 U.S.C. § 3561(a)(3).)

United States v. Lynch, 58 F.3d 389 (8th Cir. 1995). (As part of Lynch s sentence of probation, District Court imposed condition he participate in program for psychiatric or psychological treatment. Lynch contended condition was abuse of discretion as it did not reasonably relate to crime charged (violation of 18 U.S.C. § 111(a)(1) which prohibits forcibly assaulting or interfering with federal officer while engaged in performance of official duties). This Court decides given nature of Lynch s conduct giving rise to charged offense, District Court did not abuse its discretion in requiring treatment as condition of probation, 18 U.S.C. § 3563(B)(10).)

United States v. Stoural, 990 F.2d 372 (8th Cir. 1993). (This Court vacates District Court s imposition of restrictive probation conditions relating to prohibition of alcohol as they did not relate to crime to which Stoural pleaded guilty (conversion of collateral pledged to FHA) or to purposes for his sentence.)

**§ 5B1.4 [deleted by consolidation with §§ 5B1.3 and 5D1.3]:**

United States v. Morey, 120 F.3d 142 (8th Cir. 1997). (Morey argues requiring him to participate, as instructed by probation officer, in program for treatment of drug dependency improperly transfers to probation officer judicial duty to establish periodic drug testing (18 U.S.C. § 3583(d)). This Court disagrees: giving probation officer authority to require additional drug treatment (of long term drug addict who stole to feed his addiction) during supervised release is appropriate discretionary condition that goes beyond drug testing mandated by § 3583(d).

Morey argues condition forbidding him to own or possess firearm while on supervised release is invalid because it is unrelated to his offense. By clarifying portion of mandatory condition that he not commit crime (§ 3583(d) mandates Morey not commit crime during supervised release and Morey is now convicted felon who may not lawfully possess firearm), condition would seem to benefit Morey. In any event, its imposition cannot be plain error (§ 5B1.4(b)(14)).)

United States v. Iversen, 90 F.3d 1340 (8th Cir. 1996). (No plain error in District Court s order giving probation officers authority to order psychiatric or psychological treatment as special condition of probation. Iversen argues condition was improper because not reasonably related to

nature and circumstances of offense of history and characteristics of defendant, nor was condition imposed in accordance with procedural requirements of Insanity Defense Reform Act. Act applies to convicted persons committed to custody of bureau of prisons, not persons placed on probation. Note it was not plain error for District Court to find deprivations of liberty involved in psychological treatment--ordered at probation officer s discretion--were reasonably necessary to protect public and to provide Iversen with needed medical treatment under circumstances of case, (e.g., PSR said Iversen s family and friends expressed concern as to emotional toll on Iversen from various legal disputes; Iversen was reported as saying conviction felt like end of her life as she knows it).)

**Part C. Imprisonment**

**§ 5C1.1 (Imposition of Term of Imprisonment)**

United States v. Webb, 214 F.3d 962 (8th Cir. 2000) (WOLLMAN, MURPHY,* GOLDBERG). (Defendant was sentenced to split sentence of imprisonment plus probation. He contended that Sentencing Commission should not require term of imprisonment for misdemeanors which fall within Zone C of Sentencing Table, but should allow straight probation. This Court finds argument to be meritless, as Congress gave Commission broad authority to promulgate Guidelines, and defendant cites no authority for his proposition.)

**§ 5C1.2 (Safety-Valve Relief/Standard of Review):**

United States v. Quintana, 340 F.3d 700 (8th Cir. 2003) (MORRIS ARNOLD, BEAM, MELLOY*). (District Court's determination of defendant's eligibility for safety-valve relief is reviewed for clear error.)

United States v. Gutierrez-Maldonado, 328 F.3d 1018 (8th Cir. 2003) (LOKEN, FAGG, MURPHY) (per curiam). (District Court's finding that defendant did not truthfully provide government with all information is reviewed for clear error.)

United States v. Alarcon-Garcia, 327 F.3d 719 (8th Cir. 2003) (McMILLIAN, JOHN GIBSON,* BYE). (District Court's finding that defendant's proffer was not complete and truthful is reviewed for clear error, and defendant bears burden to show that proffer was complete and truthful.)

United States v. Moore, 184 F.3d 790 (8th Cir. 1999) (MURPHY, MAGILL,* REASONER). (This Court reviews District Court's determination that weapon was sufficiently connected to offense under §§ 2D1.1(b)(1) and 5C1.2(2) for clear error.), cert. denied, 528 U.S. 1161 (2000).

United States v. Tournier, 171 F.3d 645 (8th Cir. 1999) (BEAM, LOKEN,* BOGUE). (Noting it is well settled that this Court reviews District Court's application of 18 U.S.C. § 3553(f) [statutory counterpart of U.S.S.G. § 5C1.2] for clear error; and rejecting government's argument that decision to afford safety-valve relief should be reviewed de novo on basis that defendant was not entitled to such relief "as matter of law.")

**§ 5C1.2 (Safety-Valve Relief):**

United States v. Martinez-Cortez, 354 F.3d 830 (8th Cir. 2004) (MURPHY, LAY, FAGG*). (Defendant had been convicted in state court of two offenses and had been placed on one year or more of probation for each. He was later charged in federal court with drug offense and pleaded guilty. Before sentencing in federal court, he petitioned state court to shorten his already completed probation terms nunc pro tunc in order to avoid receiving criminal history points for them at his federal sentencing. State court agreed to do so. At federal sentencing, District Court then found that defendant had no more than one criminal history point, making him eligible for safety-valve relief. This Court reverses, analogizing to Application Note 10 to § 4A1.2, which provides that courts must count sentences for convictions that have been set aside for reasons unrelated to innocence or errors of law. DISSENT: This issue of first impression is not covered by Guidelines provision cited by majority, and District Court acted properly in deferring to state court.)

United States v. Quintana, 340 F.3d 700 (8th Cir. 2003) (MORRIS ARNOLD, BEAM, MELLOY*). (District Court did not clearly err in determining that defendant had not truthfully and completely provided all information to government where defendant's testimony directly contradicted that of other witnesses.)

United States v. Gutierrez-Maldonado, 328 F.3d 1018 (8th Cir. 2003) (LOKEN, FAGG, MURPHY) (per curiam). (Having chosen not to meet with government to permit examination of extent of his knowledge and truthfulness of information he provided at plea colloquy, defendant did not meet his burden to show entitlement to safety-valve relief.)

United States v. Alarcon-Garcia, 327 F.3d 719 (8th Cir. 2003) (McMILLIAN, JOHN GIBSON,* BYE). (One defendant, Alarcon-Garcia, did not submit to interview with government. Although he theoretically could have qualified for safety-valve relief without doing so, if he provided full and complete proffer through other means, record showed that he only disclosed basic facts of crime without disclosing identities and participation of others involved. Thus, he was not entitled to safety-valve relief. Another defendant, Bueno-Gardea, did submit to interview with government. He had been found at residence with third party at time police searched house and arrested them. Bueno-Gardea did not implicate third party in drug sales, but third party was nonetheless convicted at trial presided over by same judge who sentenced Bueno-Gardea. On these facts, District Court could properly discredit Bueno-Gardea's claim that he was unaware of third party's involvement in drug sales and find that his proffer was not complete.)

United States v. Madrigal, 327 F.3d 738 (8th Cir. 2003) (WOLLMAN, BRIGHT,* JOHN GIBSON). (To satisfy requirement of providing complete and truthful information "not later than the time of the sentencing hearing," defendant who has not given full proffer at time that sentencing hearing commences may nonetheless qualify if District Court adjourns/continues sentencing hearing for good cause and in interests of justice--here, in order to give Mexican defendant with language and trust issues opportunity to debrief--and defendant gives full proffer to government prior to resumption of sentencing hearing.)

United States v. Gutierrez-Manzanarez, 323 F.3d 613 (8th Cir. 2003) (WOLLMAN,* HEANEY, MELLOY). (District Court did not clearly err in disbelieving defendant's claim that he had truthfully provided all information to government before sentencing, based on evidence including witness testimony and plea agreement.)

United States v. Montano-Gudino, 309 F3.d 501 (8th Cir. 2002) (WOLLMAN, RICHARD S. ARNOLD, LOKEN*). (Two-paragraph letter defendant provided to government just before sentencing did not come close to meeting his burden of showing that he truthfully provided all information and evidence he had.)

United States v. Koons, 300 F.3d 985 (8th Cir. 2002) (MURPHY,* HEANEY, BRIGHT). (As matter of law, defendant convicted under 21 U.S.C. § 860 cannot receive safety-valve relief because it applies only to convictions under §§ 841, 844, 846, 960, and 963.)

United States v. Tyler, 238 F.3d 1036 (8th Cir. 2001) (BEAM, HEANEY, MORRIS SHEPPARD ARNOLD*). (Since this Court cannot say District Court's finding that there was nexus between defendant's gun and his drug activities was clearly erroneous, District Court did not commit legal error in refusing to sentence defendant below mandatory minimum: defendant has burden to prove he did not possess firearm in connection with his crime. DISSENT: District Court should make further determination whether government refused to make § 5K1.1 motion because of defendant's unwillingness to participate in additional illegal activities. Government has no business asking those who have been arrested for drug dealing to engage in further illegal activity in order to receive downward departure.)

United States v. Langmade, 236 F.3d 931 (8th Cir. 2001) (McMILLIAN, FAGG, MURPHY) (per curiam). (Downward departure under § 4A1.3 is merely departure from Guidelines, not actual deletion of criminal history points; defendant with three criminal history points is ineligible for safety-valve relief regardless of downward departure which treated him as if his criminal history category were I.)

United States v. Webb, 218 F.3d 877 (8th Cir. 2000) (WOLLMAN,* HANSEN, MORRIS SHEPPARD ARNOLD). (District Court did not err in denying defendant safety-valve relief for having more than one criminal history point. District Court had departed downward from Category III criminal history (based on four criminal history points) to Category I because it found Category III overstated seriousness of his criminal history, but departure did not result in defendant receiving only one criminal history point: departure under § 4A1.3 does not delete previously assessed criminal history points for purposes of safety-valve analysis. Although § 4A1.1 may be "mechanistic," this Court is bound by words of Guidelines.), cert. denied, 531 U.S. 1131 (2001).

United States v. O Dell, 204 F.3d 829 (8th Cir. 2000) (BOWMAN, LOKEN, ALSOP*). (Special agent testified at defendant s sentencing that, even after his conviction, defendant continued to deny involvement in essential conduct of which jury found him guilty. Based on this testimony and its own credibility assessments, District Court concluded defendant had not been "completely truthful" in his debriefing and therefore denied reduction. This Court cannot say finding is clearly erroneous.)

United States v. Kang, 197 F.3d 927 (8th Cir. 1999) (RICHARD S. ARNOLD, LAY, LOKEN) (per curiam). (Defendant did not satisfy his burden of showing he had truthfully provided to government all information regarding his drug crimes before resentencing.)

United States v. Moore, 184 F.3d 790 (8th Cir. 1999) (MURPHY, MAGILL,* REASONER). (Conclusion that increase under § 2D1.1(b)(1) was proper dictates conclusion that Moore was ineligible for safety valve relief.), cert. denied, 528 U.S. 1161 (2000).

United States v. Morones, 181 F.3d 888 (8th Cir. 1999) (WOLLMAN, LOKEN,* MORRIS SHEPPARD ARNOLD). (Defendant has burden to prove entitlement to safety relief by preponderance of evidence; to qualify he must truthfully disclose all information concerning crime, including identities and participation of others. Government opposed safety valve relief because Morones told DEA agent certain information about third person's involvement in marijuana transaction, which agent put in interview report, but Morones later recanted information. Morones disputes veracity of interview report, but at sentencing agent confirmed report's accuracy and this Court affirms as not clearly erroneous District Court's finding that report reflected what Morones told agent. This Court rejects argument that Morones is entitled to safety valve relief because he told full truth concerning third person's involvement in initial interview, regardless of his later recantation, although this Court notes that defendant who recants or materially changes his story prior to sentencing can present difficult safety valve issue for District Court.)

United States v. Surratt,172 F.3d 559 (8th Cir.) (McMILLIAN, JOHN R. GIBSON, HANSEN*). (District Court's finding that defendant failed to carry his burden of showing he truthfully provided government with all information and evidence he had concerning offenses was not clearly erroneous: District Court found that although defendant made proffer, it did not include information as to his own guilt or complicity.), cert. denied, 528 U.S. 910 (1999).

United States v. Hendricks, 171 F.3d 1184 (8th Cir. 1999) (BEAM,* LOKEN, BOGUE). (Reversing portion of Hendricks's sentence imposing 10 years supervised release. U.S.S.G. § 5C1.2 (comment. n.9) makes clear that safety valve applies to both term of imprisonment *and* term of supervised release. Moreover, application of safety-valve provision is not discretionary once Court determines defendant meets qualifications. Therefore, once District Court determined Hendricks was entitled to application of § 5C1.2, Court was required to impose supervised release term without regard to mandatory minimum statute; applicable Guideline provided for 3-5 years supervised release based on Hendricks's Class A felony, and although District Courts have authority to depart from Guidelines in limited circumstances, Court's statement that 10 years was "appropriate" did not allow for meaningful appellate review and did not support departure to twice maximum term provided for in Guidelines.)

United States v. Tournier, 171 F.3d 645 (8th Cir. 1999) (BEAM, LOKEN,* BOGUE). (Case involves construction of 18 U.S.C. § 3553(f) [statutory counterpart of U.S.S.G. § 5C1.2(5)]. Government concedes Tournier provided complete and truthful information prior to sentencing hearing, but argues her previous lies and omissions made her ineligible for safety valve relief. Government argues subsection (f) should be construed to prohibit safety valve relief to those who

wait until last minute to cooperate fully. Whether defendant's cooperation is tardy or grudging--and thus burdens government with need for additional investigation--are factors relevant to other sentencing determinations (e.g., acceptance of responsibility, substantial assistance), but are not preconditions to safety-valve relief, which is available even to those who put government to expense and burden of trial. Tournier's full and truthful cooperation, though grudging and fitful, was completed before sentencing and this case is distinguishable from United States v. Long, 77 F.3d 1060 (8th Cir.), cert. denied, 519 U.S. 859 (1996), where this Court reviewed for clear error denial of safety valve relief to defendant who deliberately misled government until her cross-examination at sentencing hearing.)

United States v. Rios, 171 F.3d 565 (8th Cir. 1999) (LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD*). (Reviewing for plain error and affirming decision to sentence Rios without regard to safety-valve provision: while Rios met with authorities before sentencing, government contended he failed to provide truthful information regarding his crimes, and Rios did not dispute government's contention at sentencing hearing. Because Rios failed to produce evidence of his eligibility, it would have been plain error to apply safety valve.)

United States v. Santana, 150 F.3d 860 (8th Cir. 1998). (Affirming refusal to grant two-level reduction under U.S.S.G. § 2D1.1(b)(6), which reduces offense level for defendants who qualify for U.S.S.G. § 5C1.2 safety valve exception: nothing in record indicated Diaz provided any information whatsoever regarding relevant crime prior to his sentencing.)

United States v. Dukes, 147 F.3d 1033 (8th Cir. 1998). (Rejecting government's challenge to District Court's finding that Mullings qualified for safety valve relief. Defendant must show he has provided complete and truthful information, but nothing in Guidelines specifies form or place or manner of disclosure. After receiving evidence at sentencing as to information exchange, trial Court found Mullings had truthfully provided all information and evidence he had concerning offenses--a finding that was not clearly erroneous.)

United States v. Kang, 143 F.3d 379 (8th Cir. 1998). (Kang argues he should have been given two-level reduction under safety valve. It was undisputed Kang met requirements (1) through (4); at sentencing, government took position he did not meet (5) as he had not truthfully provided all information and evidence he had concerning offenses that were part of same course of conduct or common scheme or plan. Specifically, in conversations with government, Kang had not admitted being involved with more than 6.84 grams of crack. This Court determines whether Kang truthfully denied involvement with more than 6.84 grams is question of fact for which there was no stipulation and no evidence put forth by government. Record does not allow decision as to whether there was sufficient basis for rejecting Kang s "safety valve" contention. Sentence to be determined on remand; determination will depend on amount of drug properly attributable to Kang.)

United States v. Velasquez, 141 F.3d 1280 (8th Cir.) (District Court refused to apply safety valve; Juan Velasquez relies upon fact that on day of sentencing, he presented to government affidavit purporting to set forth his knowledge of crime at issue. Government counsel informed District Court he was of opinion affidavit was not entirely truthful, and District Court itself noted certain information in affidavit was inconsistent with Court s understanding of facts of case based

upon Fidel Velasquez s trial. This Court states these are legitimate reasons upon which District Court could base refusal to apply safety valve.), cert. denied, 525 U.S. 897 (1998).

United States v. Coleman, 138 F.3d 344 (8th Cir.) (Gessaman argues District Court erred in failing to decrease her offense level, § 2D1.1(b)(4), under safety-valve exception. This Court holds Gessaman was disqualified from decrease by her possession of weapons connected to drug conspiracy. In light of evidence (e.g., 14 guns found in her car and 10 guns found at farmhouse: firearms in farmhouse were found in strategic positions suggesting intended use was for protection of residence and methamphetamine lab; during controlled delivery of iodine to farmhouse, Gessaman said Austin should have contacted farmhouse in advance to avoid possibility of being shot; firearms found in car were not commonly associated with sporting activity); District Court did not clearly err in denying safety-valve adjustment.), cert. denied, 525 U.S. 899 (1998).

United States v. Weekly, 118 F.3d 576 (8th Cir.) ("Disclosure copy" of Romero s PSR indicated eligibility for safety valve. Government objected and probation office prepared addendum to PSR indicating government s disagreement with Romero having met criteria for eligibility for safety valve. Romero objected to revisions; District Court overruled objection and allowed agent to testify about statements made by co-conspirator (Romero s husband) and polygraph examiner. Interviews with Romero and her husband elicited different stories. Because of conflicting statements, agent asked both to take polygraph exam: Romero refused and her husband agreed and polygraph exam was administered to him. District Court found Romero failed to meet her burden of showing she was eligible for departure under safety valve because of her failure to show through affirmative conduct she truthfully provided government all information and evidence she had concerning offense. District Court finding Romero did not meet burden of showing she truthfully provided government all information about offense is not clearly erroneous where conflict in evidence alone is independent evidence to support Court s finding Romero had not truthfully provided all information she had concerning offense and points to inference drawn by Court that Romero, not her husband, was untruthful. Although judge was not asked and did not specifically articulate alternative basis for finding, there was sufficient evidence of grounds besides refusal to take polygraph to support finding Romero had not truthfully provided all information. DISSENT: Would remand for resentencing because sentencing judge relied on irrelevant evidence of lie detector test to deny Romero s application of safety valve. This case illustrates sentencing structure which improperly confers immense power upon prosecutor and confines trial judge through sentencing Guidelines, criminal code, PSR, and charges filed by prosecutor.), cert. denied, 522 U.S. 1020 (1997).

Wright v. United States, 113 F.3d 133 (8th. Cir. 1997). (Wright filed § 3582(c)(2) motion to modify sentence; to justify resentencing, Wright relied on amendment to § 2D1.1(c)n.(E) which altered method for quantifying marijuana. On resentencing, Wright attempted to avoid imposition of mandatory minimum by arguing district judge should apply safety valve, 18 U.S.C. § 3553(f). Here, District Court found safety valve did not apply because Wright possessed firearm in connection with his drug offense, § 5C1.2(2). District Court made findings not clearly erroneous and well supported by record that Wright possessed cache of weapons in part because of paranoid delusions, but also in part because of marijuana operation.

This Court affirms District Court's refusal to apply safety valve: merely because guns were

not in Wright's possession at time of his arrest does not mean he did not possess them in connection with manufacture of marijuana. His offense was ongoing, weapons were found at motel which was focal point of drug planting operation, he transported guns with marijuana, and other indicia of drug trafficking were found in motel room in close proximately to guns. Wright did not meet burden of showing he did not possess these firearms in connection with his drug offense.)

United States v. Burke, 91 F.3d 1052 (8th Cir. 1996) (McMILLIAN, WOLLMAN, MURPHY) (per curiam). (Burke argued District Court erred in not sentencing him under safety-valve provision because there was insufficient evidence to prove he possessed firearm "in connection with" offense. This Court affirmed, holding that "in connection with" under § 5C1.2(2) should be interpreted consistently with "in connection with" under § 2K2.1(b)(5), which does not require government to show firearm was actually used to facilitate felony offense.)

United States v. Romo, 81 F.3d 84 (8th Cir. 1996). (After Romo pleaded guilty to aiding and abetting possession with intent to distribute methamphetamine, District Court found Romo failed to satisfy 18 U.S.C. § 3553(f)(5)/U.S.S.G. § 5C1.2(5) and imposed statutory minimum sentence of ten years imprisonment. Romo appeals, asserting he satisfied provision because he gave government names of persons involved in offense and explained drug distribution system and his role in it. Romo had burden to show, through affirmative conduct, he gave government truthful information and evidence about relevant crimes before sentencing. District Court s finding not clearly erroneous where although Romo gave government some limited information, he did not tell government whole story about his role in distribution chain and his gang s involvement. He failed to respond to government s initial request for written chronological summary of his drug trafficking activities and similarly failed to respond to government s presentence letter expressing concern about Romo s failure to give accurate, specific information about criminal drug activities and asking him to provide more information before sentencing hearing.)

United States v. Long, 77 F.3d 1060 (8th Cir.) (Parties did not dispute Long qualified for relief under 18 U.S.C. § 3553(f)(1)-(4); disagreement as to whether Long complied with terms of § 3553(f)(5)/§ 5C1.2(5). After Long pleaded guilty, U.S. Attorney and government agents interviewed Long about her criminal conduct to enable her to comply with part 5. Long lied about providing cohort in crime with non-revenue airline tickets. Long argued she provided all truthful information not later than time of sentencing hearing because she admitted she provided cohort with tickets at sentencing hearing. While she essentially argued she "cured" her misstatement, she did not comply with requirement that information be truthfully provided to government, and only if she had provided truthful information could government have avoided further investigation required to discover truth about airline tickets. Alternatively, Long argues notwithstanding her lie at government interview, she was only required to disclose information if relevant to her offense and sentencing. This Court thinks provision of airline tickets to co-conspirator is relevant to same course of conduct or common scheme of drug trafficking. Long s arrest provided context for questions and government was justified in asking about other tickets and deserved honest answer for section to apply. If questioning was beyond scope of relevant criminal conduct and Long thought she was not required to answer under part 5, she could have declined to answer, but she was not allowed to mislead government.), cert. denied, 519 U.S. 859 (1996).

United States v. Goodwin, 72 F.3d 88 (8th Cir. 1995). (Where District Court departed below both mandatory minimum of five years and applicable guideline range, "safety valve" provision affords Goodwin no further sentencing benefit.)

**Part D. Supervised Release**

**§ 5D1.1 (Imposition):**

United States v. Engelhorn, 122 F.3d 508 (8th Cir. 1997). (Although term of incarceration imposed upon defendant convicted under ACA may not exceed that provided by state substantive law, total sentence imposed--consisting of term of incarceration followed by period of supervised release--may exceed maximum term of incarceration provided for by state law.)

United States v. Douglas, 88 F.3d 533 (8th Cir. 1996). (Douglas was convicted of being felon in possession and initially sentenced to 120 months imprisonment and three years supervised release. This Court remanded for resentencing based on clarifying Guidelines amendment; upon resentencing, Douglas s guideline range was 27-33 months and supervised release range, 2-3 years. Because Douglas had already served 46 months in prison, he requested no supervised release be imposed, arguing time he had spent in prison beyond Guidelines range should qualify. District Court sentenced Douglas to 33 months imprisonment with credit for time served and two years supervised release. This Court rejects Douglas s argument excess prison time he served should be credited against supervised release term, reasoning because Douglas was convicted of Class C felony, District Court was without authority to impose supervised release term less than two years (§ 5D1.2(a)(2)). Statute indicates supervised release commences on day person is released from imprisonment and this is consistent with distinctly different purposes of imprisonment and supervised release.)

United States v. Felix, 994 F.2d 550 (8th Cir. 1993). (Dialogue at sentencing indicated District Court provided Felix with oral notice that Court expected him to remain law-abiding during his term of supervised release, and it was apparent Felix understood Court s warnings. This Court holds District Court included adequate notice of explicit condition of supervised release, that Felix not commit another crime during term of supervision, in compliance with 18 U.S.C. § 3853(d); § 5D1.3(a). This Court encourages personal service of judgment, sentence, terms of supervised release as some conditions are not so straightforward as one in this case.)

United States v. Gullickson, 982 F.2d 1231 (8th Cir. 1993). (It was impermissible to sentence Nelson to consecutive terms of supervised release. Statute (18 U.S.C. § 3624(e)) states terms of supervised release on multiple convictions are to run concurrently.)

**§ 5D1.2 (Term/Standard of Review):**

United States v. Manzer, 69 F.3d 222 (8th Cir. 1995). (Because Manzer failed to object to supervised release term at sentencing hearing, this Court reviews claim for plain error.)

**§ 5D1.2 (Term):**

United States v. Kurkowski, 281 F.3d 699 (8th Cir.) (McMILLIAN, FAGG,* RILEY). (Apprendi v. New Jersey does not invalidate Guidelines sentence of three to five years supervised release for drug offenders convicted under 21 U.S.C. § 841(b)(1)(A) where drug quantity was not submitted to jury or found beyond reasonable doubt because statutory maximum term of supervised release under 21 U.S.C. § 841(b)(1)(C) (for offense regardless of drug quantity) is life.), cert. denied, 537 U.S. 854 (2002).

United States v. Bongiorno, 139 F.3d 640 (8th Cir.) (Bongiorno argues District Court s imposition of six-year supervised release term violates three-year maximum term for Class C felony found in 18 U.S.C. § 3583(b)(2). This Court rejects Bongiorno s challenge as applicable sentencing statute, 21 U.S.C. § 841(b)(1)(C), subjected Bongiorno to supervised release term of "at least three years"; although minimum term under § 841(b)(1)(C) is same as maximum under § 3583(b)(2), this Court disagrees that six-year term was illegal.), cert. denied, 525 U.S. 865 (1998).

United States v. Behler, 100 F.3d 632 (8th Cir. 1996). (Behler contended District Court erred by sentencing him to five years supervised release and not applying 1987 Guidelines which designated only three-year term; public law was shortly amended to provide for five-year term of supervised release for Class A or Class B felony. Congressional enactment, effective while Behler s crime was still occurring, trumps written Guidelines in effect at time. This Court rejects argument Behler should have received only three-year term of supervised release.), cert. denied, 522 U.S. 855 (1997).

United States v. Manzer, 69 F.3d 222 (8th Cir. 1995). (Manzer challenges three-year term of supervised release on ex post facto grounds: District Court imposed term under post-1988 amendment version of § 5D3.2(b)(2); Manzer argues Court should have sentenced him under pre-1988 amendment version which provides for maximum two-year term for offenses such as mail and wire fraud. This Court finds no ex post facto violation because acts for which Manzer was convicted all occurred after effective date of 1988 amendment and District Court did not apply § 5D3.2(b)(2) to events occurring before its enactment.)

United States v. Osment, 13 F.3d 1240 (8th Cir. 1994). (Prior to acceptance of plea of guilty, District Court, in advising defendant of maximum penalty to which he is subject, must tell defendant not only of applicability of term of supervised release, but of that term s effect. Here, District Court advised Osment he faced maximum prison sentence of 5 years. On its face, Osment s sentence of 15 months imprisonment and 3 years supervised release (total of 51 months) does not exceed statutory penalty of which Osment was advised. Effect of supervised release term, however, was not adequately considered: maximum penalty including effect of supervised release term would be 15 months imprisonment, 2 years and 364 days supervised release, and 2 years imprisonment (75 months minus 1 day). Total exceeds 5-year/60-month term of imprisonment District Court advised Osment; accordingly, error was not harmless. Reverse and remand.)

United States v. Ravoy, 994 F.2d 1332 (8th Cir. 1993). (District Court exceeded its jurisdiction in imposing term of "inactive supervised release" on defendants which would subject them to period of supervised release longer than maximum permitted by Guidelines or Code. Terms

of supervised release on multiple convictions are to run concurrently. There is no authority for imposition of term of "inactive" supervised release: how intensely probation officers are directed to supervise defendant s term is separate from length of term which is limited by statute. Remand for resentencing.)

United States v. Saunders, 957 F.2d 1488 (8th Cir.) (The District Court exceeded its authority by departing upward from three year statutory maximum term of supervised release. On remand, District Court may impose consecutive terms of supervised release.), cert. denied, 506 U.S. 889 (1992).

United States v. LeMay, 952 F.2d 995 (8th Cir. 1991). (LeMay argued ten years supervised release term for his Class A felony, to which he agreed in his plea agreement, exceeded statutory maximum and constituted illegal sentence. This Court declines to follow Tenth Circuit s United States v. Esparsen and construes term of supervised release authorized in § 5D1.2(a) as subject to same departures as applicable to Chapter 5C imprisonment ranges. This Court determined term was consistent with plea agreement, within Court s statutory authority under § 841(b)(1)(A), and part of sentence accepted under § 6B1.2(b)(2) because it departs from applicable guideline range for justifiable reasons.)

**§ 5D1.3 (Conditions/Standard of Review):**

United States v. Ristine, 335 F.3d 692 (8th Cir. 2003) (BOWMAN,* HEANEY, BYE). (This Court ordinarily reviews District Court's imposition of conditions of supervised release for abuse of discretion. Where defendant fails to object at sentencing, however, review is for plain error. Defendant's alleged lack of notice that particular conditions would be imposed does not change standard of review.)

United States v. Weiss, 328 F.3d 414 (8th Cir. 2003) (WOLLMAN,* RICHARD ARNOLD, SMITH). (District Court's decision to impose special conditions of supervised release is reviewed for abuse of discretion. Although discretion is wide, conditions must be reasonably related to offense and defendant, and cannot involve greater deprivation of liberty than is reasonably necessary.)

United States v. Crose, 284 F.3d 911 (8th Cir. 2002) (MORRIS SHEPPARD ARNOLD, BEAM, RILEY) (per curiam). (When defendant fails to object to District Court's imposition of terms of supervised release, appellate review is for plain error rather than abuse of discretion.)

United States v. Scott, 270 F.3d 632 (8th Cir. 2001) (LOKEN, RICHARD S. ARNOLD,* FAGG). (District Court has wide discretion in imposing terms and conditions of supervised release. However, this discretion is limited by statute. Any condition must be reasonably related to nature and circumstances of offense, history and characteristics of defendant, need to deter criminal conduct, need to protect public, and need to provide defendant with treatment or care; cannot involve greater deprivation of liberty than is reasonably necessary; and must be "especially fine-tuned" if it involves restrictions on defendant's freedom.)

United States v. Juan-Manuel, 222 F.3d 480 (8th Cir. 2000) (McMILLIAN,* JOHN R. GIBSON, MAGILL). (Whether District Court has authority to impose condition tolling supervised release of illegal alien for periods he is outside United States pursuant to deportation order, or is illegally within United States, is legal question subject to de novo review.)

United States v. Kent, 209 F.3d 1073 (8th Cir. 2000) (McMILLIAN, LAY,* FAGG). (District Courts are afforded wide discretion in imposing terms of supervised release, and this Court reviews imposition of special conditions of supervised release for abuse of discretion. It is not necessary that all factors listed in § 5D1.3(b) be present in order to avoid finding of abuse of discretion; rather, each factor is to be weighed independently. Special condition imposed need not be related to each factor.)

United States v. Behler, 187 F.3d 772 (8th Cir. 1999) (BEAM, HANSEN,* MOODY). (This Court affords District Court wide discretion when imposing terms of supervised release.)

United States v. Cooper, 171 F.3d 582 (8th Cir. 1999) (BEAM, LAY, LOKEN*). (Sentencing judges have discretion to impose special conditions of supervised release so long as they are reasonably related to sentencing factors in 18 U.S.C. § 3553(a), involve no greater deprivation of liberty than reasonably necessary, and are consistent with applicable policy statements. Relevant statutes and Guidelines set forth numerous discretionary conditions Court is urged to impose when consistent with broad statutory objectives of sentencing. Applying these standards, this Court reviews special supervised release conditions for abuse of District Court's broad sentencing discretion.)

**§ 5D1.3 (Conditions):**

United States v. Henkel, 358 F.3d 1013 (8th Cir. 2004) (BYE, HEANEY, HOVLAND*).(Conditions that defendant not consume alcohol or visit establishments where alcohol is served were justified by defendant's history of alcoholism and methamphetamine use and by prior incident in which he assaulted his wife and another person after drinking at bar. While defendant argues that restrictions may impact his potential for future employment, he is not employed or seeking employment at this time, and his remedy would be to seek modification of conditions from District Court in future if he could only find employment which required him to enter drinking establishments.)

United States v. Griner, 358 F.3d 979 (8th Cir. 2004) (MORRIS ARNOLD,* BOWMAN, MURPHY). (Despite some legislative changes, 18 U.S.C. § 3583(d) continues to include community-corrections confinement as permissible discretionary condition of supervised release.)

United States v. Ristine, 335 F.3d 692 (8th Cir. 2003) (BOWMAN,* HEANEY, BYE). (District Court did not plainly err in imposing upon defendant convicted of receiving child pornography conditions that he not own or possess any pornography, not enter any pornographic establishment, not own or operate photographic equipment, not have Internet access, have his computer monitored, and not go to places where children congregate.)

United States v. Weiss, 328 F.3d 414 (8th Cir. 2003) (WOLLMAN,* RICHARD ARNOLD, SMITH). (Requirement that defendant obtain permission from probation officer before opening new line of credit or incurring debt was not abuse of discretion where defendant was ordered to pay restitution, had documented history of unemployment, and had no assets.)

United States v. Fields, 324 F.3d 1025 (8th Cir. 2003) (WOLLMAN, RICHARD ARNOLD, MURPHY*). (Defendant, who created and ran child pornography web site for profit, pleaded guilty to selling child pornography. District Court imposed conditions of supervised release prohibiting him from owning or operating any photographic equipment, computers, scanners, or printers; prohibiting him from having home Internet access; and requiring him to get his probation officer's permission if he wanted to possess computer. While these conditions might not be appropriate in case involving simple possession of child pornography, District Court did not abuse its discretion in imposing them on this defendant who created and ran child pornography website for profit.)

United States v. Crose, 284 F.3d 911 (8th Cir. 2002) (MORRIS SHEPPARD ARNOLD, BEAM, RILEY) (per curiam). (District Court committed no error, plain or otherwise, when it imposed condition as part of supervised release that defendant refrain from consumption or possession of alcoholic beverages, as defendant had serious substance abuse problem and had problem controlling himself when intoxicated, even though instant offense was not related to alcohol.)

United States v. Andis, 277 F.3d 984 (8th Cir. 2002) (MORRIS SHEPPARD ARNOLD, BRIGHT,* KYLE). (District Court exceeded its discretion by imposing conditions of release that may not bear reasonable relationship to either nature and circumstances of offense or defendant's history and characteristics. Defendant pleaded guilty to transporting minor in interstate commerce for illegal sexual activity. Objected-to conditions included prohibition on contact with minors, prohibition on employment that would bring defendant into contact with minors, prohibition on loitering in locations frequented by minors, consent to search upon reasonable suspicion of contraband or violation of conditions of release, and prohibition on use of post office box. District Court accepted these standard conditions of release recommended by probation officer without independently exercising ultimate responsibility for selecting them. DISSENT: District Court did make finding that conditions were reasonably related, and conditions are appropriate. This Court shirks its responsibility by remanding for further consideration: conditions should either be affirmed or reversed.)

United States v. Scott, 270 F.3d 632 (8th Cir. 2001) (LOKEN, RICHARD S. ARNOLD,* FAGG). (This Court reverses imposition of sex-offender conditions of supervised release. They were wholly unrelated to defendant's instant conviction for armed bank robbery, or to conduct that caused his initial term of supervised release to be revoked; they related only to his 1986 sex-offense conviction, and were therefore an abuse of discretion.)

United States v. Juan-Manuel, 222 F.3d 480 (8th Cir. 2000) (McMILLIAN,* JOHN R. GIBSON, MAGILL). (District Court imposed following supervised release condition. "If defendant is deported, his supervised release term shall be suspended during any period of time that he is outside of United States and during any period of time that he is illegally within United States and

his whereabouts [are] unknown to probation office." Congress could not have intended to allow defendant to be excluded from United States as supervised release condition, see 18 U.S.C. § 3583(d), while at same time allowing all supervised release conditions to be suspended for duration of that exclusion; further, while Congress has not expressly mentioned tolling upon deportation, it **has** expressly provided for tolling in two other specific contexts, see 18 U.S.C. § 3624(e) and (i). Thus, District Court did not have authority to impose contested condition.)

United States v. Kent, 209 F.3d 1073 (8th Cir. 2000) (McMILLIAN, LAY,* FAGG). (Conditions of supervised release should not deprive party of his or her liberty any more than is reasonably necessary to fulfill purposes of Congress and Sentencing Commission. Imposition of condition that defendant "participate in appropriate psychological/psychiatric counseling program as directed by his probation officer" was abuse of discretion and excessive infringement of defendant s liberty because District Court had no reason to believe that counseling was necessary, where, inter alia, defendant had not abused his wife within past 13 years and PSR did not report past or present mental health problems. Finally, District Court improperly delegated judicial authority by authorizing probation officer to determine whether defendant would undergo counseling; this Court limits this holding to facts of this case.)

United States v. Thomas, 198 F.3d 1063 (8th Cir. 1999) (WOLLMAN,* HEANEY, LOKEN). (Defendant raises due process challenge--on grounds of vagueness and fundamental unfairness--to condition of supervised release prohibiting him from associating with gangs. This Court declines to determine constitutional question if issue is so premature that Court would have to speculate as to presence of real injury. As defendant has not shown current, substantial controversy relating to challenged provision, his due process vagueness claim is premature and this Court declines to address it. Defendant may petition for modification of his supervised release condition before his supervised release begins.)

United States v. Behler, 187 F.3d 772 (8th Cir. 1999) (BEAM, HANSEN,* MOODY). (District Court did not abuse its discretion in (1) imposing total ban on alcohol use as special condition of supervised release where, although Behler described his use of alcohol as moderate, probation officer's confidential sentencing recommendation indicated any use of alcohol would limit Behler's ability to maintain drug-free lifestyle, and record indicated any use of alcohol is inconsistent with treatment philosophy of most substance abuse recovery programs; (2) requiring that Behler attend and pay for any diagnostic evaluation, counseling, or treatment directed by probation officer--over Behler' arguments that he had no ongoing problem warranting this imposition, and that such programs have religious component in which he cannot be forced to participate--where there was no question Behler had been abusing methamphetamine, drug that was subject of his illegal distribution offenses, and no specific treatment plan had yet been ordered to give rise to First Amendment claim at this point; and (3) requiring Behler to provide probation officer with access to financial information even though he was not ordered to pay restitution or fine: District Court understood that money and greed were at heart of offenses and believed that monitoring Behler's financial situation would aid in detecting any return to former lifestyle of drug distribution--findings that are consistent with statutory factors and Commission's policy statements.)

United States v. Cooper, 171 F.3d 582 (8th Cir. 1999) (BEAM, LAY, LOKEN*).

(Restriction on employment**.** This Court strikes as abuse of discretion special supervised release condition prohibiting defendant from employment as truck driver if it involves absence from Cedar Rapids, Iowa, for more than 24 hours. Condition effectively bars defendant from pre-detention occupation, and is not (as government argued) geographical limitation reasonably ensuring effective monitoring of defendant, but is explicit occupational prohibition bearing no relationship to defendant's offense of unlawfully transporting dangerous explosives to storage locker many years ago.

Alcohol consumption prohibition. Finding it to be close question--but upholding--condition prohibiting defendant from using alcohol and frequenting bars, taverns, or other establishments whose primary source of incomes is from alcohol sales. Despite lack of evidence linking alcohol consumption and offense of conviction, this condition must only be related to "goals of rehabilitation and protection." Here there is evidence defendant abused his family, he and his wife consumed large quantities of alcohol on weekends when he was employed as truck driver, couple argued more when he had been drinking, and defendant had propensity to violence and prior mental instability; moreover, this Court vacated special condition prohibiting defendant's employment as over-the-road truck driver--occupation particularly incompatible with alcohol consumption.

Drug and alcohol testing and treatment. Upholding condition requiring participation in testing and treatment for drug and alcohol abuse as directed by probation officer. Some testing for substance abuse is mandatory condition unless ameliorated or suspended by Court, and participation in approved substance abuse program may be imposed if Court has reason to believe defendant abuses narcotics, other controlled substances, or alcohol. Here, there was evidence defendant and wife purchased and used marijuana in home, and evidence of marijuana use was found with explosives defendant hid (underlying offense of conviction); user of controlled substances is by definition abuser.

Remaining conditions**.** Upholding conditions requiring defendant (1) to undergo mental health counseling and treatment if deemed appropriate–defendant had recent history of major depression, refusal to take anti-depressants, and dangerous conduct; (2) to participate in Batterer's Education Program if ordered by state juvenile Court–state officials were concerned by defendant's alleged domestic abuse, and condition was limited to participation ordered by state Court; and (3) to provide probation officer immediately with all waivers previously requested, and access to any requested psychiatric and medical records--this condition reasonably amplifies standard condition that defendant answer truthfully all inquiries of probation officer and follow instructions of probation officer.)

United States v. Bongiorno, 139 F.3d 640 (8th Cir.) (This Court rejects Bongiorno s challenges to special conditions of his supervised release: requirement to complete community service is expressly authorized, § 5F1.3, and this Court declines to exercise remedial discretion to review condition Bongiorno is not to consume or have anything to do with alcohol during supervised release. DISSENT: In sentencing Bongiorno, District Court imposed conditions that were clearly illegal based on this circuit s prior holdings (conditioning supervised release on Bongiorno not using or possessing alcohol; submitting to testing; subject to warrantless searches and seizures to determine whether he possessed alcohol). No evidence whatever that alcohol was in any way related to offense. Dissent unable to accede to characterization that conditions imposed did not affect Bongiorno s substantial rights; notes likelihood of successful claim counsel was ineffective for not objecting to conditions imposed.), cert. denied, 525 U.S. 865 (1998).

United States v. Bass, 121 F.3d 1218 (8th Cir. 1997). (Wakefield claims District Court abused its discretion when it placed special conditions on his supervised release which absolutely prohibit him from obtaining or consuming alcohol, subject him to testing to detect presence of alcohol in his body, and require him to submit to warrantless searches for alcohol. While district judge has wide discretion in formulating terms of supervised release, discretion is not unfettered, § 5D1.3(b). This appeal is controlled by reasoning employed in Prendergast. Here, no evidence before District Court suggesting Wakefield abused alcohol or that use of alcohol played role in crime to which he pleaded guilty. While it is uncontested Wakefield used marijuana on somewhat regular basis, no evidence he was "drug dependent," and it was incorrect for District Court to simply assume Wakefield would, as matter of course, replace alcohol for marijuana. Multiple conditions of supervised release designed to prevent Wakefield from possessing or using narcotics will hopefully serve to deter him upon release from prison, from returning to his illegal ways. Similarly, prohibition on excessive use of alcohol should cause him to refrain from immoderate consumption of that intoxicant. This Court determines supervised release terms which Wakefield finds objectionable are not reasonably related to goals of rehabilitation, protection. Conditions vacated and case remanded with instructions to eliminate these terms, but it is left to District Court s discretion whether to retain other conditions which are in accord with circuit law.)

United States v. Prendergast, 979 F.2d 1289 (8th Cir. 1992). (This Court instructs District Court to amend conditions of supervised release by eliminating provisions concerning total prohibition on all alcohol and warrantless searches for alcohol and drugs where District Court failed to make findings alcohol was contributing cause of crime or Prendergast was otherwise in need of substance abuse rehabilitation, nor was there evidence proceeds of crime were used for drug activity. District Court abused its discretion in imposing special conditions of supervised release where conditions were not fine tuned to criminal conduct or defendant.)

United States v. Smith, 972 F.2d 960 (8th Cir. 1992). (In addition to standard conditions of supervised release, District Court directed that during period of supervised release Smith shall not cause conception of another child other than to his wife unless he can demonstrate he is fully providing support to those already in existence. This Court holds special condition imposed does not meet standards of 18 U.S.C. §§ 3553 or 3563; number of children Smith has fathered is in no way related to nature and circumstances of his drug offense. Nor is there reason to believe restricting Smith from fathering more children will deter him from future criminal conduct, protect public, or assist in Smith s rehabilitation. Moreover, right to have offspring is sensitive, important area and condition is unworkable. This Court reverses and remands for resentencing, more finely tuning condition.)

United States v. Prouse, 945 F.2d 1017 (8th Cir. 1991). (Sentence for operating a commercial airplane while under influence of alcohol included supervised release, and precluded convicted pilots from piloting aircraft for one year and piloting aircraft with passengers for three years. Defendants argued power to regulate aviation resides exclusively with FAA. This Court viewed District Court s action not as usurping FAA authority, but rather as fashioning penalty reasonably related to nature of offense that would protect public.)

United States v. Sharp, 931 F.2d 1310 (8th Cir. 1991). (Condition of supervised release

subjecting Sharp to unrestricted warrantless searches to determine if he possessed alcohol or drugs was within District Court s power.)

**§ 5D1.3(d)(2) (Debt Obligations):**

United States v. Ervasti, 201 F.3d 1029 (8th Cir. 2000) (BOWMAN,* LAY, BEAM). (District Court did not abuse its direction in imposing condition prohibiting defendant from incurring new credit charges or opening additional lines of credit without prior written approval from Court (by applying through probation officer). Court ordered defendant to pay in excess of $5.7 million in restitution to more than 100 former defrauded clients; given this obligation, it was not unreasonable for District Court to insist that defendant refrain from taking on additional debt without permission.)

**§ 5D1.3(d)(5) (Mental Health Program):**

United States v. Kent, 209 F.3d 1073 (8th Cir. 2000) (McMILLIAN, LAY,* FAGG). (In order to impose participation in mental health program as condition of supervised release, District Court must have reason to believe defendant is in need of such treatment. Imposition of condition that defendant "participate in appropriate psychological/psychiatric counseling program as directed by his probation officer" was abuse of discretion because District Court had no reason to believe that counseling was necessary, where, inter alia, defendant had not abused his wife within past thirteen years and PSR did not report past or present mental health problems.)

**Part E. Restitution, Fines, Assessments, Forfeitures**

**§ 5E1.1 (Restitution/Standard of Review):**

United States v. Vanhorn, 344 F.3d 729 (8th Cir. 2003) (BYE, RICHARD ARNOLD, HANSEN*). (Restitution orders are reviewed for clear error.), cert. denied, ___ S. Ct. ____ (2004).

United States v. Young, 272 F.3d 1052 (8th Cir. 2001) (WOLLMAN, LAY, RILEY*). (District Court's finding of loss relating to restitution is reviewed for clear error. Government bears burden of demonstrating, by preponderance of evidence, amount of loss sustained by victim as result of offense.)

United States v. Cupit, 169 F.3d 536 (8th Cir.) (RICHARD S. ARNOLD, BRIGHT, WOLLMAN) (per curiam). (This Court reviews factual finding of loss relating to restitution under clearly erroneous standard, and challenge to application or construction of Guidelines de novo.), cert. denied, 528 U.S. 860 (1999).

United States v. Akbani, 151 F.3d 774 (8th Cir. 1998). (An order of restitution is reviewed under clearly erroneous standard; District Courts have wide discretion in ordering restitution.)

United States v. Riebold, 135 F.3d 1226 (8th Cir.) (This Court ordinarily reviews District Court s restitution order for abuse of discretion. However, as Riebold did not object during

sentencing hearing when Court pronounced order of restitution, nor did he even ask Court to make specific ability-to-pay findings, this Court reviews restitution order for plain error.), cert. denied, 524 U.S. 944 (1998).

United States v. Williams, 128 F.3d 1239 (8th Cir. 1997). (As Williams raises issue for first time on appeal, this Court may vacate restitution order only if District Court committed plain error.)

United States v. Berndt, 86 F.3d 803 (8th Cir. 1996). (An order of restitution is reviewed under clearly erroneous standard.)

United States v. Manzer, 69 F.3d 222 (8th Cir. 1995). (Because Manzer failed to object to restitution order at sentencing hearing, this Court reviews this issue for plain error resulting in miscarriage of justice.)

United States v. French, 46 F.3d 710 (8th Cir. 1995). (This Court reviews District Court s imposition of restitution only for abuse of discretion.)

**§ 5E1.1 (Restitution):**

United States v. Vanhorn, 344 F.3d 729 (8th Cir. 2003) (BYE, RICHARD ARNOLD, HANSEN*). (Where restitution is mandatory, District Court nonetheless has substantial discretion in determining how it is to be paid. District Court did not excessively delegate authority to Bureau of Prisons by ordering that defendant pay restitution on installment basis like Inmate Financial Responsibility Program, at rate of no less than 50% of funds available to him during his incarceration, and at rate of 10% of his gross monthly income thereafter. DISSENT: District Court was required to designate specific percentage, and its use of "no less than 50%" excessively delegates authority to Bureau of Prisons to select percentage between 50% and 100%.), cert. denied, ___ S. Ct. ____ (2004).

United States v. Johnson, 327 F.3d 758 (8th Cir. 2003) (WOLLMAN, RICHARD ARNOLD,* MELLOY). (18 U.S.C. § 3664 requires District Court to take into account defendant's ability to pay when setting schedule for restitution payments. Here, although restitution order does not explicitly refer to defendant's bankruptcy obligations, it is clear from record that District Court considered them: they were discussed in PSR, they were raised by defendant at sentencing, and they were obviously taken into account when District Court made decision to waive fine.)

United States v. Tucker, 286 F.3d 505 (8th Cir. 2002) (BOWMAN, RICHARD S. ARNOLD,* WOLLMAN). (District Court did not clearly err in ordering bank-fraud defendant to pay restitution to certain victims; however, it did err in holding him responsible for a $5,707 loss caused by individual, with whom evidence did not show defendant had any contact. Reducing restitution order by $5,707, because this amount was not de minimus.)

United States v. Young, 272 F.3d 1052 (8th Cir. 2001) (WOLLMAN, LAY, RILEY*). (Restitution order vacated. Government knew that amount of lost profits would be disputed, and warned victim that she risked not receiving restitution if she did not appear at sentencing.

Nonetheless, victim did not testify, and government presented no evidence to prove amount of lost profits. PSR recounted victim's estimate of lost profits, but contained no independent verification of it. District Court's restitution award was therefore based entirely upon speculation.)

United States v. Cupit, 169 F.3d 536 (8th Cir.) (RICHARD S. ARNOLD, BRIGHT, WOLLMAN) (per curiam). (In cases involving fraudulent-loan applications, U.S.S.G. § 2F1.1 controls amount of loss, which is greater of actual loss or amount defendant intended to inflict. Record supports District Court's finding of loss, which represented documented loss to bank that two victim/guarantors were required to pay. Cupit may not offset, against restitution obligation, claims he has against corporation that one victim guarantor owns in part, because there is no showing Cupit's claims will produce actual benefit to either victim, and claims are entirely unrelated to guarantors' obligation to bank.), cert. denied, 120 S. Ct. 149, rehearing denied, 528 U.S. 860 (1999).

United States v. Jackson, 155 F.3d 942 (8th Cir.) (Under 18 U.S.C. § 3663(a)(2) and § 3663(A)(a)(2), District Court may order restitution to every victim directly harmed by defendant's conduct in course of scheme, conspiracy, or pattern of criminal activity that is element of offense of conviction, regardless whether conduct in question was alleged in count to which defendant pleaded guilty, or was even charged in indictment. Here Jackson's fraudulent check-writing scheme caused losses to Target beyond $8,000 alleged in Count I of indictment; however, this Court reverses based on government's concession that amount awarded to Target was in error and should be reduced by certain dollar amount. Court also concludes restitution to those whose checkbooks, driver's licenses, credit cards, and social security cards were stolen in furtherance of scheme was proper, as these persons were directly harmed.), cert. denied, 525 U.S. 1059 (1998).

United States v. Akbani, 151 F.3d 774 (8th Cir. 1998). ((1) Affirming as not clearly erroneous $11,564.53 restitution order in check-kiting scheme; although District Court did not explain how it arrived at such figure, categories of loss directly attributable to check-kiting scheme amounted to $11,802.85. While this Court encourages District Courts to make specific findings of fact in determining restitution, this Court has recognized that such findings are less important when defendant does not object at sentencing to amount of restitution. (2) Holding that there is no blanket prohibition in Victim and Witness Protection Act against inclusion of attorneys' fees in calculation of restitution amount for offenses that do not result in damage to or loss or destruction of property.)

United States v. Riebold, 135 F.3d 1226 (8th Cir.) (While District Courts can order restitution even though defendant is indigent at time of sentencing, this Court encourages District Courts to make specific findings of fact regarding defendant s ability to make restitution. Here, PSR listed every victim of Riebold s scheme along with amount of loss sustained by each; individual losses total aggregate amount of $2,666,300. Riebold is not attacking this finding, but only District Court s failure to make ability-to-pay findings. This Court holds it was not plain error for District Court to order $2,666,300 restitution without making specific findings concerning Riebold s ability to pay this amount; Court takes opportunity to remind Riebold he may assert his indigency in any future proceeding to enforce restitution order.), cert. denied, 524 U.S. 944 (1998).

United States v. Mayer, 130 F.3d 338 (8th Cir. 1997). ("Outer limits" of restitution order are established by specific conduct underlying offense of conviction. Loss stipulated in Mayers plea agreement delineates outer limits of their liability. Mayers argue, and government concurs, District Court erroneously included additional $20,800 to which parties did not stipulate. Remand for recalculation of amount of restitution due.)

United States v. Williams, 128 F.3d 1239 (8th Cir. 1997). (Williams contends applying Mandatory Victims Restitution Act of 1996 to order restitution in his case violates Ex Post Facto Clause. This Court acknowledges changes wrought by Act work to Williams s disadvantage as restitution under Act is penalty. This Court holds restitution order in this case does not violate Ex Post Facto Clause because Act does not apply retrospectively here: date of offense to which Williams pleaded guilty was May 30, 1996, more than one month after Act took effect. When Williams trafficked and cloned phones on that date, he had fair warning his criminal conduct could trigger mandatory restitution under § 3663(A)(a)(3) to persons other than victims of his May 30 offense, and that is all Ex Post Facto Clause requires. No Eighth Amendment violation- contrary to Williams s view, Act requires District Court to schedule restitution payments taking into account defendant s resources, projected earnings, financial obligations. District Court may also direct defendant to make only nominal payments under appropriate circumstances.)

United States v. Stover, 93 F.3d 1379 (8th Cir. 1996). (Government argues on cross-appeal District Court abused its discretion in fashioning restitution order as it failed to identify by name victims of ordered restitution, i.e., payees. Government maintains statute and guideline require specific name and it is necessary if victims are to be able to enforce restitution order in event defendant fails to pay. Here, restitution section contains statement directly beneath heading "name of payee," "information to be submitted by probation officer." This Court holds District Court lacked authority to leave designation of payees entirely to discretion of probation office. District Courts should designate recipient(s) when ordering restitution, 18 U.S.C. § 3663. On remand, District Court is to identify payees in restitution order and to specify either amounts to be paid each victim or appropriate method of equitable distribution.

Government argues amount of restitution Stover was ordered to pay ($40,000) was so inadequate as to constitute abuse of discretion where parties acknowledged in plea agreement District Court s authority to order restitution up to full amount of loss. Government asked District Court to order restitution in full [undisputed] amount of loss or in amount of defendants ill-gotten gain ($250,000 in Stover s case). This Court agrees amount of restitution Stover was ordered to pay was low, but holds District Court did not abuse discretion in ordering Stover to pay $40,000 jointly and severally with Chandi. DISSENT: Acknowledging amount of restitution lies within discretion of trial judge, this is case in which amount of restitution required of Stover was abuse of discretion as victims loss exceeded $500,000; Stover s personal take was $250,000 and District Court made no finding she personally was unable to pay larger amount of restitution.)

United States v. Berndt, 86 F.3d 803 (8th Cir. 1996). (District Court ordered Berndt to pay $68,950 in restitution for fraud; he now claims it is too high considering his limited financial resources. Burden of demonstrating loss to victims is on government while burden of demonstrating financial resources of defendant is on defendant. District Courts have wide discretion in ordering restitution; they may impose restitution even if defendant is indigent at time of sentencing. In

determining restitution, District Court shall consider amount of loss sustained by any victim, financial resources of defendant, financial needs and earning ability of defendant, and any other factors Court deems appropriate; Courts are encouraged to make specific findings of fact regarding these factors, especially in reference to defendant s ability to pay restitution order. That Berndt pleaded guilty and did not object to sentence at hearing reduces importance of judge making specific findings about above criteria. Restitution order is only about half of loss sustained by victims of Berndt s odometer tampering. District Court competently reviewed financial resources of Berndt and his ability to pay. Restitution was fair and not clearly erroneous.)

United States v. Manzer, 69 F.3d 222 (8th Cir. 1995). (Manzer argues District Court erred in several respects in ordering him to pay $2.7 million in restitution pursuant to 18 U.S.C. §§ 3663, 3664. Manzer argued District Court erred by failing to make specific findings regarding his ability to pay. Sentencing transcript shows District Court based decision to impose restitution on PSR s assessment of Manzer s high earning potential, particularly his proven business acumen and history of successful entrepreneurship. This Court encourages District Courts to make specific findings of fact regarding defendant s financial resources, financial needs, and earning ability, and defendant s financial obligations to his or her dependents. However, District Courts have right to order restitution even though defendant is indigent at time sentence is imposed.

Manzer claims restitution order runs afoul of Hughey v. United States by basing amount of restitution on loss caused by sale of estimated 270 modification or cloning packages and he was convicted of only two counts of mail fraud, wire fraud, and copyright infringement. Because scheme or artifice to defraud is essential element of offenses of both mail and wire fraud, conviction for either can support conviction for broad scheme regardless of whether defendant is convicted for each fraudulent act within scheme. Scope of Manzer s indictment leads to conclusion it details wide-ranging scheme and artifice to defraud sufficient to encompass sale; as result, this Court finds no error, plain or otherwise.

Manzer argues District Court erred in ordering restitution for conduct which is also basis for civil judgment ($2 million in compensatory damages based on 79 separate copyright and Communications Act violations stemming from Manzer s sale of 79 modified VCII units). Manzer failed to show enforcement of restitution order would result in double recovery (i.e., due to volume of modification and cloning packages sold by Manzer, it was unclear whether 79 copyright act and Communications Act violations which formed basis of civil judgment also constituted basis of restitution order).)

United States v. Osborn, 58 F.3d 387 (8th Cir. 1995). (Osborn was sentenced to term of imprisonment and ordered to pay restitution of $43,892.20. Osborn argues District Court improperly calculated loss attributable to him and failed to make findings required by law in imposing order. Osborn argued, only check for which he should have to pay restitution is one related to count to which he pleaded guilty; he contended he had no involvement in wife s theft of checks related to three counts of indictment and checks related to four other counts were not part of same scheme or pattern of criminal activity involved in first count. This Court declines to find impropriety in amount of restitution ordered by District Court where in plea agreement, Osborn agreed to pay restitution in amount ordered by Court, including amounts associated with certain counts if Court determined all of those checks attributable to him as relevant conduct; he also agreed Court could order additional restitution for charges in four other counts. At sentencing, District Court ordered

Osborn to make restitution for half of loss incurred with wife and all remaining loss. While it would have been preferable for Court to have found explicitly all counts described criminal activity part of same scheme or pattern, such finding was implicit in Court s decision to order restitution on all counts--finding not clearly erroneous. Moreover, Osborn did not object at time to amount of restitution ordered. Osborn also challenged restitution order on ground District Court failed to make specific findings related to financial resources (18 U.S.C. § 3664(a)); he argued as Court noted his indigency in deciding not to impose fine as punishment, it was improper to order restitution in absence of those findings. Osborn s PSR included information on his financial condition; he made no objections to PSR before sentencing and at sentencing, he objected solely to computation of criminal history points. This Court finds it clear District Court considered factors listed in statute, 18 U.S.C. § 3664(b), and under those circumstances which included Osborn s agreement to order of restitution and where he made no objection at sentencing to imposition of restitution order, nothing improper in either District Court s decision Osborn should pay restitution or manner of imposing that sentence.)

United States v. Kessler, 48 F.3d 1064 (8th Cir. 1995). (Kessler s plea agreement provided he understood his sentence would be no greater than sentence imposed on one Roussin. In addition to incarceration, Roussin had been fined $25,000 and ordered to pay $25,000 in restitution. Kessler was ordered to pay $50,000 in restitution. Kessler failed to preserve argument because he made no objection at sentencing to restitution portion of his sentence. District Court did not commit plain error affecting Kessler s substantial rights in ordering him to pay $50,000 in restitution where Kessler was not fined and Roussin s fine and restitution together totaled $50,000.)

United States v. French, 46 F.3d 710 (8th Cir. 1995). (This Court holds District Court did not abuse its discretion when it ordered $50,000 restitution as it considered appropriate factors, 18 U.S.C. § 3664(a). Restitution is directly related to conviction and not, as French contends, to non-payment of notes. District Court also considered factors relating to French s financial status and in its discretion, also considered other relevant factors such as French s age, health, and potential recovery. Government bears burden to prove amount of loss; defendant bears burden to prove financial status.)

United States v. Kok, 17 F.3d 247 (8th Cir. 1994). (Kok requested restitution order be vacated because District Court failed to indicate on record it considered relevant factors set forth in 18 U.S.C. § 3664(a). PSR contained detailed information regarding Kok s assets and liabilities; Kok was furnished copy and had opportunity to comment. This Court cites U.S. v. Owens and instructs District Court to make specific findings on record concerning Kok s ability to pay restitution.)

United States v. West, 942 F.2d 528 (8th Cir. 1991). (This Court remands for further proceedings on issue of restitution where it concluded District Court did not properly take into account West s financial condition nor settlement and other credits to which West may be entitled in setting restitution amount.)

United States v. Andersen, 928 F.2d 243 (8th Cir. 1991). (Anderson argued misapplication of Guidelines where Court ordered restitution after finding her unable to pay fine. Though

Guidelines provide defendant s financial resources and needs should be considered in ordering restitution, District Court s order was based on plea agreement (holding Anderson jointly and severally liable for $42,200) and Anderson did not object at hearing.)

United States v. Mitchell, 893 F.2d 935 (8th Cir. 1990). (Failure to make informed decision on defendant s ability to pay or financial condition in determining restitution was abuse of discretion under Sentencing Guidelines. Court s order of restitution must be consistent with defendant s ability to pay and District Court must fashion payment schedule that defendant can be expected to meet.)

**§ 5E1.1(a) (Identifiable Victims):**

United States v. Owens, 901 F.2d 1457 (8th Cir. 1990). (This Court vacated restitution order and remanded for further proceedings because District Court mistakenly believed restitution was mandatory. Restitution order is to be imposed in accord with Victim and Witness Protection Act of 1982 (VWPA) which requires balancing victim s interest in compensation and defendant s circumstances. District Court did not, however, abuse its discretion in ordering indigent defendant to pay restitution. This Court noted, however, that defendant s financial resources is factor that must be considered in deciding whether to order restitution under VWPA and encouraged District Courts to make specific findings about defendants financial resources, needs, earning ability, and obligations when ordering restitution.)

**§ 5E1.2 (Fines):**

United States v. Van Brocklin, 115 F.3d 587 (8th Cir. 1997). (District Court did not make required findings of fact showing it considered relevant guideline factors, including ability to pay, in imposing $10,000 fine against Hastings. Such findings are mandatory. This Court therefore vacates Hastings s fine (and restitution order as District Courts are to consider number of factors in determining whether to order restitution, 18 U.S.C. § 36564(a), and should make specific findings of fact in regard to these factors).), cert. denied, 523 U.S. 1122 (1998).

United States v. Hines, 88 F.3d 661 (8th Cir. 1996). (Hines pleaded guilty to drug and firearm offenses. District Court sentenced him to imprisonment, supervised release, and imposed fine of approximately $300,000 based upon fact Hines will receive $1,550,000 in personal injury settlement payments over next five years. Hines challenged amount of fine and fact its terms of payment leave his wife (who recently lost her job) and stepson (who has large medical bills) with no financial support during his incarceration; his settlement payments will average only $12,500 per year until 2002. He further argued fine is excessive under Eighth Amendment. This Court holds while fine is not constitutionally excessive, District Court erred in refusing to consider burden fine will impose upon any person who is financially dependent upon defendant, namely Hines s new wife and stepson, § 5E1.2(d)(3). District Court erred in ignoring mandatory sentencing factor; Guidelines make no distinction based upon when dependents were acquired nor length of dependent relationship. This Court remands for resentencing. Panel lists concerns: record does not permit comparison between amount of immediately payable fine and Hines s present ability to pay. Terms of fine and conditions of Hines s supervised release have not been properly integrated. Amount

of fine is not constitutionally excessive--it is well within statutory maximum, consistent with Guidelines, § 5E1.2(c)(4); and additional fine for Hines s costs of incarceration is specifically authorized and clearly proportional to his crimes, § 5E1.2(i).)

United States v. Berndt, 86 F.3d 803 (8th Cir. 1996). (Berndt appealed imposition of $30,000 fine; PSR indicated Berndt possessed negative net worth of $95,000 with net monthly cash flow of $440. Government contended Berndt was hiding assets and overstating debts. Defendant has burden of proving he cannot pay fine. While District Court must take into account at least those of seven factors relevant to particular case, it need not provide detailed findings under each factor, but must provide enough information on record to show it considered factors so appellate Court can engage in meaningful review. District Court did not commit clear error in imposing fine: $30,000 fine is within range for Berndt s offense level, § 5E1.2(c)(3). Furthermore, there was substantial evidence he attempted to conceal assets for purpose of reducing amount of fine; debts Berndt claimed are also suspect. Existence of income or assets defendant failed to disclose may justify larger fine than otherwise warranted. Berndt failed to meet burden of demonstrating he will be unable to pay fine.)

United States v. Sharma, 85 F.3d 363 (8th Cir. 1996). (Sharma pleaded guilty to program fraud in amount of $101,467.89 after FBI agents received information from HUD that more than $1,000,000 had been skimmed from seven different HUD multi-family housing projects owned and operated by Sharma and several family members. District Court imposed $100,000 fine in addition to imprisonment, supervised release, and restitution; fine represented upward departure from $3,000-$30,000 called for by range. This Court reviewed District Court s imposition of fine above applicable range under three-step analysis. District Court justified upward departure on grounds Guidelines fail in any measure to reflect willful, deliberate, repetitious malfeasance of defendant in management of property, and woefully deplorable condition of property when she returned it to HUD. This Court acknowledges District Court s reason for departure may well have been appropriate, however, record is devoid of factual support for Court s reasoning. Government arrived at Sharma s [re]sentencing hearing prepared to offer testimony of witness who would establish condition of property when it was returned to HUD, whereupon Sharma s counsel requested continuance to prepare rebuttal. Request was denied and $100,000 fine was imposed without hearing evidence from either party on issue. Without record support, District Court s conclusory statements justifying departure do not afford this Court adequate basis to determine whether upward departure from fine range was based on factor not adequately considered in Guidelines. Thus, this Court vacates imposition of fine and remands for entry of further findings following introduction of such evidence as parties may offer concerning appropriateness of upward departure. This Court directs that in addition to consideration of factors set forth in § 5E1.2(d), any decision to depart upward must include explanation for both decision to depart and extent of departure.)

United States v. Aguilera, 48 F.3d 327 (8th Cir.) (District Court considered Aguilera s ability to pay fine and stated lump sum cash fine under § 5E1.2(c) was not imposed because Aguilera did not have ability to pay such fine in addition to cost of supervised release and restitution; Court found Aguilera should nevertheless be able to pay cost of supervised release after leaving prison. Aguilera contends District Court can assess "additional" fine for costs under

§ 5E1.2(i) only if it first assesses punitive fine under § 5E1.2(c). This Court rejects view requiring punitive fine to be imposed initially before imposing fine under § 5E1.2(i). Aguilera also maintained Guidelines were incorrectly applied because PSR does not support imposition of any fine at all. District Court need not itself set forth detailed analysis of defendant s financial position, but may rely on information in PSR. This Court notes District Court specifically adopted facts in PSR and found while Aguilera did not have ability to pay punitive fine, he should be able to pay cost of supervised release once he leaves prison and finds employment. This Court rejects Aguilera s argument § 5E1.2(i) exceeds Sentencing Commission s authority where he did not raise issue at sentencing and no plain error exists. DISSENT: Disagrees with conclusion District Court can assess "additional" fine for costs under § 5E1.2(i) though no punitive fine has been assessed under § 5E1.2(c). Sentencing Commission may have viewed imposition of punitive fine threshold matter with eligibility for cost-fine to have field of operation only when threshold has been passed. Commission may have thought if defendant is indigent and unable to pay punitive fine, he is also unable to pay cost-fine.), cert. denied, 516 U.S. 837 (1995).

United States v. Magee, 19 F.3d 417 (8th Cir. 1994). (Brown contended trial Court s determination he could pay $500 fine was clearly erroneous in light of fact his net worth at time of sentencing was only $1025 according to PSR. In course of sentencing hearing, trial Court in response to counsel s argument, reduced fine from $3000. Trial Court s determination Brown could pay $500 fine was not clearly erroneous where fine was less than fines imposed on his co-defendants, and although findings reflected in transcript could have been more explicit, trial Court considered factors specified in Guidelines.)

United States v. Bauer, 19 F.3d 409 (8th Cir. 1994). (Though Bauer should have objected specifically to District Court s imposition of fine, this Court concludes he adequately preserved issue for appeal as he objected to "financial situation" portions of his PSR and he testified at sentencing that PSR inflated his net worth. District Court erred in imposing $2,500,000 fine. It erred in imposing committed fine because Guidelines do not provide for committed fines. Bauer correctly noted District Court did not expressly find he had ability to pay fine--indeed, decision to waive statutory interest requirement suggests contrary finding--nor did Court explain how it took § 5E1.2 factors into account in determining amount of fine. While Court was entitled to conclude Bauer warranted larger fine because he failed to disclose his financial condition, sheer magnitude of $2,500,000 fine when compared to Bauer s known assets, lengthy prison term, and financial needs of his wife and child present problem. Countervailing factors may warrant fine in excess of Bauer s apparent ability to pay: duration, magnitude, and profitability of his drug offenses; his many years of high living at expense of victims of drug trafficking; and his attempts to conceal largesse from his criminal activities. Balancing of these conflicting factors is essential task of District Court. Thus, this Court remands for redetermination of this portion of Bauer s sentence.)

United States v. West, 15 F.3d 119 (8th Cir.) (West challenged propriety of $15,000 fine. West failed, however, to present evidence that fine is unreasonable; furthermore, fine imposed is less than minimum fine specified in Guidelines.), cert. denied, 513 U.S. 863 (1994).

United States v. Prendergast, 4 F.3d 560 (8th Cir. 1993). (Prendergast argued that District Court incorrectly applied § 5E1.2(i) by ordering him to pay cost of his supervised release as section

authorizes "additional" fine for costs of supervised release only after Court first determines that defendant has financial ability to pay punitive fine under § 5E1.2(c). Prendergast asserted that because Court concluded he was unable to pay punitive fine, it should not have imposed fine for costs of supervised release. He also argued District Court erred by imposing costs under § 5E1.2(i) because such fine is not authorized by statute. Because Prendergast did not raise these claims before District Court, this Court conducted plain-error review and concluded that District Court should be affirmed.)

United States v. Vidrickson, 998 F.2d 601 (8th Cir. 1993). (The PSR described Vidrickson s financial status and concluded that fine would be undue hardship on family. Nevertheless, District Court assessed $7500 fine, minimum fine within Vidrickson s range. District Court did not err in assessing fine where it made specific findings showing it considered mitigating factors yet concluded there were items among his assets that could be disposed of without jeopardizing welfare of his family. CONCUR: Though District Court did not err, fine will cause extreme hardship to his family and waiver would not sacrifice society s interest in punishment of offender.)

United States v. Miller, 995 F.2d 865 (8th Cir. 1993). (District Court s statements of its reasons for imposing fines sufficiently demonstrated it considered seven factors. District Court s finding that during long-running conspiracy Miller and Patterson reaped large profits which remained unaccounted, was not clearly erroneous. District Court s findings of substantial unreported assets satisfied this Court that District Court considered ability to pay fines and burden which fines would place on defendants and their dependents.)

United States v. Nelson, 988 F.2d 798 (8th Cir.) (This Court rejects Heinen s attack on his $250,000 fine as excessive on basis District Court failed to consider combined sentence. Heinen did not dispute District Court s assessment of his net worth and Court s conclusion Heinen has ability to pay fine is not clearly erroneous.), cert. denied, 510 U.S. 914 (1993).

United States v. Johnston, 973 F.2d 611 (8th Cir. 1992). (District Court made specific findings on record, taking into account appropriate factors before departing downward from specified fine range. Finding that Johnston would be able to pay $6000 fine while working in prison and after being released is not clearly erroneous.), cert. denied, 506 U.S. 1068 (1993).

United States v. Granados, 962 F.2d 767 (8th Cir. 1992). (Mora asserted $20,000. fine assessed against him was excessive. This Court remands to District Court with instructions to make specific findings of fact concerning whether Mora has assets sufficient to pay or work off assessed fine. Determination that defendant has sufficient assets must be based on more than statement to that effect in PSR.)

United States v. Cox, 942 F.2d 1282 (8th Cir. 1991). (This Court rejects Cox s contention that District Court failed to consider his ability to pay in imposing $22,000 fine at sentencing. Record indicated Court did not abuse its discretion as it considered Cox s financial circumstances and imposed fine at low end of Guidelines range.), cert. denied, 503 U.S. 921 (1992).

United States v. Cammisano, 917 F.2d 1057 (8th Cir. 1990). (Sentence vacated and cause remanded for resentencing where District Court failed to make adequate findings before imposing $25,000 fine.)

United States v. Walker, 900 F.2d 1201 (8th Cir. 1990) (per curiam). (This Court vacated fine of $2,000,000 and remanded for further proceedings because District Court failed to consider relevant factors as mandated by § 5E1.2 (formerly § 5E4.2) which resulted in incorrect application of Guidelines. Record does not indicate that District Court considered defendant s ability to pay when it assessed fine. It is incorrect application of Guidelines to impose fine that defendant has little chance of paying.)

**§ 5E1.2(c) (Amount of Fine):**

United States v. Gladfelter, 168 F.3d 1078 (8th Cir.) (McMILLIAN, JOHN R. GIBSON,* HANSEN). (Reviewing for **plain error** and upholding fine of $25,318.41--of which $7,818.41 was cost of supervised release. Fine was near bottom of Guidelines range even including cost of supervised release; Court's finding was based on defendant's participation in federal prison work program, which can provide means to pay fine; and there is no reason why defendant could not pay fine in his 22 years of incarceration and 3 years supervised release.), cert. denied, 528 U.S. 886 (1999).

**§ 5E1.2(d) (Factors in Determining Fine):**

United States v. Leigh, 276 F.3d 1011 (8th Cir. 2002) (BYE, RICHARD S. ARNOLD, BEAM) (per curiam). (Before ordering fine, District Court is required to consider any restitution defendant is obligated to pay.)

United States v. Gladfelter, 168 F.3d 1078 (8th Cir.) (McMILLIAN, JOHN R. GIBSON,* HANSEN). (Reviewing for plain error. This Court recognizes conflict in precedent on detail with which district judge must show consideration of § 5E1.2 factors: this Court has said that district judge must make specific findings as to each factor; and also that district judge need not provide specific findings under each factor, but must provide sufficient information to show it considered factors so as to permit meaningful appellate review. Here district judge made specific findings on ability to pay and explicitly adopted facts of PSR, which contained information defendant claims judge should have considered. On this record, there is no plain error in articulation of basis for fine.), cert. denied, 528 U.S. 886 (1999).

**Part F. Sentencing Options**

**§ 5F1.2 (Home Detention):**

United States v. Sykes, 46 F.3d 869 (8th Cir. 1995). (Sykes pleaded guilty to conspiracy to defraud federal government and stipulated amount of loss was $27,825. Sykes and government agreed appropriate range under Guidelines was 6 to 12 months imprisonment (§ 5A), which could be satisfied by home detention, followed by term of probation. In denying Sykes s request for

home detention, District Court referred to substantial amount of money involved, more than minimal planning, and need for punishment/deterrence. Sykes argues on appeal that because Guidelines range was determined by amount of money involved and fact of more than minimal planning, it was improper for District Court to use those considerations as basis for imposing actual imprisonment rather than home detention. Where District Court referred specifically to its desire for sentence to have deterrent effect (presumably reduced if Sykes were given home detention rather than actual imprisonment) and specific reference to amount of loss involved which was more than $20,000 minimum that determined Guidelines range, District Court was not simply duplicating considerations already used in setting appropriate guideline range; no abuse of discretion by District Court.)

**§ 5F1.5 (Occupational Restrictions):**

United States v. Coon, 187 F.3d 888 (8th Cir. 1999) (LOKEN,* HANSEN, MORRIS SHEPPARD ARNOLD). (Given defendant's long-standing and extensive history of racketeering, District Court did not abuse its discretion in prohibiting self-employment during supervised release.)

United States v. Cooper, 171 F.3d 582 (8th Cir. 1999) (BEAM, LAY, LOKEN*). (This Court strikes as abuse of discretion special supervised release condition prohibiting defendant from employment as truck driver if it involves absence from Cedar Rapids, Iowa, for more than 24 hours. Condition effectively bars defendant from pre-detention occupation, and is not (as government argued) geographical limitation reasonably ensuring effective monitoring of defendant, but is explicit occupational prohibition bearing no relationship to defendant's offense of unlawfully transporting dangerous explosives to storage locker many years ago.)

United States v. Choate, 101 F.3d 562 (8th Cir. 1996). (Choate contends District Court erred in adding as condition that he cannot maintain self-employment during term of supervised release; he contends restriction is overly broad. While restriction was general in terms, this Court finds no abuse of discretion in its imposition where Choate demonstrated he is given to excesses of salesmanship that creep up in business after business (District Court had before it evidence of three separate businesses Choate operated that all ended up perpetuating same cycle of fraud). Choate needs employment situation in which he is not left to his own devices; prohibition on self-employment seems reasonable way to protect public from Choate s practices and to channel Choate s energies into less destructive path.)

United States v. Burnett, 952 F.2d 187 (8th Cir. 1991). (This Court finds no error with restrictions prohibiting Burnett (who had been convicted of mail and wire fraud in connection with sales of vending machines) from employment in jobs involving travel and vending machine sales. This Court does not consider Burnett s argument that District Court erred in failing to consider his age in requiring him to be employed, as concurrent probation term already requires Burnett to maintain legitimate employment.)

**Part G. Implementing Total Sentence of Imprisonment**

**§ 5G1.1 (Sentencing on Single Count/Standard of Review):**

United States v. Vong, 171 F.3d 648 (8th Cir. 1999) (McMILLIAN, LAY,* MURPHY). (This Court reviews sentencing findings for clear error.)

**§ 5G1.1 (Sentencing on Single Count):**

United States v. Vong, 171 F.3d 648 (8th Cir. 1999) (McMILLIAN, LAY,* MURPHY). (Khan's adjusted offense level and criminal history category resulted in Guidelines range of 70-87 months, and statutory maximum sentence was 60 months. Although Court listed Khan's imprisonment range as 70-87 months, Court did not violate U.S.S.G. § 5G1.1, because it granted government's U.S.S.G. § 5K1.1 departure motion and sentenced him to 30 months imprisonment.)

United States v. Scott, 91 F.3d 1058 (8th Cir. 1996). (District Court was well within its discretion to depart downward on motion of government, § 5G1.1(a), to 20 years imprisonment.)

United States v. Sayers, 919 F.2d 1321 (8th Cir. 1990). (This Court affirms sentence where 60-month statutory maximum became Sayers s guideline sentence for assault (18 U.S.C. §§ 113(c), 1153) and District Court recognized its authority to depart, but chose not to.)

**§ 5G1.1(b) (Statutory Minimum Exceeds Guidelines Range):**

United States v. Washington, 318 F.3d 845 (8th Cir.) (BOWMAN, LAY, JOHN GIBSON*). (Any error in applying enhancement to offense level would be harmless because, in murder for hire resulting in death, statutory minimum penalty is life imprisonment. Statutory minimum trumps Guidelines range.), cert. denied, 124 S. Ct. 209 and 124 S. Ct. 251 (2003).

United States v. McCabe, 270 F.3d 588 (8th Cir. 2001) (WOLLMAN, MURPHY,* RILEY). (Defendant's Guidelines imprisonment range of 168-210 months was trumped by 20-year minimum under 21 U.S.C. § 851 based on prior felony drug conviction. District Court departed downward and imposed 204-month sentence. By not requesting 18 U.S.C. § 3553(c) statement, defendant waived right to appeal on ground that Court did not state reasons for imposing sentence at particular point within Guidelines range exceeding 24 months. Moreover, statutory minimum sentence trumps otherwise applicable Guidelines range; thus, Guidelines sentence became 240 months, range did not exceed 24 months, and § 3553(c) statement of reasons was not required.), cert. denied, 535 U.S. 1009 (2002).

United States v. Guerrero-Cortez, 110 F.3d 647 (8th Cir.) (Gonzalez-Gonzalez asserts District Court erred by denying him reduction for both acceptance of responsibility and for being minor or minimal participant in conspiracy and thus violated Rule 32(c)(1) of Fed. R. Crim. P.; he urges review because of importance of District Court s findings related to information in PSR to Bureau of Prisons. This Court holds it does not have authority to review District Court s denial of either reduction. Here, District Court complied with Rule 32 and ruled statutory minimum punishment of ten years applied and overrode punishment of 78-98 months as computed under Guidelines. Thus, allegedly erroneous sentencing computation under Guidelines would have no effect on Gonzalez-Gonzalez s sentence. This circuit requires only that District Courts comply

with Rule 32.), cert. denied, 522 U.S. 1017 (1997).

United States v. Carey, 898 F.2d 642 (8th Cir. 1990). (Defendant was sentenced as armed career criminal to nineteen years imprisonment and argued that departure above fifteen-year mandatory minimum was unlawful and unreasonable because § 2K2.1 would have subjected him to less than statutory minimum and that § 5G1.1(b) requires, in such case, that statutory minimum sentence be Guidelines sentence. However, District Court properly departed upward based upon defendant s criminal history and for purposes of deterrence because of his incorrigibility.)

United States v. Savage, 863 F.2d 595 (8th Cir.) (When Guidelines range is lower than statutory minimum, statutory minimum is to be Guidelines sentence, 18 U.S.C. 922(g)(1); sentence imposed was permissible both within and without new Guidelines.), cert. denied, 490 U.S. 1082 (1988).

**§ 5G1.1(c) (Any Other Case):**

United States v. Chacon, 330 F.3d 1065 (8th Cir. 2003) (HANSEN,* LOKEN, SMITH). (Where minimum sentence required by statute is greater than minimum sentence Guidelines would otherwise require, statute controls, and statutory minimum sets Guidelines minimum.)

**§ 5G1.2 (Sentencing on Multiple Counts):**

United States v. Harrison, 340 F.3d 497 (8th Cir. 2003) (BOWMAN, BEAM,* BYE). (Subsection (d), requiring consecutive sentences on multiple counts when Guidelines sentence is greater than statutory maximum for any one count, is mandatory rather than discretionary.)

United States v. Andrews, 339 F.3d 754 (8th Cir. 2003) (BOWMAN, BEAM,* BYE). (Subsection (d), requiring consecutive sentences on multiple counts when Guidelines sentence is greater than statutory maximum for any one count, is mandatory rather than discretionary.)

United States v. Alvarez, 320 F.3d 765 (8th Cir. 2002) (BOWMAN, RICHARD ARNOLD, LOKEN) (per curiam). (Making twenty-two months of 240-month sentence for second drug-trafficking conviction consecutive to 240-month statutory maximum sentence for first drug-trafficking conviction, to achieve sentence within Guidelines range, was proper and did not violate Apprendi.)

United States v. Evans, 314 F.3d 329 (8th Cir. 2002) (HANSEN, RICHARD ARNOLD, LOKEN*). (On remand for resentencing, after this Court concluded that sentences for two of seven counts exceeded statutory maximums, District Court restructured sentences on other counts in order to achieve same total punishment called for by Guidelines range. This was proper, and did not violate Double Jeopardy Clause or prohibition against vindictive sentencing, because defendant's prior appeal unbundled his sentencing package and precluded him from having expectation of finality in sentences he received on individual counts making up overall sentencing package. Vindictiveness cannot be presumed because overall sentence was not lengthened on remand. DISSENT: District Court's imposition on remand of more severe sentences on five unaffected

counts to compensate for shortened sentences on two affected counts violated defendant's right to due process.), cert. denied, 123 S. Ct. 2275 (2003).

United States v. Zimmer, 299 F.3d 710 (8th Cir. 2002) (McMILLIAN, BEAM, HANSEN*). (When sentence imposed on count carrying highest statutory maximum is less than total punishment--defined as precise sentence determined by sentencing judge from within applicable Guidelines range--then sentence imposed on one or more of other counts must run consecutively to extent necessary to produce combined sentence equal to total punishment. Defendant's 360-month sentence did not violate Apprendi v. New Jersey, 530 U.S. 466 (2000), by exceeding 240-month sentence for drug-trafficking offense simpliciter because District Court was required to run sentences for multiple counts consecutively), cert. denied, 537 U.S. 1146 (2003).

United States v. Hollingsworth, 298 F.3d 700 (8th Cir. 2002) (WOLLMAN, BEAM,* LOKEN). (Even if sentence of defendant convicted of multiple drug offenses exceeds statutory maximum under Apprendi v. New Jersey, 530 U.S. 466 (2000), this does not constitute plain error because defendant's substantial rights are not affected. Guidelines mandate that District Court run sentences consecutively to extent necessary to achieve total punishment determined by Guidelines range if statutory maximum on any one count is too low. District Court has no discretion on this matter. Thus, defendant's thirty-two year sentence amounted to no more than harmless error where his three convictions carried combined statutory maximum of sixty years), cert. denied, 123 S. Ct. 1307 (2003).

United States v. Diaz, 296 F.3d 680 (8th Cir.) (en banc). (Even if sentence of defendant convicted of multiple drug offenses exceeds statutory maximum for single offense under Apprendi v. New Jersey, 530 U.S. 466 (2000), this does not constitute plain error because defendant's substantial rights are not affected. Guidelines mandate that District Court run sentences consecutively to extent necessary to achieve total punishment determined by Guidelines range if statutory maximum on any one count is too low. District Court has no discretion on this matter, and remanding for resentencing would be idle exercise. This case resolves intracircuit split in favor of United States v. Sturgis, 238 F.3d 956 (8th Cir. 2001), by overruling in relevant part United States v. Bradford, 246 F.3d 1107 (8th Cir. 2001), and United States v. Hollingsworth, 257 F.3d 871 (8th Cir. 2001).), cert. denied, 537 U.S. 940 (2002).

United States v. Miller, 295 F.3d 824 (8th Cir. 2002) (WOLLMAN,* BOWMAN, STAHL). (Despite Apprendi v. New Jersey, 530 U.S. 466 (2000), Guidelines mandate that District Court run sentences consecutively for drug offender convicted of multiple counts to extent necessary to achieve total punishment determined by Guidelines range if statutory maximum on any one count is too low.)

United States v. Ray, 291 F.3d 1039 (8th Cir.) (WOLLMAN, LOKEN, MURPHY*). (To extent possible, total punishment for multiple offenses is to be imposed on each count. If sentence imposed on count carrying highest statutory maximum is adequate to achieve total punishment, sentences are to run concurrently. If not, sentences are to run consecutively to extent necessary to achieve total punishment), cert. denied, 537 U.S. 1036 (2002).

United States v. Caldwell, 255 F.3d 532 (8th Cir.) (WOLLMAN, HEANEY, BRIGHT) (per curiam). (Finding no plain error where sentence for defendant convicted of multiple counts could be reformed under § 5G1.2(d) to avoid Apprendi error. CONCURRENCE: Apprendi made it quite clear that stacking argument should not be available, at least in those cases where District Court did not impose consecutive sentences originally.), cert. denied, 534 U.S. 1061 (2001).

United States v. Kroeger, 229 F.3d 700 (8th Cir. 2000) (BOWMAN, MAGILL, HANSEN*). (When defendant is sentenced on multiple counts, his total punishment is not capped by statutory maximum for any one count.)

United States v. Ervasti, 201 F.3d 1029 (8th Cir. 2000) (BOWMAN,* LAY, BEAM). (Each of five counts for which Mr. Ervasti was convicted carried 60-month statutory maximum. District Court ascertained his adjusted combined offense level to be 24, placing him in total punishment range of 51-63 months, and concluded that 63 months was appropriate sentence within that range. "Total punishment," as that term in used in § 5G1.2, is precise sentence determined by District Court from within appropriate Guidelines range--in this case 63 months. Here, sentence imposed on count carrying highest statutory maximum (60 months) is less than total punishment (60 months is less than 63 months), and thus, under § 5G1.2(d), "the sentence imposed on one or more of other counts shall run consecutively, but only to extent necessary to produce combined sentence equal to total punishment." District Court did just that by determining that sentence imposed on one other count (Count 3) would be 3 months and would run consecutively to 60 months (with respect to Counts 1 and 2) to equal total punishment of 63 months; Court then correctly ordered that sentences on remaining counts (Counts 4 and 5) should run concurrently with sentence on Count 3 so as not to exceed "total punishment.")

United States v. McKnight, 17 F.3d 1139 (8th Cir.) (Judgments of conviction on counts regarding misrepresentation of social security number were reversed. Court noted, however, each defendant received sentences on false misrepresentation counts that are being served concurrently with convictions on other counts which were affirmed. Because sentences in reversed counts were ordered to be served concurrently to sentences on other counts which were affirmed, it was not necessary to remand for resentencing. One judge would have remanded to determine whether vacation of misrepresentation counts would have affected District Court s decision; Court had used top of Guideline range in rendering concurrent sentence in this case. Judge cited pre-Guidelines cases for desirability of remand for resentencing when concurrent sentences are vacated because of likelihood District Court fashioned "sentencing package." Concurring judges point out that convictions were grouped under § 3D1.2(d) and none of adjustments made to base offense level relied on now-vacated convictions. Thus, District Court s use of now-vacated convictions had no effect on determination of any of defendants Guidelines ranges. Moreover, facts concerning defendants possession of false identification materials would still have been relevant information for Court to consider its sentencing because of their relevance to other counts of conviction. Because defendants do not and cannot contend that now-vacated conviction caused District Court to apply wrong Guidelines range, and because they do not and cannot challenge any departure from Guidelines range because it is not departure case, Court need not inquire whether vacated convictions affected District Court s selection of sentence imposed.), cert. denied, 513 U.S. 907 (1994).

United States v. Edwards, 994 F.2d 417 (8th Cir. 1993). (The use of different weapons at different times--even if for same general criminal purposes--constituted two separate § 924(c) offenses for which consecutive sentences may be imposed.), cert. denied, 510 U.S. 1048 (1994).

United States v. Freisinger, 937 F.2d 383 (8th Cir. 1991). (This Court holds for sake of uniformity in federal sentencing scheme, where multiple section 924(c)(1) convictions are based upon carrying or use of more than one firearm during single underlying offense, District Court should impose sentence of five years on each firearms conviction and order them to run concurrently. Case remanded for resentencing.)

**§ 5G1.3 (Defendant Subject to Undischarged Prison Term/Standard of Review):**

United States v. Terry, 305 F.3d 818 (8th Cir. 2002) (RILEY, BEAM, MELLOY*). (This Court reviews de novo question which subsection applies to defendant's situation.)

United States v. Lyons, 47 F.3d 309 (8th Cir. 1995). (This Court reviews District Court s application of § 5G1.3 de novo.)

United States v. French, 46 F.3d 710 (8th Cir. 1995). (Issue of whether French was subject to undischarged term of imprisonment involves construction of Guidelines; consequently, this Court reviews de novo.)

United States v. Duranseau, 26 F.3d 804 (8th Cir.) (This Court reviews reasonableness of upward departure based on circumstances not adequately considered in Guidelines for abuse of discretion.), cert. denied, 513 U.S. 939 (1994).

United States v. Brewer, 23 F.3d 1317 (8th Cir. 1994). (This Court reviews de novo whether District Court properly applied subsection (c) to its imposition of Brewer s sentence.)

United States v. Gullickson, 981 F.2d 344 (8th Cir. 1992). (This Court reviews District Court s application of guideline de novo.)

**§ 5G1.3 (Defendant Subject to Undischarged Prison Term):**

United States v. Harris, 324 F.3d 602 (8th Cir.) (BOWMAN,* MORRIS ARNOLD, RILEY). (Because defendant was on parole for state felonies when he committed federal felonies, either § 5G1.3(a) or § 5G1.3(c) could apply; and, given this circuit's interpretation of Application Note 6, either would require that defendant's federal sentence run consecutive to his state sentence. § 5G1.3(b) did not apply because federal charges were not for same criminal conduct as state charges, nor were state charges for conduct necessarily included in federal charges.), cert. denied, 124 S. Ct. 209) (2003).

United States v. Sumlin, 317 F.3d 780 (8th Cir. 2003) (MORRIS ARNOLD, SMITH, BOGUE*). (While on probation for state drug-possession conviction, defendant committed new act of drug trafficking and was convicted and sentenced in federal court to fourteen years in prison.

District Court made federal sentence consecutive to state sentence defendant would serve when his probation was revoked (which had not happened yet). Doing so was legally permissible, as recognized in analogous case of United States v. Mayotte. Moreover, Application Note 6 to § 5G1.3(c) mandates consecutive sentences, as recognized in United States v. Smith.)

United States v. Plumley, 207 F.3d 1086 (8th Cir. 2000) (WOLLMAN,* F. GIBSON, MURPHY). (Finding no reversible error where, although District Court incorrectly concluded it lacked discretion to impose concurrent sentence under § 5G1.3(c), Court made clear that it would not have done so anyway, and sentence actually imposed was consistent with Guidelines.)

United States v. Otto, 176 F.3d 416 (8th Cir. 1999) (BEAM, HEANEY, FENNER*). (At sentencing Otto requested downward departure on basis that his offense conduct included Kansas conviction for which he had already served time and for which District Court thus could not credit him with time served. See U.S.S.G. § 5G1.3(b). District Court denied departure. This Court rejects argument that District Court was misled by government's erroneous argument that bureau of prisons could be directed to give credit for time served: judges are presumed to know and apply law in making decisions, and presumption that District Court knew bureau of prisons lacked authority to credit Otto with time served is supported by lack of any suggestion by District Court that bureau of prisons give such credit. This Court also rejects argument that § 5G1.3(b) violates equal protection by mandating credit for undischarged sentences but not for discharged sentences. In absence of suspect classification, legislative distinction is required only to have rational basis to survive due process challenge. With undischarged sentences, there is uncertainty as to time defendant will actually serve whereas there are no such contingencies in regard to discharged sentence, and thus it is rational to treat two differently.)

United States v. Moore, 160 F.3d 509 (8th Cir. 1998) (RICHARD S. ARNOLD, WOLLMAN, MURPHY) (per curiam). (Moore was sentenced to 7 years imprisonment for state offense, and was later released on probation. While he was serving his probation, he committed federal offense at issue here; accordingly, probation was revoked and he was ordered to serve remainder of his state sentence. District Court did not err in imposing federal sentence consecutively to undischarged state sentence.)

United States v. Comstock, 154 F.3d 845 (8th Cir. 1998). (Comstock argues District Court violated Ex Post Facto Clause when it used 1995 version of § 5G1.3(c) to deny his request for concurrent sentences, rather than 1993 version which was in effect at time Comstock committed offenses. Reviewing for plain error, this Court agrees with Comstock and reverses.

Under 1995 Guidelines, sentence could be imposed concurrently, partially concurrently, or consecutively to undischarged state sentences to achieve reasonable punishment for federal offenses. Thus Comstock faced total punishment on state and federal convictions of 54 months imprisonment (12 months already served on state sentences, plus 12 months remaining to be served, plus 30 months on consecutive federal sentence).

Under 1993 Guidelines, sentence was to be imposed consecutively to undischarged sentence to extent necessary to achieve reasonable *incremental* punishment; under applicable 1993 commentary, District Court was to sentence Comstock as if he were being sentenced on federal and state convictions at same time under Guidelines, which in this case would result in Comstock s

facing only 30-37 month range. Thus, applying 1995 Guidelines clearly violated Ex Post Facto Clause, and despite government's argument that District Court could depart upward, it is unclear from record whether Court would have done so.)

United States v. Lange, 146 F.3d 555 (8th Cir. 1998). (Lange, convicted of bank fraud, appeals sentence to be served consecutively to state sentence she is serving for bank fraud arguing state conviction was fully taken into account in determining her offense level. While it was taken into account in calculating criminal history, offense level is treated separately. Events underlying state conviction were not taken into account as "relevant conduct" under § 1B1.3 and so were not taken into account in determining her offense level. Reviewing application of § 5G1.3 de novo, this Court finds no error.)

United States v. Van Thournout, 100 F.3d 590 (8th Cir. 1996). (Where plea agreement required government to recommend concurrent sentences and government breached, this Court remands for specific performance of plea agreement though District Court would be under no obligation to follow government s recommendation of concurrent sentences and may reimpose consecutive sentences under § 5G1.3(c). This Court also notes fact that recommendation of concurrent sentences may have constituted departure below applicable statutory mandatory minimum, plea agreement may impose duties on government over and above those imposed by statute.)

United States v. Murphy, 69 F.3d 237 (8th Cir. 1995). (District Court imposed 70-month concurrent terms for drug trafficking and machine gun crimes, to run consecutive to any undischarged Missouri sentence; Court also sentenced Murphy under 18 U.S.C. § 924(c) to 60-month consecutive term for use of firearm in relation to those drug trafficking offenses. As to § 924(c) 60-month consecutive term, Murphy cited no authority to support argument sentence under statute should be concurrent; section is unequivocal. Not only is this term consecutive to drug charge for which Murphy was sentenced, but also to any other term of imprisonment which includes his second degree murder sentence. Though District Court did not specify, this Court believes it evident Court employed § 5G1.3(a) (at time of Murphy s commission of federal offenses, he was released on parole and under legal custody of state with unreduced sentence for second degree murder; hence, he was serving undischarged term of imprisonment within meaning of subsection 5G1.3(a). Once subsection 5G1.3(a) applies, inquiry is ended as structure of § 5G1.3 contains sequential provisions; thus, (c) is applicable only if subsections (a) and (b) do not govern. Murphy made no effort to demonstrate subsections (a) and (b) do not apply. Murphy contends under § 5G1.3(c) District Court should have constructed hypothetical sentencing calculation in accord with § 5G1.2, combining 1977 state murder conviction with 1994 federal charges, as if all were federal crimes being sentenced at same time. This Court distinguishes cases cited by Murphy and holds no error in sentencing Murphy to 70-month concurrent terms on drug trafficking and machine gun charges and 60 month consecutive term for firearms charge, both to run consecutive to any undischarged term of state imprisonment.), cert. denied, 516 U.S. 1153 (1996).

United States v. Marsanico, 61 F.3d 666 (8th Cir. 1995). (In September 1992, Marsanico was sentenced to 41 months imprisonment for wire fraud in W.D. Wash.; in June 1994, Marsanico was faced with criminal complaint charging him with bank fraud from E.D.N.Y. and he consented

to disposition in W.D. Mo. He pleaded guilty to bank fraud and government filed § 5K1.1 motion stating sentence of imprisonment that would run concurrently with Marsanico s undischarged Wash. sentence would be appropriate. District Court denied motion for downward departure and sentenced Marsanico to 21 months, to be served consecutively to his undischarged sentence. Marsanico appeals sentence, arguing violation of Guidelines: District Court was required to fashion sentence for N.Y. conviction that Marsanico would have received if he would have been sentenced for N.Y. conviction and Wash. conviction at same time. While Marsanico did not properly preserve issue for appeal, failure to calculate his sentence under § 5G1.3(c) would result in miscarriage of justice. Both Wash. and N.Y. offenses involve fraud and deceit and therefore would have been grouped together (§§ 2F1.1, 3D1.2(d), 3D1.3(b)); hypothetical total sentence Marsanico would have received would have been in 33-41 month range. Because Marsanico received 41-month sentence for Wash. conviction, top of range for hypothetical total sentence, § 5G1.2(c) requires sentence for current conviction to run concurrently with undischarged sentence (otherwise, Marsanico would have 62-month term of imprisonment, exceeding hypothetical sentence). Thus, Marsanico should have been sentenced to 17-month term to run concurrently. District Court may, however, depart from Guidelines when sufficient justification exists and provide specific reasons for doing so. This Court vacates Marsanico s sentence and remands for resentencing because at sentencing, District Court did not indicate it was departing upward and from record, it is unclear what specific factors Court relied upon when imposing consecutive sentences.)

United States v. Lyons, 47 F.3d 309 (8th Cir. 1995). (Lyons argued District Court should have applied subsection (b) as he contended his Nevada offenses and his possession of firearms arose out of single course of conduct and he should be given credit for time already served in state custody. This Court decides District Court s application of subsection (c)--making Lyons s federal sentence concurrent with remainder of his unexpired state sentence--achieved desired results of giving him some sentencing credit for overlap in his state and federal offense conduct, and also of imposing some incremental punishment for instant offenses. Lyons s base offense level was solely result of his armed-career-criminal status and Nevada offenses were not considered (subsection (b) allows adjustment for prison time already served as result of conduct fully taken into account in determining sentence for instant offense).)

United States v. French, 46 F.3d 710 (8th Cir. 1995). (On cross-appeal, government contended District Court erred in crediting French with time served on state perjury sentence while French was on parole. Considering South Dakota law, this Court determined French was subject to undischarged term of imprisonment in connection with state conviction (state has retained custody of French until termination of his ten-year sentence) and state s retention of custody means French is subject to "undischarged term of imprisonment" within meaning of § 5G1.3(b). District Court also determined French s perjury in South Dakota divorce case was part of relevant conduct for which federal sentence was imposed; no clear error in finding perjury before divorce Court was relevant conduct because it was part of same course of conduct that resulted in federal fraud and perjury convictions. Accordingly, this Court affirms District Court s crediting French with time served in connection with his state conviction.)

United States v. Sather, 28 F.3d 821 (8th Cir.) (Though both Sather and government contended case should be remanded to allow District Court to clarify whether federal sentence

should run concurrently with or consecutively to several state sentences, this Court believes remand unnecessary. District Court stated it specifically did not make federal sentence concurrent with any other sentence. Because Court did not consider conduct supporting state s sentences when it calculated Sather s offense level, it was not required to make his federal sentence concurrent to his state sentences, § 5G1.3(b). DISSENT: It is not good use of this Court s time and effort to decide questions that both parties agree should be sent back to District Court for reexamination.), cert. denied, 513 U.S. 1006 (1994).

United States v. Duranseau, 26 F.3d 804 (8th Cir.) (At time of sentencing, Duranseau was serving 74-month sentence for Michigan offenses. Duranseau argued District Court improperly applied Guidelines when it granted government s motion for upward departure by sentencing him to 98-month sentence to run concurrently with prior 74-month sentence; he argued Court misapplied guideline and failed to give any indication it was departing upward based on analysis of 18 U.S.C. § 3553. Court determined hypothetical total sentence Duranseau would have received had he been sentenced for both Iowa and Michigan offenses at same time (33-41 months). District Court determined that in order for Duranseau to receive any extra prison time for Iowa offense, it must depart upward. District Court did not abuse its discretion when it departed upward as it noted criminal history category did not adequately reflect likelihood Duranseau would continue to commit crimes once released and impact of crime on victim was not adequately taken into consideration in Guidelines. Each of these reasons supported District Court s upward departure which mirrored elements stated in § 3553. District Court determined Duranseau was career criminal who had obtained multiple aliases and had made his livelihood by stealing and other forms of illegal activity; he had propensity to continue to commit crimes and there was high likelihood he would return to his prior criminal pattern when released from prison. Further, District Court determined Duranseau s Iowa offense caused victim loss of between $40,000 and $60,000 and forced victim to shut down his 43-year-old jewelry business.), cert. denied, 513 U.S. 939 (1994).

United States v. Haney, 23 F.3d 1413 (8th Cir.) (Haney was found guilty of possession of firearm by felon, possession with intent to distribute crack, and use of firearm during drug trafficking crime. Haney asserted District Court improperly applied section in ordering his federal sentence run consecutively to his undischarged state sentence for attempted armed robbery first degree and armed criminal action and that, instead, Court should have imposed concurrent sentence; specifically, Haney contends for purposes of § 5G1.3(c), Court erred in finding that 18 U.S.C. § 924(c) was federal analog to Missouri offense of armed criminal action, Mo. Rev. Stat. § 571.015. Aim of § 5G1.3(c) is for District Court to fashion total sentence roughly equivalent to what defendant would have received if he had been sentenced at same time in federal Court for all relevant offenses, both state and federal, as if they had been federal offenses. Section 571.015 is utilized as sentence enhancement provision comparable to § 924(c). Term of imprisonment resulting from hypothetical guideline produced by § 5G1.3 analysis includes consecutive term of 20 years for Haney s second § 924(c) conviction. Had all Haney s offenses been federal, he would have been subject to statutorily mandated 20-year consecutive sentence for second § 924(c) conviction. Therefore, Haney will serve lesser sentence in present case than if prior attempted robbery and armed criminal action offenses had been federal offenses, and thus sentence imposed complies with § 5G1.3(c); District Court did not err in sentencing Haney to 175-month term of imprisonment to run consecutively to his state sentence.), cert. denied, 513 U.S. 898 (1994).

United States v. Brewer, 23 F.3d 1317 (8th Cir. 1994). (Brewer contends District Court improperly applied § 5G1.3(c) when it imposed 13-month consecutive sentence, thus failing to impose reasonable incremental punishment. Brewer, who pleaded guilty to false and fraudulent use of social security number and who at time of sentencing was serving undischarged state-imposed sentence, received 20-month concurrent and 13-month consecutive sentence. State charge was for theft of money resulting from same fraudulent activity giving rise to federal crime. Despite District Court s uncontested determination that reasonable incremental punishment for combined offenses would be 37 months imprisonment, Court reasoned Brewer s indeterminate state sentence precluded accurate imposition of such penalty. District Court then made "educated guess" resulting in failure to impose reasonable incremental combined punishment required by section. District Court may depart from mandate imposed by § 5G1.3 but it may not do so without justifying such departure. Moreover, this Court holds subsection (c) interprets guideline and thus is authoritative and binding on Courts. Illustrations to § 5G1.3 commentary provides District Court with guidance; applying steps would impose upon defendant total sentence that would be no longer than sentence he would have received had all offenses been prosecuted in federal Court, thus properly implementing section s purpose. This Court vacates Brewer s sentence and remands to District Court as sentence potentially imposed less than reasonable incremental punishment or greater incremental punishment than District Court found reasonable; thus, sentence represented improper application of § 5G1.3.)

United States v. Kiefer, 20 F.3d 874 (8th Cir. 1994). (Kiefer argued that when District Court reduced his sentence under § 5G1.3(b) for time served in state prison, it erred by refusing to go below applicable mandatory minimum of 18 U.S.C. § 924(e)(1). Sentence reduction for full 14 1/2 months he spent in state custody prior to his federal conviction would result in federal sentence 6½ months less than 180-month minimum mandated by § 924(e)(1). Therefore, instead of reducing Kiefer s sentence by entire period he served in state prison, Court reduced it by 8 months to 180-month mandatory minimum. As Kiefer seeks to invoke Guidelines provision to reduce his federal sentence, District Court had jurisdiction. This Court rejects government s argument that this is sentence credit question committed to primary jurisdiction of Bureau of Prisons. This Court concludes there would be no violation of plain language of § 924(e)(1) and that various sentencing statutes would be properly harmonized, if § 924(e)(1) were construed to permit District Court to give Kiefer sentence credit under § 5G1.3(b). Section 924(e)(1) does not forbid concurrent sentencing for separate offenses that were part of same course of conduct. Thus, this Court concludes time previously served under concurrent sentences may be considered time "imprisoned" under § 924(e)(1) if Guidelines so provide. Therefore, District Court erred in stating it had no discretion under § 5G1.3(b) to reduce Kiefer s mandatory minimum sentence for time he served in state prison as result of same course of conduct. Judgment reversed, case remanded for resentencing.)

United States v. Washington, 17 F.3d 230 (8th Cir.) (Washington contended District Court erred by failing to order that his sentence run concurrently with Missouri sentence imposed upon his conviction for armed jewelry store robbery, which was based on same conduct at issue here. Subsection (b) is applicable because District Court fully considered conduct supporting Missouri sentence when it calculated Washington s offense level; thus, District Court was required to make Washington s federal sentence run concurrently with his undischarged Missouri sentence. Because judgment is silent on this issue, this Court remands with instructions.

District Court judgment was also silent concerning Washington s undischarged California sentence. Because record does not clearly reveal what action California authorities took (person may be considered "escapee" when his parole is revoked, until his return to custody), District Court may be authorized under subsection (a) to order federal sentence to run consecutively to California sentence or is otherwise authorized to fashion consecutive sentence. On remand, District Court is instructed to consider and expressly state whether federal sentence should be served consecutively to or concurrently with undischarged California sentence.), cert. denied, 513 U.S. 852 (1994).

United States v. Bell, 12 F.3d 139 (8th Cir. 1993). (District Court did not err in imposing consecutive 75-month sentence for bank robbery following sentence imposed for violating terms of supervised release.)

United States v. Muzingo, 999 F.2d 361 (8th Cir.) (District Court first constructed hypothetical guideline produced by assuming that all relevant offenses, both state and federal, were federal offenses (commentary (n.3)). When it did that, however, resulting sentence fell below state sentences that Muzingo was already serving. Nevertheless, District Court directed entire 37-month sentence for bank larceny and possession of machine gun should run consecutively to state sentence, justifying its decision as departure under four different Guidelines (e.g., devastating physical and psychological injury to victim, extremely heinous, cruel and brutal nature of Muzingo s conduct, and extreme dangerousness of weapon and manner in which it was used).), cert. denied, 510 U.S. 1002 (1993).

United States v. Gullickson, 981 F.2d 344 (8th Cir. 1992). (District Courts do not have discretion under § 3584(a) to order federal sentences to run consecutively to unexpired state sentences when § 5G1.3(c) directs that consecutive sentence is not necessary to allow imposition of sentence within total punishment range. Statute and guideline can be harmonized; guideline qualifies statute by requiring Court to consider guideline departure before deviating from sentence mandated by § 5G1.3. Gullickson s sentence vacated; on remand, if sufficient justification for departure does not exist, federal sentence should run concurrently to state sentences--if justification for departure does exist, Court may order federal sentence to run consecutively to state sentences to extent it deems necessary.)

United States v. Prendergast, 979 F.2d 1289 (8th Cir. 1992). (District Court sentenced Prendergast to eighteen-month term to be served consecutively to state sentence. At time of sentencing, guideline gave Court broad discretion to impose consecutive or concurrent term. District Court did not abuse its discretion.)

United States v. Griebe, 959 F.2d 714 (8th Cir. 1992). (District Court did not abuse its discretion in deciding to order Griebe s federal sentence to run consecutive to his unexpired state sentence where sentencing transcript indicates Court provided adequate explanation for its sentence and considered factors set out in § 3553(a).)

United States v. Whitehorse, 909 F.2d 316 (8th Cir. 1990). (District Court acted within its discretion to find purposes of Guidelines would be ill-served by sentencing Whitehorse to prison time for escape beyond that mandated for assault.)

United States v. Smitherman, 889 F.2d 189 (8th Cir.) (Sentencing judge did not err in sentencing defendant to consecutive sentences on two other convictions since imposition of concurrent or consecutive sentences is within discretion of Court and record did not indicate that judge had not considered relevant factors set out in 18 U.S.C. § 3553(a).), cert. denied, 494 U.S. 1036 (1989).

United States v. Darud, 886 F.2d 1034 (8th Cir.) (per curiam). (Sentence arising out of 1983 conviction not same transaction as 1987 offenses resulting in revocation of parole; thus sentences are consecutive.), cert. denied, 493 U.S. 1031 (1989).

**§ 5G1.3(a) (Consecutively):**

White v. United States, 308 F3.d 927 (8th Cir. 2002) (HANSEN,* MORRIS S. ARNOLD, PRATT). (Because defendant was on probation when he conspired to distribute methamphetamine--which formed basis of instant conviction--and his probation was revoked, District Court was required to run his sentence for drug charge consecutive to his probation-revocation sentence.)

United States v. Smith, 282 F.3d 1045 (8th Cir. 2002) (LOKEN,* LAY, RILEY). (If defendant committed instant offense while serving prison term for another offense, new sentence must be consecutive to any undischarged term for that other offense.)

United States v. Jones, 195 F.3d 379 (8th Cir. 1999) (BEAM, HEANEY, FAGG*). (Jones argues District Court erred in failing to give him credit for time he served on undischarged state term of incarceration. Because Jones committed part of federal drug conspiracy offense while on parole for state drug conviction, § 5G1.3(a) applies, and § 5G1.3(b) does not. This Court concludes District Court did not commit error, much less plain error, in failing to apply § 5G1.3(b)).

**§ 5G1.3(b) (Concurrently):**

United States v. Terry, 305 F.3d 818 (8th Cir. 2002) (RILEY, BEAM, MELLOY*). (This subsection did not apply because defendant's state crimes for which he was serving undischarged terms of imprisonment, although involving conduct related to instant federal offense, were not used in determining his offense level or criminal history.)

United States v. Smith, 282 F.3d 1045 (8th Cir. 2002) (LOKEN,* LAY, RILEY). (If § 5G1.3(a) does not apply, and if undischarged term result from offense that is fully taken into account in determining defendant's offense level, new sentence must be concurrent with any undischarged term for that other offense.)

**§ 5G1.3(c) (Concurrently, Consecutively, or Partially Each):**

United States v. Jackson, Nos. 03-1638/1723 (8th Cir. 2004) (BYE, LAY, SMITH*). (District Court did not err in running federal sentence consecutively to defendant's state sentences. State offenses were not "fully taken into account" because defendant was sentenced under armed career criminal Guideline, under which those state offenses were irrelevant.)

United States v. Caldwell, 339 F.3d 680 (8th Cir. 2003) (MELLOY, HANSEN, SMITH*). (Application Note 6 requires that defendant's federal sentence run consecutively to his state parole revocation sentence.)

United States v. Hambrick, 299 F.3d 911 (8th Cir. 2002) (WOLLMAN, LOKEN, MURPHY) (per curiam). (District Court did not abuse its discretion in making defendant's six-month sentence for escape from federal custody consecutive to his undischarged term of imprisonment for supervised-release-revocation sentence he received for subsequent incident of absconding from supervision. Sentences reflected separate incidents of misconduct. Application Note 6, while not controlling, strongly supports consecutive sentence in this situation.)

United States v. Smith, 282 F.3d 1045 (8th Cir. 2002) (LOKEN,* LAY, RILEY). (Defendant's state parole was revoked, and he was also sentenced in federal court for new offense. District Court erred in making federal sentence concurrent with parole-revocation sentence. Discretion afforded under § 5G1.3(c) is restricted by Application Note 6, and although Application Note 6 uses word "should," it requires that new sentence must be consecutive to probation-revocation, parole-revocation, or supervised-release-revocation sentence. DISSENT: "should" connotes discretion.)

United States v. Goldman, 228 F.3d 942 (8th Cir. 2000) (LOKEN, FAGG,* MORRIS SHEPPARD ARNOLD). (Broad discretion afforded District Court by this section in determining whether sentence should be concurrent or consecutive is limited by Application Note 6, which this Court construes as mandatory. For defendant whose state parole was revoked after being arrested for federal offense, District Court erred by making federal sentence concurrent; sentence must be consecutive.), cert. denied, 531 U.S. 1175 (2001).

United States v. Robinson, 217 F.3d 560 (8th Cir.) (BOWMAN,* HANSEN, CARMAN). (Defendant pleaded guilty to state offense but had not yet been sentenced for it, and conduct underlying that offense was not taken into account in determination of offense level for instant offense; thus broad directive of U.S.S.G. § 5G1.3(c) to formulate reasonable sentence applied. Here District Court considered factors of 18 U.S.C. § 3553(a) as required, and this Court cannot conclude District Court's decision to impose sentence consecutively to undischarged state term of imprisonment was unreasonable.), cert. denied, 531 U.S. 999 (2001).

**Part H. Specific Offender Characteristics**

**§ 5H1.1 (Age):**

United States v. Hildebrand, 152 F.3d 756 (8th Cir.) (Government challenged departure based on District Court's conclusion that seventy-year-old Zurcher had life-threatening health conditions. Because age is discouraged departure factor, departure is permissible only if factor is present to exceptional degree or in some other way makes case different from ordinary case where factor is present. Here government failed to show home confinement would not cost less than imprisonment, and expert testified BOP could manage Zurcher's conditions only at certain facilities and with accommodations. Although issue is close District Court did not abuse its departure

discretion.), cert. denied, 525 U.S. 1033 (1998).

United States v. Kessler, 48 F.3d 1064 (8th Cir. 1995). (Kessler filed motion for downward departure based on his age and health. Upon review of record, this Court believed District Court s refusal to depart downward was exercise of discretion and District Court s discretionary refusal to depart downward is not reviewable. While Kessler argued he was deprived of opportunity to respond to government s argument opposing his departure motion, he remained silent when District Court gave parties opportunity to make further statements before ruling on motion.)

United States v. Rimell, 21 F.3d 281 (8th Cir. 1994). (District Court did not err in refusing to reduce Rimell s sentence based on his age. It considered his age and concluded it was not relevant and that he was in good physical condition. Indeed, Rimell testified he wanted to work and repay banks; no evidence Rimell is "infirm."), cert. denied, 513 U.S. 976 (1994).

United States v. Goff, 20 F.3d 918 (8th Cir.) (HEANEY, FAGG, LOKEN*). (Downward departure based on age was not justified for sixty-seven-year-old man in good health.), cert. denied, 513 U.S. 987 (1994).

**§ 5H1.2 (Educational and Vocational Skills):**

United States v. Dyck, 334 F.3d 736 (8th Cir. 2003) (HANSEN,* WOLLMAN, BYE). (District Court improperly departed downward on basis of defendant's Mennonite upbringing and resulting naivete about ways of world. Defendant had modest educational level and clearly knew difference between right and wrong.)

United States v. Desormeaux, 952 F.2d 182 (8th Cir. 1991). (While Desormeaux s attainment of her GED is commendable, her post-arrest achievement is not sufficiently extraordinary to warrant downward departure. This Court notes its agreement with circuits which have held defendant s post-offense rehabilitative conduct is equivalent to acceptance of responsibility.)

**§ 5H1.3 (Mental and Emotional Conditions):**

United States v. Desormeaux, 952 F.2d 182 (8th Cir. 1991). (While three years before stabbing, Desormeaux was involved in relationship with man who she claimed physically and emotionally abused her, abuse was too attenuated to justify departure in this case. Desormeaux s mental and emotional condition may be taken into account by District Court in deciding which sentence it should impose within Guidelines range.)

**§ 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse/ Standard of Review):**

United States v. Rabins, 63 F.3d 721 (8th Cir. 1995). (Whether defendant has extraordinary

physical impairment is question of fact to be decided by District Court. This Court will not disturb Court s conclusion unless it is clearly erroneous.), cert. denied, 516 U.S. 1153 (1996).

**§ 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse):**

United States v. Johnson, 318 F.3d 821 (8th Cir. 2003) (WOLLMAN,* BRIGHT, JOHN GIBSON). (District Court departed downward by five years based on defendant's physical condition: coronary heart disease, hypertension, and Hodgkin's disease. Medical testimony at sentencing was that treatment had left defendant with near-normal present heart function and 10-20% chance for heart problems in next five years, and that his Hodgkin's disease had been successfully treated years ago and was in remission. Evidence showed that Bureau of Prisons provided adequate health care in these areas and that defendant's condition was not significantly different from other inmates' ailments. This Court concludes that departure was abuse of discretion because prison would be no greater than normal hardship for defendant, imprisonment would not subject defendant to greater than normal inconvenience or danger, and defendant's condition does not have substantial present effect on his ability to function. DISSENT: majority fails to defer to District Court in this case and fails to provide guidance for District Courts in future cases.)

United States v. Orozco-Rodriguez, 220 F.3d 940 (8th Cir. 2000) (RICHARD S. ARNOLD, HEANEY, LOKEN*). (Defendant argues District Court, which heard testimony by two doctors and defendant concerning defendant's back and leg pain, erred by employing overly rigorous standard for "extraordinary physical impairment." As District Court knew of its authority to depart under § 5H1.4 or another Guideline, this Court concludes refusal to depart downward was exercise of District Court's sentencing discretion that is unreviewable.)

United States v. Eagle, 133 F.3d 608 (8th Cir. 1998). (Eagle, 42-years old, asserted District Court should have departed downward because of his numerous physical limitations including glaucoma, septic arthritis, uncontrolled hypertension, possible avascular necrosis, degenerative arthritis. District Court s refusal to depart downward was exercise of discretion where Court acknowledged Eagle s serious health problems, but found no evidence his disability prevents him from being managed in prison. Discretionary refusal to depart downward is not reviewable.)

United States v. Uder, 98 F.3d 1039 (8th Cir. 1996). (Uder argued District Court abused its discretion by failing to depart downward based on extraordinary physical impairment. As District Court was aware of its authority to grant downward departure, but declined to do so, this Court lacks authority to review that exercise of discretion not to depart.)

United States v. Rabins, 63 F.3d 721 (8th Cir. 1995). (Following his plea of guilty to conspiracy to distribute methamphetamine, District Court calculated Johnson s guideline range at 97-121 months with mandatory minimum of 120 months. Government moved for departure under § 5K1.1 and § 3553(e); Court granted motion, departing to sentence of 96 months (20% reduction from statutory mandatory minimum). Johnson filed motion for further downward departure based on AIDS-related complex (ARC), which Court denied reasoning Johnson s condition did not present extraordinary physical impairment. On appeal, Johnson asserts District Court erred by refusing to depart further based on his physical condition. Johnson s argument fails because at time

of sentencing, motion by government under § 3553(e) for substantial assistance was only authority for District Court to depart below statutorily mandated minimum sentence (Congress has since enacted § 3553(f); however, circumstances specified do not include physical impairment. This Court also rejects Johnson s assertion that once District Court departed below mandatory minimum on basis of § 3553(e) motion, it was free to depart for any reason allowed by Guidelines or policy statements; however, § 3553(b) and § 5H1.4 provide for departure from guideline range only, not from mandatory minimum. Motion of government to depart below mandatory minimum for substantial assistance does not open door for departure under § 3553(b) and § 5H1.4 based on extraordinary physical impairment.

When case was before District Court, parties and Court proceeded on premise Johnson would be entitled to consideration for further departure below mandatory minimum if he could demonstrate extraordinary physical impairment within meaning of § 5H1.4. District Court found against Johnson on merits of this argument; issue of effect of statute on availability of § 5H1.4 reduction came into case only after this Court entered order requesting parties to address it. Johnson made point it would not be fair to him to affirm on ground that was not raised below, but was inconsistent with position taken by all parties in District Court. This Court agreed to address merits of Johnson s physical impairment argument and decided even if Court had authority to depart below statutory mandatory minimum, departure would not be appropriate in Johnson s case. District Court considered Johnson s medical records, Johnson s testimony concerning his physical condition, representations of Johnson s attorney concerning his physical condition, and Johnson s physical appearance. After weighing these factors, District Court concluded Johnson s condition was not serious enough to justify departure. District Court did not err where hearing transcript indicates Johnson was not taking medication for any AIDS-related ailments, he offered no evidence that imprisonment would worsen his condition or that he would require special care, and his attorney stated unequivocally his client was not seriously ill. Whether condition meets criteria of "extraordinary physical impairment" must be answered for each individual defendant who claims benefit of § 5H1.4: no all-purpose answer fitting every situation District Court s duty to assess Johnson s condition at time of sentencing despite proposition to which all could probably agree that Johnson s condition would probably lead to very serious difficulties within four years and will almost certainly cause his death. DISSENT: Notes District Court and parties agreed at sentencing hearing, after filing of motions under § 3553(e) and § 5K1.1, door would be open for consideration of grounds for departure in addition to substantial assistance. While agreeing general analytical directive of Rodriguez-Morales is applicable, dissent would distinguish: § 3553(e) motion gave District Court authority to depart from statutory minimum, and § 5K1.1 motion then addressed question of departure below guideline range, opening door for § 5H1.4 motion. While dissent disagrees with majority s conclusion regarding availability of § 5H1.4 departure, it finds it clear if Johnson loses on threshold issue, this Court should not reach merits of § 5H1.4 argument. Dissent goes on to address substance of "extraordinary physical impairment" question. Would advise District Court HIV positive affliction with deteriorating physical condition is factor to be considered by District Court in determining whether downward departure is warranted. Another alternative grounds for downward departure is based on § 5K2.0 and § 3553(b). While majority states District Court found against Johnson on merits of § 5H1.4 argument, dissent reads Court to have concluded it was uncertain as to whether it had authority to depart downward, thus prompting District Court s request for "guidance" from this Court. Acknowledges split in circuits on issue of whether defendant who has not yet developed AIDS can obtain departure based on extraordinary physical

impairment, but would follow Third Circuit s lead in Schein case. Takes issue with majority s statement that Johnson s attorney stated his client was not seriously ill. References District Court s recommendation that if and when Johnson s illness reaches terminal stages, he would be released from incarceration and not be required to serve balance of his sentence, and discusses some difficulties with recommendation (e.g., only limited means of modifying term of imprisonment). Combination of HIV epidemic and resurgence of tuberculosis is important example of costs involved and dimensions of problem in prisons. Majority has not adequately responded to District Court s request for guidance. Dissent would hold District Court does have authority to grant downward departure under § 5H1.4 in cases of HIV-infected persons who are deteriorating, but do not yet have AIDS.), cert. denied, 516 U.S. 1153 (1996).

United States v. Fischl, 16 F.3d 927 (8th Cir. 1994). (Fischl sought downward departure because he suffers from diabetes. With knowledge of its authority to depart, District Court refused to reduce Fischl s sentence below guideline calculation; this Court has no authority under circumstances to review District Court s exercise of its discretion not to make downward departure.)

United States v. Big Crow, 898 F.2d 1326 (8th Cir. 1990). (Alcohol abuse alone is not reason for downward departure.)

United States v. Creed, 897 F.2d 963 (8th Cir. 1990). (Court rejected defendant s argument that consecutive sentence imposed for escape was excessive and greater than necessary to achieve sentencing goals set by Congress because his escape was solely result of alcoholism. Guidelines expressly provide that alcohol abuse is not reason for downward departure and provision is not arbitrary or unreasonable.)

**§ 5H1.5 (Employment Record):**

United States v. Garlich, 951 F.2d 161 (8th Cir. 1991). (A defendant s employment record is usually irrelevant in deciding whether to depart from Guidelines.)

United States v. Big Crow, 898 F.2d 1326 (8th Cir. 1990). (Although previous employment record is not ordinarily relevant, defendant s case presented mitigating circumstances of magnitude not adequately taken into consideration by Guidelines.)

**§ 5H1.6 (Family Ties):**

United States v. Orozco-Rodriguez, 220 F.3d 940 (8th Cir. 2000) (RICHARD S. ARNOLD, HEANEY, LOKEN*). (Defendant argues District Court, which heard testimony by defendant and his wife concerning their financial condition and difficulties of raising school-age children in rural location, improperly refused to grant departure. As District Court knew of its authority to depart under § 5H1.6 or another Guideline, this Court concludes refusal to depart downward was exercise of District Court's sentencing discretion that is unreviewable.)

United States v. Jones, 160 F.3d 473 (8th Cir. 1998) (WOLLMAN,* HEANEY, BRIGHT).

(Although Jones was gainfully employed, maintained relationship with his son, attended church, had significant debts, and had excellent reputation in community, he did not present "extraordinary or exceptional" case in which District Court may depart based on family ties.)

United States v. Crosby, 96 F.3d 1114 (8th Cir. 1996). (District Court did not abuse its discretion in refusing to grant Crosby downward departure based on Crosby s difficult family circumstances at time he joined conspiracy. Guidelines discourage downward departures based on family ties and responsibilities and District Court properly determined Crosby s situation was not exceptional enough to warrant departure especially since Crosby continued his criminal conduct after his family situation improved.)

United States v. Goff, 20 F.3d 918 (8th Cir.) (HEANEY, FAGG, LOKEN*). (Downward departure based on family responsibilities was not warranted even though defendant was supporting three sons and his wife had begun receiving Social Security disability benefits for depression disorder and panic attacks. Defendant's family responsibilities were not outside heartland of cases considered by Sentencing Commission.), cert. denied, 513 U.S. 987 (1994).

United States v. Vidrickson, 998 F.2d 601 (8th Cir. 1993). (Extraordinary family circumstances can be used to support downward departures. Contrary to Vidrickson s contention, District Court understood its discretion to depart downward but did not find Vidrickson s circumstances exceptional where he provided primary support for his family (a wife and two young children at home and two older teenagers out of state; his wife had had recent operation).)

United States v. Garlich, 951 F.2d 161 (8th Cir. 1991). (Community ties and family responsibilities are usually irrelevant in deciding whether to depart.)

United States v. Shortt, 919 F.2d 1325 (8th Cir. 1990). (Offhand references to family circumstances (farm to run, wife s prior problems with substance abuse) did not describe extraordinary case and thus were not relevant for departure.)

United States v. Johnson, 906 F.2d 1285 (8th Cir. 1990). (Johnson s situation as single mother of infant was adequately considered by Commission and District Court was aware it had authority to depart based on family ties. Exceptional circumstances not present.)

United States v. Neil, 903 F.2d 564 (8th Cir. 1990). (This Court remands for resentencing where following Neil s conviction of conspiracy to distribute cocaine and possession with intent to distribute cocaine, District Court departed downward from applicable Sentencing Guideline range in part based on family and community ties. Court concludes Neil s situation is not sufficiently unusual to make departure permissible though such ties may be taken into account in imposing sentence within applicable Guidelines range.)

United States v. Big Crow, 898 F.2d 1326 (8th Cir. 1990). (Although family ties are not ordinarily relevant, defendant s case presented mitigating circumstances of magnitude not adequately taken into consideration by Guidelines.)

United States v. Sutherland, 890 F.2d 1042 (8th Cir. 1989) (per curiam). (Defendant s argument that District Court should have departed downward because of his unusual family responsibilities was without merit in view of clear statement in Guidelines § 5H1.6 with respect to that subject.)

**§ 5H1.8 (Criminal History):**

United States v. Neil, 903 F.2d 564 (8th Cir. 1990). (This Court held Neil s first time offender status did not justify downward departure as Sentencing Commission adequately accounted for absence of criminal record in structuring sentencing table.)

United States v. Big Crow, 898 F.2d 1326 (8th Cir. 1990). (Although defendant s lack of prior criminal record is relevant, it is adequately accounted for by Guidelines and is not generally reason for downward departure.)

**§ 5H1.10 (Race, Sex, National Origin, Creed, Religion, Socio-Economic Status):**

United States v. Pena, 339 F.3d 715 (8th Cir. 2003) (BOWMAN, RILEY, MELLOY*). (District Court did not improperly take Cuban defendant's national origin into account when, in sentencing him for cocaine trafficking, it said: "You've been given an opportunity to come to the United States and become a productive citizen, but, in fact, you have repaid this courtesy by becoming a drug dealer." Statement is reference to defendant being given asylum, not national-origin-based explanation for selecting particular sentence.)

United States v. Dyck, 334 F.3d 736 (8th Cir. 2003) (HANSEN,* WOLLMAN, BYE). (District Court improperly departed downward on basis of defendant's Mennonite upbringing and resulting naivete about ways of world. Defendant had modest educational level and clearly knew difference between right and wrong.)

United States v. Gunderson, 211 F.3d 1088 (8th Cir. 2000) (RICHARD S. ARNOLD, HEANEY,* LOKEN). (This Court concludes District Court s assessment of defendant s culpability did not violate § 5H1.10. Defendant operated faith-based counseling service. District Court s reliance on his practice of giving moral advice indicates Court was concerned that his crime (failure to disclose certain assets in bankruptcy) reflected moral failure, not spiritual one. Court neither punished defendant for being pharisee, nor held him to higher standard based on his faith; rather his sentence properly reflected inconsistency between his assumption of moral leadership with respect to his clients and his simultaneous commission of bankruptcy fraud.)

United States v. Onwuemene, 933 F.2d 650 (8th Cir. 1991). (District Court sentenced Onwuemene to 12 months imprisonment, top of sentencing range, because crime involving nationwide automobile insurance fraud scheme was serious and could have resulted in much greater loss if victims had failed to discover it and because Onwuemene would not identify other participants in fraud; Court added orally, but not in written order, that Onwuemene was not U.S. citizen and this country has enough criminals without importing any. This Court reverses and remands, holding District Court s consideration of Onwuemene s alien status constituted both

constitutional violation and incorrect application of Guidelines. Thus, sentence was reviewable (18 U.S.C. § 3742(e)). Though two reasons given for sentence imposed were permissible, this Court could not say District Court would have imposed same sentence absent impermissible consideration.)

United States v. Natal-Rivera, 879 F.2d 391, 393 (8th Cir. 1989). (Congress may prevent considerations of cultural background from being mitigating factor for criminal activity without violating due process.)

**§ 5H1.12 (Lack of Guidance as Youth):**

United States v. Dyck, 334 F.3d 736 (8th Cir. 2003) (HANSEN,* WOLLMAN, BYE). (District Court improperly departed downward on basis of defendant's Mennonite upbringing and resulting naivete about ways of world. Defendant had modest educational level and clearly knew difference between right and wrong.)

**Part K. Departures**

**§ 5K1.1 (Substantial Assistance/Standard of Review):**

Wade v. United States, 504 U.S. 181 (1992). (District Court has authority to review prosecutor's decision not to file § 5K1.1 or 18 U.S.C. § 3553(e) motion if refusal was based on unconstitutional motive, was not rationally related to any legitimate government end, or was in bad faith. Defendant's claim that he provided substantial assistance, standing alone or coupled with generalized allegations of improper motive, will not entitle him to remedy or even to discovery or evidentiary hearing.)

United States v. McClure, 338 F.3d 847 (8th Cir. 2003) (BOWMAN, MURPHY,* BYE). (When defendant moves to compel government to file downward-departure motion, this Court reviews for abuse of discretion District Court's denial of defendant's motion.)

United States v. Williams, 324 F.3d 1049 (8th Cir. 2003) (WOLLMAN, RICHARD ARNOLD, MELLOY) (per curiam). (Extent of District Court's downward departure is unreviewable in absence of allegation of unconstitutional motive, and defendant's allegation--that District Court improperly considered another crime for which defendant had not been charged--did not amount to unconstitutional motivation for not departing further.)

United States v. Murphy, 248 F.3d 777 (8th Cir. 2001) (RICHARD S. ARNOLD, LAY, HANSEN*). (Defendant waived argument that government should have filed, and District Court should have granted, § 5K1.1 motion. Defendant did not object to PSR, did not raise issue at sentencing, and discussed his cooperation at sentencing only in connection with request to be sentenced at low end of Guidelines range.)

United States v. Tyler, 238 F.3d 1036 (8th Cir. 2001) (BEAM, HEANEY, MORRIS

SHEPPARD ARNOLD*). (This Court reviews District Court's factual findings regarding government's decision not to ask for departure for clear error.)

United States v. Johnston, 220 F.3d 857 (8th Cir. 2000) (BOWMAN, LOKEN, BYE*). (District Court found government had not promised defendant sentence reduction day he was arrested. This Court reviews that finding of fact for clear error, and then it must determine whether government's refusal to make substantial assistance motion was in bad faith, irrational, or based on unconstitutional motive--which requires Court to review de novo District Court's interpretation and enforcement of plea agreement.)

United States v. Hyatt, 207 F.3d 1036 (8th Cir. 2000) (BEAM, HEANEY, KYLE*). (Neither defendant nor his attorney requested evidentiary hearing concerning claim that government acted in bad faith in not moving for departure; instead defendant asked Court to determine merits of that claim based on evidence presented at sentencing. This Court reviews District Court s denial of motion for departure for abuse of discretion.)

United States v. Albers, 961 F.2d 710 (8th Cir. 1992). (Alberses argued their sentences were so disparate from those imposed upon their co-conspirators that District Court abused its discretion in not departing even further from range. Where Court departed downward for each defendant s substantial cooperation significantly, defendants may not appeal simply because they are dissatisfied with extent of departure as there is no statutory authority for such appeal.)

**§ 5K1.1 (Substantial Assistance):**

Melendez v. United States, 518 U.S. 120 (1996). (§ 5K1.1 substantial-assistance downward-departure motion filed by government does not also authorize District Court to depart from statutory minimum sentence; 18 U.S.C. § 3553(e) motion is required.)

United States v. McClure, 338 F.3d 847 (8th Cir. 2003) (BOWMAN, MURPHY,* BYE). (Where plea agreement reserved government's sole discretion whether to file downward-departure motion, defendant did not show irrationality, bad faith, or unconstitutional motive by government's declining to file motion. Government's decision not to file motion rested on its evaluation of value of defendant's assistance. Her trial testimony in one matter was short and cumulative of other witnesses' testimony, and her grand jury testimony in another matter did not lead to any indictments (moreover, prosecutor would not have let her testify at trial, had there been one, because he did not believe she was completely truthful).)

United States v. Hardy, 325 F.3d 994 (8th Cir. 2003) (WOLLMAN,* HEANEY, MELLOY). (Where plea agreement reserved government's sole discretion whether to move for downward departure, defendant did not show irrationality or bad faith by government, which explained why defendant's information added little to already-strong case against third parties.)

United States v. Wolf, 270 F.3d 1188 (8th Cir. 2001) (BOWMAN,* HEANEY, BYE). (Absent motion by government, District Court generally lacks authority to grant substantial-assistance downward departure, but may review prosecutor's refusal to make motion for

unconstitutionality, bad faith, or irrationality.)

United States v. Johnson, 241 F.3d 1049 (8th Cir. 2001) (BEAM,* HEANEY, MORRIS SHEPPARD ARNOLD). (Plea agreement recited, inter alia, government would move for downward departure if it concludes Johnson "provided substantial assistance." At sentencing, government did not make departure motion but sought and received leave to file sentence-reduction motion under Fed. R. Crim. P. 35(b). Government conceded Johnson's substantial assistance in Rule 35(b) motion. Finding breach of agreement, this Court remanded for resentencing consistent with terms of plea agreement and thus did not reach issue whether Rule 35(b) motion provides same relief as that provided by § 5K1.1 motion.)

United States v. Tyler, 238 F.3d 1036 (8th Cir. 2001) (BEAM, HEANEY, MORRIS SHEPPARD ARNOLD*). (Tyler maintained he wanted to help police but was wrongfully denied opportunity to do so; police did not make serious effort to work with him even though he repeatedly tried to cooperate. District Court concluded Tyler's testimony established only serious communication difficulties between Tyler and government, and did not believe government's refusal to move for downward departure was irrational, in bad faith, or based on unconstitutional motive. While District Court's analysis was brief, this Court cannot say District Court's findings regarding dispute between defendant and government was clearly erroneous and thus District Court did not err in denying request for downward departure for substantial assistance.)

United States v. Spears, 235 F.3d 1150 (8th Cir. 2001) (McMILLIAN, RICHARD S. ARNOLD,* BOWMAN). (Where defendant bargained for sentence-reduction motion under Fed. R. Crim. P. 35, not downward-departure motion under § 5K1.1, and statutory deadline for government to file Rule 35 motion had not yet expired, defendant's challenge was premature.)

United States v. Fountain, 223 F.3d 927 (8th Cir. 2000) (RICHARD S. ARNOLD,* HEANEY, MAGNUSON). (Downward departure for substantial assistance under § 5K1.1 usually cannot be granted without motion from government.), cert. denied, 532 U.S. 1053 (2001).

United States v. Johnston, 220 F.3d 857 (8th Cir. 2000) (BOWMAN, LOKEN, BYE*). (Defendant failed to show government's reason for not filing motion was irrational, in bad faith, or based on unconstitutional motive. DEA agent testified he did not promise reduction, and although defendant offered contrary evidence, District Court obviously found DEA agent more credible and thus did not clearly err in determining no promise was made. Thus, Court looks solely to subsequent plea agreement to determine whether government should have filed motion. Here Johnson failed to cooperate fully after entering plea agreement; he was given multiple opportunities to provide complete information and repeatedly refused to provide information beyond that offered during his initial interviews; under these circumstances it is clear government's decision not to file 18 U.S.C. § 3553(e) motion was based on its evaluation of nature and quality of assistance--not on reasons unrelated to nature of defendant's assistance.)

United States v. Hyatt, 207 F.3d 1036 (8th Cir. 2000) (BEAM, HEANEY, KYLE*). (District Court s refusal to find that government acted in bad faith in not moving for departure was not abuse of discretion. Although he gave information on prison escape, and his suppliers were

indicted in part based on information he provided, defendant refused to acknowledge his role in directing his girlfriend to buy drugs while he was incarcerated, he insisted he did not distribute methamphetamine, he admitted lying about quantities or drugs involved, and he tried to force his girlfriend to recant her version of events. All this combined to make defendant unreliable and unusable witness.)

United States v. Due, 205 F.3d 1030 (8th Cir. 2000) (RICHARD S. ARNOLD,* HANSEN, MELLOY). (District Court did not err in denying motion to compel government to file downward departure motion where defendant made no threshold showing of improper motive, and merely disagreed with government s appraisal of her truthfulness. It was not irrational for government to view defendant's answer--"not specifically"--as denial of prior admission of element of offense to which she had pleaded guilty. Defendant simply was not forthcoming at her debriefing. Government also could reasonably conclude any information defendant provided did not amount to substantial assistance, which was required under plea agreement and for filing of 5K1.1 motion. Issue was not merely whether defendant told all she knew and was truthful, but whether government could rationally conclude information provided was not substantial: this Court holds that it could.)

United States v. Vernon, 187 F.3d 884 (8th Cir. 1999) (McMILLIAN, LAY,* MURPHY). (Vernon did not make substantial threshold showing that government acted unconstitutionally, irrationally, or in bad faith, in moving for departure only under § 5K1.1 and not also under § 3553(e). Although he argues government improperly based its decision on his refusal to testify at co-defendants' sentencing hearing, plea agreement specifically provided Vernon would testify at any trial or other Court proceeding as requested; and while he may have been entitled to assert privilege against self-incrimination as to particular questions, he was not entitled to assert blanket privilege. Vernon's reservation of right to contest amount and type of drugs at sentencing does not change this outcome, because testimony at co-defendants' sentencing involved evidence about issues other than weight and identity of drugs. Moreover, Vernon gave government discretion in plea agreement to evaluate whether level of his assistance merited statutory departure; and it is well settled that government is not required to file statutory departure motion every time it files for departure from Guidelines.), cert. denied, 529 U.S. 1032 (2000).

United States v. Wilkerson, 179 F.3d 1083 (8th Cir. 1999) (WOLLMAN, BEAM, MURPHY*). (Wilkerson argues trial Court erred in concluding plea agreement did not require government to file § 5K1.1 motion. After evidentiary hearing, trial Court found that government's refusal to make motion was based on its conclusion that Wilkerson had not met his plea-agreement duty to continue to cooperate and provide substantial assistance. Agreement gave government sole right to judge whether Wilkerson continued to provide substantial assistance, and hearing record supports finding that refusal to make motion was based on prosecutor's judgment that Wilkerson had not continued to provide substantial assistance where he did not keep government apprised of his ongoing drug involvement or his sources, and where he undermined his usefulness as potential witness, role he had agreed to play. Government's decision was based on evaluation of quality of assistance.)

United States v. Barrett, 173 F.3d 682 (8th Cir. 1999) (LOKEN,* HEANEY, MORRIS SHEPPARD ARNOLD). (Plea agreement recited, inter alia, government would make U.S.S.G.

§ 5K1.1 motion if it determined in its sole discretion that Barrett had provided substantial assistance. Where plea agreement preserves government's discretion in this regard, Court is without authority to grant substantial-assistance departure absent government motion, and government's decision not to make motion is reviewable only if defendant makes substantial threshold showing of improper motive. Barrett made no such showing, simply disagreeing with government's assessment.)

United States v. D Angelo, 172 F.3d 1046 (8th Cir. 1999) (McMILLIAN, MORRIS SHEPPARD ARNOLD,* NANGLE). (Affirming as not clearly erroneous District Court's conclusion, following hearing, that government properly determined D Angelo had not provided substantial assistance and that government thus was not required to make U.S.S.G. § 5K1.1 motion. Although D'Angelo insists he told government everything he knew, this is not question; rather, question is whether government could rationally conclude information he provided was not substantial.)

United States v. Licona-Lopez, 163 F.3d 1040 (8th Cir. 1998). (BOWMAN,* BRIGHT, RICHARD S. ARNOLD). (Appellant pleaded guilty to drug conspiracy and agreed to cooperate. In testifying at co-conspirator's trial, appellant revealed for first time that another person was involved, which weakened government's case; he admitted he previously had withheld this information. Government refused to file substantial-assistance motion and District Court refused to hold hearing on such refusal. **Held:** no hearing was required because Licona-Lopez failed to make threshold showing that government's refusal was irrational or unconstitutional, or made in bad faith: (1) it was not irrational to refuse to file motion on basis that Licona-Lopez had been untruthful during police debriefings, and had prejudiced government's case against co-conspirator; (2) there was no bad faith shown, as plea agreement left decision whether to file motion to "sole discretion" of government; and (3) there was no evidence that refusal was motivated by invidious discrimination. This Court also rejects Licona-Lopez's argument that government violated due process by indicating it would consider moving for departure within year if Licona-Lopez provided substantial assistance in ongoing investigations. Postponing motion regarding substantial assistance to secure post-sentencing cooperation can violate due process only if defendant has right to departure motion at sentencing.)

United States v. Anzalone, 161 F.3d 1125 (8th Cir. 1998). (Anzalone s plea agreement provided he would truthfully cooperate with U.S. Attorney and any cooperation would be considered under § 5K1.1. Government agreed Anzalone could make substantial threshold showing he had substantially assisted investigation and prosecution of conspirators, but refused to file § 5K1.1 motion because it received information Anzalone had recently used and possessed controlled substances thereby violating agreement. Concluding government s position was rational, District Court denied motion to compel. **Held:** Government cannot base § 5K1.1 motion decision on factors other than substantial assistance provided by defendant. Once government concludes defendant has provided substantial assistance and assessed costs/benefit from moving, it should make departure motion and then advise District Court if there are unrelated factors (e.g., Anzalone s alleged post-plea agreement drug use) that in government s view should preclude or severely restrict downward departure relief. District Court may then weigh such alleged conduct in exercising downward departure discretion. Judgment of District Court reversed and remanded. DISSENT: Comprehensive plea agreement entered into by parties is key to resolution of this appeal.

Government took on duty in plea agreement to consider Anzalone s cooperation, but duty was explicitly conditioned on his not committing any additional crimes.)

United States v. Barresse, 142 F.3d 1091 (8th Cir. 1998). (Plea agreement provided government would move for substantial assistance downward departure if Barresse provided "truthful information, complete cooperation, truthful testimony and assistance." Noting term "complete cooperation" may connote doing all one can do to assist, rather than doing enough to satisfy government, this Court remanded for further consideration of what parties meant by complete cooperation, and whether Barresse met that condition as construed. District Court again denied Barresse s motion to compel compliance, and this Court concludes findings are not clearly erroneous as Barresse did not provide complete cooperation for two reasons--he ignored reasonable government requests to stay out of county where there was outstanding warrant for his arrest, and his subsequent arrest and incarceration in that county prevented him from doing all he could to assist government in apprehending and prosecuting other drug traffickers.)

United States v. Mitchell, 136 F.3d 1192 (8th Cir. 1998). (Where AUSA did move for § 5K1.1 departure, but in process of doing so indicated to Court Mitchell had "earned his reward" for assistance [in another case] and introduced victim-impact statements, spirit of promise and plea agreement were violated.)

United States v. Rounsavall, 128 F.3d 665 (8th Cir. 1997). (After government filed its § 5K1.1 motion, District Court sentenced Rounsavall to 20 years, lowest possible sentence under statutory mandatory minimum. Because government failed to file § 3553(e) motion, District Court correctly believed it could not depart below 20-year sentence even though it strongly disagreed with government s decision not to file motion.)

United States v. Pipes, 125 F.3d 638 (8th Cir. 1997). Pipes argues District Court erred in failing to compel government to move for downward departure for substantial assistance. Government s refusal to file motion is reviewable only when defendant makes substantial threshold showing refusal was irrational or based on unconstitutional motive. Here, District Court acknowledged Pipes presented some reliable evidence to support claim government acted irrationally; it concluded, however, Pipes s showing was not sufficient to support evidentiary hearing. This Court disagrees. Pipes had written cooperation agreement with government which was later strengthened by oral assurances of Nebraska prosecutor. Pipes cooperated with government, and cooperation in part contributed to government s case against another. Pipes s claim he provided substantial assistance to government is supported by more than mere assertion: FBI agent so stated and another implicitly confirmed when she requested Pipes s sentencing be postponed so he could testify at Green s trial. Oklahoma AUSA communicated Pipes s information was not completely correct and he was not being altogether truthful. District Court was not able to question Oklahoma prosecutor about specifics underlying decision as AUSA was not before Court. Under these circumstances, particularly lack of any concrete explanation for Oklahoma prosecutor s decision, District Court should have conducted evidentiary hearing to determine whether Nebraska prosecutor s failure to file downward departure motion was irrational. This Court reversed Pipes s sentence and remands for evidentiary hearing on question of whether Pipes had, in fact, been untruthful in his dealings with Oklahoma prosecutor. DISSENT: Plea

agreement promise obligated government to consider nature and value of cooperation, but did not require motion for downward departure. Pipes did not meet burden of showing bad faith or irrational action by government where Nebraska prosecutor relied upon Oklahoma AUSA s recommendation to conclude Pipes had not been fully truthful or forthcoming during investigation.), cert. denied, 523 U.S. 1012 (1998).

United States v. Barresse, 115 F.3d 610 (8th Cir. 1997). (Barresse signed letter agreement in which he agreed to cooperate in on-going criminal investigations and pursuant to that agreement, he waived indictment, entered plea of guilty, and signed stipulation of facts relevant to sentencing. After government advised it would not file downward departure motion, Barresse moved to compel. At sentencing, District Court denied motion on ground deciding whether Barresse had provided substantial assistance is within government s decision making discretion absent abusive motive. This Court concludes agreements did not unambiguously reserve to government its customary discretion to decide whether Barresse s cooperation warranted substantial assistance motion (agreement provided "in exchange for [Barresse] providing truthful information, complete cooperation, truthful testimony and assistance . . . Government agrees to: File motion pursuant to [§ 5K1.1 and § 3553(e)] recommending downward-departure." ) This Court remands for determination of what parties meant by "truthful information, complete cooperation," etc.; whether Barresse met that condition as construed; and if Barresse satisfied pre-conditions to government s promise, whether he is entitled to relief for government s breach.)

United States v. Matlock, 109 F.3d 1313 (8th Cir.) (Matlock argues District Court erred in denying his motion for order requiring government to make § 5K1.1 motion, claiming government s refusal to bring motion was irrational and in bad faith. Matlock did not meet burden of substantial threshold showing government s refusal was irrational or based on unconstitutional motive. In plea agreement, government expressly conditioned obligation to file motion on government s discretionary assessment of whether Matlock provided substantial assistance. Despite plea agreement obligating Matlock to cooperate in prosecution of his co-defendants, he initially refused to enter Courtroom when he was called as government s first witness in trial of two others; when he finally did testify, he attempted to minimize roles co-defendants played in conspiracy whereas his earlier plea hearing testimony had been far more incriminating; and finally, Matlock admitted his testimony was practically act.), cert. denied, 522 U.S. 872 (1997).

United States v. McCarthy, 97 F.3d 1562 (8th Cir. 1996). (Thompson, who was subject to statutory mandatory minimum sentence of ten years, claims District Court considered improper factors and relied on inaccurate information when determining extent of departure to grant him pursuant to government s § 5K1.1 and § 3553(e) motions. Here, District Court granted motion to depart from Guidelines range, but denied motion to go below mandatory minimum. Thompson claims in deciding extent of downward departure, District Court may only use factors outlined in § 5K1.1, along with others that relate generally to defendants assistance; he suggests District Court looked to other factors in his case. Extent of District Court s downward departure is not reviewable and Thompson makes no allegation Court refused further departure on basis of unconstitutional motive or bad faith. Factors listed in § 5K1.1 are not intended to be exhaustive list. This Court declines invitation to further circumscribe District Court s discretion by requiring it to examine

each listed factor in § 5K1.1 on record and explain exactly what weight it gives to each in its departure decision. District Court s decision declining to depart further in Thompson s case in unreviewable. District Court simply declined to exercise discretion to depart below statutory minimum; District Court s declination to depart downward when it knows it can do so is not reviewable on appeal.), cert. denied, 519 U.S. 1139 and 520 U.S. 1133 (1997).

United States v. Johnigan, 90 F.3d 1332 (8th Cir. 1996). (Johnigan argues that [withdrawn] paragraph in plea agreement which stated Johnigan had provided cooperation, demonstrated to District Court irrationality of government s refusal to bring § 5K1.1 motion. This Court holds District Court acted appropriately in disregarding plea agreement as government specifically described Johnigan s assistance as having negative value. Therefore, Court concludes Johnigan did not make substantial threshold showing that government s ground for withholding § 5K1.1 motion was not rationally related to legitimate government end.)

United States v. Nicolace, 90 F.3d 255 (8th Cir. 1996). (District Court did not err in finding Nicolace failed to make substantial threshold showing government s refusal to file motion for downward departure for substantial assistance was irrational or based on unconstitutional motive, where FBI questioned Nicolace s candor during its discussions with him following his arrest; although Nicolace identified two persons as drug traffickers, he was unable to contact either one and nothing developed from information he provided; information Nicolace s brother gave government in attempt to help had also proven of little use.)

United States v. Thomas, 72 F.3d 92 (8th Cir. 1995). (Absent government motion, District Court lacked authority to grant Thomas departure.)

United States v. Polanco, 53 F.3d 893 (8th Cir. 1995). (Carlos contended District Court should have discretion to impose sentence below statutory mandatory minimum whenever government files motion for departure under § 5K1.1, regardless of whether government has also filed motion under § 3553(e). This Court affirms Carlos s sentence (Court had departed downward from 121 to 60 months imprisonment) because Carlos waived any objection to his sentence by acknowledging in his plea agreement five years with statutory mandatory minimum and accepting benefit of plea and this Court is bound by decision in Rodriguez-Morales which requires two motions.), cert. denied, 518 U.S. 1021 (1996).

United States v. Kessler, 48 F.3d 1064 (8th Cir. 1995). (Kessler s argument amounted to challenge to extent of departure, matter not subject to appellate review.)

United States v. Stockdall, 45 F.3d 1257 (8th Cir. 1995). (In this Circuit, government substantial assistance motion under § 5K1.1 permits departure only from Guidelines sentencing range; government must file substantial assistance motion under § 3553(e) to permit District Court to depart from applicable mandatory minimum sentence.

In addressing whether term "a sentence" in § 3553(e) refers to each offense of conviction when multiple mandatory minimums are involved, or to total sentence imposed by reason of conviction, this Court concludes plain language of section authorizes government to make separate substantial assistance motion decision for each mandatory minimum sentence to which defendant

is subject (referring to Chapter Eighteen provisions and Guidelines §§ 3D1.1, 5G1.2). This Court recognizes government will be able to reduce District Court s departure discretion for defendants subject to multiple mandatory minimums--though sole power to reduce sentence and determine extent of any reduction rests with Court.)

United States v. Sanchez, 32 F.3d 1330 (8th Cir. 1994). (Plea agreements provided government would seek downward departure under § 5K1.1, but would not move under § 3553(e). Here, District Court granted § 5K1.1 motion and imposed ten-year minimum, stating it was bound by Rodriguez-Morales, but if it could it would have gone below that number. While appellants argue Rodriguez-Morales was wrongly decided, this Court has reaffirmed that decision: when prosecution seeks downward departure pursuant to only § 5K1.1, but does not seek departure pursuant to § 3553(e), District Court cannot depart below statutory minimum sentence.), cert. denied, 513 U.S. 1158 (1995).

United States v. Kelly, 18 F.3d 612 (8th Cir. 1994). ("Cooperation" must amount to "substantial assistance" as section requires government to state in its motion that defendant has provided substantial assistance. Court is without authority to grant downward departure for substantial assistance absent government motion. Kelly did not contend government harbored unconstitutional motive or acted in bad faith. Further, this Court cannot say government s refusal to make motion was irrational where Kelly s cooperation amounted to little more than naming one person involved in drug trafficking and giving no information to aid in locating that person; though Kelly had originally confessed to being involved in drug trafficking for two years and had records of convictions from two years, he told government, while supposedly "cooperating" that he had only been involved for seven months; and government listed specific instances where Kelly was "unable or unwilling" to cooperate.)

United States v. Griffin, 17 F.3d 269 (8th Cir. 1994). (DISSENT: In commenting on general unfairness of guideline sentencing, dissent queries, what kind of criminal system rewards drug kingpin who informs on all criminal colleagues he has recruited, but sends to prison for years least knowledgeable or culpable conspirator who is without information for prosecutors. Comments that Fed. R. Crim. P. 35(b) contains no limitation excluding additional reduction of sentence when defendant has already received benefit for prior substantial assistance under § 5K1.1 or 18 U.S.C. § 3553(e).)

United States v. Dutcher, 8 F.3d 11 (8th Cir. 1993). (The government moved under § 5K1.1 and § 3553(e) for downward departure from guideline range of 168-210 months which took into account four-level enhancement under § 3B1.1(a). District Court departed and sentenced Dutcher to 84 months imprisonment conceding that while perhaps sentence was excessive, it did not believe under circumstances that sentence below 50 percent of that called for under Guidelines would be appropriate. On appeal, Dutcher argued District Court mistakenly believed it was constrained to impose sentence not more than 50 percent below applicable guideline range. This Court holds District Court s decision to grant downward departure from applicable guideline range, either with or without four-level enhancement, is not reviewable on appeal and it may not review extent of downward departure, regardless of District Court s reasons for refraining from departing further. This Court did not review correctness of District Court s assumption that Dutcher was organizer

or leader of cocaine operation; even if assumption were clearly erroneous, and Dutcher would not have been subject to four-level enhancement, his 84-month sentence would still represent downward departure from applicable guideline range and thus is non-reviewable.)

United States v. Hammer, 3 F.3d 266 (8th Cir. 1993). (Hendrickson argued government should be required to give reason for not making motion for departure below statutory minimum, while at same time moving for departure below Guidelines. Plea agreement between Hendrickson and government carefully distinguished between two kinds of departures. Court may inquire into government s reasons and decide whether they were constitutionally improper, but only if defendant first makes "substantial threshold showing" of impropriety, which Hendrickson did not do.)

United States v. Lewis, 3 F.3d 252 (8th Cir. 1993). (Where Lewis failed to show prosecutor refused to move for downward departure for impermissible reason (i.e., unconstitutional motive or irrational refusal), he was not entitled to reduction in his sentence.), cert. denied, 511 U.S. 1111 (1994).

United States v. Jones, 2 F.3d 827 (8th Cir. 1993). (This Court rejects Jones s claim that District Court erred by denying his motion for downward departure based on his substantial assistance to government; Court had no authority to depart below Guidelines range on basis of any assistance Jones provided absent government motion or showing of unconstitutional motivation.)

United States v. Favara, 987 F.2d 538 (8th Cir. 1993). (Government s refusal to move for departure did not violate due process where Assistant U.S. Attorney s response to Favara s offer to provide [valuable] additional information did not amount to enforceable promise to move for departure. Moreover, Favara did not attempt to show refusal was motivated by constitutionally impermissible concerns, but rather relied solely on value of information he provided as basis for his motion.)

United States v. Buchanan, 985 F.2d 1372 (8th Cir. 1993). Buchanan argued his sentence should have been adjusted downward in return for information provided to government. Absent agreement, there was no obligation by government to move for downward departure and District Court may not depart downward absent motion by government.), cert. denied, 512 U.S. 1228 (1994).

United States v. Womack, 985 F.2d 395 (8th Cir.) (Because government moved for departure only under section 5K1.1, and not under section 3553(e), District Court lacked authority to depart below mandatory minimum sentence of 20 years.

Defendants complaints that District Court failed to depart to same degree it did in other cases and that District Court did not adequately articulate reasoning for giving specific sentence are attempts to have this Court review extent of departures which it will not do.), cert. denied, 510 U.S. 902 (1994).

United States v. Hawley, 984 F.2d 252 (8th Cir. 1993). (Where government did not file § 3553(e) motion, District Court did not have authority to sentence defendants below statutory mandatory minimum sentence despite District Court s reliance on youthful defendants good faith

effort to cooperate with investigating authorities; lack of criminal records; short involvement with marijuana activity dealing in small amounts; aberrant behavior in possessing firearms; and Court s belief mandatory minimums not designed for such defendants.)

United States v. Romsey, 975 F.2d 556 (8th Cir. 1992). (Romsey contended District Court erred in denying him downward departure in face of government s declination to make substantial assistance motion. Prosecutor s discretionary decision may be challenged only if defendant makes substantial threshold showing of prosecutorial discrimination or irrational conduct. Romsey focused exclusively upon quality of his assistance; his bare assertion U.S. Attorney has arbitrary policy against making motions for substantial assistance fails to raise genuine issue that decision in his case was not rationally related to legitimate government interest. Thus, he was not entitled to discovery or hearing on why prosecutor declined to make motion. Moreover, plea agreement preserved government discretion not to file motion.)

United States v. Johnston, 973 F.2d 611 (8th Cir. 1992). (Without more than bare allegation by Johnston that Government acted in bad faith in failing to make motion, District Court properly denied Johnston s attempt to conduct inquiry into government s reasons behind decision not to offer motion. Moreover, this Court was satisfied Johnston s was not rare, egregious case justifying such departure without government motion.), cert. denied, 506 U.S. 1068 (1993).

United States v. Davila, 964 F.2d 778 (8th Cir.) (Davila s was not rare "egregious case" where District Court could have departed without government motion. This was not case where government agreed to make departure motion and then reneged nor was this case where reasonable minds could not differ about substantiality and value of assistance. Though Davila wanted to cooperate further, desire to cooperate is not same as substantial assistance. Thus, District Court did not have authority to depart.), cert. denied, 506 U.S. 964 (1992).

United States v. Durham, 963 F.2d 185 (8th Cir.) (Parties calculated sentencing range as thirty years to life on drug count plus five-year mandatory penalty for firearm charge, and Durham agreed twenty-year mandatory minimum applied to drug count plus five-year mandatory penalty for firearm. Pursuant to agreement, government made motion for departure below Guidelines range based on Durham s cooperation. District Court sentenced him to twenty-five years. This Court affirms as Durham waived any objection to twenty-five-year sentence by agreeing it was minimum mandated by statutes, and by accepting benefit of plea agreement; moreover, sentence was appropriate.), cert. denied, 506 U.S. 1023 (1992).

United States v. Lyon, 959 F.2d 701 (8th Cir. 1992). (No abuse of discretion where in response to government s motion, Court reduced Lyon s sentencing range and then sentenced Lyon to one month less than maximum in that range.)

United States v. Rodriguez-Morales, 958 F.2d 1441 (8th Cir.) (A District Court may not depart below statutory minimum sentence without separate section 3553(e) motion by government for substantial assistance; section 5K1.1 motion is not enough. District Court erred in departing below 120 month statutory minimum sentence where government filed only section 5K1.1 motion; this Court remands for sentencing no lower than at statutory minimum. DISSENT: Majority

ignored application notes accompanying sections 5K1.1 and 2D1.1 which indicate that District Court may depart below Guidelines range and any mandatory minimum upon motion by government pursuant to section 5K1.1.), cert. denied, 506 U.S. 940 (1992).

United States v. Kelley, 956 F.2d 748 (8th Cir. 1992). (This Court rejects argument that because § 5K1.1 is policy statement, rather than guideline, it is not binding on Courts and that they can reject it on policy grounds. District Court did not err in holding it could not entertain substantial assistance departure motion made by defendant rather than government. CONCUR/DISSENT: Concurs in judgment. Agrees § 5K1.1 requires motion from prosecution for departure, but also believes § 5K2.0 provides alternative authority to depart under limited circumstances (e.g., district judge who has supervised several cases involving same drug conspiracy may have information not readily available to assistant U.S. Attorney prosecuting particular case, substantial assistance may have been rendered to probation officer in conjunction with different case). DISSENT (Lay): In nullifying discretion of District Court to depart, this Court encourages further detachment of judiciary from its traditional and vital involvement in individualized sentencing. Language of sections 3553 and 991(b)(1) indicate Congress intended Guidelines to act, not as rigid strictures, but as tools to be used by Court when determining individualized sentence. Effect of majority s decision is to treat Commission s policy statements as acts of Congress, thereby discarding principles normally applied when reviewing actions of administrative agencies). DISSENT (Heaney): Guidelines enabling legislation does not require motion and Congress has not approved motion "requirement" as part of binding guideline nor is it suggested in legislative history. Placing power in prosecutor s hands unfairly skews sentencing process. When prosection declines to make motion for substantial assistance, it need not give reason to defendant, Court, or public. We should recognize motion "requirement" for what it is: procedural anomaly that Sentencing Commission grafted onto advisory policy statement intended to provide guidance for Courts. Motion "requirement," if viewed as mandatory, runs counter to congressional directive as judge cannot "assure" that defendant s substantial assistance will be taken into account unless prosecutor makes motion which prosecutor may not always do. Congress provided District Court need only "consider" applicable policy statements when imposing sentence--Guidelines have force of law; policy statements are only advisory. No need to fear that chaos will result or law enforcement will be hampered if § 5K1.1 is treated as non-binding; only cost, sentencing will take more time.)

United States v. LeMay, 952 F.2d 995 (8th Cir. 1991). (Government made downward departure motion pursuant to plea agreement, which District Court granted because of LeMay s substantial assistance in government s investigation despite Court s rejection of first plea agreement as presenting too low sentence cap and its imposition of supervised release term exceeding § 5D1.2(a) range.)

United States v. Laird, 948 F.2d 444 (8th Cir. 1991). (District Court s ruling that Laird did not show bad faith on part of government for its failure to make motion under this section was not clearly erroneous where record showed Laird would not sign plea agreement, later refused to offer assistance to government, and disputed facts at trial.)

United States v. Carnes, 945 F.2d 1013 (8th Cir. 1991). (While Court may impose sentence less than statutorily required minimum, this Court was persuaded that District Court exercised its

discretion. After weighing assistance Carnes rendered to prosecution against benefit Carnes received from prosecutor s decision not to press silencer charge, District Court chose not to depart downward by more than two years.)

United States v. Drake, 942 F.2d 517 (8th Cir. 1991). (Government s failure to make motion for departure was not done in bad faith and was not arbitrary. Government fully complied with plea agreement, dismissing five of seven counts and detailing Drake s assistance in letter to District Court. Letter was not functional equivalent of motion as Drake argued; District Court did rely on letter in sentencing Drake to term at bottom of applicable sentencing range.)

United States v. Hubers, 938 F.2d 827 (8th Cir.) (Where no due process issue was raised by sequence of events in Hubers s case, motion by government was required before departure for substantial assistance could be made.), cert. denied, 502 U.S. 961 (1991).

United States v. Sharp, 931 F.2d 1310 (8th Cir. 1991). (Pursuant to government motions under § 5K1.1 and 18 U.S.C. § 3553(e), District Court recognized Guidelines range of 151-188 months and statutory minimum of 120 months and imposed sentence of 114 months. This Court will not review extent of departure.)

United States v. Gutierrez, 917 F.2d 379 (8th Cir. 1990). (Judgment of District Court affirmed by equally divided Court). (Panel decision reported at 908 F.2d 349, where this Court remanded for resentencing where District Court departed downward because of defendants assistance to government, notwithstanding government did not move for departure. Validity of motion requirement discussed in terms of statutory directive and sound policy. DISSENT: Majority view not required by Guidelines, unduly limits ability of trial Court to protect defendant against arbitrary action, and is generally inconsistent with notions of fair play, due process. Would view determination of substantial assistance as finding of fact reviewable under clearly erroneous standard.)

United States v. Hill, 911 F.2d 129 (8th Cir. 1990). (Hill was not entitled to sentence reduction. Though Hill cooperated with state officials, neither Hill nor government requested downward adjustment for assistance to authorities and Hill received substantial benefit from his plea agreement.), cert. denied, 504 U.S. 975 (1991).

United States v. Spees, 911 F.2d 126 (8th Cir. 1990). (Where there was no breach of plea agreement and Spees received benefit of his assistance under plea agreement, District Court s refusal to depart from statutory minimum sentence without government motion was proper. Court leaves for another day question of whether bad faith or arbitrary refusal on part of prosecutor may allow District Court to depart without government motion.)

United States v. Oransky, 908 F.2d 307 (8th Cir. 1990). (Government motion requirement for any downward departure does not violate due process or separation of powers. Stipulation made by Oransky and government does not take place of motion. Lacking motion, Court did not have authority to depart. CONCURRENCE: Smitherman sweeps with too broad brush.)

United States v. Dobynes, 905 F.2d 1192 (8th Cir.) (Following his conviction for drug and firearm related crimes, Dobynes agreed to cooperate in government s investigation of drug trafficking. Asserting he made good faith effort to provide substantial assistance, he claimed District Court error in refusing reduction. Refusal to depart pursuant to § 5K1.1 is nonreviewable. Absent due process violation, District Court had no authority to consider such departure absent government motion.), cert. denied, 498 U.S. 877 (1990).

United States v. Mason, 902 F.2d 1314 (8th Cir. 1990). (Neither 18 U.S.C. § 3553(e) nor § 5K1.1 violates separation of powers doctrine, as Mason contended, by delegating to prosecutors authority to control when District Court judges may consider defendant s cooperation with government as mitigating factor in sentencing.)

United States v. French, 900 F.2d 1300 (8th Cir. 1990). (Defendant was not eligible to receive reduction of sentence for substantial assistance because government did not file motion. This Court, however, expresses disapproval of District Court s policy resulting in refusal to allow defendant to cooperate with government by making controlled buys of cocaine while on bond pending his sentencing.)

United States v. Coleman, 900 F.2d 419 (8th Cir. 1990). (Plea agreement provided that government would advise District Court of nature, extent and importance of cooperation provided by defendant. District Court treated letters submitted by government pursuant to agreement as § 3553(e) motions and departed downward. This Court reversed holding that motion requirement is not ambiguous, there are no statutory exceptions and, therefore, whether particular government action is functional equivalent of § 3553(e) motion is irrelevant. Defendants may, nevertheless, have remedy if agreement bound government to file such motion. Court found that plea agreement was not ambiguous and did not bind government to file § 3553(e) motion.)

United States v. Sutherland, 890 F.2d 1042 (8th Cir. 1989) (per curiam). (Defendant not entitled to downward departure for substantial assistance since he already received benefit of his cooperation through plea agreement. Case notes that requirement of motion by government for such departure is constitutional, though District Court may be empowered to grant such departure in appropriate case.)

United States v. Smitherman, 889 F.2d 189 (8th Cir.) (Absence of § 5K1.1 motion by government precluded departure by trial Court for credit for defendant s cooperation where no question presented of prosecutorial bad faith or arbitrariness. However, existence of motion does not necessarily mandate departure.), cert. denied, 494 U.S. 1036 (1989).

United States v. Grant, 886 F.2d 1513 (8th Cir. 1989). (District Court denied defendant s request for departure based upon cooperation because government refused to make motion. Court rejected defendant s argument that § 5K1.1 improperly compromises judicial authority by requiring government to make motion before Court can grant departure based on cooperation; Court also rejected defendant s argument § 5K1.1 denies due process by vesting prosecutors with absolute discretion to control Court s departure based upon cooperation; Court did not consider related question of whether prosecutor s arbitrary or bad faith refusal to move for § 5K1.1 departure

violates due process because issue was not presented; Court also rejected defendant s argument that § 5K1.1 does not implement congressional instruction that Guidelines reflect general appropriateness of lower sentence by considering defendant s substantial assistance; Commission did not exceed its authority in drafting § 5K1.1 because Congress itself drafted 18 U.S.C. § 3553(e) same way.)

United States v. Ehret, 885 F.2d 441, 445 (8th Cir. 1989). (Where defendant refuses to cooperate with government, District Court properly refused to reduce sentence.), cert. denied, 493 U.S. 1062 (1990).

United States v. Justice, 877 F.2d 664, 666-70 (8th Cir.) (Departure for substantial assistance without government motion cannot be based on 18 U.S.C. § 3553(b); in appropriate case, District Court may be empowered to grant departure notwithstanding government s refusal to file motion; District Court need not award defendant for cooperation if he already received benefit of cooperation through leniency at charging phase.), cert. denied, 493 U.S. 958 (1989).

**§ 5K1.2 (Refusal to Assist):**

United States v. Griess, 971 F.2d 1368 (8th Cir. 1992). (District Court s upward departure based on Griess s unwillingness to assist law enforcement officers in apprehending other drug offenders, constitutes incorrect application of law.)

United States v. DePuew, 889 F.2d 791 (8th Cir. 1989). (Prosecutor s argument that defendant should be sentenced at upper end of range was not based on defendant s noncooperation and thus, did not affect Court s sentencing or offend policy of § 5K1.2.)

United States v. Smitherman, 889 F.2d 189 (8th Cir.) (While defendant s refusal to cooperate may not be considered aggravating factor, record was clear that sentencing judge did not consider timing of defendant s cooperation as aggravating factor.), cert. denied, 494 U.S. 1036 (1989).

**§ 5K2.0 (Departures/Standard of Review)**:

Koon v. United States, 518 U.S. 81 (1996). (Departure from Guidelines is reviewed for abuse of discretion. Whether factor is permissible basis for departure is question of law, and District Court by definition abuses its discretion if it commits error of law. If factor is forbidden, Court cannot use it as basis for departure. If factor is encouraged, Court is authorized to depart if applicable Guideline does not already take it into account. If factor is discouraged, or encouraged but already taken into account by applicable Guideline, Court should depart only if factor is present to exceptional degree or in some other way makes case different from ordinary case where factor is present. If factor is unmentioned in Guidelines, Court must--after considering structure and theory of relevant individual Guidelines as well as Guidelines taken as whole--decide whether factor is sufficient to take case out of heartland. Court must bear in mind Commission's expectation that departures based on unmentioned grounds will be highly infrequent.)

Williams v. United States, 503 U.S. 193 (1992). (District Court's use of impermissible basis for departure is subject to appellate review. If District Court relied on improper ground, Court of Appeals cannot affirm sentence based solely on its independent assessment that departure was reasonable; remand is required unless Court of Appeals concludes, on record as whole, that error was harmless, i.e., that error did not affect District Court's selection of sentence imposed.)

United States v. O'Malley, No. 03-1897 (8th Cir. 2004) (MELLOY, McMILLIAN,* BOWMAN). (PROTECT Act's standard of review applies to pending appeals. We review de novo question whether departure is justified given particular facts of case.)

United States v. Parks, No. 03-1286 (8th Cir. 2004) (RILEY, BEAM, SMITH*). (Discretionary refusal to depart downward is not reviewable under 18 U.S.C. § 3553. It is clear that District Court recognized its authority to depart, and simply chose not to, where it said defendant's troubled youth was not "sufficiently extraordinary to take it outside the heartland.")

United States v. Courtney, No. 02-4083 (8th Cir. 2004) (LOKEN, McMILLIAN, HANSEN*). (Under PROTECT Act, we review de novo whether District Court's basis for departure advances statutory objectives of sentencing, is statutorily authorized, and is justified by facts of case; we review for clear error District Court's factual findings; and we review for abuse of discretion reasonableness of District Court's departure. New standard applies to pending appeals.)

United States v. Cole, 357 F.3d 780 (8th Cir. 2004) (MORRIS ARNOLD, BEAM,* BYE). (Under PROTECT Act, we review de novo District Court's application of Guidelines to facts and review for clear error its factual findings. PROTECT Act standard of review applies even though defendant was sentenced prior to its effective date.)

United States v. Cuervo, 354 F.3d 969 (8th Cir. 2004) (RILEY, HEANEY,* SMITH). (This Court reviews de novo District Court's downward departure.)

United States v. Frank, 354 F.3d 910 (8th Cir. 2004) (LOKEN, HEANEY, MORRIS ARNOLD*). (Denial of downward departure was unreviewable where District Court indicated its awareness of authority to depart by stating, "I believe I do have the authority under the guidelines to give the relief you seek.")

United States v. Placensia, 352 F.3d 1157 (8th Cir. 2003) (BYE,* GIBSON, MELLOY). (Where defendant offers no cognizable argument that District Court was unconstitutionally motivated in denying departure or that District Court erroneously determined it lacked authority to depart, denial of departure is unreviewable.)

United States v. Wheeldon, 351 F.3d 897 (8th Cir. 2003) (LOKEN, RICHARD ARNOLD, BOWMAN) (per curiam). (In appeal after remand for resentencing, this Court declines to consider defendant's challenge to District Court's denial of downward departure because defendant did not raise issue in his first appeal. In any event, matter would be unreviewable because District Court's

comments at resentencing indicate it was aware of its authority to depart.)

United States v. Willey, 350 F.3d 736 (8th Cir. 2003) (MORRIS ARNOLD, BOWMAN, MURPHY*). (Under PROTECT Act, we review de novo District Court's application of Guidelines to facts and review its factual findings for clear error. New standard applies to pending appeals because it is procedural in nature.)

United States v. Sypolt, 346 F.3d 838 (8th Cir. 2003) (MORRIS ARNOLD,* BEAM, BYE). (Where defendant's attorney at sentencing drew District Court's attention to Guideline authorizing departure for mental condition, District Court was aware of its authority to depart and its refusal to depart was unreviewable.), cert. denied, 124 S. Ct. 1484 (2004).

United States v. Archambault, 344 F.3d 732 (8th Cir. 2003) (MORRIS ARNOLD, HANSEN, SMITH*). (Under PROTECT Act, this Court reviews de novo whether District Court based its departure on permissible factor, reviews for clear error District Court's factual findings, and reviews for abuse of discretion reasonableness of District Court's departure.)

United States v. Gonzalez-Lopez, 335 F.3d 793 (8th Cir.) (HANSEN,* LOKEN, SMITH). (District Court recognized its authority to depart, making its refusal to depart unreviewable, where it said departure would not be authorized under circumstances of this case. This statement reflects District Court's determination that defendant's offense did not fall outside framework of 2001 amendments to § 2L1.2 creating incremental enhancements that take into account seriousness of prior offense.), cert. denied, 124 S. Ct. 591 (2003).

United States v. Lalley, 317 F.3d 875 (8th Cir. 2003) (WOLLMAN, BRIGHT, JOHN GIBSON*). (District Court's decision to depart is reviewed under unitary abuse of discretion standard. Question whether departure is supported by facts of case is reviewed deferentially, but this Court still examines record to determine whether it supports decision.)

United States v. Patterson, 315 F.3d 1044 (8th Cir. 2003) (BOWMAN,* BRIGHT, FAGG). (District Court's decision to depart downward is reviewed for abuse of discretion, and in most cases will be due substantial deference. However, legal authority to depart is limited as described in § 5K2.0 and relevant caselaw. Where question of propriety of departure is fact-based, and departure is unsupported by evidentiary record, this Court will reverse.)

United States v. Young, 315 F.3d 911 (8th Cir.) (BOWMAN,* RICHARD ARNOLD, LOKEN). (Where District Court does not erroneously determine that it lacks authority to depart, and does not deny departure based on unconstitutional motive, decision is unreviewable on appeal.), cert. denied, 123 S. Ct. 2108 (2003).

United States v. Roberts, 313 F.3d 1050 (8th Cir. 2002) (MURPHY,* BEAM, MELLOY). (Departure from Guidelines is reviewed for abuse of discretion; however, whether particular factor is permissible basis for departure is question of law reviewed de novo.)

United States v. Rhone, 311 F.3d 893 (8th Cir. 2002) (LOKEN, RILEY, SMITH*). (Defendant requested downward departure to compensate him for time served on previous, unrelated, vacated conviction. District Court recognized its authority to depart--as shown in its statements that this was attractive argument, but one which would make bad public policy, and that defendant was recidivist who did not deserve lighter sentence on instant offense--despite its statement that "if there should be read into the Guidelines some sort of equitable argument, I think that's going to have to either come from Congress or at least, in my case, the Eighth Circuit." Thus, denial of downward departure was unreviewable on appeal.), cert. denied, 123 S. Ct. 2120 (2003).

United States v. McFarlane, 309 F.3d 510 (8th Cir. 2002) (HANSEN,* MORRIS S. ARNOLD, PRATT). (Under 18 U.S.C. § 3742(a), this Court lacks jurisdiction to review argument that District Court should have granted greater downward departure absent allegation that sentence was imposed in violation of law. Appeal dismissed.)

United States v. VanHouten, 307 F.3d 693 (8th Cir. 2002) (McMILLIAN, JOHN R. GIBSON,* LOKEN). (District Court's discretionary decision not to depart from Guidelines is unreviewable on appeal absent unconstitutional motive if District Court recognized its authority to depart. District Court's statement that it lacked power to depart "in a case like this" is acknowledgment that downward departure could not be justified by facts of particular case, not expression of District Court's mistaken belief that it lacked authority ever to depart.)

United States v. DeBuse, 289 F3.d 1072 (8th Cir. 2002) (McMILLIAN, FAGG,* MELLOY). (Defendant's appellate challenge to extent of District Court's downward departure fails because this Court lacks authority to review extent of departure regardless of District Court's reasons for declining to depart further.)

United States v. Reinke, 283 F.3d 918 (8th Cir. 2002) (BYE, LAY, J. R. GIBSON*). (District Court's decision to depart from Guidelines is reviewed under unitary abuse-of- discretion standard; abuse of discretion occurs where District Court makes error of law, fails to consider relevant factor that should have been given significant weight, considers irrelevant or improper factors; or when Court commits clear error of judgment, i.e., it relies on factual circumstances that do not adequately reflect record.)

United States v. Petersen, 276 F.3d 432 (8th Cir. 2002) (WOLLMAN, LAY, RILEY*). (District Court's decision to depart from Guidelines will usually be afforded substantial deference because it embodies traditional exercise of discretion in sentencing. However, when District Court exercises its discretion based on erroneous view of law, it necessarily abuses its discretion. District Court abuses its discretion when it fails to consider relevant factor which should have been given significant weight, gives significant weight to irrelevant or improper factor, or commits clear error of judgment when weighing proper factors.)

United States v. Carrasco, 271 F.3d 765 (8th Cir. 2001) (BOWMAN, RICHARD S. ARNOLD, HANSEN*). (Defendant's failure to request downward departure at sentencing waived his argument and subjected his appeal to, "at best," plain error review.)

United States v. Riza, 267 F.3d 757 (8th Cir. 2001) (LOKEN,* JOHN R. GIBSON, MURPHY). (This Court has consistently held that District Court's decision not to depart downward is unreviewable so long as court was aware of its authority to depart. District Court is presumed to be aware of its authority, and "cryptic remarks" will not overcome that presumption.)

United States v. Lalley, 257 F.3d 751 (8th Cir. 2001) (MORRIS SHEPPARD ARNOLD, J. R. GIBSON,* GOLDBERG). (District Court's discretionary decision not to depart from Guidelines is unreviewable unless District Court had unconstitutional motive or erroneously determined it lacked authority to consider particular mitigating factor.)

United States v. Buckendhal, 251 F.3d 753 (8th Cir.) (BEAM,* HEANEY, BYE). (This Court gives substantial deference to District Court's decision whether to depart from Guidelines, but owes no deference on issue whether particular factor is permissible basis for departure, which is question of law reviewed de novo.), cert. denied, 534 U.S. 1049 (2001).

United States v. Hasan, 245 F.3d 682 (8th Cir.) (en banc). (This Court reviews District Court's decision to grant downward departure for abuse of discretion. When District Court exercises its discretion based on erroneous view of law, it necessarily abuses its discretion.), cert. denied, 534 U.S. 905 (2001).

United States v. Causor-Serrato, 234 F.3d 384 (8th Cir. 2000) (HANSEN,* HEANEY, MORRIS SHEPPARD ARNOLD). (Vacating conviction in part and remanding when District Court stated it did not think it had authority to depart on basis of defendant's voluntary consent to deportation. District Court stated that if defendant appealed his decision and Eighth Circuit found there was authority, case would be remanded for District Court to determine whether to exercise its discretion to depart. This Court has jurisdiction to review District Court's decision not to depart when decision is based on legally erroneous determination that it lacked authority to consider particular mitigating factor. Though this Court expresses no opinion on whether departure is warranted, it instructs District Court to consider issue.), cert. denied, 532 U.S. 1072 (2001).

United States v. Navarro, 218 F.3d 895 (8th Cir. 2000) (RICHARD S. ARNOLD,* HEANEY, MAGNUSON). (Where District Court did not believe it lacked authority to depart and did not act unconstitutionally in denying defendant's motion for downward departure based on opportunities he would be denied in prison due to his deportable-alien status, this Court did not review District Court's discretionary denial of departure.)

United States v. Drew, 131 F.3d 1269 (8th Cir. 1997). (This Court reviews departures under abuse of discretion standard. Departures on unmentioned grounds should be highly infrequent.)

United States v. Hernandez-Reyes, 114 F.3d 800 (8th Cir. 1997). (Hernandez-Reyes argues his due process rights were violated on basis District Court sentenced him "mechanically." Assuming, without deciding, predetermined, mechanical decision not to depart downward implicates constitutional concern and thereby renders sentencing decision reviewable on appeal, this Court concludes Hernandez-Reyes does not prevail as what is prohibited by mechanical-sentencing rule is policy of imposing predetermined sentence without considering particular defendant s situation.

Record here belies that approach as Court occasionally grants downward departure and its policy required consideration of Hernandez-Reyes s circumstances in order to determine whether his situation was in fact extraordinary (Court adopted findings of fact in PSR; it did not impose fine because of Hernandez-Reyes s financial circumstances; it sentenced Hernandez-Reyes to low end of applicable guideline range; and Court heard extensive arguments from parties on departure motion before finding Hernandez-Reyes s case did not warrant such departure); thus, decision is not reviewable. This Court s acknowledgment that District Courts have authority to depart downward does not amount to directive to do so on routine basis; decision to depart is left to District Court s sound discretion. Appeal dismissed.)

United States v. McNeil, 90 F.3d 298 (8th Cir.) (This Court reviews District Court s decision to depart from Guidelines for abuse of discretion, citing Koon v. U.S.. Supreme Court clarified that unitary abuse of discretion standard should guide review of sentencing departures. This Court s three-part test is not necessarily inconsistent with abuse of discretion standard articulated, but this Court will nevertheless endeavor to follow unitary standard set forth in Koon. Deference owing to District Court s sentencing decision does not render appellate review empty exercise because amount of deference due depends on nature of question presented. District Court by definition abuses its discretion when it makes error of law. Under abuse of discretion standard, District Court s decision will not be disturbed as long as it is within range of discretion afforded to given determination and is not influenced by mistake of law. Abuse of discretion occurs when relevant factor that should have been given significant weight is not considered, when irrelevant or improper factor is considered and given significant weight, or when all proper and no improper factors are considered, but Court in weighing those factors commits clear error of judgment.), cert. denied, 519 U.S. 1034 (1996).

United States v. Jackson, 56 F.3d 959 (8th Cir. 1995). (Refusal to grant downward departure is unreviewable exercise of discretion on part of sentencing judge. However, where District Court has refused to depart from Guidelines because it believed it lacked authority to do so, and not because it merely refrained from exercising discretion, decision is subject to appellate review.)

United States v. Robinson, 20 F.3d 320 (8th Cir. 1994). District Court s refusal to exercise its discretion to depart from applicable guideline range is unreviewable. This Court may review District Court s conclusion it lacked authority to depart. In this case while District Court expressed its dismay regarding severe sentences for crack offenses and their disproportional impact on blacks and Court fervently wanted to exercise discretionary authority, but could not find valid reason to do so. Thus, refusal to depart is unreviewable.)

United States v. Brown, 18 F.3d 1424 (8th Cir. 1994). (At sentencing, Brown s counsel argued only that Court should depart under § 4A1.3 because Category VI overrepresented seriousness of Brown s criminal history; Court declined to depart downward. On appeal, Brown argued District Court may depart downward pursuant to § 5K2.0 where sentence is disproportional to crime because Guidelines fail to adequately reflect mitigating factors or because circumstances of case are atypical. Where, as here, District Court made it clear it did not choose to exercise its discretion to depart, this Court will not review District Court s discretionary refusal to depart.)

United States v. Evidente, 894 F.2d 1000 (8th Cir.) (Refusal to depart downward for circumstances not adequately considered by Guidelines is not reviewable pursuant to 18 U.S.C. § 3742.), cert. denied, 499 U.S. 922 (1990).

**§ 5K2.0 (Upward Departures):**

Burns v. United States, 501 U.S. 129 (1991). (District Court may not depart upward from Guidelines range without first notifying parties that it intends to depart.)

United States v. Courtney, No. 02-4083 (8th Cir. 2004) (LOKEN, McMILLIAN, HANSEN*). (Background to § 3D1.4 expressly authorizes upward departure when application of grouping rules results in significantly more than five units but caps enhancement at five levels. Regardless of whether defendant had twenty-six or thirty-four units (depending on how they are counted), three-level upward departure was justified.

Application Note 1 to § 2N1.1 expressly authorizes upward departure when offense caused extreme psychological injury to victims. Victim-impact statements documented psychological injury cancer patients suffered as result of being given diluted chemotherapy drugs. Three-level upward departure was justified.)

United States v. Cole, 357 F.3d 780 (8th Cir. 2004) (MORRIS ARNOLD, BEAM,* BYE). (Defendant called 911 operator and said that anthrax had been placed in school. District Court erred by departing upward on grounds that defendant's call disrupted government functions, his call posed significant danger to public health and safety, he had recidivist tendencies, and he made call month after September 11 terrorist attacks. There was no evidence of substantial disruption, just that law enforcement was dispatched to school and post office. Public health and safety were not endangered because no real anthrax was present. There was no evidence that defendant would commit more crimes in future. Given these three invalid grounds for departure, it is unclear what role timing of offense played in District Court's departure decision, and case is remanded for reconsideration.)

United States v. Orchard, 332 F.3d 1133 (8th Cir. 2003) (LOKEN, BRIGHT, MURPHY*). (In case where babysitter's longtime employer attempted to rape her, upward departure was proper to account for abuse of position of trust which could not have been used for enhancement under § 3B1.3, which applies only to abuses of trust characterized by professional or managerial discretion.)

United States v. Lalley, 317 F.3d 875 (8th Cir. 2003) (WOLLMAN, BRIGHT, JOHN GIBSON*). (Application Note 2 to § 3B1.1 and interpretive caselaw make clear that management of property of criminal enterprise is encouraged basis for departure. It was not abuse of discretion for District Court to depart upward in this case--involving money launderer who conspired with embezzler--where he served accounting role, decided when and in what amounts to withdraw money from bank, and to lesser extent decided how to divvy up proceeds.)

United States v. Rose, 315 F.3d 956 (8th Cir.) (LOKEN, BEAM,* MELLOY). (District Court did not abuse its discretion in departing upward based on extreme conduct (where defendant posted names, address, phone number, and pictures of victim's children on pornographic web sites encouraging rape of these children) and extreme psychological injury (where defendant threatened

sexual and physical violence against victim and her children, knowing that victim had been raped and her brother had been murdered).), cert. denied, 123 S. Ct. 2238 (2003).

United States v. Iron Cloud, 312 F.3d 379 (8th Cir. 2002) (MURPHY,* JOHN GIBSON, SMITH). (Defendant was convicted of voluntary manslaughter for drowning his seventeen-year-old second cousin. Facts of offense were that she became severely intoxicated, he had sexual intercourse with her, she became angry, he knocked her unconscious and dragged her into river where she regained consciousness, he dunked her underwater thirteen to fifteen times before losing his grip on her, she was swept away downstream, and she drowned. Four-level upward departure under § 5K2.8 for extreme conduct was not abuse of discretion and did not double count conduct taken into account by offense-level enhancements for vulnerable victim and physical restraint.)

United States v. Brown, 287 F.3d 684 (8th Cir. 2002) (WOLLMAN, HANSEN,* FENNER). (Defendant was convicted of three counts of assault resulting in substantial bodily injury to child under age sixteen and one count of assault resulting in serious bodily injury. Under Guidelines grouping rules, single most serious count determined total offense level, without any incremental increase reflecting other counts. District Court did not abuse its discretion in departing upward by three levels to provide additional punishment for three other assaults in which child victim had his skull fractured, his face burned, and his leg bitten on three separate days. Commentary to § 3D1.4 expressly authorizes upward departure in unusual cases where, as result of grouping rules, Guidelines range is too restrictive to compensate for nature of disregarded counts.)

United States v. Bougie, 279 F.3d 648 (8th Cir. 2002) (BYE, RICHARD S. ARNOLD,* BEAM). (District Court departed upward in carjacking case on two bases: (1) there were multiple victims and (2) defendant brandished firearm. Although facts supporting (1) were in PSR, facts supporting (2) were not: they were only in FBI agent's affidavit supporting criminal complaint. District Court therefore erred by departing on basis unsupported by record. Error was not harmless because, although (1) could be adequate basis for departure, this Court cannot determine what importance District Court attributed to (2). Case is remanded for resentencing, at which time government may introduce evidence to support (2) if it wishes.)

United States v. Moskal, 211 F.3d 1070 (8th Cir. 2000) (RICHARD S. ARNOLD, BEAM,* CONMY). Affirming District Court's upward departure because of: (1) large number of vulnerable victims; (2) extraordinary manner defendant manipulated victims to gain their trust; (3) number of methods he used to defraud victims; (4) damage to defendant's law firm's goodwill and standing in legal community; and (5) adverse impact on legal profession and system of justice. All five factors are permissible bases for departure.)

United States v. Merrival, 176 F.3d 1079 (8th Cir. 1999) (BEAM, HEANEY, GOLDBERG*). (This Court upholds 49-month upward departure (for total of 70-month sentence) where District Court clearly relied on death and significant physical injury caused by defendant's conduct (vehicular involuntary manslaughter). Although District Court may also have relied on invalid factors in departing upward, this Court determines remand is unnecessary because record reveals District Court would have imposed same sentence absent reliance on potentially invalid factors. This Court notes that in imposing departure of this magnitude, District Court acted at

outermost limits of its discretionary authority.)

United States v. Colbert, 172 F.3d 594 (8th Cir. 1999) (RICHARD S. ARNOLD,* HANSEN, STROM). (District Court did not abuse its discretion in refusing to depart downward from applicable Guidelines range based on defendant's status as former police officer, which would make defendant unusually susceptible to abuse in prison; victim's provocation of defendant's conduct; and hardship imposed on defendant's three children and on his fiancee: there was no extraordinary publicity, victim never physically threatened defendant, and defendant's family circumstances did not take case out of heartland.)

United States v. Hildebrand, 152 F.3d 756 (8th Cir.) (Rejecting appellant's argument that District Court interfered with his right to allocution by considering it in departing upward and in sentencing him at top of (increased) range; also rejecting argument that appellant was not given advance notice his allocution might serve as basis for upward departure: at start of sentencing hearing Court gave notice it would consider upward departure on grounds urged by government and then departed for those reasons.), cert. denied, 525 U.S. 1033 (1998).

United States v. Washington, 109 F.3d 459 (8th Cir. 1997). (District Court departed upward four BOL s primarily because Washington opened fictitious account at bank in name of elderly Hot Springs waitress. As result of this fraud, which resulted in rather small loss to bank, warrant issued for Cassady s arrest, and police questioned her at home before concluding she was innocent of fraud. District Court did not abuse its discretion as it acted upon encouraged departure factor (§ 2F.1 comment. (n.11)), Washington preyed upon his drug addict accomplices, directed his scheme at numerous banks and other merchants, and caused anguish to elderly waitress. Washington s history was of unrepentant, incorrigible recidivist.)

United States v. LeCompte, 99 F.3d 274 (8th Cir. 1996). (Before District Court can depart upward on ground not identified either in PSR or in prehearing submission by government, Rule 32 requires that Court give parties reasonable notice it is contemplating such ruling. Here, LeCompte s PSR stated departure might be appropriate under commentary 5 to § 2A3.4. However, District Court first disclosed it was departing in part because of psychological injury to (§ 5K2.3), just before pronouncing sentence. Because psychological injury issue is fact intensive, notice of possible departure on this ground should be given prior to sentencing hearing.)

United States v. McCarthy, 97 F.3d 1562 (8th Cir. 1996). (Labrie challenged upward departure as inappropriate. Relevant guideline is § 2D1.8, renting or managing drug establishment. Guideline does not take into account acts on which District Court based its upward adjustment: activities of investing in drug activity and laundering proceeds through business or charitable donation as was present in this record are beyond what is required to fall within conduct addressed by guideline. District Court did not abuse its discretion in deciding to depart upward as this case falls outside heartland; furthermore, extent of departure (nine months) was not unreasonable and District Court did not abuse its discretion.), cert. denied, 519 U.S. 1139 and 520 U.S. 1133 (1997).

United States v. Bartsh, 69 F.3d 864 (8th Cir. 1995). (While Bartsh s case was remanded for District Court to recalculate amount of restitution due, this Court s previous decision affirming

original District Court s upward departure is law of case. Bartsh asserts law of case should not have precluded further review of upward departure issue because he introduced substantially different evidence on remand making prior decision clearly erroneous, working manifest injustice. Revision to PSR presented no new substantial evidence, but merely recalculation of same evidence; 28% net reduction in amount of loss calculation is insubstantial for purposes of this appeal as recalculation ($1,564,517 to $1,120,662) had no effect on sentencing range under applicable version of Guidelines (§ 2B1.1(b)(1)(L) (1988)). Nor would it have influenced original District Court decision to depart upward as decision was based entirely on Bartsh s abuse of position of trust as federal officer. While this Court s decision relied on both extent of Bartsh s embezzlement and his position as officer of Court, Bartsh s corruption of his federal office stands alone as sufficient grounds for affirming departure. Nothing clearly erroneous or manifestly unjust in affirming such upward departure when appointed federal officer concedes to embezzling more than $1,000,000 from estate he has been charged to oversee.)

United States v. Beatty, 9 F.3d 686 (8th Cir. 1993). (This Court rejects Beatty s contention that he did not receive adequate notice of possibility that District Court might depart upward where PSR included section entitled "factors that may warrant departure" and specifically informed Beatty upward departure might be warranted. This Court concluded PSR which listed specific factors that could justify upward departure provided sufficient information to Beatty about possibility of upward departure. In addition, Beatty s counsel acknowledged he was aware of District Court s power to depart upward.

Beatty contended District Court misapplied Guidelines by relying on specific offense characteristic, "more than minimal planning" as basis for adjustment under § 2F1.1(b)(2)(A) and § 5K2.0. He contends District Court engaged in improper "double-counting." This Court states that double-counting is permitted in some circumstances. Here, Beatty s offense level was adjusted upward two levels because of first factor enumerated in § 2F1.1(b)(2), more than minimal planning. District Court found three of four enumerated factors present in Beatty s case; relying on presence of additional factors, District Court departed upward under § 5K2.0. Thus, no single factor was directly responsible for two discrete increases in Beatty s sentence. This Court thus concludes District Court did not err when it both adjusted Beatty s offense level and departed upward.)

United States v. Nomeland, 7 F.3d 744 (8th Cir. 1993). (District Court departed upward from guideline range of 110-137 months to 162 months imprisonment. Nomeland argues that neither victim trauma nor his criminal history provides proper basis for upward departure. Nomeland missed career offender status because he was paroled from his sentence for one of prior violent felonies 2 months more than 15 years before he committed bank robbery. While career offender "near miss" by itself is insufficient basis for departure, here, District Court expressly based its departure on Nomeland s extensive and violent criminal record. District Court also departed based on its judgment that two-level enhancement for physical restraint of robbery victims did not adequately account for psychological trauma Nomeland imposed. This Court expresses doubt that standing alone, this factor would warrant 25 months departure given slight evidence that victim suffered to unusual degree. But District Court did not view psychological trauma factor in isolation, but rather as one of combination of aggravating factors that justified upward departure. Because psychological trauma is expressly authorized upward departure under § 5K2.3, this Court concludes District Court committed no error of law in taking it into account in making its decision. Even if

District Court erred in basing departure in part on victim trauma, this Court concludes error was harmless as District Court s primary focus was on proper factor, Nomeland s extensive criminal record. Court notes District Court selected departure less than one-half of difference between top of Nomeland s guideline range and bottom of his career offender range. DISSENT: Conclusion that District Court would have imposed same sentence without reliance on impermissible ground is speculative--would remand for resentencing.)

United States v. Muzingo, 999 F.2d 361 (8th Cir.) (In effecting departure and imposing consecutive, rather than concurrent, sentences, District Court properly considered conduct underlying Muzingo s state convictions. There is no authority that restricts District Courts, in considering motion to depart, to reliance only on circumstances that relate to charged conduct.), cert. denied, 510 U.S. 1002 (1993).

United States v. Yankton, 986 F.2d 1225 (8th Cir. 1993). (District Court erred in concluding it could not depart. Rape victim became pregnant with twins, one of whom died in utero; other was delivered by c-section and had fatal disease. Victim was hospitalized for several weeks. This Court reverses and remands for District Court s consideration of government s departure motion as it would not presume Sentencing Commission would be so callous as to consider but then ignore pain and trauma of pregnancy resulting from rape. Court concluded aggravating circumstances present in case were of kind or degree not adequately taken into consideration by Commission and may serve as factual predicate for upward departure.)

United States v. Bartsh, 985 F.2d 930 (8th Cir. 1993), pet. for reh g granted in part, limited remand to recalculate amount of restitution. (District Court did not err in departing upward where it gave specific reasons for its departure, i.e., Bartsh was appointed by Court to assist victims of fraudulent activity and in turn he victimized same individuals second time by embezzling over $1.5 million. As Court officer, Bartsh s actions amounted to degree of abuse not adequately taken into account in Guidelines (§ 3B1.3). Court s findings were supported by evidence where plea agreement set forth details of Bartsh s offense and his attorney admitted that factors in case would give Court discretion to depart. Departure (24-30 month range to 72 months) was reasonable given Bartsh s position and extent of embezzlement and his understanding of potential consequences of his plea.), cert. denied, 510 U.S. 1170 (1994).

United States v. Passmore, 984 F.2d 933 (8th Cir. 1993). (This Court upholds District Court s four-point upward departure: expert psychological testimony was unnecessary to recognize extraordinary circumstances of Passmore s illicit, long term sexual relationship with young girl (who was eleven or twelve when relationship began and became pregnant by him at age fifteen) who was not "victim" of crime (contrast § 5K2.3). Pervasive character of fraudulent activities was also valid basis for departure where increases in base offense level did not adequately reflect Passmore s commission of similar frauds in three other states. DISSENT: District Court improperly assumed relationship could only have been extremely psychologically damaging to young girl. Nevertheless, analyzed as harmless error because dissent agrees Passmore "corrupted" girl and repeatedly carried on activity in other states. Believes District Court would have imposed same sentence absent invalid factor.)

United States v. Jagim, 978 F.2d 1032 (8th Cir. 1992). (Totality of circumstances supported twelve-month upward departure (for total of forty-two-month sentence) where District Court found Ziebarth obstructed justice by suborning perjury (though he was not so charged); Ziebarth s nephew was dragged into conspiracy in part because of familial relation; he was involved in extensive and long-term criminal activity.

Extent of Depew s obstruction supported departure (District Court believed § inadequate) based on his perjury, extensive and long-term participation in tax fraud, flooding Court with frivolous motions.)

United States v. Claymore, 978 F.2d 421 (8th Cir. 1992). (Upward departure was warranted and sixty-month sentence, reasonable where District Court relief upon pervasiveness of Claymore s conduct (he raped young victim several times in course of three months) and his use of force.)

United States v. Marion, 977 F.2d 1284 (8th Cir. 1992). (Because in its view, District Court was not constrained by sentencing Guidelines, it is incorrect to analyze any alleged error in not imposing more severe sentence than it did as failure "to depart upwards." On remand, government may renew arguments for departure based on failure to disclose prior criminal record and unscored criminal conduct. These findings are domain of trial Court discretion.)

United States v. Wint, 974 F.2d 961 (8th Cir. 1992). (District Court noted section 2J1.2(b)(1) provides for eight-level increase where obstructive conduct involved threats of physical injury, but is of no effect where, as here, offense level for underlying conduct exceeds adjusted offense level for obstruction offense (threatening witness). Where section (two level increase) did not adequately account for nature of Wint s and Murdock s conduct--threats were of death, were ongoing and sincere, aimed at government witness and innocent third parties, wife and family of government witness who was incarcerated, unable to protect his family or to flee himself. Four level adjustment was reasonable in light of offense level adjustments available for other offenses that endanger human life. CONCUR: Where guideline commentaries fail to adequately or fully describe offender s conduct or background, District Court possesses power to depart upward or downward from guideline-prescribed sentence and appeals Court should affirm. Same principles undergird departure in either direction.), cert. denied, 506 U.S. 1062 (1993).

United States v. Lara-Banda, 972 F.2d 958 (8th Cir. 1992.) (District Court did not err in determining that unrepentant, incorrigible recidivist, who poses significant threat to community safety, should have sentence imposed more severe than described by Guidelines; Court s departure (24-30 month range to 48 months) was eminently reasonable.)

United States v. Griess, 971 F.2d 1368 (8th Cir. 1992). (District Court properly considered Griess s five outdated juvenile offenses as valid factor for departure and sentence of 42 months (21 months added to top of guideline range) was not unduly harsh under circumstances. DISSENT: One permissible ground cited for departure does not support departure of such magnitude. Griess received sentence in excess of that which he would have received if juvenile convictions had been used to calculate his criminal history category. Griess s profile is not one of hardened criminal. Dissent convinced that primary reason for upward departure was Griess s refusal to name his sources, reason expressly forbidden by Guidelines. Griess s perjury related to same subject matter

as perjury before grand jury (for which he was convicted) and Griess s conduct did not involve any significant collateral consequences. Thus, acts of perjury were not present to degree substantially in excess of that contemplated by Commission in formulating section and District Court s reliance on perjury and subornation of perjury to warrant departure constituted incorrect application of Guidelines. Where neither government nor District Court cited any convincing evidence of Griess s incorrigibility and he had only one adult offense and several juvenile offenses which occurred seven to fifteen years earlier, finding that Griess is incorrigible is clearly erroneous and does not support departure.)

United States v. Estrada, 965 F.2d 651 (8th Cir. 1992). District Court departed upward by three months reasoning that obstruction of justice enhancement did not sufficiently consider dangers of high-speed chase; conspiracy charge was for same type of conduct as earlier drug conviction; and Estrada had taken advantage of his co-conspirator, trusting and vulnerable woman. This Court concluded Estrada s prior similar criminal conduct and need for deterrence warranted departure, but other factors did not. Court rejects Estrada s argument that consecutive nature of sentence takes into account prior similar conduct. There was no finding Estrada acted with higher degree of culpability than recklessness during his flight (which would have been covered by § 3C1.2) and there was no support in record for finding Estrada had vulnerable co-conspirator. District Court placed no special reliance on high-speed chase and abuse of co-conspirator factors. In view of minimal departure and reimposition of same sentence on resentencing, this Court concludes District Court would have imposed same sentence which was reasonable one.)

United States v. Davila, 964 F.2d 778 (8th Cir.) (This Court agreed with District Court that Davila s criminal history category of III understated prior criminal conduct and high probability of recidivism where he had received lenient sentences in past, number of convictions were not included in criminal history category because they were too old, and he had dealt drugs with two persons under age 21. Factors were sufficiently unusual to justify departure. Sentence of 264 months, 29 months above applicable sentencing range, was reasonable given Davila s long criminal history.), cert. denied, 506 U.S. 964 (1992).

United States v. Lloyd, 958 F.2d 804 (8th Cir. 1992). (This Court affirms Lloyd s 60-month sentence (on Court s own motion, it had departed from range of 21-27 months), concluding upon de novo review, circumstances upon which District Court relied were sufficiently unusual to justify departure; and there was no clear error in District Court s findings regarding Lloyd s past criminal conduct (willingness and propensity to use firearms) or circumstances of his current offense (entered convenience store with loaded handgun, reached for gun in course of his arrest.)

United States v. Saunders, 957 F.2d 1488 (8th Cir.) (In compliance with 18 U.S.C. § 3553(c), District Court set forth adequate reasons for its departure, i.e., Coleman s repeated use of same fraudulent scheme (not adequately considered by Guidelines), his two prior offenses which were not counted because of age (§ 4A1.2), his two additional pending fraud charges with warrants outstanding on both, his outstanding warrant in connection with probation violation, his receipt of leniency in past despite repetitive nature of his offenses, and trial testimony did not adequately reflect extent of fraudulent activity or harm associated with it (§ 1B1.4). Sentence of 36 months imprisonment was reasonable considering Coleman s continued use of same fraudulent scheme,

past lenient sentences, and non-quantifiable harm caused by his conduct.), cert. denied, 506 U.S. 889 (1992).

United States v. Hill, 951 F.2d 867 (8th Cir. 1991). (In contrast to situation in Burns v. United States, Hill received notice of possible upward departure in presentence report, which specified various grounds upon which that departure might be based.), cert. denied, 504 U.S. 975 (1992).

United States v. Andrews, 948 F.2d 448 (8th Cir. 1991). (Formal notice of District Court s intent to depart upward from Guidelines range not required where PSR expressly noted presence of factors which might warrant departure and prior to sentencing hearing, government requested that District Court depart upward. Burns v. United States standard cited.)

United States v. Fawbush, 946 F.2d 584 (8th Cir. 1991). (Fawbush was found guilty of seven counts of aggravated sexual assault of two girls aged three and four years old. Citing six reasons, District Court departed upward from range of 135-168 months to 241 months imprisonment. This Court remands for resentencing where District Court relied on both proper and improper factors for departure. This Court holds District Court abused its discretion in departing upward based on ages of victims of sexual abuse where Guidelines adequately accounted for this element by four-point addition which added three to four years to sentence. Court suggests that on remand, District Court can consider departure based on permissible reasons, e.g., Fawbush s abuse of position of trust, repetitive nature of assaults, prior incidents, likelihood he would commit similar crimes in future.)

United States v. Cox, 921 F.2d 772 (8th Cir. 1990). (Where Guidelines essentially merged Cox s escape charge into his robbery charge (§ 3D1.4(a),(c)), merger effectively barred District Court from imposing separate sentence for escape charge. Circumstances not sufficiently unusual to warrant upward departure as Sentencing Commission already determined how to calculate offense level when multiple offenses are sentenced in same proceeding. This Court finds judge was not justified in departing upward simply because he believed Cox deserved stiffer sentence, and reverses that part of judgment.)

United States v. Thomas, 914 F.2d 139 (8th Cir. 1990). (Though this Court s review of sentence would have been aided by indication from District Court of which guideline it was departing under and specific selection of appropriate criminal history category, under three-part test, this Court finds that District Court properly considered combination of aggravating circumstances not adequately taken into account by Guidelines: "assaultive-nature" of 1983 conviction, nature of firearms possessed by Thomas-Bey, and fact firearms were loaded.)

United States v. Sands, 908 F.2d 304 (8th Cir. 1990). (This Court reverses upward departure where District Court failed to identify any unusual facts or circumstances on issue of departure and record revealed no support for action. If Court departed based on information not introduced at sentencing hearing or set forth in presentence report, Court denied Sands opportunity to comment on matters relating to his sentence.)

United States v. Streeter, 907 F.2d 781 (8th Cir. 1990). (Streeter s sentence vacated; remanded for resentencing. Sentence must be within Guidelines unless District Court finds specific facts not adequately taken into account in formulation of Guidelines; if such findings are made, any departure must be reasonable. Generalized feeling defendant had been involved with drugs in past not sufficient basis for sentencing outside Guidelines), overruled on other grounds, U.S. v. Wise, 976 F.2d 393 (8th Cir. 1992).

United States v. Snover, 900 F.2d 1207 (8th Cir. 1990). (District Court departed upward in defendants sentences for fraud and listed factors supporting departure which included defendants acts of concealment before and after filing bankruptcy as well as "activity of similar nature, though not resulting in criminal charges but intimating deep attachment to obtaining of money or property at expense of others," which demonstrated unlikelihood of their rehabilitation. Defendants argued factors cited by District Court were merged into offense to which they pleaded guilty; and several factors were not violations of law, were acts advised by bankruptcy counsel, or were not established by reliable information. This Court held § 1B1.4 allows District Court to consider without limitation any information concerning background, character and conduct of defendant unless otherwise prohibited by law, that conduct pertaining to dismissed counts may be considered in calculating adjustments to offense level, and it was proper to consider conduct which did not constitute criminal activity as long as it is not given undue weight. Court found departure reasonable by applying First Circuit three-step analysis for reviewing sentence departing upward from Guidelines range, United States v. Diaz-Villafane, 874 F.2d 43 (1st Cir.), cert. denied, 493 U.S. 862 (1989).)

United States v. Drew, 894 F.2d 965 (8th Cir.) (No abuse of discretion where District Court departed upward, finding Guidelines do not adequately take into account attempt to murder government witness under section concerning willful obstruction of proceedings (§ 3C1.1).), cert. denied, 494 U.S. 1089 (1990).

**§ 5K2.0 (Downward Departures):**

United States v. Rodriguez-Ceballos, No. 03-2208 (8th Cir. 2004) (MORRIS ARNOLD, SMITH,* HANSEN). (District Court erred by departing downward on basis that sixteen-level enhancement under § 2L1.2(b)(1)(C) overstated seriousness of defendant's predicate conviction for domestic abuse assault. Circumstances of prior offense were not proper consideration.)

United States v. O'Malley, No. 03-1897 (8th Cir. 2004) (MELLOY, McMILLIAN,* BOWMAN). (District Court erred in departing downward. Defendant's payment of $459,000 restitution in full at time of sentencing was not extraordinary. Given that District Court did not apply mitigating-role reduction, it was not permitted to depart downward on basis that defendant's role in offense was overstated. Finally, defendant's community ties were not exceptional.)

United States v. Chapman, 356 F.3d 843 (8th Cir. 2004) (MORRIS ARNOLD,* BOWMAN, MURPHY). (Exceptional post-offense rehabilitation can, in rare cases, support downward departure even when defendant is not eligible for acceptance-of-responsibility reduction. In practice, defendant who goes to trial on issues relating to factual guilt faces near-absolute bar to receiving acceptance-of-responsibility reduction, no matter how exceptional his post-offense rehabilitation.

However, such defendant may nonetheless receive downward departure if his post-offense rehabilitation is atypical and truly extraordinary. Acceptance of responsibility may lend support to genuineness of rehabilitation, but it is not prerequisite.)

United States v. Cuervo, 354 F.3d 969 (8th Cir. 2004) (RILEY, HEANEY,* SMITH). (District Court departed downward by two levels. Defendant received two-level enhancement under § 2D1.1(b)(1) for possessing firearm during instant drug crimes. Defendant had been misadvised by lawyer that he could lawfully possess firearm despite his past misdemeanor conviction, and he possessed firearm in reliance on that advice. District Court concluded that defendant's case fell outside heartland and justified two-level downward departure to effectively undo two-level enhancement. This Court affirms, stating that defendant's attempted adherence to law is not irrelevant consideration when considering his sentence.)

United States v. Brings White, 354 F.3d 841 (8th Cir. 2004) (MORRIS ARNOLD, HEANEY,* FAGG). (Defendant argues that District Court was unaware of its authority to depart downward under Application Note 7 to § 5G1.3, dealing with time served on discharged terms of imprisonment. Sentencing transcript suggests that District Court thought this decision rested with Bureau of Prisons, and therefore, this Court remands for resentencing.)

United States v. Willey, 350 F.3d 736 (8th Cir. 2003) (MORRIS ARNOLD, BOWMAN, MURPHY*). (District Court erred in granting downward departure where defendant had ended drug use, was credentialed as engineer, had college education, enjoyed status in community, and had support of his wife and family. Given that defendant had obstructed justice (by testifying falsely at trial) and had not accepted responsibility, this aggregation of partial post-offense rehabilitation with several discouraged factors was insufficient to justify departure.)

United States v. Banks, 340 F.3d 683 (8th Cir. 2003) (BOWMAN, BEAM, BYE) (per curiam). (Sentencing disparity amongst codefendants is not proper basis for departure.)

United States v. Collins, 340 F.3d 672 (8th Cir. 2003) (LOKEN, RILEY, SMITH*). (Absent government motion under 18 U.S.C. § 3553(e), District Court lacked authority to depart below statutory minimum.)

United States v. Swick, 334 F.3d 784 (8th Cir. 2003) (HANSEN, RICHARD ARNOLD, BYE*). (District Court erred in granting defendant downward departure for extraordinary post-offense rehabilitation. Defendant's decision to stop abusing alcohol and successfully undergo treatment, while commendable, was not extraordinary: it was mostly just compliance with his conditions of pretrial release.)

United States v. Aguilar-Portillo, 334 F.3d 744 (8th Cir. 2003) (MORRIS ARNOLD,* HANSEN, SMITH). (Assuming arguendo that cultural assimilation could be basis for downward departure in cases involving immigration offenses, it has no relevance to drug offenses and cannot be proper basis for departure in drug cases.)

United States v. Dyck, 334 F.3d 736 (8th Cir. 2003) (HANSEN,* WOLLMAN, BYE).

(District Court improperly departed downward on basis that § 2L1.2(b)(1)(B) enhancement double-counted defendant's criminal history and overrepresented seriousness of prior offense. Double-counting is specifically authorized here, and 2001 amendments to § 2L1.2 created incremental enhancements that take into account seriousness of prior offense. Departure that would be impermissible under § 4A1.3 is also impermissible under § 5K2.0.)

United States v. Rice, 332 F.3d 538 (8th Cir. 2003) (WOLLMAN,* MURPHY, AUTREY). (Assuming arguendo that physical and emotional abuse suffered during childhood and adolescence could be basis for downward departure, it was not abuse of discretion for District Court to deny departure here because defendant did not show how his history of abuse made him into extraordinary bank robber deserving of leniency.)

United States v. Chacon, 330 F.3d 1065 (8th Cir. 2003) (HANSEN,* LOKEN, SMITH). (This Guideline does not authorize District Court to depart below statutory minimum; only authority to do so is 18 U.S.C. § 3553(e) and (f).)

United States v. Hardy, 325 F.3d 994 (8th Cir. 2003) (WOLLMAN,* HEANEY, MELLOY). (Downward departure for substantial assistance must be under § 5K1.1, not § 5K2.0.)

United States v. Patterson, 315 F.3d 1044 (8th Cir. 2003) (BOWMAN,* BRIGHT, FAGG). (Atypical post-offense rehabilitation, if so exceptional as to be beyond type that could be taken into account by acceptance-of-responsibility reduction, may be basis for downward departure. District Court abused its discretion in departing downward in this case because rehabilitative efforts must begin before defendant was subjected to prosecution (in this case, she began after she was arrested) and must consist of more than merely leading lawful life (in this case, she stopped using drugs and became attentive to her children and grandparents). DISSENT: this determination should be left to discretion of District Court, and requiring prison rather than probation for this type of offender makes no sense.)

United States v. Young, 315 F.3d 911 (8th Cir.) (BOWMAN,* RICHARD ARNOLD, LOKEN). (Ineffective assistance of counsel is not valid basis for downward departure.), cert. denied, 123 S. Ct. 2108 (2003).

United States v. Jauregui, 314 F.3d 961 (8th Cir., 2003) (WOLLMAN, RILEY, MELLOY*). (Defendant's waiver of right to deportation hearing was valid basis for downward departure, notwithstanding government's decision not to join in downward-departure motion. District Court's four-level downward departure was at "outer limits" of permissible departure but was not abuse of discretion.)

United States v. Roberts, 313 F.3d 1050 (8th Cir. 2002) (MURPHY,* BEAM, MELLOY). (Reversing twelve-month downward departure for defendant convicted of aggravated sexual abuse of child (rubbing his penis against four-year-old's vagina for five to ten minutes) based on aberrant behavior, diminished capacity, post-offense rehabilitation, mental condition, and cooperation. Departure based on aberrant behavior is specifically precluded if defendant has more than one criminal history point, regardless of how minor or unrelated his prior crimes were, and this

defendant had six points. There was no finding of diminished capacity, only voluntary intoxication and recurrent depression. Maintaining sobriety and attending mental health counseling, as required by defendant's bail conditions, was not extraordinary post-offense rehabilitation. There was no finding that defendant's depression was present to unusual degree or related to his commission of offense. Defendant's cooperation with authorities was of type supporting acceptance-of-responsibility reduction (which he received), not downward departure, because he only confessed after being approached by FBI agent, his statements minimized his culpability, and he pleaded guilty only after reaching quite favorable plea agreement. Finally, even aggregating all individually insufficent factors together, defendant's case was not outside of heartland.)

United States v. McFarlane, 309 F3.d 510 (8th Cir. 2002) (HANSEN,* MORRIS S. ARNOLD, PRATT). (Where cooperation agreement afforded defendant only § 1B1.8 immunity, District Court was entitled to use incriminating statements he made during cooperation against him in determining whether to grant downward departure and, if so, extent of departure.)

United States v. VanHouten, 307 F3.d 693 (8th Cir. 2002) (McMILLIAN, JOHN R. GIBSON,* LOKEN). (Defendant pleaded guilty to possessing child pornography and District Court denied his downward-departure motion. Assuming arguendo that denial is reviewable, grounds asserted by defendant--that he only downloaded small amount of pornography from easily accessible website, that he did not distribute it, and that he was responsible for taking care of his sick mother--did not take his case outside of heartland.)

United States v. Koons, 300 F.3d 985 (8th Cir. 2002) (MURPHY,* HEANEY, BRIGHT). (Defendant was convicted of possessing methamphetamine with intent to distribute within 1,000 feet of public playground. He moved for downward departure on basis, inter alia, that he posed no real danger to children by virtue of his proximity to park. District Court correctly concluded that it lacked authority to depart on this basis because statute of conviction does not require that children be present or that defendant pose risk to children. Other factors identified by defendant--including his twenty-year record of continuous employment, economic privation that his dependents will suffer, his minimal criminal history, and his willingness to cooperate--are not so special or unusual as to take his case out of heartland.)

United States v. McDonald, 298 F.3d 1020 (8th Cir. 2002) (MORRIS S. ARNOLD, HEANEY*, MURPHY). (Departure may be granted where there exists aggravating or mitigating circumstance of kind or degree not adequately considered by Sentencing Commission in formulating Guidelines. However, Commission has considered substantial assistance and has provided § 5K1.1 as means for implementing such departures. Absent government motion under § 5K1.1 or substantial threshold showing by defendant of prosecutorial discrimination or irrational conduct, substantial-assistance downward departure is unavailable.)

United States v. Searcy, 284 F.3d 938 (8th Cir. 2002) (BYE, RICHARD S. ARNOLD,* RILEY). (On remand, District Court had upheld defendant's claim of sentencing entrapment based on finding defendant was not predisposed to deal in crack cocaine. Government appealed, and this Court reversed, determining defendant had not met his burden of establishing by preponderance of evidence lack of predisposition to sell crack. While defendant had never sold crack before;

government had pursued purchase of crack; defendant had stated at beginning of contact with informant that he did not sell crack; and five or six conversations between informant and defendant took place before first sale of crack, defendant had been present during manufacturing of crack in past; had used it; had distributed it as gifts; and had displayed no reluctance to sell it in very first conversation with informant, which was uncoerced.)

United States v. Reinke, 283 F.3d 918 (8th Cir. 2002) (BYE, LAY, J. R. GIBSON*). (Departure inappropriate where District Court found case fell within heartland and factors Court relied upon to support departure--defendant's lack of pecuniary gain from crime, her role in offense, and her expression of contrition--were specifically accounted for by Guidelines, and Court did not make factual findings to suggest factors were present in degree not anticipated by Guidelines. Remanding for District Court to articulate reasons justifying departure or for resentencing.)

United States v. Jimenez, 282 F.3d 597 (8th Cir. 2002) (WOLLMAN, HANSEN,* FENNER). (Defendant was convicted of perjury for grand jury testimony concerning armed robberies. District Court departed downward based on her "minimal participation," fact that no weapon was used "in the offense," and apparent aberrancy of perjury. This Court reverses. Fact that defendant's perjury played minor role in robberies was already taken into account by Guidelines, and Defendant who commits perjury directly can never be minor or minimal participant in crime of perjury, because crime arises from defendant's own conduct and therefore forecloses culpability comparisons with others. Further, it was undisputed guns were used in robberies, and District Court was presumably not referring to fact that defendant did not use weapon while committing perjury before grand jury. Departure based on aberrancy requires crime to be marked deviation from otherwise law-abiding life, and defendant had also been convicted of giving false information to authorities and possessing controlled substance. Further, her situation was not unusual simply because she had been reluctant to provide incriminating evidence against family and friends, and District Court's aversion or distaste for applicable range was not ground for departure.)

United States v. King, 280 F.3d 886 (8th Cir.) (McMILLIAN, FAGG,* RILEY). (Departure under § 5K2.0 was abuse of discretion where defendant's family circumstances were not substantially different from those facing families of any other defendant--there was no finding that defendant's wife was unable to care for their children because of her arthritis, wife lived next door to her parents, and government had agreed not to seek forfeiture of family residence. Parental influence also did not warrant departure because facts of case did not support finding of exceptional degree of coercion where 32-year-old, college-educated defendant had full knowledge and understanding of nature of fraudulent transactions at issue, actively participated in them for financial gain, did not present duress defense at trial, and Court found he was not minor or minimal participant. Combination of factors did not make this "extremely rare" case warranting departure.), cert. denied, 537 U.S. 965 (2002).

United States v. Petersen, 276 F.3d 432 (8th Cir. 2002) (WOLLMAN, LAY, RILEY*). (Temporary insanity is not valid basis for departure under § 5K2.0; such circumstances must be considered for diminished-mental-capacity departure under § 5K2.13. Reversing such departure because it is only available to defendants who commit nonviolent offenses, and because District Court failed to make adequate factual findings. Also reversing District Court's departure on basis

that defendant committed atypical burglary by breaking into his own house, because facts of case--defendant and wife were separated, she was pursuing divorce, she had gotten protective order against him, and she had changed locks--did not support such departure. Finally, reversing District Court's departure on basis that defendant had used minimal force in raping wife, because facts of case--defendant struck her head repeatedly with flashlight to wake her, choked her until she became unconscious, dislocated her shoulder, lacerated her head, bruised her neck and shoulder, molested her in shower, and raped her while threatening to kill her if she divorced him--did not support such departure.)

United States v. Carrasco, 271 F.3d 765 (8th Cir. 2001) (BOWMAN, RICHARD S. ARNOLD, HANSEN*). (District Court did not commit plain error by not departing downward sua sponte based upon sentencing disparity between codefendants or fact that defendant's wife was disabled.)

United States v. Wolf, 270 F.3d 1188 (8th Cir. 2001) (BOWMAN,* HEANEY, BYE). (Substantial assistance must be considered under § 5K1.1 and cannot serve as basis for departure under § 5K2.0.)

United States v. Riza, 267 F.3d 757 (8th Cir. 2001) (LOKEN,* JOHN R. GIBSON, MURPHY). (When District Court observed that it agreed with defendant's position that Congress had in mind large-scale drug trafficking and professional money laundering when it enacted money-laundering statues, but was required by precedent to deny downward departure, it obviously meant that departure based solely on disparity between money-laundering and embezzlement Guidelines would be reversed as abuse of discretion.)

United States v. Lopez-Salas, 266 F.3d 842 (8th Cir. 2001) (MURPHY, HEANEY, BEAM*). (Adverse effects suffered by deportable aliens convicted of drug offenses--ineligibility for early release, placement in minimum-security facility, and placement in halfway house for last portion of sentence--standing alone, absent additional facts concerning defendants' individual circumstances making case atypical or unusual, are not basis for downward departure. DISSENT: downward departure is appropriate where immigration status alone makes defendants' sentences more severe.)

United States v. Auginash, 266 F.3d 781 (8th Cir. 2001) (LOKEN, JOHN R. GIBSON,* MURPHY). (18 U.S.C. § 3553(e) and (f) provide only authority for District Court to depart below statutory minimum sentence.)

United States v. Lalley, 257 F.3d 751 (8th Cir. 2001) (MORRIS SHEPPARD ARNOLD, J. R. GIBSON,* GOLDBERG). (Defendant argues District Court erred by denying his request to depart downward. He does not allege District Court erroneously believed it lacked discretion to allow departure or had unconstitutional motive in denying his request; absent such grounds, this Court cannot review District Court's decision not to depart.)

United States v. Buckendhal, 251 F.3d 753 (8th Cir.) (BEAM,* HEANEY, BYE). (Sentencing disparity arising from U.S. Attorney's policy not to grant § 1B1.8 immunity does not

provide basis for § 5K2.0 downward departure. This matter is within prosecutor's discretion, and does not produce sort of unwarranted disparity Guidelines were enacted to remedy. DISSENT: this should be basis for downward departure when defendant is substantially prejudiced thereby.), cert. denied, 534 U.S. 1049 (2001).

United States v. Hasan, 245 F.3d 682 (8th Cir.) (en banc). (District Court erred in granting downward departure for post-sentencing rehabilitation at 18 U.S.C. § 3582(c)(2) resentencing. At resentencing, District Court must determine what sentence it would have imposed had retroactive amendment been in effect at time defendant was originally sentenced. Defendant's commendable in-prison conduct should have been considered only to aid District Court in determining whether to sentence defendant within new sentencing range; it was not basis to depart from that range. District Court is only authorized by § 1B1.10 to depart from amended sentencing range when previous departure had been granted at original sentencing, and post-sentencing conduct could not provide grounds for such departure. § 5K2.0 was not relevant, applicable, or pertinent policy statement within language of 18 U.S.C. § 3582(c)(2). DISSENT: for reasons set forth in opinion for panel, 205 F.3d 1072 (8th Cir. 2000).), cert. denied, 534 U.S. 905 (2001).

United States v. Cardosa-Rodriguez, 241 F.3d 613 (8th Cir. 2001) (RICHARD S. ARNOLD,* FAGG, BOWMAN). (For defendant sentenced under § 2L1.2, alien status is not basis for departure. Defendant's alien status, without more, cannot take case outside of heartland because Sentencing Commission clearly considered deportable-alien status when formulating § 2L1.2. This case is distinguishable from cases in which departures for voluntary consent to deportation have been upheld; in such cases, defendants can choose to consent, and consent saves government time and expense.)

United States v. Causor-Serrato, 234 F.3d 384 (8th Cir. 2000) (HANSEN,* HEANEY, MORRIS SHEPPARD ARNOLD). (Vacating conviction in part and remanding when District Court stated it did not think it had authority to depart on basis of defendant's voluntary consent to deportation. District Court stated that if defendant appealed his decision and Eighth Circuit found there was authority, case would be remanded for District Court to determine whether to exercise its discretion to depart. This Court has jurisdiction to review District Court's decision not to depart when decision is based on legally erroneous determination that it lacked authority to consider particular mitigating factor. Though this Court expresses no opinion on whether departure is warranted, it instructs District Court to consider issue.), cert. denied, 532 U.S. 1072 (2001).

United States v. Searcy, 233 F.3d 1096 (8th Cir. 2000) (WOLLMAN, LAY, BRIGHT*). (Sentencing entrapment, recognized in § 2D1.1, comment. (nn. 12, 15), provides basis for downward departure. When official government conduct leads defendant--who is predisposed to sell only small drug quantity or less serious drug type--to sell larger quantity or more serious type, resulting in increased sentence, sentencing entrapment has occurred. Focus is on defendant's predisposition; outrageous government conduct is not part of analysis. Government's coaxing of powder cocaine dealer to sell crack cocaine may constitute sentencing entrapment; remanded for District Court's consideration of downward departure on this basis.)

United States v. Edwards, 225 F.3d 991 (8th Cir. 2000) (BOWMAN, LOKEN,* BYE).

(Post-sentencing rehabilitative conduct is not relevant at resentencing and is not basis for downward departure.), cert. denied, 531 U.S. 1100 (2001).

United States v. Fountain, 223 F.3d 927 (8th Cir. 2000) (RICHARD S. ARNOLD,* HEANEY, MAGNUSON). (Substantial assistance is ground for departure only under § 5K1.1, not § 5K2.0, and defendant cannot avoid requirement of government motion by invoking § 5K2.0.), cert. denied, 532 U.S. 1053 (2001).

United States v. Navarro, 218 F.3d 895 (8th Cir. 2000) (RICHARD S. ARNOLD,* HEANEY, MAGNUSON). (Defendant, who pleaded guilty to conspiring to commit money laundering and to distribute controlled substances, moved for downward departure on basis he would be subjected to harsher conditions of confinement than other defendants, because his status as deportable alien would render him ineligible for certain prison benefits, such as incarceration in minimum-security prison or in community corrections center. After noting its authority to depart, District Court denied departure, finding that defendant's ineligibility for these benefits was outweighed by benefit deportation afforded him in avoiding supervised-release portion of his sentence, and thus that defendant's case did not fall outside heartland. This Court notes that District Court's discretionary decision not to depart from Guidelines is unreviewable absent District Court's unconstitutional motive or erroneous determination that it lacked authority to consider factor. Court finds that District Court did not believe it lacked authority to depart, and did not act unconstitutionally, as defendant's circumstances result from his having entered country illegally and committing aggravated felonies here. This Court also rejects defendant's contention that District Court made erroneous finding when it based its decision on rationale that his deportable alien status benefitted him more than it harmed him; District Court's statement did not amount to finding, but merely discretionary weighing of circumstances.)

United States v. Newlon, 212 F.3d 423 (8th Cir. 2000) (RICHARD S. ARNOLD, BEAM, MORRIS SHEPPARD ARNOLD*). (District Court did not abuse its discretion in departing downward based on extraordinary rehabilitative effort. Before his arrest on federal charges, Newlon had, at his own request, spent approximately eighty-five hours over twenty days in substance abuse treatment program which had resulted in marked improvement in his behavior. District Court's reference to defendant's IQ and family circumstances, which would have constituted improper grounds for departure, was merely part of its explanation why defendant's efforts were so atypical.)

United States v. Ross, 210 F.3d 916 (8th Cir.) (McMILLIAN, LAY,* FAGG). (Defendant was found guilty of wire fraud and money laundering. Record indicates District Court departed downward because (1) Court found not all of $3.2 million in wire-fraud proceeds were put to fraudulent use; and (2) there was "unfortunate" variation between Guidelines treatment of basic fraud and money laundering, which took case out of heartland of money-laundering Guideline. District Court abused its discretion in departing because Guidelines make clear that dissatisfaction with available sentencing range, or preference for different sentence than that authorized by Guidelines, is not proper basis for departure. Variance at issue reflects Congress intent that money-laundering crimes which promote further illegal activity be punished more severely than those which do not. This Court also questions departure based on finding that not all $3.2 million was put to fraudulent use. Among other things, proceeds generated from wire fraud were, in large

part, income stream that allowed defendant s corporation to maintain appearance of legitimacy for years; and evidence showed virtually all of $3.2 million in fees was reinvested in business and spent to maintain operation.), cert. denied, 531 U.S. 969 (2000).

United States v. Guzman-Landeros, 207 F.3d 1034 (8th Cir. 2000) (McMILLIAN, HANSEN, MORRIS SHEPPARD ARNOLD) (per curiam). (District Court is not obligated to advise defendant of possibility of receiving downward departure by consenting to deportation. This Court also rejects argument that error occurred when defendant was not informed of his eligibility for downward departure based on sentencing disparity arising from differing prosecution and plea-bargaining practices among federal districts, because he was not in fact eligible for such departure.)

United States v. Shepard, 207 F.3d 455 (8th Cir. 2000) (RICHARD S. ARNOLD,* FAGG, HANSEN). (Defendant asked Court to depart downward on basis that his criminal history category greatly overstated seriousness of his criminal record and that his commission of crime was caused or influenced by mental illness; District Court refused to depart downward based on these facts, singly or in combination. This Court declines to review because District Court simply declined to exercise its discretion in defendant s favor; in addition, there was nothing unreasonable or amounting to abuse of discretion in what District Court did.)

United States v. Oligmueller, 198 F.3d 669 (8th Cir. 1999) (BOWMAN, LAY, BEAM*). (Affirming downward departure where defendant in fraudulent-bank-loan-application case voluntarily began making restitution almost year before he was indicted: he worked hard to ensure that his assets (sold to satisfy his indebtedness) received highest possible value, often working 16-hour days to do so; he turned over his life insurance policy and his wife's certificate of deposit; and he took up outside job, and gave up his home. Additionally, restitution paid constitutes substantial percentage of amount owed to bank.)

United States v. DeShon, 183 F.3d 888 (8th Cir. 1999) (RICHARD S. ARNOLD,* BRIGHT, WOLLMAN). (Affirming District Court's downward departure to five months' community confinement without work release, to be followed by two years supervised release, based on defendant's exceptional post-offense rehabilitation. Following events that led to his conviction for income-tax evasion, money laundering, and interstate transportation of property obtained by fraud, DeShon made extraordinary efforts to change his life: among other things, he attended as many as four church services each week, participated in counseling sessions at church "virtually every day," and made efforts to catch up on bills, sometimes working as many as 70 to 80 hours each week. Although religion may never be basis for Guidelines departure, issue before District Court was not DeShon's religion nor what motivated his rehabilitation efforts, but whether his rehabilitation was exceptional enough to be atypical of cases in which acceptance-of-responsibility reduction is usually granted. This Court also rejects government's argument that District Court was required to justify extent of departure decision.)

United States v. Decora, 177 F.3d 676 (8th Cir. 1999) (BEAM, HEANEY,* FENNER). (Affirming downward departure from 37-46 month range of imprisonment to probation. Decora pleaded guilty to assault with dangerous weapon (shod feet); District Court found case fell outside heartland of assault-with-weapon offenses. Decora had been drinking and when he was stopped on

traffic violation and placed in back of patrol vehicle, he kicked police officer. District Court found Decora's behavior aberrant, noting Decora had never committed such act of violence, and had not done so since; Decora, who faced adversity on reservation, had shown remarkable resilience, being only one semester away from receiving college degree at time of incident; and Decora had successfully completed intensive alcohol-treatment program while released on bond, and attended Alcoholics Anonymous meetings. District Court judge had spent thirty years in institutionally advantageous position in which he had seen many such assault cases, as well as numerous defendants raised on reservation; this experience along with this Court's prior cases, guided trial judge in his determination that case fell outside heartland. This Court also rejects argument that departure to probation is excessive, as trial judge made quintessential judgment call.)

United States v. Allery, 175 F.3d 610 (8th Cir. 1999) (LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD*). (Reversing downward departure for defendant convicted for committing abusive sexual contact. District Court had found departure was warranted because facts fell outside heartland of offenses proscribed by statute of conviction, 18 U.S.C. § 2244(a)(1): Allery forced himself on victim while she was asleep, and when she awoke she successfully pushed him away. Applying Koon, this Court concludes it was not abuse of discretion for District Court to hold that case lay outside heartland because amount of force used--although sufficient to sustain conviction--was virtually least amount of force that could do so. Nevertheless, remand is required because District Court identified other inappropriate considerations that led it to depart, namely, Allery's lack of criminal history, his abstention from criminal behavior after trial, and aberrant nature of his behavior. Lack of criminal history can never be basis for departure, obeying law after conviction is not atypical, and Court abused its discretion in finding Allery's acts to be aberrant. CONCURRENCE/DISSENT. Structure and theory of Guideline at issue, U.S.S.G. § 2A3.1, demonstrate amount of force has been accounted for by Commission in setting base offense level and establishing specific offense characteristics and cross-references; consequently minimal amount of force used cannot support downward departure.)

United States v. Sims, III, 174 F.3d 911 (8th Cir. 1999) (RICHARD S. ARNOLD, HANSEN, MORRIS SHEPPARD ARNOLD*). (At his resentencing hearing (following vacating of his prior 18 U.S.C. § 924(c) conviction), Sims asked District Court to depart downward based on extraordinary efforts at rehabilitation he asserts he made in prison since his original sentencing five years earlier. District Court believed it lacked authority to consider post-sentencing rehabilitation as basis for downward departure. Disagreeing with other appellate Courts that have examined this issue, this Court concludes defendant's post-sentencing rehabilitative conduct cannot be appropriate basis for downward departure at resentencing of that defendant, and thus District Court did not err in refusing to consider Sims's request for such departure.)

United States v. Johnson, 169 F.3d 569 (8th Cir. 1999) (LAY, McMILLIAN, HALL*). (No jurisdiction to review where Johnson failed to argue District Court had unconstitutional motive in denying his downward departure request, or erroneously believed it lacked authority to depart based on unusual circumstances claimed by Johnson; in addition, no evidence in record suggested Johnston could have made his claims.)

United States v. Rodriguez-Ochoa, 169 F.3d 529 (8th Cir. 1999) (McMILLIAN, RICHARD

S. ARNOLD,* MORRIS SHEPPARD ARNOLD). (District Court correctly concluded it could not depart on basis that defendants had mistakenly believed they were transporting marijuana, not methamphetamine. Defendants pleaded guilty to possessing "controlled substance" with intent to distribute, and nature of controlled substance becomes relevant only as sentencing factor.)

United States v. Pennington, 168 F.3d 1060 (8th Cir. 1999) (BEAM, LAY, LOKEN*). (No abuse of discretion in refusing to grant downward departure based on fraud victim's civil judgment against defendant for conduct at issue in criminal case as adverse judgment in prior *civil* case involving same fraudulent conduct is not permissible basis for departure.)

United States v. Correa, 167 F.3d 414 (8th Cir. 1999) (McMILLIAN, LAY,* HALL). (During sentencing, District Court considered arguments by defense in favor of departure and did not find "the type of extraordinary circumstances . . . which would warrant granting motion for downward departure in this case." Because there is no indication Court determined it lacked authority to depart and instead found Correa's situation fell within norm of cases considered by Guidelines, this Court lacks jurisdiction to review decision to depart.)

United States v. Goodson, 165 F.3d 610 (8th Cir.) (WOLLMAN, ROSS,* BEAM). (Goodson argues District Court erred in refusing his request for downward departure based on prosecutorial misconduct; District Court was uncertain it had authority to depart in such circumstance, but assumed that it did and then refused to depart. Even if Court had power to depart, which this Court doubts, this Court will not review District Court's discretionary refusal to depart downward.), cert. denied, 527 U.S. 1030 (1999).

United States v. Baber, 161 F.3d 531 (8th Cir. 1998) (McMILLIAN,* F. R. GIBSON, HANSEN). (District Court did not err in refusing to grant downward departure based on sentencing entrapment. Because source of Baber's sentencing argument is Due Process Clause, this is not usual case in which defendant seeks review of unreviewable failure to depart. However, it was Baber's burden to show sentencing entrapment or manipulation occurred, and he failed to show officers engaged in continuing drug transactions solely to enhance his sentence; rather evidence supports conclusion that officers did so to gain his confidence, and identify co-conspirators and source of supply.)

United States v. Jones, 160 F.3d 473 (8th Cir. 1998) (WOLLMAN,* HEANEY, BRIGHT). (District Court properly ruled that disparity in sentences given to testifying co-conspirators did not authorize Court to depart downward for defendants. CONCURRENCE: notes that case exemplifies emerging trend in which government secures substantially reduced sentence for principals of drug conspiracy in exchange for their testimony against lesser members of conspiracy. Thus, District Court has discretion to depart when government's conduct directly results in prejudice to defendant which is significant enough to take case out of heartland.)

United States v. Woods, 159 F.3d 1132 (8th Cir. 1998) (RICHARD S. ARNOLD,* WOLLMAN, KELLY). (Woods filed for bankruptcy, but failed to list and turn over certain stocks; instead she sold them, deposited proceeds in her husband's bank account, and purchased cashier's checks. She later pleaded guilty to bankruptcy fraud and money laundering. At sentencing, District

Court departed from money-laundering Guideline and sentenced her according to bankruptcy-fraud Guideline; Court also granted her additional one-level departure based on her extensive charitable activity. Government appeals, and this Court affirms downward departure. Certain amendments that Sentencing Commission proposed to money-laundering Guidelines (which Congress disapproved) as well as report on money-laundering prepared by DOJ, provide support for District Court's conclusion that Woods's case was atypical because underlying offense was bankruptcy fraud rather than drug trafficking or some other offense typical of organized crime. This Court also could find no basis to disagree with District Court that Woods's charitable activity--housing and successfully educating two troubled young women--was exceptional.)

United States v. O Kane, 155 F.3d 969 (8th Cir. 1998). (Reviewing for abuse of discretion and reversing downward departure based on what District Court viewed as unusual acceptance of responsibility, as demonstrated by O'Kane's restitution of full value of fraud prior to adjudication, his immediate admission of conduct to authorities, and his continued cooperation during investigation. This is unlike United States v. Garlich, 951 F.2d 161 (8th Cir. 1991) where defendant made six-fold repayment of harm over objection of his counsel one full year before indictment. O'Kane was actively involved in negotiations with state and federal authorities for over year after his crime was first discovered before he entered into plea agreement that benefitted him; despite plea-agreement stipulation as to amount of fraud, O'Kane disputed amount of restitution required of him; large part of his full restitution consisted merely of returning stolen goods not yet peddled elsewhere; and he did not voluntarily disclose largest purchaser of stolen merchandise.)

United States v. Eastman, 149 F.3d 802 (8th Cir. 1998). (Eastman moved for downward departure based on advanced age and poor health and relative disparity between his sentence and those of co-conspirators. This Court refuses to review as District Court acknowledged its authority to depart but concluded facts did not justify departure. Moreover, disparity in sentences among co-conspirators is not proper basis for departure.)

United States v. Puckett, 147 F.3d 765 (8th Cir. 1998). (Sparkin was granted reduction for coercion and downward departure for his assistance, but coercion reduction was reduced from three to two levels and departure granted was 40 months below new Guidelines range. Sparlin attempts to challenge extent of downward departure. This Court will not consider argument because extent of downward departure is unreviewable on appeal.)

United States v. Jones, 145 F.3d 959 (8th Cir.) (Disparity in sentences among co-defendants is not proper basis for departure. Although Jones s sentence was significantly heavier than other more culpable members of drug conspiracy, this Court s review of Jones s sentence imposed under Guidelines is limited to determining whether it was imposed as result of incorrect application of Guidelines, and this Court finds District Court correctly applied Guidelines in Jones s case. DISSENT: Goes into detail concerning unfair impact of sentences based on mandatory minimum penalty statutes.), cert. denied, 525 U.S. 988 (1998).

United States v. O Hagan, 139 F.3d 641 (8th Cir. 1998). (On cross-appeal, government argues District Court improperly gave O Hagan credit for 23 of 30 months he served while imprisoned on state convictions for misappropriation of client funds. Applicable 1987 Sentencing

Guidelines do not provide for granting of credit for time served for expired sentence imposed for same conduct underlying offense for which defendant is being sentenced, § 5G1.3 (1987). This Court recognizes circuit split on issue. In this case, no provision in 1987 version of Guidelines or in later rendition of § 5G1.3 forbids or prohibits granting of departure when defendant has already served state sentence for conduct which is included in relevant conduct for which he is being sentenced in federal Court. Inclusion of unexpired sentences without providing for expired sentences in § 5G1.3 indicates Commission may have never considered that defendant would have already completed sentence for same conduct underlying his conviction prior to sentencing. This Court holds District Court had authority to depart downward to give O Hagan credit for time served on expired state sentence and affirms District Court s grant of 23 months credit.)

United States v. Turechek, III, 138 F.3d 1226 (8th Cir. 1998). (Turechek argues District Court erred in denying his motion for downward departure, claiming his BOL overstated his role in offense. Decision is not reviewable where District Court considered motion for downward departure and rejected it.)

United States v. Coppedge, 135 F.3d 598 (8th Cir. 1998). (After pleading guilty to drug offenses, District Court sentenced Coppedge to 135 months imprisonment; less than one year later, government filed Fed. R. Crim. P. 35(b) motion. District Court granted motion and sentenced Coppedge to 84 months imprisonment. On appeal, Coppedge argues Court should have departed farther. This Court concludes Coppedge s challenge to extent of departure is unreviewable because he is not appealing sentence based on criteria listed in 18 U.S.C. § 3742(a); this Court dismisses appeal for lack of jurisdiction.)

United States v. Diaz-Diaz, 135 F.3d 572 (8th Cir. 1998). (Sentencing Commission forbids consideration of few grounds for departure, discourages or encourages use of some specific grounds, and does not mention others. In absence of characteristic or circumstance that distinguishes case as sufficiently atypical to warrant sentence different from that called for under Guidelines, sentence outside Guideline range is not authorized, noting dissatisfaction with available sentencing range or preference for different sentence than authorized by Guidelines is not appropriate basis for sentence outside applicable Guideline range.)

United States v. Morken, 133 F.3d 628 (8th Cir. 1998). (Morken pleaded guilty to one count of bank fraud; applicable Guideline range was 63-78 months. Moved by letters from Morken s friends and neighbors, District Court departed downward to 48 months imprisonment plus community service, prompted by Morken s "long standing record of exemplary service to [his] community." Letters District Court received sound three themes: Morken s business acumen, anxiety that Morken s imprisonment might injure town s economy, and various services Morken performed in and for community. Possible departure grounds, § 5H1.6 (community ties) and § 5H1.11 (civic and charitable service, employment-related contributions) are discouraged factors. After reviewing letters and Morken s PSR, and after comparing Morken s case with relevant Guidelines cases, this Court concludes no basis for determination case warrants downward departure, and holds District Court abused its discretion in concluding otherwise. Rather than business acumen, Court observes speed with which Morken managed to destroy family business through risky and unlawful practices. District Court s comments suggest real ground for departure

decision was economic injury to innocent third parties, discouraged basis for departure, § 5H1.6. Income Morken s cattle operation once generated disappeared in 1994 when business collapsed under weight of Morken s criminal mismanagement, not later when Morken was sentenced to reduced prison term. As to remaining business which provides jobs and generated revenue for local businesses, mere fact business faces likely failure and innocent others will be disadvantaged when key person goes to jail, is not by itself unusual enough to warrant departure. While Morken s record of good works is laudable, it is neither exceptional nor out of ordinary in setting. DISSENT: Mindful that District Court s decision to depart will in most cases be due substantial deference for it embodies traditional exercise of discretion by District Court, Dissent would conclude District Court did not abuse discretion. Although Court did not indicate precisely what aspect of Morken s community contributions it relied on, letters of record document unusual entrepreneurial skills he used to good effect in providing very substantial employment to small community (contributions present to very unusual degree), § 5H1.11.)

United States v. Drew, 131 F.3d 1269 (8th Cir. 1997). (Drew pleaded guilty to receiving child pornography; application of Guidelines resulted in sentencing range of 15-21 months. Based on mitigating circumstances, District Court sentenced Drew to two years home confinement and five years probation. To justify departure, Court relied on Drew s high intelligence and candidacy for doctoral degree in chemistry. Guidelines discourage use of education as ground for departure, § 5H1.2, so departure permissible only in exceptional cases. High intelligence and advanced education are not in themselves unusual enough to warrant departure. District Court also departed because it believed Drew s conviction had collateral consequences not found in usual case, e.g., likelihood conviction disqualified Drew from working as forensic chemist for law enforcement office as he had dreamed. Because it is not unusual for convicted felon to be barred from work in law enforcement, Drew s possible disqualification is insufficient to warrant downward departure. District Court also said Drew may have forfeited chance to obtain doctorate; Drew s own testimony shows expulsion from doctoral program is wholly speculative, and interruption of inmate s education during incarceration not unusual. District Court also believed Drew would be vulnerable to abuse in prison; susceptibility to abuse by fellow inmates justifies departure only in extraordinary cases. To support departure for extraordinary susceptibility, District Court cannot simply rely on defendant s status as child pornographer, but must identify something exceptional about facts of case. District Court pointed only to Drew s naivete in addition to nature of his offense. Even if Drew is inexperienced 26-year old, no reason to believe he is exceedingly vulnerable to victimization given his average size and good health. District Court abused its discretion in departing, and this Court vacates sentence and remands for resentencing.)

United States v. Kapitzke, 130 F.3d 820 (8th Cir. 1997). (Kapitzke pleaded guilty to one count of unlawful possession of child pornography; sentencing range was calculated at 15-21 months, but District Court departed downward, sentencing Kapitzke to 9 months confinement at facility with release privileges for work and treatment. District Court s reliance in departing on Kapitzke s family s need for his support and his imprisonment having same effect as divorce decree was abuse of discretion. Kapitzke failed to show family ties and responsibilities are exceptional; even if divorce is unmentioned rather than discouraged factor, disintegration of existing family life expected when family member engages in criminal activity that results in incarceration.

While susceptibility to abuse in prison justifies departure in extraordinary circumstances,

Kapitzke s mere membership in class of offenders that may be targeted by other inmates cannot make his case extraordinary. Pornographers as class are not entitled to more favorable treatment under Guidelines. Kapitzke s average physique and good health do not make him exceedingly vulnerable to victimization; District Court abused its discretion in relying on this reason for departure.

After granting Kapitzke maximum three-level reduction for acceptance of responsibility, District Court concluded departure under § 5K2.0 warranted because Kapitzke made extraordinary post-offense efforts at rehabilitation, and shown guilt and regret for conduct beyond that normally seen by Court. He had entered sex offender and chemical dependency treatment, and he submitted documentation from counselors and medical personnel as to his prognosis and high probability of success if he remains in treatment, and possibility of negative effect of prison on treatment continuity. As Kapitzke s post-offense rehabilitation removes his case from heartland in which acceptance of responsibility guideline was intended to apply, this Court acknowledges it is dealing with fact-based judgment call that falls within District Court s sentencing discretion, and it is not permitted to substitute judgment for District Court s. On record, this Court cannot say District Court abused discretion, and thus, Kapitzke s rehabilitation efforts are permissible basis for departure.

District Court believed Kapitzke s incarceration would jeopardize continued rehabilitation, but acknowledged it did not know specifics about sex offender treatment programs in federal prison. This Court concludes there is no factual basis for departure on this ground.

Where District Court based departure from applicable range on some invalid factors and one valid factor, this Court cannot ascertain whether Court would have departed based only on Kapitzke s post-offense rehabilitation efforts; because Court does not know District Court would impose same sentence absent invalid factors, it remands for resentencing.

DISSENT IN PART: Dissent from portion of opinion holding District Court erred in relying on Kapitzke s susceptibility to abuse in prison: sees no realistic possibility allowing departures in these kinds of cases runs risk of thwarting Guidelines sentences for crimes like Kapitzke s.)

United States v. Wind, 128 F.3d 1276 (8th Cir. 1997). (Wind pleaded guilty to one count of possession of child pornography, 18 U.S.C. § 2252(a)(4). Although application of Guidelines resulted in sentencing range of 12-18 months, District Court departed downward to 8 months. District Court applied § 2G2.4 to determine Wind s Guidelines sentence and it decided Wind s case was atypical; Court found most persuasive results of various psychological, psychiatric, and other tests revealing Wind is not typical child predator or pedophile. Reliance on this ground was erroneous as Wind s lack of sexual tendencies towards children does not make his possession of child pornography significantly different from normal case. District Court also believed federal investigators discovery of only computer files containing images of child pornography, as compared to various items listed in search warrant, suggested this was not typical child pornography case. District Court cited no authority for using warrant to define heartland of child pornography possession; this Court rejects Court s novel view. Amount of child pornography possessed cannot be deemed less than typical for cases to which § 2G2.4 applies as applicable Guideline provides for enhancement if offense involves possession of ten or more items of child pornography, and Wind pleaded guilty to violating statute prohibiting possession of three or more items of child pornography. Likewise, this Court rejects District Court s reasons for concluding Wind s criminal behavior was aberrant justifying departure: Guidelines adequately account for absence of criminal

record; education, employment, and family ties are discouraged factors that warrant departure only in extraordinary cases and Court did not specify anything extraordinary about Wind s case. Although District Court can consider defendant s character in making departure decision, § 1B1.4, this Court doubts unmentioned factors of honesty, thoughtfulness, and compassion are enough in themselves to take Wind s case out of heartland. This Court vacates eight month sentence and remands for resentencing.)

United States v. Weise, 128 F.3d 672 (8th Cir. 1997). (Sentencing Commission named certain potential mitigating factors in Guidelines and forbids, discourages, or encourages their consideration. Discouraged factors should be relied on only in exceptional cases. To warrant departure based on discouraged, encouraged, or unmentioned factor, factor, as occurring in particular circumstances, must take case outside heartland of applicable Guideline. At resentencing, District Court [again] based its departure decision on view Weise s conduct was aberrant behavior, unmentioned factor for serious crime like murder; Court was not free to revisit aberrant behavior as this Court foreclosed it in first appeal of Weise s sentence. District Court also based its departure at resentencing on other grounds: Weise s employment history, family ties, reputation in community, and extraordinary problems and difficulties he struggled against and overcame on Red Lake Reservation. District Court acknowledged its belief if Weise did not live on Indian reservation, his case would not fall outside Guidelines heartland. This Court concludes District Court abused its discretion in granting downward departure on these additional grounds. District Court could not use prohibited factors of Weise s race, socioeconomic status, economic hardship, or disadvantaged upbringing as bases for departure. Even taking Weise s presence on reservation as unmentioned factor, record does not show anything about reservation environment skewed Weise s opportunities in ways strikingly different from families of similar means and circumstances living elsewhere. Other reasons for departure, i.e., reputation, stable employment history, family ties and responsibilities, are discouraged factors and although this Court gives substantial deference to District Court s determination that discouraged factor justifies departure because it is present in some unusual or exceptional way, in Weise s case, this Court concludes District Court abused its discretion in determining these factors are present to exceptional degree and nothing makes his case exceptionally different from ordinary case where factors are present. This Court concludes District Court abused its discretion in deciding Weise s case lies outside heartland of applicable Guidelines, and thus reverses and remands to District Court.)

United States v. Hughes, 127 F.3d 1132 (8th Cir. 1997). (Where District Court decided not to depart downward and sentenced Hughes to 240 months imprisonment (within applicable range 235-293 months), this Court declines to review District Court s decision.), cert. denied, 523 U.S. 1013 (1998).

United States v. Wong, 127 F.3d 725 (8th Cir. 1997). (District Court imposed sentences on defendants, which did not fall within calculated Guideline ranges. This Court reverses and remands as "departures" were based on District Court s dissatisfaction with constraints imposed on judicial discretion by Sentencing Guidelines; Court s reliance on disparate sentences as justification for departing; reference to costs of imprisoning three defendants as reason for departing; Court s belief length of sentences imposed by Guidelines was unnecessary to prevent future criminal activity; distinction made under Guidelines between powder cocaine and cocaine base/crack; justification

based on absence of weapons or violence in conduct of these crimes. Opinion acknowledges Guidelines allowance for district judge to depart from prescribed ranges in exceptional cases, i.e., factor sufficient to take case out of Guidelines heartland, but disapproving factors relied on by District Court in this situation. This Court notes that on remand District Court should explore whether this case can properly be said to be extraordinary or exceptional in any relevant way, including based on family ties and responsibilities which are not ordinarily relevant to determining whether sentence should be outside applicable Guideline range.)

United States v. Larry, 126 F.3d 1077 (8th Cir. 1997). (Where District Court understood it had authority to depart downward and simply decided departure was not warranted, District Court s refusal to grant Larry s motion for downward departure is unreviewable.)

United States v. Saelee, 123 F.3d 1024 (8th Cir. 1997). (Saelee moved for downward departure based upon his circumstances as political refugee; he maintained uncertainty of his future deportation and possibility of permanent separation from his family create harsher consequence than that faced by typical non-citizen defendant. This Court agrees with District Court Saelee s status as alien is not by itself sufficient to warrant departure. District Court correctly understood its discretionary authority to depart rested upon determination circumstances of case make it exceptional and atypical, outside heartland. Because Court understood its authority to depart downward, but declined to do so in circumstances presented, its decision not to exercise authority is unreviewable.)

United States v. Beltran, 122 F.3d 1156 (8th Cir. 1997). (Defendants challenge District Court s refusal to grant downward departure (18 U.S.C. § 3553(b)) based upon low purity level of methamphetamine mixture involved in crime; defendants argue low purity (less than 1% actual methamphetamine) was circumstance not contemplated by Sentencing Commission in formulating drug quantity table, and circumstance takes case out of heartland of drug quantity guideline. Congress explicitly considered purity level of methamphetamine when it determined penalties; likewise, Guidelines plainly indicate Commission adequately took into consideration purity level of methamphetamine in formulating Guidelines (notes to drug quantity tables in § 2D1.1 reflect two methods of determining BOL in methamphetamine cases--one based on weight of mixture which refers to entire weight of any mixture containing detectable amount of controlled substance, and one based on pure weight of methamphetamine which refers to actual weight of methamphetamine contained in mixture). Guidelines further provide trafficking in drug mixtures with unusually high purity level may warrant upward departure except in case of PCP or methamphetamine for which Guideline itself provides for consideration of purity. District Court did not err by concluding it lacked authority to grant downward departure because Commission has already adequately considered how to handle case involving low purity of methamphetamine present in mixture, including one so low as to be merely "detectable" and this Court believes existence of such circumstance is "forbidden factor" under Koon.)

United States v. Bass, 121 F.3d 1218 (8th Cir. 1997). (Recognizing this Court s rejection of similar arguments, Bass argues District Court erred when it refused to depart downward in order to mitigate 100 to 1 ratio between sentences for crack and powder cocaine. While expressing

sympathy toward Bass s entreaties, this Court holds District Court did not commit error when it denied motion for downward departure.)

United States v. Baca-Valenzuela, 118 F.3d 1223 (8th Cir. 1997). (This Court finds meritless Baca-Valenzuela s substantive argument--Sentencing Commission did not adequately take into account sentence enhancement for aggravated felony would be interpreted to include crimes committed before sentence enhancement became law. In any event, District Court fully understood argument Baca-Valenzuela was making and rejected it; in such circumstances, this Court declines to upset well-reasoned decision of sentencing judge.)

United States v. Van Brocklin, 115 F.3d 587 (8th Cir. 1997). (Hastings appeals District Court s denial of motion for downward departure. As record show, District Court recognized it had authority to depart downward, but refused to exercise its discretion to do so, such discretionary refusal is not reviewable.), cert. denied, 523 U.S. 1122 (1998).

United States v. Rounsavall, 115 F.3d 561 (8th Cir.) (No authority exists for District Court to depart from statutory minimum sentence based on defendant s physical condition (motion by government for substantial assistance is only authority for District Court to depart below statutorily mandated minimum sentence; 18 U.S.C. § 3553(f) allows for departures under specified circumstances not including physical impairment).), cert. denied, 522 U.S. 903 (1997).

United States v. Hernandez-Reyes, 114 F.3d 800 (8th Cir. 1997). (Hernandez-Reyes pleaded guilty to reentering U.S. after having been arrested and deported. In plea agreement, he agreed to administrative order of deportation and waived right to any appeal or challenge to that order; in return, government agreed to move for downward departure based on administrative deportation. District Court denied government s motion. Absent unconstitutional motive, District Court s decision is unreviewable as District Court fully understood its authority and decided not to exercise it.)

United States v. Field, 110 F.3d 587 (8th Cir. 1997). (Richard Field contends District Court erred by not recognizing its authority to depart downward on basis of economic hardship to innocent third parties (his family and persons employed by his business). Where record fairly indicated District Court recognized its authority to depart in exceptional circumstance, even though family and community ties are not ordinarily relevant in determining whether to depart, § 5H1.6, but exercised its discretion not to depart---District Court s decision not to depart is unreviewable.)

United States v. Paton, 110 F.3d 562 (8th Cir. 1997). (Paton argues District Court erred by denying downward departure, asserting Court s denial resulted from erroneous belief it did not have authority to depart. Paton was convicted for possession of materials involving use of minors in sexually explicit conduct (18 U.S.C. § 2252(a)(4)(B)). District Court decided case before Koon. Mitigating factors asserted by Paton are unmentioned by Guidelines; Guidelines did not contemplate situation where individual enters into plea bargain in full satisfaction of all federal charges which may be brought and government later prosecutes individual for non-criminal conduct known to government at time of plea bargain, but which later becomes criminal. In light of Koon, Court misconstrued Guidelines in determining situation was contemplated by Sentencing Commission.

Thus, District Court erred in determining it lacked authority to depart downward. On remand, District Court may depart downward if it determines Paton presents mitigating circumstances outside heartland of Guidelines. DISSENT: sees no abuse of discretion in District Court s ruling. Although District Court did not articulate its reasoning in precise formulation set forth in Koon, it in effect made refined assessment of many facts bearing on outcome and determined there was nothing about case that warranted departure from Guidelines range.)

United States v. Schaffer, 110 F.3d 530 (8th Cir. 1997). (Schaffer maintains District Court should have departed downward on § 924(c)(1) count based on extraordinary acceptance of responsibility; he contends to disallow such departure ignores second sentence of § 3553(e). This Court has held government motion under § 3553(e) for substantial assistance is only authority for District Court to depart below statutorily mandated minimum sentence. Guidelines do not ordinarily recognize acceptance as reason for departure, § 5K, and § 3553(e) does not authorize District Courts to depart below mandatory minimum for any reason other than substantial assistance. This Court notes District Court found Schaffer s early cooperation, while substantially assisting government, did not warrant additional departure because Commission already took into account early assistance Schaffer provided in eligibility for three-level reduction for substantial assistance, which he received.)

United States v. Kalb, 105 F.3d 426 (8th Cir. 1997). (Kalb pleaded guilty to participating in methamphetamine manufacturing conspiracy; District Court determined sentencing range at 108-135 months and he was subject to 10 year mandatory minimum. District Court granted Kalb's motion for downward departure for aberrant behavior and sentenced him to 60 months imprisonment, 5 years supervised release. Government appeals grant of § 5K2.0 downward departure. This Court explains, subsequent to Kalb's sentencing, Supreme Court decided Koon v. United States, adopting "unitary abuse-of-discretion standard on appellate review of departure decisions. This Court comments that in course of appeal, parties primarily debated whether Kalb's offense was single act of aberrant behavior as that term has been defined in prior Eighth Circuit departure cases. However, Koon-mandated motive analysis has not been applied. Sentencing Commission only mentioned "single acts of aberrant behavior" in discussing probation and split sentences (not encouraged departure factor for serious crimes like Kalb's). Prior Eighth Circuit cases suggest only aberrant behavior which may be considered for departure is single act mentioned in introductory comment about probation and split sentences. When dealing with unmentioned potential departure factor such as alleged aberrant behavior, Koon instructs District Court to consider structure and theory of both relevant individual Guidelines and Guidelines taken as whole. When Koon analysis is conducted properly, it is entitled to deferential review on appeal. Reversed and remanded for resentencing. DISSENT: Koon sends signal to appellate Courts to extend greater measure of deference to District Court's discretion in sentencing. Dissent's view of case differs from majority's in four ways: (1) aberrant behavior constitutes encouraged factor, rather than unmentioned factor, according to Sentencing Commission's comments; (2) District Court satisfied requirements laid out in Koon; (3) Koon and United States v. McCarthy demonstrate District Court did not abuse its discretion; and (4) cases support affirming sentence. Majority's opinion may lead to confusion regarding appropriate analysis for District Courts to undertake when considering whether defendant's conduct constitutes aberrant behavior justifying departure. Majority's opinion requires District Court to explain how Kalb's acts were aberrant for drug courier; it should

determine whether behavior was more unusual for particular defendant to engage in given unique characteristics of defendant.)

United States v. Garin, 103 F.3d 687 (8th Cir. 1996). (This Court rejects as without merit Garin s contentions District Court should have departed downward on grounds 10:1 ratio between methamphetamine of unknown purity and actual methamphetamine is irrational, and because sentencing entrapment occurred.), cert. denied, 520 U.S. 1148 (1997).

United States v. Moore, 98 F.3d 347 (8th Cir. 1996). (Moore and Jones argued District Court erred in concluding it could not depart downward on ground U.S. Sentencing Commission urged Congress to eliminate statutory sentencing disparity between crack and powder cocaine. On prior occasion, this Court expressly rejected this contention (Higgs).

United States v. Spook, 97 F.3d 234 (8th Cir. 1996). (This Court has previously determined 100:1 sentencing ratio is not basis upon which District Court may rely to depart downward. Sentencing Commission s recommendation to eliminate distinction between cocaine base and powder does not prove Congress did not intend to impose longer sentences for cocaine powder; in fact, Congress s rejection of recommendation indicates opposite; it is not Court s role to decide whether ratio is wise or equitable.), cert. denied, 519 U.S. 1133 and 520 U.S. 1129 (1997).

United States v. Carter, 91 F.3d 1196 (8th Cir. 1996). (Carter sought downward departure under § 3553(b) and § 5K2.0 because Sentencing Commission had concluded 100:1 ratio was not justified (proposed Amendment 5). This Court concludes Carter s downward-departure argument is foreclosed by United States v. Lewis.)

United States v. Lewis, 90 F.3d 302 (8th Cir. 1996). (At resentencing, following remand from this Court, appellants again moved for downward departure pointing to: recent statement by President recognizing disparity between sentences for crack and cocaine powder, Sentencing Commission s recent recommendation against 100:1 ratio, and Public Law 104-38 which rejected Commission s recommendations but directed it to submit new recommendations for changing drug-quantity ratio. This Court agrees with District Court that it had no authority to depart. All defendants convicted of crack-related crimes receive harsh sentences; appellants cases are no different from other "heartland" crack cases. As for appellants contention black defendants should receive less severe sentences than other defendants convicted of crack related offenses, this Court rejects notion (defendant s race is one of few factors never permissible reason for departure). Appellants new "evidence" proves only that Congress, President, and Sentencing Commission have considered matter and that ratio--its disparate impact notwithstanding--remains law. Section 5K2.0 gives District Court power to depart for unusual circumstances peculiar to particular cases, and not for reasons common to whole class of cases. Disparate impact of 100:1 ratio on black defendants, without question disturbing fact, is not basis upon which Court may rely to depart downward. As to whether 100:1 ratio is wise or equitable, that is question for properly chosen branches of government.), cert. denied, 519 U.S. 1069 (1997).

United States v. Elliott, 89 F.3d 1360 (8th Cir. 1996). (Elliott claims he was entitled to

downward departure because other defendants snared in second injury fund investigation received far lesser sentences. Record reveals District Court was aware of its discretionary authority to depart downward and exercised that discretion by declining to grant requested departure; decision is not reviewable.), cert. denied, 519 U.S. 1118 (1997).

United States v. Weise, 89 F.3d 502 (8th Cir. 1996). (On cross-appeal, government contends District Court improperly granted Weise s request for downward departure. District Court decided difficult conditions on Red Lake Reservation, Weise s record of steady employment, and his maintenance of family ties and responsibilities were sufficiently unique in degree to constitute grounds for departure. District Court also decided departure was warranted because Weise s crime was single act of aberrant behavior, ch. 1, pt. A, intro. 4(d). Panel remands for further consideration. Although Weise mentioned some difficulties of reservation life, he neither provided details nor made clear he struggled against these difficulties and that his accomplishments stand out because he succeeded. Though record provides some support for District Court s general understanding of living conditions on reservation, panel cannot tell what there was about impact of reservation life on Weise that makes this case different from ordinary case. Thus, it does not have enough information to review District Court s exercise of sentencing discretion. Panel disagrees with District Court s view Weise s criminal conduct was aberrant behavior. Weise s conduct was neither spontaneous nor thoughtless (something "out of character" does not equate with aberrant behavior deserving of downward departure). DISSENT: In commenting on Weise s upbringing, majority does not address substance of District Court s findings and fails to accord findings substantial deference to which they are entitled, due to institutional advantage District Courts possess in dealing with such issues. In holding Weise offered some evidence but did not provide connecting link of showing how conditions on reservation affected him so as to make his case extraordinary, majority fails to give proper consideration to statute prohibiting limitation of information District Courts may use in sentencing. District Court specifically enumerated examples of Weise s efforts. Counsel for government made no objections to statements of Weise s counsel at sentencing regarding testimony of Weise s peaceable character and that relatively speaking, Weise s crime involved less violence than many.)

United States v. Tauil-Hernandez, 88 F.3d 576 (8th Cir. 1996). (Tauil-Hernandez argues District Court should have granted her downward departure, § 5K2.0 and § 3553(b), because her sentence is substantially greater than sentences of more culpable conspirators, and because she cooperated in unrelated government narcotics investigations, though not enough to earn substantial assistance departure motion. At sentencing, District Court recognized its authority to depart, but declined to exercise that discretion, explaining it had taken these mitigating factors into account in imposing mandatory minimum sentence. That discretionary decision is unreviewable on appeal.), cert. denied, 520 U.S. 1121 (1997).

United States v. Jenkins, 78 F.3d 1283 (8th Cir. 1996). (Jenkins urged District Court was not aware of its authority to depart/refusal to depart was abuse of discretion because Guidelines do not take into account unique circumstances of this case (e.g., first offense, employed for over 21 years, brother s involvement in conspiracy was main reason Jenkins himself participated, he did not have knowledge of breath of conspiracy). Review of sentencing transcript persuades this Court that District Court recognized its authority to depart and simply chose not to exercise that discretion

based on facts of this case. Alternatively, Jenkins argued his behavior was aberrant occurrence providing sufficient basis for downward departure. This Court agrees circumstances of this case were not so unusual as to warrant departure. Jenkins s ongoing involvement in drug conspiracy and in transfer of drug proceeds over five-year period does not appear to fall into category of aberrant behavior. District Court s denial was not abuse of discretion.)

United States v. Morris, 73 F.3d 216 (8th Cir. 1996). (Motion in case was based upon defense theory that revelation of act of marital infidelity had so incensed offended wife, she acted out spontaneously in single act of aberrant behavior. When basis for motion began to expand into other conduct on part of alleged victim, District Court did not abuse its discretion in allowing reasonable cross examination to make certain defense was keeping its motion within agreed facts and not enlarging facts to include generalized syndrome of stress brought on by domestic violence and spousal abuse.)

United States v. Thomas, 72 F.3d 92 (8th Cir. 1995). (District Court lacked authority to depart on basis of substantial assistance.)

United States v. Goodwin, 72 F.3d 88 (8th Cir. 1995). (This Court rejects Goodwin s claim his 57-month sentence created unwarranted disparity between his punishment and that of another cooperating offender. Other offender was sentenced by another Court to 18 months incarceration after she pleaded guilty to one count of conspiracy to possess with intent to distribute methamphetamine. Both Goodwin and other offender cooperated with law enforcement and received downward departures for cooperation. Thus, Goodwin in essence challenges relative extent of Courts downward departures: this Court has repeatedly held extent of downward departure is unreviewable on appeal.)

United States v. Higgs, 72 F.3d 69 (8th Cir. 1995). (Higgs contended District Court erred in not granting him downward departure as Sentencing Commission s February 1995 conclusion and proposed amendments to Guidelines--100-to-1 ratio between penalties for crack and powder cocaine was not justified--constitutes mitigating factor. This Court concludes it may not review Higgs s claim; only Congress or Commission--not Courts-- can effect change in Guidelines with note Congress recently rejected Commission s proposed amendment.)

United States v. Harris, 70 F.3d 1001 (8th Cir. 1995). (District Court was not entitled to defeat parties expectations by imposing more severe sentence using Harris s role in armed robbery that preceded offense of conviction to depart upward. On remand, District Court is to resentence Harris or reject plea agreement.)

United States v. Toledo, 70 F.3d 988 (8th Cir. 1995). (This Court cannot review District Court s refusal to depart downward where sentencing transcript shows Court realized it had authority to depart based on Toledo s claim of mitigating circumstances, but decided departure was unwarranted.), cert. denied, 517 U.S. 1114 1996).

United States v. Janis, 69 F.3d 914 (8th Cir. 1995). (Citing United States v. Big Crow, Janis

sought downward departure based on excellent employment record and obligation to support his children. He also asked District Court to depart because AUSA had threatened on eve of trial to file additional charge against Janis unless he pleaded guilty, and because probation officer who prepared PSR had noted, in response to downward departure request, additional sentencing enhancement might be justified. This Court cannot review District Court s refusal to depart based on Big Crow factors Janis relied on, because District Court clearly recognized its authority to depart but exercised discretion not to. This Court rejects as meritless argument District Court should have considered actions of AUSA and probation officer: District Court cannot depart where only purpose of departure is to deter government misconduct; thus, District Court did not err in not departing on grounds of alleged government misconduct.)

United States v. Collins, 66 F.3d 984 (8th Cir. 1995). (The minimum statutory term of imprisonment for violation of 21 U.S.C. § 841(a)(1) is 5 years and maximum, 40 years. Collins s guideline range was 63-87 months. Collins asserts District Court erred in sentencing him to 63 months incarceration, arguing that so long as requirements of § 3553(f) are met, Court required to deviate downward both from any statutory minimum and sentencing range without regard to separate requirements found in § 3553(b). Collins cannot rely on § 3553(f) to argue for downward departure from Guidelines as language of section specifically provides reduced sentence be within range provided by Sentencing Guidelines and only authorizes downward departure from statutory mandatory minimum; Collins s argument § 3553(f) authorizes departure from Guidelines contradicts language from statute and is without merit.)

United States v. Knight, 58 F.3d 393 (8th Cir. 1995). (Knight contended District Court failed to consider downward departure based on his diminished mental capacity. Failure to depart downward is reviewable only if District Court did not realize it had discretion to consider downward departure; here, Court clearly understood it had that discretion and it considered this option before rejecting it in favor of sentence having greater deterrent affect.), cert. denied, 516 U.S. 1099 (1996).

United States v. Polanco, 53 F.3d 893 (8th Cir. 1995). (Statutory mandatory minimum of five years narrowed imprisonment range for Jose from 51-63 to 60-63 months. District Court sentenced Jose below mandatory minimum under § 3553(b) and § 5K2.0 based on disproportionality between sentences of Jose and Carlos; Jose s lack of previous criminal involvement; and government s "bad faith" failure to move for § 3553 departure. Court further determined disproportionality of sentence to culpability was mitigating circumstance not adequately taken into consideration by Commission. Thus, Court sentenced Jose to 36 months. At time of Jose s sentencing, without § 3553(e) motion or unconstitutional refusal of one, District Court had no authority to depart below statutory minimum. Disparity between sentences imposed on co-defendants is not proper basis for departure although relevant, Commission has adequately accounted for absence of criminal record in structuring sentencing table (neither perceived disproportionality in sentence nor lack of criminal history suffice to take Jose s case from "heartland" established by Guidelines); and government s refusal to request departure in this case cannot be grounds for § 5K2.0 departure as government based its refusal solely on Jose s inability to provide substantial assistance. This Court reverses District Court, vacates Jose s sentence and remands for resentencing, instructing District Court to consider § 3553(f)/§ 5C1.2 as these provisions broaden Jose s sentencing range to 51-63 months provided he fulfills all requirements,

fifth of which needs trial Court s initial consideration.), cert. denied, 518 U.S. 1021 (1996).

United States v. McMurray, 34 F.3d 1405 (8th Cir. 1994). (Appellants contended District Court erred in determining it could not depart downward. They challenged 100:1 ratio for offenses involving crack, contending these increased penalties have disparate adverse impact on sentences of African-Americans. They urged disparate impact is kind of circumstance sentencing commission did not consider and thus, District Court could have departed. Claims of error on failing to depart downward are not reviewable.), cert. denied, 513 U.S. 1179 (1995).

United States v. Premachandra, 32 F.3d 346 (8th Cir. 1994). (Because Sentencing Commission did not consider single acts of aberrant behavior when formulating Guidelines, this Court has recognized spontaneous and seemingly thoughtless act may be basis for departure. However, as robberies Premachandra committed were neither spontaneous nor thoughtless (to contrary, record indicates robberies were planned and Premachandra took steps to avoid apprehension), there was no error in not departing on that basis.)

United States v. Bowling, 32 F.3d 326 (8th Cir.) (Bowling contended trial Court erred in refusing to depart downward. This Court concludes from sentencing transcript it is clear trial Court was aware of its authority to depart yet chose not to do so. That decision is not reviewable, nor in Court s view, was it abuse of discretion in circumstances of this case.), cert. denied, 513 U.S. 1050 (1994).

United States v. James, 30 F.3d 84 (8th Cir. 1994). (James argued trial Court improperly failed to depart downward from relevant federal sentencing Guidelines range. Upon this Court s reading of transcript of sentencing hearing, it was clear trial Court considered possibility of downward departure and rejected it. Thus, decision is neither reviewable nor, in circumstances of this case, abuse of discretion.)

United States v. Johnson, 28 F.3d 1487 (8th Cir.) (This Court may not review defendants contention that District Court erred when it failed to grant downward departure for factor not adequately taken into consideration by Sentencing Commission, disparate crack/powder penalties.), cert. denied, 513 U.S. 1098 (1995).

United States v. Atkins, 25 F.3d 1401 (8th Cir.) (Atkins argued District Court should have granted her motion for downward departure as her crime was single act of aberrant behavior. She further argued District Court would have departed but for its mistaken belief it lacked authority to do so. This Court concludes statements by District Court demonstrate its refusal to depart was based on consideration of facts of case which showed Atkins s crime was non-spontaneous and pre-planned. Thus, this Court does not have authority to review District Court s refusal to depart downward as its refusal was exercise of discretion. Furthermore, this Court concludes District Court did not err, as matter of law, in refusing to depart as evidence showed Atkins was active participant in conspiracy that spanned two-month period and she committed number of non-spontaneous and pre-planned acts throughout course of conspiracy. Thus, Atkins s crime was not single act of aberrant behavior (act that is spontaneous and seemingly thoughtless).), cert. denied, 513 U.S. 953 (1994).

United States v. Maxwell, 25 F.3d 1389 (8th Cir.) (District Court departed downward on ground that 100:1 ratio between cocaine powder and crack has disparate impact on African-Americans which was not contemplated by Congress nor considered by Sentencing Commission. This Court reflects it had rejected defendants equal protection challenge because they presented no evidence of racial animus in adoption or continued enforcement of harsher crack penalties. This Court reiterates that while racially disparate impact may be serious matter, it is not matter for Courts and therefore, not basis upon which Court may rely to impose sentence outside of applicable Guidelines range. Congress provided for more severe penalties for all, not merely some, cocaine base offenders. This Court adopts Fourth Circuit reasoning that downward departure based on racially disparate impact would ultimately result in class-wide downward departures and impede Congress s policy decision to treat crack more harshly than powder cocaine. This Court also refers to its Lattimore decision and concludes disparate impact of 100:1 ratio is not proper basis for downward departure. Thus, government wins its cross-appeal as sentences were vacated and cases remanded to District Court for resentencing within applicable Guidelines ranges.), cert. denied, 513 U.S. 1031 (1994).

United States v. Haversat, 22 F.3d 790 (8th Cir. 1994). (In support of decision to depart downward in Haversat s case, District Court referred to Haversat s assistance to Court, good character and exemplary life, coercive economic influence of another company, and Haversat being relative newcomer who swam with crowd, lacking courage to object to scheme. On appeal, Haversat relied on substantial assistance to Courts and his exceptional character as factors to support departure. This Court has never authorized downward departure on basis defendant s assistance to Courts; and concludes defendants early nolo plea and assistance in settling related civil suit do not provide basis for downward departure under this section (they are more properly considered in conjunction with § 3E1.1). As Haversat and District Court failed to point to any evidence in record to show how Haversat struggled in difficult environment or otherwise overcame some significant hardship, downward departure was not authorized under Big Crow. While charitable or volunteer activities conceivably can serve as basis for downward departure, Haversat s activity, while laudable, is not extraordinary, truly exceptional in nature. Thus, downward departure on that basis was not permissible as circumstances were not sufficiently unusual in kind or degree to warrant departure. District Court also erred in relying on economic coercion as ground for departure as Commission considered relevance of economic hardship and determined personal financial difficulties and economic pressures upon trade or business do not warrant decrease in sentence, § 5K2.12. As to District Court s reasoning that Haversat was relative newcomer who swam with crowd, this Court finds it unnecessary to determine whether this constitutes sufficient legal grounds for departure because no factual support appears for District Court s statements. Accordingly, this Court sets aside Haversat s sentence (fine with no imposition of incarceration or probation) and remands for resentencing.

In departing downward in Gibson s case, District Court cited in part Gibson s family situation. This Court finds Gibson s truly exceptional family circumstances make this appropriate case for downward departure. Mrs. Gibson has suffered severe psychiatric problems, which have been potentially life threatening; Gibson has been actively involved in her care; and Mrs. Gibson s treating physician has characterized Gibson s participation as irreplaceable part of doctor s treatment. This Court finds, however, that District Court abused its discretion by granting unreasonable departure (imposition of fine with no incarceration or probation). This is not rarest

of cases where confinement should be avoided all together. Sentencing Guidelines provided District Court with ability to craft sentence imposing some form of confinement to meet expressed goal of § 2R1.1 and still take into consideration his need to be available to render care to his wife. Gibson s sentence set aside and case remanded for resentencing.), cert. denied, 516 U.S. 938 (1995).

United States v. Rawe, 21 F.3d 850 (8th Cir. 1994). (Rawe challenged District Court s refusal to depart downward based on threats made against her, § 5K2.12. As District Court made it clear it did not find departure warranted by facts in this case, this Court will not review that exercise of discretion.)

United States v. Bieri, 21 F.3d 811 (8th Cir.) (District Court must impose sentence within applicable Guidelines unless mitigating circumstances exist that were not adequately taken into account when Sentencing Commission drafted sentencing Guidelines. This Court interprets District Court s statements that if left completely to its discretion, it would choose probation sentence but under facts of this case it did not have authority to depart, as acknowledgment that downward departure was not justified rather than belief on judge s part he was barred as matter of law from departing.

Bieris argued for departure based on needs of their two small children. Family responsibilities are not ordinarily relevant, § 5H1.6. Sentencing both parents is not different than sentencing single parent, which this circuit has held not to be extraordinary circumstance outside "heartland" of cases covered by Guidelines. District Court did not err as matter of law in refusing to depart downward and this Court concludes judge s decision not to depart was determination based on facts of case and thus exercise of discretion which this Court cannot review.

Susan Bieri argued for downward departure based on "aberrant behavior" because she has no prior convictions relating to controlled substance. Guidelines have adequately accounted for absence of prior criminal record in structure of sentencing table and § 5H1.8.), cert. denied, 513 U.S. 878 (1994).

United States v. Ward, 21 F.3d 264 (8th Cir. 1994). (Trial Court determined (charitably) Ward was responsible for distribution of 5 kilograms of cocaine. Government argued trial Court erred in fixing sentence of 6 years confinement. Where relevant statutes provide minimum sentence of 10 years and government did not file § 3553(e) motion, trial Court had no authority to deviate from mandatory minimum sentence.)

United States v. Goff, 20 F.3d 918 (8th Cir.) (At sentencing, District Court determined Goff s guideline range, 51-63 months under § 2S1.1, for money laundering was "unduly harsh" and sentenced him to 6 months incarceration with work release, citing as departure factors absence of prior convictions, "relatively minor" nature of offense, Goff s advanced age, and need to care for his family. This Court reverses and remands. Whether viewed singly or in combination, factors do not take case outside Guidelines "heartland." Departure below lower limit of guideline range for criminal history category I on basis of adequacy of criminal history cannot be appropriate. Goff s conduct was not merely technically unlawful but was squarely within prohibitions of 18 U.S.C. § 1956. Despite Goff s supporting three young sons and his wife receiving social security disability benefits for mental disorder, family situation was not extraordinary, § 5H1.6. Goff was

healthy at age 67, which cannot justify downward departure. DISSENT: Only as to family responsibilities. Issue is not whether Goff s family will suffer financially, but whether his family responsibilities are extraordinary. Would defer to District Court that believed Goff s circumstances were sufficiently different, even from that of single parent, to warrant departure. Would not find error. Sees decision as frustrating District Court s exercise of informed judgment about facts of defendant s life.), cert. denied, 513 U.S. 987 (1994).

United States v. Kok, 17 F.3d 247 (8th Cir. 1994). (Where statements of District Court clearly recognized its authority to consider downward departure, but determined that no departure was warranted, District Court s determination is not subject to review.)

United States v. Parham, 16 F.3d 844 (8th Cir. 1994). (No government motion is required under § 5K2.0. Parham and Johnson requested departure on several grounds including that case was atypical, it was not commonly prosecuted crime (conspiracy to vote more than once), and conspiracy was not completed. This Court states that factors warranting departure may well exist in this case, but it is for District Court to determine in first instance. This Court notes it has not ruled out possibility of departure based on single act of aberrant behavior; District Court may also consider government s conduct in decision to grant downward departure; factors warranting departure in particular case do not exist in isolation. Totality of individual circumstances may well converge to create unusual situation not contemplated by Sentencing Commission. This Court further acknowledges that although family ties and responsibilities and employment record are not ordinarily relevant, extraordinary circumstances may support departure from guideline range.)

United States v. Holmes, 13 F.3d 1217 (8th Cir. 1994). (Holmes argued trial Court improperly failed to depart downward because of government s outrageous conduct of selecting protected location (Family Fun Center; § 2D1.2(a)(1)) as cite of second drug transaction. As trial Court was aware it could depart downward, this Court cannot review refusal to depart downward.)

United States v. Kirkeby, 11 F.3d 777 (8th Cir. 1993). (Kirkeby argued his sentence of 72 months could be thought of as departure, arguing that trial Court found mitigating circumstance in his case--namely that Kirkeby s acquisition of cocaine was only to feed his own drug habit and not because he was in business of crime. As Guidelines explicitly declare drug dependence is not reason for imposing sentence below Guidelines (§ 5H1.4), this Court finds no factual basis in transcript to justify departure.)

United States v. White Buffalo, 10 F.3d 575 (8th Cir. 1993). (After deciding departure was justified under § 5K2.11, District Court added departure was also justified under § 5K2.0 based on White Buffalo s employment record, high standing in community, family ties and responsibility, and Sentencing Commission s failure to understand living conditions on South Dakota Indian reservations. This Court concludes § 5K2.0 was not legally sufficient basis for departure and distinguishes White Buffalo s situation from those described in Big Crow and One Star.)

United States v. Maul-Valverde, 10 F.3d 544 (8th Cir. 1993). (A departure might be appropriate due to impact of § 2L1.2(b)(2) enhancement if purposes underlying 16-level enhancement would not be served by applying it in given situation. This Court sees nothing in

Maul-Valverde s record to suggest presence of such unusual circumstances: he had pattern of entering U.S. illegally, being arrested for non-immigration offenses, returning to Mexico, and then reentering U.S., demonstrating his offense is within "heartland" of cases which § 2L1.2(b) enhancement was intended to apply.)

United States v. One Star, 9 F.3d 60 (8th Cir. 1993). (Government appeal of District Court decision to depart downward from range of 33-41 months imprisonment to 5 years probation with conditions, following One Star s guilty plea to being felon in possession of firearm. Decision to depart was based upon combination of factors: One Star did not appear to be dangerous, possessed revolver for self defense, and had strong family ties and responsibilities and good employment record. This Court rejected government s argument that Big Crow conflicts with Prestemon. Government did not argue District Court s findings of fact were clearly erroneous. This Court could not conclude, as matter of law, that mitigating circumstances cited by District Court were insufficiently unusual in kind or degree to warrant departure. Because maximum prison term for violation of § 922(g)(1) is ten years, District Court had statutory authority to sentence One Star to probation. That being so, and its findings being legally sufficient to warrant departure, District Court s decision to impose probation is quintessentially judgment call and while approaching outer limits of sentencing discretion, was reasonable exercise of that discretion.)

United States v. Shinder, 8 F.3d 633 (8th Cir. 1993). (Shinder claimed District Court abused its discretion in refusing to grant downward departure; she asserted Court believed it could not depart and therefore erred as matter of law. This Court stated record belied such claim; trial Court failed to find any extraordinary reasons for departure under § 5H1.6 (i.e., trial Court was aware that Shinder s five children would have to be split up among her relative). Thus, this Court has no authority to review discretionary ruling of trial Court in failing to depart.)

United States v. Simpson, 7 F.3d 813 (8th Cir. 1993). (Government challenge to District Court s downward departure following Simpson s convictions on four counts of distribution of cocaine and three counts of food stamp fraud. Notwithstanding applicable guideline range was 30-37 months, Court sentenced Simpson to 12 months imprisonment, 6 to be satisfied by 6 months imprisonment in jail-type institution with work release. District Court cited following circumstances: Simpson s first time offender status, present employment and financial support of his family, serious addiction to cocaine during period for which conduct giving rise to convictions occurred, short time-frame that offenses took place, government s initiating role in use of food stamps, and Simpson s efforts at recovering from his cocaine addiction (following "shock incarceration"). This Court reviewed factors District Court must consider in imposing sentence, 18 U.S.C. § 3553(a) and decided that on this record it could not determine whether or not District Court actually relied upon invalid ground for granting departure. It reversed, vacated, and remanded with directions as to applicability of circumstances pertaining to departure as cited by District Court, e.g., first time offenders receive benefit of § 4A1.3. This Court leaves open question as to whether because of short time that elapsed in which Simpson engaged in more than one act of drug dealing, whether such conduct could qualify as aberrant behavior warranting departure. This Court recognizes government s conduct relating to Simpson s acquisition of food stamps would seem to have played role in District Court s decision to depart, limited record did not establish sufficiently egregious conduct alone warranting relief at sentencing. Totality of individual

circumstances may converge to create unusual situation not contemplated by Sentencing Commission.)

United States v. Franik, 7 F.3d 811 (8th Cir. 1993). (Franik argued District Court erred in refusing to depart downward based upon his youth and brevity of his criminal career. District Court was aware of its discretionary authority to depart downward but found no grounds for departure; hence, Court s decision not to depart is not reviewable. District Court found circumstances that served as basis for motion justified sentence at low end of Franik s sentencing guideline range.)

United States v. Desormeaux, 4 F.3d 628 (8th Cir. 1993). (Disagreement with Guidelines does not justify departure.)

United States v. Baker, 4 F.3d 622 (8th Cir. 1993). (This Court reverses District Court departure (from 24-30 months range to 5 years probation) on rationale that Baker s cooperation with government involved implicating close relative exposing her to emotional repercussions from her family even though government did not consider her efforts meaningful enough to warrant § 5K1.1 motion. This Court determined circumstances relied upon by District Court were not different in kind or quality from circumstances considered in promulgation of § 5K1.1. Moreover, as § 5K1.1 affords possibility of unlimited departure, cooperation with prosecutors cannot be sufficiently extraordinary § 5K2.0 departure. This Court holds circumstances relied upon by District Court are not sufficiently unusual in kind or degree to permit circumvention of § 5K1.1. Judgment reversed and remanded for resentencing.)

United States v. Marshall, 998 F.2d 634 (8th Cir. 1993). (Where District Court departed from sentencing range of 97-121 months to 66-month term of imprisonment based on its view that conversion ratio of 1 kilogram per marijuana plant, for 50 or more plants, but only 100 grams per plant for 49 or fewer plants was arbitrary and capricious classification. While acknowledging skepticism about rationale used by Sentencing Commission, this Court reverses as disagreement with Guidelines does not justify departure.)

United States v. Groene, 998 F.2d 604 (8th Cir. 1993). (The government claimed on cross-appeal that District Court abused its discretion in departing from Guidelines and not imposing imprisonment in federal facility. Applicable guideline range for chiropractor Groene s failure to pay taxes was 12-18 months imprisonment. Though neither probation nor split sentence was available under applicable Guidelines, Court made what it characterized as "lateral departure" in which it imposed sentence of 312 days of confinement in county jail, allowing for work release every work day (so he could make his services available to persons in small Nebraska community where he lived and also make restitution to government more certain and quicker) followed by 61 consecutive weekends of confined community service at nursing care center, plus 5 years probation, $12,000 fine, and $115,757 in restitution. District Court concluded that Sentencing Commission did not and could not take into account impact that absence of particular physician could have on his local community by being in prison. Government produced survey indicating that at least 25 chiropractors were available within 50 mile radius of Groene s community. This Court finds District Court error in finding that Groene s absence would impose such significant hardship on community as to justify departure. Exigency identified was insufficient to warrant departure in face

of Guidelines policy statements to effect that vocational skills, community support, and ability to make restitution are excluded as basis of departure. DISSENT: This Court should not substitute its judgment for that of District Court. District Court recognized constraints on its discretion but nonetheless concluded Groene s vocational skills are sufficiently unusual to warrant departure and departure, relatively modest in terms of total punishment, was intended to impose detention without depriving citizens in Groene s rural community of his valued services.), cert. denied, 510 U.S. 1072 (1994).

United States v. Scoggins, 992 F.2d 164 (8th Cir. 1993). (Scoggins sought downward departure based on her extraordinary family ties and responsibilities, e.g., her husband was severe diabetic, one child had speech disorder and other was hyperactive. This Court repeats its three prong test: whether circumstances, as matter of law, may be appropriately relied upon to justify departure; are circumstances supported by record; and if so, is departure reasonable. District Court s finding that extraordinary circumstances did not exist was neither clearly erroneous nor contrary to law. Sentence was not imposed in violation of law and Court s refusal to depart downward was well within its discretion.)

United States v. Deitz, 991 F.2d 443 (8th Cir. 1993). (Dietz requested downward departure based on potential disparity between theoretical sentence he might have received upon conviction in state Court and sentence he received as result of conviction in federal Court--the potential disparity being circumstance not adequately taken into consideration by Guidelines. This Court agrees with District Court that it lacked authority to depart on this basis, holding possible discrepancy between state and federal sentences is factor Sentencing Commission considered, but chose not to account for in Guidelines. Introducing this factor would fracture uniform national system for sentencing particular federal crime. DISSENT: Case represents example of how state and federal prosecutors abuse their power. Because Dietz asserted speedy trial rights under state law, he faces increased penalties in federal Court. Principles of federalism should govern. It is time for braking activity by judicial oversight of federal prosecutors awesome powers. Majority cites no authority in support of Commission s recognition that defendant might be subject to prosecution in two forums. Would give trial judge power to ameliorate unfair penalty should he choose.)

United States v. Barth, 990 F.2d 422 (8th Cir. 1993). (While sentencing entrapment is valid basis for downward departure, here, this Court disagrees with District Court that undercover officer continued to purchase drugs merely to enhance Barth s potential sentence. Undercover officer used standard procedure; established dealer will not readily sell large quantities to new customer; undercover officer was from state where threshold for invoking most serious penalty is ten grams suggesting that triggering 50-gram threshold was not motivating factor in continuing investigation. Case is remanded for resentencing.)

United States v. Brown, 990 F.2d 397 (8th Cir. 1993). (A District Court has discretion to depart from guideline range on its own motion under 18 U.S.C. § 3553(b) and § 5K2.0. Where District Court s statements of its reasons for not departing were ambiguous--could be read to say it found no reason to exercise its discretion to depart or could be read to say Court believed it needed government motion as prerequisite to depart--this Court concludes there was incorrect application of sentencing Guidelines and vacates sentence and remands for resentencing.)

United States v. Wesley, 990 F.2d 360 (8th Cir. 1993). (This Court may review District Court s decision to remain within Guidelines because it believed it could not depart downward. Journey contended that Guidelines fail to consider as whole his position in community, family values, lack of criminal record, and actual contribution in crimes for which he was indicted. Sentencing Commission did consider all relevant arguments for downward departure, which District Court recognized.)

United States v. Johnson, 988 F.2d 859 (8th Cir. 1993). (Where government did not file motion for downward departure from statutory mandatory minimum sentence, District Court properly determined that it had no authority to depart. (18 U.S.C. § 3553(e)).)

United States v. Taylor, 986 F.2d 297 (8th Cir. 1992). (A District Court s decision not to depart from applicable guideline range is not reviewable. Therefore, this Court affirms denial of Taylor s motion for downward departure. Motion was based on Taylor being only one of thirty persons that prosecuted by federal, rather than state, authorities and his claim investigating officer deliberately solicited repeated drug sales so aggregate (§ 1B1.3(a)(2)) would result in substantially enhanced sentence.)

United States v. Tucker, 986 F.2d 278 (8th Cir.) (The potential for victimization can provide proper predicate for departure. In this case, however, record supported no substantial atypicalities. Moreover, totality of circumstances (Tucker s age, history of abuse, and health) did not serve to take case out of "heartland" established by Guidelines.), cert. denied, 510 U.S. 820 (1993).

United States v. Aslakson, 982 F.2d 283 (8th Cir. 1992). (At sentencing, Aslakson moved under section 5K2.0 for departure from Guidelines range of 21 to 27 months for conspiracy offense, contending his willingness to cooperate and testify against his co-defendant was not adequately rewarded by recommended two-level reduction under section 3E1.1. This Court holds cooperation with prosecutors simply cannot be sufficiently extraordinary to warrant departure under section 5K2.0 absent government motion under section 5K1.1. Thus, only time District Court has authority to depart for such cooperation in absence of section 5K1.1 motion is when defendants makes substantial threshold showing of prosecutorial discrimination or irrational conduct.), cert. denied, 507 U.S. 1041 (1993).

United States v. Long, 977 F.2d 1264 (8th Cir. 1992). (Government appealed District Court s downward departure based on finding that Long s physical injuries leave him exceptionally vulnerable to attack in prison. Extraordinary physical impairment resulting in extreme vulnerability is legitimate basis for departure. Moreover, District Court did not clearly err in imposing sentence which would exclude prison time where term of imprisonment could be equivalent of death sentence and government never presented evidence of how Bureau of Prisons could protect Long.)

United States v. Dillard, 975 F.2d 1554 (8th Cir. 1992). (Dillard pleaded guilty to violent crime. He requested downward departure because his paranoia schizophrenia constituted mitigating circumstance not adequately considered by Sentencing Commission. District Court found Dillard suffered from diminished mental capacity, but concluded it lacked authority under section 5K2.0

because Commission took diminished mental capacity into account in formulating section 5K2.13. This Court agreed with District Court that it lacked authority to depart downward as diminished mental capacity was addressed in section 5K2.13 and Dillard was not entitled to departure under that section because he committed violent offense.)

United States v. Harrison, 970 F.2d 444 (8th Cir. 1992). (This Court does not directly conclude District Court knew it had authority to depart but exercised its discretion by sentencing within Guidelines range, in light of holding District Court lacked authority to depart. Harrison s age (64) was not extraordinary circumstance as she was in good health (§ 5H1.1). Her part-time employment was not permissible basis for downward departure when she otherwise showed no atypical circumstances (§ 5H1.5). Nor did Harrison s responsibility for care of minor child who might be left under care of another adult who is allegedly substance abuser who "goes out frequently," extraordinary circumstance (§ 5H1.6).)

United States v. Posters N Things Ltd/Acty/Acty, 969 F.2d 652 (8th Cir. 1992). (This Court finds no error in District Court s decision to depart downward (range of 188-235 to 108 months) in sentencing Acty, convicted of aiding and abetting manufacture of 100 kilograms of cocaine. Acty did not aid and abet specific act of manufacturing or distributing; rather, she sold diluent (and other drug paraphernalia), situation Sentencing Commission did not have in mind or adequately provide lower sentence for.)

United States v. LaChapelle, 969 F.2d 632 (8th Cir. 1992). (LaChapelle contended District Court erroneously believed it did not have authority to depart downward. Upon review of sentencing hearing transcript, this Court was convinced Court was fully aware of its prerogative to depart downward but nonetheless concluded facts of this case dealing with receiving child pornography through mail did not warrant such departure.)

United States v. Condelee, 961 F.2d 1351 (8th Cir. 1992). (This Court has recognized authority of sentencing judge to depart downward from Guidelines without any government motion in unusual circumstances such as extraordinary restitution.)

United States v. Wilson, 955 F.2d 547 (8th Cir. 1992). (Because Kellett s sentence was correct application of Guidelines, question of whether to depart downward so as to make his separate state and federal sentences concurrent was committed to District Court s unreviewable discretion.)

United States v. Prestemon, 953 F.2d 1089 (8th Cir.) (At resentencing hearing, District Court sentenced Prestemon to 33 months imprisonment (applicable guideline range of 33-41 months). Prestemon s argument that District Court was under mistaken belief this Court had completely limited its authority to depart downward is foreclosed by mandate of this Court in Prestemon I, which was to sentence Prestemon within applicable guideline range, giving due consideration to his status as bi-racial adopted child, excellent academic record, and other factors. DISSENT: This Court erred in reversing District Court in Prestemon I. This Court encourages District Court judges to exercise their discretion in sentencing, and then reverses them when they do.)

United States v. Amos, 952 F.2d 992 (8th Cir. 1991). (This Court disagrees with District Court s conclusion that nature of Amos s forced sexual assault of victim permitted downward departure. Because statute and Guidelines adequately account for severity of Amos s conduct, downward departure is unwarranted. Case remanded for resentencing.), cert. denied, 503 U.S. 1010 (1992).

United States v. Desormeaux, 952 F.2d 182 (8th Cir. 1991). (Following jury conviction of assault resulting in serious bodily injury and assault with dangerous weapon, Guidelines range for Desormeaux was 37-46 months. She moved for downward departure pursuant to United States v. Big Crow. District Court departed and imposed sentence of 24 months, citing as factors history of abuse and resulting emotional trauma, Desormeaux s post-arrest conduct, and victim s wrongful conduct. Government argued departure was based on improper factors. Applying Lang standard, this Court holds circumstances relied upon were not sufficiently extraordinary to warrant departure. Court states its belief that Desormeaux s potential contribution to society was adequately taken into account in constructing Guidelines and thus is insufficient as matter of law to justify departure. Court notes its agreement with circuits holding that defendant s post-offense rehabilitative conduct is equivalent to acceptance of responsibility under § 3E1.1 and does not serve as basis for departure from Guidelines. On remand, District Court may take into consideration Desormeaux s post-offense rehabilitative conduct in determining appropriate sentence within Guidelines range.)

United States v. Garlich, 951 F.2d 161 (8th Cir. 1991). (Where it was unclear as to whether District Court exercised discretion and declined to depart downward or whether judge believed he lacked authority to depart downward, this Court remands for District Court s consideration of whether extent and timing of Garlich s restitution (Garlich had liquidated all his assets to ensure full restitution to banks over year before his indictment) were sufficiently unusual to warrant downward departure. Garlich s actions in planning and executing financing scheme over one-year period were not acts of aberrant behavior because they were not spontaneous and seemingly thoughtless.)

United States v. Schneider, 948 F.2d 1074 (8th Cir. 1991). (Schneider asked for downward departure based on facts surrounding offense of felon in possession of firearm. These included he sold firearms in effort to convince his wife to reconcile with him; he had never used firearms and realized he couldn t have them; retired police chief testified to his good character. District Court found offense constituted crime in its "usual and common form." District Court s decision not to depart downward under this section is nonreviewable.)

United States v. Laird, 948 F.2d 444 (8th Cir. 1991). (Guidelines specifically mention alcohol and drug dependence are not reason for downward departure. Moreover, this Court will not review Laird s argument that District Court erred in denying motion for downward departure based on his drug dependence and prospects for rehabilitation, as this Court is not empowered to review District Court s exercise of its discretion to depart from applicable guideline range.)

United States v. Olson, 931 F.2d 1250 (8th Cir.) (This Court rejects Olson s argument that government s conduct (agent lowering price of cocaine to induce sale) "raised spectre of entrapment" supporting downward departure under §§ 5K2.10 and 5K2.12 as District Court

correctly applied Guidelines and found government s conduct was not instigating factor.), cert. denied, 502 U.S. 886 (1991).

United States v. Prestemon, 929 F.2d 1275 (8th Cir.) (Based on government s appeal, this Court vacates sentence of 24 months imprisonment which represented departure from guideline range of 33-41 months, where departure was based on Prestemon s adoptive background (3 month old biracial (which was then unknown) child adopted by white couple); he was 21 at time of offense, had been honors student and successfully completed some vocational training; disparity between guideline ranges applicable to Prestemon and lower one to defendant in pending bank fraud case. Specific offender characteristics (5H1.3, 6, 10) improperly relied upon as was perceived disparity. On remand, District Court should consider 5H1. factors in relation to sentencing at low end of Guidelines range. (DISSENT: Decision of experienced chief judge to depart downward was not only wise and prudent, but consistent with Guidelines. It is important to sustain District Court s exercise of discretion.), cert. denied, 502 U.S. 877 (1991).

United States v. Woodard, 927 F.2d 433 (8th Cir.) (Woodard argued District Court made error of law in failing to depart downward because he was subjected to "double jeopardy application of Guidelines," based on his conviction and sentence in state Court for same act (possession of methamphetamine with intent to distribute). This Court recognized Woodard had served no time for serious drug crime, five-year minimum for firearm charge had no substantial influence on drug sentence imposed (63 months), District Court accepted government argument state had not punished drug crime enough. DISSENT: Government s hindsight may be 20/20, but its justice is blind. District Court mistakenly believed only de facto double jeopardy claim could constitute grounds for departure in dual prosecution case; it made no findings on rehabilitation or need for federal incarceration.), cert. denied, 502 U.S. 887 (1991).

United States v. Hutchinson, 926 F.2d 746 (8th Cir. 1991). (Hutchinson argued he was entitled to sentence at lower end of sentencing range as otherwise he would be denied any benefit from reduction for acceptance of responsibility. This is non-reviewable.)

United States v. Brown, 921 F.2d 785 (8th Cir. 1990). (Dorsey claimed District Court error in its refusal to depart downward on basis of mitigating circumstances not adequately considered in formulation of Guidelines, specifically, small amount of PCP involved, his lack of criminal record, his trial testimony of lack of knowledge of use of money he wired, his cooperation with officials after arrest. This Court held it lacked authority to review this aspect of Dorsey s sentence.)

United States v. Torres, 921 F.2d 196 (8th Cir. 1990). (District Court correctly rejected Torres s request for downward departure which was based solely on co-defendant receiving lesser sentence.)

United States v. Foote, 920 F.2d 1395 (8th Cir. 1990). (To extent Foote s argument that there was insufficient evidence to connect her to quantity of drugs involved challenged District Court s failure to depart from Guidelines, this Court cannot entertain it.)

United States v. Shortt, 919 F.2d 1325 (8th Cir. 1990). (Downward departure unreasonable where Shortt was sentenced to three years on probation rather than to any time in prison (guideline range of 10 months to 16 months). District Court s reliance on 5K2.10 victim s provocation (adultery with defendant s spouse) did not justify blowing up adulterers or building bomb capable of doing so, and did not warrant departure.)

United States v. Sayers, 919 F.2d 1321 (8th Cir. 1990). (District Court chose not to grant downward departure for victim misconduct where Sayers s wife by Indian tradition testified stabbing victim had been sexually harassing her to point several persons had to intervene.)

United States v. Ybabez, 919 F.2d 508 (8th Cir. 1990). (Where District Court granted downward departure, this Court will not review extent of departure. Ybabez argued his substantial assistance to government, failure to profit substantially from drug dealings, his age of 60 upon release under current sentence.), cert. denied, 499 U.S. 940 (1991).

United States v. Yerks, 918 F.2d 1371 (8th Cir. 1990). (District Court statement did not show declination to depart because of belief it lacked power to do so, but rather reflected discretionary decision not to depart based on facts of case.).

United States v. Keene, 915 F.2d 1164 (8th Cir. 1990). (Keene argued unwarranted disparity in drug conspiracy sentences between him and co-defendants, after his plea for downward departure was rejected by District Court. This Court found no abuse of discretion by District Court as it found facts contemplated by Guidelines for sentencing range applicable to Keene.), cert. denied, 498 U.S. 1102 (1991).

United States v. Smith, 909 F.2d 1164 (8th Cir.) (Government cross-appealed Smith s sentence where District Court had departed downward by four years for three reasons: lack of deterrence value in longer sentence, brevity of Smith s career and his youth at time, and Smith s apparent rehabilitation. Organic statute invites District Courts to attend to circumstances of kind and degree not adequately taken into consideration by Sentencing Commission. Length and scope of career that places criminal under career offender guideline are appropriate grounds for departure. Test of reasonableness was met.), cert. denied, 498 U.S. 1032 (1990).

United States v. Whitehorse, 909 F.2d 316 (8th Cir. 1990). (Government appealed District Court s downward departure from Guidelines where after Whitehorse pleaded guilty to escape, Court sentenced her to prison term of four months to be served concurrently with sentence on previous assault conviction. Sentence had other components. District Court found mitigating circumstances not adequately considered by Commission: prison officials ill-advised decision to release Whitehorse on unsupervised furlough despite alcohol addiction; nature of her "escape"; compelling need for effective treatment of her alcoholism; administrative loss of good time. This Court held District Court s departure reasonable based on Whitehorse s unique circumstances considered in toto.)

United States v. Foley, 906 F.2d 1261 (8th Cir. 1990). (District Court s failure to depart

downward due to mitigating family circumstances (five minor children) or Foley s good faith efforts to assist government is exercise of discretion not reviewable by this Court.)

United States v. Neil, 903 F.2d 564 (8th Cir. 1990). (This Court acknowledges as Guidelines are silent about military service as potential basis for departure, it could constitute grounds for departure in unusual case. Neil s military service alone, however, did not warrant departure but could be weighed in deciding sentence to be imposed within applicable Guideline range.)

United States v. Crumb, 902 F.2d 1337 (8th Cir. 1990). (Government appealed District Court s downward departure following two-point adjustment for acceptance of responsibility after defendant reported nine days late and pleaded guilty to failing to surrender for service of [credit card fraud] sentence. This Court applied First Circuit s three-step analysis (Diaz-Villafane) and also noted District Court determined Crumb s surrender contained mitigating circumstances not adequately accounted for in § 2J1.6 (which considers only sentence length for underlying offense). Moreover, departure found reasonable where defendant would still be serving more than one month s imprisonment for each day he was late.)

United States v. Figueroa, 900 F.2d 1211 (8th Cir.) (Court did not address argument that District Court should have departed downward based on circumstances not adequately considered by Guidelines because issue was nonreviewable, (Evidente).), cert. denied, 496 U.S. 942 (1990).

United States v. Big Crow, 898 F.2d 1326 (8th Cir. 1990). (Although two stated reasons for downward departure, intoxication and lack of criminal record, were not appropriate reasons for departure, other reasons, excellent employment record and efforts to overcome adverse environment of Indian reservation, provided for appropriate use of District Court s discretion in this case. Dissent notes Guidelines § 5H1.10 prohibits Courts from conferring any relevance to race, national origin, and socio-economic status when sentencing.)

**§ 5K2.1 (Death):**

United States v. Merrival, 176 F.3d 1079 (8th Cir. 1999) (BEAM, HEANEY, GOLDBERG*). (Upholding upward departure based, in part, on multiple deaths caused by defendant's drunk driving. When using death as factor for upward departure, Court should base amount of departure on, inter alia, dangerousness of defendant's conduct.)

**§ 5K2.2 (Physical Injury/Standard of Review):**

United States v. Goings, 200 F.3d 539 (8th Cir. 2000) (WOLLMAN,* HEANEY, LOKEN). (This Court reviews departure under unitary abuse-of-discretion standard, which, although "unitary," is also nuanced: while departure questions are fact-intensive, appellate Courts owe no deference to District Courts concerning issues such as mathematical errors in applying Guidelines, or consideration of facts Guidelines classify as irrelevant.)

**§ 5K2.2 (Physical Injury):**

United States v. Evans, 285 F.3d 664 (8th Cir. 2002) (LOKEN, RICHARD S. ARNOLD,* FAGG). (District Court did not abuse its discretion in departing upward where one victim suffered head trauma, broken wrist, and dislocated shoulder; second victim suffered ear damage and cuts; and third victim suffered broken rib, facial trauma, and swollen eyes. Although use of force and serious bodily injury were also incorporated into defendant's enhanced offense level, District Court permissibly found that they were present to degree beyond what Guidelines contemplated), cert. denied, 123 S. Ct. 1257 (2003).

United States v. Evans, 272 F.3d 1069 (8th Cir. 2001) (LOKEN, RICHARD S. ARNOLD,* FAGG). (District Court did not abuse its discretion in applying enhancement where one victim suffered head trauma and cuts, and another victim suffered ear damage, as result of beatings from defendant.

District Court did not abuse its discretion or violate Double Jeopardy Clause by applying enhancement where Court used § 2A3.1 (criminal sexual abuse) as base offense level; District Court found this factor present to exceptional degree such that further enhancement was permissible: one victim suffered split head; another had bruises, split lip, and eyes swollen shut; and yet another had cuts on head and beatings requiring hospital stays.

District Court did not abuse its discretion in departing upward, and fact that violence giving rise to injury occurred in context of longstanding personal relationship is hardly excuse.), cert. denied, 535 U.S. 1029 (2002).

United States v. Goings, 200 F.3d 539 (8th Cir. 2000) (WOLLMAN,* HEANEY, LOKEN). (Defendant was convicted of involuntary manslaughter after he lost control of vehicle in Indian country. During incident, passenger Duane Brewer was ejected from vehicle, suffering cracked vertebrae requiring stitches and hospitalization. Passenger Frank Goings, also ejected, was referred to simply as one of "two injured males" found at accident scene, and was not hospitalized. Court departed upward 2 levels for each injured passenger. Although defendant argues Court appears not to have followed recommendation in § 5K2.2 to calibrate departures to seriousness of injury--given difference in severity between Brewer's and Going's injuries--this is not reversible error, because § 5K2.2 is not Guideline but policy statement which does not interpret Guideline or prohibit District Court from taking specified action. Thus, District Court may choose not to follow its recommendation provided no abuse of discretion otherwise occurs. Here there was none: description of Goings as "injured male" who was "ejected" from vehicle was sufficient to support 2-level upward departure for Goings's injuries.)

United States v. Merrival, 176 F.3d 1079 (8th Cir. 1999) (BEAM, HEANEY, GOLDBERG*). (Upholding upward departure based, in part, on extensive bodily injury suffered by 3 surviving victims of accident caused by defendant's drunk driving.)

United States v. Morin, 935 F.2d 143 (8th Cir. 1991). (Morin pleaded guilty to two counts of abusive sexual contact with his seven-year-old niece who was living with him and his wife at time. District Court departed upward four months above maximum Guideline range in reliance on §§ 5K2.2 (physical injury) and 5K2.3 (extreme psychological injury) because victim was very young child and had suffered extensively. This Court reversed and remanded, acknowledging that while additional four-month sentence can be reasonably justified by victim s age (§ 2A3.4 since amended

to reflect age as aggravating circumstances), District Court gave other reasons for departure not supported by record.)

**§ 5K2.3 (Extreme Psychological Injury):**

United States v. Orchard, 332 F.3d 1133 (8th Cir. 2003) (LOKEN, BRIGHT, MURPHY*). (Upward departure was proper where victim of attempted rape's victim-impact statement showed severe psychological injury. Even though she had not sought counseling, this was because she could not afford it.)

United States v. Thin Elk, 321 F.3d 704 (8th Cir. 2003) (WOLLMAN, JOHN GIBSON, MELLOY*). (Drunk driver crashed his car at ninety-five miles per hour head-on into car of elderly couple who had been married for fifty-three years. Wife died of her injuries; husband was hospitalized to recover from pulmonary contusion, leg fracture, and arm fracture. Prior to accident, husband had been in generally good health, was active, walked five to seven miles per day, and had beginning stages of dementia; accident caused him to have memory loss and pancreatitis, greatly accelerated his dementia, limited his mobility, required him to have home health care, and left him depressed and without desire to live. On these facts, it was not impermissible double-counting for District Court both to impose six-level enhancement under § 2A2.2(b)(3)(C) for permanent or life-threatening injury and to depart upward. District Court's determination that husband's extreme psychological injury was present to exceptional degree not fully accounted for by enhancement was supported by facts, and upward departure was not abuse of discretion.)

United States v. Rose, 315 F.3d 956 (8th Cir.) (LOKEN, BEAM,* MELLOY). (District Court did not abuse its discretion in departing upward based on extreme psychological injury where defendant threatened sexual and physical violence against victim and her children, knowing that victim had been raped and her brother had been murdered.), cert. denied, 123 S. Ct. 2238 (2003).

United States v. Hampton, 260 F.3d 832 (8th Cir. 2001) (WOLLMAN,* HANSEN, SCHREIER). (District Court did not abuse its discretion in departing upward for extreme psychological injury of child pornography victim, based on pornographic tapes and testimony of victim's therapist, which constitute ample evidence of ongoing psychological problems. It was for District Court to weigh probative force of testimony, and Court did not err in discounting testimony of defendant's expert who neither met victim nor viewed tapes.), cert. denied, 535 U.S. 1058 (2002).

United States v. Lewis, 235 F.3d 394 (8th Cir. 2000) (LOKEN, HEANEY, FAGG) (per curiam). (District Court departed upward from Guidelines range (18-24 months) and sentenced defendant (who pleaded guilty to conspiring to harbor illegal alien) to 96 months based on obstruction of justice; extreme psychological injury; unlawful restraint, § 5K2.4; and extreme conduct, § 5K2.8. Defendant and her family had held captive alien-- later found dead and buried in her backyard, forced him to work as servant and to give his outside wages to defendant, deprived him of adequate nourishment and medical care, and subjected him to physical and psychological humiliation and abuse. And while in jail, defendant communicated with her co-defendant and material witness, to convince witness to lie; defendant also threatened fellow inmate who had met with government attorney prior to sentencing and provided information about defendant's statements

concerning her treatment of victim, and offered yet another fellow inmate $1,000 to testify that another fellow inmate, who had spoken to Government, was lying. On appeal, defendant argues extent of departure was unwarranted. District Court's departure, although extraordinary, was not abuse of discretion.)

United States v. Johnson, 144 F.3d 1149 (8th Cir. 1998). (Johnson argues District Court improperly imposed upward departure based on extreme conduct (§ 5K2.8) and injury (§ 5K2.3). District Court did not abuse its discretion by departing upward based on records supporting finding Johnson s conduct was unusually cruel and degrading and victims suffered severe psychological injury (e.g., rape victim testified Johnson threatened her and male co-worker with sawed off shotgun and forced them to disrobe; after unsuccessfully failing to penetrate, he repeatedly forced her to perform oral sex, left her lying naked on floor, and threatened to return and kill her if she called police); from time of attack she required ongoing psychological counseling and treatment with anti-depressant drugs; her sexual relations with her husband were damaged; and she testified to being haunted by fear which led her to carry gun, move to area more frequently patrolled by police, install home security system, and stay inside at night except for emergency.)

United States v. Johnson, 121 F.3d 1141 (8th Cir. 1997). (Based on victim s testimony as to rape, Court granted 72-month upward departure because Court found Johnson s conduct was unusually heinous, cruel, brutal, or degrading to victim under § 5K2.8 and victim suffered serious psychological injury under § 5K2.3. Johnson challenges sufficiency of evidence for upward departure, arguing departure, relies on same factors used to support § 2B3.1(b)(3)(A) enhancement. Without addressing Johnson s claim, this Court reverses District Court s decision to depart because Johnson never received proper notice it was going to consider departure. This Court vacates 72-month sentencing departure and remands.)

United States v. Grey Cloud, 90 F.3d 322 (8th Cir. 1996). (District Court departed upward from guideline range (188-235 months) and sentenced Grey Cloud to life imprisonment based on extreme conduct, § 5K2.8, and inadequacy of criminal history category, § 4A1.3. On appeal, Grey Cloud argues District Court erred by departing upward from recommended range. Because District Court did not err in finding it had authority to depart and facts of case warranted departure, and because extent of departure was reasonable, this Court rejects claim.)

United States v. Otto, 64 F.3d 367 (8th Cir. 1995). (Departure was amply supported by evidence indicating that as result of Otto s harassment, victim lived in constant fear for herself and her children and was always on lookout for Otto. Victim could not eat or sleep, lost weight, required counseling, and already fears Otto s ultimate release. Her psychological injury was obvious based on her testimony and common sense and experience. Psychological injury seemed to have been whole point of Otto s stalking activity.), cert. denied, 516 U.S. 1133 (1996).

United States v. Johnson, 56 F.3d 947 (8th Cir. 1995). (At sentencing, District Court sustained government s motion for upward departure from Guidelines range on two grounds--extreme psychological or emotional injury and extreme conduct (§ 5K2.8). Johnson contended District Court erred because there was not evidence psychological injury was more serious than that normally resulting from offense and because upward departure was not reasonable as his sentence

before departure amounted to life sentence. Where this Court found Johnson s conduct clearly warranted departure pursuant to § 5K2.8, it was not necessary to discuss Johnson s arguments related to § 5K2.3.)

United States v. Yellow, 18 F.3d 1438 (8th Cir. 1994). (Following Yellow s conviction for raping his disabled younger brother and younger sister, District Court departed upward from range of 135-168 months to 240 months--the statutory maximum--imprisonment. Relying upon expert testimony, Court expressly found Yellow s siblings suffered psychological injury much more serious than that normally resulting from sexual abuse. Court was entitled to rely upon psychologist s professional opinion rather than Yellow s older sister who testified that victims are adjusting well. Finding that victims suffered sufficiently severe psychological injury to warrant upward departure was not clearly erroneous. This Court defers to District Court s judgment call on reasonableness of departure; this Court cannot conclude additional 72-month prison term was unreasonable penalty.)

United States v. Fawbush, 946 F.2d 584 (8th Cir. 1991). (Record contained no evidence that either young victim of sexual abuse suffered harm greater than that normally resulting. Government did not prove nor did District Court substantiate reasons it gave: counseling received by one of victims and opinion of probation officer who prepared PSR.)

United States v. Morin, 935 F.2d 143 (8th Cir. 1991). (Morin pleaded guilty to two counts of abusive sexual contact with his seven-year-old niece who was living with him and his wife at time. District Court departed upward four months above maximum Guideline range in reliance on §§ 5K2.2 (physical injury) and 5K2.3 (extreme psychological injury) because victim was very young child and had suffered extensively. This Court reversed and remanded, acknowledging that while additional four-month sentence can be reasonably justified by victim s age (§ 2A3.4 since amended to reflect age as aggravating circumstances), District Court gave other reasons for departure not supported by record.)

United States v. Perkins, 929 F.2d 436 (8th Cir. 1991). (This Court affirms Perkins s 84 month sentence (departure from Guidelines range of 30-37 months) which District Court based on deterring crime and exceptional financial and emotional hardship to person whose identity Perkins assumed for purpose of credit card fraud. Where Perkins ruined his "victim s" academic record and sullied forever his identity, it was not abuse of discretion for District Court to consider impact of Perkins s crimes on his victims (§§ 5K2.3, .5, .8). CONCURRENCE: Based on belief District Courts must have considerable discretion to depart from Guidelines. Would not have doubled sentence as criminal history score accounted for Perkins s inability to complete term of noncustodial supervision; injury to victim was other than psychological; actual dollar loss inflicted was relatively small.)

United States v. Fire Thunder, 908 F.2d 272 (8th Cir. 1990). (While facts did not support finding that Fire Thunder s conduct was "unusually heinous" (§ 5K2.8), departure affirmed on basis of District Court s finding victim suffered extreme and unusual psychological injury as result of stepfather s conduct (§ 5K2.3).)

**§ 5K2.4 (Abduction or Unlawful Restraint):**

United States v. Lewis, 235 F.3d 394 (8th Cir. 2000) (LOKEN, HEANEY, FAGG) (per curiam). (District Court departed upward from Guidelines range (18-24 months) and sentenced defendant (who pleaded guilty to conspiring to harbor illegal alien) to 96 months based on obstruction of justice, extreme psychological injury, § 5K2.3; unlawful restraint; and extreme conduct, § 5K2.8. Defendant and her family had held captive alien-- later found dead and buried in her backyard, forced him to work as servant and give his outside wages to defendant, and deprived him of adequate nourishment and medical care, and subjected him to physical and psychological humiliation and abuse. And while in jail, defendant communicated with her co-defendant and material witness, to convince witness to lie; defendant also threatened fellow inmate who had met with government attorney prior to sentencing and provided information about defendant's statement concerning her treatment of victim, and offered yet another fellow inmate $1,000 to testify that another fellow inmate, who had spoken to government, was lying. On appeal, defendant argues extent of departure was unwarranted. District Court's departure, although extraordinary, was not abuse of discretion.)

**§ 5K2.5 (Property Damage or Loss):**

United States v. Perkins, 929 F.2d 436 (8th Cir. 1991). (This Court affirms Perkins s 84 month sentence (departure from Guidelines range of 30-37 months) which District Court based on deterring crime and exceptional financial and emotional hardship to person whose identity Perkins assumed for purpose of credit card fraud. Where Perkins ruined his "victim s" academic record and sullied forever his identity, it was not abuse of discretion for District Court to consider impact of Perkins s crimes on his victims (§§ 5K2.3, .5, .8). CONCURRENCE: Based on belief District Courts must have considerable discretion to depart from Guidelines. Would not have doubled sentence as criminal history score accounted for Perkins s inability to complete term of noncustodial supervision; injury to victim was other than psychological; actual dollar loss inflicted was relatively small.)

**§ 5K2.6 (Weapons and Dangerous Instrumentalities):**

United States v. Evans, 272 F.3d 1069 (8th Cir. 2001) (LOKEN, RICHARD S. ARNOLD,* FAGG). (District Court did not abuse its discretion or violate Double Jeopardy Clause by applying enhancement where Court used § 2A3.1 (criminal sexual abuse) as base offense level; District Court found this factor present to exceptional degree such that further enhancement was permissible.), cert. denied, 535 U.S. 1029 (2002).

United States v. Joshua, 40 F.3d 948 (8th Cir. 1994). (District Court increased offense level from 6 to 9. Joshua argues § 5K2.6 may be used only to enhance non-weapons charge whereas Joshua had pleaded guilty to possession of firearm in school zone. Guidelines permit District Court to consider especially dangerous nature of weapon; even where applicable offense guideline and adjustments take into consideration factor listed in policy statements, departure is warranted if factor is present to degree substantially in excess of that which is ordinarily involved in offense. Base

offense guideline for 18 U.S.C. § 922(q) penalizes simple possession of firearm within school zone (§ 2K2.5). It does not take into account whether firearm was loaded, semi-automatic, easily accessible, or had obliterated serial number--all of these aggravating factors present here. District Court has leeway to enhance sentence accordingly, even in weapons charge.)

**§ 5K2.7 (Disruption of Governmental Function):**

United States v. Cole, 357 F.3d 780 (8th Cir. 2004) (MORRIS ARNOLD, BEAM,* BYE). (Defendant called 911 operator and said that anthrax had been placed in school. District Court erred by departing upward on grounds that defendant's call disrupted government functions, his call posed significant danger to public health and safety, he had recidivist tendencies, and he made call month after September 11 terrorist attacks. There was no evidence of substantial disruption, just that law enforcement was dispatched to school and post office. Public health and safety were not endangered because no real anthrax was present. There was no evidence that defendant would commit more crimes in future. Given these three invalid grounds for departure, it is unclear what role timing of offense played in District Court's departure decision, and case is remanded for reconsideration.)

United States v. Archambault, 344 F.3d 732 (8th Cir. 2003) (MORRIS ARNOLD, HANSEN, SMITH*). (Defendant disrupted governmental function where he set fire to two vans belonging to Native American Tribal District, such that they could not be used to transport community members to events for three months.)

**§ 5K2.8 (Extreme Conduct):**

United States v. Rose, 315 F.3d 956 (8th Cir.) (LOKEN, BEAM,* MELLOY). (District Court did not abuse its discretion in departing upward based on extreme conduct where defendant posted names, address, phone number, and pictures of victim's children on pornographic web sites encouraging rape of these children.), cert. denied, 123 S. Ct. 2238 (2003).

United States v. Iron Cloud, 312 F.3d 379 (8th Cir. 2002) (MURPHY,* JOHN GIBSON, SMITH). (Defendant was convicted of voluntary manslaughter for drowning his seventeen-year-old second cousin. Facts of offense were that she became severely intoxicated, he had sexual intercourse with her, she became angry, he knocked her unconscious and dragged her into river where she regained consciousness, he dunked her underwater thirteen to fifteen times before losing his grip on her, she was swept away downstream, and she drowned. Four-level upward departure under § 5K2.8 for extreme conduct was not abuse of discretion and did not double count conduct taken into account by offense-level enhancements for vulnerable victim and physical restraint.)

United States v. Evans, 285 F.3d 664 (8th Cir. 2002) (LOKEN, RICHARD S. ARNOLD,* FAGG). (District Court did not abuse its discretion in departing upward when defendant forced one prostitute to work during seventh month of pregnancy, forced another with pneumonia to work, and supplied victims with cocaine), cert. denied, 123 S. Ct. 1257 (2003).

United States v. Evans, 272 F.3d 1069 (8th Cir. 2001) (LOKEN, RICHARD S. ARNOLD,*

FAGG). (District Court did not abuse its discretion in applying enhancement where there was sufficient evidence of extreme conduct, including defendant's forcing victim to participate in making of pornographic videotape. Application of enhancement was not impermissible double counting or violation of Double Jeopardy Clause; although District Court used Guideline for sexual exploitation of minor, § 2G2.1, it was not abuse of discretion for Court to determine that departure basis was not already fully taken into account because of severity of beatings and because of coercion involved in making videotape.

District Court did not abuse its discretion or violate Double Jeopardy Clause by applying enhancement where Court used § 2A3.1 (criminal sexual abuse) as base offense level; District Court found this factor present to exceptional degree such that further enhancement was permissible: defendant forced victim to work as prostitute up until birth of her children, threatened her with abortion by use of vacuum hose, forced her to perform oral sex on him, and forced her to have sex with another woman.

District Court did not abuse it's discretion in departing upward, and fact that conduct occurred in context of longstanding personal relationship is hardly excuse.), cert. denied, 535 U.S. 1029 (2002).

United States v. Hampton, 260 F.3d 832 (8th Cir. 2001) (WOLLMAN,* HANSEN, SCHREIER). **(**District Court did not abuse discretion in departing upward for extreme conduct based upon child pornography tapes and testimony of victim's therapist, which constitute ample evidence of extreme nature of defendant's conduct. It was for District Court to weigh probative force of testimony, and Court did not err in discounting testimony of defendant's expert who neither met victim nor viewed tapes**.),** cert. denied, 535 U.S. 1058 (2002).

United States v. Loud Hawk, 245 F.3d 667 (8th Cir. 2001) (WOLLMAN, HANSEN, BYE*). (This Court reviews for abuse of discretion District Court's decision to depart upward under § 5K2.8. District Court did not abuse its discretion in assessing ten-level enhancement given "brutal and inhumane" method by which defendant stalked and killed his parents, burned their bodies, and exposed six-year-old child to murders. Although departure approached "the outer bound of sentencing Court's discretion," it was justified under "the barbaric circumstances of this case." Defendant's substance abuse and diagnosis of paranoid schizophrenia were irrelevant to departure analysis, because§ 5K2.8 omits mention of ameliorative circumstances and, by its own terms, measures only extreme character of defendant's criminal conduct.)

United States v. Lewis, 235 F.3d 394 (8th Cir. 2000) (LOKEN, HEANEY, FAGG) (per curiam). (District Court departed upward from Guidelines range (18-24 months) and sentenced defendant (who pleaded guilty to conspiring to harbor illegal alien) to 96 months based on obstruction of justice; extreme psychological injury, § 5K2.3; unlawful restraint, § 5K2.4; and extreme conduct. Defendant and her family had held captive alien-- later found dead and buried in her backyard, forced him to work as servant and to give his outside wages to defendant, and deprived him of adequate nourishment and medical care, and subjected him to physical and psychological humiliation and abuse. And while in jail, defendant communicated with her co-defendant and material witness, to convince witness to lie; defendant also threatened fellow inmate who had met with government attorney prior to sentencing and provided information about defendant's statement concerning her treatment of victim, and offered yet another fellow inmate

$1,000 to testify that another fellow inmate, who had spoken to government, was lying. On appeal, defendant argues extent of departure was unwarranted. District Court's departure, although extraordinary, was not abuse of discretion.)

United States v. Amsden, 213 F.3d 1014 (8th Cir. 2000) (McMILLIAN, F. R. GIBSON, MORRIS SHEPPARD ARNOLD*). (Defendant was sentenced to 120 months imprisonment, following District Court's 2-level increase under § 3C1.1 for obstruction of justice. Having reversed obstruction enhancement and remanded, this Court has reduced Guidelines range from 51-63 months to 41-51 months; this Court cannot determine from record extent to which District Court's upward departure for extreme conduct may have been based on Guidelines range. Therefore, this Court remands on departure issue as well.)

United States v. Johnson, 144 F.3d 1149 (8th Cir. 1998). (Johnson argues District Court improperly imposed upward departure based on extreme conduct (§ 5K2.8) and injury (§ 5K2.3). District Court did not abuse its discretion by departing upward based on records supporting finding Johnson s conduct was unusually cruel and degrading and victims suffered severe psychological injury (e.g., rape victim testified Johnson threatened her and male co-worker with sawed off shotgun and forced them to disrobe; after unsuccessfully failing to penetrate, he repeatedly forced her to perform oral sex, left her lying naked on floor, and threatened to return and kill her if she called police); from time of attack she required ongoing psychological counseling and treatment with anti-depressant drugs; her sexual relations with her husband were damaged; and she testified to being haunted by fear which led her to carry gun, move to area more frequently patrolled by police, install home security system, and stay inside at night except for emergency.)

United States v. Keester, 70 F.3d 1026 (8th Cir. 1995). (District Court determined four level upward departure from Keester s offense level resulted in reasonable sentencing range. Keester pleaded guilty to voluntary manslaughter of his former wife and District Court found victim suffered severe beating and was bruised, swollen, and scratched; she was denied immediate medical attention, dragged from vehicle to vehicle, and deposited at hospital unconscious and without identification. District Court concluded Keester s conduct was unusually heinous, § 5K2.8, particularly in light of his failure to seek prompt medical attention and his history of domestic abuse. District Court did not abuse its discretion; it is proper and appropriate for this Court to affirm sentencing judge s exercise of discretion to depart from Guidelines for adequate reasons supported by record.)

United States v. Otto, 64 F.3d 367 (8th Cir. 1995). (District Court properly departed upward as Otto s harassment was extreme conduct. District Court may consider other than relevant conduct in determining whether to depart upward. Record supported existence of unusual circumstances: Otto stalked and otherwise harassed victims, inflicting severe psychological injury. Even as to acquitted conduct--which District Court did not rely on in this case--District Court may find certain facts were proven by preponderance of evidence even though jury found same facts not proven beyond reasonable doubt. Giving due deference to District Court which has superior feel for case, six level departure was reasonable.), cert. denied, 516 U.S. 1133 (1996).

United States v. Johnson, 56 F.3d 947 (8th Cir. 1995). (District Court did not err by granting

upward departure where Johnson bound victim and subjected her to course of extremely cruel and degrading physical, sexual, and verbal abuse, including acts and words by which he deliberately put her in constant fear of her life. This Court also concludes District Court s departure was reasonable even though it surpasses what is effectively life sentence for Johnson. Where District Court s decision is quintessentially judgment call and given extremely heinous nature of Johnson s conduct with victim, this Court finds no abuse of discretion.)

United States v. Clark, 45 F.3d 1247 (8th Cir. 1995). (Clark was convicted of hijacking (§ 2B3.1) and his BOL of 20 was increased by 4 because person was abducted and two levels for obstruction of justice (§ 3C1.1). District Court sentenced Clark to 160 months--76 months for carjacking, 24-month upward departure and consecutive 60 months for firearm violation. District Court departed upward because of Clark s callous treatment of victim, degrading and terrorizing him, e.g., putting gun against victim s head, cocking it, and telling him he was going to die. Clark argued District Court erred in departing because factors on which it relied--abduction of victim and use of firearm--had already been taken into account in Guidelines for carjacking and firearms. Nevertheless, if factor already included is present to degree substantially in excess of that ordinarily involved in offense, as here, upward departure will be upheld. Clark also asserted victim was neither physically nor psychologically harmed, and abduction lasted for only few minutes. Physical injury is not necessary component of heinous and cruel behavior; no doubt Clark s gratuitous inhumane conduct psychologically harmed victim. This Court will not second guess District Court s finding conduct was sufficiently extreme to warrant § 5K2.8 upward departure particularly in light of fact upward departure produced total sentence that does not exceed correct guideline range.)

United States v. Perkins, 929 F.2d 436 (8th Cir. 1991). (This Court affirms Perkins s 84 month sentence (departure from Guidelines range of 30-37 months) which District Court based on deterring crime and exceptional financial and emotional hardship to person whose identity Perkins assumed for purpose of credit card fraud. Where Perkins ruined his "victim s" academic record and sullied forever his identity, it was not abuse of discretion for District Court to consider impact of Perkins s crimes on his victims (§§ 5K2.3, .5, .8). CONCURRENCE: Based on belief District Courts must have considerable discretion to depart from Guidelines. Would not have doubled sentence as criminal history score accounted for Perkins s inability to complete term of noncustodial supervision; injury to victim was other than psychological; actual dollar loss inflicted was relatively small.)

United States v. Fire Thunder, 908 F.2d 272 (8th Cir. 1990). (While facts did not support finding that Fire Thunder s conduct was "unusually heinous" (§ 5K2.8), departure affirmed on basis of District Court s finding victim suffered extreme and unusual psychological injury as result of stepfather s conduct (§ 5K2.3).)

**§ 5K2.9 (Criminal Purpose):**

United States v. Orchard, 332 F.3d 1133 (8th Cir. 2003) (LOKEN, BRIGHT, MURPHY*). (Upward departure was proper where defendant administered GHB to victim in attempt to facilitate rape. His conviction was for distributing drug to person under age twenty-one, which is not necessarily done to facilitate another offense.)

United States v. Robertson, 324 F.3d 1028 (8th Cir. 2003) (WOLLMAN,* HEANEY, MELLOY). (Defendant was convicted of lying to federal officer about incident in which he fired gun, pointed it at person confined to wheelchair, and left gun with friend. District Court abused its discretion in departing upward based on premise that defendant made false statement in order to conceal his criminal activity, because that context represents heartland of cases in which people lie to federal law enforcement officers.)

United States v. Martin, 195 F.3d 1018 (8th Cir. 1999) (BEAM, LOKEN, MORRIS SHEPPARD ARNOLD) (per curiam). (Conduct justifying upward departure. Departure may be appropriate if defendant intended to use firearm to facilitate another felony offense but was arrested before other offense was completed or attempted. Here, Martin was imprisoned for assault after he discharged firearm while sitting in his car in front of home of woman he had harassed and stalked; rope and duct tape were found in car, and he admitted that he had broken into woman's home with handgun intending to kidnap, rape, and kill her. Two months after his release from imprisonment, he illegally purchased shotgun and violated supervised release condition by failing to return home. When he was arrested police found in his car shotgun, roll of duct tape, handcuffs, box of ammunition, extensive list of names and addresses including those of judges and prison officials, and psychological evaluation and stolen Court records relating to female correctional officer he had harassed and intimidated while in prison. These circumstances persuasively evidence Martin's intent to use weapon in committing potentially violent felony against one or more persons; only uncertainty was identity of his next victim and precise nature of offense he intended to commit.

Argument that Guidelines adequately account for conduct. Martin argues conduct is adequately accounted for in § 2K2.1(b)(5)--a Guidelines section not mentioned in PSR or by parties at sentencing. Although his conduct appears encompassed by § 2K2.1(b)(5)'s plain language, departure sentence he received is in middle of range that would have resulted from applying § 2K2.1(b)(5), so he cannot show prejudice from departure.)

United States v. Culver, 929 F.2d 389 (8th Cir. 1991). (District Court did not abuse its discretion in departing upward where record supported finding that stolen aircraft was to be used to transport illegal drugs.)

**§ 5K2.10 (Victim s Conduct):**

United States v. Sheridan, 270 F.3d 669 (8th Cir. 2001) (WOLLMAN, BEAM,* HANSEN). (District Court granted downward departure on improper ground: statutory-rape victim had sexually transmitted disease which led Court to believe he was unchaste. This Court in no way sees how such malady can lead to conclusion that victim provoked encounter. Victim's consent or chasteness was irrelevant.)

United States v. Waloke, 962 F.2d 824 (8th Cir. 1992). (Evidence did not establish that assault victim s misconduct substantially provoked or led to assault. District Court implicitly determined evidence did not support Waloke s contention. That finding, resting as it did on Court s credibility determinations, is not clearly erroneous. District Court did not abuse its discretion in refusing downward departure.)

United States v. Whitetail, 956 F.2d 857 (8th Cir. 1992). (To extent section permits consideration of battered women syndrome as basis for downward departure, it does not require proof of same elements necessary to establish claim of self-defense at trial. Thus, jury rejection of Whitetail s claim she acted in self-defense did not remove from District Court its discretion to consider at sentencing battered-woman evidence as basis for departure. Here, District Court erred as matter of law as it believed jury s verdict foreclosed Whitetail s evidence at sentencing that she was battered woman. Whitetail s sentence vacated and case remanded for resentencing.)

United States v. Desormeaux, 952 F.2d 182 (8th Cir. 1991). (Stabbing victim s conduct, though probably breach of dating etiquette, was not as matter of law of kind or degree that could appropriately be relied upon to justify departure where there was no evidence she was physically menacing or reputedly violent, made threats, or contributed to danger presented.)

United States v. Martinez, 951 F.2d 887 (8th Cir. 1991). (This Court holds as matter of law that alleged actions of government (taped conversations between Martinez and police informant), admittedly not rising to level of entrapment, do not constitute "victim conduct" sufficient to warrant downward departure.), cert. denied, 503 U.S. 944 (1992).

United States v. Sayers, 919 F.2d 1321 (8th Cir. 1990). (District Court chose not to grant downward departure for victim misconduct where Sayers s wife by Indian tradition, testified stabbing victim had been sexually harassing her to point several persons had to intervene.)

United States v. Left Hand Bull, 901 F.2d 647 (8th Cir. 1990). (Defendant was sentenced as career offender, but received downward departure as victim s wrongful conduct (here, abandoning child) contributed significantly to provoking offense behavior; extent of departure nonreviewable (citing Evidente).)

United States v. Yellow Earrings, 891 F.2d 650 (8th Cir. 1989). (Government s appeal rejected; departure downward approved where victim s wrongful conduct contributed to provoking defendant s offense behavior (victim of stabbing had tried to "force himself" upon defendant).)

**§ 5K2.11 (Lesser Harms):**

United States v. Dyck, 334 F.3d 736 (8th Cir. 2003) (HANSEN,* WOLLMAN, BYE). (District Court improperly departed downward on basis that defendant did not reenter United States for illegal purposes. Crime of illegal reentry does not merely target harm of deported aliens reentering country to commit further crimes; it targets harm of deported aliens reentering country at all for any reason.)

United States v. Lewis, 249 F.3d 793 (8th Cir. 2001) (BEAM, MORRIS SHEPPARD ARNOLD, ALSOP*). (Deciding--for first time--that "lesser harms" rationale permits downward departure in case of conviction for making false statement in attempt to acquire firearm. Lewis's sentence was vacated and remanded for resentencing, because this Court could not determine from record whether District Court denied departure believing itself powerless to depart or whether it considered facts and decided that departure was not warranted.)

United States v. Pinson, 24 F.3d 1056 (8th Cir.) (Pinson contended District Court erred in failing to grant downward departure as his marijuana cultivation and use avoided perceived greater harm of his suffering from asthma. He further contended District Court abused its discretion in denying sentence reduction on this basis because Court mistakenly construed his motion for downward departure as premised on § 5K1.1 and Court felt powerless to grant motion in absence of government request. Statute under which Pinson was convicted provides for mandatory minimum sentence. Because there was no government motion pursuant to § 3553(e), District Court was without authority to depart below mandatory minimum and therefore did not err in refusing to do so.), cert. denied, 513 U.S. 1057 (1994).

United States v. White Buffalo, 10 F.3d 575 (8th Cir. 1993). (Following guilty plea to unlawful possession of unregistered firearm (26 U.S.C. § 5861(d)), District Court departed downward from range of 18-24 months and sentenced White Buffalo to three years probation with numerous conditions. Government appealed, asserting that because § 5861 seeks to prevent possession of certain unregistered weapons for any purpose, lawful or unlawful, § 5K2.11 does not apply. District Court had used "lesser harms" policy statement and found White Buffalo s use of weapon to shoot animals did not pose quantifiable risk of accidental harm to others because he lived in remote area of reservation and he did not use gun in violent or offensive way. Because District Court s finding to effect White Buffalo did not use gun for unlawful purpose is not clearly erroneous, it could depart based on facts of this case; this Court notes legislative history of § 5861 shows "harm or evil" law seeks to prevent is violent crimes and loss of human life. This Court also rejects government s assertion extent of departure was unreasonable, concluding District Court reasonably exercised its discretion in imposing probation where maximum prison term for violation of § 5651 is ten years and thus, District Court had statutory authority to sentence White Buffalo to probation.)

**§ 5K2.12 (Coercion and Duress):**

United States v. King, 280 F.3d 886 (8th Cir.) (McMILLIAN, FAGG,* RILEY). (Using Tenth Circuit standard--coercion is discouraged basis for departure and is usually warranted only in cases of unusual or exceptional coercion; ordinary coercion is sufficient to warrant departure only when it involves threat of physical injury, substantial damage to property, or similar injury resulting from unlawful action of third party or from natural emergency. Facts of case did not support finding of exceptional degree of coercion where 32-year-old, college-educated defendant had full knowledge and understanding of nature of fraudulent transactions at issue, actively participated in them for financial gain, did not present duress defense at trial, and Court found he was not minor or minimal participant.), cert. denied, 537 U.S. 965 (2002).

United States v. Hutzell, 217 F.3d 966 (8th Cir. 2000) (FAGG, MORRIS SHEPPARD ARNOLD,* BENNETT). (Defendant argued District Court erred in denying downward departure for "incomplete defense"; he had argued that because he was unaware his conduct, possessing firearm after having been convicted of domestic violence misdemeanor, constituted crime, he was left with "incomplete defense," analogous to "imperfect defenses" present when defendant pleads coercion or duress defense. This Court, assuming without deciding that defendant's analogy to imperfect defenses is appropriate, holds that District Court did not abuse its discretion in refusing

to depart, because District Court had discretion to decide that facts of defendant's case did not take it outside heartland of cases. This Court also finds circumstances of this case do not suggest defendant was afforded less notice than any other offender, and thus his case did not fall outside heartland.), cert. denied, 532 U.S. 944 (2001).

United States v. Henderson-Durand, 985 F.2d 970 (8th Cir. 1993). (This ground for departure is broader than defense of duress--it does not require immediacy of harm and allows District Court to consider subjective mental state and personal characteristics of defendants. Here, District Court recognized its authority to depart. But after considering circumstances surrounding threats and effect of those threats on defendants actions, District Court properly applied Guidelines in determining defendants had not shown coercion was motivation for defendants offenses.)

United States v. Martinez, 951 F.2d 887 (8th Cir. 1991). (This Court holds as matter of law, departure on this basis would not apply where Martinez did not allege government made any kind of threats to him or engaged in any unlawful activity, but only that it used paid informant in "controlled buy" scenario.), cert. denied, 503 U.S. 944 (1992).

**§ 5K2.13 (Diminished Capacity/Standard of Review):**

United States v. Mayotte, 76 F.3d 887 (8th Cir. 1996). (This Court reviews de novo District Court s application of sentencing Guidelines.)

United States v. Premachandra, 32 F.3d 346 (8th Cir. 1994). (This Court reviews de novo District Court s application of Sentencing Guidelines (here determination of "non-violent" offense.)

**§ 5K2.13 (Diminished Capacity):**

United States v. Woods, 359 F.3d 1061 (8th Cir. 2004) (MELLOY, BEAM, COLLOTON*), vacated in part on panel rehearing, ___ F.3d ___ (8th Cir. 2004) (MELLOY, BEAM, COLLOTON) (per curiam). (Prior Eighth Circuit case of United States v. Petersen holds that crimes of violence are categorically ineligible for downward departures under this section, even after Amendment 583 changed relevant language. Even if this decision was wrong, it is binding on subsequent panels.)

United States v. Petersen, 276 F.3d 432 (8th Cir. 2002) (WOLLMAN, LAY, RILEY*). (Temporary insanity is not valid basis for departure under § 5K2.0; such circumstances must be considered for diminished-mental-capacity departure under § 5K2.13. Reversing such departure because it is only available to defendants who commit nonviolent offenses, and because District Court failed to make adequate factual findings.)

United States v. Hartje, 251 F.3d 771 (8th Cir. 2001) (WOLLMAN,* BOWMAN, MORRIS SHEPPARD ARNOLD). (Defendant's counsel raised possibility of departure and moved for full psychiatric evaluation prior to sentencing. District Court granted motion, which resulted in report indicating defendant suffered from substance abuse and adjustment disorder with depressed mood, but that his mental capacity was not significantly diminished. At sentencing, Court briefly discussed defendant's statement that he had been diagnosed as bipolar manic depressive and immediately

before declaring judgment, Court mentioned it found no basis to depart. Given District Court's granting of motion of examination and discussion of defendant's possible mental illness, this Court concludes District Court was aware of its ability to depart downward if it determined defendant's situation merited such relief. Court's decision not to depart is virtually unreviewable on appeal.), cert. denied, 534 U.S. 1116 (2002).

United States v. Valdez, 146 F.3d 547 (8th Cir. 1998). (To be considered for departure under this section, defendant must have committed nonviolent offense. This Court rejects Valdez s argument that attempted robbery offense was nonviolent because shotgun used in attempted robbery was not loaded and his accomplice was carrying weapon.)

United States v. Jones, 145 F.3d 959 (8th Cir.) (Jones argues District Court mistakenly believed it lacked authority to depart for Jones s mental illness and retardation. District Court found Jones s mental capacity was not significantly reduced or even if it was lower than normal, it did not contribute to commission of offense. District Court clearly recognized its authority to depart, and therefore its decision refusing request for departure based on diminished mental capacity is unreviewable (as exercise of discretion). DISSENT: Even under Sentencing Guidelines, District Court should have determined Jones s limited mental capacity probably prevented him from comprehending conspiracy s activities other than those sales he personally made. Jones did not possess mental capacity to comprehend drug distribution scheme beyond performing tasks he was ordered to do. Number of phone calls between Jones and Sykes showed that because of Jones s reduced mental capacity, he needed constant and perhaps repeated directions to even carry out simplest duties of conspiracy.), cert. denied, 525 U.S. 988 (1998).

United States v. Risse, 83 F.3d 212 (8th Cir. 1996). (This Court affirms District Court s downward departure for diminished capacity caused by post-traumatic stress disorder because Court s factual findings were not clearly erroneous and degree of departure was reasonable.)

United States v. Mayotte, 76 F.3d 887 (8th Cir. 1996). (Mayotte suffered from bipolar affective disorder and post-traumatic stress syndrome. Prior to committing bank robbery, he voluntarily ceased taking lithium prescribed for his mental condition. On appeal, Mayotte argues District Court erred in denying his reduction motion based on its finding diminished capacity was result of Mayotte s voluntary cessation of consuming his medicine. This Court concludes Mayotte s commission of offense of bank robbery precludes "diminished capacity" reduction in his sentence: § 5K2.13 requires offense be "non-violent." This Court looks to § 4B1.2 for definition of "crime of violence" and joins majority of circuits in stating "non-violent offense" necessarily excludes "crime of violence." Robbery is specifically listed as crime of violence because it requires use, attempted use, or threatened use of physical force against another person.)

United States v. Jackson, 56 F.3d 959 (8th Cir. 1995). (District Court found Jackson ineligible for downward departure because he had sufficient mental capacity to understand consequences of his actions and offense charged (bank robbery) was not non-violent offense in view of Jackson s threatened use of firearm, even though gun was only facsimile. District Court was not under any mistaken belief about scope of its discretion. It specifically stated it had reviewed all medical and psychological information supplied and could not conclude Jackson was acting with

significantly reduced mental capacity--a finding not challenged by Jackson. Failure of Jackson to satisfy this prerequisite, without more, made him ineligible for departure. Unnecessary for this Court to address Jackson s argument relating to application of career offender definition of "crime of violence" to determine what is "non-violent crime" under this section.)

United States v. Premachandra, 32 F.3d 346 (8th Cir. 1994). (This Court agrees with District Court that Premachandra s offenses, based upon surrounding facts and circumstances, were not non-violent. Premachandra contended his crimes were non-violent because he used pellet gun. This Court adopts reasoning from its prior cases (e.g., display of gun instills fear in average citizen and as consequence, it creates immediate danger violent response will ensue). Likewise, robbery committed using such devices as pellet gun are not non-violent offenses. Accordingly, because offenses for which Premachandra was convicted (robberies) were not non-violent, District Court had no authority to depart downward pursuant to § 5K2.13.)

United States v. Rudolph, 970 F.2d 467 (8th Cir. 1992). (Though Rudolph was person of marginal intelligence with incapacity to learn from his past mistakes, Court s authority to depart downward in face of statutory minimum sentence is limited to situation when government makes motion based on substantial assistance.), cert. denied, 506 U.S. 1069 (1993).

United States v. Ruklick, 919 F.2d 95 (8th Cir. 1990). District Court erroneously concluded it could not depart downward under Guidelines unless diminished capacity amounted to but-for cause of Ruklick s offense. Downward departure authorized where, as here, defendant s diminished capacity (emotional difficulties stemming from childhood illness-schizoaffective disorder-psychological functioning at 12-year old level) comprised contributing factor in commission of offense. Remand for resentencing.)

United States v. Follett, 905 F.2d 195 (8th Cir.) (District Court s refusal to depart downward on basis of psychological problems and diminished mental capacity is not reviewable on appeal, citing Evidente. (DISSENT: Guidelines do not permit judge to substitute judgment as to mental condition for that of medical experts absent basis in record. Follett should be in facility which has resources to deal with individuals with severe mental problems).), cert. denied, 501 U.S. 1204 (1990).

**§ 5K2.14 (Endangerment of National Security, Public Health, or Safety):**

United States v. Cole, 357 F.3d 780 (8th Cir. 2004) (MORRIS ARNOLD, BEAM,* BYE). (Defendant called 911 operator and said that anthrax had been placed in school. District Court erred by departing upward on grounds that defendant's call disrupted government functions, his call posed significant danger to public health and safety, he had recidivist tendencies, and he made call month after September 11 terrorist attacks. There was no evidence of substantial disruption, just that law enforcement was dispatched to school and post office. Public health and safety were not endangered because no real anthrax was present. There was no evidence that defendant would commit more crimes in future. Given these three invalid grounds for departure, it is unclear what role timing of offense played in District Court's departure decision, and case is remanded for reconsideration.)

**§ 5K2.20 (Aberrant Behavior):**

United States v. Grassrope, 342 F.3d 866 (8th Cir. 2003) (RILEY, HEANEY, ERICKSEN*). (This type of departure is not available in cases involving serious bodily injury or death. Under Application Note 1(i) to § 1B1.1, serious bodily injury is deemed to have occurred if offense involved criminal sexual abuse.)

## CHAPTER SIX: SENTENCING PROCEDURES AND PLEA AGREEMENTS

### Part A. Sentencing Procedures

**§ 6A1.2 (Disclosure of PSR; Issues in Dispute):**

United States v. LaRoche, 83 F.3d 958 (8th Cir. 1996). (District Court may accept as true all factual allegations contained in PSR that are not specifically objected to by parties. Because LaRoche did not specifically object to factual allegations contained in three paragraphs of PSR, this Court concludes District Court did not err by relying on those paragraphs in assessing challenged enhancement.)

United States v. Sykes, 977 F.2d 1242 (8th Cir. 1992). (There was no support in record for Sykes s contention that Probation Office submitted "confidential" letter to District Court of which Sykes s counsel was not aware at sentencing. Moreover, Court applied statutory minimum for both PCP trafficking and gun offenses, entirely appropriate sentences.)

**§ 6A1.3 (Resolution of Disputed Factors/Standard of Review):**

United States v. Knight, 230 F.3d 1086 (8th Cir. 2000) (HANSEN, HEANEY, MORRIS SHEPPARD ARNOLD*). (District Court's drug-quantity determination based on defendant's incriminating statements to police is reviewed for clear error.)

United States v. Stavig, 80 F.3d 1241 (8th Cir. 1996). (Determination of whether hearsay is sufficiently reliable to warrant credence for sentencing purposes necessarily depends upon particular circumstances of each case. This Court reviews District Court s determination for abuse of discretion.)

**§ 6A1.3 (Resolution of Disputed Factors):**

United States v. Watts, 519 U.S. 148 (1997) (per curiam). (District Court may consider acquitted conduct, proven by preponderance of evidence, as relevant conduct.)

United States v. Shevi, 345 F.3d 675 (8th Cir. 2003) (LOKEN,* FAGG, MURPHY). (Reliable hearsay evidence may be considered at sentencing. While affidavit of law enforcement officer may not suffice, live testimony of law enforcement officer was properly used to established disputed facts here.), cert. denied, 124 S. Ct. 1182 (2004).

United States v. Tucker, 286 F.3d 505 (8th Cir. 2002) (BOWMAN, RICHARD S. ARNOLD,* WOLLMAN). (Sentence based on hearsay will be sustained if testimony is reliable enough. Evidence adduced at sentencing for bank-fraud case was sufficiently reliable to uphold amount-of-loss determination. Participant's testimony was corroborated by FBI agent, and FBI agent's investigation included participants making statements against their penal interests.)

United States v. Bougie, 279 F3.d 648 (8th Cir. 2002) (BYE, RICHARD S. ARNOLD,* BEAM). (District Court erred by relying on facts found only in FBI agent's affidavit supporting criminal complaint, and not in PSR or elsewhere in record, when departing upward.)

United States v. Young, 272 F.3d 1052 (8th Cir. 2001) (WOLLMAN, LAY, RILEY*). (Restitution order vacated. Government knew that amount of lost profits would be disputed, and warned victim that she risked not receiving restitution if she did not appear at sentencing. Nonetheless, victim did not testify, and government presented no evidence to prove amount of lost profits. PSR recounted victim's estimate of lost profits, but contained no independent verification of it. District Court's restitution award was therefore based entirely upon speculation.)

Ortega v. United States, 270 F.3d 540 (8th Cir. 2001) (RILEY, ROSS,* BEAM). (Expressing concerns with reliability of polygraph evidence and noting that most Courts that have considered issue of admissibility of such evidence at sentencing have upheld refusals to admit it. Recommending that District Courts not suggest that defendants take polygraph tests.)

United States v. Stapleton, 268 F.3d 597 (8th Cir. 2001) (LOKEN, HALL,* ROSENBAUM). (Where defendant objected to facts in PSR, District Court erred by relying on unsworn statements of probation officer who drafted PSR, who defendant did not have opportunity to cross-examine.)

United States v. Luna, 265 F.3d 649 (8th Cir. 2001) (RILEY, ROSS,* BEAM). (District Court may consider relevant information that has sufficient indicia of reliability, including acquitted conduct proved by preponderance of evidence.)

United States v. Searing, 250 F.3d 665 (8th Cir. 2001) (HANSEN,* BYE, MELLOY). (District Court erred by overruling defendant's factual objection solely on basis of objected-to facts in PSR and PSR author's unsworn hearsay comments at sentencing about what victim reported. Distinguishing case in which District Court permissibly relied on PSR because it was supported by documentation which had been furnished by victims and independently verified by FBI.)

United States v. Wright, 248 F.3d 765 (8th Cir. 2001) (LOKEN, FAGG, BEAM) (per curiam). (District Court may not resolve disputed factual issues by relying on PSR without supporting evidence. Vacating sentence and remanding for resentencing because despite Wright's objection to PSR's assessment of serious-bodily-injury enhancement (§ 2B3.1(b)(3)(B)), District Court overruled objection even though government offered no evidence at sentencing.)

United States v. Gonzalez-Rodriguez, 239 F.3d 948 (8th Cir. 2001) (HANSEN,* MURPHY, BYE). (Sentencing Court did not err in including drugs found in bathroom, even though jury did not specifically find defendant guilty of possessing or knowing about those drugs. District Court

could consider any evidence in its sentencing determination as long as it had sufficient indicia of reliability to support its probable accuracy. At sentencing, District Court made explicit factual findings regarding drug quantity based upon its assessment of evidence at trial and at sentencing hearing, and concluded that drugs in bedroom and bathroom had same appearance, consistency, and purity. District Court's credibility determinations of government witnesses were virtually unreviewable on appeal.)

United States v. Knight, 230 F.3d 1086 (8th Cir. 2000) (HANSEN, HEANEY, MORRIS SHEPPARD ARNOLD*). (District Court's credibility determination regarding defendant's incriminating statements to police was virtually unassailable on appeal; District Court was entitled simultaneously to believe that these statements were truthful and that defendant had lied at other points during case. Defendant's statements had sufficient indicia of reliability to support drug-quantity finding.)

United States v. Arrington, 215 F.3d 855 (8th Cir. 2000) (WOLLMAN, FAGG,* MURPHY). (In his written objection defendant specifically contended that U.S.S.G. § 2K2.1(b)(4) stolen-firearm enhancement was not warranted by facts or law, and that defendant objected to "any facts contained in presentence investigation upon which those enhancements are based." This triggered District Court's obligation to make factual finding regarding whether shotgun was stolen if enhancement was to be applied. District Court was bound to do so on basis of evidence and not PSR. Record is not clear as to whether District Court considered any evidence beyond bald assertion in PSR that shotgun was confirmed stolen. Because it also is unclear whether District Court would have imposed same sentence without stolen-weapon enhancement, this Court cannot say application of enhancement was harmless error. Accordingly, defendant's sentence is vacated and case is remanded for factual determination by District Court and resentencing.), cert. denied, 534 U.S. 1049 (2001).

United States v. Granados, 202 F.3d 1025 (8th Cir. 2000) (BEAM, LAY, J. GIBSON*). (District Court has discretion to determine appropriate procedure to follow in conducting each sentencing hearing, including whether to allow testimony or to receive additional evidence. Hearsay evidence may be considered by District Court if it has sufficient indicia of reliability.)

United States v. Jones, 195 F.3d 379 (8th Cir. 1999) (BEAM, HEANEY, FAGG*). (Hearsay evidence is admissible at sentencing if evidence is sufficiently reliable, which depends on particular circumstances of each case. Law enforcement officer s testimony about statements made by coconspirators may be sufficient to attribute drug quantities to defendant. At sentencing, officer testified to statement made by coconspirator who, prior to his guilty plea, said defendant sold 1-2 ounces of crack per week. At trial, however, coconspirator testified he never saw defendant sell drugs, but knew he was selling based on statements from other coconspirators. Coconspirator s pretrial statements were sufficiently reliable to support their use to decide drug-quantity, based on other corroborating testimony.)

United States v. Hoelzer, 183 F.3d 880 (8th Cir. 1999) (BEAM, HANSEN,* KOPF). (Hoelzer argues District Court erred by relying on ATF agent's hearsay testimony about store clerk's statements to other officers (concerning Hoelzer's conduct during robbery of firearms). But Hoelzer

concedes agent's account of store clerk's report is consistent with clerk's sworn testimony in state Court: this concession provides "sufficient indicia of reliability" needed to allow District Court to rely on agent's hearsay testimony. Further, District Court could have relied solely on Hoelzer's own admissions of content of clerk's state Court testimony. District Court properly relied on evidence of clerk's testimony for its factual determination.)

United States v. Alvarez, 168 F.3d 1084 (8th Cir. 1999) (BEAM, LAY, SIPPEL*). (District Court did not err in relying on special agent's testimony that third person had told him defendant was involved with certain drugs. Whether hearsay is sufficiently reliable for sentencing purposes depends on particulars of case, and testimony by law enforcement officer regarding statements made by co-defendants may be sufficient to attribute drug quantities to defendant. Hearsay evidence here was supported in substance by third person's statements to other law enforcement officers, and defendant was given ample opportunity to call third person as witness and challenge those statements.)

United States v. Roach, 164 F.3d 403 (8th Cir. 1998) (HANSEN, LAY, MURPHY*). (District Court is not bound by rules of evidence and may consider hearsay in making its determinations.), cert. denied, 528 U.S. 845 (1999).

United States v. Garrett, 161 F.3d 1131 (8th Cir. 1998) (BOWMAN, RICHARD S. ARNOLD, MORRIS SHEPPARD ARNOLD*). (A District Court may not rely on facts in PSR if defendant contests them. Although PSR's uncontested facts could have formed sufficient basis for upholding District Court's finding that Garrett owned 2.5 grams of cocaine base (which he had disputed), District Court relied on "all of evidence" in PSR and this Court could not determine whether District Court would have come to same conclusion had it not relied on disputed fact. This Court thus reverses.)

United States v. Jones, 160 F.3d 473 (8th Cir. 1998) (WOLLMAN,* HEANEY, BRIGHT). (To provide meaningful appellate review, Rule 32(a)(1) findings must meet threshold standard of sufficiency. Although this Court prefers that District Courts specify basis for their drug quantity findings, District Court's finding was sufficient where judge overruled defendants' objections to PSR drug quantity calculations and made express finding that it considered credible sentencing witnesses who testified as to drug quantity.)

United States v. Maggard, 156 F.3d 843 (8th Cir. 1998). (District Court must make findings of fact and rule on unresolved objections to PSR; sentencing judge who also presides over trial may base factual findings on trial record and is not required to hold evidentiary hearing prior to sentencing. After hearing appellants' objections to PSR and government's summary of pertinent evidence, District Court made finding that at least 10 to 30 grams of methamphetamine had been distributed and each defendant was responsible for that amount; these statements were legally sufficient in this case but not as precise or expansive as this Court would prefer drug quantity determinations to be.), cert. denied, 525 U.S. 1170 and 526 U.S. 1058 (1999).

United States v. Jackson, 155 F.3d 942 (8th Cir.) (Finding no reason to disagree with District Court's findings as to enhancement for obstruction of justice that was based on hearsay

evidence where District Court found testimony credible.), cert. denied, 525 U.S. 1059 (1998).

United States v. Milton, 153 F.3d 891 (8th Cir. 1998). (Both Milton and government objected to PSR's recommendation for role enhancement, but District Court overruled both parties' objections after finding sufficient evidence of Milton's role as leader. Although government did not present further evidence as to role, nothing in Guidelines prevents District Court from using its discretion to determine sufficient evidence exists to support enhancement when it is recommended in PSR; in this case Court made proper findings required by Guidelines to apply enhancement.), cert. denied, 525 U.S. 1165 (1999).

United States v. Shoff, 151 F.3d 889 (8th Cir. 1998). (Reversing where Shoff timely objected to PSR's finding that Thirsk Incorporated wired deposit from Shanghai bank; Shoff timely objected to this PSR finding; government introduced no additional evidence concerning Thirsk at sentencing; and Court overruled Shoff's objection, stating that "relevant conduct for purposes of sentencing can mean things other than occurred at trial. And for those reasons findings as made in [PSR] are accepted and adopted." This was error: PSR to which defendant has objected may not be evidence at trial. Government argues trial evidence was sufficient to support District Court's finding but District Court did not base its finding on trial evidence.)

United States v. Campbell, 150 F.3d 964 (8th Cir. 1998). (Campbell forfeited opportunity to bring witnesses to testify at sentencing where--in series of failures--he failed to adequately comply with Court's order to set forth witnesses' addresses and substance of expected testimony.)

United States v. Ortega, 150 F.3d 937 (8th Cir. 1998). ((1) District Court must make findings of fact and rule on any unresolved objections of PSR prior to pronouncing sentence; when sentencing judge also presided over trial, evidentiary hearing is not necessary to resolve factual objections as Court may base findings on trial record. (2) Reversing for specific findings necessary to independent drug quantity determination where record contained no indication District Court made quantity determination based upon evidence rather than on disputed PSR; District Court's ambivalent pronouncements about quantity ("Well, I said there was, undoubtedly, something under 1,000 grams and I also stated that I felt there was more than one kilogram...") when coupled with Court's apparent acceptance of PSR's drug quantity estimate would not permit this Court to determine what quantity District Court found attributable to conspiracy count for statutory mandatory minimum sentencing purposes.), cert. denied, 525 U.S. 1087 (1999).

United States v. Alaniz, 148 F.3d 929 (8th Cir.) (Alejandro Alaniz argues District Court did not make sufficient findings to support quantity of drugs on which it based its sentence and certain enhancements. District Court s statement that quantity determinations and sentence enhancements were based on trial testimony and evidence presented at sentencing hearing provides sufficient basis for adequate appellate review. District Court also specifically noted preponderance of evidence demonstrated objections raised were without merit.), cert. denied, 525 U.S. 1047 (1998).

United States v. Hudson, 129 F.3d 994 (8th Cir. 1997). (This Court rejects Hudson s contention District Court abused its discretion in admitting and crediting probation officer s hearsay testimony at sentencing hearing, § 6A1.3(a).)

United States v. Gooder, 124 F.3d 985 (8th Cir. 1997). (Gooder received 18-month sentence for being accessory after fact to bank robbery; he contends District Court violated Fed. R. Crim. P. 32(c)(1) by considering disputed information in setting his sentence at high end of Guidelines range. Contrary to Gooder s argument, this Court believes District Court sufficiently indicated it was not going to consider controverted matters, and seriousness of Gooder s undisputed offense conduct--driving getaway vehicle--justified sentence at top of range for accessory charge. This Court notes Gooder s sentence was within range anticipated by plea agreement.)

United States v. Weekly, 118 F.3d 576 (8th Cir.) (Romero contends District Court erred in admitting hearsay and government failed to provide "discovery" regarding statements of polygraph examiner; Romero argues admission of testimony violated her Sixth Amendment right to confront her accusers. There is no right of confrontation in sentencing process. Guidelines permit use of hearsay to resolve disputed facts provided information has sufficient indicia of reliability to support probable accuracy (§ 6A1.3(a)). Furthermore, Romero had opportunity to cross-examine agent regarding his interviews with co-conspirator and polygraph examiner, and Romero has not provided specific reason as to why agent s testimony was unreliable. As to discovery, Romero failed to distinguish her sentencing hearing from trial and does not suggest statements exist which are exculpatory to her.

Weekly contends there was no independent testimony of scope of his involvement in conspiracy, only hearsay testimony of DEA special agent. He complained there was not physical evidence he was involved in breaking down heroin and he further complains agent referred to conversations elicited from wiretaps and interviews with co-defendants, but government failed to introduce evidence of wiretap transcripts, notes of agent s interviews of co-defendants, or other witnesses corroborating agent s testimony. Where Weekly and Braddock each made certain stipulations and government presented testimony from agent about electronic surveillance and his interviews with several co-defendants, and government provided Braddock and Weekly with DEA reports, 200 hours of wiretaps, and wiretap affidavits, government was not required to turn over agent s notes of impressions from interviews with co-defendants and Court may rely on hearsay testimony as long as evidence has sufficient indicia of reliability to support its probable accuracy.), cert. denied, 522 U.S. 1020 (1997).

United States v. Guerrero-Cortez, 110 F.3d 647 (8th Cir.) (Gonzalez-Gonzalez asserts District Court erred by denying him reduction for both acceptance of responsibility and for being minor or minimal participant in conspiracy and thus violated Rule 32(c)(1) of Fed. R. Crim. P.; he urges review because of importance of District Court s findings related to information in PSR to Bureau of Prisons. This Court holds it does not have authority to review District Court s denial of either reduction. Here, District Court complied with Rule 32 and ruled statutory minimum punishment of ten years applied and overrode punishment of 78-98 months as computed under Guidelines. Thus, allegedly erroneous sentencing computation under Guidelines would have no effect on Gonzalez-Gonzalez s sentence. This circuit requires only that District Courts comply with Rule 32.), cert. denied, 522 U.S. 1017 (1997).

United States v. Knight, 96 F.3d 307 (8th Cir. 1996). (Knight asserts agent s testimony was unreliable hearsay. District Court could properly rely on agent s testimony (in finding Knight was organizer or leader) as agent s testimony was corroborated and Knight had opportunity to rebut

evidence by cross-examining agent.), cert. denied, 520 U.S. 1180 (1997).

United States v. Edwards, 91 F.3d 1101 (8th Cir. 1996). (District Court may consider hearsay evidence contained in PSR if individual being sentenced is given opportunity to explain or rebut evidence, and if Court makes explicit factual finding on any disputed issue.)

United States v. Tauil-Hernandez, 88 F.3d 576 (8th Cir. 1996). (Mordan argued District Court abused discretion in granting government two-week continuance of sentencing hearing. At initial hearing, FBI agent testified to amount of cocaine seized, relying upon laboratory report prepared by New York City Police lab. Mordan objected to use of report as unreliable hearsay and Court sustained objection, but also continued hearing so government could produce author of report. Chemist testified two weeks later in support of statements in report. District Court did not abuse its substantial discretion in granting continuance: government was not unreasonable in initially believing it had enough other corroboration of cocaine quantity to establish lab report s reliability; when District Court ruled otherwise, resulting two week delay did not prejudice Mordan who thoroughly cross-examined chemist.), cert. denied, 520 U.S. 1121 (1997).

United States v. Campos, 87 F.3d 261 (8th Cir.) (Demands of due process satisfied under circumstances of this case; thus, District Court did not err in considering hearsay statements regarding source of cocaine supplied to government s cooperating witnesses. Hearsay declarants were drug couriers who Campos himself confirmed had assisted him in distributing cocaine, and nothing in record indicated these accomplices had any reason to misrepresent source of drugs. This Court notes testimony of these witnesses was internally consistent, lending substantial indicia of reliability to testimony.), cert. denied, 519 U.S. 1019 (1996).

United States v. Stavig, 80 F.3d 1241 (8th Cir. 1996). (Government s only evidence regarding why one kilogram was chosen came from South Dakota DEA agent who stated Florida agents told him confidential informant told them Stavig had indicated interest in one kilogram quantity. District Court was quite concerned with hearsay nature of evidence presented by government. This Court is also troubled by reliability of hearsay evidence offered in this case, but cannot conclude District Court abused its discretion in allowing it.)

United States v. Darden, 70 F.3d 1507 (8th Cir. 1995). (In resolving dispute concerning factor important to sentencing determination, District Court may consider relevant information without regard to its admissibility under Rules of Evidence applicable at trial, provided information has sufficient indicia of reliability.), cert. denied, 517 U.S. 1149 (1996).

United States v. Rice, 49 F.3d 378 (8th Cir.) (Rice objected to PSR s recommendation on his BOL and asserts District Court s factual finding was procedurally invalid because it was not sufficiently specific. Finding was not inadequate where District Court heard arguments from both parties, reviewed trial notes and exhibits, then made determination Rice was accountable for conduct of others and such acts were reasonably foreseeable.), cert. denied, 515 U.S. 1168 (1995).

United States v. Smith, 40 F.3d 933 (8th Cir. 1994). (Smith objected to "offender characteristics" section of PSR which alleged he was alcoholic and had physically abused former

wife. District Court refused Smith s request noting Fed. R. Crim. P. 32(c)(3)(D) provides that Court does not have to make finding as to controverted material in PSR if Court does not consider it in sentencing. On appeal, Smith argued District Court did consider controverted materials despite its assurance it would not. This Court states sentencing record showed District Court considered none of controverted material; District Court need only satisfy Rule 32.)

United States v. Saffeels, 39 F.3d 833 (8th Cir. 1994). (Prior history omitted). (Absent specific allegations of factual mistake, District Court was not obligated to make findings under Rule 32.)

United States v. Pugh, 25 F.3d 669 (8th Cir. 1994). (Pugh contended District Court should not have considered testimony of detective who related to Court incriminating statements Pugh had made while in county jail. District Court did not err by considering that testimony as there were sufficient indicia of probable accuracy of detective s testimony, e.g., Pugh s motion to suppress was properly denied; Pugh did not dispute fact that detective was at jail on day of his arrest or that they had conversation.)

United States v. Rodgers, 18 F.3d 1425 (8th Cir. 1994). (Alfred Rodgers submitted list of pro se objections to PSR that District Court considered and overruled at time of sentencing. Specifically Alfred objected to drug quantity used in calculating his guideline range; enhancements for leadership role and obstruction of justice; and he requested reduction for acceptance of responsibility. This Court finds no abuse of discretion where record supports sentencing factors considered by District Court.)

United States v. Behler, 14 F.3d 1264 (8th Cir.). (Behler contended District Court erred in relying on testimony of two witnesses because their testimony did not have sufficient indicia of reliability. Behler asserted District Court adopted jury s assessment of testimony instead of making independent determination. This Court finds no reason to disturb District Court s finding as it specifically stated at sentencing that it accepted these two witnesses testimony, demonstrating District Court independently assessed testimony and found it contained sufficient indicia of reliability as to determine drug quantity. As to Behler s argument that Court erred in finding testimony to be reliable, witness credibility is issue for sentencing judge that is virtually unreviewable on appeal.), cert. denied, 513 U.S. 960 (1994).

United States v. Knife, 9 F.3d 705 (8th Cir. 1993). (District Court may consider relevant hearsay testimony provided information has sufficient indicia of reliability to support its probable accuracy. Here, victim s hearsay statements were offered through professional therapist who had treated victim at length. Statements were corroborated in part, by defendant s later testimony, by medical records, and by victims public conduct. There was foundation laid that might well have made statements admissible at trial. In these circumstances, District Court did not abuse its discretion in admitting testimony.)

United States v. Cassidy, 6 F.3d 554 (8th Cir. 1993). (Guidelines permit use of hearsay to resolve disputed facts provided information has sufficient indicia of reliability to support its probable accuracy. Determination of whether hearsay is sufficiently reliable to support sentencing

decision depends on facts of particular case and is committed to sound discretion of District Court.

District Court found state defendant s testimony, as presented through detective, worthy of consideration where state defendant made her statements in presence of her attorney while she was awaiting sentencing in state Court; detective testified much of what she said was consistent with facts he discovered through his own investigation; she incriminated herself with her statements and did not attempt to shift entire blame to Cassidy; and part of her statement was corroborated by search of Cassidy s apartment and Cassidy s own testimony at sentencing. Despite inconsistencies pointed out by Cassidy, this Court was satisfied District Court acted well within its discretion: this Court has upheld consideration of hearsay under more tenuous circumstances.)

United States v. Jones, 994 F.2d 456 (8th Cir. 1993). (District Court did not abuse its discretion in admitting into evidence transcript of minor s interview. Confrontation Clause does not apply in sentencing proceedings and hearsay was sufficiently reliable (District Court stated it was not credible nine-year-old girl would take nude pictures of herself--as Jones suggested--and then falsely state during interview Jones had taken pictures.)

United States v. Kelly, 989 F.2d 980 (8th Cir.) (District Court may consider relevant information without regard to admissibility under rules of evidence if information has sufficient indicia of reliability.), cert. denied, 510 U.S. 874 (1993).

United States v. Mahler, 984 F.2d 899 (8th Cir. 1993). (Discussion of when and how uncorroborated hearsay may be used and when it is incumbent upon District Court to limit its reliance on same.)

United States v. Harris, 982 F.2d 317 (8th Cir. 1992). (Because District Court acted within its discretion in refusing to consider grand jury hearsay at sentencing, its reliance on Fortier was harmless error.)

United States v. Merritt, 982 F.2d 305 (8th Cir. 1992). (Merritt did not make hearsay objection to victim s written statement, upon which Court relied, at sentencing. Thus, this Court will not consider it as Merritt also made no showing of plain error.), cert. denied, 508 U.S. 979 (1993).

United States v. Callaway, 972 F.2d 904 (8th Cir. 1992). (Following resentencing after remand from this Court, Callaway contested District Court s reliance on hearsay statements to sentence Callaway at top of sentencing range, claiming it violated her due process rights and contravened section 6A1.3(a). As this Court implicitly relied on hearsay statement to affirm part of sentence, Callaway could have raised hearsay argument in first appeal, and resentencing transcript does not support Callaway s contention, law-of-the-case doctrine controls.)

United States v. Haren, 952 F.2d 190 (8th Cir. 1991). (Where trial testimony indicated between ten and twenty thousand dollars was drug proceeds and District Court converted it into 448 grams of amphetamine for sentencing purposes, V. Haren claimed evidence was insufficient to establish money was drug money she had "earned." Finding by District Court was not clearly erroneous as testimony at trial had sufficient indicia of reliability to support its probable accuracy.)

United States v. Culver, 929 F.2d 389 (8th Cir. 1991). (Here, District Court held evidentiary hearing before imposing sentence; all parties were advised of hearing and given opportunity to present evidence; Court entertained oral objections to presentence report. This Court acknowledges discretion given to District Court to determine appropriate procedure. This Court found no error in amount of time between hearing and imposition of sentence as parties had opportunity to object to District Court s findings.)

United States v. Cammisano, 917 F.2d 1057 (8th Cir. 1990). (Case remanded for resentencing. This Court found insufficient corroboration of agents hearsay testimony concerning Cammisano s involvement in murder and membership in organized crime where government argued reliability of information based on confidential informants corroborating each other.)

United States v. Fire Thunder, 908 F.2d 272 (8th Cir. 1990). (This Court accepts District Court s finding that hearsay testimony of victim s social worker as to threat made to victim by stepfather, was reliable.)

United States v. Wayne, 903 F.2d 1188 (8th Cir. 1990). (Where there is sufficient indicia of reliability, Court may consider quantities of drugs for which defendant was neither indicted nor convicted or for which count was dismissed pursuant to plea agreement; here, District Court required sentencing factors proven by clear and convincing evidence.)

United States v. Thomas, 894 F.2d 996 (8th Cir.) (District Court complied with requirements of Rule 11 by advising defendant of maximum statutory penalty and was not required to inform him of applicable Guideline range. District Court complied with Rule 32 and Guidelines when it made its factual findings concerning PSI; it was only required to resolve disputed factors.), cert. denied, 495 U.S. 909 (1990).

United States v. Johnson, 888 F.2d 1255 (8th Cir. 1989). (A District Court may consider conduct in dismissed counts of indictment and may rely on information in presentence investigation report even if defendant alleges it is inaccurate. Section 6A1.3(a) allows District Court to determine appropriate procedures in light of nature of dispute, its relevance to sentencing determination and applicable case law.)

**Part B. Plea Agreements**

**§ 6B1.1 (Procedure):**

United States v. Mitchell, 136 F.3d 1192 (8th Cir. 1998). (Both parties agreed bargain underlying plea agreement included Mitchell s promise to plead guilty in exchange for government s agreement to seek downward departure at sentencing. While government technically adhered to promise to make § 5K1.1 motion, this Court concludes AUSA s reference to Mitchell s "reward" in another case, and subsequent introduction of victim-impact statements, violated spirit of promise and ultimately, plea agreement. This Court concludes government s statement it had no recommendation as to sentence was also breach of promise to recommend downward departure of up to fifty percent; Court rejects as meritless government s contention it was required by Fed.

R. Crim. P. 32 to introduce victim-impact statements; this Court also rejects as contrary to plain language of AUSA s confirmation letter, government s position it was not obligated to recommend reduction of up to fifty percent unless § 5K1.1 motion was first granted. Court remands for resentencing before another judge.)

United States v. Cain, 134 F.3d 1345 (8th Cir. 1998). (In each plea agreement, government stated it was "in agreement" with relevant defendant with respect to amount of loss "readily provable." In Paul s plea agreement, government also stated it was "in agreement" with Paul with respect to "belief" of parties level III was appropriate criminal history assessment for him. In this Court s review, neither statements of "agreement," amount to promise by government to defend at sentencing hearing amount of loss or criminal history assessment in plea agreements. Construing statements as promises to defend is especially unreasonable in light of additional provision in plea agreements that both parties retain right to present respective versions of offense.)

United States v. Pompey, 121 F.3d 381 (8th Cir. 1997). (Pompey s plea agreement states parties agree there are no adjustments to be made for obstruction, § 3C1.1; Pompey maintains, and government admits, government provided information to probation officer preparing PSR that Pompey put pressure on his sister not to testify against him, thus furnishing basis for District Court s upward adjustment under § 3C1.1. Pompey characterizes government action as breach of plea agreement. While portion of plea agreement involved does not promise anything, Pompey argues words fairly imply promise on government s part not to seek upward adjustment. Government believes it discharged its obligation by not requesting upward adjustment at sentencing hearing. This Court declines to imply kind of promise Pompey asserts, i.e., government s obligation under agreement extended to point it was not supposed to supply information to Court that might support finding Pompey obstructed justice; such reading would be contrary to public policy.), cert. denied, 522 U.S. 1133 (1998).

United States v. Allen, 75 F.3d 439 (8th Cir. 1996). (Allen pleaded guilty only to one count of mail fraud of indictment charging him with mail fraud, wire fraud, and conspiracy. On appeal, he contends government breached plea agreement by allowing allegations of other counts to be considered as relevant conduct in calculating amount of loss (§ 2F1.1) to victims. Allen stipulated, however, offenses to which he pleaded guilty were subject to sentencing Guidelines. Guidelines require all relevant conduct be considered (§ 1B1.1). Moreover, District Court is not bound by stipulations and plea agreement in determining facts relevant to sentencing (§ 6B1.4(d); § 6B1.2(a)). This Court rejects Allen s argument that government breached plea agreement with him.)

United States v. Torres-Diaz, 60 F.3d 445 (8th Cir.) (Torres-Diaz s 100-month sentence was upward departure from plea agreement. This Court states Torres-Diaz misconstrued plain language of plea agreement, specifically contemplating Court might exercise discretion adversely to Torres-Diaz. This Court goes on to characterize claim as challenge to extent of District Court s downward departure and labels it unreviewable. DISSENT: Conviction of Torres-Diaz should be vacated and matter remanded to permit him to withdraw his guilty plea. District Court told Torres-Diaz at guilty plea that after reviewing PSR, if it disagreed with agreement between government and Torres-Diaz as to length of sentence, it would throw out plea and matter would go to trial. Interest of justice requires remand as, after reading PSR, Court refused to sentence pursuant to agreement

and failed to set aside plea as promised, but rather imposed sentence of 8½ years.), cert. denied, 516 U.S. 971 (1995).

United States v. Stockdall, 45 F.3d 1257 (8th Cir. 1995). (Stockdalls were charged with number of offenses. Their plea agreements recited government might file § 3553(e) motion and each agreement contained language preserving government s discretion whether to file such motion. For each defendant, government then filed § 3553(e) motion limited to only one applicable mandatory minimum sentence. Stockdalls urge entitlement to specific performance of their understanding of agreements, i.e., motion would encompass all mandatory minimums involved based upon government s failure to advise them it might limit any motion it elected to file. District Court did not clearly err in finding agreements unambiguously left filing of substantial assistance motions to government s sole discretion and no contrary agreement existed outside of written plea agreements. This Court concludes Stockdalls guilty pleas could not reasonably have been based upon understanding government would only file "all or nothing" § 3553(e) motion(s). Desire to dictate length of defendant s sentence for reasons other than his or her substantial assistance is not permissible basis for exercising government s power under § 3553(e). Here, prosecutor s own statements at evidentiary hearing held to consider possible violation of plea agreements raised serious question regarding government s compliance with § 3553(e). Consequently, this Court remands case to permit government either to file new § 3553(e) motions or to provide satisfactory assurance to District Court that its prior motions were based solely upon its evaluation of Stockdalls respective substantial assistance.)

United States v. Karam, 37 F.3d 1280 (8th Cir. 1994). (Karam s plea agreement specifically provided he would be sentenced under Sentencing Guidelines and application of those Guidelines rest within sole discretion of District Court. Base offense level noted in plea agreement only governs parties agreed-to position with regard to sentencing; agreement explicitly stated it was not binding on Court.)

United States v. Ghent, 29 F.3d 416 (8th Cir. 1994). (This Court dismisses as frivolous Ghent s pro se challenge to his plea agreement where government promised to move for either § 5K1.1 reduction or reduction pursuant to Fed. R. Crim. P. 35. Because time for Rule 35 motion has not yet expired, Ghent s claim is premature.)

United States v. Wyatt, 26 F.3d 863 (8th Cir. 1994). (Wyatt argued government breached plea agreement because prosecutors stated at sentencing Wyatt s offense was serious, and thus effectively cancelled out information as to cooperation. Wyatt waived claim because he did not object to prosecutor s remark at sentencing and this Court declines to grant relief under plain error standard.)

United States v. Wessels, 12 F.3d 746 (8th Cir. 1993). (Wessels is not entitled to relief due to government s withdrawal of its consent to plea agreement. He was not justified in relying on terms of plea agreement because it had not been approved and accepted by Court. In addition, he failed to show government gained unfair advantage over him in withdrawing its consent to agreement, such as by use at trial of statements made during course of plea negotiations, nor did he show deprivation of due process in his subsequent trial. Wessels was not prejudiced by

government s withdrawal of its consent and District Court committed no error when it increased statutory penalty on account of Wessels s prior felony drug conviction.), cert. denied, 513 U.S. 831 (1994).

United States v. Beatty, 9 F.3d 686 (8th Cir. 1993). (Beatty argued government violated plea agreement which stated that government agreed not to make motion for upward departure when it asked District Court to impose "substantial sentence." Beatty failed to preserve alleged error for review when he failed to object. This Court reviewed prosecutor s remarks under plain error standard of review and declined to grant relief. DISSENT: Believes Beatty did adequately preserve issue for review based on Beatty s earlier assertions on point. Under these circumstances, this Court should review under clearly erroneous standard. Would find clear error and remand for resentencing in compliance with plea agreement.)

United States v. Garrido, 995 F.2d 808 (8th Cir.) (Where Carlos voluntarily and knowingly agreed to withdraw pretrial motions with prejudice and then lied at debriefing, destroying possibility of implementing plea agreement, District Court did not err in denying Carlos leave to file pre-trial motions as untimely.), cert. denied, 510 U.S. 926 (1993).

United States v. Villegas, 987 F.2d 1362 (8th Cir. 1993). (Where Villegas knowingly and voluntarily entered plea agreement that made length of his sentence depend on Court s later factual findings, mere fact that ultimate result of agreement (sentence based on amount of cocaine did not differ substantially from that which would have been imposed had Villegas been convicted after trial) was not that which he had hoped for, does not render agreement unfair or violation of due process.)

United States v. Fortney, 957 F.2d 629 (8th Cir.) (Before parties executed plea agreement, government supplied Fortney with FBI rap sheet which listed three prior convictions and estimate of his criminal history category, II. District Court accepted plea agreement and ordered PSR. PSR included listing of seven priors and Court sentenced him on basis of category VI. This Court rejects Fortney s argument his sentence should be reduced to reflect range suggested by government s erroneous criminal history estimate. No evidence government s incorrect estimate rendered guilty plea invalid nor was there evidence government acted in bad faith or inconsistent with Rule 11. Moreover, given Fortney s extensive criminal history (seven convictions between 1978 and 1990), this Court was not persuaded he was misled by FBI rap sheet which revealed only three prior convictions.), cert. denied, 506 U.S. 902 (1992).

United States v. White, 888 F.2d 1252 (8th Cir. 1989). (Court rejected White s argument that plea agreement to sentence him under Category 1, regardless of discovery of earlier conviction in presentence investigation, bound District Court or afforded him right to withdraw guilty plea. Plea agreement stated Category 1 is applicable . . . "absent any other circumstances" and judge made clear, during guilty plea hearing, that presentence investigation would establish governing facts and which White acknowledged understanding.)

**§ 6B1.2 (Standards for Acceptance of Plea Agreements):**

United States v. Stuttley, 103 F.3d 684 (8th Cir. 1996). (Appellants each argue extent of downward departure he was granted by District Court was not commensurate with assistance he gave government pursuant to his plea agreement. Extent of downward departure is not reviewable on appeal; moreover, even if this Court could review, it could not review these particular appellants claims. In their plea agreements and at guilty plea hearings, each appellant expressly waived right to appeal his sentence so long as District Court sentenced him in sentencing range recommended in plea agreement; District Court did so in each case. Because each appellant was sentenced in accordance with his plea agreement, he cannot challenge bargain he made, 6B1.2(c).), cert. denied, 522 U.S. 824 (1997).

United States v. Greger, 98 F.3d 1080 (8th Cir. 1996). (Greger claims sentence was in conflict with plea agreement because agreement was implicitly negotiated with understanding sentencing hearing would be conducted according to law; he contended hearing did not comply with 18 U.S.C. § 3664 safeguards and he should therefore be permitted to appeal restitution order. Here, record shows Greger knowingly and intelligently waived his right to appeal all issues other than jurisdiction. Waiver was included in plea agreement and discussed at some length. At sentencing hearing, Court pronounced sentence including restitution without objection from Greger or his attorney and reviewed waiver of right to appeal. As Greger knowingly and voluntarily waived his right to appeal any issue other than jurisdiction, this Court need not consider merits of his arguments about restitution.)

United States v. Harris, 70 F.3d 1001 (8th Cir. 1995). (District Court erred in considering conduct from dismissed count as basis for upward departure under § 5K2.0 in clear opposition to intentions of parties as embodied in plea agreement. Contrary rule would allow District Court to eviscerate plea bargaining process vital to Court administration. District Court had valid, alternative means to impose different sentence if that was its objective; Fed. R. Crim. P. 11(e) gives Court discretion to reject plea bargain it believes to be unduly lenient; Court should accept plea only if it determines charges adequately reflect seriousness of actual offense behavior and agreement does not undermine statutory purposes of sentencing or sentencing Guidelines. Moreover, Court had significant latitude in applying Guidelines; e.g., it could have rejected government s motion for downward departure under § 5K1.1.)

United States v. Cohen, 60 F.3d 460 (8th Cir. 1995). (Cohen contended government breached plea agreement by failing to recommend sentence at low end of Guidelines range. Where government stated it had no specific recommendation as to sentence and "no objection to defendant being sentenced at low end of guideline range," and defense counsel voiced no question, objection, or complaint regarding prosecutor s statement, this Court concludes Cohen waived any objection to government s failure to make recommendation it had provided. Cohen could have raised immediate objection to statement; asked for continuance for purpose of recalling AUSA who had made promise; restated terms of agreement in open Court; moved to withdraw plea. Cohen did not raise issue until supporting his motion for release on bail pending appeal whereas after sentencing he could have made motion to withdraw guilty plea or to reduce or correct sentence or filed petition to set aside conviction. Whatever difference between prosecution s affirmatively recommending low end sentence and not objecting to one, it does not rise to level of plain error given extensive proceedings at sentencing hearing.

Plea agreement obligated government to take no position during sentencing phase with regard to more than minimal planning, § 2F1.1(b)(2). Cohen contends government breached plea bargain by arguing to probation officer there was more than one victim. But while plea bargain insured government could not argue for enhancement based on part A of guideline, bargain did not refer to part B and thus, plea agreement was not breached.)

United States v. Kelly, 18 F.3d 612 (8th Cir. 1994). (In interpreting plea agreement, Kelly urged Court to draw distinction between "cooperation" as used in agreement and "substantial assistance" as used in § 3553(e) and § 5K1.1. He argued plea agreement required only cooperation as specified in agreement and not substantial assistance statutorily required before Court can grant downward departure motion. Cooperation phrase contained non-exhaustive list of acts that might be required as "cooperation" and agreement linked Kelly s "cooperation" to "substantial assistance" requirement. This Court concedes cooperation phrase might be somewhat ambiguous if viewed narrowly; agreement was carefully worded with respect to government s reservation of discretion. Government expressly conditioned its obligation to file motion for downward departure on government s discretionary assessment of whether or not Kelly had provided substantial assistance/cooperation. This Court finds government did not breach plea agreement.)

United States v. Patterson, 11 F.3d 824 (8th Cir. 1993). (As Grubbs conceded in his plea agreement he was subject to sentencing range of 210-262 months and he ultimately received sentence of 121 months, he has no basis for appeal against sentence.)

United States v. Mabry, 3 F.3d 244 (8th Cir. 1993). (A defendant has no right to plea bargain and prosecutor need not bargain if she prefers to go to trial.)

United States v. Van Horn, 976 F.2d 1180 (8th Cir. 1992). (Van Horn pleaded nolo contendere to violation of 18 U.S.C. §§ 842(i) and 844(a). Van Horn claimed government breached plea agreement by recommending upward departure from guideline range (10-16 months); District Court imposed 41 month sentence of imprisonment. Government countered it did not violate agreement because District Court did not accept offense level recommendation in PSR. This Court rejects government s reasoning as hypertechnical and unreasonable, and remands for resentencing by different judge where government breached its promise not to recommend upward departure. Court emphasizes it is not questioning fairness of sentencing judge--upward departure was based on appropriate factors; sentence was patently reasonable and justified. DISSENT: Plea agreement was complex. After Court sustained defense objection to one of increases, offense level at that point was not that calculated by Probation Office and this was what U.S. Attorney had agreed was condition for its agreement not to seek upward departure.)

United States v. Ludwig, 972 F.2d 948 (8th Cir. 1992). Where written plea agreement was specific in its terms and offered no certain sentencing range despite representation of "probable" sentencing, Ludwig s ignorance of applicability of career offender provision (§ 4B1.1) until after agreement had been signed did not constitute fair and just reason to allow him to withdraw guilty pleas.)

United States v. Rutan, 956 F.2d 827 (8th Cir. 1992). (This Court holds Ratan knowingly

and voluntarily waived his right to appeal. In exchange for his guilty plea and waiver of right to appeal, Ratan knew he gained dismissal of gun charge (additional five-year sentence possibility), and lack of resistance to acceptance of responsibility reduction. Where government reserved right to object to reduction and had cause to object, objection did not constitute breach of agreement.)

United States v. Wilson, 955 F.2d 547 (8th Cir. 1992). (Where plea agreements did not mention more-than minimal planning issue, government objected to proposed enhancements, and each plea agreement recited it was not binding on Court, fact that Court chose to impose enhancement not addressed in plea agreements cannot constitute breach of those agreements.)

**§ 6B1.2(a) (Acceptance of Plea Agreement and Effect of Agreement on Relevant Conduct):**

United States v. Cave, 293 F.3d 1077 (8th Cir. 2002) (RILEY,* BEAM, MELLOY). (Plea agreement that includes dismissal or non-prosecution of charge does not preclude consideration of that conduct as relevant conduct.)

**§ 6B1.2(b) (Sentence Recommendation/Standard of Review):**

United States v. Hager, 985 F.2d 945 (8th Cir. 1993). (District Court did not reject plea agreement so Hager did not have arguable right to withdraw guilty plea. Agreement s recitation of probable sentencing ranges does not amount to recommendation by government; moreover, Hager had not disclosed earlier conviction when agreement was made. Agreement recited that final sentencing decision belongs to Court and government kept its only promise: to recommend reduction for acceptance of responsibility.)

United States v. LeMay, 952 F.2d 995 (8th Cir. 1991). (Accepting or rejecting plea agreements remains discretionary task, reviewable on abuse of discretion standard.)

**§ 6B1.2(b) (Sentence Recommendation):**

United States v. Archambault, 344 F.3d 732 (8th Cir. 2003) (MORRIS ARNOLD, HANSEN, SMITH*). (Although government agreed in plea agreement to recommend sentence at low end of Guidelines range, defendant waived right to appeal government's failure to object to District Court's upward departure because defendant sat idly by at sentencing.)

United States v. LeMay, 952 F.2d 995 (8th Cir. 1991). (The District Court s reason for rejecting LeMay s first plea agreement--that it provided excessive downward departure from Guidelines range (27-33 months from 97-121 months)--is nonreviewable Guidelines decision.)

**§ 6B1.4 (Stipulations):**

United States v. DeWitt, No. 03-2779 (8th Cir. 2004) (MELLOY, BEAM, COLLOTON*).

(PSR is not evidence. Once defendant objected to drug quantity in PSR, District Court could not hold her liable for that quantity unless evidence was presented at sentencing. Government was precluded by plea agreement from presenting such evidence of its own volition. District Court remained entitled to independently evaluate evidence by investigating, calling witnesses, or compelling government to put on evidence.)

White v. United States, 308 F3.d 927 (8th Cir. 2002) (HANSEN,* MORRIS S. ARNOLD, PRATT). (Non-binding sentence recommendation in plea agreement, governed by Fed. R. Crim. P. 11(e)(1)(b), does not constrain discretion of District Court at sentencing.)

United States v. Franco-Martinez, 271 F.3d 764 (8th Cir. 2001) (BYE, BRIGHT, RICHARD S. ARNOLD) (per curiam). (District Court was not bound by stipulation in plea agreement concerning drug quantity, which, in any event, was phrased as recommendation only. Judge Bright, concurring, states that where parties enter arms-length agreement based on fair assessment of evidence, agreement ought to be accepted by District Court without further hearing.)

United States v. Kang, 143 F.3d 379 (8th Cir. 1998). (District Court attributed to Kang more than 50 grams of crack--yielding BOL 32-- and held Kang had stipulated to his involvement with between 50 and 150 grams. Government introduced no evidence to connect Kang with more than 6.84 grams, claiming reliance on stipulation. This Court recites relevant portion of agreement and concludes it contains no such stipulation. Rather, operative language is "the United States submits." Effect of language is to set out position of government with respect to sentencing. Government contends construction would make agreement meaningless, but as agreement contains numerous other undertakings and promises on both sides, it is not deprived of all sense by interpreting words to have their ordinary meaning. Government also relies on certain remarks made by counsel at guilty-plea hearing. This Court reviews passage and does not believe ambiguous language strong enough to convert plain language of plea bargain agreement. Stipulation by defendant in criminal case should be free of ambiguity. This Court rejects government s argument colloquy is clear enough to convert statement of government s position into stipulation of both parties. Thus, it was not proper on this record to sentence Kang on basis of 50 or more grams of crack; such sentence would require evidence. Case remanded.)

United States v. Morris, 73 F.3d 216 (8th Cir. 1996). (Whether government s agreement in plea bargain "to take no position" on motion for downward departure based on aberrant behavior precluded cross examination of defense psychologist who testified at sentencing hearing. Psychologist s written report had been attached to PSR; when testimony began to develop additional expert testimony about spousal abuse, government cross examined witness and defense objected government was violating plea agreement by taking position. This Court states control of cross examination during sentencing hearing, and discretionary rulings necessary in that control, must be guided by specific facts and argument in each case: problem does not lend itself to black letter lists of permitted and not permitted questions. Accordingly, Court decides only that in this case, where witness began to shift focus of grounds for downward departure from agreed fact that marital infidelity had precipitated offense, to larger collection of grievances based upon spousal abuse, prosecutor had right to employ reasonable cross examination to bring inquiry back to agreed facts. District Court has authority to permit reasonable cross examination to present true facts;

agreement "not to take position" does not deny prosecutor right to ask questions to keep inquiry from becoming wide ranging application for leniency.)

United States v. Griggs, 71 F.3d 276 (8th Cir. 1995). (Griggs argued government violated plea agreement by allowing District Court to consider conduct outside stipulated facts for sentencing. District Court must examine all circumstances surrounding convicted defendant s offense, § 1B1.3(a). Any plea agreement entered into by defendant and government cannot limit District Court in examining defendants conduct for sentencing. Government, however, must abide by its plea agreement with defendant. Griggs also argued District Court should not have used conduct for which government agreed not to charge him to increase his sentence. As Griggs failed to raise these arguments during sentencing hearing, this Court may reverse only for plain error. Government did not violate plea agreement in this case: events of one date to which Griggs referred occurred after Griggs entered into his plea agreement with government; nowhere in plea agreement did government agree to limit information it would give District Court for sentencing; Griggs and his attorney represented plea agreement to be entire agreement between Griggs and government; and Griggs had opportunity to speak to Court and he did not contradict his attorney s answer to Court s questioning. District Court did not err in using Grigg s uncharged conduct to determine sentence: plea agreement did not limit government or District Court to stipulated facts for determining sentence; and Court was correct in considering all of Grigg s relevant conduct.)

United States v. Lutfiyya, 26 F.3d 1468 (8th Cir. 1994). (Lutfiyya appealed his sentence, arguing that in determining sentence for conspiracy to distribute copyright-infringing tapes and labels, trial Court relied on information contained in PSR that was not included in stipulation of facts. Section 6B1.4(d) specifies Court is not bound by stipulation and may rely on PSR to determine sentence. Plea agreement and stipulation cited § 6B1.4 in caption. Lutfiyya claims he did not understand, but he did not seek to withdraw his plea under Rule 32(d).)

United States v. Kok, 17 F.3d 247 (8th Cir. 1994). (On remand, District Court will have opportunity to specify actions it considers as relevant conduct for sentencing purposes. Disputed facts should be noted (§ 6B1.4(b)).)

United States v. Westerman, 973 F.2d 1422 (8th Cir. 1992). (District Court was not bound by stipulation entered into by Westerman and government and could with aid of PSR determine facts relevant to sentencing.)

United States v. Russell, 913 F.2d 1288 (8th Cir. 1990). (Language of (d) is unequivocal, facts stated in stipulation not necessarily consistent with those in presentence report. Moreover, District Court considered and rejected Russell s contention.), cert. denied, 500 U.S. 906 (1991).

## CHAPTER SEVEN:
## VIOLATIONS OF PROBATION AND SUPERVISED RELEASE

### Part A. Introduction

#### Part A. (Standard of Review)

United States v. Jasper, 338 F.3d 865 (8th Cir. 2003) (BOWMAN, RICHARD ARNOLD, BYE*). (As Chapter 7 policy statements are purely advisory, this Court reviews for abuse of discretion District Court's decision to impose sentence above recommended Guidelines range but within statutory range. District Court must consider statutory factors and Guidelines policy statements, but it need not mechanically list every consideration. Here, District Court's comments satisfactorily explain relationship between revocation sentence and nature of supervised release violations.)

United States v. Rodriguez-Favela, 337 F.3d 1020 (8th Cir. 2003) (MORRIS ARNOLD, HANSEN,* SMITH). (As Chapter 7 policy statements are purely advisory, revocation sentence below statutory maximum will not be reversed absent abuse of discretion.)

United States v. Carothers, 337 F.3d 1017 (8th Cir. 2003) (MELLOY, HANSEN,* SMITH). (District Court's decision to revoke supervised release is reviewed only for abuse of discretion. District Court's subsidiary factual finding as to whether violation occurred is reviewed for clear error. Credibility determinations are virtually unreviewable on appeal, and finding of violation based on "he said/she said" testimony will rarely be overturned.)

United States v. Hensley, 36 F.3d 39 (8th Cir. 1994). (Question as to whether policy statements are binding and should have been applied to determine Hensley s proper sentence raised question of statutory construction, question of law which this Court reviews de novo.)

**Part A.**

United States v. Tschebaum, 306 F.3d 540 (8th Cir. 2002) (HANSEN, MORRIS S. ARNOLD,* PRATT). (Although Chapter 7 policy statements are not binding, District Court must give some indication that it considered them. Here, it did. District Court must also give some indication that it considered 18 U.S.C. § 3553(a) factors in selecting sentence. Here, it did not, so case is remanded for resentencing.)

United States v. Brown, 203 F.3d 557 (8th Cir. 2000) (McMILLIAN, RICHARD S. ARNOLD, HANSEN) (per curiam). (Rejecting argument that 1994 amendment to 18 U.S.C. § 3553(a)(4)(B) rendered policy statements in Chapter 7 of Guidelines binding rather than advisory, and that District Court thus erred by sentencing defendant above range suggested by § 7B1.4(a).)

United States v. Caves, 73 F.3d 823 (8th Cir. 1996). (Unlike other Guidelines policy statements, Chapter Seven policy statements are advisory, rather than binding, upon District Courts.)

United States v. Smith, 62 F.3d 1073 (8th Cir. 1995). (In November 1986, Smith was convicted of numerous fraud counts in N.D. Ill. and sentenced; probation was to begin after she completed concurrent sentences of imprisonment. In 1989, District Court reduced her eight-year terms to four years, but did not alter other sentences. Probation commenced in 1991 (in Minnesota). Smith claimed sentence of probation was illegal because it was imposed together with term of imprisonment in violation of 18 U.S.C. § 3561(a)(3) (effective 11/1/87). Smith conceded § 3561

was not operative at time she was originally sentenced but argued it should be applied because of modification to her sentence in 1989. This Court rejects argument as Smith s 1989 sentence reduction affected only those counts for which she had previously received sentences of eight years incarceration; three counts of probation were not altered. Reduction merely adjusted date Smith would begin serving probation; it did not affect date she was sentenced to probation or trigger application of § 3561.), cert. denied, 516 U.S. 1098 (1996).

United States v. Hartman, 57 F.3d 670 (8th Cir. 1995). (Hartman argued on appeal District Court erred in imposing additional term of supervised release after revocation and imposition of term of imprisonment. Panel notes this Court has consistently declined to reconsider Schrader en banc. Furthermore, panel s reading of legislative history of § 3583(h) (enacted in 1994, expressly allowing District Courts to impose revocation sentence consisting of both imprisonment and supervised release) indicates new legislation was intended to confirm this Court s interpretation of prior law, § 3583(e).)

United States v. Wilson, 37 F.3d 1342 (8th Cir. 1994). (Wilson appealed his revocation sentence, arguing this Court should reconsider its decision in U.S. v. Schrader. This Court refused to do so. Wilson alternatively argued that prison and supervised release components of his revocation sentence may not total more than three years (§ 3583(e)(3)). This Court decides it need not consider issue on facts of this case as Wilson s total revocation sentence is less than two years which would be valid even under his proposed integration of § 3583(e)(3) and Schrader.)

United States v. Hensley, 36 F.3d 39 (8th Cir. 1994). (Hensley contended District Court abused its discretion in imposing two-year prison sentence after finding Hensley violated conditions of supervised release when Chapter Seven policy statements prescribed 6-12 month sentence. This Court refers to Levi holding policy statements in Chapter Seven are advisory and not binding as they do not accompany Guidelines. Because Chapter Seven policy statements are not binding, 18 U.S.C. § 3583(e)(3) controls maximum sentence allowable in Hensley s case (prison sentence of up to entire time of supervised release upon violation of release conditions, with maximum of two years for Class C felony). This Court remands, however, as § 3583(e)(3) directs that in resentencing offender after revocation, District Court is to consider factors set forth in 18 U.S.C. § 3553(a), e.g., section requires Court consider any pertinent policy statement in effect on date defendant is sentenced, and record in this case did not conclusively show whether Court did or did not do so. Date of sentence for purposes of § 3553(a)(5) is date when Hensley was sentenced for violation of his supervised release at which time 6-12 month sentence was set forth in policy statement § 7B1.4, p.s.)

United States v. Bewley, 27 F.3d 343 (8th Cir. 1994). (This Court concludes District Court erred in imposing combined term of imprisonment and supervised release of 41 months, which exceeded Bewley s 36-month original term of supervised release by 5 months. This Court rejects Bewley s argument that his original term of supervised release is now only 27 months because of time already served; this reasoning is foreclosed by § 3583(e)(3) and this Court s decision in U.S. v. Krabbenhoft. Though Bewley did not raise issue at sentencing, this Court addressed it to avoid miscarriage of justice, reversing and remanding for imposition of either aggregate term of imprisonment and supervised release which is not more than Bewley s original 36-month term of

supervised release or one of other options available under § 3583(e).)

United States v. Love, 19 F.3d 415 (8th Cir.) (Court revoked Love s supervised release after he tested positive for cocaine at least six times over nine-month period. Court sentenced Love to eight months imprisonment and upon release, he was to serve remainder of original six-year term of supervised release. Court revoked Frazee s supervised release after she issued dishonored check in violation of state law and tested positive for cocaine. Court sentenced her to one year and one day in prison and provided upon release, she would complete original three-year term of supervised release. Both Love and Frazee challenge inclusion of additional supervised release in their revocation sentences, arguing 18 U.S.C. § 3583(e)(3) does not authorize additional term of supervised release following such incarceration; they urge reconsideration of Schrader en banc. This Court states recent cases from other circuits and judiciary committee comment reinforced its view Schrader correctly interpreted statute. Love and Frazee urged that decisions in Schrader and Stewart give District Court potentially endless jurisdiction over defendant. This Court looks to statute in defining power to sentence under § 3583(e)(3), including lesser included power to reimpose supervised release, statutory phrase, "without credit for time previously served on post-release supervision." Revocation penalty of prison plus additional supervised release that does not exceed defendant s original term of supervision is consistent with supervised release concept--until released defendant has lived under supervision for meaningful period of time without committing violation warranting revocation, supervision continues to be appropriate.), cert. denied, 513 U.S. 967 (1994).

United States v. Bender, 16 F.3d 977 (8th Cir. 1994). (District Court found Bender had violated terms of his supervised release and sentenced him to 6 months in prison and reimposed supervised release until 1 day short of expiration of Bender s original term of supervised release. This Court rejects Bender s argument that U.S. v. Schrader was decided incorrectly. DISSENT: For same reasons stated in dissent in U.S. v. Stewart.)

United States v. Stewart, 7 F.3d 1350 (8th Cir. 1993). (Stewart began serving 3-year term of supervised release in April 1991. On May 29, 1992, Stewart s probation officer filed petition stating that Stewart had been arrested and on July 13, 1992, District Court revoked Stewart s supervised release and ordered that Stewart be imprisoned for additional 18 months; Court also added 24-month term of supervised release and directed that Stewart complete 120 hours community service during supervision. On appeal, Stewart challenged only additional term of supervised release and community service as not authorized by 18 U.S.C. § 3583. This Court reads disjunctive wording of §§ 3583(e)(3) and (4) to preclude, upon revocation of supervised release, imposition of prison term and supervised release term which together exceed original supervised release term. District Court s order reversed and remanded.

This Court rejects Stewart's invitation to overrule U.S. v. Schrader. On remand, Court instructed to alter Stewart's sentence in one of two ways: in conformance with Schrader (where prison and supervised release terms imposed on revocation are less than original term of supervised release), Court could revoke Stewart s supervised release and sentence him to term of imprisonment followed by term of supervised release, so long as aggregate of two terms is less than or equal to Stewart s original 36-month term of supervised release; or it could revoke Stewart s supervised release and sentence him according to one of options listed in § 3583(e). DISSENT:

Would sustain Stewart s appeal and vacate newly imposed term of supervised release. Disagrees with majority s conclusion that District Court may still combine term of imprisonment and term of supervised release. Reviews inconsistency between Schrader and other circuits. Reads § 3583(e) to mean District Court may only revoke term of supervised release and impose new term of imprisonment or modify terms of supervised release--one or other, but not both. Believes en banc consideration warranted.)

United States v. Schrader, 973 F.2d 623 (8th Cir. 1992). (The District Court has power under 18 U.S.C. § 3583(e)(3) to require offender who has violated terms of his supervised release, to serve part of remaining supervised release period in prison and other part under supervised release. Court does not reach issue of whether District Court can revoke defendant s term of supervised release and impose new term of prison and supervised release that together is longer than original term of supervised release and extends beyond expiration date of original term.)

United States v. Jones, 973 F.2d 605 (8th Cir. 1992). (It was clear District Court considered policy statements when determining Jones s two-year sentence, which represented "upward departure." Because Chapter 7 policy statements are not binding, Court is not required to make explicit, detailed findings required when it departs upward from binding guideline. Nor is Court required by section 3583 to consider mitigating circumstances or anything else under section 3553(b).)

United States v. Fallin, 946 F.2d 57 (8th Cir. 1991). (Upon commission of second violation of supervised release, District Court revoked Fallin s release and sentenced him to serve in prison his two-year term of supervised release. Fallin complained sentence imposed is greater than recommended sentencing range set out in policy statement s revocation table, § 7B1.4(a)(2). While this Court agrees District Court should have considered policy statements upon revocation, any error was harmless given Fallin s blatant defiance of terms of supervised release and sentence of imprisonment was appropriate, within statutory maximum.)

United States v. Williams, 943 F.2d 896 (8th Cir. 1991). (Remand for resentencing. This Court held it was error for District Court in sentencing defendant after revocation of probation to apply Chapter 7 policy statements effective November 1, 1990, instead of statutes and Guidelines under which he was originally sentenced in August 1988.)

United States v. Oliver, 931 F.2d 463 (8th Cir. 1991). (District Court revoked Oliver s supervised release based on his testing positive for drugs on numerous occasions and failing to show up for treatment sessions. This Court holds drug testing as condition of supervised release did not violate Fourth Amendment, and was appropriate where Oliver admitted at time of original sentence he was drug addict who stole checks from mail to finance his addiction. Eighteen-month sentence imposed on revocation exceeded sentence for underlying conviction, but was reasonable and well within statutory limits. Sentence upon revocation is controlled by 18 U.S.C. § 3583.)

United States v. Von Washington, 915 F.2d 390 (8th Cir. 1990). (This Court held following probation revocation, District Court must impose sentence that was available at time of original

sentence.)

**Part B. Probation and Supervised Release Violations**

**§ 7B1.1 (Classification of Violations):**

United States v. Yates, 304 F.3d 818 (8th Cir. 2002) (RILEY,* BEAM, MELLOY). (Because Yates committed forcible assault rather than simple assault, District Court did not err in sentencing him under range for Grade A rather than Grade C violation of supervised release), cert. denied, 123 S. Ct. 1485 (2003).

United States v. Grimes, 54 F.3d 489 (8th Cir. 1995). (Grimes asserted District Court erred in concluding false statements he made in monthly reports constituted grade B violations rather than grade C violations. District Court based its conclusion that false statements to probation officer were grade B on violation of 18 U.S.C. § 1001. This Court rejects Second Circuit reasoning and concludes § 1001 may be applied to false statements in monthly supervision report because such statements do not relate to Court s adjudicative function; function of report is predominately supervisory and administrative. Grimes also asserted classifying false statements as grade B violations is contrary to spirit of Guidelines and he was not on notice such statements could violate § 1001. Warning was sufficient as each report filed by Grimes referred to statute and warned false statements could result in imprisonment and revocation. Even if false statements were classified as grade C, action of District Court could be justified under Chapter VII (maximum sentence of 2 years because offense for which Grimes was convicted was Class C felony combined with number of violations committed by Grimes and their nature--no abuse of discretion in imposition of 12-month sentence.)

**§ 7B1.3 (Revocation of Probation or Supervised Release):**

United States v. Tschebaum, 306 F.3d 540 (8th Cir. 2002) (HANSEN, MORRIS S. ARNOLD,* PRATT). (When revoking probation, District Court is not limited to sentence within Guidelines range established at time of original sentencing: it is permitted to begin sentencing process anew and impose any sentence authorized by statute.)

United States v. Mayotte, 249 F.3d 797 (8th Cir. 2001) (HANSEN, HEANEY, BEAM) (per curiam). (While on supervised release, defendant violated its conditions and committed new crime. His supervised release was revoked, and District Court made revocation sentence consecutive to any sentence he later received for this new crime for which he had been charged--but not convicted or sentenced--in state Court. This Court concludes that it was within District Court's broad discretion to make revocation sentence consecutive to yet-to-be-imposed state sentence.)

United States v. Iversen, 90 F.3d 1340 (8th Cir. 1996). (Iversen contends District Court erred by revoking her probation and sentencing her to six months imprisonment. Iversen argues evidence on which Court relied in revoking probation was uncorroborated and unreliable and effectively denied her opportunity to challenge evidence. Evidence was more than sufficient to establish Iversen s violations of her probation: she admitted violating probation by failing to

appear for psychological evaluation and by moving to another state without first obtaining probation officer s approval. Furthermore, there was testimonial evidence about Iversen s shoplifting (another violation) and Iversen s counsel had opportunity to cross-examine this witness so her rights to defend herself were protected in process. Iversen s contention she should have received credit from District Court for three months she spent in home detention is claim which should have been presented first to Bureau of Prisons.

Iversen also contended maximum sentence of imprisonment she could receive upon violating probation was three months. This Court finds sentence imposed after Iversen violated her probation--six months imprisonment plus three years supervised release--was within range of sentences available at time of initial sentencing. Fact she had already served three months home detention as condition of probation did not limit maximum sentence available to District Court.

Iversen also argued District Court denied her right of allocution at time of sentencing upon revocation of her probation. Assuming Iversen had right at this stage, this Court finds right was satisfied as course of hearing made clear Iversen knew she had right to speak on any subject prior to imposition of sentencing.)

United States v. Cotroneo, 89 F.3d 510 (8th Cir.) (While Cotroneo was serving two concurrent terms of supervised release on convictions for credit card fraud and escape, he violated certain conditions of release and after revocation hearing, District Court revoked Cotroneo s supervised release and sentenced him to two consecutive periods of 24 months imprisonment on two convictions. On appeal, Cotroneo argues that upon revocation, Court should have imposed concurrent rather than consecutive sentences. This Court concludes District Court acted within its discretion in sentencing Cotroneo to consecutive terms, 18 U.S.C. § 3584(a).), cert. denied, 519 U.S. 1018 (1996).

United States v. Evans, 87 F.3d 1009 (8th Cir. 1996). (This circuit has always permitted "stacking" supervised release terms and Congress has amended 18 U.S.C. § 3583(h) to make clear "stacking" was permissible. Fact that Fifth Circuit prohibited "stacking" is time Evans was originally convicted is irrelevant as amended statute applied to his case in 1995 because District Court did not increase sentence for his original crime, but merely punished him for violating his supervised release, event that occurred after amendment became effective. Evans s transfer from W.D. Texas to E.D. Missouri (transfer to jurisdiction which permitted "stacking") did not modify terms and conditions of his release.)

United States v. Caves, 73 F.3d 823 (8th Cir. 1996). (Caves pleaded guilty to distributing marijuana in E.D. Ok. and was sentenced to 108 months imprisonment. Government then commenced supervised release revocation proceeding in Minn., at which Caves admitted Ok. drug conviction violated condition of supervised release. District Court sentenced him to 12 months in prison, to be served consecutively to Ok. sentence. Caves urged Court to exercise discretion and impose concurrent revocation sentence because his original offense conduct and violation of supervised release had already resulted in increased prison term imposed in Ok. Nevertheless, District Court imposed 12-month consecutive sentence. On appeal, Caves argues reversal warranted because District Court did not state on record it had considered sentencing factors specified in 18 U.S.C. § 3583(e) and did not explain reasons for sentence imposed. This Court affirms judgment where District Court imposed minimum sentence in range to which parties had agreed and followed

explicit policy statement in making sentence consecutive. This Court declines Caves s invitation to assume District Court did not consider basic statutory sentencing factors and rejects his contention Court abused its discretion by imposing 12-month consecutive sentence for serious violation of conditions of supervised release.)

United States v. Stephens, 65 F.3d 738 (8th Cir. 1995). (District Court revoked Stephens s supervised release and committed him to ten months imprisonment noting it was in Stephens s best interest to be housed in federal facility where he could get needed medical attention for AIDS. Stephens argued District Court erred in considering his need for medical treatment for AIDS as factor. Stephens s supervised release required him to participate in substance abuse program and substance abuse testing as deemed appropriate by probation office. Where Stephens admitted he failed to attend two counseling sessions and uncontradicted testimony indicated he failed to submit urine specimens required by drug and alcohol program to which he was assigned--and Stephens did not offer sufficient explanation to excuse any of these failures--this Court holds Stephens s failure to comply with drug testing regime imposed by conditions of his supervised release can only be seen as knowing and willful failure; therefore, as refusal to comply, he was subject to mandatory revocation requirement of 18 U.S.C. § 3583(g)(3). This Court need not and does not decide whether in case in which revocation is not mandatory, it would be improper for Court to rely upon defendant s need for medical treatment as reason for revocation.)

United States v. Levi, 2 F.3d 842 (8th Cir. 1993). (This Court rejects Levi s argument that District Court sentenced him in violation of Ex Post Facto Clause by using § 7B1.3(d) to impose additional four months imprisonment representing portion of work release component of his supervised release that remained unserved. (§ 7B1.3(d) became effective 11/1/90, subsequent to time Levi committed underlying offense and while serving his original 21-month term of imprisonment; it did, however, become effective before he began serving any of his supervised release term). After holding that Ex Post Fact Clause was not implicated, this Court also rejected Levi s assertion that District Court exceeded its authority by imposing on him both sentence for violation of supervised release and one for unserved portion of his work release. Levi pointed to disjunctive options available under 18 U.S.C. § 3583(e). This Court found that third option explicitly permitted sentencing judge to revoke offender s term of supervised release and to require offender to serve in prison all or part of term of supervised release without credit for time previously served on post-release supervision. Furthermore, this Court determines that District Court could have reached same revocation sentence under either older version, §§ 7A1.3 and 7A1.4 and newer version, § 7B1.3(d) of Chapter VII policy statements with imposition of 13-month term of imprisonment following revocation of Levi s supervised release.)

United States v. Krabbenhoft, 998 F.2d 591 (8th Cir. 1993). (Krabbenhoft argued District Court exceeded its authority by combining 18 U.S.C. § 3583(e) alternatives rather than choosing only one of four alternatives listed in statute. After Krabbenhoft pleaded guilty to state Court crime, thus violating condition of his supervised release, District Court revoked his supervised release and sentenced him to 15-month term of imprisonment--Krabbenhoft argued that his term of supervised release was extended and this "extended" term of supervised release was revoked and prison term imposed equal in length to "extended" term of supervised release. This Court concludes District Court did not extend Krabbenhoft s term of supervised release, and thus did not combine

alternatives contained in § 3583(e). This Court concludes that "term of supervised release" as used in section 3583(e) means term of supervised release as originally imposed by District Court at sentencing. In this case, District Court relied on § 3583(e)(3) to revoke Krabbenhoft s two-year term of supervised release and order him to serve 15 months in prison.)

United States v. Glasener, 981 F.2d 973 (8th Cir. 1992). (The District Court did not err in ordering that sentences run consecutively despite technicality that Glasener was sentenced for supervised release violation before he was sentenced for felon in possession of firearm charge. Mere order does not alter result; there is no conflict between chapters 5 (§ 5G1.3(b)) and 7. Sentencing Commission adopted "breach of trust" approach, sanction for which should be in addition or consecutive to any sentence imposed for new conduct.)

United States v. Smeathers, 930 F.2d 18 (8th Cir. 1991). (No abuse of discretion in District Court s imposition of sentence where it properly considered factors listed in 18 U.S.C. § 3553(a) and Guidelines sentencing range for new criminal conduct, and concluded two-year sentence was appropriate in order to deter Smeathers from further criminal conduct and to protect public from further crimes.)

**§ 7B1.3(f) (Consecutive to Any Other Prison Sentence Defendant is Serving):**

United States v. Brown, 198 F.3d 713 (8th Cir. 1999) (McMILLIAN, RICHARD S. ARNOLD, HANSEN) (per curiam). (Defendant argues this subsection is invalid because it conflicts with federal statutes such as 28 U.S.C. §§ 991(b)(1)(B) and 994(f). Reviewing for plain error, this Court notes defendant has not pointed to any case law invalidating this section on asserted grounds, and this Court is not aware of any. Moreover, any invalidity in § 7B1.3(f) would not have affected defendant's substantial rights because section is merely advisory, and District Court was free to disregard it; thus Court did not plainly err.)

**§ 7B1.4 (Term of Imprisonment):**

United States v. Touche, 323 F.3d 1105 (8th Cir. 2003) (WOLLMAN, JOHN GIBSON,* MELLOY). (Sentence imposed by District Court upon revocation of supervised release, if below statutory maximum, is reviewed for abuse of discretion. Fifteen-month prison term, exceeding range of four to ten months recommended by non-binding policy statements in Chapter 7, was not abuse of discretion where District Court considered factors set forth in 18 U.S.C. § 3553(a) and concluded that defendant's use of drugs and alcohol within week after being released from prison merited longer sentence. Additionally, District Court is entitled to consider any leniency defendant received at original sentencing in determining appropriate length of revocation sentence.)

United States v. Holmes, 283 F.3d 966 (8th Cir. 2002) (HANSEN, McMILLIAN, BEAM*). (Although District Court must consider policy statements, it is free to impose revocation sentence outside of suggested range when in its considered discretion such sentence is warranted. District Court explicitly considered relevant factors and did not abuse its discretion in sentencing defendant to double maximum recommended, so that defendant could participate in drug treatment program.)

United States v. Brown, 198 F.3d 713 (8th Cir. 1999) (McMILLIAN, RICHARD S.

ARNOLD, HANSEN) (per curiam). (Because there is no evidence in record suggesting that District Court was unaware it was not bound by policy statement's recommended range of imprisonment, and because defendant stressed to District Court nonbinding nature of policy statement, this Court concludes District Court was aware of its discretion to deviate from them.)

United States v. Shaw, 180 F.3d 920 (8th Cir. 1999) (FAGG, HANSEN, MORRIS SHEPPARD ARNOLD) (per curiam). (Shaw appeals sentence he received on revocation of supervised release because it was above recommended range and, until probation officer expressed concern about Shaw's intravenous drug use and suicidal ideations, Court had been willing to continue hearing so Shaw could participate in outpatient counseling. Chapter 7 Guidelines are purely advisory policy statements, and thus revocation sentence exceeding suggested range is not "upward departure"; because revocation sentence was within statutory maximum allowed for revocations, Shaw's argument regarding lack of notice fails. Court also rejects contention that defense counsel was denied opportunity to address Shaw's drug use and mental state before sentence was imposed, and concludes District Court did not abuse its discretion in imposing 24-month prison term in light of nature of supervised release violations and Court's goals in sentencing Shaw.)

United States v. Kaniss, 150 F.3d 967 (8th Cir. 1998). ((1) District Court did not abuse its discretion in sentencing Kaniss to longer prison term than that suggested by § 7B1.4, which is nonbinding recommendation. Court sentenced Kaniss as it did because he repeatedly violated conditions of his release, Kaniss's first sentence was lenient, and Kanis failed to take advantage of available substance abuse treatment programs--all factors that were proper for District Court to consider. (2) This Court rejects suggestion that District Court was under misimpression that it had to sentence Kaniss to prison when more lenient option was available; District Court never said anything to suggest that it believed it was required to sentence Kaniss to prison. District Courts are presumed to know applicable law, and Kaniss has not rebutted this presumption.)

United States v. Pierce, 132 F.3d 1207 (8th Cir. 1997). (This Court reads Violent Crime Control and Law Enforcement Act of 1994 to permit District Court to choose to impose program of treatment rather than incarceration, if one on probation fails drug test; § 7B1.4 (comment. n.6) supports interpretation. Thus, District Court had discretion to provide for treatment rather than imprisonment. This Court not convinced District Court recognized it had alternative, and thus, it remands to District Court to determine proper sentence it desires to impose.)

United States v. Thornell, 128 F.3d 687 (8th Cir. 1997). (Upon revocation of supervised release, District Court sentenced Thornell to 14 months confinement, term in excess of range indicated by Sentencing Commission s non-binding policy statements (3-9 months). Thornell contends it was unreasonable and abuse of discretion for District Court to impose sentence based on Court's perception of her need for intensive and continuous drug treatment. This Court views District Court's action as judicious and carefully tailored to needs of particular case and offender (18 U.S.C. §§ 3553(a)(1), (a)(2)(D). Thornell had failed in-patient and out-patient treatment programs after release from prison, and District Court believed best chance she had of retaining her parental rights and being reunited with children lay in intensive residential treatment program available from Bureau of Prisons. This Court also notes 14-month sentence imposed was well within statutory maximum of two years.)

United States v. Carr, 66 F.3d 981 (8th Cir. 1995). (At his supervised release revocation hearing, Carr pleaded guilty to leaving inpatient substance abuse program (dismissed were charges of use of cocaine and marijuana and failure to submit two urinalyses). In accordance with 18 U.S.C. § 3583(e)(3), District Court sentenced Carr to 24 months imprisonment. Carr argues Chapter Seven narrows applicability of § 3583(e)(3) as § 7B1.4 sets out schedule indicating appropriate prison terms following revocation--suggested range for Carr is 7-13 months. Upon review of this statutory interpretation, this Court reviews de novo and states Carr s argument runs counter to established law of circuit that Chapter Seven serves non-binding, advisory role with District Court free to depart from suggested sentences when in its discretion, such departure is warranted. Carr offered no compelling rationale for this Court to change its position on interplay between § 3583(e)(3) and Chapter Seven, to produce reduction in his sentence.)

United States v. Byrkett, 961 F.2d 1399 (8th Cir. 1992). (Following Byrkett s guilty plea to forgery of endorsement on United States Treasury check, District Court determined applicable guideline range was 0-6 months and sentenced him to two years probation. Byrkett later violated conditions of probation by possessing controlled substance and Court revoked his probation. In such circumstances, Anti Drug-Abuse Act of 1988 requires sentence of at least one-third of original sentence. This Court agrees with Ninth Circuit analysis, original sentence includes term of probation (as opposed to any other sentence available). Thus, sentence of eight months imprisonment was minimum District Court could impose.)