SELECTED GUIDELINE APPLICATION DECISIONS FOR THE TENTH CIRCUIT

Prepared by the
Office of General Counsel
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CHAPTER ONE: *Introduction and General Application Principles*

Part A General Application Principles

§1B1.3 Relevant Conduct

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

See United States v. Boyd, 289 F.3d 1254 (10th Cir. 2002), §2D1.1, p. 6.

See United States v. Holbert, 285 F.3d 1257 (10th Cir. 2002), §3A1.3, p. 18.

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

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

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

United States v. Tran, 285 F.3d 934 (10th Cir. 2002). The district court did not err in finding that the defendant was engaged in a common scheme with his codefendants and therefore

should be held responsible for their criminal conduct as well as his own. Looking to the record of facts from the district court, the court held on appeal "the acts of [the defendant's] codefendants were performed in furtherance of jointly undertaken criminal activity that was both reasonably foreseeable to him and within the scope of his agreement" and thus the guideline was appropriate. *Id*. at 938.

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

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

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

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

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

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against the Person

§2A1.1 First Degree Murder

See United States v. Hanson, 264 F.3d 988 (10th Cir. 2001), §5K2.0, p. 30.

§2A1.2 Second Degree Murder

See United States v. Hanson, 264 F.3d 988 (10th Cir. 2001), §5K2.0, p. 30.

§2A2.2 Aggravated Assault

United States v. Pettigrew, 468 F.3d 626 (10th Cir. 2006), *cert. denied*, No. 06-8931, 2007 WL 159985 (U.S. Feb. 20, 2007). The Tenth Circuit upheld the district court's application of an upward departure on grounds that the defendant's conduct, which included driving with a blood-alcohol level approximately three times the legal limit, crossing a highway against traffic, and doing so with a history of alcohol abuse resulting in the death of at least one other person, was so excessively reckless as to put the case outside the heartland of §2A2.2 cases.

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

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

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

United States v. Drewry, 365 F.3d 957 (10th Cir. 2004), *cert. granted, judgment vacated*, 543 U.S. 1103 (2005), *opinion reinstated*, 133 Fed. Appx. 543 (10th Cir.), *cert. denied*, 126 S.Ct.

457 (2005). The defendant was convicted of physical and sexual abuse of four children in Indian country. The district court enhanced his sentence under §2A3.1(b)(1) for the use of force or threats in the course of sexually assaulting one of the children. The evidence established that the eleven year old victim was intimidated and threatened over a lengthy period of time. The child stated that she was scared of defendant, who was frequently violent with her and her siblings, that he had pulled her hair, hit her face, and thrown her to the floor and stomped on her stomach, and that he once told her he might kill her and bury her by the creek. The Tenth Circuit held that the victim's submission to the defendant's sexual abuse was a result of the fear of force and, therefore, the district court properly enhanced the defendant's sentence on basis of use of force or threats of force.

Part B Offenses Involving Property

§2B1.1 Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

United States v. Lin, 410 F.3d 1187 (10th Cir. 2005). Despite the parties' stipulation to an actual loss amount, the district court calculated the defendant's sentence by using the aggregate credit limits of all altered or counterfeit credit cards in the defendant's possession. The Tenth Circuit held that the district court could aggregate the credit limits of all counterfeit or altered credit cards in defendants' possession to reach the amount of loss for guideline sentencing purposes, when sentencing defendants for using altered or counterfeit access devices, absent evidence at sentencing that defendants did not intend to use maximum credit limit of the cards. The amount of loss to be considered is the defendant's intended, rather than actual, loss, if an intended loss can be determined, and if the intended loss exceeds the amount of actual loss. Given the lack of record evidence to suggest that the defendant did not intend to use the maximum credit limits of the cards, the district court did not commit clear error when it calculated the intended loss amount. The court also upheld the enhancement for production or trafficking in unauthorized access devices. The definition of the term "produce" includes altering and testimony indicated that the defendant had attempted to iron silver foil on several credit cards to transfer silver from the foil to the embossed numbers on the cards.

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

§2B3.1 Robbery

United States v. Arevalo, 242 F.3d 925 (10th Cir. 2001). The notes that the defendant handed to the tellers during the robbery constituted "threats of death" warranting a two-level enhancement under §2B3.1(b)(2)(F). The defendant's two statements "I have a gun and I'm willing to use it" and "If you do what I say, you will live" inferred that failure to comply with the defendant's instructions would result in death.

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

United States v. Metzger, 233 F.3d 1226 (10th Cir. 2000). The defendant was convicted of robbery of a credit union during which a police officer mistakenly shot a driver in the parking lot whom he believed to be the perpetrator. The district court applied the bodily injury enhancement under §2B3.1(b)(3)(B) to increase a defendant's sentence. The Tenth Circuit held that the district court properly applied the four-level enhancement under §2B3.1(b)(3)(B) because the victim's injury was a reasonably foreseeable result of the defendant's conduct. *See United States v. Malone*, 222 F.3d 1286, 1296 (10th Cir.), *cert. denied*, 531 U.S. 1028 (2000) (the district court's decision to apply the four-level enhancement under §2B3.1(b)(4)(A) based on the defendant's abduction of the victim in order to facilitate the commission of the carjacking was not plain error).

United States v. Pearson, 211 F.3d 524, 527 (10th Cir.), *cert. denied*, 531 U.S. 899 (2000). The defendant's bank robbery offense level was increased under §2B3.1(b) for physically restraining bank personnel with a gun. He received a consecutive sentence for his 18 U.S.C. 924(c) conviction. The Tenth Circuit held that the district court properly increased the bank robbery offense level for physical restraint with a gun. No impermissible double counting occurred because physical restraint with a gun during a robbery under §2B3.1(b)(4)(B) and the possession of the firearm under section 924(c) involved two distinct acts and punished two distinct harms. *See also United States v. Rucker*, 178 F.3d 1369 (10th Cir.), *cert. denied*, 528 U.S. 957 (1999) (enhancement for otherwise using a gun and for physical restraint of victims, stemming from the defendant's single act of pointing the gun at the victims, was not improper double counting).

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

United States v. Bruce, 78 F.3d 1506 (10th Cir.), *cert. denied*, 519 U.S. 854 (1996). The application of a five-level enhancement under §2B3.2(b)(3)(A)(iii) was warranted where defendant possessed weapons at home when he mailed an extortion letter threatening their use. The defendant admitted to possessing the weapons prior to his arrest and the police found weapons in defendant's home upon searching it. The circuit court held that the defendant's weapons possession demonstrated that the defendant was prepared to follow through with his threats if his monetary demands were not met.

§2B5.3 Criminal Infringement of Copyright or Trademark

United States v. Foote, 413 F.3d 1240 (10th Cir. 2005). The defendant participated in a conspiracy to traffic in counterfeit goods. Because an exact record of the defendant's sales was

not available, the district court calculated the retail value of the infringing goods seized by the total of the defendant's bank account deposits and cashed checks during the relevant time period. The district court then subtracted the defendant's legitimate income and reduced the resulting value by ten percent to reflect its determination that no more than that proportion of goods sold at the defendant's store constituted non-counterfeit merchandise. The Tenth Circuit held that district courts have "considerable leeway in assessing the retail value of the infringing items," and "need only make a reasonable estimate of the loss, given the available information." In the absence of more accurate information indicating the retail value of the counterfeit goods sold by the defendant, the Tenth Circuit held that the sentencing court's decision to include bank account transactions in its calculation did not constitute clear error.

Part D Offenses Involving Drugs

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

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

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

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

United States v. Higgins, 282 F.3d 1261 (10th Cir. 2002). The sentencing court determined the amount of methamphetamine attributed to the defendants based on testimony regarding two quantities of a chemical used to manufacture the drug. The Tenth Circuit held that

while a court's determination of drug quantity attributed to defendants may be an approximation, the estimate used to establish the offense level under the guidelines must have "some basis of support in the facts of the particular case" and must have "sufficient indicia of reliability." Finding that the estimates of methamphetamine attributable to the defendants did not have an indicia of reliability, the Tenth Circuit remanded the case for sentencing.

United States v. Pompey, 264 F.3d 1176 (10th Cir. 2001), *cert. denied*, 534 U.S. 1117 (2002). The district court did not err in enhancing the defendant's sentence by two levels for possession of a firearm during the course of a drug conspiracy. Once the government has satisfied its initial burden showing a temporal and spatial relationship among the weapon, the defendant, and the drug trafficking, the burden shifts to the defendant to prove that it is clearly improbable that the weapon was connected with the offense. Actual seizure from the defendant is not necessary.

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

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

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

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

See United States v. Smith, 264 F.3d 1012 (10th Cir. 2001), §2D1.1, p. 7.

Part F Offenses Involving Fraud or Deceit

§2F1.1 Fraud and Deceit

United States v. Banta, 127 F.3d 982 (10th Cir. 1997). The defendant was properly held responsible for the value of vehicles obtained through bank fraud despite the fact that the vehicles were ultimately recovered. The defendant's conduct in furnishing to the bank a false

address and telephone number and his failure to make even one payment were reasonably seen by the district court as evidence of the defendant's intent to permanently deprive the bank of the vehicles.

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

United States v. Lewis, 240 F.3d 866 (10th Cir. 2001). The defendant was convicted of violating the Lacy Act, in connection with a commercial elk hunting venture that he ran from his 320-acre tract of property located adjacent to wildlife refuge. The district court included in its calculation of loss under §2F1.1 value of the elk intended to be killed, along with the value of the other elk actually killed. The circuit court held that the district court reasonably concluded that the defendant intended to cause the killing of a second elk and, as such, its value should be included in the calculation of loss in the defendant's case. *See United States v. Nichols*, 229 F.3d 975, 982 (10th Cir. 2000) (entire amount of bad checks written on an account acquired by using a false social security number can be considered in calculating the loss, even though the bank recovered some of the losses).

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

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

United States v. Garcia, 411 F.3d 1173 (10th Cir. 2005). The defendant pled guilty to interstate transportation of child pornography, based on sending photos to an undercover agent which depicted minors engaging in sexual conduct with adults. In the course of the interaction with the agent, the defendant suggested specific acts of the mother and girls that he wanted the agent to photograph. The sentencing court applied the cross reference in §2G2.2(c)(1) to §2G2.1, which is applicable if the offense involved causing, transporting, permitting or seeking by advertisement to have a minor engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct. The Tenth Circuit upheld application of the cross-reference, reasoning that the defendant's quest to obtain sexually explicit photos was part of a common scheme and common course of conduct and that the defendant sent his pornography as a trade for the pornographic pictures of the girls.

United States v. Kimler, 335 F.3d 1132 (10th Cir.), *cert. denied*, 124 S. Ct. 945 (2003). The defendant was convicted of receiving or distributing, by computer, images of minors engaged in sexually explicit conduct; possession of the images; and distribution of the images. On appeal, the defendant claimed that the district court erred (1) by imposing the enhancement

under §2G2.2(b)(1) for possession of images of prepubescent children; and (2) by imposing the enhancement for sadistic conduct under §2G2.2(b)(3). The defendant argued that expert testimony was required to prove that the minors in the images were prepubescent. The court of appeals stated that a case by case determination must be made as to whether a lay jury can determine on its own, without the assistance of expert testimony, the age of a child in a pornographic image. In this case, the court found that the images so obviously depicted prepubescent children that no expert testimony was required. The court of appeals affirmed the enhancement for possessing sadistic images under §2G2.2(b)(3), concluding that the district court applied the enhancement because it found that some of the images depicted anal or vaginal penetration of prepubescent children by adults causing pain and humiliation. It found that this conduct was not covered in the statutory definitions of the offense of conviction. Finally, the court of appeals held that expert testimony is not required to justify an enhancement under §2G2.2(b)(3).

United States v. Plotts, 347 F.3d 873 (10th Cir. 2003). The defendant pled guilty to one count of receiving child pornography over the Internet in violation of 18 U.S.C. § 2252(a)(2), and one count of criminal forfeiture in violation of 18 U.S.C. § 2253(a)(3). The district court sentenced him to 87 months of prison followed by 5 years of supervised release. The defendant challenged his sentence, arguing that the five-level sentence enhancement contained in §2G2.2(b)(4) should be read as discretionary as opposed to mandatory. The Tenth Circuit disagreed, holding that the language of the guideline is unambiguous and requires a five-level enhancement.

§2G2.4 Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct[1]

United States v. Thompson, 281 F.3d 1088 (10th Cir.), *cert. denied*, 537 U.S. 875 (2002). The district court did not err when applying a two-level enhancement under §2G2.4(b)(2) to the sentences of two defendants convicted of violating section 2252(a)(5)(B), child pornography possession. Section 2G2.4(b)(2) permits a two-level enhancement when a defendant is in possession of ten or more "items" containing visual depictions involving the sexual exploitation of a minor. Both defendants had hundreds of such depictions on less than ten computer disks and argued that the district court erred in interpreting "items" to include computer files, rather than the disks themselves. The Tenth Circuit determined that the term "items" in §2G2.4(b)(2) meant computer files, not the entire disks. A file is a different kind of container that may be transported electronically far more easily than the listed items and thus should be sufficient to trigger the enhancement under §2G2.4(b)(2).

Part J Offenses Involving the Administration of Justice

§2J1.3 Perjury or Subornation of Perjury

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

United States v. Sinclair, 109 F.3d 1527 (10th Cir. 1997). The district court assessed a three-level upward adjustment of the defendant's offense level pursuant to §2J1.3(b)(2) for substantial interference with the administration of justice. The defendant argued that the government failed to establish that his perjured testimony caused an unnecessary expenditure of substantial government or court resources. The Tenth Circuit concluded that substantial interference with the administration of justice may be inferred if the defendant concealed information of which he is the only known source. In the instant case, the district court had made a specific finding that the perjured testimony offered by the defendant at the trial was the cornerstone of the defense and led to additional false testimony.

Part K Offenses Involving Public Safety

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

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

United States v. Blackwell, 323 F.3d 1256 (10th Cir. 2003). During a gathering at a truck stop, police officers aided a private security guard in dispersing a large crowd of young people that congregated there after local nightclubs had closed. The record reflected that three of the four officers that reported to the scene personally saw a red laser-like beam that passed over their bodies that the security guard later confirmed was coming from the driver's seat of the vehicle where defendant was seated. The Tenth Circuit concluded that sufficient evidence supported the finding that the defendant pointed the gun at the officers or that the officers were in fear of imminent bodily threat, and supported application of a four-level enhancement under §2K2.1(b)(5) on the theory that the defendant possessed the weapon in connection with the state crime of felony menacing. *See also United States v. Norris*, 319 F.3d 1278, 1284-85 (10th Cir. 2003) (imposition of upward sentencing enhancement for use or possession of firearm in connection with another felony offense was warranted).

United States v. Collins, 313 F.3d 1251 (10th Cir. 2002). The district court erred in determining that application of §2K2.1(b)(2) was precluded by two instances of lawful, non-sporting use. Section 2K2.1(b)(2) should be read broadly to encompass circumstances that are consistent with the provision's intent to provide a lesser punishment for possession of a firearm that is more benign. The district court must examine the totality of the circumstances, including the specific circumstances of possession and actual use, rather than relying on a single factor to preclude application of the guideline.

United States v. Constantine, 263 F.3d 1122 (10th Cir. 2001). The defendant pled guilty to possession of an unregistered firearm. He was in possession of the firearm during the burglary of a home. In addition to the .22 caliber handgun, the defendant was also found in possession of

a homemade silencer, extra ammunition, a knife, and an expandable baton. The Tenth Circuit held that a weapon is connected with the felony and the enhancement was appropriate when the weapon facilitated or had the potential to facilitate the underlying felony. *See also United States v. Eaton*, 260 F.3d 1232 (10th Cir. 2001) (the district court did not err in enhancing the defendant's sentence based on his possession of a pipe bomb with the knowledge or intent that it will be used in connection with another felony offense); *United States v. Walters*, 269 F.3d 1207 (10th Cir. 2001) (the district court did not err when it applied a four-level enhancement under §2K2.1(b)(5) to a defendant for possession of a stolen gun in connection with the felony of unlawfully possessing a stolen truck).

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

United States v. Jardine, 364 F.3d 1200 (10th Cir. 2004), *cert. granted, judgment vacated*, 543 U.S. 1102 (2005), *opinion reinstated*, 406 F.3d 1261 (10th Cir. 2005), *cert. denied*, 127 S.Ct. 568 (2006). The defendant was convicted of being a felon and person previously convicted of a domestic violence crime in possession of a firearm. The district court applied the cross-reference in §2K2.1(c) to §2X1.1 because the defendant had used or possessed firearms in connection with drug trafficking activities. Although there was no proof that the firearms which formed the basis for the defendant's conviction were used in connection with his drug trafficking activities, the district court applied the cross-reference, reasoning that such a connection is not necessary. The Tenth Circuit affirmed, holding that §2K2.1(c)(1) applies to any firearm or ammunition, including that firearm or ammunition used by a defendant in connection with another offense, even if different from the particular firearm or ammunition upon which defendant's felon-in-possession conviction is based.

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

United States v. Battle, 289 F.3d 661 (10th Cir.), *cert. denied*, 537 U.S. 856 (2002). The district court did not err in choosing to sentence the defendant to consecutive sentences for separate crimes under 18 U.S.C. § 924. The court held that section 924(c)(1) mandates a

consecutive sentence for the use of a firearm in the commission of a violent crime, and section 924(c) mandates a consecutive sentence in addition to the sentence for use of a firearm used in the commission of a violent crime where the evidence supports the aggravating factors outlined in section 924(j).

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

Part L Offenses Involving Immigration, Naturalization, and Passports

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

United States v. Aranda-Flores, 450 F.3d 1141 (10th Cir. 2006). The defendant contested a reckless conduct enhancement imposed pursuant to §2L1.1(b)(5), and the Tenth Circuit held that the defendant's conduct did not support the enhancement. The defendant "departed at night to avoid being apprehended by law enforcement; [. . .] chose a circuitous route on a two-lane highway instead of a major interstate; [. . .] drove eight-and-a-half hours and made only one brief stop for gasoline; [. . .] fell asleep at the wheel; and [. . .] did not have a United States driver's license." The Tenth Circuit concluded that, although the defendant's conduct did in fact cause several deaths due to his collision with another vehicle, the conduct was not reckless because falling asleep at the wheel did not in and of itself constitute reckless conduct. Rather, the Tenth Circuit said, it looked to factors such as "lack of sleep, length of time at the wheel, presence of sure warning signs, influence of drugs or alcohol, and strenuous activities before driving." With no evidence of any such factors in the record, the Tenth Circuit concluded that the reckless conduct enhancement was improperly applied.

See United States v. Jose-Gonzalez, 291 F.3d 697 (10th Cir. 2002), §5K2.0, p. 30.

*United States v. Maldonado-Ramire*s, 384 F.3d 1228 (10th Cir. 2004). The defendant pleaded guilty to transporting illegal aliens within the United States. In arriving at a sentence under the guidelines, the district court increased the defendant's base offense level by two points pursuant to §2L1.1(b)(5), concluding that the defendant's offense conduct had "recklessly creat[ed] a substantial risk of death or serious bodily injury to another person." The evidence established that the defendant was driving a minivan containing six illegal aliens when he lost control of the minivan, causing it to roll over. One of the passengers was killed in the accident and several others were injured. At the time of the accident, one passenger was sitting in the front passenger seat and the remaining five passengers were lying on the floor of the minivan.

The rear seats and seatbelts had been removed from the van and the defendant had directed the aliens to lie down on the floor of the minivan to avoid detection. The Tenth Circuit affirmed the district court's finding.

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

United States v. Gonzalez, 419 F.3d 1090 (10th Cir. 2005). The defendant was convicted of entering the United States illegally after having been deported. He argued on appeal that his state conviction for attempted aggravated assault should not be considered a crime of violence under §2L1.2 because he was sentenced to probation rather than to imprisonment. The Tenth Circuit held that, unlike 8 U.S.C. § 1326(b)(2)'s requirement that an aggravated felony must result in a sentence of at least one year, §2L1.2 does not require that a prior conviction result in a sentence of any particular length to be a crime of violence. Therefore, the court held that the district court did not err in applying the guidelines when it enhanced the defendant's base offense level by sixteen under §2L1.2(b)(1)(A)(ii), based upon the prior Kansas conviction for attempted aggravated assault, even though that prior conviction resulted in only probation.

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

United States v. Martinez-Candejas, 347 F.3d 853 (10th Cir. 2003). The defendant pled guilty to illegally reentering the United States after deportation in violation 8 U.S.C. § 1326. The district court determined that the defendant's prior offense for conspiracy to transport and harbor illegal aliens had been committed for profit, thereby triggering a 16-level enhancement under §2L1.2(b)(1)(A). The Tenth Circuit examined 1) whether the prior conspiracy offense constituted an alien smuggling offense and 2) whether a court may look beyond the elements of this prior offense to determine it was committed for profit. In terms of the first issue, the Tenth Circuit determined that the phrase "alien smuggling offense" should be construed broadly, and includes transportation and harboring aliens. Regarding the second issue, the Tenth Circuit concluded that the district court properly considered the underlying facts of the prior offense to determine whether it was committed for profit.

United States v. Miranda-Ramirez, 309 F.3d 1255 (10th Cir. 2002), *cert. denied*, 537 U.S. 1244 (2003). The district court did not err when it determined that it lacked authority to depart downward based upon the circumstances surrounding the defendant's reliance on Form I-

294. A departure based upon Form I-294 is inconsistent with the goals of the sentencing guidelines.

United States v. Munguia-Sanchez, 365 F.3d 877 (10th Cir. 2004), *cert. denied,* 537 U.S. 896 (2004). The appellate court affirmed the district court's holding that a sexual assault of a child constitutes a crime of violence under §2L1.2(b)(1)(A)(ii). A conviction for sexual assault on a child constitutes a crime of violence regardless of the victim's alleged consent.

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

United States v. Saenz-Mendoza, 287 F.3d 1011 (10th Cir.), *cert. denied,* 537 U.S. 923 (2002). The district court did not err in finding that a state misdemeanor qualified as an "aggravated felony" for purposes of an enhancement under the guideline. An offense need not be classified as a felony to qualify as an aggravated felony as that term is statutorily defined [in the Immigration and Nationality Act].

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

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

United States v. Vasquez-Flores, 265 F.3d 1122 (10th Cir. 2001), *cert. denied,* 534 U.S. 1165 (2002). The district court did not err in imposing a sentencing enhancement for defendant's prior conviction of attempted receiving or transferring a stolen motor vehicle. The Tenth Circuit held that whether a crime is an aggravated felony for sentencing purposes does not depend on its characterization under state law. "Theft offense" includes more than just "theft" itself. A conviction for attempting to knowingly receive or transfer a stolen motor vehicle qualifies as an aggravated felony.

Part Q Offenses Involving the Environment

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

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

United States v. Overholt, 307 F.3d 1231 (10th Cir. 2002). The district court did not err when it enhanced the defendant's offense level pursuant to §2Q1.2(b)(1)(A) for unlawfully injecting liquid waste into Class II disposal wells. The Tenth Circuit held that proof of actual contamination of the environment is not necessary to trigger §2Q1.2(b)(1)(A).

Part S Money Laundering and Monetary Transaction Reporting

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

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

Part X Other Offenses

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

United States v. Martinez, 342 F.3d 1203 (10th Cir. 2003). The defendant pled guilty to being an accessory after the fact to an attempted armed robbery in violation of 18 U.S.C. § 3. The defendant argued on appeal that the court should have used the attempt guideline, §2X1.1, as opposed to §2B3.1 when sentencing him. The Tenth Circuit held that where a defendant is convicted of an attempt crime not itself covered by a specific offense guideline, calculation of a defendant's sentence must be pursuant to §2X1.1. *Id.* at 1207. However, the Tenth Circuit upheld the sentence, finding that the defendant would not have been entitled to a §2X1.1 reduction because all necessary acts for completion of the underlying offense were present.

§2X3.1 Accessory After the Fact

United States v. Lang, 364 F.3d 1210 (10th Cir. 2004), *cert. granted, judgment vacated,* 543 U.S. 1108 (2005), *opinion reinstated in part*, 405 F.3d 1060 (10th Cir. 2005). The defendants were convicted of acting as accessories after the fact to the distribution of heroin, conspiring to do so, and other offenses. Based on its reading of §2X3.1(a), the district court considered the entire quantity of drugs distributed by the drug organization, including those about which the accessory did not know, or could not have reasonably known, when calculating the accessory's sentence. It interpreted the guidelines to require a reasonable-knowledge finding only for specific offense characteristics of the underlying offense. This presented the Tenth Circuit with an issue of first impression. Reviewing *de novo*, the Tenth Circuit held that the reasonable- knowledge requirement in cases under §2X3.1 applies only to specific offense characteristics of the underlying offense. Because drug quantity was not a specific offense characteristic of unlawfully trafficking heroin, the district court did not err in considering the entire quantity of drugs distributed by the drug organization, including those about which the accessory did not know, or could not have reasonably known, when calculating the accessory's sentence.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.1 Hate Crime Motivation or Vulnerable Victim

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

the laws of the United States, and illegal status which the court used to dub them as "vulnerable." Concluding that the district court did not merely apply a class-based enhancement to the group of illegal aliens because the victims differed in the type of vulnerabilities from which they suffered, the court affirmed the sentence.

See United States v. Holbert, 285 F.3d 1257 (10th Cir. 2002), §3A1.3, p. 18.

United States v. Proffit, 304 F.3d 1001 (10th Cir. 2002). The district court erred when it enhanced the defendant's offense level based on the victim's vulnerability. Victim vulnerability is reserved for exceptional cases in which the victim is unusually vulnerable or particularly susceptible to the crime committed. Although the victim had recently learned that he had cancer and might only have a few months to live, the victim was a sophisticated and successful businessman. The link between the victim's illness and the defendant's success in defrauding him was indirect. The court held that allowing a vulnerable victim enhancement based on illness alone would suggest that sick individuals as a group qualify as vulnerable victims.

§3A1.2 Official Victim

United States v. Blackwell, 323 F.3d 1256 (10th Cir. 2003). The district court erred in enhancing the defendant's sentence under §3A1.2(a) where his offense of conviction was possession of a weapon by a felon. The court held that application of §3A1.2(a) applies only to the offense of conviction, not the offense accompanied by relevant conduct. The offense of conviction must be motivated by the status of an "official victim" in order for the enhancement to apply.

United States v. Coldren, 359 F.3d 1253 (10th Cir.), *cert. denied*, 543 U.S. 847 (2004). The defendant was convicted of being a felon in possession of a firearm. He argued on appeal that the district court impermissibly double counted the fact that he pointed a rifle at a police officer because this conduct served as the factual basis for both the four-level increase under §2K2.1(b)(5) (use of the weapon in connection with another felony) and the three-level increase under §3A1.2(b)(1) (assaulting a police officer). The Tenth Circuit held that these sentence enhancements did not result in impermissible double counting. Although both enhancements to the defendant's offense level were based on the same incident, they were based on distinct aspects of the defendant's conduct.

§3A1.3 Restraint of Victim

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

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Lacey, 86 F.3d 956 (10th Cir.), *cert. denied*, 519 U.S. 944 (1996). "Participant" under §3B1.1 can include persons who are acquitted of criminal conduct for purposes of determining the defendant's role in the offense.

United States v. Vanmeter, 278 F.3d 1156 (10th Cir. 2002). The district court did not err in applying a two-level enhancement to a defendant who supervised another participant in a criminal scheme. Although the accomplice that the defendant supervised was not a "participant" in the commission of the crime for which the defendant was convicted, the §3B1.1 enhancement was properly applied based on the defendant's supervision of the accomplice's participation in other relevant crimes.

§3B1.2 Mitigating Role

United States v. Jeppeson, 333 F.3d 1180 (10th Cir.), *cert. denied*, 540 U.S. 992 (2003). A role in offense reduction under §3B1.2 is unavailable to a defendant who qualifies as a career offender under §4B1.1.

United States v. Salazar-Samaniega, 361 F.3d 1271 (10th Cir.), *cert. denied*, 543 U.S. 859 (2004). The defendant, convicted for possession of cocaine with intent to distribute, was not entitled to a sentence reduction for a minor role. The evidence established that the defendant transported cocaine from one state to another, and he bought and insured the carrier car. The only evidence that the defendant was not more than a transporter came from the defendant himself. The Tenth Circuit held that a defendant's own testimony that others were more heavily involved in a criminal scheme may not suffice to prove his minor or minimal participation, even if uncontradicted by other evidence, and found that the district court's conclusion that the defendant did not have a minor role was not clearly erroneous.

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

United States v. Edwards, 325 F.3d 1184 (10th Cir. 2003). The defendant objected to the district court's application of the adjustment under §3B1.3 for abusing a position of trust, arguing that she did not occupy the type of position for which §3B1.3 was designed: a position "characterized by professional or managerial discretion." The defendant's tasks were solely ministerial and the defendant had no authority to exercise discretionary judgment with respect to any part of her job. Job titles do not control whether §3B1.3 applies. In the instant case, the evidence did not support the district court's application of the abuse of trust adjustment.

United States v. Haber, 251 F.3d 881 (10th Cir.), *cert. denied*, 534 U.S. 915 (2001). The district court did not err in applying the enhancement to defendant under §3B1.3 for misrepresenting himself as a manager of an investment firm. The defendant was entrusted with

the supervision and management of the investment funds of his investors in Israeli operations, which he later converted for his personal use. By his own admission the defendant acknowledged that he was the "key man" in the purported business and that no one else had the connections he had with anyone in Israel or knew how to conduct the business. *See also United States v. Ma*, 240 F.3d 895 (10th Cir. 2001) (holding that the district court did not err in applying the sentence enhancement provision of §3B1.3 to the defendant who was a postal employee convicted of theft of undelivered United States mail while working in that position).

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

United States v. Kravchuk, 335 F.3d 1147 (10th Cir.), *cert. denied*, 540 U.S. 941 (2003). The appellate court affirmed the district court's finding that, under §3B1.4, an enhancement can be applied for the use of a minor to the defendants between the ages of 18 and 21, even though the congressional directive leading to promulgation of this section required the Sentencing Commission to promulgate sentence enhancements for a "defendant 21 years of age or older . . . if the defendant involved a minor [less than 18 years old] in the commission of the offense."

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

Part C Obstruction

§3C1.1 Obstruction of Justice

United States v. Bedford, 446 F.3d 1320 (10th Cir. 2006). The district court did not err in enhancing the defendant's sentence pursuant to §3C1.1 where the defendant actually swallowed crack cocaine during an arrest, and later attempted to hide its presence in his vomit at the police station. The district court found that the defendant's actions had prevented the police from determining the quantity of the controlled substance, and the Court of Appeals concluded that these actions were not excepted by Application Note 4(d) of the Commentary to §3C1.1 because, on the whole, they did not constitute an attempt but instead were a successful obstruction, and they were not "spontaneous or reflexive" but "deliberate action[s]." The Court of Appeals also held that, although the "material hindrance" requirement in Application Note 4(d) applies only to conduct contemporaneous with the arrest, even if it were to apply the requirement the "conspicuously low" threshold of materiality was easily satisfied given the importance of drug evidence and drug quantity in such prosecutions.

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

States v. Salazar-Samaneiga, 361 F.3d 1271 (10th Cir. 2004) (upholding application of obstruction increase for perjury at suppression hearing).

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

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

Part D Multiple Counts

§3D1.2 Groups of Closely Related Counts

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

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

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

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

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

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Brown, 316 F.3d 1151 (10th Cir. 2003). The district court erred when it concluded that §3E1.1(a) allowed a compromise one-level downward adjustment for acceptance of responsibility. The court held that §3E1.1(a) must be interpreted in a binary fashion: either the defendant qualifies for the full two-level acceptance of responsibility adjustment or the defendant gains no acceptance of responsibility adjustment at all.

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

United States v. Prince, 204 F.3d 1021 (10th Cir.), *cert. denied*, 529 U.S. 1121 (2000). The district court did not err in considering reports of the defendant's criminal conduct in prison while awaiting sentencing when determining whether acceptance of responsibility applied. The Tenth Circuit held that the government did not violate the plea agreement by supplying the probation department with the reports of the defendant's post-plea agreement conduct. The court further held that the guidelines do not prohibit a sentencing court from considering, in its discretion, criminal conduct unrelated to the offense of conviction in determining whether a defendant qualifies for an adjustment for acceptance of responsibility under §3E1.1. *See also United States v. Archuletta*, 231 F.3d 682, 686 (10th Cir. 2000) (holding that two-level reduction for acceptance of responsibility was precluded because the defendant obstructed justice by fleeing before her original sentencing hearing); *United States v. Saffo*, 227 F.3d 1260, 1271 (10th Cir. 2000), *cert. denied*, 532 U.S. 974 (2001) (holding that acceptance of responsibility reduction does not apply to a defendant who did not deny that she committed the acts that occurred but never admitted any culpability for those acts); *United States v. Patron-Montano*, 223 F.3d 1184, 1190 (10th Cir. 2000) (holding that the court can properly consider a defendant's lie about relevant conduct in evaluating the defendant's eligibility for a §3E1.1 acceptance of responsibility reduction); *United States v. Salazar-Samaneiga*, 361 F.3d 1271 (10th Cir.), *cert.*

denied, 543 U.S. 859 (2004) (reversing acceptance reduction for committing perjury at a suppression hearing and by denying guilt at trial); *United States v. Wooten*, 377 F.3d 1134 (10th Cir. 2004), *cert. denied*, 543 U.S. 993 (2004) (acknowledging the wrongfulness of one's conduct after conviction, without more, is insufficient to warrant a decrease for acceptance of responsibility).

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Bush, 405 F.3d 909 (10th Cir. 2005). The defendant challenged the district court's criminal history computation on appeal, alleging that one misdemeanor conviction was improperly included in the calculation because he was not represented by counsel in that case. The Tenth Circuit held that the defendant did not carry his burden of showing by the preponderance of evidence that he did not waive counsel previously when he pleaded guilty to misdemeanor conviction. The records of the prior conviction apparently were destroyed, the final judgment enjoyed a presumption of regularity, and the defendant did not submit an affidavit denying that he waived counsel.

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

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

United States v. Maddox, 388 F.3d 1356 (10th Cir. 2004). The district court correctly concluded that the defendant's previous failure to return to prison during a work-release program constituted an escape from prison and enhanced the defendant's sentence as a "violent felony" under 18 U.S.C. § 924(e)(1) and § 4B1.4. Tenth Circuit precedent forecloses the defendant's argument that his failure to return from the work-release program does not constitute a violent felony. *See also United States v. Nichols*, 169 F.3d 1255, 1261 (10th Cir.1999); *United States v. Moudy*, 132 F.3d 618, 620 (10th Cir. 1998).

United States v. Rosales-Garay, 283 F.3d 1200 (10th Cir.), *cert. denied*, 536 U.S. 934 (2002). The defendant was deported in 1995, after a committing a felony drug offense. He was arrested for illegal entry in the United States in 2000. Because the defendant was on probation at the time of arrest, the district court added two criminal history points under §4A1.1, which permits the enhancement if the defendant committed the instant offense while under any criminal justice sentence, including probation. The defendant claimed that the enhancement was wrongly applied because his section 1326(a) offense was a "status" offense, occurring before his probationary offense and because the two-level enhancement to a defendant "found in" the United States unfairly depends on the timing of when immigration officials "find" that defendant for purposes of section 1326(a). The Tenth Circuit rejected these arguments. Despite the fact that the defendant reentered the United States on a date prior to his state conviction and sentence, he committed the section 1326(a) offense charged in the indictment when he was found. At the time the defendant was found, he was undeniably serving a criminal probation sentence. Therefore, the district court correctly applied the enhancement under §4A1.1

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

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

§4A1.3 Adequacy of Criminal History Category

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

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

the district court was reasonable and the judge succinctly, but adequately, explained the reasons for the degree of departure from the guidelines.

United States v. Lowe, 106 F.3d 1498 (10th Cir.), *cert. denied*, 521 U.S. 1110 (1997). The district court did not err in departing above Criminal History Category VI in sentencing the defendant. It is permissible to depart upward from Criminal History Category VI when the defendant is also a career offender. In this particular case, the court departed upward based on three considerations independent of the defendant's status as a career offender, including: 1) offenses that were not included in his characterization as a career offender because they were outside of the applicable time period; 2) prior violent offenses that were not counted because they were consolidated for sentencing; and 3) the similarity between the defendant's "criminal past" and the instant offense.

United States v. Rice, 358 F.3d 1268 (10th Cir. 2004), *cert. granted, judgment vacated*, 543 U.S. 1103 (2005), *opinion reinstated*, 405 F.3d 1108 (10th Cir. 2005). The district court erroneously double counted when it used the same prior conduct of producing child pornography in Mississippi to both increase the defendant's base offense level and his criminal history category. The district court properly used the defendant's prior uncharged conduct for producing child pornography in Mississippi as relevant conduct for purposes of applying the cross-reference in §2G2.2©) and increasing his base offense level for count two. The district court should not, however, have used that prior conduct to increase the defendant's criminal history category. Because the guidelines prohibit using a prior sentence involving relevant conduct both to increase the defendant's base offense level and to increase his criminal history category, the Tenth Circuit held that such double use is also prohibited when the conduct at issue was uncharged and did not result in a sentence.

United States v. Walker, 284 F.3d 1169 (10th Cir. 2002), *appeal after remand*, 59 Fed. Appx. 278, *cert. denied*, 539 U.S. 921 (2003). The district court did not err in departing upward upon deciding that Criminal History Category VI did not adequately reflect the seriousness of the defendant's 34 total criminal history points. The district court did err, however, in relying solely on the number of criminal history points exceeding the requirement of Criminal History Category VI for the degree of departure. The district court departed one offense level for each additional conviction that was in excess of the number required to place the defendant in Criminal History Category VI. The Tenth Circuit held the explanation does nothing more than restate the justification for upward departure and does not fulfill the separate requirement of stating the reasons for imposing the particular sentence.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Gay, 240 F.3d 1222 (10th Cir.), *cert. denied*, 533 U.S. 939 (2001). The district court did not err in applying the "otherwise applicable" offense level under §2D1.1 and the specified §4B1.1 Criminal History Category VI because the offense level under the §2D1.1

was greater than the defendant's career criminal offense level. The Tenth Circuit held that the reference under §4B1.1 to the application of Criminal History Category VI to "every case" should be interpreted to mean that the sentencing court must employ category VI regardless of which offense level is applied.

See United States v. Hannah, 268 F.3d 937 (10th Cir. 2001), §4A1.3, p. 24.

See United States v. Turner, 285 F.3d 909 (10th Cir.), *cert. denied*, 537 U.S. 895 (2002), §4B1.2, p. 25.

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

See United States v. Hannah, 268 F.3d 937 (10th Cir. 2001), §4A1.3, p. 24.

United States v. Turner, 285 F.3d 909 (10th Cir.), *cert. denied*, 537 U.S. 895 (2002). The district court did not err in enhancing the defendant's sentence for an aggravated escape on the determination that the conviction was a "crime of violence." An escape always includes conduct that presents a serious potential risk of physical injury to another, for the purposes of the career offender provisions of the sentencing guidelines. Although the initial circumstances of the escape may be non-violent, such as a failure to return to a halfway house from work release, there is no way to predict what an escapee will do when encountered by the authorities.

United States v. Vigil, 334 F.3d 1215 (10th Cir.), *cert. denied*, 540 U.S. 1026 (2003). Aggravated incest is a crime of violence for purposes of §4B1.2. Aggravated incest involved conduct that presented a serious potential risk of physical injury to another under §4B1.2(a)(2) and the possibility of the child-victim's sincere consent to aggravated incest was irrelevant.

§4B1.4 Armed Career Criminal

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

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

§5C1.1 Imposition of a Term of Imprisonment

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

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

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

United States v. Stephenson, 452 F.3d 1173 (10th Cir. 2006). The defendant challenged the district court's determination that he was not eligible for safety valve relief in spite of his submission of a "proffer letter" to the government offering to provide more information. The Tenth Circuit upheld the district court's determination that the letter was insufficient to satisfy the requirement in §5C1.2(a)(5). The Tenth Circuit concluded that the district court did not err in determining that the defendant had not fully disclosed all the information he knew about the conspiracy in which he was involved, and that the government did not have an affirmative duty to seek further information from him in response to his proffer.

Part D Supervised Release

§5D1.3 Condition of Supervised Release

United States v. Walser, 275 F.3d 981 (10th Cir. 2001), *cert. denied*, 535 U.S. 1069 (2002). The district court did not err in imposing a special condition of supervised release barring a defendant convicted of child pornography from using the Internet without prior permission. Because the defendant was not completely banned from using the Internet but was required to obtain permission from the probation office to use it, the condition more readily accomplishes the goal of restricting use of the Internet and more delicately balances the protection of the public with the goals of sentencing.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

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

Part G Implementing the Total Sentence of Imprisonment

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

United States v. Wood, 386 F.3d 961 (10th Cir. 2004), *cert. denied*, 544 U.S. 913 (2005). The defendant, a Native American, pled guilty to one count of second degree burglary in Indian Country in violation of the Indian Major Crimes Act (IMCA). Federal law assimilates the crime's definition and punishment under state law because burglary is a crime not defined and punished by federal law. In the state where the offense was committed, burglary was punishable by two to seven years imprisonment. The defendant's guidelines range was zero to six months. She argued that the district court had the discretion to suspend her sentence and impose a period of probation pursuant to state law. The district court ruled that it lacked the discretion to suspend the sentence because federal law assimilated only the range of punishment between the minimum and maximum sentences set forth in the state statue. Because the guideline range fell below the minimum sentence, the district court imposed a sentence of two years. The Tenth Circuit affirmed, reasoning that when sentencing defendants for assimilated crimes, federal courts have consistently declined to assimilate state laws if such laws conflict with the guidelines and their underlying polices. Because the guidelines deny the district court the discretion to suspend a sentence of imprisonment, that option is unavailable to defendants convicted of violating the IMCA.

§5G1.2 Sentencing on Multiple Counts of Conviction

United States v. Price, 265 F.3d 1097 (10th Cir. 2001), *cert. denied*, 126 S.Ct. 731 (2005). The appellate court held that §5G1.2(d) is a mandatory provision so sentences imposed under the guidelines must be imposed consecutively when necessary to reach the total guideline punishment.

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

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

United States v. Moyer, 282 F.3d 1311 (10th Cir. 2002). The district court did not err in sentencing the defendant to consecutive, rather than concurrent, sentences under §5G1.3. The Tenth Circuit held that the district court had the discretion to sentence the defendant under §5G1.3(c) after considering the directives in §5G1.3(c) when imposing the sentence because neither §5G1.3(a) nor §5G1.3(b) applied to the defendant.

Part H Specific Offender Characteristics

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

United States v. McClatchey, 316 F.3d 1122, 1132-36 (10th Cir. 2003). The Tenth Circuit held that the defendant was not entitled to a downward departure for extraordinary family circumstances based on the defendant's care of his severely disabled 22-year-old son and the good character references for community service submitted on his behalf. The court further held that the defendant was also not entitled to an aberrant behavior downward departure based on the defendant's prior law-abiding life. The court held that a downward departure based on family circumstances was not appropriate "absent evidence that the defendant was the only individual able to provide the assistance a family member needs." *See also United States v. Reyes-Rodriquez*, 344 F.3d 1071 (10th Cir. 2003) (departures based on family circumstances require "exceptional" conditions and the defendant would have to be the only individual able to provide the assistance a family member needs to qualify for this type of departure).

Part K Departures

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

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

United States v. Doe, 398 F.3d 1254 (10th Cir. 2005). The district court notified the parties of its intent to depart upward. Both parties argued against the departure, because of the defendant's cooperation with the government. The district court refused to consider the cooperation because the government had not filed a §5K1.1 motion. The Tenth Circuit reversed,

holding that the government's decision not to file a §5K1.1 motion did not prevent the district court from fully considering the defendant's assistance in deciding whether to depart upward or in calculating the proper degree of departure. The district court erred as a matter of law when it refused to fully consider the defendant's cooperation in deciding whether to depart and in setting the degree of departure.

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

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

United States v. Benally, 215 F.3d 1068, 1078 (10th Cir. 2000), *cert. denied*, 534 U.S. 1034 (2001). Combining legally impermissible and factually inappropriate grounds for departure cannot make a case one of the extremely rare cases contemplated by §5K2.0 to warrant a downward departure.

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

United States v. Contreras, 108 F.3d 1255 (10th Cir.), *cert. denied*, 522 U.S. 839 (1997), *and cert. denied*, 528 U.S. 904 (1999). The district court erred departing downward to avoid an unwarranted disparity of sentences with her codefendant. While similar offenders engaged in similar conduct should be sentenced equivalently, disparate sentences are allowed where the disparity is explicable by the facts on the record. A defendant's sentence may not be reduced merely because a codefendant engaging in similar conduct received a shorter sentence by means of a plea agreement.

United States v. Fortier, 242 F.3d 1224 (10th Cir.), *cert. denied*, 534 U.S. 979 (2001). The defendant pled guilty to several offenses resulting from his involvement with codefendants prior to the Oklahoma City bombing of 1995. The district court did not err in imposing an

upward departure[2] for the harm resulting from crimes of which the defendant was not charged under various provisions of the guidelines, based on the defendant's knowledge of the possible consequences of his actions because there was a sufficient nexus between the defendant's admitted wrongdoing and the other crimes to permit an upward departure.

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

United States v. Jose-Gonzalez, 291 F.3d 697 (10th Cir. 2002). The district court did not err in relying on the number of deaths and injuries as a basis for an upward departure even though death and bodily injury are considered under §2L1.1. Recognizing that §2L1.1 does take into account both injury and death, the court held that the offense-level increases for multiple aliens were not intended as a means of dealing with multiple deaths or injuries. Because the circumstances of multiple deaths and injuries had not been adequately considered by the Commission, their factors supported a departure.

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

§5K2.8 Extreme Conduct (Policy Statement)

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

§5K2.9 Criminal Purpose (Policy Statement)

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

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

§5K2.13 Diminished Capacity (Policy Statement)

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

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

United States v. Webb, 49 F.3d 636 (10th Cir.), *cert. denied*, 516 U.S. 839 (1995), and *cert. denied*, 519 U.S. 1156 (1997). The district court erred in granting the defendant a downward departure based on the defendant's psychiatric condition, his family circumstances, and the unsophisticated nature of his crime. It was improper to depart downward based on the defendant's psychiatric condition because the defendant's psychiatric reports did not conclude that the defendant suffered from "significantly reduced mental capacity" as required by §5K2.13. In addition, the defendant's role as sole caretaker of his child was not extraordinary and cannot justify a departure under §5H1.6. Finally, the unsophisticated nature of the silencer possessed by the defendant cannot justify a downward departure.

§5K2.20 Aberrant Behavior (Policy Statement)

See United States v. McClatchey, 316 F.3d 1122, 1132-36 (10th Cir. 2003), §5H1.6, p. 28.

See United States v. Nunemacher, 362 F.3d 682 (10th Cir. 2004), §5K2.0, p. ?.

See United States v. Pettigrew, 468 F.3d 626 (10th Cir. 2006), §2A2.2, p. 4.

CHAPTER SIX: *Sentencing Procedures and Plea Agreements*

Part A Sentencing Procedures

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

United States v. Espinoza, 338 F.3d 1140 (10th Cir. 2003*), cert. denied*, 541 U.S. 950 (2004). Section 6A1.3 permits the consideration of reliable hearsay with "sufficient corroboration." The out of court declaration by an unidentified informant was properly considered in support of an obstruction adjustment where good cause existed for non-disclosure of that informant's identity and there was sufficient corroboration as to the particulars of the informant's report in the record to justify reliance.

United States v. Jones, 80 F.3d 436 (10th Cir.), *cert. denied*, 519 U.S. 849 (1996). The district court did not err in its adoption of the sentencing guideline calculations recommended in the presentence report. By participating in a sentencing hearing without objection, the defendant automatically waived the minimum review period provided for by Rule 32(b)(6)(A).

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

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

See Contreras-Martinez, 409 F.3d 1236 (10th Cir. 2005), Post-*Booker*, p. 43.

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

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

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

United States v. Burdex, 100 F.3d 882 (10th Cir. 1996), *cert. denied*, 520 U.S. 1133 (1997). In an issue of first impression, the Tenth Circuit joined the Third, Fourth, Fifth and Eleventh Circuits in holding that the sentencing court need not give notice before departing upward from a sentencing range recommended by the policy statements of Chapter Seven. Because those policy statements are not binding on the sentencing court, a departure from a Chapter Seven range is not a "departure" from a binding guideline.

United States v. Hurst, 78 F.3d 482 (10th Cir. 1996). The district court did not err in imposing a sentence in excess of the range recommended in §7B1.4. The circuit court noted that every circuit court that has considered the impact of *Stinson* and *Williams* on §7B1.4 has concluded that it is only advisory and not binding. In *Stinson*, the Supreme Court held that a policy statement "that interprets or explains a guideline is authoritative." 508 U.S. at 38. However, all of the circuit courts that have considered the impact of *Stinson* and *Williams* have concluded that the "policy statements of Chapter Seven do not interpret or explain a guideline." 78 F.3d at 484. Because the policy statements regarding revocation of supervised release are advisory rather than mandatory in nature, a district court who imposes a sentence in excess of that recommended in Chapter Seven will only be reversed if its decision was not reasoned and reasonable. *See United States v. Kelley*, 359 F.3d 1302 (10th Cir. 2004).

United States v. Tsosie, 376 F.3d 1210 (10th Cir. 2004), *cert. denied*, 543 U.S. 1155 (2005). The court reviewed *de novo* the district court's decision to impose an enlarged sentence on the defendant upon revocation of his supervised release for the sole purpose of his rehabilitation. Concluding that when determining the imposition and length of supervised release, a court is required to consider rehabilitation factors, the Tenth Circuit then examined whether the revocation sentence imposed in excess of that recommended in Chapter Seven was reasoned and reasonable. After examining the various facts surrounding the defendant's alcoholism and the problems it caused that were cited by the district court in support of the sentence, the Tenth Circuit found that it was not unreasonable for the district court to determine that the defendant was more likely to successfully address his alcoholism in a prison setting given his failure to address it outside of prison.

POST-*BOOKER* (*UNITED STATES V. BOOKER*, 543 U.S. 220 (2005))

Application of the Guidelines

United States v. Lynch, 397 F.3d 1270 (10th Cir. 2005). The district court held that *Blakely* applied to the guidelines and over the government's objection, applied the guideline range that corresponded to the drug quantity admitted by defendant, instead of the guidelines that corresponded to the larger drug quantities contained in presentence report when sentencing the defendant. The government appealed. The Tenth Circuit held that rather than simply applying the sentencing guidelines that corresponded to the drug quantity admitted by defendant, instead of the guidelines that corresponded to the larger drug quantities contained in presentence report, the district court was required to consider the guidelines and the sentencing factors set forth in the statute governing imposition of sentence. The court ordered a remand of the case to allow the government and the defendant, if he should so choose, to seek resentencing in accordance with the standards announced in *Booker*.

United States v. Magallanez, 408 F.3d 672 (10th Cir.), *cert. denied*, 126 S. Ct. 468 (2005). In sentencing criminal defendants for federal crimes, district courts are still required to consider guideline ranges, which are determined through application of the preponderance standard, just as they were before. The only difference is that the court has latitude, subject to

reasonableness review, to depart from the resulting guideline ranges. When a district court makes a determination of sentencing facts by a preponderance of evidence test under the advisory United States Sentencing Guidelines, it is not bound by jury determinations reached through application of the more onerous reasonable doubt standard.

United States v. Rines, 419 F.3d 1104 (10th Cir. 2005), *cert. denied*, 126 S.Ct. 1089 (2006). The defendant argued that applying the *Booker* remedial holding in sentencing for an offense that predated *Booker* would violate the Fifth Amendment's Due Process Clause because it is a "judicially created rule [that] is [an] unforeseeable alteration of what was up until *Booker* a clear statutory requirement [that he be sentenced within the guidelines range]." The Tenth Circuit noted that this argument was contrary to the Supreme Court's explicit instructions in *Booker* and declined to hold that the Supreme Court instructed district courts to violate the Constitution. Moreover, the Tenth Circuit concluded that the defendant was not deprived of constitutionally required notice because the only difference between the *Booker* regime under which his sentence was determined and the regime he would have anticipated at the time of his offense is that the guidelines are not mandatory. The defendant was sentenced within the guidelines range, so he cannot complain of any unanticipated harshness.

United States v. Sierra-Castillo, 405 F.3d 932 (10th Cir. 2005). District courts must still consult the guidelines and take them into account when sentencing. The guidelines provide for departures from the applicable sentencing range in certain specified situations. Although district courts post-*Booker* have discretion to assign sentences outside of the guidelines-authorized range, they should also continue to apply the guidelines departure provisions in appropriate cases.

United States v. Begay, 470 F.3d 964 (10th Cir. 2006). The Tenth Circuit reversed and remanded a within-guidelines sentence in this felon-in-possession case on grounds that the district court had imposed the sentence under the erroneous belief that it could only go below the guidelines range if it found that the guidelines range produced an "unreasonable" sentence. The Tenth Circuit found that this constituted plain error, and therefore vacated the sentence.

United States v. Allen, 134 F. App'x 261 (10th Cir. 2005) (stating that on remand, the district court may impose a lower sentence, a greater sentence, or the same sentence, as long as the sentence falls within the constraints of *Booker*).

United States v. Lang, 405 F.3d 1060 (10th Cir. 2005) (noting that the district court generally has discretion to expand the resentencing beyond the sentencing error causing the reversal).

United States v. Cherry, 433 F.3d 698 (10th Cir. 2005), *cert. denied*, 126 S. Ct. 1930 (2006). (holding that *Booker* did not render statutory mandatory minimum sentences unconstitutional).

United States v. Visinaiz, 428 F.3d 1300 (10th Cir. 2005), *cert. denied*, 126 S. Ct. 1101 (2006) (explaining that *Booker* does not apply to restitution because restitution is not criminal punishment in the Tenth Circuit).

United States v. Morales-Chaires, 430 F.3d 1124 (10th Cir. 2005) (discussing the district court split over whether the disparity in sentencing that results from fast-track programs is unwarranted disparity under § 3553(a)(6), but declining to decide the issue; instead, the court reviews the sentence for reasonableness).

United States v. Yazzie, 407 F.3d 1139 (10th Cir. 2005), *cert. denied*, 126 S. Ct. 303 (2005) ("The *Booker* Court . . . did not determine whether § 3553(b)(2) must be excised in order to remedy the [g]uidelines' underlying Sixth Amendment violations. Applying *Booker's* reasoning, we hold that it must be excised as well.").

United States v. McCullough, 457 F.3d 1150 (10th Cir. 2006), *cert. denied*, 127 S.Ct. 988 (2007) (holding district court did not err when it refused to impose a lower sentence based on the disparity in the guidelines' treatment of crack and powder cocaine).

United States v. Dozier, 444 F.3d 1215 (10th Cir. 2006) ("Rule 32(h) survives *Booker* and requires a court to notify both parties of any intention to depart from the advisory sentencing guidelines as well as the basis for such a departure when the ground is not identified in the presentence report or in a party's prehearing submission.).

United States v. Valtierra-Rojas, 468 F.3d 1235 (10th Cir. 2006). The Tenth Circuit upheld an above-guideline sentence in this illegal re-entry case. The district court agreed with the defendant that his prior conviction for involuntary manslaughter (resulting from one of several DUI convictions) was not a "crime of violence" but imposed an above-guideline sentence on the grounds that the defendant's indicated a high likelihood of recidivism and risk of future harm. The Tenth Circuit held that the defendant had a "demonstrated propensity for returning to the United States" because his re-entry occurred only four months after his deportation. It also rejected the defendant's argument that he did not pose a future risk of harm by drinking and driving because, although he previously had a serious problem with alcoholism, he had been sober since 2003. The Tenth Circuit found that the district court had not erred in its determination that he posed a risk of future harm because it noted (a) the possibility of relapse; and (b) that the involuntary manslaughter incident had not prevented him from continuing to drink and drive thereafter. Therefore, it said, "the facts of this case – and particularly Mr. Valtierra-Rojas's propensity for dangerous criminal conduct when he is drinking – are compelling reasons justifying a substantial increase to the advisory Guidelines sentencing range."

Standard of Review

United States v. Branson, 463 F.3d 1110 (10th Cir. 2006) The court affirmed as reasonable a within-guidelines sentence, holding that "a disparity between the federal-court

sentence and the sentence that would be imposed for a like offense in state court does not make the sentence unreasonable."

United States v. Cage, 451 F.3d 585, 591 (10th Cir. 2006) "Reasonableness has both procedural and substantive components."

United States v. Davis, 437 F.3d 989 (10th Cir. 2006), *cert. denied*, 126 S. Ct. 1935 (2006) The court explained while conducting a reasonableness review that similar offenders who engaged in similar conduct should be sentenced equivalently, but disparate sentences between co-defendants is allowed where the disparity is supported by the record.

United States v. Herula, 464 F.3d 1132 (10th Cir. 2006) The court affirmed a within-guideline low-end sentence of 188 months in fraud and money laundering case where the calculated range was higher that parties expected; holding that the parties' miscalculation of expected range should not be rewarded, is not a factor within § 3553(a), and is not sufficient to overcome the presumption of reasonableness of the guideline sentence.

United States v. Kristl, 437 F.3d 1050 (10th Cir. 2006) "Reasonableness review is guided by the factors set forth in 18 U.S.C. § 3553(a) which include the nature of the offense and characteristics of the defendant, as well as the need for the sentence to reflect the seriousness of the crime, to provide adequate deterrence, to protect the public, and to provide the defendant with needed training or treatment. Significant to our discussion, the now-advisory [g]uidelines are also a factor to be considered in imposing a sentence, which means that district courts 'must consult those [g]uidelines and take them into account when sentencing.' . . . [A] sentence that is properly calculated under the [g]uidelines is entitled to a rebuttable presumption of reasonableness. This is a deferential standard that either the defendant or the government may rebut by demonstrating that the sentence is unreasonable when viewed against the other factors delineated in § 3553(a). . . .[I]f we determine under the appropriate standard of review that the district court correctly determined the relevant [g]uidelines range, and if the defendant was subsequently sentenced to a term of imprisonment within that range, then the sentence is entitled to a rebuttable presumption of reasonableness on appeal. A different approach, however, is warranted when the district court errs in applying the [g]uidelines. In that situation, we must remand—without reaching the question of reasonableness—unless the error is harmless. . . .[T]he reasonableness standard of review set forth in *Booker* necessarily encompasses both the reasonableness of the length of the sentence, as well as the method by which the sentence was calculated. A sentence cannot, therefore, be considered reasonable if the manner in which it was determined was unreasonable, *i.e.*, if it was based on an improper determination of the applicable [g]uidelines range." (citations omitted).

United States v. Kristl, 437 F.3d 1050 (10th Cir. 2006) "First, we must determine whether the district court considered the applicable [g]uidelines range, reviewing its legal conclusions de novo and its factual findings for clear error. A non-harmless error in this calculation entitles the defendant to a remand for resentencing. If, however, the district court properly considers the relevant [g]uidelines range and sentences the defendant within that range, the sentence is

presumptively reasonable. The defendant may rebut this presumption by demonstrating that the sentence is unreasonable in light of the other sentencing factors laid out in § 3553(a)."

United States v. Serrata, 425 F.3d 886 (10th Cir. 2005) The court decided that because the sentencing court has discretion with respect to departures, the court of appeals will review a departure for an abuse of discretion.

United States v. Sierra-Castillo, 405 F.3d 932 (10th Cir. 2005) A district court's refusal to depart downward is not reviewable.

United States v. Sierra-Castillo, 405 F.3d 932 (10th Cir. 2005). Although the *Booker* court excised the statutory provision of the Sentencing Reform Act providing for the standard of review of sentences on appeal, 18 U.S.C. § 3742(e), the Supreme Court left intact the section providing for appellate review of sentences, 18 U.S.C. § 3742(a). The Tenth Circuit therefore concluded that it continues to have the same jurisdiction to review guidelines sentences as it had before the Supreme Court's decision in *Booker*.

United States v. Wolfe, 435 F.3d 1289 (10th Cir. 2006) "Even after *Booker*, '[w]hen reviewing a district court's application of the [s]entencing [g]uidelines, we review legal questions de novo and we review any factual findings for clear error, giving due deference to the district court's application of the guidelines to the facts.'" (citations omitted).

Plain Error Review

United States v. Bass, 411 F.3d 1198 (10th Cir. 2005), *cert. denied*, 126 S.Ct. 1106 (2006). The defendant was convicted of various counts of possession of child pornography. The court enhanced his sentence based on facts not admitted to by the defendant or found by the jury. The Tenth Circuit found that the defendant showed that the error affected his substantial rights because there was little evidence in the record to support the court's findings. The court concluded that the error should be noticed because the district court had sentenced the defendant at the low end of the guideline range and there were indications that the court would have imposed a lower sentence if it knew it had the discretion to do so. The case was remanded for re-sentencing in accordance with *Booker*.

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

demonstrated a reasonable probability exists the district judge would impose a sentence outside the guidelines range under the specific facts of her case. The error is egregious in this case because of the lack of evidence to support the entire sentence the guidelines required the district court to impose.

United States v. Dazey, 403 F.3d 1147 (10th Cir. 2005). The error in this case was constitutional, which entails a less rigorous application of the plain error review burden. The defendant vigorously contested the judge-found facts that enhanced his sentence. The strength of the evidence supporting guidelines enhancements was not relevant to the mandatory results under the pre-*Booker* regime (provided the evidence satisfied the preponderance standard); now, in the discretion of the district court, it may be. Third, the judge-found facts in this case substantially increased the defendant's sentence under the guidelines. The judge-found fact that the defendant was responsible for over $7 million in losses authorized a sizable 20 level enhancement of his offense level. While *Booker* permits this approach to sentencing, allowing a substantial increase in the defendant's sentence through the now-suspect practice of mandatory enhancements, based on judge-found facts, runs the risk of impugning the integrity and reputation of judicial proceedings. The defendant demonstrated a reasonable likelihood that, applying proper post-*Booker* standards, the outcome might have been significantly different. For these reasons, the Tenth Circuit held that the plain error warranted exercise of the court's discretion to remand the case.

United States v. Dowlin, 408 F.3d 647(10th Cir. 2005). The Tenth Circuit held constitutional *Booker* error was not structural error because any prejudice stemming from such error could have been evaluated on the record developed in prior proceedings. It further held that it will not notice non-constitutional *Booker* error unless the defendant establishes the error is particularly egregious and that the failure to correct it would result in a miscarriage of justice. The court then identified several non-exclusive factors that might show that a defendant has satisfied the fourth prong: a sentence increased substantially based on a *Booker* error, a showing that the district court would likely impose a significantly lighter sentence on remand, a substantial lack of evidence to support the sentence the guidelines required the district court to impose, and/or a showing that objective consideration of the 18 U.S.C. § 3553(a) factors warrants a departure from the sentence suggested by the guidelines.

United States v. Gonzalez-Huerta, 403 F.3d 727 (10th Cir.) (en banc), *cert. denied*, 126 S.Ct. 495 (2005). The Tenth Circuit announced how the plain error test would be applied in cases raising *Booker* issues. There are two distinct types of error that a court sentencing prior to *Booker* could make. First, a court could err by relying upon judge-found facts, other than those of prior convictions, to enhance a defendant's sentence mandatorily, thereby committing "constitutional *Booker* error." Second, a sentencing court could err by applying the guidelines in a mandatory fashion, as opposed to a discretionary fashion, even though the resulting sentence was calculated solely upon facts that were admitted by the defendant, found by the jury, or based upon the fact of a prior conviction, thereby committing "non-constitutional *Booker* error."

Although several courts of appeals have held that once the third prong of the *Olano*[3] plain error test was satisfied, the fourth prong is met as a matter of course, the Tenth Circuit decided that it could not subscribe to this approach and was bound to treat the third and fourth prongs as independent inquiries. The court then held that the defendant failed to meet his burden to satisfy the fourth prong of plain-error review, offering nothing more than the conclusory statement that: "[T]o leave standing this sentence imposed under the mandatory guideline regime, we have no doubt, is to place in jeopardy the fairness, integrity, or public reputation of judicial proceedings." The court concluded that based upon its review of the record, the district court's mandatory application of the guidelines was not "particularly egregious" or a "miscarriage of justice."

United States v. Johnson, 414 F.3d 1260 (10th Cir. 2005). The defendant argued that the district court erred by adding a two level firearm enhancement based on judge found facts not alleged in the indictment or found by the jury. The Tenth Circuit agreed that the case involved a constitutional *Booker* error. In light of the facts that the sentencing court had rejected the government's request for a life sentence and sentenced the defendant to the bottom of the applicable guideline range and that the errors increased the defendant's sentence by nearly 100 months, the court further found that the error should be noticed.

United States v. Lawrence, 405 F.3d 888 (10th Cir.), *cert. denied*, 126 S.Ct. 468 (2005). This case involved constitutional *Booker* error because the defendant's sentence of seventy-two months could not have been imposed absent judge-found facts regarding the sentencing enhancements and adjustments. The Tenth Circuit concluded that the defendant could not satisfy the fourth plain-error prong. The district court sentenced the defendant to seventy-two months in prison, two months above the bottom of the range, strongly indicating that the court felt that there were no mitigating factors that would justify a lower sentence in this case. The district court acknowledged that it possessed discretion to depart downward, but nevertheless denied defendant's motions for downward departure. The court's refusal to invoke its discretion to depart is further evidence that the court felt that seventy-two months was an appropriate sentence, and that it would have given the same sentence even under an advisory guidelines system. Based upon these facts, the Tenth Circuit concluded that core notions of justice would not be offended by its failure to notice the sentencing error that had no effect on the defendant's sentence.

United States v. Mozee, 405 F.3d 1082 (10th Cir.), *cert. denied*, 126 S.Ct. 253 (2005). The defendant was unable to satisfy the plain error test, even though he satisfied the first three prongs of the test, where the court sentenced the defendant to the maximum possible sentence the court could lawfully impose. Any argument that the court might have sentenced the defendant to a lesser sentence had it understood it had the discretion was unpersuasive under those circumstances.

United States v. Trujillo-Terrazas, 405 F.3d 814 (10th Cir. 2005) The appellate court decided that the defendant demonstrated plain error where the relatively trivial nature of his

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[3] *United States v. Olano*, 507 U.S. 725 (1993).

criminal history was at odds with a 16-level enhancement, the district court expressed sympathy to the defendant, and the court indicated its dissatisfaction with the mandatory sentencing system.

United States v. Williams, 403 F.3d 1188 (10th Cir. 2005), *cert. denied*, 127 S. Ct. 461, (2006). Imposition of a 210-month prison sentence under the Armed Career Criminal statute for a defendant convicted for being a felon in possession of a firearm constituted plain error, requiring a remand for resentencing. The sentence was imposed prior to *Booker*, and the sentencing judge indicated that he was disgusted with the sentence that he had to give, and that if it were up to him he would impose a five-year sentence.

United States v. Begay, 470 F.3d 964 (10th Cir. 2006). The Tenth Circuit reversed and remanded a within-guidelines sentence in this felon-in-possession case on grounds that the district court had imposed the sentence under the erroneous belief that it could only go below the guidelines range if it found that the guidelines range produced an "unreasonable" sentence. The Tenth Circuit found that this constituted plain error, and therefore vacated the sentence. The Tenth Circuit also held that the defendant was entitled to relief from this error despite not having objected at sentencing and despite the fact that it would not satisfy the usual "plain error" standard. In so doing, the court analogized the district court's "novel interpretation of *Booker*" to an earlier Tenth Circuit case allowing relief from an erroneous sentence where the district court imposed a special condition of supervised release without advance notice to the defendant that it was considering doing so. This lack of notice, the Tenth Circuit said, "made it impossible for the parties to anticipate the nature of the special condition and short-circuited the significance of any opportunity to comment." Similarly, it said, nothing in the record suggested that the defendant could have anticipated the district court's erroneous interpretation of *Booker*, and the Tenth Circuit therefore excused the failure to object. The government did not argue that the error was harmless; therefore, the Tenth Circuit vacated the sentence and remanded the case for resentencing.

Harmless Error Review

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

United States v. Ollson, 413 F.3d 1119 (10th Cir. 2005). A defendant convicted for being a felon in possession of a firearm was not entitled to remand for resentencing pursuant to new advisory guidelines, determined by *Booker*. Even though the defendant's sentence was imposed under the mandatory guidelines system, the error was harmless. The sentencing court departed

from the guidelines range in response to a §5K1.1 motion filed by the government based upon the defendant's provision of substantial assistance. Although the district court understood that it had discretion to reduce the sentence even more for substantial assistance, it did not do so. Consequently, the Tenth Circuit concluded that the record showed that the defendant's sentence would have been the same under the post-*Booker* discretionary regime.

United States v. Riccardi, 405 F.3d 852 (10th Cir.), *cert. denied*, 126 S.Ct. 825 (2005). The defendant's timely *Apprendi* objection adequately preserved his *Booker* claim; however, the error was harmless. Although the defendant objected to the sentence-enhancing fact-finding of the district court on *Apprendi* grounds, the evidence to support these factual findings was overwhelming. The defendant made a number of legal objections to the judge-found facts that increased his sentence; he did not challenge the factual basis of any of these findings. The defendant's decision not to contest these facts was another strong indication that the district court based the sentencing enhancements on the defendant's actual conduct. Nor was there any reason to think that the district judge would have imposed a less severe sentence in the exercise of his post-*Booker* discretion. On the contrary, the district judge sentenced the defendant at the top of the applicable guideline range. Accordingly, although the sentence was imposed in violation of Sixth Amendment standards as set forth in *Booker*, the error did not violate the defendant's substantial rights.

Prior Convictions

United States v. Corchado, 427 F.3d 815 (10th Cir. 2005), *cert. denied*, 126 S. Ct. 1811 (2006) The court extended the prior-conviction exception to subsidiary findings such as whether a defendant was under court supervision at the time of the subsequent crime and when the defendant was released from prison; the court reasons that "such facts are merely aspects of the defendant's recidivist potential, are easily verified, and their application for purposes of enhancing a sentence requires nothing more than official records, a calendar, and the most self-evident mathematical computation."

United States v. Harris, 447 F.3d 1300 (10th Cir. 2006). *Booker* does not preclude the sentencing court from imposing a statutory minimum sentence based on the defendant's prior convictions.

United States v. Moore, 401 F.3d 1220 (10th Cir. 2005). The defendant pled guilty to being a felon in possession of firearms and had been convicted of three or more prior felonies, subjecting defendant to an enhanced sentence under the Armed Career Criminal Act (ACCA). Even after *Booker*, neither the existence of prior convictions, nor their classification as violent felonies, constitute facts that must be charged in an indictment and proven to a jury under a beyond a reasonable doubt standard.

United States v. Michel, 446 F.3d 1122 (10th Cir. 2006). The defendant, whose sentence was enhanced pursuant to the Armed Career Criminal Act (ACCA), argued that the Sixth Amendment required that the issue of whether his three prior convictions were committed on different occasions be found by a jury beyond a reasonable doubt. The Court of Appeals

concluded that "whether prior convictions happened on different occasions from one another is not a fact required to be determined by a jury but is instead a matter for the sentencing court."

United States v. Perez-Vargas, 414 F.3d 1282 (10th Cir. 2005). The question of whether a prior conviction is for a crime of violence is a question of law.

United States v. Zuniga-Chavez, 464 F.3d 1199 (10th Cir. 2006), *cert. denied*, No. 06-8631, 2007 WL 506495 (U.S. Feb. 20, 2007). The defendant challenged the government's proof of his prior convictions, arguing that the documents used to demonstrate his prior convictions were insufficiently reliable to satisfy the standard set forth in *Shepard v. United States*, 544 U.S. 13 (2005). Some of these documents were not certified copies, but the Tenth Circuit held that "certification is not a prerequisite to reliability." It also concluded that "[a] case summary obtained from a state court and prepared by a clerk-even if not certified by that court-may be sufficiently reliable evidence of conviction for purposes of enhancing a federal sentence where the defendant fails to put forward any persuasive contradictory evidence."

Plea Agreements

United States v. Green, 405 F.3d 1180 (10th Cir. 2005). A waiver of appellate review is not rendered unknowing or involuntary by the subsequent decisions in *Booker* and *Blakely*. Enforcing the waiver would not result in a miscarriage of justice with respect to a sentence that was determined in part by judicial factfinding under the guidelines but did not exceed the statutory maximum that Congress legislatively specified for the offense. *See also United States v. Porter*, 405 F.3d 1136 (10th Cir.), *cert. denied*, 126 S.Ct. 550 (2005) (holding that the change *Booker* rendered in the sentencing landscape does not compel a conclusion that the defendant's plea agreement was unlawful).

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

Collateral Review

United States v. Bellamy, 411 F.3d 1182 (10th Cir. 2005). For purposes of retroactive application, *Booker* announced a new rule of criminal procedure that was not a watershed rule of criminal procedure implicating fundamental fairness and accuracy. Consequently, *Booker* does not apply retroactively to initial habeas petitions. *See also United States v. Price*, 400 F.3d 844 (10th Cir.), *cert. denied*, 126 S.Ct. 731 (2005) (*Blakely* does not apply retroactively to initial § 2255 motions).

Bey v. United States, 399 F.3d 1266 (10th Cir. 2005). The defendant sought authorization to file a second or successive 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence, contending that his sentence entered pursuant to the then-mandatory United

States Sentencing Guidelines is unconstitutional under *Blakely* and *Booker*. The circuit court denied authorization, having previously concluded that *Blakely* was not to be applied retroactively to second or successive § 2255 motions. *See Leonard v. United States*, 383 F.3d 1146 (10th Cir. 2004). The *Booker* Court expressly applied its holding only to cases on direct review and did not expressly declare, nor has it since declared, that *Booker* should be applied retroactively to cases on collateral review. Accordingly, the appellate court declined to extend *Booker* to case on collateral review.

Chapter Seven Violations

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