Summaries of published Eighth Circuit decisions May 13, 2024–April 30, 2025.[1]

***US v. Willis*, 101 F.4th 577 (8th Cir. May, 13, 2024)**

(Winner) Willis wanted to make sovereign citizen arguments at trial and was found competent to represent himself after a *Faretta* hearing. On morning of trial, DC told Willis he had "forfeited" his right to self-representation.

The district court "erred in revoking Willis's constitutional right of self-representation . . . because of his repeated assertion of judicially-rejected sovereign citizen theories and defenses." This case involved a "lack of defiant or physically disruptive pretrial conduct." In addition, Mr. Willis had demonstrated "consistent respect for the court and the proceedings." (The district court had called him "pleasant and respectful" at a prior hearing.) On this record, Mr. Willis had not engaged in the kind of "serious and obstructionist misconduct" which warranted the appointment of standby counsel. Reversed and remanded.

***US v. McMillion*, 101 F.4th 573 (8th Cir. May 13, 2024).**

Around 4:40 a.m., officers were dispatched to an apartment complex following a report that an occupant in an improperly-parked Buick was "swinging a gun around." When officers arrived, the Buick tried to leave; officers drove closer and activated their "takedown" lights. They approached on foot and saw a backseat passenger making "furtive movements." The backseat passenger identified himself as Mr. McMillion; officers recognized him from a safety bulletin, so they removed him from the vehicle, handcuffed him, and patted him down for weapons.

Permitless open carry is legal in Iowa, so the district court found that that this *Terry* stop was not supported by reasonable suspicion. In its opinion, however, the Eighth Circuit reminds us that if there is *any* ambiguity about whether a person's conduct is lawful, officers are entitled to detain that person until they "resolve the ambiguity." In this case, the fact that Mr. McMillion was in a high-crime area with a gun at night meant that his behavior could be "indicative of criminal activity such as trespass, assault, or burglary." Officers were entitled to detain him, handcuff him, and conduct a pat-down search. Reversed and remanded.

***US v Flores Atilano*, 101 F.4th 977 (8th Cir. May 20, 2024)**

Rejecting a *Rehaif* claim by a man prosecuted for possessing a firearm while unlawfully in the US despite a claim that his American wife secured a visa application form that made it legal for him to be in the country. The panel rejected his alternative claim that the evidence proved he only possessed a firearm in duress due to fear of gang members in Colorado that prompted his flight to South Dakota.

Police found Atilano when a Motel 6 in Rapid City reported an "unwanted person in Room 259" on December 1, 2022. A pat down search revealed bullets in a front pocket of a second pair of jeans he was wearing due to the cold and a red backpack between the beds in the room contained three firearms. Atilano told police he traveled to South Dakota from Greeley Colorado (a sanctuary jurisdiction) fearing violence from gang members seeking to kill him. After his arrest, Atilano told police he married an American citizen some eight years earlier. Homeland Security located an application for a visa completed by Atilano's wife in 2014, approved in 2015, which established a spousal relationship and rendered

[1] The summaries herein were prepared and distributed by various attorneys, paralegals, interns, and others within the Federal Defender system and Eighth Circuit. They have been compiled for convenience only and all credit is owed to the original authors. Attorneys are reminded to review original decisions to ensure accuracy before citing.

Atilano eligible to petition for a visa. The face of the application indicted that its approval would ***not*** give status in this country. An immigration officer testified no additional steps had been taken to complete the process of adjusting Atilano's status to that of a legal permanent resident and that no record existed of Atilano applying for a visa as a victim of violence. In continuing questioning Atilano said Greeley detectives told him if they found him with a weapon again, he would only be ticketed because they knew his life was in danger. When Atilano expressed a desire to get out of jail, an officer explained he was under arrest and being held in jail because "number one" he was in the US illegally and "number two" he was a citizen of Mexico without permission to be in the US so he could not have weapons. Atilano stated he understood. Atilano admitted he had no license to carry a gun. He stated he did not hold the guns in his hands because that would be illegal, a felony, "very bad." Atilano maintained he had the guns available, but not on him, because he feared for his safety.

The narrow dispute on appeal centered on whether the evidence proved beyond a reasonable doubt that Atilano knew his presence in the US was unlawful. The panel acknowledged that "the interview by law enforcement was convoluted. People spoke simultaneously, officers sometimes engaged in discussions among themselves, and translation was difficult at times because of the lack of an equivalent English word. . . ." The panel reasoned that, even accepting Atilano's understanding that the visa form his wife secured gave him permission to be in the US, "he acted inconsistent with that belief as the interview progressed. When law enforcement informed Atilano of the reasons for his arrest-he was found in the US illegally and as a citizen of Mexico without permission to be in the US he was not allowed to have weapons—Atilano did not contest the reasons provided by instead responded, "'I understand.'" Notwithstanding a statement about the legality of his gun possession subject to conflicting interpretations, the panel cited the fact that Atilano stated twice in the interview he wanted to seek asylum and asked law enforcement if they could help him. A reasonable factfinder could conclude this undermined his earlier assertion he thought he had a lawful right to be in the US

The panel held that Atilano's alternative defense of duress failed in that his evidence consisted of a generalized and speculative fear of violence, and he failed to show that he had no reasonable legal alternative to committing the crime. Atilano stated that he fled from Colorado to South Dakota to get away from gang members he believed were trying to kill him. He did not go to the authorities when he arrived in Rapid City, South Dakota. Instead, he went to job sites looking to work for cash and purchased firearms from several different men that he met in a nearby casino.

***US v. Haskins*, 101 F.4th 997 (8th Cir. May 22, 2024).**

Upward variance on single-count FIP. Gov't dismissed drug charges & a 924(c) in plea agreement. District court imposed statutory max: more than twice the applicable 46–57-month Guidelines range (neither party sought a variance). The judge began by stating he would not call this "a random" felon-in-possession case due to the meth, ecstasy, digital scales, and box of 9 mm ammo in the client's car. The Court claimed other considerations "push[ed] this . . . considerably above the guidelines" and dwelled on a "brutal murder" committed at age 16 in 1993, for which he served a long sentence and a dangerous 2009 misdemeanor in which he punched and hit them with a stick a victim, plus a 2009 felon-in-possession. The judge acknowledged defense counsel's argument that Haskins had been in the free world since 2013 and, since that time, "didn't commit any crimes – or at least . . . while you were arrested for a bunch, you weren't convicted of anything." The Court said those factors plus "respect for law, which I don't believe you have at all . . . are the factors that . . . push this all the way to the statutory maximum. . . [N]othing below it will do."

Haskins argued abuse of discretion by imposing an excessive sentence where the 1993 murder occurred at a young age, his only prior drug conviction was misD possess MJ in 2009 and only other COV was the misD domestic assault (the panel drops a footnote citing a PSR assertion that while Hawkins served his long sentence for the juvenile murder in 1993 he was disciplined for bather and aggravated battery 13 times. Loken writes the panel finds no abuse of the district court's substantial discretion in imposing the statutory maximum, finding the 3553(a) factors of specific deterrence, promoting respect for the law and

protection of the public outweighed the mitigating factors that the district court stated it considered. "Though Haskins' more serious prior convictions were accounted for by the guidelines, ' a sentencing court may vary upward based on criminal history already accounted for by the Guidelines.'"

***US v. Maloney*, 102 F.4th 904 (8th Cir. May 24, 2024)**

A jury convicted Maloney for his role in orchestrating sales of large quantities of meth while doing time in state prison. A tip from a confidential informant led to an investigation that identified Maloney as an incarcerated person communicating with others outside prison to traffic meth. In recorded phone calls, Maloney discussed buying and storing meth with his girlfriend (Lahr) and a man named Garza. After seizing drugs in Garza's residence, law officers enlisted Garza's girlfriend to conduct a controlled exchange of cash and meth with Lahr.

On appeal, Malone claimed:

(1) violations of his confrontation rights by limiting cross-examination of Lahr about statements she allegedly made "in a drug and trauma induced memory" that she had been present during a highly publicized assault and murder of a child in 1989 (when Lahr was seven) that remained unresolved until 2016. The judge ruled this would not be helpful to the jury's understanding of Lahr's credibility, which remained subject to ample other grounds for cross. The panel affirms, noting that a viable Confrontation Clause challenge requires that one establish the jury would receive a "*significantly different impression"* of the witness's credibility by the excluded questioning. Maloney got to question Lahr's credibility many other ways by citing her plea agreement for dismissal of two other charges, desire to receive less time by cooperating, extensive drug use including during the conspiracy and inconsistent statements she gave in prior government interviews. He also got to call in rebuttal a longtime friend of Lahr's who opined that through several interactions, Lahr was "not at all" truthful. The government also called a Special Agent investigator who listened to the recorded prison calls and testified he came to understand their code. Panel says any error was harmless.

(2) improper denial of his request to present a pro se closing argument as untimely made on the last day of a five-day trial. Although defense counsel at a pretrial conference indicated that Maloney might at some point ask to represent himself and the Court said that might be possible, it was not bound by any earlier indication made when no actual motion to go *pro se* had been made. The judge denied the request as coming too late and that it was not going to go through the process of sorting out what Maloney was stating in an improper testimonial way from what constituted comment on the evidence elicited from the stand (Maloney had couched his request to deliver summation as his right to "conduct [his] own business."). The Court found no error in the district court's conclusion the risk of potential disruption to the proceedings was greater than Maloney's interest in representing himself.

(3) the denial of discovery sanctions based on the Government's failure to produce audio recordings of phone conversations forming the linchpin of the government's case. The government made disclosure to defense counsel ahead of the deadline set for disclosure, although significant technical issues arose with defense counsel and Maloney's ability to listen to the recordings. The panel finds no error in denying sanctions where the Government responded to each of defense counsel's alerts to problems accessing the recordings, and where all technical issues were resolved allowing Maloney and counsel to listen to them 10 months before trial. And,

(4) the violation of his Sixth Amendment right to speedy trial by being tried 17 months after he was indicted. Malone asserted that he suffered "particularly oppressive and anxiety inducting" incarceration and the Government' star witness recovered from addiction, allowing her to appear as a more credible witness than if she'd testified while suffering the physical effects of addiction. Addressing all four *Barko v. Wingo,* factors (1) the length of delay was presumptively prejudicial, (2) the reasons for delay weighed against Maloney even though the delay of his inability to hear the prison phone calls may have contributed, since he twice changed counsel, the parties filed numerous motions, and the pandemic suspended trials for six months, so the government did not intentionally delay the case for tactical gain (3) Maloney did not unequivocally assert the right to speedy trial (only citing it in passing in a motion for discovery sanctions for his inability to hear the audio files), but he also three times sought additional continuances) and (4) the claim of prejudice

from the delay weighed against Maloney as his anxiety comprised "the weakest interest" the Sixth Amendment right serves and the lost opportunity to find work and treatment and to witness his son's birth did not demonstrate prejudice, his claim that the delay rendered him unable to cross-examine the key witness when she most visibly appeared to be a drug user was speculative, as it was unlikely her appearance alone would significantly alter the jury's view of her credibility and the outcome.

***US v. Garrett*, 103 F.4th 490 (8th Cir. May 29, 2024)**

James and his son Levi participated in a federal crop insurance program, wherein both obtained insurance for sunflower crops in 2018 and James insured a corn crop in 2019. The USDA required the sunflower crop be planted no later than June 20, 2018. James certified he planted 1,122.79 acres of sunflowers by then. A hailstorm hit June 27, 2018. In 2019, James agreed to plant at least 20 acres of corn on two or more fields within a square mile section. He signed an acreage report certifying he planted 47.5 acres of corn on June 17, 2019, and was prevented from planting 2,171.28 acres due to weather related issues. He reported a loss of $557.066. Both were prosecuted with making false statements certifying the number of acres they planted of both crops. Cody Hostler, co-owner of Sioux Nation, LLC, testified about the seeds he sold the Garretts in June 2018 and neighbors testified to their farming habits, including failure to timely plant or maintain their fields.

(1) No plain error occurred in admitting Supplier Hostler's handwritten log of when seeds were delivered/picked up even though he testified to an employee's writing on some of the entries. It was relevant to show the earliest date the Garretts could have planted and fell within the business record hearsay exception in Fed. R. Evid 803(6)(B).

(2) Two members of the panel find harmless error in the exclusion of 2 photos of a field adjacent to the Garretts' farm offered to rebut the corn-related charge. The government's theory posed that James did not actually plant corn on the 47.5 acres he certified but covered it with stover (parts of the corn plant and detritus a combine spews during harvest). Levi took the photos to portray a "disked corn field" on neighbor's land. Levi at first testified he took the photos "last spring", but when asked which month he replied "I think . . . Novemberish" The court sustained the Government's objection, indicating it was "disinclined to allow[] photos of other fields prepared by other farmers using other machinery." The Court assumed the photos were relevant and admissible but deemed any error had only a slight influence given the weight of evidence supporting it (including an insurance adjuster's testimony that when he first visited the two purported corn tracts in July, the fields were full of weeds and did not appear prepared for planting. When he returned unannounced in September, the weeds were waist- and chest-high but still "no growing crop." In October, the adjuster gave advance notice of his return, at which time Levi took him to two fields (only one of which corresponded to the tracks James certified planting) and the adjuster "knew it wasn't planted." Three neighbors also described Levi's character for truthfulness ("very dishonest", "the least truthful person" in the agriculture industry, and someone whose word one "would not honor"). The panel adds the Garretts used every opportunity to challenge the Government's theory. ***Judge Shepherd dissents*** from this result, concluding the photos were offered specifically to rebut the adjuster's testimony by showing a neighboring field "in which corn had undisputedly been planted" that looked just like James's corn plot. Shepherd quotes *US v. Flenoid*, 949 F.2d 970, 973 (8th Cir. 1991), that exclusion of testimony was not harmless where it "was not an insignificant piece of evidence, and "was a crucial aspect of proving [the defense] theory of the case," because without it, the accused "had no direct, independent support for his version of the events." These photos went to the most controverted issue on the corn count—whether James made a false statement.

(3) The evidence supported the verdicts despite the Garretts' claims it only established circumstantial proof establishing only "mere suspicion or possibility of guilt." The panel cites the testimony that the Garrets obtained their sunflower seeds after the date they certified having planted it, and neighbors testifying about the Garrets habitually late planting practices, and chronic weed issues.

(4) A post-trial affidavit the Garrets submitted from Hostler to overturn the verdict did not require reversal. The panel agrees it added little new information, none of which had not been available at the time of his testimony and included Hostler's affirmation his trial testimony "remains true and correct."

***US v. Fleming*, 103 F.4th 509 (8th Cir. May 31, 2024)**

A jury convicted Fleming for possessing a rifle found on the ground by the driver's door after a high-speed crash into a cement barrier at the end of an I-70 exit ramp in downtown St. Louis, MO. Surveillance video from a camera facing the end of the ramp showed the crash after which the driver's door opened and the driver fled on foot to a garage. A St. Louis City Metropolitan Police Officer had pursued the car at high speeds leading up to the crash because it fit the description/plates of a car cited in an Illinois Police radio alert two hours earlier from which person(s) unknown fired at an Illinois cruiser. The security video and the SLMPD officer's bodycam showed that he stopped a distance behind the rear passenger corner of the crashed car. He testified at trial that Fleming exited the vehicle with the rifle in his "hand or hands" and dropped it. He chased the driver who fled to an unoccupied parking area and took custody of him, finding no gun in his possession there.

(1). New Trial denied from a claim the verdict was against the weight of the evidence. Judge Melloy writes that glare from the headlights of the SLMPD Officer's cruiser parked up the ramp behind the crashed vehicle made it difficult to discern from the security footage precisely when the driver's door opened, "although it appears that an object lands on the ground near the driver's door slightly before Mr. Fleming appears to exit the vehicle." The Court also found that streetlamps and distortion in the bodycam footage caused by the portly officer's foot chase also made footage from his perspective unclear. Fleming argued that despite the glare and bumpy footage, the SLMPD officer was clearly a distance up the ramp behind the passenger side of the wrecked car when the driver exited the vehicle to run away from the ramp and could not have seen the driver's hands before the gun hit the ground. Judge Melloy finds the bodycam video lacked the detail necessary to directly disprove the SLMPD's claim. The panel found no abuse of the district court's discretion in denying a new trial, noting that defense counsel pointed out to the jury the lines of sight and relative vantage points of the officer and the cameras. It also noted that the jury was not required to accept Fleming's assertions that he had not knowingly possessed the rifle while still in the vehicle and cited the government's claims about the unlikelihood that the presence of a large semiautomatic rifle in the car was unknown to Mr. Fleming or in the sole possession of his passenger before landing precisely where it might fall out of an unsuspecting driver's door.

(2) Challenge to double-counting reckless endangerment in flight as obstruction (USSG § 3C1.2) because it made that same flight "another felony" (USSG § 2B2.1(b)(6)(B)) under Missouri law. Fleming objected to adding the two-level enhancement under § 3C1.2 for obstruction of justice in the form of high-speed flight leading to the crash because that same conduct formed the basis for the four levels added under § 2K2.1(b)(6)(B). Fleming argued that Missouri law made resisting a stop for questioning about a felony only a misdemeanor. Evidence at sentencing proved Illinois police did not know who was in the car at the time of the Illinois incident two hours earlier. The panel finds no clear error by double-counting, upholding the district court's finding that the SLMPD officer pursued Fleming on foot after the crash, and that the circumstances left "little doubt" that he was "effectuating an arrest at the time" and was clearly going to do more than just question him." Judge Melloy found no clear error in a conclusion that the firearm "emboldened" Mr. Fleming to resist arrest by fleeing on foot after the car came to a halt, even if the evidence did not compel that finding. The panel noted that distinctions which may exist between independent offenses (here, high speed flight on the highway and flight on foot moments later) "may be highly varied in any given situation." The district court, in its view, did not clearly err in viewing the flight on foot as something that was both separate in time and different in nature from the preceding high-speed car chase.

***US v. Walker*, 103 F.4th 515 (8th Cir. June 3, 2024)**

Sufficient evidence established defendant had constructive possession of cocaine found on passenger floorboard of car.

***USA v. Lukassen*, 103 F.4th (8th Cir. June 04, 2024)**

Lukassen was convicted at trial of child pornography offenses and sentenced to 240 months' imprisonment. The Court of Appeals rejected his points on appeal, which fall into four categories:

Suppression – Lukassen argued the search warrant affidavit's unadorned reference to "an age difficult juvenile" prevented a finding of probable cause that he'd possessed or distributed an image depicting a minor. But the affiant testified he'd used the term "juvenile" to mean a person under the age of 18 and that he believed the person depicted to be a minor based on his training. Further, the Court noted Lukassen admitted receiving sexually explicit images of children, so it was reasonable to infer a fair probability he used the devices in his possession for that online activity.

Lukassen also argued the warrant did not authorize search of the seized electronic devices and that officers therefore exceeded its scope. In the warrant, the search authorization—"And to search the above listed items for evidence of violations of" specified Nebraska statutes"—was included as the last item in a list titled "ITEMS TO BE SEIZED." Despite this "awkward organization," the Court understood the warrant to authorize both seizure and search of the listed items. And even if the warrant were defective, the Court noted *Leon* would apply.

Sufficiency of the Evidence – The Court held proof of Lukassen's knowledge regarding receipt or distribution was sufficient: The username for the account that uploaded images of child pornography matched Lukassen's first name, last initial, and birth year; his phone number was associated with the account; and the user's location was Omaha, while Lukassen lived in an Omaha suburb. Further, one of the uploaded images was found on Lukassen's computer and a data memory card seized from him. Finally, Lukassen admitted receiving sexual images of people who were "too young," and he had other child pornography images on his devices.

Sentence – The district court did not abuse its discretion by denying Lukassen's motion for a downward departure and sentencing him to the statutory maximum. The applicable range was above the statutory maximum, so the 240-month max was the guideline sentence. And the court considered the § 3553(a) factors and sufficiently explained its decision to deny the departure, emphasizing Lukassen's criminal history and lack of remorse.

Restitution –The district court did not plainly err in imposing restitution pursuant to the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018 instead of the MVRA. Lukassen argued the government presented no evidence his offense occurred after the AVAA's December 2018 effective date, as required by the Act. Reviewing for plain error, though, the Court concluded Lukassen did not show prejudice or a miscarriage of justice. The district court could have set the same restitution amount under the MVRA's "reasonable and circumscribed award" standard, and Lukassen didn't show the court would have imposed a lower amount but for the AVAA's $3,000-per-victim minimum.

***USA v. Ahmed*, 103 F.4th 1318 (8th Cir. June 4, 2024)**

Ahmed appealed his sentence 108-month sentence for possession with intent to distribute cocaine and fentanyl and possession of a firearm in furtherance of drug trafficking. While executing a search warrant at Ahmed's home, officers found, among other things, counterfeit Percocet pills containing fentanyl. After Ahmed pleaded guilty, the presentence report alleged he'd supplied a fentanyl-laced pill to a minor who then overdosed. Ahmed denied this allegation.

At sentencing, the government presented testimony from a first responder who treated the overdosing minor as well as a drug task force investigator who interviewed the minor and her boyfriend after the incident. Notably, both the minor and her boyfriend separately told the investigator they bought the pill from someone named "Mo." The investigator knew this to be Ahmed's nickname and knew Ahmed lived at the apartment complex where the sale took place. The district court ultimately credited the witnesses' testimony and overruled Ahmed's objection, concluding he sold the pill that caused the overdose. The

court then sentenced him to 48 months' imprisonment on the drug possession count—an upward variance from the 15-21 months the Guidelines recommended—and 60 months on the 924(c) count.

The Court of Appeals found no procedural error. The district court did not clearly err in finding Ahmed distributed the pill that caused the overdose, and the Court of Appeals rejected Ahmed's arguments to the contrary as credibility attacks. Further, the district court sufficiently explained its sentence, touching on § 3553(a) factors like the nature of the offense, Ahmed's criminal history and personal characteristics, and the need for the sentence to reflect the seriousness of the offense and promote respect for the law. Finally, the Court rejected Ahmed's argument that his sentence was substantively unreasonable. The district court weighed his age and lack of violent criminal history as mitigating factors. But it was primarily concerned with the serious nature of the offense and the risk someone could have died, and its balancing of the relevant factors fell within its broad discretion.

***US v. Tumea*, 103 F.4th 1349 (June 6, 2024)**

During his first term of supervision, Tumea was arrested for possessing pills originally described as oxycodone. At his revocation hearing, though, his counsel explained the pills had been tested and found not to be a controlled substance. The district court therefore dismissed that violation. It revoked Tumea's supervision based on other drug- and alcohol-related violations, imposed a time-served sentence with additional supervision, and imposed a residential reentry center condition. During his second term of supervision, Tumea accrued additional drug and alcohol violations. In imposing a 12-month sentence at a second revocation hearing, the district court noted among its concerns the "oxycodone pills" Tumea had been found with during the first term of supervision.

On appeal, Tumea argued the district court procedurally erred by relying on unproven and clearly erroneous facts when deciding the appropriate sentence—namely, that he'd previously been in possession of oxycodone. Reviewing for plain error, the Court of Appeals was not convinced the reference to oxycodone resulted in a less favorable sentence than Tumea would have otherwise received. The Court noted the mention of oxycodone was in the context of a larger discussion about Tumea's longstanding struggle with substance abuse and weapons and saw no indication the mistake impacted the district court's ultimate sentence.

***US v. Mallory, et. al*, 104 F.4th (8th Cir. June 12, 2024)**

Mallory drove an SUV in which Patton and others were passengers when they were involved in a drive-by shooting with a rival gang member. Both were convicted at trial of attempted murder in aid of racketeering and discharging a firearm during a crime of violence—Patton as a principal and Mallory as his accomplice.

As to Patton, the district court did not err in failing to give his proffered justification instruction on the racketeering-related-attempted-murder charge. Because Patton was engaged in illegal activity, Iowa law imposed a duty to retreat before using force, but there was no evidence he tried to do so. Further, on the racketeering element, Patton was not entitled to an instruction requiring the jury to find the attempted murder was an "integral aspect of membership" in the gang or that a "substantial purpose" of the crime was maintaining or increasing his position in the gang. And the district court did not abuse its discretion in admitting background information about gangs or about the actions of Patton's gang in particular.

Mallory sought to introduce hearsay evidence that he'd switched seats with someone else in the SUV before being pulled over, but the district court's excluding the statement was not error given the declarant's motive to lie, his previous denial, and the lack of corroboration. Nor did the district court err in refusing to admit evidence of Mallory's involvement in various non-gang activities, as it would have amounted to inadmissible character evidence under Rule 405(b). Finally, the evidence was sufficient for the jury to find Mallory was an accomplice, as the government proved he knew someone in the SUV was armed and about to fire.

***US v. Green*, 104 F.4th 12 (8th Cir. June 12, 2024)**

Green challenged the sufficiency of the evidence supporting his convictions of two counts of attempted murder in aid of racketeering and two counts of discharging a firearm during a crime of violence. The Court of Appeals affirmed. The government proved the gang Green was involved with was an "enterprise" in that it functioned as a continuing unit whose members had a common purpose, including earning money through drug sales and attacking rivals. And Green did not need to be a full-fledged member of the gang—as opposed to an "associate"—to have taken actions in aid of racketeering. Rather, it was good enough that the requisite violent acts were "for the purpose of gaining entrance to or maintaining or increasing position in" the gang

***US v. Lemoine*, 104 F.4th 679 (8th Cir. June 13, 2024)**

After the jury convicted Lemoine on three aiding-and-abetting counts, the district court granted a judgment of acquittal and conditionally granted a new trial if the JOA were reversed on appeal. The Eighth Circuit held the district court erred in overturning the jury's verdicts. The government's circumstantial evidence regarding aiding and abetting included testimony that drug traffickers often use "lookouts" who remain in the car to keep watch during drug sales, evidence that Lemoine had twice traveled with the principal to meet with the CI, and evidence about his access to storage units used to store drugs. Viewed in the light most favorable to the verdict, and accepting the jury's credibility determinations, this was sufficient. The district court did not, however, abuse its broad discretion by granting a new trial based on the same evidence-sufficiency concerns that drove its JOA decision. The trial court may grant a new trial if it is convinced the evidence weighs so heavily against the verdict that a miscarriage of justice may have occurred. The Court therefore affirmed the conditional grant of a new trial and remanded.

***US v. Cullar*, 104 F.4th 686 (8th Cir. June 14, 2024)**

After being sentenced to a top-of-the-guideline sentence, Cullar appealed claiming the district court erred in calculating the guidelines and that his sentence was substantively unreasonable. The 8th Circuit affirmed. Any error in the district court's drug quantity finding and sentencing enhancements was harmless because those calculations were supplanted by the career-offender designation, which Cullar didn't challenge on appeal. The district court didn't clearly err in denying Cullar a reduction for acceptance of responsibility based on its finding that he'd obstructed justice by leaking confidential information identifying a cooperator. And Cullar's within-guidelines sentence was not substantively unreasonable.

***US v Shaw*, 104 F.4th 691 (8th Cir. June 17, 2024)**

The government sought to revoke Shaw's supervision for committing a grade A violation and grade C violations. After a contested hearing, the district court decided to revoke Shaw's supervision based only on the grade C violations, but it failed to calculate the guideline range for those lower-grade violations, which was 8-14 months. Further, the probation office had only calculated the higher grade-A range in its violation worksheet—33-41 months, lowered to 24 months due to the statutory maximum. The district court ultimately sentenced Shaw to the 24-month statutory maximum, and Shaw appealed claiming procedural error. The Eighth Circuit found plain error in the district court's failure to calculate the proper guideline range and vacated and remanded the matter for resentencing.

***US v. Austin*, 104 F.4th 695 (8th Cir. June 17, 2024)**

After being convicted following a jury trial, Austin appealed the district court's denial of his motion to suppress, the government's comments during closing argument, and the court's application of USSG Sect 4A1.1(e) in calculating his criminal history. The Eighth Circuit affirmed. It held officers did not unreasonably prolong their traffic stop of Austin because they developed reasonable suspicion to investigate possible criminal activity within minutes of encountering Austin based on the odor of marijuana, his movements suggestive of an attempt to hide something, and his admission that he'd smoked marijuana earlier in the day. Officers also reasonably suspected Austin was armed due to his

"furtive gestures" and the suspicious bulge they observed, so the handgun they recovered in a pat-down search was admissible. Even if the prosecutor's remarks in closing about choices having consequences were improper, Austin was not deprived of a fair trial in light of the overwhelming evidence of guilt. And the district court did not err in assessing additional points for prior crimes of violence under USSG Sect. 4A1.1(e) (now 4A1.1(f)). Austin's prior convictions were for crimes of violence and were treated as a single sentence, as required by the Guideline. And since the 2007 amendments, there is no longer a requirement the offenses occur on separate occasions.

***US v. Deng*, 104 F.4th 1052 (8th Cir. June 20, 2024)**

Deng moved to dismiss the indictment charging him with being an unlawful drug user in possession of a firearm in violation of 18 USC Sect 922(g)(3), arguing the statute violated the Second Amendment (both facially and as applied to him) and is void for vagueness. The district court denied his facial challenge to the Second Amendment and deferred ruling on the vagueness and as-applied challenges because they were bound up with facts about the offense that needed to be found by a jury. Deng then unconditionally pleaded guilty and appealed.

The Court of Appeals held Sect 922(g)(3) is facially constitutional based on its decision in *US v. Veasley*, 98 F.4th 906, 918 (8th Cir 2024). The Court also rejected Deng's as-applied challenge, holding he waived it when he entered an unconditional guilty plea. Similarly, Deng waived his argument that the district court erred when it deferred ruling on his vagueness and as-applied challenges. As for the merits of Deng's vagueness challenge, the Court stated that although Sect 922(g)(3) might be unconstitutionally vague on the right facts, it isn't in this case because Deng admitted he frequently used marijuana and knew he was a marijuana user when he possessed the gun.

***US v Sutton*, 105 F.4th 1083 (8th Cir. June 26, 2024)**

After pleading to a felon-in-possession charge, the district court sentenced Sutton to 71 months and a term of supervised release with, as relevant here, three sex-offender-related special conditions. The sex-offender conditions were based on government allegations that Sutton had previously fathered a child in an incestuous relationship with a teenage relative. Sutton appealed the imposition of those conditions, arguing they lacked a lawful basis and were unsupported by evidence in the record.

The Court of Appeals concluded the district court abused its discretion by applying a probable cause standard —rather than a preponderance of the evidence—when it found Sutton committed incest and thereby fathered a child. It also held the district court's factual findings were not supported by the sentencing record: the government submitted no evidence to support its allegations, and judicial notice was not an acceptable alternative to proof. Lastly, the district court impermissibly shifted the burden to Sutton to refute the allegations when it is the government that bears the burden to justify a condition of supervised release. The sex-offender-related conditions were therefore vacated and the case remanded.

***US v Cupples*, 105 F.4th 1096 (8th Cir. June 27, 2024)**

Cupples objected in the district court to his career offender classification, arguing his prior conviction for conspiracy to manufacture methamphetamine is not a controlled substance offense because the Sentencing Commission improperly added inchoate offenses to the definition of controlled substance offense via the application notes. In overruling Cupples's objection, the district court relied on *US v. Mendoza-Figueroa*, 65 F.3d 691 (8th Cir. 1995) (en banc), which held 4B1.2(b)'s commentary applies to predicate drug conspiracy convictions because it was within the Commission's authority and was not an erroneous reading of the Guideline. Having denied Cupples's request for initial *en banc* hearing, the Eighth Circuit affirmed, holding that *Mendoza-Figueroa* remains binding panel precedent that forecloses Cupples's argument. (As the Court states in a footnote, the Commission recently addressed this issue in the 2023 amendments, which moved the relevant language from 4B1.2's application notes to the Guideline itself.)

***US v Pinto*, 106 F.4th 750 (July 1, 2024)**

Pinto was charged and convicted of multiple counts relating to a drug distribution conspiracy. The conspiracy spread nationwide, with the manufacturing of the drugs in Rhode Island, but being distributed and sold in Oregon and more important, North Dakota. In North Dakota, one of the conspiracy's distributors died of an overdose. This sparked a three-year investigation into the conspiracy. After a 19-day, jury trial, Pinto was convicted on multiple counts. Pinto appeals, arguing the venue was improper on the drug conspiracy counts, the sufficiency of the evidence on the money laundering conspiracy count, and he raises a Double Jeopardy argument on three of the counts.

First, regarding venue, Pinto argued that the government's evidence failed to establish that the conspiracy he was involved in connected Pinto to North Dakota. Pinto argued that even though they had the same supplier of drugs, his conspiracy to distribute drugs on the east coast was separate from the dealers distributing them in North Dakota. The evidence presented to the jury included testimony from the "source" regarding the scope of the conspiracy, why there was a lack of communication between the source and Pinto via the dark web, and how the drugs were supplied. Evidence also established the money sent from Pinto to the source, and how Pinto's main contact was more involved with the distributors in North Dakota. The Court concluded that a reasonable jury could infer that even though there was no direct communication between Pinto and the North Dakota distributors, the government did not have to establish that Pinto had knowledge of the North Dakota conspirator's activities to uphold a conviction, and that there was a single conspiracy.

Second, Pinto argues the indictment for his money laundering conspiracy count under 18 USC. Sec. 1956(h) failed to name any of the co-conspirators which resulted in either a constructive amendment or a fatal variance. The Court found Pinto failed to establish how the government's evidence at trial on the money laundering conspiracy proved facts materially different from those alleged in the indictment due to failing to name the co-defendants. Further the indictment tracked the language of 18 USC. Sec. 1956(h) and gave the defendant adequate notice of the charges against him. The indictment provided Pinto with dates and locations of the conduct alleged, described the nature of the relevant transactions, and identified the overt acts alleged in furtherance of the conspiracy. Also, the Court found the government is not required to identify co-conspirators in the indictment. As a result, defendant's argument there was a fatal variance is rejected.

Last, Pinto argued that Counts 1, 2, and 3 violated the Double Jeopardy clause. Count 1, conspiracy to distribute drugs, 21 USC. § 841 and 846, is a lesser included offense to Count 3, continuing criminal enterprise (CCE), 21 USC. § 848. Therefore, he cannot be convicted and sentenced as to both and that constituted plain error.

Count 2 charged Pinto with conspiracy to import drugs into the US, in violation of 21 USC. § 963. Pinto also argues that it, too, is a lesser included offense of CCE. But Count 2 required proof that Pinto conspired to import drugs into the US, and Count 3, Pinto's CCE charge, only incorporated Pinto's conspiracy to distribute drugs. The Court reiterated its prior holding that "[c]onspiracy qualifies as a predicate to CCE." It further concluded that the government selected the drug distribution conspiracy rather than the drug importation conspiracy to serve as the predicate offense for Pinto's CCE charge. Only Count 1 is a lesser included offense of Count 3. Count 2 is not. The Court vacated the judgements on Counts 1 and 3 and remanded the case for resentencing. Everything else was affirmed.

***US v Nelson*, 106 F.4th 719 (8th Cir. July 01, 2024)**

Nelson appeals after pleading guilty to committing mail fraud against Diemel's Livestock, David Foster, and John Gingerich. The fraud scheme stemmed from separate farm related agreements between Nelson and Diemel's Livestock and Nelson and Foster/Gingerich. Nelson defrauded Diemel's Livestock by agreeing to raise and feed their cattle, and then turn around and sell them to give the proceeds to Diemel's Livestock. During that process, Nelson failed to feed and care for the livestock, killing off 40% of the herd. Because he could not provide the full proceeds to Diemel's Livestock, he wrote the two owners of

the company, Justin and Nicholas Diemel, a bad check to hide his mistake. After the check did not clear, the brothers visited Nelson, and he killed them. The fraud regarding Foster/Gingerich was an agreement to raise calves with the help of Foster/Gingerich, but Nelson would incur the cost of raising the cattle. However, Nelson did not, and therefore, Foster/Gingerich covered the cost.

At issue here, Nelson argues that the district court allowed a double recovery by ordering restitution to Diemel Livestock. As a result of the murders of the Diemel brothers, a wrongful death civil suit awarded the Diemel family a $2 million dollar settlement and none of that settlement was allotted to "Diemel Livestock." Nelson argues the district court should have required the government to present evidence to prove Foster and Gingerich's losses and asserts that by objecting to the paragraph in the PSR that recommended restitution, he put specific factual allegations in dispute. However, as Nelson acknowledged at sentencing, he failed to object to the factual allegations regarding the loss amounts outlined in the PSR. Instead, he objected to "any order as to restitution" and asserted that Foster and Gingerich were not "victim[s] in this case." The Court found that this "summary objection" lacked the "specificity and clarity" necessary to preclude the district court from relying on the factual allegations in the PSR. The Court also found the district court did not clearly err when it accepted the unobjected-to loss amounts alleged in the PSR.

***US v. Dennis*, 106 F.4th 759 (8th Cir. July 2, 2024)**

Mr. Dennis pled guilty to charges related to the distribution of controlled substances and to his possession of a firearm after having been convicted of a felony. The district court sentenced him to 400 months in prison and five years of supervised release.

On appeal, first, Mr. Dennis argued that the district court erred by relying on statements he made during proffer interviews with the government during sentencing. However, Mr. Dennis' proffer agreement, states the information provided by Dennis, including incriminating statements, *may* be used by the court for sentencing.

Second, Mr. Dennis argued the district court clearly erred in finding he used violence in connection with a drug offense. However, the Court held that since the district court considered weaknesses and conflicts in witness testimony and motivation, there was no sufficient reason to find clear error. Third, Mr. Dennis argued that the district court clearly erred in finding he had a leadership role in the drug-distribution conspiracy. The Court found all of those determinations were supported by sufficient evidence. Fourth, there was no abuse of discretion since the district court expressly considered the 18 USC. § 3553(a) factors. Affirmed.

***US v. Rollins*, 105 F.4th 1115 (8th Cir. July 02, 2024)**

Rollins appeals his 40-month sentence following a revocation of his supervised release arguing it was substantively unreasonable. Rollins had three separate terms of supervised release following a conviction and prison term for a conspiracy to manufacture methamphetamine, which were all revoked. The first term of supervised release was revoked due to his continued use of controlled substances, and he was sentenced to four months of incarceration with three years of supervised release to follow. The second term of supervised release was revoked due to his continued use of controlled substances and a Grade C drug-related law violation. For that conduct he was sentenced to 10 months of incarceration and one year of supervised release.

While on his third term of supervised release, Rollins admitted to failing to show up to three drug tests, using a controlled substance, committing a new Grade B law violation (distribution of a controlled substance), and not informing his probation officer he was terminated from his job. The court determined his guideline range was 12-18 months, and sentenced Rollins to 40 months' imprisonment with no supervision to follow.

Rollins argued that the district court relied on an improper factor based on a comment made when deciding to vary upwards, regarding the Guidelines not adequately considering the Grade B violation. The

Court concluded, however, the district court correctly calculated the Guidelines range because it properly applied the Grade B violation when deciding the 12–18-month guideline range. Other factors the court relied on when deciding to vary upwards were the repeated nature of his noncompliance, continued drug use, failing to follow the rules of supervision, associating with other criminals, and no interest in changing his behavior.

The Court concluded that the district court properly calculated the Guidelines range, did not rely on any impermissible factors, and gave proper weight to the listed factors. Therefore, the Court found no abuse of discretion, and affirmed the sentence.

***US v. Henry*, 106 F.4th 763 (8th Cir. July 2, 2024)**

Co-defendants, Henry and Strickland, were charged with two counts of conspiracy to interfere with commerce by robbery, one count of attempt to interfere with commerce by robbery, one count of murder while discharging a firearm in furtherance of a crime of violence, one count of interference with commerce by robbery, and one count of brandishing a firearm in furtherance of a crime of violence. Henry and Strickland pled guilty pursuant to plea agreements admitting to murder while discharging a firearm in furtherance of a crime of violence. The appeal waiver in the plea agreement Strickland entered afforded him the limited right to appeal the substantive reasonableness of the sentence if the district court determined the murder of the alleged victim was premeditated, the district court applied Application Note 2(A) of USS.G. Sec. 2A1.1, and imposed a life sentence. The appeal waiver in the plea agreement Henry entered afforded him the limited right to appeal the substantive reasonableness of the sentence of imprisonment if the sentence was above the Guideline range, if the court determined the murder of the alleged victim was premeditated and the district court applied Application Note 2(A) of USS.G. Sec. 2A1.1. He was also allowed to challenge the substantive reasonableness of his sentence if the court imposed a life sentence.

In a joint sentencing hearing, the district court noted that the applicable statute provides a maximum term of life imprisonment. The district court calculated Strickland's Guidelines range to be 324 to 405 months imprisonment, and Henry's to be 360 months to life imprisonment. After hearing both parties' arguments regarding the alleged premeditation of the murder, the district court ultimately found that both Strickland and Henry acted with premeditation. Both Strickland and Henry moved for a downward variance from the Guidelines range. The district court, however, denied both, and sentenced both men to a sentence of life imprisonment.

On appeal, both Strickland and Henry argue the district court erred in finding the murder was premeditated and warranted a life sentence. Additionally, Henry argues that the district court erred in calculating his Guidelines range because it included criminal history points for juvenile adjudications, and that his life sentence was substantially unreasonable because the district court failed to consider factors such as his age at the time of the offense and circumstances related to his childhood.
In response to Strickland and Henry's argument regarding premeditation, the Court found the facts presented by the government were sufficient to show premeditation, and the district court did not err in that regard. In response to Henry's argument the district court miscalculated his criminal history score by considering two juvenile offenses, the government moved to dismiss arguing that Henry's appeal waiver barred this procedural error. The Court agreed with the government's argument and granted their motion to dismiss as to that issue. The Court also rejected Henry's substantive unreasonableness argument, noting the district court considered Henry's mitigating factors, and found Henry's disagreement with the district court's weighing of the mitigating factors was insufficient to prove his sentence was substantially unreasonable.

***US v. Jackson*, 106 F.4th 772 (8th Cir. July 2, 2024)**

Jackson was sentenced to 120-months after pleading guilty to possessing a firearm as an unlawful user of a controlled substance and now appeals this sentence arguing the district court miscalculated her Guidelines range, thus imposing a substantively unreasonable sentence. At the time of sentencing,

Jackson had been convicted of an Iowa drug felony for which she had not yet been sentenced. On appeal, Jackson claimed the district court wrongly included this Iowa drug felony in her Guidelines calculation, arguing that a "conviction" requires the court impose a sentence and final judgment. The district court rejected Jackson's argument, referencing the plain language of USS.G. Sec. 2K2.1(a)(3) to support this finding. The Court affirmed the district court's decision, concluding that the date of conviction is the date that a defendant's guilt is established, and therefore, the district court did not err in including the drug felony in its Guidelines calculation.

Jackson then challenged the district court's application of a four-level enhancement for use or possession of a firearm or ammunition in connection with another felony offense pursuant to USS.G. Sec. 2K2.1(b)(6)(B). The Court held the district court did not clearly err in finding Jackson possessed a firearm in connection with felony drug trafficking.

Jackson also asserted the district court erred in denying a reduction for her acceptance of responsibility under USS.G. Sec. 3E1.1(a). The Court rejected this argument, finding Jackson's continued criminal activity while incarcerated supported that determination. Lastly, the Court also rejected Jackson's assertion her sentence was substantively unreasonable. It held that "[w]here a district court has sentenced a defendant below the advisory Guidelines range, 'it is nearly inconceivable that the court abused its discretion in not varying downward still further.'"

***US v. Wings*, 106 F.4th 793 (8th Cir. July 03, 2024)**

Wings pleaded guilty to unlawfully possessing a firearm and ammunition as a felon. At sentencing, the district court determined that Wing's base offense level was twenty pursuant to USS.G. § 2K2.1(a)(4)(A) because he had sustained a prior felony conviction for a crime of violence.

On appeal, Wings contends the record did not establish his prior felony conviction for Missouri second-degree domestic assault (Mo. Rev. Stat. § 565.073.1(1) (2001)) constituted a crime of violence. The Court found though that the statute was divisible, and the relevant judicial records established Wings was convicted of a subsection within the statute that qualified as a crime of violence under the force clause. To make this determination, the Court, at the urging of the government, took judicial notice of the charging document, the guilty plea, and the state court judgment. Affirmed.

***US v Manning*, 106 F.4th 796 (8th Cir. July 5, 2024)**

Manning was found guilty by a jury of possession of child pornography after having been convicted of sexual exploitation of a minor. Manning appealed two trial-related rulings, the admission of his prior Iowa conviction, under Fed. R. Evid. 414, and the district court's choice of sanction for the government's untimely disclosure of evidence, under Fed. R. Crim. P. 16.

Manning argues that the district court erred by not applying the categorical approach to determine whether his prior Iowa conviction for sexual exploitation of a minor was admissible under Fed. R. Evid. 414, and that his prior conviction was not a categorical match to child molestation.
Manning did not dispute that his conviction did involve conduct prohibited by 18 USC. Chpt. 110 under Fed. R. Evid. 414(d)(2)(B), but instead argued the Fed. R. Evid. 414(d)(1) definition of "child" is misaligned with Iowa's definition of "minor". Under Fed. R. Evid. 414(d)(1), a child is a person below the age of 14, and under Iowa law, a minor is any person under the age of 18. But here, the evidence was found to be admissible because Fed. R. Evid. 414's definition of child was not relevant. Manning's prior conviction was brought in under Fed. R. Evid. 414(d)(2)(B), which was "any conduct prohibited by Chapter. 110." And Chapter 110's definition of minor is any person under the age of 18. Even if the court applied the categorical approach, his prior conviction would still qualify as child molestation under Rule 414.

Next, Manning argued the court abused its discretion by allowing the government to introduce evidence of a late-disclosed writing on the back of a cell phone. Manning argued the appropriate sanction for the

violation was to exclude the evidence from being introduced at trial. The writing on the back of the cell phone was "PTHC rocks," which stands for "Preteen Hard Core."
When deciding the proper remedy for untimely disclosures, the court is to weigh the reasons for the delay and whether the government acted intentionally or in bad faith, the degree of prejudice suffered by the defendant, and whether the sanction is the least severe sanction likely to remedy the prejudice and address the wrongdoing. Federal Rule of Criminal Procedure 16 states the district court has a broad discretion to grant a continuance or prohibit the party who failed to comply with the discovery order from introducing the evidence.

Manning argued the local police department had custody of the phone for two and a half years and failed to document the unusual writing during that time, but did not attribute that to any bad faith. The investigators testified they were more interested in the digital evidence from the phone, and overlooked the writing. Manning further argued the lack of timely disclosure prejudiced his defense because his defense was he was not responsible for and didn't know about the PTHC images downloaded on the phone's SD card, which would be undermined by the evidence of the "PTHC" written on the back cover. Manning argued he could have investigated whether the writing was even there at the time of the seizure, and why it was overlooked by law enforcement for two-and-a-half years. Manning then declined the court's offer for a continuance in order to investigate the late disclosure. Manning offered no evidence of why a continuance would not remedy any prejudice to his defense. Lastly, Manning was not limited in his ability to cross-examine the officer regarding the evidence of the writing on the back of the phone.

Manning also raised two procedural challenges to his sentence. First, Manning challenged a two-level enhancement for obstruction of justice. During the execution of the search warrant, Manning was seen entering his car, and physically attempting to destroy a cell phone. Manning argued his actions would fall under the exception to the enhancement which includes conduct that occurs contemporaneously with arrest. The district court concluded that Manning's conduct, was somewhere above on the scale of culpability to the exception. The court stated that Manning's action amounted to a willful attempt to destroy the cellphone, and he was not yet under arrest at the time he attempted to destroy the evidence.

Lastly, Manning challenged the calculation of his criminal history category, claiming the court erred when it added two points for committing the instant offense while under a criminal justice sentence. Manning's was under a sentence until September 13, 2018, and argued the government failed to prove he committed any portion of the instant offense prior to that date. The court found that trial testimony from one of the agents established the earliest date of creation found on the hard drives dated back to August 2018, which was before the expiration of the prior criminal justice sentence. Affirmed.

***US v. Thurber*, 106 F.4th 814 (8th Cir. July 8, 2024)**
Thurber was convicted in district court of multiple counts of child pornography and was sentenced to 20 years imprisonment on each count, running concurrently, and ten years of supervised release. On appeal, Thurber brought several challenges regarding trial rulings, evidence, and the district court's imposition of supervised release conditions in the written judgment it failed to pronounce orally at sentencing.

Thurber asserted the district court violated his rights under the Confrontation Clause when it allowed the government to introduce a Texas Department of Public Safety certified abstract record and a copy of a minor's birth certificate, arguing these exhibits were testimonial in nature and alleging that the government's use of them was to avoid calling the minor as a witness. The Court found that the district court did not commit error in allowing the documents to be admitted over the defendant's objection. It found the documents were not testimonial in nature, because they were not created by the state agency in anticipation of litigation. The Court found they were created in the regular course of the agency's business.

Thurber then asserted the Government's admission of photo and video evidence, not used as a basis for any charges, resulted in a constructive amendment or variance to the Indictment. The Eighth Circuit

reviewed this issue de novo by first considering whether a variance existed and, if so, whether it prejudiced the defendant. The Court, however, found the admission of a video and photo depicting the alleged victim in a shower did not constitute a constructive amendment to the Indictment. In this holding, the Court also relied on the finding there were six other videos, and that the government indicated during examination of the witness that the photo and video were not part of the charges. The Court concluded that because the government clearly identified to the jury which videos were charged in the Indictment and which video and photo were not, there was no substantial likelihood that the jury convicted Thurber of an offense that was in addition to those charged in the Indictment.

The Court next considered Thurber's challenge that the inclusion of the exhibits resulted in a constructive amendment to the Indictment. The Court concluded that because the "government never wavered in its theory of the case at trial, and the introduction of the exhibits did not alter the evidence Thurber expected to defend against and that no fatal variance occurred.

Thurber also challenged the sufficiency of the evidence, asserting the government failed to meet its burden of proving, beyond a reasonable doubt, that he committed the offense of production of child pornography. The Court found the evidence was sufficient for the jury to find all of the elements of the offense: the victim was under the age of 18, and the defendant had the requisite intent for the victim to engage in sexual conduct for the purpose of creating a visual depiction.

Thurber next argued the district court erred when it instructed the jury that a person is "used" for the purposes of § 2251(a) if "they are photographed or videotaped," asserting that the instruction should have included the requirement that the videotape or photograph depict the minor "engaging in sexually explicit conduct to create a visual depiction of such conduct," as stated in the statute. This challenge was reviewed for plain error as the Court found the defendant did not timely object to the instruction at trial. The Court, however, found that the district court did not err in instructing the jury as to the definition of the term "used." It explained that Thurber's argument ignored the rest of the jury instruction; each element of the offense was listed, and the language he challenged was part of the definitional section, not part of an element.

Thurber also asserted the district court erred when it prevented him from presenting a complete defense by prohibiting him from introducing additional portions of the text messages he exchanged with A.H. The Court held that Thurber's purpose in wanting to present the additional portions was not an entitlement in this Circuit. It reasoned 1) that he did not preserve this claim of error by preserving it below; and 2) the First Amendment does not require a mistake of age defense to charges of production of child pornography, and therefore, the district court did not commit error in denying Thurber the opportunity to present that defense.

Last, Thurber asserted that conditions of supervised release contained in the written judgment but not pronounced at sentencing should be stricken. The court agreed with Thurber's argument. Relying on its previous decisions made under similar circumstances, the Court held the conditions be vacated and the matter remanded for the district court to consider whether any condition was consistent with or necessarily included within the scope of the conditions announced at sentencing. It also held that Thurber could challenge any standard conditions he feels should not be imposed upon him.

***US v. Norman*, 107 F.4th 805 (8th Cir. July 09, 2024)**

A jury convicted Norman of conspiring to commit murder for hire, 18 USC. § 1958, and of conspiring to commit mail and wire fraud, §§ 1349, 1341, and 1343.

On appeal, Norman challenged the denial of his motion to compel two witnesses to testify. The Court determined though that the district court did not commit error in denying Norman's motion. Specifically, the district court found one of the witnesses did not waive their Fifth Amendment privilege by making unsworn, out-of-court statements to investigators. The district court also found that the witness faced

jeopardy from the potential of compelled testimony. For the second witness, since they were not subpoenaed, the Court found they had no duty to appear in court.

Norman next challenged the district court's ruling admitting hearsay texts that were allegedly (1) irrelevant and (2) lacked proper foundation. *See* Fed. R. Evid. 602. However, the Court determined the texts were relevant, and the witness did have the knowledge for proper foundation. Norman challenged the admission of another out-of-court statement, but the Court found the record revealed there was ample evidence of the witness's involvement in the conspiracy.

Norman next argued the district court should not have allowed FBI agents to use two demonstrative exhibits. Since there was nothing unfair or misleading about the illustrative slides, the Court determined the district court did not abuse its discretion.

Finally, the Court found Norman's challenge to the final jury instruction was waived by jointly proposing the instructions and failing to object. However, it found his challenge to the supplemental jury instruction failed because (1) his preferred instruction would have been inaccurate, and (2) another instruction covered the substance of Norman's complaint. Affirmed.

***US v. Whitworth*, 107 F.4th 817 (8th Cir. July 11, 2024)**

A jury convicted Whitworth of conspiring to distribute methamphetamine, 21 USC. §§ 841(a)(1), (b)(1)(A), and 846, and possessing methamphetamine with the intent to distribute, 21 USC. §§ 841(a)(1) and (b)(1)(A). The district court imposed a sentence of 235 months' imprisonment.

On appeal, Whitworth argued the district court abused its discretion by striking for cause a potential juror based on the judge's personal relationship with her and her family. Regardless of whether there was a "sound reason" for striking the juror, Whitworth could not prevail because he did not show prejudice by this decision.

Whitworth next argued the district court erred when it permitted the government, over his relevance objection, to ask Sgt. Primm "why" law enforcement seized two shotguns and ammunition from a shed. The Court held the evidence of the guns in the shed was relevant evidence, and its probative value was not substantially outweighed by prejudice.

Whitworth also argued the district court erred by denying his request for a mistrial when Sgt. Primm answered by suggesting that Whitworth had a prior felony. Whitworth declined the district court's offer to strike the testimony or provide a limiting instruction; thus, he effectively "waived his right to appeal the denial of his motion for a mistrial as to any prejudice that would have been cured by such an instruction." *US v. Davis*, 867 F.3d 1021, 1032 (8th Cir. 2017) (quoting *US v. Petrovic*, 701 F.3d 849, 857 (8th Cir. 2012)). The Court found there was substantial evidence of guilt in this case, so the Court chose not to disturb the verdict.

Finally, Whitworth argues the district court erred when calculating his Guidelines range for purposes of sentencing by improperly applying an aggravated role enhancement under USS.G. § 3B1.1(c). However, the Court found the record supported the two-level increase. Affirmed.

***US v. Minsk*, 107 F.4th 824 (8th Cir. July 11, 2024)**

Mink challenged the district court's denial of his combined motion for a judgment of acquittal or for a new trial under Federal Rules of Criminal Procedure 29 and 33, which he filed more than three years after his conviction.

On appeal, Mink argued that while his filing surpassed the filing deadline that was 14 days following the return of his guilty verdict, his neglect was excusable under Federal Rules of Criminal Procedure 45(b)(1). In *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, the Supreme

Court noted that an excusable neglect determination should consider the following factors: (1) "the danger of prejudice to the [opposing party]"; (2) "the length of the delay and its potential impact on judicial proceedings"; (3) "the reason for the delay, including whether it was within the reasonable control of the movant"; and (4) "whether the movant acted in good faith." 507 US 380, 395 (1993). The Court held the application of these four factors did not come out in Mink's favor.

First, the Court determined that Mink failed to provide a satisfactory explanation for the late filing. Mink claimed two Supreme Court cases constitute intervening precedent that changed the law governing his case. *See US v. Taylor*, 596 US 845 (2022); *see Borden v. US*, 593 US 420 (2021). However, the Court held these cases do not represent a substantial change in the law as to his conviction.

Second, the Court held the delay was within Mink's reasonable control. Regardless of whether Mink's previous attorney was deficient for failing to timely file, Mink's post-conviction counsel waited two months.

Third, the Court held the length of the delay was inordinate. A delay of more than three years and eight months, as elapsed here, greatly exceeded the outer bounds established by Eighth Circuit case law. Moreover, by forcing the district court to continue the resentencing hearing by two months to allow for additional briefing, the delay directly impacted the judicial proceedings.

Fourth, while the prejudice to the government associated with the long-delayed Rule 33 motion for new trial does not exist with a Rule 29 motion for acquittal, the Court held the extent of the prejudice associated with granting a new trial was so great that this factor counseled against a finding of excusable neglect.

Fifth, the Court held the motion was not made in good faith since a delay of more than three years demonstrates an intentional disregard of the district court's procedures. Affirmed.

***US v. Donath*, 107 F.4th 830 (8th Cir. July 12, 2024)**

Donath pled guilty felon in possession of a firearm, on appeal he challenges the district court's categorization of his two previous state offenses as "crime[s] of violence" under USS.G. §§ 2K2.1(a)(4)(A) and 4B1.2(a). He also challenged the district court's decision to decrease his offense by two levels, rather than three, for acceptance of responsibility under USS.G. § 3E1.1.

Donath argued his prior conviction for assault on law enforcement officers was wrongly categorized as a crime of violence under USS.G. § 2K2.1(a)(4)(A) by the district court. Donath cited state case law supporting his argument. The Court declined to consider that case law, instead quoting its opinion in *Mader v. US*, 654 F.3d 794, 800 (8th Cir. 2011); explaining "[i]t is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel." Applying this rule, the Court concluded that because a prior panel has held the Iowa assault statute (§ 703.3A(3)) is a crime of violence (*US v. Hamilton*, 46 F.4th 864, 870 (8th Cir. 2022)), Donath's prior conviction was a crime of violence. The Court further added, regarding state law, that there may be an exception to this cardinal rule when an intervening state court decision exists, but that Donath did not cite to any such state case for the Court to consider.

The second argument Donath raised was that his offense level should have been decreased by three levels, rather than two, for acceptance of responsibility pursuant to USS.G. § 3.E1.1(a) (providing that offense level be decreased by two for acceptance of responsibility) and subsection (b) (which provides that the offense level be decreased by one additional level for the defendant assisting the government with the investigation or prosecution in preparation for the defendant's own trial). After Donath's sentence was imposed the Sentencing Commission amended subsection (b) to define "preparing for trial" to mean "substantive preparations taken to present the government's case against the defendant to a jury [or judge] at trial. 'Preparing for trial' is ordinarily indicated by actions taken close to trial … Preparations for pretrial proceedings … ordinarily are not considered 'preparing for trial' under this subsection. Post

conviction matters … are not considered 'preparing for trial.'" The Court stated that whether the version of the Guidelines that existed at the time of sentencing applies depends on the nature of the amendment, and that USS.G. § 1B1.11(a) provides amendments to the Guidelines merely meant for clarification can still be applied despite the change taking place after the defendant's sentencing, as long as the amendment is not substantive and does not conflict with the preexisting Guidelines (*US v. Hansen*, 859 F.3d 576, 578 (8th Cir. 2017). Looking at the version of the Guidelines when Donath was sentenced and the amended version, the Court found the amendment was a mere clarification to the meaning of "preparing for trial" and that no conflict exists between the two versions. Accordingly, the Court reviewed Donath's sentence under the new version's "preparing for trial" definition. The Court referred to Application Note 6 of USS.G. § 3E1.1, which explains the additional point deduction afforded for assisting the government in preparing for trial "may only be granted upon a formal motion by the Government at the time of sentencing." To provide further clarification the Court explained that the acceptance of responsibility Guideline permits the government to move for an additional level decrease but never requires it to do so, and "a defendant … is not entitled to an additional level of reduction as a matter of right." (*US v. Smith*, 422 F.3d 715, 726 (8th Cir. 2005)). Thus, the Court concludes that because the government did not move for an additional level decrease at the time of Donath's sentencing, he was not entitled to one.

***US v. Myrick*, 107 F.4th 873 (8th Cir. July 12, 2024)**

Myrick pled guilty to possession with intent to distribute 50 grams or more of methamphetamine, in violation of 21 USC. § 841(a)(1) and (b)(1)(A). Myrick objected to all drug quantity attributed to him in the PSR, except the 69.01 grams seized from his apartment, asserting that his base offense level should be calculated solely on that amount. The government objected to the reduction for acceptance of responsibility. After considering the evidence, the district court overruled Myrick's objections.

Next, Myrick argued the district court erred by applying a two-level enhancement for "maintain[ing] a premises for the purpose of manufacturing or distributing a controlled substance." USSG § 2D1.1(b)(12). Considering the witness testimony and the unobjected-to facts in the PSR describing the items found during the search of the apartment, the district court did not clearly err in applying the enhancement.

Finally, Myrick argued the district court erred when it denied him a reduction for acceptance of responsibility. The Court found a guilty plea does not entitle a defendant to this reduction. There was no clear error since after stipulating in his plea agreement that the sentencing court would consider the conduct that supported the dismissed conspiracy charge, Myrick raised factual objections to nearly every paragraph in the PSR concerning the conspiracy and contested relevant conduct that was "well supported in the record." Affirmed.

***US v. Kingsbury*, 107 F.4th 879 (8th Cir. July 15, 2024)**

Kingsbury was an FBI Intelligence Analyst with access to classified national defense information. She pled guilty to two counts of willful retention of national defense information in violation of 18 USC. § 793(e). At sentencing, the district court applied a two-level enhancement under the US Sentencing Guidelines Manual § 3B1.3 for abusing a position of public trust in a manner that significantly facilitated the commission or concealment of the offense.

On appeal, Kendra argued that because her position of trust was "inextricably interwoven and central" to the commission of her crime, a carveout applies, and her "abuse of trust" is already included in her base offense level. The Court found that since an employee without the same clearance could also have unlawfully obtained the same classified documents, her position of trust was not necessarily interwoven into the base offense level. Affirmed.

***US v. McCoy*, 108 F.4th 639 (8th Cir. July 15, 2024) (en banc)**

Matthew McCoy appeals his convictions for two counts of sexual exploitation of a minor. McCoy brought the following arguments on appeal: (1) the district court abused its discretion with instructing the

jury, (2) evidence presented at trial was insufficient to support the convictions under 18 USC. § 2251(a), (3) the evidence was insufficient to sustain the convictions under settled law as reflected in the jury instructions used at trial, and (4) the district court made erroneous evidentiary rulings.

McCoy first argued the district court abused its discretion when instructing the jury, however, because McCoy did not object to the jury instructions during trial, the Court reviewed the district court's decision for plain error only. McCoy challenged the district court's use of Instruction No. 12, which was drawn from prior Eighth Circuit decisions. He argued the district court should have instead used an instruction on the issue from a divided panel in another circuit filed after his trial. The majority rejected McCoy's argument, finding the district court did not plainly err by instructing the jury in accordance with settled circuit precedent.

Additionally, McCoy also challenged the district court's definition of the term "used" in Instruction No. 11, arguing that it was an incomplete statement of law because it failed to define other statutory terms. McCoy made no objection at trial, nor did he explain why the district court should have also defined terms that could reasonably be deemed self-explanatory. The majority also rejected this argument, finding the district court's use of this instruction, along with additional clarification the district court included in the instruction, was consistent with circuit precedent and, thus, there was no plain error under settled law.

McCoy then challenged the sufficiency of the evidence to support the convictions under 18 USC. § 2251(a), arguing again that a legal standard under §§ 2251(a) and 2256(2) taken from a decision of another circuit should instead have been applied. The standard suggested by McCoy differed from Eighth Circuit precedent and from the jury instruction he failed to object to. Noting McCoy preserved a challenge to the sufficiency of evidence, but failed to preserve a challenge to the relevant jury instruction, the majority ultimately found McCoy was using this sufficiency of the evidence challenge to get around his unpreserved jury instruction challenge. Based on the close connection between the jury instructions and McCoy's argument, the majority rejected this argument finding the district court did not plainly err by applying a legal standard under §§ 2251(a) and 2256(2) consistent with settled circuit precedent.

McCoy also brought an additional challenge to the sufficiency of evidence, arguing there was insufficient evidence to sustain the convictions under settled law as reflected in the jury instructions used. To prevail on this claim, McCoy had to establish that no reasonable juror could have found the essential elements of the crime beyond a reasonable doubt. Relying on its previous decisions about this issue, the majority found the issue is not whether the images were intended to appeal to the defendant's sexual interests, but whether they are of a sexual nature on their face. The majority rejected the arguments as to insufficiency based on the Court's precedent.

Last, McCoy argued the district court made erroneous evidentiary rulings. First, McCoy asserted the district court erred by admitting evidence that constituted a constructive amendment of the indictment or variance from the indictment. The majority held that a variance arises when evidence presented proves facts materially different from those alleged in the indictment. The majority found the district court instructed the jury remember McCoy was only on trial for the crimes charged in the indictment and only evaluate the evidence based on what he was charged with and nothing else. The majority rejects his argument, noting the defense had fair notice of the evidence and that evidence did not create a material variance.
McCoy then challenged the district court's admission of other images from hidden cameras, that did not constitute child pornography, for the purpose of showing McCoy's knowledge, opportunity, and intent to commit the crimes charged, and to address the issue of whether the child pornography videos the government also introduced were a result of a mistake or accident. The district court, however, found the admission of other images and other acts was proper under Rule 404(b), and the court limited any prejudice by giving a limiting instruction. The majority ultimately rejected McCoy's argument, finding the district court did not abuse its discretion in admitting that evidence for the stated limited relevancy

purposes, as well as providing the jury with a limiting instruction and finding the probative value of the evidence substantially outweighed the risk of unfair prejudice.

***US v Sledge*, 108 F.4th 659 (8th Cir. July 16, 2024)**

Darius and Baquan were charged with five counts each involving a drug trafficking conspiracy. At first, Baquan led the conspiracy where he would make trips delivering thousands of pills from Michigan to North Dakota. After being arrested in 2019, Baquan then directed, via jail calls, Darius to continue the operation. About a year later, they both had been arrested and charged. After a joint trial, Baquan was found guilty on all counts, and Darius was found guilty on all but one of the counts.

The first challenge addressed by Darius was his continuing criminal enterprise (CCE) conviction based on an error in the jury instructions. Darius argued the SCOTUS decision in *Richardson v. US* requires an instruction stating the jury must unanimously agree as to which three predicate felonies constituted the continuing series. The jury did not receive this instruction and the jury found him guilty on only two of the predicate felonies. However, the Court found Darius did not properly object to the instruction when it was given. The Court stated that even though counsel stated the Court should include the predicate drug felonies in the instructions, that he did not clearly state that the unanimity instruction was required. Further, even though Darius' proposed jury instructions included the unanimity instruction, and he objected to any instruction that conflicted with his proposed instruction, the Court stated he did not properly to the specific unanimity instruction when discussing the final proposed instructions. However, the Court found the district court committed plain error based on *Richardson* that the instruction should have been given. The Court also concluded that the error prejudiced Darius' rights because the jury only found Darius guilty of the two predicate narcotics violations. Last, the Court found the error seriously affected the fairness, integrity, or public reputation of judicial proceedings because Darius was sentenced to 360 months on the CCE count, and 240 months on the remaining three convictions. Since Darius had a loss of liberty due to the error, it affected the fairness and integrity of the proceedings. The Court reversed and remanded the CCE conviction for a new trial. The Court also remanded Baquan's drug conspiracy count, but only to vacate the lesser included offense.

Next, Darius and Baquan both argued text messages, videos, and photos obtained from an unindicted coconspirator should not have been introduced into evidence under FRE 801(d)(2)(E). They claimed the admission of that evidence violated their Confrontation Clause rights. The Court concluded that evidence admitted under FRE 801(d)(2)(E) is generally non-testimonial and does not violate the Confrontation Clause.

Darius and Baquan next argued the district court abused its discretion by denying their motion for a new trial and evidentiary hearing based on juror bias and misconduct. That argument was based on information brought to defense counsel's attention months after the verdict was returned. An alternate juror contacted Baquan's counsel and provided texts between herself and a second juror where they discussed a third juror who mentioned his daughter had previously overdosed on pills. After reviewing the voir dire transcript, the Court concluded that the juror in question answered no questions dishonestly. The defendants were also not entitled to an evidentiary hearing because they did not meet their burden under *McDonough Power* and inquiring into the intra-jury communications would violate FRE 606(b).

Last, Baquan argued prosecutorial misconduct by the government in listening to his jail calls during trial. The Court stated Baquan did not properly object to the action, but instead only made a "request" as to those actions. The Court concluded a defendant gives his implied consent to the government listening to their jail calls when informed the calls are recorded and they speak anyway.

***US v. Sanford & Simmons*, 108 F.4th 655 (8th Cir. July 16, 2024)**

Co-defendants Sanford and Simmons each entered a conditional guilty plea to one count of possessing a firearm after having been convicted of a felony, 18 USC. §§ 922(g)(1), 924(a)(2). They also reserved their right to appeal the denial of their motions to suppress.

On appeal, the defendants argued that they were unlawfully seized when the officers blocked their vehicle from leaving. Since the alleged seizure occurred before the officer smelled marijuana, they argued that all evidence seized from the vehicle must be suppressed as a result. Relying on photographs and video footage, the district court found that the car was not completely blocked: the positioning of the marked squad cars limited the options for the Kia's egress, but the Court found their vehicle could have backed up along the curb or into the adjoining driveway, without facing any obstacle, despite the placement of the squad cars. The Court stated that a reasonable person in the defendants' position would have felt free to leave the scene. Because Sanford and Simmons pointed to no other factors to support their assertion that they were seized after the officers arrived at the club, but before the officer smelled marijuana, the motions were properly denied. The decisions were affirmed.

***Worth v. Jacobson*, 108 F.4th 677 (8th Cir. July 16, 2024)**

The Eighth Circuit reviewed the government's appeal regarding Minnesota's permit-to-carry statute. The District Court granted summary judgement on behalf of the Plaintiffs concluding the statute violated their Second Amendment rights because the plain text covered the conduct and the government did not meet their burden to show that restricting the 18-20 year old's right to bear handguns in public was consistent with this Nation's historical tradition of firearm regulation.

The Minnesota statute stated that in order to carry a handgun in public, that you must have a permit. In order to get a permit, the applicant must be 21 years old. The plaintiffs allege the statute was unconstitutional facially, and as applied to the plaintiffs.

The Court then evaluated the two-part test laid out in *Bruen*. The first step is deciding whether the statute, the Carry Ban, governs conduct that falls within the plain text of the Second Amendment. The Court began with the threshold question, are the plaintiffs part of the people? The Court concluded that ordinary, law-abiding adults are indeed part of the people that the Second Amendment protects. The State of Minnesota (Minnesota) argues that 18-20 year olds are not part of the people based on common law that states individuals did not have rights until they turned 21 years old. The Court disagreed, stating that ordinary, law-abiding adult citizens 18-20 because they are members of the political community under *Heller*'s "political community" doctrine, the people has a fixed definition, though not fixed contents, they are adults, and that the Second Amendment does not have a freestanding, extratextual dangerousness catchall.

First, the right to keep and bear arms is not a right granted by the Constitution. The Second Amendment states that it shall not be infringed. *Heller* recognizes the applicability of that right to "all Americans". Minnesota is required to overcome the strong presumption that the right applies to all Americans. Minnesota argues that at the time of the founding, 18-20 year olds are not part of the political community because they did not possess all their civil and political rights as minors. Minnesota's argument is misplaced, because the Second Amendment is interpreted in *Heller* to apply to all bearable arms, even those that were not in existence at the time of the founding. And that the Constitution bust apply to circumstances beyond those the Founders specifically anticipated. *Heller* also extends the definition of "the people" to all members, even those not included at the time of the founding. This is also supported when reading the Constitution as a whole, and that 18-20 years olds have been guaranteed the rights to vote, free speech, etc. Minnesota also claims that from the founding, states have had the power to regulate guns in the hands of irresponsible and dangerous groups. But in step one of the analysis, being irresponsible and dangerous does not exclude them from the definition of the people. Because the Second Amendment does not explicitly list an age limit, and the Founders had set age limits in other Constitutional amendments, ordinary, law-abiding 18-20 year old Minnesotans are members of the people.

For the second step of the analysis, *Bruen* suggests that we should prioritize the Founding-era to evaluate the historical portion. The reasoning behind that is so states and the federal government are held to similar standards. The court then stated that Minnesota must prove that a regulation similar to their Carry Ban is consistent with the Nation's historical tradition of firearm regulation. The Court must consider the "how"

(comparable burden) and the "why" (comparably justified). The "how" is a ban of bearing of arms in an otherwise constitutional manner.
Minnesota states that the "why" of the Carry Ban is because 18-20 year olds are not competent to make responsible decisions with guns, and pose a risk to the public and themselves. Minnesota states their three reasons why the Carry Ban meets the *Bruen* historical tradition test because a freestanding catchall for groups the state deems dangerous, the founding-era and common law analogues, and Reconstruction-era analogues. The Court concluded that Minnesota did not present evidence to support the first reason, that 18-20 year olds are dangerous, and therefore does not justify the Carry Ban. Further, the Court looked at the Minnesota statute and stated that in order to get a permit, the applicant must show that they've taken a training course. There were also statutes that restricted access to getting a permit.

Secondly, Minnesota argues for three founding era sources provide the proper regulations, the common law, college gun rules, and municipal regulations. Under common law, 18-20 year olds were considered minors, and their Second Amendment rights were restricted. Minnesota's argument that college rules restricting students from possessing guns on campus was unpersuasive. And that rules restricting carrying guns at schools were much different that a blanket ban on carrying guns in public. Lastly, Minnesota's argument of the municipal ordinances were not analogous to the Carry Ban with respect to minors. Lastly, Minnesota's argument regarding Reconstruction-era arguments was unpersuasive because they did not have much weight. First, Minnesota argues that the court should take a nuanced approach because the market revolution since the founding-era has made pistols more accessible. They argue because handguns were not in common use at the founding, that the founding-era regulations were insufficient to properly regulate them. The common-use doctrine should be applied to how society is today. Minnesota also cites 20 state laws from the Reconstruction era that limit the Second amendment rights of those under 21 years old. The Court did not give much weight to this argument because several of the laws prohibited only concealed carry, others prohibited other concealable weapons like knives and other pistols. Some laws criminalized the sale or furnishing of weapons to minors. Third, Minnesota argues that because no historic cases found age restrictions to be unconstitutional, the Carry Ban is consistent with historical traditions of firearm regulation. Out of the four cases cited by Minnesota, the only one that addressed the Constitutionality regarded the concealed carry by minors and is not analogous. Lastly, Minnesota argues that the Carry ban is a presumptively lawful longstanding prohibition. They proffered a long list of prohibitions, but there were no age restrictions on that list. The list included laws that banned mentally ill and people with unsound minds from carrying firearms, and not all 18-20 year olds are mentally ill. Minnesota was unable to meet its burden and proffer sufficient evidence to rebut the presumption, and the judgement was affirmed.

***US v. Bordeaux*, 108 F.4th 702 (8th Cir. July 17, 2024)**
Kevin Bordeaux pled guilty to assault with a dangerous weapon; using and carrying a firearm during and in relation to a crime of violence; and assaulting, resisting, and impeding a federal officer. The district court mistakenly sentenced Bordeaux at an offense level of 29 instead of 28, resulting in a Guidelines range of 108 to 135 instead of 97 to 121 months. Bordeaux was sentenced to 132 months' imprisonment.

On appeal, Bordeaux challenged the Guidelines range calculation by the district court and the departure from the Guidelines range in the sentence imposed. Bordeaux did not object at sentencing to the district court's guidelines range calculations. The government, however, conceded the district court erred, and the error was plain. The government contended, however, that any error did not prejudice Bordeaux.

The Court found the miscalculation affected Bordeaux's substantial rights because there is a reasonable probability that Bordeaux would have been sentenced within the lower range rather than 132 months, which exceeded the correct range by 11 months. The Court found the increased range affected the fairness and integrity of the judicial proceedings. Also, the Court found notable that the district court stated it had the authority to increase Bordeaux's criminal history category "back up to IV if the Court were inclined to do that," but it was "not inclined to do that." The Court noted that those words reflected the importance the district court was placing on the recommended guideline range. The Court concluded that where there

is a reasonable probability that a defendant would have received a lower sentence but for an improper classification under the sentencing guidelines, plain error is established.

***US v. Davidson*, 108 F.4th 706 (8th Cir. July 18, 2024)**

Jackie Davidson was found guilty and convicted of assaulting a federal officer with a deadly weapon and discharging a firearm during a crime of violence after he shot at the bumper of an SUV that was being driven by federal law enforcement officers. Davidson appeals his conviction, raising three arguments: that the district court erred in prohibiting him from raising a self-defense argument at trial, in concluding that the Government need not prove that Davidson knew his victims were federal officers, and that the district court abused its discretion in instructing the jury.

Davidson brought a two part argument in regard to the district court's decision prohibiting him from raising a self-defense argument: he first argues that the district court erred in deciding the availability of the defense via pre-trial proffer, and then also argues that the court erred by determining he did not proffer sufficient facts to support his self-defense claim. The Eighth Circuit Court first notes that it has consistently permitted pre-trial determinations to determine if a defense is available, but that all of its decisions in these cases considered availability of affirmative defenses whereas self-defense requires a different burden of proof. The Court explains that self-defense requires the federal defendant to bear the burden of production, but once that burden is met the government must prove beyond a reasonable doubt that the defendant did not act in self-defense. Furthermore, the Court notes that a self-defense instruction must be given when the defendant provides more than a mere scintilla of evidence. (*Hall v. US*, 46 F.3d 855, 857 (8th Cir. 1995). Davidson argues that the distinct nature of raising self-defense, as compared with other affirmative defenses, means that it cannot properly be resolved before trial. The Court rejects this argument stating that the district court is not precluded from determining pre-trial the availability of a self-defense argument, explaining that when a defendant's evidence "is insufficient to sustain [an instruction of self-defense] even if believed, the trial court and jury need not be burdened with testimony supporting … the defense." (*US v. Bailey*, 444 US 394, 416 (1980). In analyzing the evidence proffered by Davidson in support of a self-defense argument, the Court found the evidence insufficient to meet the imminency requirement, and thus, also insufficient to meet the burden of production. The Court concluded that because Davidson did not meet the "mere scintilla of evidence" standard, the district court did not err in prohibiting Davidson from arguing self-defense at trial.

Davidson then argues that *Feola* foreclosed his argument that the Government must prove he knew his victims were federal officials. *US v. Feola*, 420 US 671 (1975) sets forth the principle that "§ 111 cannot be construed as embodying an unexpressed requirement that an assailant be aware that his victim is a federal officer," and also provides limited circumstances when "ignorance of the official status of the person assaulted or resisted negates the very existence of mens rea." The Eighth Circuit Court rejects Davidson's interpretation of *Feola*, explaining that it is to be interpreted to mean that a defendant may lack requisite intent to assault if, for example, he reasonably but mistakenly believed an office in plain clothes was placing defendant in imminent danger. The Court further concludes that this principle does not apply to Davidson because he lacked reasonable belief of imminent danger. The Court also rejects Davidson's other two arguments on this issue, finding that *Feola* has not been overruled and is still binding on this court, and the Government was required to, and did prove Davidson acted with criminal intent to assault the occupants of the SUV.

Lastly, Davidson argues that the district court abused its discretion when it did not repeat the word "forcibly" in its assault-of-federal-officers jury instruction and when it instructed the jury that self-defense was not available to Davidson. The Eighth Circuit Court quoted its decision in *US v. Weckman*, 982 F.3d 1167, 1175 (8th Cir. 2020) where it stated "jury instructions are adequate if, taken as a whole, they adequately advise the jury of the essential elements of the offenses charged and the burden of proof required of the government," and further provided that a defendant is not entitled to a particularly worded instruction when it adequately and correctly covers its substance. (*US v. Walker*, 817 F.2d 461, 463 (8th Cir. 1987)). The Court rejects the first contention in Davidson's argument finding that the district court

did not err in not repeating "forcibly," reasoning that repetition of the adverb is not necessary for it to apply to all the listed verbs, and that failing to do so also tracks the language of § 111 that only states "forcibly" once. The Court also rejected the second Contention in Davidson's argument. Having already determined that the district court did not err in its determination that self-defense was not available to Davidson, the Court concluded that the district court did not abuse its discretion in instructing jurors that self-defense was not available in this case.

***US v. Foard*, 108 F.4th 729 (8th Cir. July 19, 2024)**

A jury convicted Foard of conspiring to engage in sex trafficking of a minor and sex trafficking of a minor. The district court sentenced Foard to 45 years of imprisonment.

On appeal, first, Foard challenged the jury instructions as constructively amending the indictment. Count I of the indictment charged Foard with conspiring to sex traffic "two minor females," but the jury instructions only required the jury to find Foard conspired to traffic "a minor." Since the instruction did not add anything new, this was a permissible narrowing of the indictment without modifying an essential element of the conspiracy offense.

Second, Foard contested the admission of certain out-of-court statements as being hearsay. Under the co-conspirator exclusion to hearsay statement, the district court admitted the statements, noting that (1) "a conspiracy to engage in sex trafficking existed," (2) Foard and the declarant, M.D., "were members of the conspiracy," and (3) "the statements were made during the course and in furtherance of the conspiracy." The Court found that the statements established the beginning of the coordination of the conspiracy, so there was no abuse of discretion.

Third, Foard challenged the district court's denial of his motion for judgment of acquittal. There was sufficient evidence for a reasonable jury to find Foard guilty.

Fourth, Foard challenged the district court imposing four sentencing enhancements and declining to apply a requested mitigating role reduction. There was sufficient evidence to support the district court's factual findings when applying enhancements to Foard's sentence for unduly influencing a minor (USS.G. § 2G1.3(b)(2)(B)), electronic communications (USS.G. § 2G1.3(b)(3)), vulnerable victim (USS.G. § 3A1.1(b)(1)), and obstruction of justice (USS.G. § 3C1.1). Foard argued that he was eligible to receive a two-level reduction since he was a minor participant in the criminal offense in accordance with USS.G. § 3B1.2(b). However, in many respects, Goard was more culpable than other participants, so the denial of the application of a role reduction was proper.

Fifth, Foard argued that the sentence was not substantively reasonable. His within the Guidelines sentence is presumptively reasonable. Moreover, the district court considered all the 18 USC. § 3553(a) sentencing factors, the seriousness of the crime, Foard's significant role, and his criminal history. Affirmed.

***US v. Bagola*, 108 F.4th 722 (8th Cir. July 19, 2024)**

A jury convicted Bagola of first-degree murder, in violation of 18 USC. §§ 1111(a) and 1153, and discharging a firearm during the commission of a crime of violence, in violation of 18 USC. § 924(c)(1)(A)(iii). Sentenced to life imprisonment.

On appeal, first, Bagola claims the district court improperly admitted certain expert testimony. Specifically, Bagola argued that the Bureau of Alcohol, Tobacco, Firearms and Explosives Special Agent Brent Fair's methodology was unreliable. Any alleged error was harmless because even without Agent Fair's testimony, ample evidence connected Bagola to the shooting.

Second, Bagola also takes issue with the district court's handling of the "Indian" status element of his first-degree murder charge. The district court failed to include instructions explaining how the jury should make the determination that Bagola was "Indian." Bagola did not object. While this was an error, this

error did not affect Bagola's substantial rights because there was ample evidence supporting the omitted status element.

Third, Bagola maintains that there was insufficient evidence to support this premeditated first-degree murder conviction. Specifically, he did not believe that there was enough evidence to support the premeditation element. The Court held that the facts sufficiently show premeditation.

Fourth, Bagola argues first-degree murder is not a "crime of violence" under 18 USC. § 924(c). Section 924(c)(3)(A) defines "crime of violence" as "a felony" that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another . . . ." In *Janis v. US*, this Court decided that "[h]omicides committed with malice aforethought involve the 'use of force against the person or property of another[.]'" 73 F.4th 628, 636 (8th Cir. 2023). This decision controls here. Affirmed.

***US v. Simpson*, 109 F.4th 1018 (8th Cir. July 25, 2024)**

Simpson pleaded guilty to wire fraud and possessing a firearm while an unlawful drug user. While on pretrial release, he was arrested for marijuana possession, interfering with official acts, and traffic offenses. Based on this conduct, the government initially objected to a two-level decrease for acceptance of responsibility, but later withdrew their objection in exchange for Simpson withdrawing one of his own. The government refused, however, to move for the third-level reduction. Simpson asked the court to vary downward from the guidelines instead, but the court declined to do so.

On appeal, Simpson argues that the district court erred by failing to compel the government to move for the one-level reduction. The court of appeals reviewed the argument for plain error, as Simpson only requested the district court to vary downward. A district court may compel the government to move for a three-level decrease only if the government's decision not to move based on an unconstitutional motive or irrational. Simpson did not claim an unconstitutional motive, nor was the government's decision irrational based on Simpson's pretrial release actions. Lastly, Simpson argued that Amendment 820 clarified the government may refuse to move for the third-level reduction only if the defendant's conduct did not help it avoid preparing for trial. But, the Court stated that the Amendment only "narrows the government's discretion to move *for* a three-level decrease, and does not affect the government's decision *against* a motion." Affirmed.

***US v. Gaston*, 109 F.4th 1065 (8th Cir. July 29, 2024)**

Tyrell Gaston pleaded guilty to one count of being a felon in possession of ammunition. Gaston appeals the denial of his motion to suppress the search of a backpack found in a vehicle he was driving.

Gaston had a short but severe history of committing violent crimes all of which included firearms. His history started with a robbery of a drug dealer gone wrong which left his cousin, who was participating in the robbery, dead. For the robbery, Gaston received a probation sentence of three years. While on probation for that case, Gaston was involved in a shooting involving his uncle, and another passenger in the car. Gaston was charged with two counts of attempted murder for that incident. Later while on probation, Gaston was involved in a disagreement with his baby's mother, in which he pointed a firearm at her, and broke a window in her home. Also, Gaston was later seen on camera at a nightclub three hours before a deadly shooting occurred. Although he was not a suspect in the shooting, he still violated his probation by being out past curfew and being underage at the nightclub. After the nightclub incident, Gaston's Probation Officer obtained an arrest warrant, and went to serve the warrant with another officer. While serving the warrant, one of the officers patted down Gaston, found keys to his truck, and asked Gaston if there was anything in the truck that would get him in trouble. Gaston responded by saying no, but revealed there was a backpack in the vehicle that belonged to his brother. Based on that response, Officer Warner decided to search the truck, located the backpack, and found a loaded 9mm pistol.

Based on Gaston's signed probation agreement, Gaston consented to all searches, with or without a search warrant, by any probation officer having reasonable grounds to believe contraband is present. Reasonable grounds are equivalent to the Fourth Amendment's reasonable suspicion standard. Gaston argued the officers had no more than a hunch to support their search. The court disagreed using factors such as the

officer knowing Gaston's violent history all involving guns, Gaston's response distancing himself from the backpack indicating to the officer there was contraband inside based off the officer's training and experience. Taking the totality of the circumstances and the information known to the officers at the time, the Court affirmed the denial of the motion to suppress.

***US v. Collins*, 108 F.4th 1080 (8th Cir. July 30, 2024)**

A jury convicted Collins of possession of heroin with intent to distribute in violation 21 USC. § 841(a)(1) and (b)(1)(A), and possession of a firearm in furtherance of drug trafficking in violation of 18 USC. § 924(c)(1)(A). He was sentenced to 228 months' imprisonment.

On appeal, Collins argued the district court erred in denying his motion to suppress. Collins moved to suppress evidence seized at the time of his arrest arguing officers conducted a warrantless investigatory stop and search of his person without reasonable suspicion of criminal activity. However, Collins initial encounter with the police was consensual. The officer smelled marijuana on Collins, and Collins admitted to possessing marijuana. The Court found the officer then had probable cause to arrest the defendant and conduct a search of his person and the area of the bus where he had been seated without a warrant. The denial of the motion to suppress was affirmed.

Second, Collins argued there was "reasonable doubt" as to his convictions, and the government presented insufficient evidence to convict him. Resolving all inferences in favor of the jury's verdict, the Court determined the evidence was more than sufficient to support both of Collins' convictions. Affirmed.

***US v. Morris*, 109 F.4th 1078 (8th Cir. July 31, 2024)**

Morris was convicted by a jury of conspiracy to distribute fentanyl. After denying Morris's motions for an acquittal and a new trial, he appeals the conviction on the sufficiency of evidence, that the District of Minnesota was an improper venue, and that the court improperly applied an offense level enhancement as to his Guidelines range for obstructing justice, and that affected his sentence.

As to the sufficiency of the evidence, Morris argued the testimony given by his coconspirator, Johnson, was unreliable to support he knowingly entered into the conspiracy. Morris claimed Johnson had lied to the arresting officers when he was apprehended, and Johnson had a motivation to lie to receive a lighter sentence. The Court determined the jury "was fully aware" Johnson lied when he was initially arrested and "he had strong motivation to lie because he faced a potential life sentence due to his lengthy criminal history." Notwithstanding this knowledge, the jury still found his testimony to be credible enough to convict Morris. The Court held, however, a district court is precluded from making its own determination on a witness's credibility to overrule a jury's verdict and because the jury is the final arbiter of witness credibility, its credibility determinations are virtually unassailable on appeal.

Also, the Court described the test for rejecting an accomplice's testimony is whether it is "incredible or unsubstantial on its face." The Court concluded it was reasonable to credit Johnson's testimony about Morris making travel arrangements to pick up drugs and bring them back to Minnesota to distribute. The Court found that testimony was further corroborated by recorded phone conversations and text messages between Morris and Johnson, and testimony from law enforcement officers.

Morris also raised a venue issue in his motion for acquittal under Rule 29. The Court determined that acquittal is not the appropriate remedy for improper venue, and that it the remedy for improper venue is a retrial. However, the Court concluded venue was proper in Minnesota since there was evidence presented that established Morris and Johnson were living in Minnesota at the time of the conspiracy, that when Morris and Johnson left Minnesota they knew it was to pick up drugs, and that Morris attempted to assist Johnson in evading law enforcement while Morris was in Minnesota.

The Court concluded there was no abuse of discretion, nor was there a miscarriage of justice in the denial of his motion for new trial.

Last, Morris argued the enhancement to his offense level for obstruction of justice should not have been applied. The district court based the enhancement on evidence that Morris's girlfriend made two deposits into Johnson's inmate account, and Johnson testified that while in custody, another inmate had approach him and pressured him into signing an affidavit exonerating Morris. Johnson then sent a letter to his attorney that explained how he was pressured into signing the affidavit. The Court concluded there was sufficient evidence to support the application of the enhancement on the foregoing basis.

***US v. Hansen*, 111 F.4th 863 (8th Cir. Aug. 1, 2024)**

Hansen was convicted by two separate juries of conspiring to distribute methamphetamine, 21 USC. §§ 841(a)(1), (b)(1)(A), 846; distributing methamphetamine near a protected location, §§ 841(a)(1), (b)(1)(B), 860(a); and being a felon and unlawful drug user in possession of a gun, a DPMS rifle, 18 USC. §§ 922(g)(1), (g)(3), 924(a)(2). The district court sentenced him to 300 months of imprisonment in the first case and 120 months of imprisonment in the second case.

On appeal, first, Hansen argued that there was insufficient evidence to support his convictions in both cases. Specially, he argued that the juries could not credit the cooperating witnesses who testified against him because they were known liars who had every motivation to fabricate their testimony in the hope of receiving lesser sentences. The Court was not willing to second guess the jury's credibility determinations, and Hansen did not argue that the witnesses' testimony if credible was insufficient to convict him.

Second, Hansen argued that the district court plainly erred in the first case by not giving the jury a special interrogatory and that counsel was ineffective. Hansen claims that there needed to be a special interrogatory asking the jury whether the gun was the DPMS rifle. The Court held that the jury instructions and verdict form adequately informed the jury that it needed to find that Hansen unlawfully possessed the DPMS rifle to convict him.

Third, in the second case, since Hansen was only on trial for two counts of unlawful gun possession, he argues that the district court abused its discretion by admitting witness testimony asserting that Hansen stored meth at the witness' house which unfairly branded him as a drug dealer and by denying his motion for a new trial. *See* FED. R. EVID. 404(b). Since storing meth at this location makes it more likely that he also would have stored guns there, the Court held that the evidence was relevant to the charges.

Fourth, Hansen challenged his sentence. Hansen argues that the drug quantity findings and use-of-violence enhancement rest on the hearsay statements of three cooperating witnesses. He argued that the Constitution requires cross examination of these witnesses; however, it's well-settled law that sentencing courts may rely on hearsay to resolve disputed facts.

Fifth, Hansen's final claim was that there was insufficient evidence to support the managerial or supervisory role enhancement because there was no credible testimony against him, but this claim was rejected for the same reason that the court rejected the insufficient evidence argument. Affirmed.

***US v. Starr*, 111 F.4th 877 (8th Cir. Aug. 2, 2024)**

On supervised release, Starr remained at a sober living home for nearly a year but relapsed on fentanyl in June 2023 and was "unsuccessfully terminated" from the placement. The district court revoked Starr's supervised release and, varying upward, imposed a revocation sentence of 24 months of imprisonment to be followed by three years of supervised release.

On appeal, Starr challenged the prison term as being substantively unreasonable. Specifically, Starr believes that the court (1) overemphasized her relapse while not according sufficient weight to her year of sobriety and the family circumstances which induced her relapse; (2) gave too little weight to the advice of the sober home counselor to minimize Starr's incarceration; and (3) incorrectly concluded that Starr did not take the residential treatment opportunities made available to her seriously without properly focusing on her one year of successful supervised release following conviction. The district court expressly stated that it "considered the Sentencing Guidelines under Chapter 7, [and] the sentencing factors under 18 USC. [§] 3553(a)." Affirmed.

***US v. Gordon*, 111 F.4th 899 (8th Cir. Aug. 5, 2024)**

Nethaniah Gordon pleaded guilty in March 2023 to one count of being a felon in possession of a firearm, he had a prior conviction for Possession of Marijuana with Intent to Deliver in violation of Iowa Code § 124.401(1)(d). In preparing his PSI, the US Probation Office concluded this was a controlled substance offense under § 2K2.1(a)(1) of the sentencing guidelines which provides that the base offense level is 26. Because Gordon also had a prior conviction for a crime of violence the PSR determined that his base level offense is 26 and applied the four-level increase for use of a firearm in connection with another felony offense because he violated several Iowa felony statues. Gordon objected to the increased base offense level arguing the Iowa conviction for Possession of Marijuana with Intent to Deliver is not a predicate controlled substance under the Guidelines. The Eighth Circuit Court cites its decision in *US v. Henderson*, 11 F.4th 713, 716 (8th Cir. 2021), c*ert. denied.* 142 S. Ct. 1696 (2022) where it held that USSG § 4B1.2(b) broadly defines "controlled substance offense" to include "an offense under … state law," even if the particular substance underlying the state offense is not controlled under the Controlled Substance Act. In addressing the issue of whether the sentencing court must look to a substance controlled under state law at the time of a prior state conviction, or at the time of the defendant's federal sentencing for the offense of conviction, the Eighth Circuit Court concludes that the court must look at whether the substance underlying a prior conviction was a controlled substance under state law at the time of that sentencing. Therefore, because prior marijuana convictions under Iowa Code § 124.401(1)(d) categorically qualify as controlled substances, the Court affirms the judgment of the district court.

***US v. Winborn*, 111 F.4th 910 (8th Cir. Aug. 5, 2024)**

After being arrested, the government charged Marlon Winborn with one count of unlawfully possessing a forearm as a felon. Winborn moved to suppress all evidence arguing that police did not have reasonable suspicion to make the initial investigatory stop. The district court denied Winborn's motion and he plead guilty but reserved the right to appeal the denial of his motion to suppress, which he now appeals. The Eighth Circuit reviews the district court's "denial of a motion to suppress de novo by the underlying factual determinations for clear error giving due weight to inferences drawn by law enforcement officials." (*US v. Clutter*, 674 F.3d 980, 982 (8th Cir. 2012)). "Reasonable suspicion exists when an 'officer is aware of particularized, objective facts which, when taken together with rational inferences from those facts, reasonably warrant suspicion that a crime is being committed.'" (*US v. Givens*, 763 F.3d 987, 989 (8th Cir. 2014) (quoting *US v. Hollins* 685 F.3d 703, 706 (8th Cir. 2012)). Winborn argues that the officers lacked reasonable suspicion for the investigatory stop because the 911 callers' tips that it acted upon were not reliable. The Eighth Circuit relies on its opinion in *US v. Mosely*, 878 F.3d 246, 253 (8th Cir. 2017) in analyzing whether the police officers had reasonable suspicion. A 911 caller's tip can, under the totality of the circumstances, support an officer's reasonable suspicion if the tips are reliable. Reliability is determined by evaluating the eyewitness's knowledge of the incident, the contemporaneous reporting of the event, and the ability to hold the caller accountable for potentially false reports. The Eighth Circuit concluded that the totality of the circumstances supported the officers' reasonable suspicion, because even though taken separately, the tips could suggest innocent behavior, taking the tips all together provided the officers with reasonable suspicion for the investigatory stop of Winborn. The district court's decision in denying the motion to suppress is affirmed.

***US v. Osorio et al.*, 110 F.4th 1089 (8th Cir. Aug. 5, 2024)**

Juan D. Osorio and Jonathan M. Bravo-Lopez were convicted of kidnapping and the resulting death of Christian Escutia. Osorio and Bravo-Lopez were sentenced to life imprisonment and now appeal. Both Osorio and Bravo-Lopez challenge their convictions based on an alleged violation of their Confrontation Clause rights. Osorio and Bravo-Lopez argued that the district court erred in instructing their attorneys not to utilize the word "mandatory" on cross-examination of Sosa-Perea or when referring to the potential mandatory life-sentence Sosa-Perea avoided with his plea deal. The Eighth Circuit reviews the district court's limitations on cross-examination under an abuse of discretion standard. The right to confront witnesses afforded by the Sixth Amendment's Confrontation Clause is not unlimited and district court's have wide discretion to put limitations on such right. To establish that a limitation on cross-examination

has violated the Sixth Amendment, the defendant must "show that a reasonable jury might have received a significantly different impression of the witness's credibility had defense counsel been permitted to pursue his proposed line of cross-examination." (*US v. Campbell*, 986 F.3d 782, 794 (8th Cir. 2021)). Here, the reason for the district court's limitation was concern that the use of "mandatory life" would "distract" jurors from their role. Osorio and Bravo-Lopez argue that the jury would have had a different impression on Sosa-Perea's credibility had they been able to refer to a "mandatory life sentence" rather than "facing a life sentence." However, the Eighth Circuit points out that Osorio and Bravo-Lopez have not cited any authority to support this assertion and the court has found no abuse of discretion in similar situations with greater disparities. The Eighth Circuit concludes that because Osorio and Bravo-Lopez failed to show that a reasonable jury would have received significantly different impressions on Sosa-Perea's credibility had they learned he avoided a mandatory sentence, the district court did not abuse its discretion in limiting cross-examination on this point.

Osorio argues that the district court erred in denying his motion for acquittal arguing there was insufficient evidence to prove that he intended for the kidnapping to result in death. In response the Eighth Circuit court cites its opinion in *US v. Simpson*, 44 F.4th 1093, 1099 (8th Cir. 2022), *cert denied,* 143 S. Ct. 813 (2023) explaining that the government only need to prove that Osorio had intent and knowledge regarding the kidnapping and that the kidnapping caused the death. There is evidence to support Osario's knowledge of, and intent to commit the kidnapping and that the kidnapping resulted in death. The district court did not err in denying the motion.

Bravo-Lopez argues that the district court erred in refusing to instruct the jury on his diminished-capacity defense. At trial Bravo-Lopez argued that his "borderline intellectual functioning" prevented him from forming the specific intent to commit the kidnapping or enter into the conspiracy. The Eighth Circuit Court reviews the district court's refusal of this proposed instruction under an abuse of discretion standard. The Court cites its decision in *US v. Christy*, 647 F.3d 768, 770 (8th Cir. 2011) where it explained that although a defendant's entitlement to a theory of defense instruction, it is not an abuse of discretion for the district court to decline to give an instruction on a theory of defense when the instructions, as a whole, will afford counsel opportunity to argue a defense and reasonably ensure the jury will consider it. The district court afforded Bravo-Lopez opportunity to argue his defense at closing, and because he failed to argue that the instructions given did not adequately set forth the law, the Eighth Circuit concludes that the district court did not abuse its discretion in declining to give the proposed instruction.

Bravo-Lopez then argues that the district court erred in denying his motion for judgment of acquittal based on the insufficiency of evidence that he conspired to kidnap Escuita. He argues that the kidnapping was a result of panic, rather than a conspiracy, because there was no prior discussion about the kidnapping until the panicked decision was made to do so. The Eighth Circuit court reviews the district court's denial de novo and will "affirm unless, viewing the evidence in the light most favorable to the Government and accepting all reasonable inferences that may be drawn in favor of the verdict, no reasonable ejury could have found the defendant guilty." (*US v. Soto*, 58 F.4th 977, 981 (8th Cir. 2023)). Zapata- Delgado testified to hearing Bravo-Lopez and Osorio talking about Escuita before dropping her off to go purchase marijuana. Security cameras later captured the pair arriving at Escuita's house and holding him at gun point to get into their van. The Eighth Circuit Court found that that the district court did not err in denying Bravo-Lopez's motion for acquittal, finding that a reasonable jury, based on the evidence, could have found that the pair conspired to kidnap Escuita under the pretense of purchasing marijuana.

Lastly, Bravo-Lopez argues that the district court erred when it denied his motion to suppress the incriminating statements he made to detectives after his arrest. He claims that detectives "glossed over" his Miranda rights and that his statements were coerced in violation of the Due Process Clause of the Fourteenth Amendment. The Eighth Circuit court was not convinced that the circumstances asserted by Bravo-Lopez were evidence that he did not voluntarily, knowingly, and intelligently waive his Miranda

rights. Bravo-Lopez failed to point out any evidence indicating police coercion either by physical punishment, nor by his mental incapabilities. Affirmed.

***US v. Berrier*, 110 F.4th 1104 (8th Cir. Aug. 6, 2024)**
Seeking upward variance at sentencing was not a breach of plea agreement by government.

***US v. Olivas*, 110 F.4th 1101 (8th Cir. Aug. 6, 2024)**
Court did not err in denying defendant's request for two-level reduction in offense level under Sentencing Guidelines for minor role in offense of conspiracy to distribute controlled substance.

***US v. Edwards*, 111 F.4th 919 (8th Cir. Aug. 6, 2024)**
Government was not required to prove that defendant knew precise nature of controlled substances agreed to be distributed in conspiracy in order to obtain drug distribution conspiracy conviction.

***US v. Stagner*, 111 F.4th 936 (8th Cir. Aug. 7, 2024)**
Stagner was sentenced to 288 months after pleading guilty to conspiracy to distribute a controlled substance and possession of a firearm in furtherance of a drug trafficking crime. Stagner was pulled over and law enforcement found 209 grams of methamphetamine and two firearms in his vehicle. That methamphetamine was tested and was found to be 100% pure methamphetamine. Stagner admitted that he was involved in drug trafficking, possessed the firearm for that purpose, and had obtained and distributed various amounts of methamphetamine. Based on the laboratory testing of the recovered methamphetamine, the PSR stated that Stagner was responsible for 12 kilograms of "ice." Stagner objected, stating that there was insufficient evidence to conclude that all 12 kilograms was ice. He argued that there was no correlation between the methamphetamine found, and the methamphetamine that was admitted to.

Stagner challenges his sentence, arguing the district court misapplied relevant sentencing factors in assessing his request for a downward variance. Stagner first argues that the court failed to account between the disparity between the guidelines base offense level for ice and a methamphetamine mixture. But the district court agreed with Stagner, and based its decision to vary downward based on that disparity.
Second, Stagner asserts that his post-*Miranda* admissions about the quantities increased his guideline range exponentially. But the district court gave weight and credit to the fact that Stagner admitted the conduct quickly, and that due to his admission, law enforcement may not have otherwise been able to prove the amount of drugs in question. The court gave adequate weight and did not abuse its discretion.

Lastly, Stagner argues that the court gave insufficient weight to his personal traits and characteristics. But the court took into account Stagner's difficult upbringing, early exposure to drugs, and other childhood trauma when deciding its sentence and did not abuse its discretion.
The court affirmed the judgment.

***US v. Jackson*, 110 F.4th 1120 (8th Cir. Aug. 8, 2024)**
Edell Jackson appeals his conviction for unlawful possession of a firearm as a previously convicted felon. Jackson argues (1) that the district court erred when it instructed the jury on the elements of the offense and when it responded to questions from the jury during deliberations, and (2) that he had a Second Amendment right to possess a firearm as a convicted felon. The case is now on remand from the Supreme Court for further consideration in light of *Rahimi.*
https://media.ca8.uscourts.gov/opndir/24/08/222870P.pdf

1. Jury Instructions

In response to Jackson's first argument regarding the jury instructions The Eighth Circuit court reviews the district court's formulation for the jury instructions for abuse of discretion and its interpretation of the law de novo. Jackson first asserts that the district court abused its discretion when it instructed the jury on the first element of the offense. The first element for a conviction under § 922(g)(1) requires that the

government prove that "(1) the defendant sustained a previous conviction for a crime punishable by a term of imprisonment exceeding one year." *Rehaif v. US*, 139 S. Ct. 2191, 2200 (2019); *US v. Coleman*, 961 F.3d 1024, 1027 (8th Cir. 2020). The district court instructed the jury on the first element stating that the government must prove "One, the defendant has previously been convicted of a crime punishable by imprisonment for more than one year." The district court further instructed that under Minnesota law, the sale of a controlled substance in the second degree is a crime punishable by imprisonment for more than one year (*See* Minn. Stat. § 152.022.1(1),(3)), and that when an offender is convicted of this drug offense the state "does not permit the full restoration of the defendant's civil rights insofar as he was not permit to ship, transport, possess, or receive a firearm for the remainder of his lifetime." *See* Minn. Stat. §§ 609.165(1), 624.712(5). Jackson asserts that a prior conviction does not qualify under §922(g)(1) if the conviction "has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored … unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." § 921(a)(20). He argues that the district court should have provide the statutory language from § 921(a)(20) and allowed the jury to decide whether his right to possess a firearm had been restored. The Eighth Circuit strikes down Jackson's argument relying on its opinion in *US v. Stanko*, 491 F.3d 408 (8th Cir. 2007) that held whether a predicate conviction satisfies criteria under § 921(a)(20) is a question of law for the court.

Jackson then challenges the district court's instruction on the third element of the offense regarding knowledge. The statutory language of the third element under § 922(g)(1) provides "(3) he knew that he belonged to a category of persons prohibited from possessing a firearm." *Rahaif*, 139 S. Ct. 2191, 2200. The district court's jury instruction on the third element provided "Three, at the time the defendant knowingly possessed a firearm, he knew he had been convicted of a crime punishable by imprisonment for more than one year." The district court further instructed the jury that in determining whether the third element has been satisfied "you may consider whether the defendant reasonably believed that his civil rights had been restored, including his right to possess a firearm." Jackson argues that the instruction should have instructed the jury that it "must consider" whether he reasonably believed his rights had been restored and required the jury to do so, rather than merely permitting the jury to do so. However, because the district court did incorporate Jackson's requested language into the final instruction, and such request did not include the exact language Jackson now complains of, the Eighth Circuit court concludes that this objection is waived. The Court further provides that even if this objection were not waived and was reviewed under for plain error, Jackson's argument would still fail because the instruction on the third element was not obviously wrong. Jackson argued that the jury instruction was flawed because it failed to instruct the jury that it find that he knew he was still a prohibited person at the time of the charged offense. However, the Court brings attention to the fact that the instructions also allowed the jury to consider whether Jackson reasonably believed his right to possess a firearm had been restored, which allowed Jackson to argue, and for the jury to find, that he believed his rights had been restored thus lacking the requisite knowledge.

Jackson then argues that the district court erred when it responded to two questions from the jury during its deliberations. The eighth district court reviews the district court's decision for abuse of discretion. The jury first asked a question regarding the instructive on the third element requesting clarification on a sentence that stated: "In making that determination, you may consider whether the defendant reasonably believed that his civil rights had been restored, including his right to possess a firearm." The district court responded, and Jackson agreed to the response stating, "I don't have any objection." The Eighth Circuit court concluded that Jackson's agreement waived his objection. The second question asked by the jury stated: "Does the defendant believing that his civil rights had been restored, AND knowing that he had been convicted of a crime punishable by imprisonment for more than one year translate to having proven [element three of the offense]." The district court responded "this is a question you must decide based on the evidence before you and my instructions." Jackson objected to this response and requested the court answer "no." Jackson argues this question suggested the jury had a misunderstanding and that it was an abuse of the district court's discretion to not provide a supplement the instruction to cure the jury's misdirection. The Eighth Circuit court found that the jury's question was effectively a request for

direction as to whether the element of the offense was proved under hypothetical assumptions, and that the question did not align with the original instruction. As such, the Court concluded that the district court did not abuse its discretion by declining to answer a hypothetical and instead referring the jury back to the original instructions.

2. Second Amendment Right to Possess a Firearm as a Convicted Felon

Jackson appeals the district court's denial of his motion to dismiss the indictment. He argues that § 922(g)(1) is unconstitutional as applied to him because his drug offenses were "non-violent" and do not show that he is more dangerous than the typical law-abiding citizen. The Eighth Circuit court rejects this argument citing ***Bruen*** and ***Rahimi***. The Court first that neither ***Bruen*** or ***Rahimi*** conflict with the opinion in *District of Columbia v. Heller*, 554 US 570 (2008) which recognized the right to keep and bear arms "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." Given the assurances by the Supreme Court, and the history in support of them, the Eighth Circuit Court denies any need for felony-by-felony litigation regarding the constitutionality of § 922(g)(1). When the Second Amendment's text covers an individual's conduct the government must justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. ***Bruen***, 597 US at 24. After going through a full analysis of the history of the Nation's regulation on the right to bear firearms, the Eighth Circuit Court concludes that the historical record suggests that legislatures traditionally possessed discretion to disqualify categories of people from possessing firearms to address a danger of misuse by those who deviated from legal norms, and not only to address persons with a propensity of violence, thus, Jackson's rights are not violated by § 922(g)(1). The Court further explains that even if the historical regulation of firearms was viewed as an effort to address a risk of dangerousness, the prohibition on possession by convicted felons would still pass under historical analysis because such prohibition has historically been imposed on categories of people that have been concluded, as a whole, to present an unacceptable risk of danger if armed with there being no requirement of individualized determinations of dangerousness for each member of such a class. The Court lists numerous instances where Congress has acted consistent with this rationale.

In conclusion, the Eighth Circuit Court concludes the status-based restriction to disqualify categories of persons from possessing firearms pursuant to § 922(g)(1), whether characterized as restrictions on persons who deviated from legal norms or persons who presented an unacceptable risk of dangerousness, is consistent with historical tradition and constitutional as applied to Jackson. The Court holds that the district court properly denied the motion to dismiss the indictment.

***US v. Gilmore*, 111 F.4th 942 (8th Cir. Aug. 9, 2024)**

Main Issue: Whether there was probable cause to issue a warrant to search Gilmore's home and whether law enforcement followed proper procedure when applying for a search warrant.

Facts: After receiving a tip regarding possible drug trafficking coming from Gilmore's home, law enforcement went to the residence and spoke with Gilmore. While on the porch, officers smelled marijuana coming from the residence. Officers detained Gilmore while they requested a warrant to search the home.

Holdings: Gilmore first argues that the warrant that was issued lacked probable cause because Arkansas had legalized medical marijuana. He argues that the smell of marijuana in isolation, does not suggest a violation of law, and could be considered innocent legal conduct. The Court concluded that his argument was unavailing because the probable cause affidavit mentioned the suspected use and sale of a controlled substance.

Gilmore next argues that law enforcement never obtained the warrant at all. He argues that officers never left the scene before the search began and argues that any warrant was not issued or filed in accordance with AR law. The government presented evidence from an officer on the scene that he went to his patrol car, emailed an affidavit to a judge, and was put under oath on the telephone. Based on testimony and body cam footage, it was confirmed that a warrant was obtained prior to the search.

Lastly, Gilmore argued that evidence should be suppressed because the warrant, any recordings or transcripts were not filed to the court. The court examined the good faith exception regarding the disputed evidence. Suppression is warranted only in the following scenarios: (1) when the affiant misled the issuing judge by way of "a knowing or reckless false statement"; (2) when "the issuing judge wholly abandoned [their] judicial role;" (3) when "the supporting affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," or (4) when the warrant is "so facially deficient" that no police officer could reasonably presume it valid. None of the facts triggered any of these scenarios so the court affirmed the judgment.

***US v. Plume*, 110 F.4th 1130 (8th Cir. Aug. 9, 2024)**

Main Issues: Sufficiency of the evidence for a jury to convict and double jeopardy issues with three of his nine charges related to the same conduct.

The evidence was sufficient to support defendant's convictions for witness tampering as he made several efforts on his own through another to try to convince the victim not to testify and to refuse to cooperate with authorities; the evidence established an assault resulting in serious bodily injury; defendant did not raise a Double Jeopardy argument below, and his issue would be reviewed for plain error; the charges of aggravated assault, assault resulting in serious bodily injury, and aiding and abetting sexual abuse all require different elements of proof, and defendant's conviction on all three counts does not constitute a Double Jeopardy violation.

***US v Euring*., 112 F.4th (8th Cir. Aug. 12, 2024)**

After being convicted by a jury on two counts of a four count indictment, Euring appeals two evidentiary rulings and challenges the sufficiency on the evidence.

Issue:

1. Did the court err in not admitting a transcript of testimony given in front of a grand jury?
2. Should the court have allowed the defense to introduce extrinsic evidence of the victims statements even when she was denied the opportunity to explain herself?
3. Was the evidence sufficient to prove the Euring knew or recklessly disregarded that the victim would engage in commercial sex act?

Issue #1:

A party seeking admission of prior testimony must show that the other party's motive at the time of the prior testimony was substantially similar in both scope and intensity to the motive at the time of trial; the inquiry in inherently factual, and the district court may consider the nature of the prior proceeding, any differences in burden of proof, the information known to the examining party at the time of the prior testimony, the motive of the examining party to avoid disclosing such information, the scope of examination undertaken and foregone, and whether the prior testimony contradicts the evidence introduced at trial. The court found that the government's motive to question the witness at the grand jury was dissimilar to its motive at trial. In between the witness's testimony in front of the grand jury and trial in which he was unavailable, more incriminating evidence of the witness's involvement had been brought to light changing the dynamic of the motive. Based on the new information at trial, there was also no indicia of reliability in the witnesses grand jury testimony.

Issue #2:

The district court did not err in refusing to permit the defendant to admit extrinsic evidence of the victim's prior inconsistent statements where he denied her the opportunity to explain the statements after she asked for the opportunity to explain them. Euring argued that because Rule 613(b) allows a party to introduce extrinsic evidence of prior inconsistent statements only when they're given an opportunity to explain *or* deny the statement, which he argues that he gave the witness an opportunity to deny the statements. The court read the rule differently, and reasoned that if that were true, the word *explain* would be superfluous.

Issue #3:
The court found the evidence presented as sufficient to support his conviction for the sex trafficking of a child count. The court found that the evidence of Euring suggested to the victim that she could make money going on the dates and would make more if she performed sex acts, set up a suggestive account on a dating website for the victim, rented hotel rooms, and took proceeds from the date as sufficient to support the conviction.

***US v. Hanapel*, 112 F.4th 539 (8th Cir. Aug. 12, 2024)**
Hanapel was convicted on enticing a minor to engage in unlawful sexual activity after being caught during a sting operation involving a 14 year old on a dating app. At trial, he presented the defense of entrapment to the jury. During deliberations, Hanapel moved for a judgment of acquittal which was denied and the jury found him guilty.

A defendant is entitled to a jury instruction on entrapment if prior to trial he produces sufficient evidence of inducement. If he makes a showing of inducement, the burden at trial shifts to the government to prove predisposition beyond a reasonable doubt. To prevail on appeal, Hanapel must establish as a matter of law both that he was induced and that he was not predisposed to commit the offense.

As to inducement, although Hanapel was hesitant to meet with the girl, and she had sent messages which Hanapel argues were suggestive, a reasonable jury could reject his claim of impermissible inducement by the government. The court also concluded that a reasonable jury could have found that he was predisposed to commit the offense of attempting to entice a minor to engage in sexual activity. Hanapel was ready to go in responding to officers first offer to commit the crime. Judgment was affirmed.

***US v. Wolter*, 112 F.4th 567 (8th Cir. Aug. 13, 2024)**
A jury convicted Wolter of bank robbery. After a long series of continuances and a period of time to complete a psychological evaluation, Wolter filed a pro se motion to dismiss the indictment claiming his right to a speedy trial was violated under the Speedy Trial Act and the Sixth Amendment due to the delays. The court denied the motion, and Wolter was found guilty at trial.

Issues:
1. Did the district court err by finding the transportation delays during his psychological evaluations were excludable under the STA?
2. Did the district court accurately consider the Sixth Amendment argument that his right to a speedy trial was violated by the delays?

Holdings:
1. The district court did not clearly err in denying defendant's Speedy Trial Act. Under the Act, the 15 days of transportation delays related to defendant's psychological exam were nonexcludable, and the 31 days in between pretrial motions were nonexcludable. The total of days not excluded under the Act, 46 days, is well below the 70-day threshold in the Act.
2. The district court did not clearly err in denying defendant's Sixth Amendment speedy trial claims. The court evaluated the *Barker* factors to determine whether the Sixth Amendment was violated. The amount of time that elapsed amounted to 1,377 days, and this does weigh in defendant's favor, however, the lengthy delay related to psychological testing was not intended by either party, and the other delays were at defendant's request; further, defendant's substantial contribution to the delay undermines his attempt to assert his rights, and he failed to show how the delay affected his interests in avoiding oppressive pretrial detention, minimizing his anxiety, and limiting the possibility that his defense would be impaired, especially when he was the party who sought to postpone the trial. Judgment affirmed.

***US v. Roubideaux*, 112 F.4th 606 (8th Cir. Aug. 14, 2024)**

Roubideaux was convicted by a jury of attempted enticement of a minor using the internet.

Issues:

1) Did the district court err in not granting Roubideaux's *Batson* challenge?
2) Should Roubideaux's motion for judgment of acquittal have been granted based on an entrapment defense?
3) Should the court have ordered a new trial because the verdict was against the weight of the evidence?
4) Were Roubideaux's Constitutional rights violated by not being allowed to present a complete defense?

Holdings:

1) The district court did not err in rejecting defendant's Batson challenge as the government provided an honest, race-neutral reason for striking the only non-white juror from the panel. The government had struck the only non-white juror on the panel. After the challenge was raised, the government provided their reasoning for striking her as "she stated she might be uncomfortable with the facts of the case, because she had four children, some of which were teenagers." Although other white jurors with teenage children were not stricken, the court found the reason to be race-neutral.
2) The government met its burden to prove beyond a reasonable doubt that defendant was predisposed to commit the offense of attempted enticement of a minor using the internet in violation of 18 USC. Sec. 2244(b), and the district court did not err in denying defendant's motion for a judgment of acquittal based on the defense of entrapment. After showing the first step of inducement, Roubideaux argues that the government did not prove the predisposition element of whether he was an unwary innocent, or an unwary criminal who readily availed himself of the opportunity to commit the crime. Based on the numerous messages, and Roubideaux continually making suggestive comments, the court found that a reasonable jury could find predisposition.
3) The guilty verdict was not against the weight of the evidence, and the district court did not err in denying defendant's motion for a new trial. The government presented evidence of numerous text messages between the parties to suggest that Roubideaux initiated the conversations, the history of Grindr, and multiple times where the fake victim stated that he was 15.
4) The district court did not violate defendant's right to present a complete defense when it excluded certain online conversations between defendant and other Grindr users on the ground they were not relevant under Fed. R. Evid. 403. The court allowed Roubideaux to present some of the prior conversations, but left some out due to repetitiveness, and non-relevance.

The Court affirmed the judgment.

***US v. Barrera*, 112 F.4th 614 (8th Cir. Aug. 14, 2025)**

Barrera was found guilty by a jury of conspiring to defraud the Social Security Administration. Barrera appeals her sentence that required restitution for private health and disability insurers.

Issues:

1) Did the district court err when ordering Barrera to pay restitution to private insurers when she was only convicted of defrauding the SSA?
2) Did the court err in calculating the restitution amounts for Prudential and Metlife?
3) Was the sentence substantively unreasonable because the court ordered Barrera, and not a codefendant, to pay restitution for the private insurer losses?

Holdings:

1) The district court did not err in ordering her to pay restitution to private insurers who were billed for unnecessary medical treatments as it was part of her criminal conduct in the conspiracy, which

included defrauding both private health care and disability providers as part and parcel of the scheme to defraud the SSA.

2) The record before the court is unclear on the correct amount of restitution for two of the private insurers, but supports the amount of restitution awarded three others. Barrera argues that the trial testimony and the PSR correctly established that Prudential and Metlife suffered a certain amount, but the amount proposed by the government was incorrect and it was unclear as to which amount was actually intended. The court of appeals vacated the amount of restitution to Prudential and Metlife and remanded it for further proceedings.
3) Defendant's claim that the restitution award to private insurers created an unwarranted disparity between defendant and another participant is rejected as this court has consistently explained the statutory direction in 3553(a)(6) to avoid disparities applies to national disparities and not to differences among co-conspirators.

***US v. Parker*, 112 F.4th 621 (8th Cir. Aug. 14, 2024)**

Derrick Parker pled guilty to one count of possession with intent to distribute heroin. The court varied upward and sentenced him to 180 months imprisonment when his guidelines were 70 to 87 months. The court of appeals determined that the sentence was not substantively unreasonable, as the court did not give undue weight given to factors partially accounted for by the Guidelines. The court reiterated that factors already used in the guidelines can still be used as the basis for a variance. The court reasoned that the underlying conduct in the current offense what their main reason for the upward variance and that it was concerned with Parker repeating the offense he knew was unlawful. The court also properly considered Parker's mitigating evidence that was presented when deciding its sentence. Affirmed.

***US v. Lowry*, 112 F.4th 629 (8th Cir. Aug. 15, 2024)**

Lowry pled guilty to unlawful possession of a firearm by a felon. He reserved his right to appeal two orders by the district court denying his motions to dismiss the indictment. On appeal, Lowry argues that the government violated his substantive due process rights by delaying bringing him in front of a Federal Magistrate Judge after being served with the indictment, and his rights under the Sixth Amendment for a speedy trial. Here, the defendant was held in state custody on state charges, the Marshal's Service action in delivering a federal indictment and warrant to the jail through a local police officer amounted to the lodging of a detainer, and did not amount to a federal arrest or presentment for purposes of Fed. R. Crim. P. 5(a). The facts here did not trigger a speedy trial violation either. The court cited the nine and a half month period between the service and the plea as insufficient to trigger any speedy trial issues.

Lastly, Lowry's Constitutional argument against 18 USC Sect. 922(g)(1) was foreclosed by the Eighth Circuit's decision in *US v. Jackson*. Judgment affirmed.

***US v. Harris*, 112 F.4th 624 (8th Cir. Aug. 15, 2024)**

Harris appeals the judgment revoking him of his supervised release arguing the court denied his right to confront witnesses at his revocation hearing. While on supervised release, Harris picked up a new law violation for assaulting his wife, along with 3 other violations. At the revocation hearing, the government used multiple forms of hearsay to establish the new law violation.

Issue: Ability to use hearsay at a revocation hearing.

Holding: The court found that the government could present out-of-court statements to establish defendant's domestic assault, as it provided reasonably satisfactory explanations for the absence of witnesses – the victim of defendant's assault who feared reprisal and refused to appear under subpoena, a witness who had recently suffered significant injuries in a car accident, and a witness who could not be found from information she supplied police at the time of the incident. The hearsay statements in which the victim identified defendant as her assailant all corroborated each other, and the fact that the statements

were made in the wake of the assault indicated the statements were reliable. The district court's determination that defendant violated his supervised release by committing a domestic assault in the second degree is consistent with the interest of justice and the guarantee of due process. Affirmed.

***US v. Cunningham*, 114 F.4th 671 (8th Cir. Aug. 16, 2024)**

This case was on remand for further consideration in light of *Rahimi*. Cunningham appeals his conviction for unlawful possession of a firearm as a convicted felon, possession with intent to distribute cocaine, and possession of a firearm in furthering of a drug trafficking offense. Cunningham appeals the denial of a suppression, the denial of his motion to dismiss the indictment based on Section 922(g)(1) infringed on his Second Amendment rights, and the sufficiency of the evidence to support the convictions.

The officer's action on the unlawful search claim was permissible under the Fourth Amendment on two grounds, it was an investigative search based on suspicion of crime and danger, and as a search for evidence based on probable cause under exigent circumstances. After leaving his wheelchair unattended while shopping at a Walmart, an employee found a gun on Cunningham's wheelchair. An officer was called over and seized the firearm from the chair. Cunningham also mentioned that he was on federal supervised release giving the officer reason to believe he was prohibited from possessing the firearm. Cunningham argues that he had a right under the Second Amendment to possess a firearm because his prior felonies were nonviolent. The Court concluded that a Second Amendment challenge to defendant's conviction for being a felon in possession of a firearm is foreclosed by this court's recent decision in *Jackson*.

Lastly, Cunningham appeals the sufficiency of the evidence. The court concluded that a reasonable jury could have concluded that base on the ownership of the wheelchair, the location of the firearm found, and that no one else was around the wheelchair at the time of the discovery as Cunningham having the requisite knowledge of the possession. The court also concluded that there was ample evidence to suggest that Cunningham possessed the cocaine with the intent to distribute it. The court also stated that due to the location of the gun and the drugs, a reasonable jury could have found that the firearm was used to further the drug trafficking.

***US v. Hugs*, 112 F.4th 632 (8th Cir. Aug. 16, 2024)**

Hugs was convicted of unlawfully selling eagle feathers and wings and was ordered to pay $70,000 in restitution as a mandatory condition of supervised release. 18 USC. Secs. 3663 and 3663A do not authorize an order of restitution for violation of 18 USC. Sec. 668(a), but the court did have authority to enter an order of restitution under 18 USC. Sec. 3583(d). As to the amount of restitution, defendant did not waive his objection to the amount. The district court erred in calculating the amount of restitution based on 14 eagles (more parts were found in defendant's home), and the actual loss caused by his conviction is limited to the money the government spent to buy the eagle parts covered by the three counts of conviction - $1,600. The court modified the judgment to eliminate he mandatory condition of supervised release regarding restitution, but to include a special condition of supervision that defendant must make restitution in accordance with 18 USC. Sec. 3583(a). The criminal monetary penalties of the judgment should be modified to substitute a restitution amount of $1,600. The court vacated the judgment and remanded the case to modify the restitution order.

***US v. Burch*, 113 F.4th 815 (8th Cir. Aug. 19, 2024)**

Burch was convicted by a jury on four counts of child pornography charges while on supervised release on another conviction for child pornography. Burch appeals the district court's decision to admit evidence of Burch's prior conviction under FRE 404(b) & 414(d)(2)(B), the sufficiency of the evidence on all four counts, and the revocation of his supervised release.

The district court did not err in concluding that defendant's prior conviction for possession of child pornography was admissible under Fed. R. Evid. 414 to prove the defendant's propensity to sexually exploit children. There was no Rule 403 violation because the court placed limits on the testimony and provided the jury a cautionary instruction. Burch did not adequately show how the evidence would confuse or mislead the jury.

Next, Burch argues that the evidence was insufficient to support the verdict. The evidence presented in Count 1, for the attempted production of child pornography, was sufficient to support the conviction, although there was no actual nudity in the videos recorded on Burches phone, the court determined it was a substantial step in the actual production of child pornography. There was also sufficient evidence to support Counts 2 and 3, the attempted receipt of child pornography based on the images and searches on his home desktop and personal flip phone. The judgment was affirmed.

***US v Sully*, 114 F.4th 677 (8th Cir. Aug. 19, 2024)**

Sully was charged with various counts of abusing her foster children while on tribal land. After the first trial resulted in a mistrial, the district court ordered the trial to start again in 18 days following the mistrial, denied Sully's two motions to continue, and admitted evidence under FRE 803(2) and 807 over Sully's objection.

The court's denial of defendant's motions for continuance of the second trial date was not an abuse of the district court's discretion, nor did the district court err in denying defendant's motion for a new trial, based, in part, on the denials, as defendant failed to explain what additional arguments, evidence, or witnesses she would have discovered had the continuances been granted. Challenges to admission of certain hearsay evidence rejected as the some of the statements were properly admitted under the excited utterance exception and others were properly admitted under the residual hearsay exception. In any event, any error in admitting the statements was harmless, as the statements were cumulative to other unchallenged evidence and could have had only a slight effect on the guilty verdict.

Affirmed.

***US v. Bradford*, 113 F.4th 1019 (8th Cir. Aug. 20, 2024)**

Intervening Supreme Court decision did not make enforcement of plea agreement's appeal waiver a miscarriage of justice.

***US v. Alexander*, 114 F.4th 967 (8th Cir. Aug. 23, 2024)**

Alexander was convicted of a two drug conspiracy count after a jury trial. During the arrest of Alexander and the codefendant, the codefendant told LEO that Alexander had nothing to do with the drugs found in the car. Before trial, the government filed a motion in limine to exclude the exculpatory statements from being introduced at trial. That motion was granted. Alexander appeals the ruling on that motion, and other trial management decisions.

Alexander argues that the court's ruling on the exculpatory statements violated Fed. R. Evid. 804(b)(3) and his Fifth Amendment rights to present a complete defense. The Eighth Circuit agreed with the district court's ruling that under Rule 804(b)(3), Alexander failed to establish that the codefendant's statement corroborated the other trustworthy evidence that was presented. Further, the court concluded that it was not a Fifth Amendment violation to exclude the exculpatory evidence.

Next, Alexander argued that the court erred in managing the testimony of three government witnesses. First, he argues that an LEO exceeded his expertise by testifying about certain observations may indicate that criminal activity is afoot. Second, he argues that both LEOs on scene crossed a line when testifying about observing Alexander being deceptive and evasive when speaking to him. And lastly, he argues that the district court erred by not mitigating the risks of allowing the three LEOs to testify as dual witnesses.

Regarding Alexander's first argument, the court held that a state trooper's testimony regarding physical actions which may indicate a witness's involvement in criminal activity was not outside the scope of his expertise under Rule 702 regarding expert opinions.

Next, the court held that admission of testimony from the trooper and another arresting officer that they found defendant deceptive, if error, was harmless. Given the other inculpatory evidence presented at the proceeding, even if the testimonies from the officers were excluded, the outcome would not have changed.

Third, the court did not err in allowing the trooper, the officer and a second trooper to give "dual-witness" testimony – both lay and expert opinion testimony. The testimonies were given with phrases like, "In my opinion…" and questions were formed as, "Based on your training and experience…" The court also gave

proper instruction to the jury regarding different types of testimony, and their ability to believe or not believe what they were hearing.
The judgement was affirmed.

***US v. Ellingburg* 113 F.4th 839 (8th Cir. Aug. 23, 2024)**

Ellingburg was indicted for a December 1995 bank robbery in April 1996. He was convicted August that same year, and was ordered to pay $7,500 restitution. The amount of restitution was only partially paid by the time of his release in 2022. He asserted the statutory time period for paying restitution under the Victim and Witness Protection Act expired in 2016 and that any attempt to expand the restitution liability term under the current Mandatory Victim Restitution Act, 18 USC. Sec. 3613(b), would violate the Ex Post Facto Clause.
The court held that application of the MVRA to the restitution imposed in defendant's 1995 judgment and commitment order did not violate the Ex Post Facto Clause because, under this court's binding precedents, retroactive application of the MVRA to a restitution order does not constitute an Ex Post Facto violation because restitution is a *civil* remedy, not a *criminal* penalty.
Affirmed.

***US v. State of Missouri*, 114 F.4th 980 (8th Cir. Aug. 26, 2024)**

Missouri's Second Amendment Preservation Act classifies various federal firearms laws as violations of the Second Amendment and provides they are invalid in Missouri. The US sued the State, the governor, and the attorney general, asserting the Act violates the Supremacy Clause. The district court denied the motion to dismiss from the State of Missouri based on a lack of standing, granted the United State's summary judgment motion, and enjoined Missouri from implementing and enforcing the Act. Missouri appeals the district court's order finding the US had standing and concluding that the Act purported to invalidate federal law in violation of the Supremacy Clause.
The court determined that standing was established as the US' injury is both traceable to Missouri and redressable by a favorable decision. The Court determined that the US suffered an injury in fact because they have a legally protected interest in enforcing federal law. The injury was also traceable to Missouri because they were withdrawing state resources to help enforce federal law and redressable by enjoining them to assist in enforcing federal law.
Missouri next argues that the US cannot sue to enforce the Supremacy Clause because it lacks a cause of action. The court held that US may sue to enjoin unconstitutional acts by state actors. Missouri also argues that they can lawfully withhold assistance from federal law enforcement. The court stated that while Missouri may withhold its assistance from federal law enforcement, it may not due so by purporting to unconstitutionally invalidate federal law.
The District Court's judgement was affirmed.

***US v. Dailey*, 113 F.4th 850 (8th Cir. Aug. 27, 2024)**

While on supervised release, the US Probation Office filed numerous violations of conditions against Dailey. Dailey stipulated to a majority of the violations, which resulted in a guideline range of 6-12 months. The parties recommended 6 months of imprisonment followed by a 10-year term of supervised release, the court revoked Dailey's supervised release and sentenced him to 12 months imprisonment followed by a 240-month term of imprisonment. Dailey appeals the revocation of his supervised release, alleging procedural errors, and substantive unreasonableness with the sentence imposed.
Dailey contends that the district court erred by giving improper weight to the unstipulated allegations of his new law violations. The district court based defendant's revocation on admitted violations and stipulations and not on violations he did not admit. The guideline range and Judge's reasoning reflected that finding.
Dailey next argues that the district court violated his due process rights by not allowing him to defend against the unstipulated allegations. The Eighth Circuit concluded that the district court allowed ample opportunity to defend against contested violations. The law enforcement officer in question was available

at the final revocation hearing, where he could have called her as a witness. At a revocation hearing, the court may admit a probation officer's report when she is available for cross-examination.
Lastly, Dailey argues that the sentence imposed was substantively unreasonable. The court concluded that the 240-month term of supervised release imposed in the revocation sentence, although longer than the term imposed at the original sentencing, was not substantively unreasonable on this record, and the term was within the parameters of the period of supervision (five years to life) the court could have imposed at the original sentencing.
Judgment affirmed.

***US v. Scherer*, 114 F.4th 987 (8th Cir. Aug. 29, 2024)**
Scherer was convicted of possessing a firearm as a felon in 2011. At his revocation hearing for violations committed on his third term of supervised release, the court sentence him to 36 months imprisonment with no supervised release to follow. Scherer argues that the court abused its discretion by prohibiting defense counsel to describe the resolution of his state charges for mitigation. Second, he argues that the court imposed an substantively unreasonable sentence.
Scherer first claims that the court abused its discretion by limiting counsel's argument at the revocation hearing. Under Fed. R. Crim. P. 32(b)(2) there is an implicit right to counsel, to allocution, or the complementary rights. Scherer preserved his objection to the court's limitation on his attorney's argument at sentencing, because counsel asked to respond after the Court cut her off. The Eighth Circuit concluded that any error in limiting the argument, which concerned disposition of state charges, was harmless as defendant was permitted to present both argument and evidence to demonstrate the mitigating factors he claimed the disposition established, and it was highly unlikely that any further statements from counsel concerning the guilty plea in the state court proceeding would have provided meaningful additional impact.
Lastly, Scherer argues that the 36-month sentence was unreasonable in light of his improvements in custody. The Eighth Circuit concluded that the court gave proper weight to the proper factors, and due to Scherer's history on supervised release, the 36-month sentence was not substantively unreasonable.
Judgment affirmed.

***US v. Mull*, 113 F.4th 864 (8th Cir. Aug. 29, 2024)**
Mull pleaded guilty to four counts of being a felon in possession of a firearm. Mull appeals the district court's base level offense enhancement 2K2.1(a)(4)(B) of the offense involving a semiautomatic firearm capable of handle large capacity magazines. He argues that it was his codefendant was responsible for that firearm. He also raises that the felon in possession statute violated his Second Amendment rights.
Mull argues that the court procedurally erred in applying the enhancement. The Eighth Circuit concluded that the district court did not err in imposing a Guidelines Sec. 2K2.1(a)(4)(B) enhancement for possession of the firearm at defendant's sentencing. The men were engaged in a jointly-undertaken-criminal-activity within the meaning of Guidelines Sec. 1B1.3(a)(1)(B), and the co-defendant's possession of the gun was within the scope of that activity. Mull and his co-defendant participated in a shoot-out, and the co-defendant was in possession of a firearm with a large capacity magazine was in furtherance of the jointly undertaken criminal activity and was reasonable foreseeable to defendant.
Lastly, as to Mull's Second Amendment argument, the Court concluded that Mull's Second Amendment challenge to his felon-in-possession conviction is foreclosed by this court's recent opinions in *US v. Jackson*. Judgment affirmed.

***US v. Millsap*, 115 F.4th 861 (8th Cir. Sept. 3, 2024)**
POSTURE AND ISSUES: Post-trial appeal on five main issues: (1) Interstate Agreement on Detainers (2) juror intimidation mistrial motion (3) sufficiency of evidence (4) evidentiary issues (5) sentencing issues.

FACTS: Millsap assisted Gullet (president of the New Aryan Empire) with a drug-trafficking operation by lending money, facilitating shipments and selling methamphetamine, including to a CI. Millsap offered money for someone to kill the CI--who did later end up dead at someone's hand. Millsap and co-

defendants were indicted for RISO conspiracy, attempted murder in aid of racketeering (someone else took a shot at the CI before an unknown party actually succeeded) and methamphetamine conspiracy.

When indicted, Millsap was in custody of the Arkansas Department of Corrections for a drug offense. Millsap was brought to federal court BY WRIT AND KEPT IN FEDERAL CUSTODY PENDJNG TRIAL. The marshal sent a detainer to Arkansas DOC but it arrived after Millsap was already gone on the writ. A co-defendant moved to continue the federal matter and Millsap moved to dismiss for violation of the IAD trial time limit. The district court denied the motion.

Conviction on all counts. Life sentence imposed. All appeal challenges rejected; judgment affirmed.

INTERSTATE AGREEMENT ON DETAINERS: Denial of motion to dismiss affirmed because the IAD never even applied since the federal government did not obtain custody by the detainer but by a writ before the detainer was ever received at Arkansas DOC.

JURY INTIMIDATION MISTRIAL MOTION: Two jurors reported that Millsap's wife drove away fast after watching them outside the courthouse and that they saw a "menacing" man one night in the courthouse parking lot. Denial of mistrial affirmed because Millsap did not make a threshold showing of any contact with the jurors about the trial itself. Although juror contact is presumptively prejudicial to fair trial, no abuse of discretion here because physical proximity and stares are not the same as communication and contact about the trial.

SUFFICIENCY OF THE EVIDENCE: denied under light most favorable to prosecution standard of review.

EVIDENCE ISSUES-HEARSAY: District court properly found existence of a conspiracy under applicable preponderance standard and admitted statements in furtherance. Statements about past events to keep co-conspirators in the loop or to recruit others qualify as in furtherance of conspiracy. Other statements were not admitted for the truth of the matters asserted and other hearsay challenges denied as harmless error.

EVIDENCE ISSUES-FRE 403: Probative value of tattoo and Hitler gestures not substantially outweighed by danger of unfair prejudice. Testimony about CI's murder by someone unknown was proper since Millsap was on trial for attempting to arrange the CI's murder and it explained the CI's unavailability and eliminated speculation that Millsap had done the actual murder.

SENTENCE CHALLENGES:
A. Two levels for drug premises was proper since there was testimony about distributed meth coming from a five-gallon bucket in Millsap's house.
B. Two levels for possession of dangerous weapon in connection was proper since there was testimony that Millsap gave a handgun to a co-conspirator after discussion of killing the CI to protect the organization.
C. Although relevant conduct priors are not ordinarily countable, conduct that is part of a pattern of racketeering activity may be counted if it resulted in a conviction prior to the last overt act of the instant offense.
D. Not reducing sentence under guideline sec 5G for time served in Arkansas custody reviewed for plain error (no objection below) but unavailing anyway because Millsap committed part of the RICO conspiracy while out on bond pending appeal.
E. Challenge to sentencing consideration of the actual CI murder rejected because the district court stated it had nothing to do with its sentence for previously seeking someone to kill the CI.

***US v. Fisher*, 115 F.4th 875 (8th Cir. Sept. 4, 2024)**

POSTURE AND ISSUE: Post-trial appeal of felon in possession of ammo conviction under Rehaif challenging sufficiency of evidence on knowledge of prohibited status.

FACTS: Fisher helped plan and participated in a burglary of a home for weed and cash. In the process, Fisher shot the occupant multiple times. Evidence against Fisher included social media boasts. Guilty verdict.

HOLDING: Knowledge of status is reviewed *de novo* in its totality under the familiar light most favorable to the verdict standard with reversal only if no reasonable jury could have found guilty beyond a reasonable doubt. Here, evidence included that Fisher plead guilty to a felony in state court and signed probation paperwork stating his felony status and resulting firearm prohibition. The court (again) distinguished the pre-Rehaif Davies decision tried when the law did not require proof of status knowledge. In Davies, there was a reasonable probability of a different verdict because the jury never addressed the status knowledge element and Davies had plead guilty but had not yet been sentenced. Here, the jury had sufficient evidence of factual knowledge of the conviction, a burden "not difficult to meet in most cases."
September 6

***US v. Collier*, 116 F.4th 756 (8th Cir. Sept. 6, 2024)**
POSTURE AND ISSUES: post-trial appeal of six main issues (all rejected).

FACTS: Interstate stop based on drift into shoulder. Then the usual reasonable suspicion script: nervous driver behavior, appearance of vehicle interior, unusual itinerary. Consent was denied and trooper called for a dog which alerted, leading to a PC warrantless vehicle search locating 10 kilos of cocaine. One count PWID indictment, adverse jury verdict and ten year mand min sentence followed.

ISSUES:
1. Drug dog reliability and PC: A dog is presumptively reliable with satisfactory completion of bona fide certification and training. Reliability challenge rejected because the dog completed training satisfactorily and had in-field batting average pf .970 -- well above the minimum required batting average of .500. Non-enthusiastic alert behavior (distinguished from my dear departed Belgian's window frame destruction over the mailman) did not matter because alert behavior can vary from dog to dog.

2. Dog expert testimony at suppression hearing: Challenge to expert's qualification rejected. The expert could not translate the German language name and did not know the history of the Garman source of the dog, but those details were extraneous to the state police dog program.

3. District court's applied standard for suppression: the district court couched the standard of reasonable "officer" and not "person," but those terms are interchanged in precedent anyway and court applied correct Fourth Amendment reasonableness standard.

4. Rule 16 discovery: challenge to adequacy of expert disclosure on lab expert rejected because there was no prejudice since the defense had adequate time to prep cross and seek its own expert and the defense motion to exclude was untimely. No abuse of discretion. MORE INTERESTING RULE 16 NUGGET: Defense objected that the dog handler was testifying as an expert without notice and the trial court let it go as lay testimony. Noting this as an issue of first impression in our circuit, the Circuit does not reach the lay vs expert witness issue, holding no showing of prejudice/surprise either way.

5. Cocaine isomer defense: defense argued that the testing did not distinguish possible positional isomers vs statutory illegal optical and geometric isomers (nightmarish undergrad organic chem flashbacks for your author). They requested jury instruction and moved for acquittal

accordingly. Although the First Circuit has recognized that there are narcotic isomers and chemically related but not illegal non-narcotic isomers, where the prosecution expert testifies that the substance was "cocaine" and there is no other expert deep dive, it's close enough. To get a jury instruction on this, the defense must pony up the evidence since a requested instruction has to be correct statement of the law and supported by the evidence. Isomer defense here was speculative, so no abuse of discretion to deny the instruction.

6. Prosecution comment on post-Miranda silence: Defense moved for mistrial and requested curative instruction, but the mention was fleeting in the context of the overall argument and the overall evidence. Therefore, no abuse of discretion to reject curative instruction (no objection to that below so plain error review) and mistrial motion.

***US v. Topete*, 116 F.4th 792 (8th Cir. Sept. 10, 2024)**

Carillo Topete was sentenced to a mandatory minimum of 10 years after the district court found a prior conviction met the definition of 18 USC. § 2252A(a)(5)(B), (b)(2), in that it related to prior sexual abuse. The 8th reiterated that what matters is the statutory definition of his prior offense, not his actual conduct. *US v. Sonnenberg*, 556 F.3d 667, 670 (8th Cir. 2009). The statute required him to "ha[ve] a prior conviction under" a qualifying state "law[]," which makes the conviction itself the focus, not the facts underlying it. 18 USC. § 2252A(b)(2); *see Taylor v. US*, 495 US 575, 600 (1990). "Sexual abuse" refers to "physical or nonphysical misuse or maltreatment of a [victim] for a purpose associated with sexual gratification." *Sonnenberg*, 556 F.3d at 671. The 8th determined that Carillo Topete's prior Iowa conviction for assault with the intent to commit sexual abuse qualified. Iowa Code § 709.11. Iowa's statute proscribes sex acts done by force or against the will of someone else. This necessarily involves physical misuse or maltreatment meaning "the full range of conduct" covered by the Iowa statute "fits squarely within" the generic federal definition. A person guilty of that crime does not have to commit sexual abuse, just intend to do it. Iowa Code § 709.11. That intent creates the necessary relationship: by definition, the assault had to have been committed with the goal of committing sexual abuse. Hence, conviction affirmed.

***US v. Begay*, 116 F.4th 795 (8th Cir. Sept. 10, 2024)**

Begay challenged the evidence the jury heard and the sentence he received for sexual abuse and aggravated sexual abuse. 18 USC. §§ 2241(a)(1), 2242(1). He challenged admission of prior consistent statements of the victim. The general rule is that a witness's prior consistent statements are inadmissible hearsay when offered for the truth of the matter asserted. However, two exceptions permit admission. First, when rebutting an express or implied charge that the declarant recently fabricated her testimony or acted from a recent improper influence or motive in testifying. Second, when rehabilitating the declarant's credibility as a witness when attacked on another ground. Fed. R. Evid. 801(d)(1)(B). The victim's testimony fit into both categories and therefore was admissible. Begay asserted that the victim had a motive to lie, that being, that her ex would be angered if he thought she had consensual sex, so she lied and said she was raped (a "charge" that she fabricated a story based on a motive to lie). Begay also asserted that the victim's memory was faulty due to drug use and mental health issues, hence, her credibility was attacked on "other grounds." Begay also asserted that he should have been able to introduce evidence the 8th circuit ruled inadmissible; he wanted to explore the victim's sexual history in detail, but the district court placed limits on how far he could go. Although he could argue that somebody else was behind the injuries and the sperm fragments, prior inconsistent statements about her sexual history were off-limits. *See* Fed. R. Evid. 412(a).

As to sentencing, the 8th affirmed application of an enhancement for "serious bodily injury" because of the impact on the victim's "mental faculties." Additionally, the Court affirmed application of an enhancement for physically restraining the victim during the offense. Begay argued it was "double counting" to permit the enhancement, as it duplicates an element of aggravated sexual abuse. The 8th rejected the argument in the past and did so again here. Conviction and sentence affirmed.

***US v. Clark*, 115 F.4th 895 (8th Cir. Sept. 10, 2024)**

Clark committed three car thefts, entered two homes and a manufacturing campus where he stole personal items and terrorized a homeowner, and struggled with police officers who attempted to arrest him. A jury convicted Clark of possessing a stolen firearm
in violation of 18 USC. § 922(j), three counts of carjacking in violation of 18 USC. § 2119, and three associated counts of brandishing a firearm during the carjackings in violation of 18 USC. § 924(c)(1)(A)(ii). Clark challenged the sufficiency of the evidence as to two of the carjacking allegations and the brandishing charges. Clark argued the evidence established he did not use force and violence or intimidation to "take" a Dodge Ram company truck. Rather, surveillance footage introduced at trial showed he could take the Dodge Ram and drive it toward the exit of the premises because its keys were left in the unlocked vehicle. The 8th determined that a reasonable jury could find that a "taking" was not fully completed until Clark pointed his firearm to escape the enclosed facility. As to a different count of carjacking, Clark argued that a victim's testimony that an "intruder" said he was not going to hurt her while holding a gun to her head, and that he never asked her for her car keys before she volunteered them, was contrary to the jury's finding that he possessed the requisite intent to kill or seriously harm her when he took her car. The 8th disagreed. The Court stated that even absent a specific demand for the victim's car keys, Clark's actions provided evidence from which a reasonable jury could find the necessary intent. Clark's statement that he was not going to hurt the victim while holding a gun to her head does not negate the requisite conditional intent. "Nor was the jury required to take him at his word." Affirmed.

***US v. Villanueva*, 116 F.4th 813 (8th Cir. Sept. 16, 2024)**

Case involving a murder in Indian country. Francisco Villanueva and Adan Corona convicted at trial and appeal their convictions. Estevan Baquera pleaded guilty to accessory after the fact and appeals his sentence.

FACTS : Dispute over alleged drug debt. Vincent Von Brewer III owed money to the street gang the Eastside Oldies. October of 2016 Villanueva gathered others to collect the money from Brewer. The group included Villanueva, Corona and Baquera, a juvenile H.C. and others. They traveled in two cars finding Brewer at a community center in Pine Ridge. Brewer was with his cousin Jordan "Sky" Brewer and two minors. Villanueva's group stopped the cars in front of Brewer, got out with firearms and faces largely covered . the prosecution maintained Villanueva and Corona shot Brewer dead in the parking lot of the center . Villanueva and Corona indicted on two counts of murder in the first, conspiracy to commit assault with a dangerous weapon, use of a firearm during a crime of violence and felons in possession of ammo. Convicted of all counts and sentenced to life. Baquera pleaded guilty to accessory to murder after the fact as among other things he helped disguise the getaway car by putting stolen plates on it. Guideline range was 78-97 but court varied upward at sentencing to 180 months (stat max) , finding at the hearing that Baquera pointed his firearm at the crowd to protect the gang members who were attacking Brewer.

VILLANUEVA ISSUES:

A. Court erred when prosecution allowed to present Sky Brewers eyewitness identification of Villanueva.

Sky testified at trial that one of the armed men did not cover his face. A few days after the murder Brewer' sister had shown Sky a photo from a Facebook page she had found associated with the Eastside Oldies. Sky identified one of the men in the photo as the uncovered face armed man from the murder. Brewer's sister later identified that man from the photo as Villanueva. At trial Sky identified the uncovered face man as Villanueva. Villanueva asserts Skys testimony was from an unduly suggestive eyewitness ID procedure. Eyewitness ID made under suggestive police arranged procedure may violate due process violation if creates likelihood of misidentification. The Due Process Clause however does not require preliminary judicial inquiry into the reliability of the eyewitness ID when the ID was not procured by unnecessarily suggestive circumstances arranged by law enforcement. Due Process Clause

no implication here as Sky's ID was from photo Brewers sister displayed on her own. No law enforcement involved . No error.

B. Court erred in not allowing defense expert psychologist who studies social cognition.

Expert had opined in pretrial report that Sky's ID from Facebook and his subsequent in court testimony identifying Villanueva would be highly unreliable. District court excluded the expert testimony as it would invade the province of the jury and may well confuse the jury in performing it's task in judging the weight and credibility of Sky's identification. The 8th says long line of cases showing it frowns on the use of expert testimony regarding the use of expert testimony regarding the believability or reliability of witnesses ID testimony. No error as the district court's ruling on the experts proposed testimony was in line with the 8ths precedents and did not constitute an abuse of discretion. Also rejects Villanueva's contention that should be remand for a Daubert hearing on the proposed expert testimony.

VILLANUEVA AND CORONA ISSUES:
C. Both contend district court abused its discretion by declining a proposed jury instruction about the testimony of a cooperating juvenile witness.

H.C. testified at trial that Villanueva and Corona shot Brewer. He also identified Baquera as a participant in the group that had guns and assaulted Brewer. H.C. admitted he carried a gun and directed it toward the crowd while others confront Brewer. For impeachment the defense elicited testimony that the government declined to move to transfer H.C.'s case to adult court and therefore the max incarceration he could get was through his 21st birthday. Prior to H.C. testifying the court instructed the jury that the government didn't move to transfer and that whether the witness was influenced by the hope of staying in juvenile court was for the jury to decide. At close of evidence the defendants requested the court include a final jury instruction regarding a cooperating juvenile witness. The instruction would have also explained that remaining in juvy court would have resulted in substantially less detention than the max term for an adult. The instruction further proposed that whether the testimony of a witness may have been influenced "by a desire to please the government or to get prosecuted as a juvenile" is for the jury to decide. The court declined to give the proposed instruction, explaining it would single out one witness's testimony as compared to others and would cause the court to comment on the evidence. The court concluded the other instructions were adequate. The 8th rules no abuse of discretion as the jury instructions already informed the jury that in weighing the evidence they can consider whether testimony nay have been influenced by a plea agreement or government's promise not to prosecute further. The court also referred back to prior specific instruction given at trial. Jury was told to consider all instructions as a whole.

CORONA ISSUE:
D. Denial of Corona's motion to suppress statements.

Corona was a backseat passenger in a vehicle stopped by police in 2016 in Colorado. Officer noted Corona appeared extremely nervous and his eyes kept shifting directions. Officer figured a gang member as in high crime area with 2 active street gangs and tattoos he had were consistent with Eastside Oldies members. ID requested and Corona denied documents but said he was Jonathon Rojas. After learning of false name Corona was removed from vehicle for pat down and seemed shaky and sweaty even though it was cold out. Officer thought due to Corona looking around, he may flee so he was cuffed and put in patrol car. Corona upon being asked gave his real name and admitted he had warrants. Officer asked if any weapons in car and Corona disclosed yes there was a firearm. Gun was seized. Then Miranda warnings were given. Evidence at trial suggested the firearm was used in the attack on Brewer. Corona contended officer who questioned him during traffic stop violated Miranda. Miranda required when in custody. Custody is a formal arrest or restraint on freedom of movement. District court ruled no Miranda violation. Like a Terry stop, a traveler in a traffic stop is temporarily deprived of freedom of action but not typically subjected to a degree of restraint associated with a formal arrest so Miranda not required.

(US v Pelayo-Ruelas 345 F3d589, 592 8th 2003). The 8th finds Corona's roadside detention falls within this rule. He was detained only 5 minutes before telling officer about the gun in the car. Detention at that time was "temporary and brief" and somewhat in public. Although handcuffed did not amount to formal arrest. As here was briefly used to protect officer safety. The initial 5 minute phase was an ordinary traffic stop or Terry stop during which Miranda warning not required. District court correctly denied motion to suppress.

BAQUERA ISSUE:
E. Appeal of sentence.: He argues district court relied on clearly erroneous facts and imposed unreasonable sentence. Specifically that court clearly erred in finding that Baquera aimed his firearm at bystanders during assault on Brewer. The court found he participated in the attack by holding a firearm on the crowd to protect the attacking gang members. 8th concludes no clear error here as H.C. testified Baquera carried AK47 when he got out of the car and pointed his gun at Brewer and participated in the beating of Brewer before fatal shot fired. Baquera's unobjected to PSR stated when he and others exited vehicles at the center "they were all armed with the firearms" and "initially the group pointed their firearms at the bystander" In his plea agreement he admitted he "assisted in keeping anyone from approaching during the assault and murder of Brewer ". It was reasonable to assume Baquera was among "the group " that pointed firearms at a bystander and Baquera admitted helping keep anyone from approaching.
Baquera also argued sentence unreasonable as not commensurate with sentences imposed on others involved in attack on Brewer. The court at sentencing considered others and made explicit effort to avoid unwarranted disparities. Another offender got a lesser sentence as he provided one of the vehicles but didn't participate in the beating at the scene. The 8th says no abuse of discretion in selecting a sentence.

US v. Castillo, 117 F.4th 1021 (8th Cir. Sept. 20, 2024)
In October of 2021 Rodrigo Castillo and co-defendant Nava were charged in an indictment with 7 counts of 21 USC 841(a)(1) and (b)(1), and 846 to include Count I , one count of conspiracy to distribute over 500 grams meth mixture, four counts of distributing over 50 grams, and 2 counts of distributing over 500 grams. Nava also had a forfeiture allegation count. In March of 2023, Castillo entered a guilty plea to the conspiracy count without a plea agreement. The government had made a plea offer which Castillo had discussed with counsel. Counsel explained at the plea hearing that Castillo plead without to "keep all of our options", including the right of appeal if the government argued that Castillo "is not eligible for safety valve" or that the guideline range be based on actual not mixture of meth. Plea accepted and sentencing scheduled for later date. In April co-defendant Nava entered into an 11(c)(1)(C) plea agreement with the government to a 120 month sentence as to Count I, agreed to the forfeiture and waived appeal rights and post-conviction motions. Castillo's PSR recommended he be held responsible for 1256.14 grams actual meth and 403 grams of meth mixture, resulting in a base offense level 34 (2D1.1(a)(5), (c)(3). The PSR further gave a 2 level increase because "the offense involved the importation of amphetamine or methamphetamine" (2D1.1(b)(5)). With a 3 level decrease for acceptance the adjusted base offense level of 33 produced a guideline of 135-168 months prison. Castillo objected before sentencing to drug amount and the 2 level increase. Castillo also filed a variance motion, requesting the same 120 month sentence co-defendant Nava had agreed to "avoid sentencing disparities" and asked the court to impose the mandatory minimum 120 month sentence. There no objections to any fact allegations in the PSR. At the sentencing hearing counsel withdrew the original objections . After argument the district court denied the variance motion stating

> I'm going to deny the defendant's motion for a downward variance because a downward variance would be inappropriate in this case. The defendant was involved in distributing a significant amount of methamphetamine in Nebraska, because the seriousness of the offense warrants a within the guideline sentence. I'm also unpersuaded by the defendant's argument as to the sentencing disparities . . . . I am simply not bound to give the same sentence because one defendant entered into a 11(c)(1)(C) plea agreement for 120 months.

The court then noted, "the way I read the documents [this] defendant is being held responsible for 25,928.8 kilograms of converted drug weight while the other co-defendant is being held responsible for 21,048 kilograms of converted drug weight." The court further noted, "the other defendant had put together a (c)(1)(C) agreement that provided him some certainty and he gets a benefit for . . . that as well."

Castillo was then sentenced to within guideline range of 140 months. Castillo on appeal argues the sentence is procedurally and substantively unreasonable. Castillo argues the court procedurally erred by failing to consider 18 USC 3553(a)(6) "the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct". The 8th disagrees saying not so as the district court did not fail to consider the 20 month difference in sentences, as indeed the subject dominated the discussion of an appropriate sentence. The court specifically discussed the need to avoid unwarranted disparities and even assumed it was required to consider among co-conspirators. Castillo's argument asserts that court is required to avoid unwarranted sentences under 3552(a)(6) as alleged. The 8th says the precedent is contrary and has repeatedly held 3553(a)(6) refers to national disparities, not differences among co-conspirators. They further add it's not to say disparities between co-conspirators are irrelevant but how those factors are weighed is not mandated by 3553(a)(6). Lastly Castillo argues court abused its discretion as sentence is substantively unreasonable. 8th says a within guidelines sentence is afforded a presumption of reasonableness. Affirmed.

***US v. Garner*, 119 F.4th 571 (8th Cir. Oct. 21, 2024)**

Facts: Garner pleaded guilty to Receipt/Distribution of CP. The PSR included a 2015 Texas conviction for Indecency with a Child; Exposing Anus or Genitals in violation of Texas Penal Code § 21.11(a)(2)(A). Garner was convicted in 2015 after a jury trial for masturbating in front of a child for the purpose of sexual gratification. The PSR determined that this conviction qualifies as a predicate state law offense under 18 USC. § 2252(b)(1). Garner objected to the enhancement. District court cited to *US v. Sonnenberg*, 556 F.3d 667 (8th Cir. 2009), stating that the logic in *Sonnenberg* applied to the TX statute in this case, which demonstrates that the Eighth Circuit would apply the enhancement. Garner's guidelines of 135 to 168 months changed to 180-188 month due to the enhanced statutory minimum. Garner was sentenced to 240 months.

Appeal: Garner appealed the statutory 15-year mandatory minimum on the basis that his conviction for violating the Texas law is not a predicate § 2252(b)(1) state law offense. Government moved to dismiss the appeal as bared by the appeals waiver in the plea agreement.

Issue: Whether the TX conviction qualified as a predicate state offense "relating to abusive sexual conduct involving a minor," pursuant to the sentencing enhancement under 18 USC. § 2252(b)(1).

Holding: The Circuit applied the categorical approach and held that a prior conviction for indecent exposure with a child in violation of Texas Penal Code § 21.11(a)(2)(A) categorically relates to a perpetrator's physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification, and thus qualifies as a predicate offense under 18 USC. § 2252(b)(1) to enhance a sentence for a child pornography conviction.
The Circuit reasoned that the phrase "relating to" in § 2252(b)(1) is given a broad ordinary meaning and does not require the predicate offense to involve actual harm or use the word "abuse."
Court relied on Eighth Circuit case precedents in *US v. Sonnenberg*, *US v. Weis*, 487 F.3d 1148, 1151-53 (8th Cir. 2007) and other 8th Circuit cases applying § 2252(b)(1) statutory enhancements. Judgment affirmed.

***US v. Ahmed*, 119 F.4th 564 (8th Cir. Oct. 21, 2024)**

Facts: Ahmed was found guilty by a jury of two counts of kidnapping and sentenced to 480 months. Victim reported that after leaving a casino in IA, a man in a car asked her to come over, she got into the man's car (at trial she testified that she was *pulled into the car)*. The man took her to NE, stopped on a dirt road, sexually assaulted her in the car and pushed her out. She made her way to a fast-food restaurant to report the rape. Victim described Ahmed's car, police found Ahmed and his DNA was found on the Victim's vagina. Surveillance from the Casino showed a car matching the description that the Victim gave of Ahmed's car. A year later a 2nd victim reported she was raped by Ahmed after they went on a date. Ahmed's DNA was found on a condom collected at the park where this victim alleged the rape took place.
Issues: Ahmed argued that the court should have
(1) held separate trials for the two offenses,
(2) the court erred by allowing into evidence that he committed a similar offense in the past,
(3) evidence was insufficient to support his convictions,
(4) the court erred in considering uncharged sexual assaults against two other victims at sentencing.

Holding: (1) Severance of the charges were not necessary. Evidence of each kidnapping would have been admissible in a separate trial of the other kidnapping under FRE 413. That rule permits the jury to consider evidence showing that the defendant has a propensity to commit sexual assaults. *See US v. Weber*, 987 F.3d 789, 793 (8th Cir. 2021).
(2) Rule 413(a) provides that "[i]n a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault." Rule 413(d)(1) explains that a "sexual assault" is a crime involving "any conduct prohibited by 18 USC. chapter 109A."
**Rule 413 applies even though Ahmed was "accused of" kidnapping and not "sexual assault." Rule 413 only requires that the instant offense involve conduct proscribed by chapter 109A. Ahmed's kidnaping offenses involved sexual assault-conduct covered in Ruel 413(d). Rule 413 also applies in admission of evidence that the Defendant committed other sexual assaults. Circuit stated that under FRE 403 the prior sexual assault from four years earlier carries little to no probative value (Circuit has permitted evidence of much older offenses under FRE 413 and 403). No error in allowing the prior similar offense conduct.
(3) Evidence was sufficient: DNA of Defendant, Reports of victims and testimony.
(4) No error in the District court considering uncharged sexual assaults at sentencing because the Government introduced evidence that Ahmed sexually assaulted the other victims around the same time period. Affirmed.

***US v. Driskill*, 121 F.4th 683 (8th Cir. Nov. 12, 2024)**
Defendants appeal; each argues his sentence is substantively unreasonable. Both sentences were affirmed.

Oliver pleaded guilty to Count Ten (possession with intent to distribute over 40 grams of a mixture containing fentanyl) and Driskill pleaded guilty to Count One (distribution of a mixture containing fentanyl which resulted in a person's death). The district court1 sentenced Oliver to 168 months imprisonment, an above guidelines-range sentence. The court sentenced Driskill to 456 months imprisonment for distributing a fentanyl mixture that resulted in the death of a person, a within-range sentence.

The court found that Oliver's argument that the district court erred in applying the § 5K2.1 departure because Oliver "did not sell any fentanyl directly to" the victim was without merit. According to the court: "we have upheld § 5K2.1 departures in cases where the defendant's distribution of fentanyl resulted in the death of a person when the defendant did not directly sell the death-causing drugs to the victim. See US v. Harris, 44 F.4th 819, 823 (8th Cir. 2022); US v. Nossan, 647 F.3d 822, 827 (8th Cir. 2011)." Oliver also argued that there was insufficient evidence to support the court's finding that Oliver was the one who sold fentanyl to Tally on the day of Wooten's death. The district court found that any contrary inference raised by a "stray comment" was overcome by the government's supporting evidence. As in US v. Sherrod, Oliver "asks us to overturn the court's credibility determinations, which are 'virtually unreviewable on appeal.'" 966 F.3d 748, 752 (8th Cir. 2020), quoting US v. Coleman, 909

F.3d 925, 929 (8th Cir. 2018). Lastly Oliver argued that his sentence was substantively unreasonable, but the court found that the district court did not abuse its discretion in determining the extent of the § 5K2.1 departure and did not impose a substantively unreasonable in-range sentence.

The court found that Driskill failed to rebut the presumption that his within-guidelines sentence is not substantively unreasonable. The court concluded that the district court did not abuse its discretion by imposing a substantively unreasonable sentence on Driskill as compared to Oliver. The judgments of the district court were affirmed.

***US v. High Hawk*, 121 F.4th 701 (8th Cir. Nov. 13, 2024)**

A jury convicted Spencer High Hawk of aiding and abetting second degree murder, 18 USC. §§ 1111(a), 2, and 1153. He appealed, arguing that the evidence was insufficient to support the jury's verdict and that the district court plainly erred by failing to instruct the jury on involuntary manslaughter and imperfect self-defense. The Eighth Circuit affirmed.

The court found that no reasonable jury could have convicted High Hawk of involuntary manslaughter because there was no evidence, including High Hawk's own testimony, suggesting that he accidentally killed Jealous of Him. High Hawk testified that he fought with Jealous of Him, walked away from the fight, and had no idea that Acorn was going to murder him. A.F.H. testified that High Hawk intentionally beat Jealous of Him to death. Jealous of Him was struck over 30 times, suggesting intentionality. And High Hawk's Facebook messages described murdering someone, not accidentally killing them. Because there was nothing supporting involuntary manslaughter, the district court did not err—plainly or otherwise—in not sua sponte instructing the jury on the lesser offense.

The court also found that there was no evidence that High Hawk acted in imperfect self-defense. Even if the jury believed High Hawk's version of events, there was no evidence he truly but unreasonably thought the use of force was necessary to avoid an assault. See Milk, 447 F.3d at 599. And the extensive blows suggest that no matter who killed Jealous of Him it was not done in self-defense. In any case, the district court instructed the jury on the lesser included offense of voluntary manslaughter and on self-defense, so the lack of imperfect self-defense instruction did not affect High Hawk's substantial rights.

***US v. Virrueta*, 121 F.4th 706 (8th Cir. Nov. 15, 2024)**

Smell of marijuana and defendant's behavior justified extension of traffic stop and search of vehicle.

***US v. Maluoth*, 121 F.4th 1158 (8th Cir. Nov. 20, 2024)**

Maluoth challenged the sufficiency of the evidence supporting his conviction for unlawful possession of a machinegun and the substantive reasonableness of his above-guideline sentence. At trial, the evidence established that police officers were surveilling a house as part of their search for an escaped convict. They saw a black Kia in the alley behind the house and a black male matching the convict's description come outside with what appeared to be a rifle. The Kia left and officers assumed that the man with the rifle was in the car. The surveillance officers relayed this information to other officers nearby, who stopped the Kia when they noticed it roll through a stop sign.

When they approached the vehicle, the officers testified that they observed Maluoth, who was in the front passenger seat, lean forward and try to hide something. They ordered Maluoth to stop reaching but they claim he continued his "furtive" movements. The officers then reached in and pulled Maluoth from the car and handcuffed him. A search of the car revealed a Glock handgun with a switch that converted it into a machinegun under the front passenger seat.

Maluoth testified at trial that he knew nothing about how the firearm came to be in the car. He said his movements were an attempt to locate his lighter and cigarettes while he was also on the phone. Some of

his testimony contradicted bodycam footage. Maluoth also admitted that he had entered the vehicle in the alley and he was the only male in the car.

The court found that, between the inconsistent testimony of Maluoth, his disregard of commands, and the location of the firearm, the jury's verdict was supported by sufficient evidence.

With regard to sentencing, the government had belatedly objected to the PSR because it did not include a four-level increase for an obliterated serial number. The district court overruled the objection but said it might consider the obliterated serial number in the final sentence anyway. Maluoth argued that the court gave too much weight to the obliterated serial number and did not adequately consider the empirically irrational escalation of base offense levels for firearms offense over the past 30 years. The court found no abuse of discretion and affirmed.

***US v. Brown*, 122 F.4th 290 (8th Cir. Nov. 25, 2024)**

Lester Brown was convicted by a jury of: (1) conspiracy to commit cyberstalking (18 USC. 371); (2) cyberstalking resulting in death (18 USC. 2261A, 2261(b)); and (3) being a felon in possession of a firearm (18 USC. 922(g)(1)). For this, he got life plus 180 months' imprisonment.

Issues: The issues were: (1) the admissibility of potentially hearsay statements; (2) the admissibility of prior bad act(s); and (3) the sufficiency of the evidence on the conspiracy-to-commit-cyberstalking and cyberstalking-resulting-in-death counts.

Facts: Lester Brown was a marijuana dealer implicated in the March 14, 2018 killing of marijuana dealer Christopher Harris.

Harris accompanied Brown to Arizona in 2013 and, upon his return, told a friend, Mr. Tolefree, "[n]ot to ever deal with [Brown] no more." Later, when another of Harris' friends – Mr. Cobbins – disappeared, Brown told Harris that his cousin "had" the missing man. Harris paid Brown a ransom for Cobbins's return, but Cobbins was not returned and was later found murdered. A month before Harris's murder, Brown sent him and Tolefree "threatening" (Tolefree's word) messages, including one that said if Harris didn't pay Brown $10,000, he'd "end up" like Cobbins. At one point, Harris told another friend, Victor McVea, that he was worried that "people [were] trying to kill him," and that he "was going through a situation [involving] a friend" with "some low-grade weed from Arizona."

The evidence showed that Brown enlisted his cousin, Michael Young, to track Harris's and Tolefree's cars. Brown bought a tracking device and attached it to Harris's car three days before his death. On the day of Harris's murder, Brown, Young, and another cousin tracked Harris's car on their phones. The trio followed Harris to his daughter's mother's house where he was shot by either Brown or Young or both. The police found a tracking device on Harris's car with a fingerprint matching Brown's.

Hearsay**:** Harris's statements to McVea – that he was worried that "people [were] trying to kill him," and that he "was going through a situation [involving] a friend" with "some low-grade weed from Arizona" – were admissible under Fed. R. Evid. 803(3) under the "state of mind" exception.

Harris's statement to Tolefree "[n]ot to ever deal with [Brown] no more" was a command and not offered for the truth of the matter asserted. As such, it was not hearsay.

Brown's statements to Harris and Tolefree (via Snapchat) were offered by the government against an opposing party and therefore admissible under Fed. R. Evid. 801(d)(2)(A).

Tolefree's recollection that he and Harris had discussed Brown's "threatening" messages, *i.e.,* this characterization, if inadmissible hearsay, was harmless error, especially given the admissibility of the messages themselves.

403/404(b): Evidence of the Cobbins disappearance and murder was admissible because it completed the story of the charged crimes. It provided context about Brown's and Harris's marijuana dealings and why Harris felt threatened by Brown. It particularly gave context for the "end up [like Cobbins]" comment. Rule 404(b) does not apply to intrinsic evidence of this sort. This evidence had, according to the Court, great probative value in a Rule 403 analysis.

Sufficiency of the evidence: The Court concluded that there was sufficient evidence that Brown and Young had conspired to cyberstalk Harris. The Court further concluded that the elements of cyberstalking resulting in death were also met. Affirmed.

***US v. Lemicy*, 122 F.4th 298 (8th Cir. Nov. 26, 2024)**

Anthony Lemicy was convicted by a jury of four counts of sexual exploitation of a minor and got four consecutive 30-year sentences. The issues were:

(1) Whether he knowingly and voluntarily waived his right to counsel;
(2) Whether his right to a fair trial was violated by his wearing an orange prison garb and leg shackles;
(3) Whether the district court used the correct definition of "use" in the use-of-a-minor-to-engage-in-sexually-explicit-conduct instruction;
(4) Sufficiency of the evidence;
(5) Whether the defendant's "related" state convictions should have been counted for criminal-history points; and
(6) The substantive reasonableness of the sentence.

For eight days in July 2019, Anthony Lemicy babysat 6 to 8 children between the ages of 5 and 11. The police responded to a 911 call. A forensic examination of Lemicy's phone revealed: (1) videos of two girls showering that, at one point, was focused upon the girls' unclothe genitals (Ct. I); (2) two videos of Lemicy engaging in sexual conduct with a minor female (Cts. II and III); and (3) a video of minor female's genitals (Ct. IV).

After his public defender was allowed to withdraw, Lemicy became dissatisfied with his second lawyer. The district court, after providing the requisite warnings, allowed Mr. Lemicy to proceed *pro se* and relegated the second lawyer to standby counsel. Mr. Lemicy represented himself at trial with standby counsel present. Before the trial, Mr. Lemicy shunned civilian clothes that had been offered to him, electing to wear his orange prison garb. His legs were shackled.

Before deliberations, the district court instructed the jury that "[a] person is 'used' if they are photographed, video recorded, or videotaped." Lemicy wanted an instruction that required "use" in a sexual depiction, as opposed to mere photography.

After the jury convicted Mr. Lemicy, the district court counted three criminal-history points from state convictions arising out of these facts. His guideline range on the sentencing table was life, but because of the statutory maximums, each count carried a minimum of 15 and a maximum of 30 years.

Waiver of right to counsel: The Eighth Circuit concluded that *pro se* defendants aren't entitled to a hybrid counsel, *i.e.,* a standby counsel who performs legal functions. Once a proper *Faretta* hearing is conducted, the options are: (1) *pro se* (with or without standby counsel) or (2) full assistance of counsel. The scope of standby counsel's role is within the discretion of the district court.

Orange clothes: The Court found that Mr. Lemicy invited this error by electing to wear orange after a colloquy with the judge, in which the judge advised Mr. Lemicy of the risks of wearing the orange prison garb. Moreover, the Court instructed the jury twice to disregard Mr. Lemicy's appearance.

Jury Instructions: Filming a minor engaged in sexually explicit conduct is one type of "use" under the statute. The Court of Appeals found the jury instruction correct.

Sufficiency of the evidence: Regarding Counts II and III, Lemicy argued that there was insufficient evidence for the jury to find that the sex acts were performed *for the purposes of* producing the visual depiction. The jury, however, need only find that a "dominant purpose" (as opposed to the *sole* purpose) of the sex act was the depiction's creation.

And regarding Counts I and IV, the Court concluded that the jury was properly instructed on the factors to consider in determining whether the videos contained lascivious exhibitions of the genitals. Considering the facts in the light most favorable to the verdict, the Court affirmed the lasciviousness.

Sentencing Guidelines: Because the state convictions were "severable, distinct offenses," the district court's conclusion that they weren't relevant conduct was not clear error.

Reasonableness of the sentence: All good with us, said the Eighth Circuit. Affirmed.

***US v. Wilson*, 122 F.4th 317 (8th Cir. Dec. 2, 2024)**

This is a felon in possession trial case. Appeal on four issues: (A) the denial of a motion to dismiss on speedy trial grounds (related to delay caused by competency proceedings), (B) denial of a motion for judgment of acquittal, (C)(1) district court's guideline calculations, and (C)(2) an upward variance. Affirmed on all issues.

Background**:** Officers were investigating a shooting homicide. They learned that, although he had not been directly involved, Mr. Wilson hid the firearm that was used in the shooting. They searched Mr. Wilson's residence and found a different handgun and ammunition. Mr. Wilson was charged with being a felon in possession of a firearm.

Mr. Wilson first appeared in court in August 2022. Within one month he informed the court he wanted to dismiss his counsel and proceed pro se. He was appointed new counsel and the new counsel moved for a continuance. Under the "ends-of-justice" exception to the Speedy Trial Act ("STA") 18 USC. § 3161(h)(7), the court excluded the time from Sept. 20, 2022 (the date of the motion) until the new trial date.

After a hearing on Nov. 17, 2022, the district court ordered a competency evaluation and excluded time under the STA pending a competency hearing and conclusion. In the ruling, the court did not make an ends-of-justice finding. Mr. Wilson was found competent on March 28, 2023, and his trial was set for May 2023.

Before trial, Mr. Wilson filed a motion to dismiss for violation of the STA. The district court denied the motion, and the case proceeded to trial. After jury selection, Mr. Wilson requested the district court excuse his attendance at the trial and the district court granted the request. Mr. Wilson was convicted, and the district court denied motions for judgment of acquittal.

The PSR applied a 2-level adjustment for possession of three to seven firearms. The district court imposed an upward variance, based on a finding that Mr. Wilson had hidden the firearm used in the shooting. The court stated it would have imposed the same sentence, regardless of the guideline range. It would have imposed a different sentence only if the finding that Mr. Wilson hid the firearm from the shooting was reversed.

Issues: A. Denial of the motion to dismiss under the Speedy Trial Act.
The speedy trial issues relate to the time after the district court ordered the competency evaluation. Before ordering the evaluation, the district court had excluded time under the ends-of-justice exception to the

STA, 18 USC. § 3161(h)(7). Mr. Wilson argued that once the competency evaluation was ordered, the continuance was governed by the exception for transportation delays, § 3161(h)(1)(F). A continuance based on transportation delay is limited to 10 days. An ends-of-justice continuance is not limited to 10 days. Thus Mr. Wilson did not believe the court could exclude as many days under the STA clock as it did.

The Eighth Circuit held that the transportation delay exception did not override the ends-of-justice exception. Time can be excluded under multiple sections at the same time. And, if the time for one exception runs out, a different exception may continue to run. For Mr. Wilson, even if the time was not excludable under the transportation exception, it was still excludable under the ends-of-justice exception. Based on the ends-of-justice exception, the speedy trial clock did not resume after 10 days of transportation time had expired.

Mr. Wilson also argued that the time between when his competency evaluation was completed and when he returned to Iowa should have been counted for STA purposes. The competency evaluation was completed on February 13, 2023, but the US Marshals Service did not begin transporting Mr. Wilson until an order directing transportation was filed February 21. Mr. Wilson did not arrive in ND Iowa until March 24.

The Court found that the Speedy Trial Clock did not begin to run again until USMS received the transportation order. Once the order was issued, 10 days were excludable for transportation purposes. After those 10 days had expired, the remaining time necessary to transport Mr. Wilson to Iowa counted against the speedy trial clock.

The Eighth Circuit held the district court did not abuse its discretion in calculating the time under the Speedy Trial Act. By the time Mr. Wilson's trial began, only 68 days counted against the clock. Because the STA requires trial within 70 days, there was no violation.

B. Denial of the motion for judgment of acquittal.

First, the court held that the evidence was sufficient to show Mr. Wilson committed the offense as witness testimony and other evidence confirmed there was no mistaken identity.

Second, Mr. Wilson argued that the court should adopt a rule that would always require the defendant's in-court identification. The Eighth Circuit refused to adopt that rule. That rule would put two principles in conflict: the defendant's right not to appear at trial, and the government's obligation to prove that the person on trial is the person charged. If the court always required in-court identification, a defendant could prevent his own prosecution by refusing to come to court.

Here, there was sufficient evidence that Mr. Wilson was the person charged, and the person portrayed in the government's evidence. The evidence was sufficient to prove his identity, and an in-court identification was not necessary.

C. Sentencing issues

- Guideline calculation: The district court found that this offense involved three to seven firearms. Therefore, it applied a 2-level upward adjustment under USSG § 2K2.1(b)(1)(A). Mr. Wilson argued the evidence did not support this enhancement because witnesses weren't credible.

The Court found that the evidence presented showed that Mr. Wilson possessed the handgun seized from his home, and the weapon involved in the shooting. In addition to these guns, two witnesses saw Mr. Wilson with a long gun. Based on this testimony, the district court did not clearly err in finding Mr. Wilson possessed at least three firearms.

- Upward variance: The district court imposed an upward variance. The Eighth Circuit finds no abuse of discretion based on the aggravating factors in the case. Mr. Wilson hid a firearm involved in a homicide and attempted to have a witness recant. Mr. Wilson argued that the district court did not adequately consider mitigating factors, including his upbringing, difficult life circumstances, and mental

health. The Court finds that the district court's weighing of some sentencing factors more heavily than others is not an abuse of discretion. The sentence was substantively reasonable.

***Davis v. City of Little Rock*, 122 F.4th 326 (8th Cir. Dec. 3, 2024)**

Mr. Davis was the subject of a drug investigation. The police used a confidential informant (CI) to conduct a controlled purchase of cocaine from Mr. Davis's residence. The police then obtained and executed a no-knock warrant at the home. The detective requested the no-knock warrant because, in his experience, it "would greatly reduce the risk and increase the safety of the executing officers and occupants." SWAT used a flash-bang grenade to execute the warrant. Mr. Davis sued. The district court granted the defendant-police officers' motion for summary judgment. Mr. Davis appealed, and the Eighth Circuit affirmed.

Two Fourth Amendment issues: First, the Eighth Circuit has not clearly established whether it is an unreasonable search, in violation of the Fourth Amendment, to use a SWAT team to execute a no-knock warrant.

Second, Mr. Davis did not show the detective made misrepresentations in the warrant affidavit, in violation of *Franks v. Delaware*. To establish a *Franks* violation, the person must show the officer made a false statement knowingly and intentionally, or with reckless disregard for the truth. An officer's statements do not have to be totally factually correct. Instead, the officer must have "a reasonable basis for the conclusion." The court asks whether the officer "entertained serious doubts as to the truth" of the statements, "or had obvious reasons to doubt the accuracy of the information."

Here, the detective stated that no-knock warrants reduce risk and increase safety. Mr. Davis presented a treatise by a SWAT administrator and a SWAT training document. The Court found that these documents, at most, show some disagreement about the safety of no-knock entry. Given this dispute, the detective had a reasonable basis to believe the no-knock entry would increase officer safety.

Mr. Davis also challenged the reliability of the CI because the CI was terminated two years after this warrant. The Court finds Mr. Davis did not show that, at the time, the detective had obvious reasons to doubt the CI's reliability. Therefore, it was not a *Franks* violation to include information about the controlled buy in the warrant affidavit.

***US v. Lozier*, 122 F.4th 717 (8th Cir. Dec. 5, 2024)**

Mr. Lozier was a licensed bounty hunter in Louisiana. He detained a fugitive in Missouri. He was charged with federal kidnapping and went to trial. The Eighth Circuit finds that the jury instructions were improper because they relieved the government of its burden of proof. Convictions vacated, case remanded for a new trial.

Under Missouri law, "surety recovery agents" (colloquially, bounty hunters) must (1) be licensed by the state, and (2) inform local law enforcement before attempting to enter a residence.

Mr. Lozier was hired by R.C.'s bondsman in Louisiana after she failed to appear. Mr. Lozier apprehend R.C. at a residence in Missouri and began driving south. The owner of the residence called law enforcement. The investigating officer learned Mr. Lozier was not licensed in Missouri and had not notified law enforcement. The officer notified Mr. Lozier of these violations and directed him to stop in Arkansas to release R.C. to police. Mr. Lozier did not stop, but ultimately delivered R.C. to a jail in Mississippi. Mr. Lozier was charged with conspiracy to kidnap and kidnapping.

Mr. Lozier went to trial. At issue was whether he had unlawfully seized R.C. Mr. Lozier argued that there was no unlawful seizure because this was a standard fugitive apprehension, with technical mistakes. The government argued he acted unlawfully because he violated Missouri law. The district court gave Jury Instruction 16. This instruction asked two questions: (1) whether Mr. Lozier failed to inform law

enforcement before entering a residence; and (2) whether Mr. Lozier engaged in fugitive recovery without a license. The instruction directed that if the jury answered "yes" to either question, Mr. Lozier had acted unlawfully. Mr. Lozier objected to this instruction. The jury convicted Mr. Lozier on both counts.

Analysis: Mr. Lozier argued that Instruction 16 was improper because it imposed a conclusive presumption on one of the elements of the offense—the element that Mr. Lozier had acted unlawfully.

Under the Fifth Amendment's Due Process clause, the government must prove all elements of an offense beyond a reasonable doubt. The court cannot give a jury instruction that creates a mandatory presumption on an element. That instruction would relieve the government of the burden of proof. In other words, if the jury is instructed to presume the element, then the government does not have to prove that element beyond a reasonable doubt.

Here, the government was required to show Mr. Lozier acted "unlawfully." "Unlawfully" means both (1) contrary to law; *and* (2) without justification or excuse. The government was required to prove both. Instruction 16, however, stated that merely violating Missouri law was sufficient to meet the unlawful element. Thus, it directed the jury to find Mr. Lozier had acted unlawfully if he acted contrary to law, regardless of any justification or excuse. By eliminating the requirement that the government prove there was no justification, the instruction relieved the government of its burden of proof on this element.

This error was not harmless beyond a reasonable doubt. A rational jury could have found that Mr. Lozier's actions were justifiable or excusable because he was acting under authority of R.C.'s bondsman. But Instruction 16 directed the jury to disregard the evidence of justification or excuse. The government emphasized the error in closing by telling the jury that once they found the state law violations, the "unlawfully" element was conclusively proven. No harmless error.

***US v. Wiley*, 122 F.4th 725 (8th Cir. Dec. 6, 2024)**

Fentanyl trial. Mr. Wiley was charged with conspiracy to distribute and possession with intent to distribute resulting in injury. Mr. Wiley's 18-month-old baby ingested pills, overdosed, and survived. There was testimony Mr. Wiley had received the pills from a dealer within an hour of the overdose and he had been distributing fentanyl for months.

Mr. Wiley argued the evidence was insufficient, the court incorrectly calculated his guideline range, and his sentence was unreasonable. Affirmed on all issues.

1. Sufficiency of the evidence**:** Mr. Wiley argued the evidence was insufficient on the conspiracy charge because the government did not show a voluntary agreement to distribute. He argued that he distributed to support his own addiction, not because a "shared conspiratorial purpose." The Court finds the evidence was sufficient. Facebook messages showed Mr. Wiley intended to buy drugs, owed a dealer for earlier transactions, and "shared a conspiratorial purpose to advance other transfers" with the dealer. The messages were sufficient to show an implied agreement to distribute.

The evidence was also sufficient for the possession with intent to distribute resulting in injury charge. Mr. Wiley argued that the government did not prove that the fentanyl the baby consumed was meant for distribution, rather than his own personal use. He argued that the government must prove that the fentanyl that caused the injury was the portion he intended to distribute.

The Court rejects this argument. The government must show that some of the drugs in a person's possession are meant for distribution. Acquittal is only warranted if *all* the drugs are intended for personal use. If he possessed any drugs with intent to distribute, and any use resulted in an injury, the evidence is sufficient. Nor does the government have to prove he intended to distribute to the person who was injured by the drugs.

2. Guideline calculations: The district court applied a 4-level enhancement because Mr. Wiley "knowingly misrepresented or knowingly marketed" fentanyl as another substance. *See* USS.G. § 2D1.1(b)(13). He advertised his pills as "perks," "perk 30s," and "perk 30." Having overdosed himself, Wiley knew the pills were fentanyl, not legitimate Percocet. The Court finds the enhancement is proper because Mr. Wiley knowingly advertised fentanyl pills as Percocet.

3. Substantive reasonableness**:** The district court imposed a below-Guidelines sentence of 324 months. The sentence is substantively reasonable because the district court considered each § 3553(a) factor, including Mr. Wiley's challenging life experiences and the seriousness of the offense.

***US v. Mims et al*., 122 F.4th 1021 (8th Cir. Dec. 9, 2024)**

The defendants in these four cases were indicted as members of a conspiracy to distribute pure methamphetamine in violation of 21 USC. §§ 841(a)(1)(, (b)(1)(A), & 846. The district court authorized the use of wiretaps between February 2021 and February 2022. Because the district court had authorized the wiretaps, two of the defendants sought the district court's recusal from determining the motion to suppress. All four defendants appealed the denial of the motion to suppress, and two appealed the denial of the motion for recusal. The defendants also made individual challenges which will be summarized in turn. The CA8 affirmed all of the district court's rulings.

Denial of the motion to suppress: All or some of the defendants challenged the following suppression issues (1) necessity requirement of the wiretap under 18 USC. § 2518(3)(c), (2) that the DEA failed to establish one or more of the three types of probable cause required by § 2518(3), and (3) that the vehicle search violated the 4th Amendment.

As to necessity, the defendants argued that law enforcement should have tried alternative investigative techniques prior to using the wiretaps, that law enforcement should have continued using the investigative techniques that had already enabled them to obtain evidence, and that some of the allegations are boilerplate. The CA8 found no clear error in the district court's factual findings on necessity as law enforcement is not required to exhaust every other possible investigative technique prior to seeking a wiretap warrant, and here they used many techniques and explained why others would likely be ineffective.

Next, several defendants challenged whether the was sufficient probable cause related to specific wiretap instances. Based on the totality of the circumstances, which considers the law enforcement officer's training and experience as a whole, the CA8 found probable cause in each of these fact-bound inquiries.

The CA8 did not err in searching the vehicle. Law enforcement must have probable cause to conduct a search. Here, a car hauler was hired to transport the vehicle from AZ to Iowa and the driver because suspicious when the shipper paid $1k upfront when most shippers pay upon delivery. Also, the driver because suspicious that the car was a graduation present, but graduation was months away. And due to the driver's unwitting prior involvement in a similar situation hauling a car that contained methamphetamine, the driver contacted HSI and relayed his suspicions. HSI thought that the lack of a phone number and no last name for the consignee was unusual. And similarly, that it was unusual to pay upfront and that the $1K was higher than average for this service. The FOB access to the trunk was disabled, and the car had aftermarket modifications consistent with the concealment of contraband. So based on the totality of the circumstances, the CA8 affirmed that there was probable cause to search the vehicle.

Motion to recuse - a district court's authorization of wiretaps does not require its recusal from a subsequent motion to suppress evidence obtained from those wiretaps. There was no abuse of discretion.

Sufficiency of the evidence for the jury verdict – the jury convicted Elmer of conspiracy to distribute methamphetamine though Elmer claimed that he was a marijuana distributor, and that the government presented no evidence that he bought or sold methamphetamine. Elmer said the calls the jury heard about

drug trafficking between himself and the co-conspirators were about marijuana instead of methamphetamine. The CA8 said the timing of these communications support the distribution of methamphetamine. The jury also heard testimony that one of the other co-conspirators only distributed methamphetamine. These facts supported guilt beyond a reasonable doubt.

4-level role enhancement – Derek Mims challenged the court's finding that he was an organizer or leader of the conspiracy and that the court should've varied downward because he was a compliant inmate with a good work ethic and employment history. The court found that Derek directed another to collect money for a distributor, that his ability to fly back after drug runs instead of retuning in a car showed a higher-level position in the organization, and that he shared equally in the profits from the shipments indicating leadership status, so there was no clear error in finding the role enhancement. Also, the sentence he received was within the , so the sentence was substantively reasonable as well.

Drug quantity and mitigating role adjustment under 3B1.2 – Whitney challenged the drug quantity but the CA8 affirmed as the government presented evidence that Whitney knew of at least 90lbs of methamphetamine, which was more than enough to establish a base offense level of 38. The court's refusal to grant a role reduction was not clearly erroneous because the intercepted communications indicated that Whitney played a larger role in the conspiracy than he let on.

Substantive reasonableness of sentence – Elmer Mims was found to have a guideline range of 188-235 months and he was sentenced to 235 months. He argued he should have been sentenced to the low end due to his advanced age and the possibility that he had cancer. The district court did not abuse its discretion as it addressed these points and others (including aggravating considerations) so the within-the-guidelines sentence was substantively reasonable. Affirmed.

***US v. Driscoll*, 122 F.4th 1067 (8th Cir. Dec. 17, 2024)**

A jury convicted Driscoll of conspiracy to distribute controlled substances, and he was sentenced to 540 months in prison.

Discovery order. Before trial, Driscoll's attorney entered into a stipulated discovery order under Local Rule 16.1 which restricted dissemination of discovery materials to Driscoll. Thereafter, he twice moved to personally access discovery, and the court denied both motions. The Court affirmed the denial of these motions. The Court noted that a district court has broad discretion regarding discovery motions which will be upheld absent a gross abuse of discretion resulting in fundamental unfairness at trial, and discovery may be restricted for good cause. The Court held that Driscoll had not shown good cause for exemption from the discovery order, noting specifically that Driscoll had shared information from a proffer report. In a footnote, the Court reiterated its concerns that the standard discovery order could violate a defendant's Sixth Amendment right to conduct his own defense, "but "[t]hese concerns need not be examined here because the district court had good cause to restrict Driscoll's access to discovery."

Admission of photos. The Court also rejected Driscoll's challenges to the admission of pictures of various items found during a search, including a letter to Driscoll, cash, and a backpack. The Court found that the pictures were not unduly prejudicial, that the authenticity was established, and that the best evidence rule was not violated because the testifying agent identified the pictures as accurate depictions and thereby adopted the pictures as his testimony.

Sentence. The Court also rejected Driscoll's claim that his below-guidelines range sentence was substantively unreasonable when compared to the sentences imposed upon his co-conspirators. The district court did not violate the requirement of § 3553(a)(6) to avoid unwarranted sentence disparities among similarly situated defendants. The sentence was not an abuse of discretion because Driscoll was the leader of the conspiracy and, unlike his co-conspirators, he went to trial and did not accept responsibility.

***US v. Phillips*, 124 F.4th 522 (8th Cir. Dec. 23, 2024)**

Defendant pleaded guilty to a 922(g)(1) firearm offense after a history of multiple Missouri state marijuana possession convictions. Defendant received a 120-month sentence and the district court imposed a lifetime ban on federal benefits. On appeal, the Court affirmed the 120 month sentence, but vacated the federal benefits ban, without resentencing.

Length of sentence – Marijuana/expungement issue**:** At sentencing, Defendant argued that his criminal history category was overstated because the State of Missouri had recently legalized possession of marijuana, by referendum. Therefore, he urged the court to "revisit[ ]" its "views" on marijuana, based on these changes. The district court overruled the objection and stated it would have imposed the same sentence "by way of variance or otherwise," if the guidelines were different.

In the 18 months after his federal sentencing, Defendant's state marijuana convictions were expunged. On appeal, Defendant argued that the expungements changed his criminal history and required resentencing. The Eighth Circuit disagreed, regardless of the standard of review applied. The Court found that Defendant had neither clearly preserved the specific expungement issue, as opposed to the generalized referendum issue, nor asked to postpone federal sentencing until his pending state-court expungement issues were resolved. Further, at the time of sentencing, there were "no clear answers" about whether the past convictions should be included in the criminal history or not, or how any anticipated expungement would be handled from a "retroactivity" perspective.

Moreover, (and probably most importantly) the district court's statements that it would impose the same sentence "means that preserving the issue would have been of no help to Phillips." Simply, "[n]o matter what . . . Phillips cannot win." However . . .

Federal benefits ban**:** The district court's imposition of a lifetime ban on Philips' receipt of federal benefits was a plain error that the Eighth Circuit vacated, without resentencing. The Court explained that the statute authorizing a federal benefits ban only covers those who are convicted of "any Federal or State offense consisting of the *distribution of controlled substances*." 21 USC. 862(a)(1)(C). In other words, the federal benefits ban applies to drug distributors, not gun possessors. Therefore, it was misapplied to Philips in sentencing, in violation of the plain language of the statute. "As far as his federal conviction is concerned, Phillips only possessed a *firearm,* not drugs." The Court found this error affected Phillip's substantial rights going forward, by prohibiting him from receiving future federal benefits. In other words, but for the statutory application error, "the outcome of the proceeding would have been different."

Moreover, "[a]lthough not every mistake deserves fixing . . . this one does." The Court found that applying an inapplicable statute "to pile lifelong professional and financial penalties on top [of the lengthy prison sentence] would undermine the 'integrity [and] public reputation of judicial proceedings." Further, "fairness" requires that this ban be vacated - Philips would be the only person convicted of a firearms offense to receive this punishment. Essentially, the benefits ban imposed on Philips was an "illegal sentence," which survived the appeal waiver in his plea agreement.

***US v. Hinkeldey*, 124 F.4th 1093 (8th Cir. Dec. 24, 2024)**

The district court's imposition of a polygraph test requirement was not an abuse of discretion where "Hinkeldey had a history of untruthfulness and conduct which suggested a risk he would re-offend."

However, the newly imposed special condition requiring Hinkeldey to obtain full-employment, or to perform up to 20 hours of community service per week in lieu of employment, was an abuse of discretion. The Court referenced the Guidelines commentary that community service generally should not exceed 400 hours. *See* USS.G. 5F1.3, comment. (n.1). Here, Hinkeldey's 5 year term could result in approximately 5,000 hours of community service, "well over the 400-hour limit suggested by the Guidelines." "Without any justification for the excess hours, we conclude that the district court plainly erred in imposing the condition without a cap on the number of hours." The Court, therefore, modified the

community service condition "to require reconsideration if and when Hinkeldey reaches 400 total hours of community service."

***Xzavier Clark v. US*, 124 F.4th 1109 (8th Cir. Jan. 3, 2025)**

2255/*Bruen* appeal. Clark pleaded guilty to possession of a firearm as an unlawful user of a controlled substance in violation of 18 USC. § 922(g)(3). He filed a § 2255 motion arguing that his conviction violated the Second Amendment (facially and as applied). On appeal, the court found that his facial challenge to § 922(g)(3) was foreclosed by circuit precedent (citing *Veasley*) and that his guilty plea foreclosed his as-applied challenge. Affirmed.

US v. Hayward, 124 F.4th 1113 (8th Cir. Jan. 3, 2025)

Hayward was convicted at trial of five heroin-related offenses.

Rule 404(b)/403: Hayward argued that the district court abused its discretion in admitting evidence of an uncharged (post-indictment) controlled buy involving heroin and fentanyl. The court found no abuse of discretion. It found that the later controlled buy was relevant to a material issue – intent. "By pleading not guilty, [Hayward] placed every element of the charges brought against him at issue." The controlled buy was sufficiently similar to the charged crimes even though it was later in time and involved a different drug (fentanyl). It was supported by sufficient evidence (testimony of a police sergeant, a video, physical evidence, and a lab report). And the probative value was not substantially outweighed by the risk of unfair prejudice. The district court gave a limiting instruction that referred to the substance as "a controlled substance" rather than the more inflammatory "fentanyl."

Sufficiency: Hayward also challenged the sufficiency of the evidence as to three counts (conspiracy and two counts of aiding and abetting the distribution of heroin). The court found sufficient evidence to support each count. Multiple witnesses testified as to a working relationship between Hayward and codefendant Steed and investigators found multiple indicia of drug trafficking during a search of their shared home. As to the first count of aiding and abetting, Hayward directed the buyer to call Steed. As to the other count, Brown testified that Hayward asked him to sell heroin for him while he was traveling and provided instructions on what to do.

Affirmed.

***US v. Rose*, 124 F.4th 1101 (8th Cir. Jan. 3, 2025)**

Rose entered a conditional guilty plea to possessing methamphetamine and possessing a firearm as a felon. He challenged the denial of his suppression motion and his sentence on appeal.

Suppression: Rose sought to suppress evidence from a traffic stop and subsequent searches and incriminating statements. The court affirmed the denial of his motion to suppress.

- Initial stop: The court found that the initial stop was lawful because officers had probable cause to believe that the window tint violated state law. The district court did not clearly err in crediting the officer's testimony.
- Dog sniff/extension of stop: Rose argued there was no valid reason for a calling a canine unit. The court found that officers did not prolong the stop in order to conduct the dog sniff. The dog arrived 10 minutes into the stop. During that time, the officer was communicating with dispatch and typing up citations. He had not printed the citation when the dog alerted, and there was no evidence that he delayed printing them to facilitate the dog sniff.
- Reliability of dog sniff: Rose also argued that the dog sniff was unreliable. The court found that he did not overcome the presumption of reliability of a dog sniff. The dog and officer satisfactorily completed bona fide certification programs, they trained monthly, and there was no evidence of past false alerts. The district court did not err in finding the dog reliable despite Rose's expert's opinion that it did not spend enough time training. The circumstances of the alert did not undermine probable cause. "Although it was an excitable dog and Officer Roling shortened his leash before the second alert, Officer Roling testified that the dog alerted twice during the search by sitting."

- Statements: Rose also sought to suppress statements he made after he was taken into custody. The court found that the Miranda warning given in the car was sufficient even though Rose made statements approximately 30 minutes later at the police department.

Sentencing: Rose was found to be a career offender based in part on his prior conviction under Iowa Code § 708.2A(4). The government agreed the case must be remanded for resentencing based on the court's decision in *US v. Daye*, 90 F.4th 941 (8th Cir. 2024). In *Daye*, the court considered the nearby statute, Domestic Abuse Assault, Enhanced (DAAE) under Iowa Code § 708.2A(3)(b), and declined to decide whether that statute was divisible. Here, the court held that without adversarial briefing, it would not determine Rose's career offender classification based on Iowa Code § 708.2A(4). It remanded for the district court to address the career offender issue in light of *Daye* (and noted in a footnote that the government represented that on resentencing it would not seek to apply the career offender enhancement).

***US v. Harper*, 124 F.4th 1094 (8th Cir. Jan. 3, 2025)**

Harper pleaded guilty to being a felon in possession of ammunition arising out of a shooting at a gas station. On appeal, he challenged the denial of his motion to suppress a witness's identification from a photo array and the application of the cross-reference to the attempted murder guideline.

Motion to suppress identification: Harper moved to suppress an eyewitness's identification of him as the shooter under the Due Process Clause. The eyewitness, A.H., was asked to identify the shooter from a photo array. In the first meeting, the detective placed his thumb directly above Harper's picture. The detective pressed A.H. to make an identification, questioning A.H.'s truthfulness that he didn't know the shooter like that and threatening him with prosecution. A.H. expressed concerns for his safety if he cooperated. In the second meeting, the detective again placed his thumb directly above Harper's photograph. In this meeting, A.H. identified Harper as the shooter.

Due process prohibits the admission of evidence derived from improper eyewitness identification procedures. The court must determine (1) if the identification procedures were impermissibly suggestive, and (2) whether under the totality of the circumstances the procedures created a very substantial likelihood of irreparable misidentification.

The court found that while the detective's conduct of pressing A.H. to identify the shooter, using veiled threats of prosecution and incarceration, saying he would "blow [A.H.] up," placing his thumb over Harper's picture, and breaking police department protocol might be impermissibly suggestive under the right circumstances, it need not resolve this issue here.

Instead, the court found that there was not a substantial likelihood of irreparable misidentification. A.H. knew Harper, drove him to the gas station, observed the shooting, and identified Harper as the shooter from the surveillance footage before being presented with a photo array. "In contrast to eyewitnesses asked to identify unknown suspects, A.H. merely reidentified Harper—a known party—as the shooter."

Harper argued that the detective's conduct was manifestly unreliable. The court rejected this argument, finding that the reliability of an identification rests not merely on the actions of law enforcement but on the probable effect of those actions on the identification itself.

Cross-reference**:** The district court applied a cross-reference to USSG 2A2.1(a)(2), the attempted murder guideline. The court found no clear error in the district court's finding that Harper acted with malice aforethought. He fired multiple rounds from two different locations, and there was no evidence that the victim fired a weapon at any time during the incident. Affirmed.

***US v. Carrington*, 124 F.4th 1110 (8th Cir. Jan. 3, 2025)**

Supervised release appeal. Carrington was sentenced to 13 months in prison and 10 years of supervised release upon revocation of his supervision for failure to register as a sex offender.

Carrington argued that the district court procedurally erred by basing the sentence on a misunderstanding of the laws about sex-offender registration (specifically whether he would be required to register if he moved to Minnesota). The court found that the district court did not base its 10-year term of supervised release on a misunderstanding of these requirements. Instead, it considered the 3553(a) factors, the guideline range, Carrington's history of addiction and failed treatment, his failure to complete sex offender treatment, public safety, and his history & characteristics. The court also found that the sentence was not substantively unreasonable. Affirmed.

***US v. Strawther*, No. 23-3779, 125 F.4th 860 (8th Cir. Jan. 10, 2025)**

The district court denied Mr. Strawther's motion to suppress. The Eighth Circuit affirms, finding the traffic stop and search were lawful.

A Highway Patrol officer pulled Mr. Strawther over for speeding, asked Mr. Strawther to accompany him to the patrol vehicle, and wrote him a warning. Meanwhile, Mr. Strawther's passenger exited their car and went to the back seat. The officer went to check on her and smelled the odor of burnt marijuana.

When the officer asked Mr. Strawther about the marijuana, Mr. Strawther admitted to having smoked in the vehicle in California. At the suppression hearing, the officer testified "When I asked [Strawther] about the marijuana, he really opened his eyes and I could see his heartbeat begin to pound more underneath his clothing in his stomach, and I could see his bottom lip quivering." The district court found this was not credible – the officer could not have seen his heartbeat in his stomach, and the video did not show his lip quivering. Nevertheless, the district court credited the rest of the officer's testimony because it was "corroborated by the video and audio evidence."

About 8 ½ minutes into the traffic stop, Mr. Strawther told the officer there were about two pounds of marijuana in the vehicle. A search of the vehicle found raw marijuana and a gun. Mr. Strawther and the passenger stated the gun belonged to Mr. Strawther.

First, Mr. Strawther argued the original traffic stop was not supported by reasonable suspicion or probable cause because the officer's explanation was not corroborated, and he was not credible. The Eighth Circuit notes that the district court's credibility finding is "virtually unassailable on appeal." Although the district court discredited some of the officer's testimony, it credited the rest. The Court finds that the officer's testimony was not so inconsistent or implausible that the district court clearly erred in believing the portion of the testimony regarding speeding.

Second, Mr. Strawther argued the officer impermissibly extended the traffic stop because it took nearly 9 minutes to write the warning and because it is not credible that the officer smelled marijuana. The Eighth Circuit finds there was no extension – the officer completed tasks associated with writing the citation and did not do any gun or drug investigation until the passenger exited the stopped vehicle. Nor was checking on her an unreasonable extension of the stop. The Court also finds no error in crediting multiple officers' statements about the smell of burnt marijuana, even though only raw marijuana was found in the car. The testimony was supported by other facts, including Mr. Strawther's admission he had smoked in California.

***US v. Bell-Washington*, 125 F.4th 870 (8th Cir. Jan. 13, 2025)**

Bell-Washington pleaded guilty to felon in possession of a firearm in violation of 18 USC. §922(g)(1). His guideline range was 21-27 months, the parties jointly recommended a sentence of 27 months, and the court varied upward and sentenced him to 60 months. Bell-Washington argued there was nothing egregious about the circumstances of his firearm possession (as I he did not point, shoot, threaten, or commit another felony offense while having the weapon), and that the court relied too heavily on his criminal history. The CA8 found the district court did not abuse its discretion. Affirmed.

***US v. Jonathan Davis*, 126 F.4th 610 (8th Cir. Jan. 14, 2025)**

In January 2021, an unidentified individual wearing a black sweatsuit and a face mask entered a Steak 'n' Shake near closing time and headed straight to the back office where two employees were preparing money for bank deposits. The individual held one employee at gun point and demanded the money from open safe and left after receiving the money. The two employees were adamant that the robber was a former employee based on the black Nike jumpsuit and surgical mask he was wearing. Davis was identified in a photo lineup and he was arrested wearing a black Nike jumpsuit. The magistrate judge granted a search warrant for his phone and the contents showed he engaged in or contemplated several large financial transactions in the days immediately following the robbery. A jury convicted Davis for Hobbs Act robbery in violation of 18 USC. § 1951(a) and brandishing a firearm in furtherance of a crime of violence in violation of 18 USC. § 924(c)(1)(A)(ii). Davis appealed the following three issues:

(1) Motion to suppress – Davis argued the search warrant lacked probable cause because the affidavit did not establish a sufficient nexus between the alleged crime and the red iPhone found on him at the time of the arrest. He argues that because the warrant was so lacking in probable cause that the good-faith exception does not apply. When questioned about the robbery, Davis admitted to contemporaneous use of a cell phone as the robbery occurred (he told investigators that at the time of the robbery he was at a hotel speaking on the phone with his girlfriend). Based on the totality of the circumstances the district court had substantial evidence to conclude that there waws a fair probability that evidence proving or disproving Davis's alibi could be found by searching his phone, and the phone found on his person was likely the phone that he possessed just one month earlier during the robbery. Because the warrant was supported by probable cause, the good-faith exception need not be addressed.

(2) Empaneled juror member who had been a victim of a similar crime – Davis argued the district court abused its discretion by not excluding a juror who had experienced a similar crime nearly 50 years prior. Davis argues this prior experience caused the juror to be prejudiced against him due to implied bias. The implied bias theory is the use of the conclusive presumption of implied bias in extreme situations. While the CA8 has permitted implied bias arguments, none have succeeded. A finding of implied bias would occur where the relationship between the prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in the deliberations under the circumstances. Here, this juror's experience 50 years ago did not constitute an "extreme situation" warranting a finding of implied bias.

(3) Whether the district court abused its discretion in excluding defense testimony as irrelevant – The government suggested that Davis, flush with stolen funds, began searching for a car immediately after the robbery. Davis sought to counter this narrative with the evidence that he was gifted a car a month later. The district court excluded this evidence and Davis argues the district court deprived him of his constitutional right to present his defense. While a court may abuse its discretion when it excludes evidence material to issues of intent or motive, here Davis sought to introduce evidence of receiving a car by gift a month *after* the robbery. So the evidence was not relevant to his motives prior to the robbery. Additionally, the record reveals that the defendant was able to present to the jury evidence that he worked other jobs to get money and that he was not broke before the robbery as the government claimed. Therefore the district court did not abuse its discretion in excluding this evidence.

Affirmed.

***US v. Turner*, 125 F.4th 892 (8th Cir. Jan. 14, 2025)**

Turner was convicted of possession of child pornography. He argues on appeal that the district court erred in denying his motion to suppress. While Turner was an inmate at a correctional facility, a prison guard caught him with a cell phone in his bunk. Several month later, prison officials summoned him to an interview with a special agent of the FBI and an investigator with the BOP where Turner made incriminating statements. Prison guards escorted Turner from his housing unit through a series of gates and doors to the meeting location. Neither agent was armed and the agent that did most of the questioning

was wearing plain clothes. The interview began with the agent telling Turner he did not have to answer any questions and that he was not in custody. The district court found the agent had a "soft spoken" and "gentle" demeanor and did not use deception during the interview.

Turner argues the district court clearly erred in finding that the agent had a "gentle" demeanor during the interview and that he told Turner that the did not have to answer any questions. The CA8 does not disturb the district court's credibility findings on these points. Turner argues the court erred by concluding that he was not "in custody" for purposes of *Miranda* when he was interrogated at the prison. Though Turner was incarcerated at the time of the questioning, this does not mean he was automatically "in custody" for purposes of *Miranda*. An inmate is considered free to leave for purposes of *Miranda* if he is free to "return to his normal life within the prison." Turner argues he was required to abide by the orders of the prison officials who summoned him to the interview room, and that his movement to the interview room through a series of locked doors to a foreign location that he could not leave without assistance shows that he was in custody. But these circumstances were primarily a function of Turner's incarceration rather than the circumstances of the questioning.

Turner also alleged that the agent employed deceptive stratagems that would prevent a reasonable person from terminating the interview. That the agent decided not to recite *Miranda* warnings and took into account that Turner had no defense to the cell phone infraction does not amount to deception bearing on custody. The district court found, and the CA affirms, that the agent informed Turner that he was not in the agent's custody and that he was not required to answer any questions, and this was enough. The CA8 found that considering the totality of the circumstances, a reasonable inmate in Turner's position would have understood that he was free to discontinue the interview and go back to his housing unit. Affirmed.

***US v. Charles*, et.** al., 125 F.4th 904 (8th Cir. Jan. 15, 2025)

Four septuagenarian sisters pleaded guilty to one count of conspiracy to defraud the government.

(1) The Appellants argued the district court erred in denying their motion to suppress. A USDA special agent visited a building where it was disputed the degree the sisters used or accessed said building. The agent knocked on the door several times with no answer. Without obtaining a search warrant, he then looked through the window and saw a sheet of paper that listed several names and numbers he recognized that were relevant to the case. He recorded those names and numbers and later cross-referenced them to confirm their relation to the case, and utilized those recorded names and numbers in the affidavits utilized for the search warrants. The Appellants argued that by peering through the building's window and obtaining information without a search warrant, the agent violated the 4th Amendment. The district court had denied the motion arguing the sisters lacked standing as none of them owned the property, lived there, worked there, or had a possessory interest in the papers or items seized, or otherwise had a personal expectation of privacy that was violated. The CA8 held that the standing issue need not be resolved as the challenged affidavits were sufficient to support the search warrants even without the contested information.

(2) The Appellants argued the district court should have granted their motion to dismiss the indictment as barred by the statutory limitations period. Appellants argued that the first eight counts of the indictment, which charged aiding and abetting mail fraud, were not charged within the five-year statute of limitations. They argued that the aiding and abetting charge was essentially a conspiracy, and that it was thus barred by the statutory limitations period for conspiracy. Aiding and abetting mail fraud and conspiracy are both subject to a five-year statute of limitations. The CA8 found that here the charges were indisputably filed within the five-year limitations period for aiding and abetting mail fraud. The indictment alleged the mailings took place from July 2015 through January 2016, and the indictment was filed on December 5, 2019. Thus, the mailings all occurred within the five years prior to the indictment. The CA8 found the argument that the aiding and abetting charges were essentially conspiracy charges was unavailing as conspiracy is a separate and distinct crime from aiding and abetting. Thus, the district court properly denied the motion to dismiss the indictment as untimely.

(3) The Appellants argued the district court should have held a hearing on the motion to suppress and the motion to dismiss the indictment. The CA8 found the district court did not abuse its discretion in denying the requested evidentiary hearing on the motion to suppress because the district court resolved the motion without having to address immaterial disputes of facts. And the district court did not abuse its discretion in declining to hold a hearing on the motion to dismiss the indictment as the Appellants do not dispute that they did not ask for a hearing on the motion to dismiss the indictment, and the Appellants alleged no disputed facts as to the applicable limitations period.

Affirmed.

***US v. Burnett*, 125 F.4th 912 (8th Cir. Jan. 15, 2025)**

Burnett filed a motion to vacate his sentence under 28 US.C. § 2255 stating that he received ineffective assistance of counsel because his attorney failed to file a notice of appeal. The district court credited the attorney's version of events over the defendant's version of events. The CA8 found the district court did not clearly err in finding that defense counsel was credible, and that Burnett did not ask counsel to file a notice of appeal. Affirmed.

***US v. Potter*, 125 F.4th 916 (8th Cir. Jan. 15, 2025)**

Potter appeals the denial of his motion to suppress. Potter was apprehended after an investigation at a motel where police were conducting surveillance due to reports of drug activity and stolen vehicles. Potter's vehicle was located in the parking lot, and when police ran a computer check on the license plate of Potter's vehicle, they discovered an outstanding warrant. Potter and a passenger (Dryden) drove out of the parking lot and the officers conducted a traffic stop and arrested Potter on the warrant. Officers discovered Dryden's license was suspended so they advised that someone else would have to take the car. Potter gave the name of an acquaintance, but that person did not answer three telephone calls from the officers. Dryden told the officers he would walk five minutes back to the hotel to ask an acquaintance to take the car, but he had not returned in 30 minutes and officers drove to the hotel but could not find him Thus the officers towed the car and conducted an inventory search of the vehicle and seized methamphetamine.

Potter argues the evidence seized from the car should have been suppressed because the timing of the traffic stop made the seizure unconstitutional. He alleges police delayed the arrest until he drove off private property so that they could justify a warrantless inventory search of his vehicle after it was stranded on a public roadway. The CA8 noted, "There is no constitutional right to be arrested," and the Fourth Amendment does not require officers to arrest a suspect immediately upon learning of an outstanding arrest warrant. Here, the officers had an appropriate reason to delay because they were conducting undercover surveillance in the parking lot of the motel. There is no showing that the officers knew in advance that Dryden was driving with a suspended license or that no other driver would be available to assume control of the vehicle.

Potter next argues that the inventory search of his car did not comply with departmental policy and was a ruse for discovering incriminating evidence. The CA8 found the officers' decision to tow and inventory Potter's car was a valid exercise of their community caretaking function. Potter's vehicle was stopped on a public roadway and no licensed driver was reasonably available to remove it. The CA8 found the impoundment and inventory were consistent with a legitimate purpose of the standard policy to remove seized vehicles from a public roadway and to inventory the contents for safekeeping and avoidance of disputes over lost or stolen property.

Finally, Potter argued on plain error review that his sentence was a product of vindictiveness by the sentencing judge. Potter contends that court vindictively sentenced him in retaliation for his exercise of the right to jury trial, and he cites the fact that his sentence was 360 months which was 10x greater than the sentence received by his co-conspirator (Dryden) who pleaded guilty. The CA8 agreed the cases differed in material respects and there was no vindictiveness. Affirmed.

***US v. Dickenson*, 127 F.4th 722 (8th Cir. Jan. 31, 2025)**

Dickenson and codefendants Taylor and Boelter were charged with conspiracy to distribute heroin and methamphetamine. Two codefendants (Taylor and Boelter) pleaded guilty to the same conspiracy charge, and another codefendant pleaded guilty to a different conspiracy charge.

A jury convicted Dickenson of conspiring to distribute heroin and between 50 and 500 grams of methamphetamine. The PSR calculated the guideline range to be 63 to 78 months in prison, and the base offense level counted 72.98 grams of heroin and 310.04 grams of methamphetamine, being the drugs contained in a single package that was intercepted in August 2016. The district court varied upward and sentenced Dickenson to 120 months in prison because he was an essential cog in the conspiracy and was not a minor participant. Dickenson appealed and his conviction was affirmed; however, the Court held that procedural error occurred when the district court varied upward based on facts contradictory to the PSR based on the court's knowledge of the trial evidence without providing notice that it was considering such an upward variance.

On remand, the district court remedied the procedural error by giving proper notice that it was considering an upward variance. The defense recommended a 63-month prison sentence, and the government recommended an upper within-guideline sentence of 78 months. The court again found that Dickenson was an essential cog to the conspiracy and again varied upward and sentenced Dickenson to 120 months in prison. Dickenson appealed this sentence and argued on appeal that the court procedurally erred and that his sentence was substantively unreasonable.

Dickenson argued that the district court procedurally erred in two respects. First, the defense claimed that the district court failed to properly calculate the guideline range. The Court noted that as the district court remedied the procedural error on remand and did not base its sentencing determination on clearly erroneous facts and thus there was no guideline range error. The district court was not required to recalculate the guideline range using an increased drug quantity "because the sentencing court has discretion to vary from whatever guidelines range is determined." The court reasoned that the district court ". . . need not take two steps when only one is needed." Thus, there was no procedural error due to the purported improper calculation of the guidelines range.

Second, the defense claimed that procedural error occurred because the district court selected a sentence based on clearly erroneous facts. The Court held that the applicable standard of review was whether clear error occurred. Although the jury found that Dickson did not conspire to distribute 500 or more grams of methamphetamine, the district court was free to find otherwise so long as there was proof by a preponderance of the evidence. The district court did not clearly err in finding Dickenson was involved in a conspiracy to distribute additional drugs or in concluding that Dickenson was an essential cog in the drug conspiracy, and there was thus no procedural error.

Finally, the district court did not impose a substantively unreasonable sentence. Specifically, the court did not give improper weight to its determination that Dickson should receive a sentence greater than the sentences imposed on co-defendants Boelter and Taylor.

Although 3553(a)(6) directs federal sentencing courts to consider the need to avoid unwarranted sentence disparities among defendants with similar records if found guilty of similar conduct, the district court did not abuse of discretion by imposing a more severe sentence on him than on the co-conspirators. Sentencing factor 3553(a)(6) applies to national sentencing disparities and does not apply to sentencing disparities among co-conspirators. Sentencing disparities between co-conspirators could in rare cases be an abuse of discretion if there were no legitimate distinctions between them. However, here both co-conspirators pleaded guilty and one cooperated with the prosecution and testified against Dickenson, and Dickenson had a more prominent role in the conspiracy than that found by the jury. Additionally, the Court asserted that as the appeals were not consolidated and the sentencing records of the co-defendants

were not before it, the Court lacked the ability to determine whether the sentencing disparities were unjustified.

***US v. Vavra*, 127 F.4th 737 (8th Cir. Feb. 4, 2025)**
Evidence was sufficient to support finding deputy, who posted as father on chatting app about minor daughter, did not induce defendant to commit crimes of attempted coercion and enticement of minor.

***US v. Baxter*, 127 F.4th 1087 (8th Cir. Feb. 5, 2025)**
Baxter was charged with being an unlawful user of a controlled substance in possession of a firearm in violation of 18 USC. § 922(g)(3) based on an incident in which he was found with a loaded pistol and a baggie of marijuana. He moved to dismiss the charge, arguing that 922(g)(3) violates the Second Amendment as applied to him and is unconstitutionally vague. The district court rejected both arguments pretrial. Baxter entered a conditional guilty plea, preserving the right to appeal these rulings. The court found that the opinion below does not contain sufficient factual findings for the court to review Baxter's as-applied Second Amendment challenge & remanded in part.

Pretrial motions to dismiss are governed by Federal Rule of Criminal Procedure 12. Rule 12(b)(1) allows a party to raise a pretrial motion that can be determined without a trial on the merits. Rule 12 also allows district courts to make some factual findings so long as it states them on the record, but not when an issue is inevitably bound up with evidence about the alleged offense itself.

Here, the district court did not state its essential findings on the record. The two-paragraph "background" section of the order did not lay out the court's findings as to the extent and frequency of Baxter's drug use with his firearm possession. The court found that the underdeveloped record left too much guesswork for appellate review and remanded to the district court for the factual findings required under Rule 12(d).

The court noted that proper application of Rule 12 will require the district court to determine whether this issue is appropriate for pretrial resolution. It suggested that pretrial resolution may be appropriate if the district court determines that the relevant factual evidence is agreed to by the parties or if the district court determines it can decide the legal issues without making any factual findings. If, however, ruling on the as-applied challenge requires resolving factual issues related to Baxter's alleged offense, such as the extent of his drug use, then resolution of the issue is likely improper before trial. The court took no position on whether Baxter's motion could be properly resolved without a trial.

The court further explained that if the district court finds that Rule 12 allows pretrial resolution of the motion to dismiss, it should focus only on Baxter and whether applying the regulation to his conduct is consistent with the Nation's historical tradition of firearm regulation. The district court may consider evidence beyond the pleadings to make factual findings on the record. If the district court finds that Rule 12 precludes pretrial resolution of the Second Amendment challenge, it should allow Baxter the opportunity to move to withdraw his guilty plea and proceed to trial on the original charge.

The court rejected Baxter's vagueness challenge, finding that he had not carried his burden of showing why the phrase "unlawful user" is unconstitutionally vague as applied to his particular conduct.

***US v. Cooper*, 127 F.4th 1092 (8th Cir. Feb. 5, 2025)**
The opinion begins by reaffirming that as-applied challenges to 922(g)(3) are available – "In US v. Veasley, we concluded that keeping firearms out of the hands of drug users does not 'always violate[] the Second Amendment.' 98 F.4th 906, 908 (8th Cir. 2024). Now the question is whether it sometimes can. The answer is yes, so we remand for the district court to determine whether it does for LaVance Cooper."

Cooper had a bench trial on stipulated facts – he smoked marijuana three to four times a week and had done so two days before officers found a pistol in his car during a traffic stop. The district court found that as-applied challenges to 922(g)(3) are not available.

The Eighth Circuit disagreed and remanded for reexamination of Cooper's motion to dismiss the indictment. The court analyzed the two Founding-era analogues to 922(g)(3) it found in *Veasley* – confinement of the mentally ill and the criminal prohibition on taking up arms to terrify people. It explained that 922(g)(3) is relevantly similar to these laws, but not for everyone. The relevant questions for resolving Cooper's as-applied challenge are whether using marijuana made him act like someone who is both mentally ill and dangerous and whether he induced terror or posed a credible threat to the physical safety of others. "Unless one of the answers is yes—or the government identifies a new analogue we missed, but cf. US v. Connelly, 117 F.4th 269, 274–75 (5th Cir. 2024) (coming up with a similar list)—prosecuting him under § 922(g)(3) would be '[in]consistent with this Nation's historical tradition of firearm regulation.'" The court emphasized that this is an individualized assessment – "Nothing in our tradition allows disarmament simply because Cooper belongs to a category of people, drug users, that Congress has categorically deemed dangerous."

The court declined to resolve the as-applied challenge, noting that the factual record was thin and the parties may want to supplement the record with other evidence.

Finally, the court "tie[d] up a loose end to save everyone time on remand." The government argued that Cooper was too dangerous to have a gun because he possessed one for protection after a recent shooting at his residence. The court disagreed. First, the parties stipulated that officers were dispatched to the residence in reference to an individual who had been shot, not that the shooting had happened there. Second, " 'individual self-defense is 'the *central component'* of the Second Amendment right,' not an exception to it." The court also noted in a footnote that marijuana use by itself is not an exception to the Second Amendment.

***US v. Hoeft*, 128 F.4th 917 (Feb. 5, 2025)**

Remand for reconsideration in light of *Rahimi* from the Supreme Court. The panel vacated its prior opinion and re-affirmed. There are no substantive changes to the court's June 7, 2024, opinion regarding the suppression, sufficiency, or evidentiary issues.

Regarding the Second Amendment issues, Hoeft moved to dismiss the gun charge, arguing that 922(g)(1) and 922(g)(9) are facially unconstitutional. The court followed its post-*Rahimi* opinion in *Jackson* and held that 922(g)(1) is constitutional. It passed no judgment on whether 922(g)(9), which prohibits people convicted of misdemeanor crimes of domestic violence from possessing firearms. Any error in refusing to dismiss that charge was harmless beyond a reasonable doubt – the jury stated in a special verdict form that it found Hoeft guilty under both 922(g)(1) and 922(g)(9).

***US v. Hamber*, 127 F.4th 1083 (8th Cir. Feb. 5, 2025)**

Suppression appeal. Hamber was convicted of being a felon in possession of a firearm following the discovery of a pistol on his person during a traffic stop. He moved to suppress the pistol, arguing that it was obtained during a warrantless pat-down search conducted without his voluntary consent. On appeal, he conceded that law enforcement had probable cause for the initial stop and that he voluntarily consented to the pat-down search. The only issue was whether the officer impermissibly extended the stop by ordering him out of his vehicle after speaking with him, running his license, and determining the license was valid.

The court found that the officer had an objectively reasonable suspicion that Hamber was unfit to drive sufficient to extend his investigation under *Terry*. The officer discovered Hamber asleep at the wheel of his running vehicle at a gas station in an area known for heavy narcotic use around 2:00 a.m., two hours after the gas station had closed. Hamber was discovered because of a request for a welfare check. It was objectively reasonable for the officer to ask Hamber to step out of the vehicle to confirm that he was not under the influence of drugs or alcohol and could safely operate the vehicle. The court found that the

entire purpose of the stop was to address safety-related concerns, and ordering Hamber out of the car was within the scope of the initial stop. The district court did not err in denying the motion to suppress.

***US v. Syphax*, 127 F.4th 746 (8th Cir. Feb. 5, 2025)**

Syphax pleaded guilty to possession of a firearm by a felon and was sentenced to 84 months in prison. He challenged the calculation of his criminal history score on appeal.

Syphax had four Missouri felony convictions in three separate cases. He was sentenced to over 13 months in prison, suspended, for each conviction. The state court then ordered "probation revoked. Sentences to execute-all counts concurrent." The basis of the revocations was the same for all three cases. The PSR assigned three points for each of Syphax's three state felony cases.

Syphax argued that under Note 11 to USSG 4A1.2, he should have 3 points for one prior conviction and 1 point each for the others because the state court ordered a single revocation. The Eighth Circuit disagreed, finding that the state court ordered three revocations, not "a revocation" within the meaning of Note 11. The court stated, "Note 11's plain and unambiguous language applies to a single revocation, not cases where, as here, there are multiple revocations. Although the revocations occurred on the same day based on the same conduct, they were separate, each applying to a different case." The Eighth Circuit followed the 10th Circuit's opinion in *US v. Norris*. It declined to follow the contrary holdings of the 6th and 9th Circuits. It also declined to follow a USSC primer on 4A1.2(k) and Note 11, stating that the court must follow the commentary's text, not contrary "quick reference materials." Affirmed.

***US v. Bradley*, 127 F.4th 1127 (8th Cir. Feb. 7, 2025)**

Bradley was convicted of four firearms offenses arising out of the fatal shooting of Thomas Willett. The district court calculated Bradley's offense level by applying the cross-reference for voluntary manslaughter. On appeal, he argued that the district court erred in rejecting his self-defense claim and applying the cross-reference.

At Bradley's initial sentencing, the district court applied the voluntary manslaughter cross-reference and sentenced Bradley to 120 months in prison. Bradley appealed, and the government moved to vacate and remand, agreeing that it had erroneously described a witness's trial testimony and that two counts—stealing a firearm and possessing a stolen firearm—were multiplicitous. On remand, the district court dismissed one of the counts, determined that the voluntary manslaughter cross-reference was still appropriate, calculated the guideline range as 108 to 135 months, and sentenced Bradley to 108 months in prison.

On appeal from the resentencing, Bradley argued that the district court erred in applying the voluntary manslaughter cross-reference because the government failed to prove by a preponderance of the evidence that Bradley did not act in lawful self-defense when he shot and killed Willett. The Eighth Circuit found no clear error in the district court's decision to credit a witness's testimony that Bradley stood up, pulled the gun out of his hoodie pocket, and shot Willett– its credibility determination is virtually unreviewable on appeal. The district court provided an explanation for why it credited this witness over the conflicting accounts of Bradley and other witnesses. The district court did not clearly err in finding that Bradley's statements and behavior, including saying "don't make me do this," running out after the shooting, and being angry with Willett before the shooting, were indicative of guilt. Application of cross-reference affirmed.

***US v. Ellis*, 127 F.4th 1122 (8th Cir. Feb. 7, 2025)**

Ellis was convicted at trial of being a felon in possession of a firearm and sentenced to 120 months in prison.

Sufficiency: The evidence was sufficient to establish that Ellis knowingly possessed a firearm. Although Ellis did not have the firearm on his person, the evidence established a sufficient connection between his

movements and the firearm found by law enforcement. Dashboard camera footage showed Ellis jumping and tossing an object over the fence as an officer pursued him. Other officers recovered a firearm in the area where Ellis appeared to have thrown something. Although the footage did not clearly show what was thrown, a reasonable jury could infer that Ellis threw the firearm that was recovered on the other side of the fence, demonstrating constructive possession of the firearm.

Sentencing/crimes of violence: The district court found that Ellis's two prior Arkansas robbery convictions qualified as "crimes of violence." Ellis did not object at sentencing. The Eighth Circuit found "no error, plain or otherwise" in the calculation of Ellis's guideline range. The court has previously found that Arkansas robbery qualifies as a crime of violence under both the force clause and the enumerated offenses clause (citing *US v. Smith*, 928 F.3d 714, 717 (8th Cir. 2019)). Ellis argued that *Smith* should be reconsidered in light of *Borden*. The court found that *Borden* does not alter the analysis under the enumerated offenses clause. "While *Borden* may cast doubt on whether robbery under Arkansas law qualifies as a crime of violence under the force clause, it does not disturb our decisions in *Smith* or *Stovall* that held it is a qualifying offense under the enumerated offenses clause." Affirmed.

***US v. Watkins*, 127 F.4th 1142 (8th Cir. Feb. 10, 2024)**

At trial, Watkins was found guilty of possession of a firearm by a prohibited person under 18 USC. 922 (g)(1). On appeal, Watkins challenged alleged unnoticed expert testimony and claimed ineffective assistance of counsel.

Factual background: Watkins went into a home of an 82 year old woman and asked if he could mow her lawn. She declined. He returned with a handgun and forced entry into the home. He took 2 $20 bills from her purse and searched the house for 30-45 minutes. A neighbor saw Watkins force entry into the home and contacted law enforcement. When law enforcement arrived and surrounded the house, Watkins opened a return vent cover in the front bedroom and disposed of the firearm into the vent. When the homeowner and Watkins exited the house, she alerted law enforcement that he had put the gun into the vents.

Sgt. Pagel searched the vents and heard a loud bang after he moved the air filter in the front bedroom return vent. He went to the garage, where the furnace was located, removed panels from the furnace, and retrieved the firearm. At trial, he explained his actions and his belief that the firearm could not have entered the furnace without disassembling the furnace or removing several pieces of ductwork, unless it had been placed there through the bedroom vent.

On cross-examination, the defense asked Sgt. Pagel if he had any specialized training or knowledge in furnace repair or maintenance. He said he did not. On redirect, he testified that he had a construction business and had built homes so he "had a lot of experience with minor issues with furnaces" and "knew his way around the furnace." He reiterated his testimony that the gun would have to be placed in the vent from the bedroom or would have required disassembly of the furnace in the garage. Defense counsel objected that the testimony was unnoticed expert testimony – Sgt. Pagel had not been noticed as an expert on construction or furnaces.

The Eighth Circuit determined that Sgt. Pagel's testimony was lay witness testimony "based on his firsthand knowledge of the vent, furnace, and the firearm's location, derived from his personal examination at the home during his search for the weapon." His opinions about how the gun would easily get into the vent from the bedroom, and the difficulty to get it there otherwise (from the garage), "were circumscribed to matters within his own knowledge and experience and did not rely on any specialized training." Further, his statements about his experience in construction came on redirect to rehabilitate him after challenge from the defense. There was no abuse of discretion in admitting this lay opinion testimony.

The court declined to address Watkins' ineffective assistance of counsel claim. Affirmed.

***US v. Jennings*, 127 F.4th 1145 (8th Cir. Feb. 10, 2025)**

Jennings pleaded guilty to one count of illegally possessing a firearm under 18 USC. 922(g)(1). In the plea agreement, the parties agreed to a joint recommendation of 40 months' imprisonment.

At sentencing, the guideline range was determined to be 46-57 months' imprisonment. The district court questioned the government about the recommended 40 months as a downward departure, noting its concerns about Jennings's criminal history and 10 bond violations while on pretrial release. The government responded that it had miscalculated the guidelines when reaching the plea agreement, "I counted for the three points, but not the additional two. So my understanding is that it was a mistaken assumption, a lesson learned on my part." The district court continued to question the recommendation, to which the government explained:

> The bond violations consisted of all substance abuse violations. And since his 1994 crime, the Defendant has not been convicted of any crimes of violence. So I regard his violations while on bond to represent primarily that he may be a danger to himself, more than to others, but I absolutely appreciate the Court's concerns regarding those, and –

The court cut off the government, and asked again about the 40 month recommendation; ". . . the Government is recommending a sentence of 40 months; is that correct?" The government responded, "That's right, your Honor." The district court then reviewed "the 3553(a) factors and Jennings's pattern of conduct, parole behavior, and bond violations." It imposed a 54-month sentence, based on the sentencing factors.

On appeal, Jennings alleged that the government breached the plea agreement by claiming the recommendation was a result of a mistaken calculation of the Guidelines, and that the sentence was substantively unreasonable.

Breach of plea agreement: The Eighth Circuit reviewed for plain error because no objection was made at sentencing. The Court noted that it requires the government to have "meticulous fidelity to the plea agreement." (citing *US v. Brown*, 5 F.4th 913, 916 (8th Cir. 2021). "Although a less than enthusiastic recommendation will not ordinarily constitute a breach, the government is obligated to make the recommendation to the court." *US v. Jeffries*, 569 F.3d 873, 876 (8th Cir. 2009).

The Court identified that, in sentencing, "[t]he court chose to focus on Jennings's bond violations rather than the Guidelines calculations. As directed by the court, the government defended its downward variance recommendation by suggesting that a variance could be appropriate because Jennings's bond violations were non-violent. The court interrupted . . . to ask if the government was recommending 40 months' imprisonment, and the government reiterated its support for the joint recommendation." Based on these discussions, the Court concluded the government had not breached the plea agreement. "The government only mentioned its mistaken criminal history calculation in response to the court's skepticism towards the joint recommendation." Quoting *US v. Zurheide*, 959 F.3d 919, 921 (8th Cir. 2020), the Court explained "[The prosecutor] was not obligated to zealously defend the joint recommendation in the face of the court's hostility." The Court noted that Jennings's case was distinguished from *Zurheide*, because "Jennings does not argue that the government breached by failing to argue in support of the joint recommendation but rather argues that it breached by informing the court of its mistake, which cast doubt on the sincerity of the joint recommendation." However, that distinction made no difference because in both cases the government "kept its promise, and its comments were in response to the court's suspicion and inquiry into the joint recommendation."

Further, the Court found that Jennings could not show a reasonable probability that the district court would have imposed a more favorable sentence without the statements of the government. ". . . [T]he district court[ ] expressed skepticism towards the joint recommendation before the government committed

the alleged breach of the plea agreement." Therefore, Jennings' argument failed on the third prong of the plain error test, as well.

Sentence: The within Guideline range sentence was presumed reasonable and was not an abuse of discretion. Affirmed.

***US v. Kucharo*, 127 F.4th 1152 (8th Cir. Feb. 11, 2025)**

Kucharo called an Iowa county prosecutor and threatened him, saying "I'm gonna . . . come get ya real soon . . . I'll wait outside that door for you . . . I will eliminate you." Eventually, he was convicted of first-degree harassment for this call in state court.

The same day of the call, a homemade pipe bomb exploded and damaged a pontoon boat and trailer parked in a residential neighborhood. Witnesses reported a person meeting Kucharo's description seen running away after the explosion. Kucharo also threatened his then-defense counsel, who relayed photos showing Kucharo in front of a blue Econoline van, next to containers of black powder and a pipe bomb consistent with the one found near the explosion. The blue van was eventually located and a search warrant issued. Kucharo was detained and officers retained the keys to the van after searching it. It was left in a public parking lot. A cell phone was recovered that had messages indicating Kucharo's intent to "annihilate" various persons and videos of him working on pipe bombs in the van.

Days later, another law enforcement officer returned from out of town, and observed security footage of a person fleeing the scene of the explosion in a distinct US flag t-shirt. That t-shirt had been seen in the initial search of the van, but was not seized at that time. Law enforcement sought a second warrant to search the van again, noting new information had developed regarding the contents of the van and a residence. The warrant application asserted that "After the search the van was left secured where it was parked and [Kucharo] has been incarcerated . . . since that time. On 06/27/22 the van was relocated and still parked in the same location and impounded pending a new search warrant request. It has since been located in a secured garage at the Davenport Police Department."

Kucharo sought to suppress the evidence seized under the second warrant, arguing that the van had not been secured from the public in the interim, therefore the application contained false or misleading information regarding the van being secured. The district court denied Kucharo's motion. Kucharo then conditionally pleaded guilty to two federal criminal charges.

In the PSR, the Iowa state conviction for the threats against the prosecutor were not treated as relevant conduct, i.e. part of the instant offense. Therefore, that conviction added three points to Kucharo's criminal history score, resulting in a criminal history category of V rather than IV and a GL sentencing range of 84-105 months rather than 70 to 87. Kucharo objected, claiming the threats to the prosecutor and the boat explosion were part of the same conduct, as they had occurred on the same day. Therefore, he argued, the harassment conviction should be considered relevant conduct and add no criminal history points. The district court disagreed, then varied upward to sentence Kucharo to 108 months of imprisonment, noting that the relevant conduct determination was not "material to [its] ultimate sentencing decision."

Suppression: The Eighth Circuit agreed with the district court that law enforcement's description of Kucharo's van as "secured" was "arguably not false or misleading . . . and certainly not to the degree that would rise to the level of deliberate or reckless disregard for the truth." The Eighth Circuit focused on the "use of the word 'secure,' which can have different meanings in different circumstances." The key factor was that the "van was 'secure' from Kucharo – he was in custody and the van keys were in the custody of the Scott County Sherriff." Whether someone else had broken into or accessed the van while it was unattended in a public parking lot did not affect the analysis. "The mere possibility that someone could have accessed Kucharo's vehicle after the [first search on] June 22 [ ] does not defeat probable cause."

Moreover, the remaining information in the warrant application was sufficient to support the issuance of the second warrant.

Sentencing: The Eighth Circuit agreed again with the district court that the harassment of the prosecutor was not relevant conduct of the pipe bomb explosion, but a severable, distinct offense, despite being committed on the same day. Moreover, because the district court stated that it would have entered the same sentence, regardless of the relevant conduct issue, any alleged error was harmless.

Furthermore, Kucharo's related argument that the degree of upward variance was much greater, if he had a criminal history category of IV vs. V, was disregarded by the Eighth Circuit. (21 month upward variance with Crim. Hist. IV, compared to 3 month upward variance with Crim. Hist. V). "This is an argument that the sentence is substantively unreasonable, an issue not included in Appellant's Statement of the Issues Presented for Review." Even if the issue was considered, the argument would merely be a disagreement with the district court's weighing of the 3553(a) factors, "which is not enough to demonstrate an abuse of the district court's substantial sentencing discretion." Affirmed.

***US v. Schram*, 128 F.4th 922 (8th Cir. Feb. 12, 2025)**

A jury convicted Schram of multiple offenses related to his operation of four child pornography websites. These included four counts of advertising child pornography and one count of engaging in a child exploitation enterprise. He was sentenced to a life term and four concurrent 30-year terms of imprisonment. Schram appealed arguing: the evidence was insufficient, improper admission of multiple images of child pornography, error in calculating his guidelines, and an overlong sentence.

Sufficiency**:** Schram argued that the advertising images were not proven to be depictions of real children, a fact essential to his convictions, rather that computer-generated facsimiles. The court reviewed the sufficiency de novo – finding that a reasonable jury could find that the images were of real children, despite advances in computer technology discussed on webpages referenced by Schram. "What matters is how accurate jurors are in distinguishing realistic images of virtual children from images of real children. And on that question, the webpages are silent."

The Court signaled that it may at some point be willing to reconsider its precedent regarding these determinations. However, "[w]ithout more, we are not prepared to depart from our court's precedent allowing juries to decide whether images depict real children based on the images themselves. At the foundation of that precedent is the principle that the government need not produce evidence to negate a speculative assertion that a child in an image is virtual. . . .That principle is as true today as it was when we announced it – three years after Congress found that one could make images of virtual children almost 'indistinguishable to the unsuspecting viewer' from images of actual children [in 1996]. . . . And it requires us to reject Schram's challenge to the sufficiency of the evidence. On the nearly empty record here, Schram's concern that images shown to the jury depicted virtual children is just speculation unsupported by any concrete facts." "In our view, [research considered by the Court confirms] that the danger of confusing virtual children with real children at Schram's trial was speculative, however serious it might be at some later date."

Prejudicially cumulative evidence**:** The district court's admission of multiple images of child pornography was not an abuse of discretion. "Schram protests that the government could have proven the [facts necessary to convict him] with just four images – one for each website on which he advertised – but nothing in Rule 403 forced the government to pick a single image from each website and discard the rest. Rule 403 does not require the government to produce on the minimum amount of evidence necessary to prove its case." The government's images "were few and highly probative, and the district court's decision to admit them was reasonable."

The government also introduced images that were "less probative," but did not amount to reversible error. These included screenshots from videos found on Schram's hard drive, depicting child pornography.

"[T]he government does not contend that Scram himself obtained any of the videos from his websites or linked them there. The screenshots thus did not evidence any particular child pornography advertisement Schram made. But they did further the government's case less directly, and we are confident that any mistake in admitting them did not influence Schram's convictions." "The screenshots tended to prove Schram's propensity to advertise child pornography, for the jury could find, as Schram's trial counsel conceded, that Schram collected the screenshots because he was 'a coveter and keeper of child pornography.' And if it so found, the jury would have had greater reason to infer that Schram used his website to obtain or exchange child pornography, which would have qualified as prohibited advertising." "Though we typically frown on offering evidence of a defendant's uncharged misdeeds to show his propensity to commit charged misdeeds, . . . , we do not do so here [under Rule 414(a)]."

The Court did express some concern with the redundancy of the screenshots. "Yet we hesitate to say that the screenshots were too cumulative to admit. There were only nine exhibits containing screenshots, only a few screenshots in each exhibit, and only a few seconds for the jury to see each screenshot when published. . . . Considering the limited presentation of screenshots and the more disturbing child pornography already in the record, any error in admitting the screenshots was, at the very least, harmless."

Sentence**:** Schram's argument regarding application of the two-level enhancement for willfully obstructing justice, under USSG 3C1.1, was rejected. "We are more than a little skeptical of this argument since, before trial, Schram sent a letter to the magistrate judge assigned to his case in which he threatened to kill her if she did not dismiss the charges against him." (Practice tip: this is a bad thing for your clients to do.) Moreover, the enhancement would not have harmed him, as Schram "earned the maximum offense level" before the enhancement.

The sentence itself was within the guidelines range, thus, presumptively reasonable:

"In addition to his threats against the magistrate judge, there is evidence that Schram planned to kidnap, enslave, rape, and perhaps to kill an eight-year-old girl; threatened to kill a coworker, rape his children, and kill his family; and plotted to bomb a union hall. While incarcerated, Schram threatened to kill a prison guard, tried to strangle a cellmate, kicked a fellow inmate, and drew sexually explicit images of children on his cell walls and in a booklet. On one occasion, he asserted that he had raped and murdered multiple children in the past." (Practice tip 2: same.).

The court also rejected Schram's argument that other users of his websites received lower sentences. Affirmed.

***US v. Zielinski*, 128 F.4th 961 (8th Cir. Feb. 13, 2025)**

Zielinski "absconded" with her minor child to Mexico. She was indicted for international parental kidnapping under 18 USC. 1204(a). She was found guilty at a bench trial and sentenced to 36 months' imprisonment. On appeal, she argued that the district court erroneously prohibited her from presenting evidence that she **"absconded** with her child to protect him from sexual abuse by the father." (Emphasis added). In other words, she was prevented from raising an affirmative defense to the charges under 18 USC. 1204(c)(2) – "**the defendant** was **fleeing** an incidence or pattern of domestic violence." (Emphasis added).

The majority concluded that the plain language of Section 1204(c)(2) requires that the defendant, him or herself, must be the victim of the alleged domestic violence to assert this defense, not a third-party victim, such as a child. "Zielinski's reading stretches the plain text of the statute. . . . **The statute makes no reference to domestic violence against a third party**. [It] speaks only of the *defendant's* flight from domestic violence. If Congress had wanted to include defense of a third party in [Section] 1204(c)(2), it easily could have done so. . . . [I]n other sections of the same statute, Congress specifically referenced third parties, including a 'child.' *See, e.g.*, 18 USC. 1204(c)(3) (… if 'the defendant had physical custody of the child . . . and failed to return the child as a result of circumstances beyond the defendant's

control')." (Emphasis added). "Since the legislature says what it means and means what it says . . . we reject Zielinski's contention that 1204(c)(2) includes defense of a third party."

In response to the concerns of the dissent, the majority explained: "Without 1204(c)(2), a parent suffering from domestic violence faces a Hobson's choice – [A] flee alone and leave the child behind, or [B] out of love for the child, stay with the child even if that means the parent continues to suffer domestic violence. Section 1204(c)(2) explicitly seeks to prevent the latter situation by providing an affirmative defense to a parent who chooses to flee with the child, even if the domestic violence is *only* directed towards the defendant." The majority rejected the dissent's interpretation because it "would lead to unintended consequences – allowing defendant to 'convert every child-kidnapping prosecution into a replay of the child-custody proceedings, in which the defendant would try to relitigate the domestic-relations case by showing that he or she really should have received custody.'" (quoting *US v. Nixon*, 901 F.3d 918, 920 (7th Cir. 2019)). "'The loser in a child-custody proceeding must accept the decision. . . and may not spirit the child across an international border.'"

The majority also rejected Zielinski's vagueness and rule of lenity arguments, finding no ambiguity in the statute.

The dissent (Kelly) suggests that the majority opinion reads the term "flee" too narrowly – "the word 'flee' here can apply when a defendant escapes domestic violence aimed at herself or her child." "The government concedes that 1204(c)(2) is available when the defendant claims she is the victim of domestic violence and 'flees' with her child in an effort to escape an abusive partner. This affirmative defense recognizes that a parent has an inherently intimate connection with her child. Otherwise, there is no need for 1204(c)(2): a parent who is subject to domestic violence could flee with or without taking her child. And notably, the availability of a 1204(c)(2) defense is not contingent on whether the child faces any danger. . . . On the flip side, nothing about 1204(c)(2) requires the domestic violence to be targeted toward the defendant. Allowing a defendant to take her child when the defendant herself is subject to domestic violence, but not allowing a defendant to take her child when the child is the victim of domestic violence, simultaneously minimizes a central premise of the statute (the intimate connection between the defendant an her child) and adds a requirement (that the violence be directed toward the defendant), without a textual basis." (Emphasis added). Judge Kelly explains that the majority's reading "collapses the requirement that the defendant be the one fleeing with the definition of domestic violence. . . . But as the district court and both parties agree, the definition of 'domestic violence' readily includes violence against children. . . . If a defendant flees with a child due to domestic violence against the child, she is still fleeing an incidence or pattern of domestic violence." (Emphasis added).

Judge Kelly then distinguishes the district court decision in *US v. Malka,* 602 F.Supp. 3d 510, 541 (S.D.N.Y. 2022), referenced by the majority as "[t]he only court to have considered the issue (besides the district court in this case)." As Judge Kelly explains, "[T]he facts in *Malka* showed the defendant were not fleeing as required under 1204(c)(2) because, rather than trying to *escape* any domestic violence (whether aimed at the defendants or the children), the defendants were actively travelling thousands of miles *toward* the violence."

Judge Kelly also distinguishes *Nixon*, which involved a defendant seeking to "expand 1204(c)'s definition of 'domestic violence' to encompass a wide array of emotional or financial abuse.' *See id.* at 919. It was in this context that the court stated it 'could not equate 'violence ' with 'abuse' without converting every child-kidnapping prosecution into a replay of the child-custody proceedings…" In summary, the dissent believes that Zielinski was prevented from presenting a complete defense, and would reverse and remand for further proceedings.

Simple summary: 18 USC. 1204(c)(2) provides: "the defendant was fleeing an incidence or pattern of domestic violence." (Emphasis added). The majority focused on the narrowness of the term "the defendant;" the dissent focused on the breadth of the terms "fleeing" and "domestic violence." Affirmed.

***US v. Kills Warrior*, 128 F.4th 999 (8th Cir. Feb. 18, 2025)**

Failure to register case. In 2007 and 2008, Mr. Kills Warrior was prosecuted in both tribal and federal court for the same act – sexual contact with a child under 12. Because of the federal conviction, he was required to register as a sex offender. In 2022, he was charged for failure to register. He moved to dismiss the case and argued that the 2008 federal prosecution violated the double jeopardy clause.

The Court finds there was no double jeopardy violation under the dual sovereignty principle (sometimes called the "separate sovereigns doctrine"). Under this principle, there is no double jeopardy violation when two separate sovereigns prosecute an individual because they derive their power to prosecute from different sources. Here, the Oglala Sioux Tribe and the US government are separate sovereigns, with separate powers to punish. Therefore, they can both prosecute an individual for the same conduct. No double jeopardy problem.

The Court did not need to address whether this was an impermissible collateral attack on the 2008 conviction, or whether a defendant can preserve a double jeopardy challenge when he pleads guilty.

***US v. Gehl*, 128 F.4th 1001 (8th Cir. Feb. 19, 2025)**

A jury found Gehl guilty of one count of conspiracy to distribute marijuana and one count of possession with intent to distribute marijuana. Gehl did not move for a judgment of acquittal. He was sentenced to the mandatory minimum for his crimes, 120 months in prison. On appeal he argues the sufficiency of the evidence, that he should have been safety valve eligible, and that he should have received a minor-participant downward adjustment.

Sufficiency: After several months of surveillance and investigation, law enforcement executed a search warrant at a warehouse where Gehl and others were found with "788 pounds of marijuana bagged and piled up all over the floor, crates for transporting the marijuana, various marijuana products and paraphernalia," as well as $22,934 in cash. At least some of the marijuana bags were in garbage bags.

A search of Gehl's home found " 'marijuana all throughout the house' that was 'packaged for sales' and looked similar to the marijuana found at the warehouse." Officers also found "THC vapes, gummies, and other edibles, pound-size marijuana bags with marijuana residue in them, a drug ledger, a digital scale, a money counter, a metal ammunition can with live ammunition, and many wads of cash. In total, officers seized nearly seven pounds of marijuana and $186,948 in cash." Gehl's phone also contained communications regarding marijuana distribution, corresponding with shipment dates of crates that had been delivered to the warehouse on earlier occasions. Other records showed that Gehl had flown to California on two prior occasions, with co-conspirators, at times corresponding with earlier crate shipments to the Minnesota warehouse.

Gehl argued that "the Government failed to establish that Gehl knew the bags contained marijuana because '[t]he garbage bags were thick and opaque,' the marijuana packages inside 'were triple sealed to prevent scent from being detected' and '[i]t is entirely possible that Gehl was asked by his brother to move trash out of the business and did so without realizing he was moving marijuana." He also argued that the Government failed to prove the amount of drugs.

Because Gehl did not move for a judgment of acquittal at the close of the Government's case, the close of all evidence, or after the jury's verdict, the plain error standard of review applied. " '[W]e reverse only if the district court, in not *sua sponte* granting judgment of acquittal, committed plain error.' "

Gehl contested his knowledge of the conspiracy. The Court found no plain error, given the circumstantial evidence of his involvement in the conspiracy.

Gehl contested the amount of drugs involved in the conspiracy. When the search of the warehouse was conducted, modified shipping crates were seized, along with the contents that had been shipped. The marijuana seized at that time amounted to 52.6% of the total weight of the shipped crates (788 pounds marijuana/shipping weight 1,498). Evidence showed that 31 shipments had been made from a California warehouse to the Minnesota warehouse. Applying the same percentage to the weight of those previous shipments "would equate to 15,804 pounds – or 7,168.6 kilograms – of marijuana, more than seven times the '1,000 kilograms or more' the jury found." Again, no plain error. Further, the Court rejected Gehl's argument that the Government was required to "seize and test a full 1,000 kilograms of marijuana in order to survive such a sufficiency challenge," finding no case law to support this proposition. Here, the Government had tested 31 sample one-pound bags, all of which contained THC. One bag was further tested and found to have a concentration of 6.4% THC, "more than 21 times the 0.3% threshold for marijuana." The evidence was sufficient.

Safety-Valve eligibility: The district court did not apply safety valve relief because it found Gehl was not truthful in his proffer. The district court's findings as to the completeness and truthfulness of the proffer was reviewed for clear error.

Gehl's statements were described by an agent as " '[n]ot at all' truthful because Gehl's answers were 'vague, nonexistent, or just implausible.' For instance, when asked about his two flights to California and texts he sent while there, Gehl told officers he had never gone there and that someone must have used his ID and phone. He further stated he never looked inside the black bags he helped move and did not know what was in them. Gehl did not affirmatively prove that he conveyed even the 'basic facts' of the crime to the Government, let alone 'truthful information and evidence' about it." The district court did not err in its findings regarding the truthfulness of the proffer.

Minor-participant: Gehl received the mandatory minimum sentence of 120 months. Thus, any determination by the Eighth Circuit regarding the minor-participant adjustment would make no difference. Because the Court could provide no relief, the issue was moot.

Affirmed.

***US v. Young*, 129 F.4th 459 (8th Cir. Feb. 20, 2025)**

Allegation that three venirepersons were struck from venire because they were Native American was insufficient to make prima facie Batson challenge.

***US v. Worthy*, 129 F.4th 479 (8th Cir. Feb. 21, 2025)**

Defendant voluntarily consented to search of his cell phone.

***US v. Black*, 129 F.4th 508 (8th Cir. Feb. 25, 2025)**

The district court sentenced Christopher Black to 720 months in prison after he pleaded guilty pursuant to a conditional guilty plea to three counts of production of child pornography, one count of receipt of child pornography, and one count of possession of child pornography. The Circuit Court rejected Black's arguments that the district court erred by denying his motion to suppress evidence or by imposing a substantively unreasonable sentence.

Motion to suppress: Black moved to suppress evidence found pursuant to warrantless searches of two Airbnbs (one in Iowa and one in Minnesota), as well as evidence from a subsequent search of the Minnesota Airbnb pursuant to a warrant. Brown's phone was ultimately seized from the Minnesota Airbnb while executing a search warrant, and the phone contained produced child pornography of a missing 14-year-old female (A.W.) as well as various images and videos of child pornography of other minors. The Circuit Court affirmed the district court's finding that the two warrantless searches were proper due to exigent circumstances and found that all of the searches therefore did not violate the Fourth

Amendment (presumably the challenge to the search pursuant to the warrant was based on fruit of the poisonous tree, although the decision does not specifically state this).

--Warrantless Iowa Airbnb search: various evidence connected both Brown and A.W. to the Iowa Airbnb. FBI agents were also aware that Brown had previously been investigated for sex crimes involving juveniles and was suspected of filming minors in hotel rooms. FBI agents knocked on the open door to the room booked under Black's pseudonym "Sanchez." The agents saw nobody in the room, but the bathroom door was closed. The Airbnb owner entered the room and knocked on the locked bathroom door with no response. Purportedly concerned that A.W. or someone else was in need of medical attention, the agents entered the room, found a key to the bathroom, unlocked the bathroom door, and saw nobody inside. The court found that this search was justified under the exigent circumstances exception to the warrant requirement because "the agents reasonably feared that A.W. might have been unresponsive in the bathroom and in need of immediate medical attention." The Court further asserted that their concerns were "especially acute" because A.W. was "a minor subject to sexual exploitation."

-Warrantless Minnesota Airbnb search: After the Iowa Airbnb search, Black acknowledged to an FBI agent that he did stay at the Iowa Airbnb with A.W., but he believed she was about 20 years old and they merely watched tv together. Another witness indicated that he heard Black state at the Iowa Airbnb that he needed to get A.W. out of town because law enforcement was looking for her. Black thereafter booked Airbnb rooms under the pseudonym "Jason Gustavson."

Agents went to one of Gustavson's booked Airbnb locations in Minnesota and saw Black and a female who resembled A.W. in the backyard. Agents knocked on the door and detained Black, then entered the room and A.W. emerged. In plain view the agents saw sex toys, stained bedding, and drug paraphernalia. The Court held that this warrantless entry was justified under exigent circumstances to prevent A.W. and Black from destroying evidence or fleeing from law enforcement.

Substantive reasonableness of the 720-month sentence**:** The Circuit Court found that the district court did not abuse its discretion when sentencing Black to 720 months in prison. The Court observed that the imposed sentence was below the applicable guidelines range, and stated that it is nearly inconceivable that a court which imposed a below-guidelines sentence abused its discretion by not varying downward further.

***US v. Ellis*, 129 F.4th 1075 (8th Cir. Feb. 25, 2025)**

Gilbert Ellis and three codefendants (Chris Ellis, Joshua Townsen, and Michael Brown) pleaded guilty to conspiring to distribute methamphetamine and heroin. Brown did not appeal. Gilbert pleaded guilty without a plea agreement, whereas Chris and Brown pleaded guilty pursuant to plea agreements. Gilbert, Chris, and Brown appealed their sentences, and the Circuit Court addressed their challenges in a consolidated appeal. A fourth codefendant, Theodis Bagby, was acquitted by a jury.

Gilbert's sentencing challenges: Gilbert challenged the application of the three-level enhancement pursuant to USSG § 3B1.1(b) to his sentence. This enhancement is applicable if the defendant's role in the offense was "one of a manager or supervisor (but not an organizer or leader)," and (2) "the criminal activity involved five or more participants or was otherwise extensive." The Circuit Court found that the district court did not clearly err in applying this enhancement. An informant testified that drug transactions would be arranged through Gilbert and that Gilbert directed and controlled drug transactions. This testimony alone sufficed, despite Gilbert being wheelchair-bound.

The Circuit Court also found no plain error occurred when the district court attributed to him drugs seized during a traffic stop of Bagby and Brown. The Court observed that the district court could properly consider any undisputed fact in the presentence report (PSR). Because Gilbert did not object to the drug quantity in the PSR, he could not correctly argue on appeal that the district court erred by considering that evidence.

The Circuit Court also rejected Gilbert's argument that his 240-month prison sentence was substantively unreasonable. Gilbert first argued that the sentence was substantively unreasonable because he questioned the fairness of the drug conversion tables in the Guidelines. The Court concluded that the district court "declining to vary downward based on his policy disagreement with the Guidelines' treatment of a mixture of methamphetamine as opposed to pure methamphetamine" did not render the sentence substantively unreasonable. The Circuit Court also rejected Gilbert's argument that his sentence was substantively unreasonable because Brown was sentenced to just 150 months in prison, being a downward variance. The Court found that Gilbert was more culpable. Further, the direction to avoid unwarranted disparities among defendants in 18 USC. § 3553(a)(6) refers to national disparities, not differences among co-conspirators.

Chris's sentencing challenge: Chris challenged the imposition of the career-offender sentencing enhancement under USSG § 4B1.1(a). Chris argued that because his 2017 Iowa state conviction for possession with intent to deliver marijuana did not qualify as a controlled substance offense, he did not have the requisite number of felonies for that enhancement (at least two prior convictions for a controlled substance offense or a crime of violence). The Court held that *US v. Henderson*, 11 F.4th 713, 718 (8th Cir. 2021) foreclosed this argument. *See Id.* (holding a "controlled substance" under § 4.B1.2(b) includes "any type of drug whose manufacture, possession, and use is regulated by law," even if the state law is broader than the federal definition). Thus, the district court did not err when it applied the career-offender sentencing enhancement.

Townsen's sentencing challenge: Townsen argued on appeal that the district court erred when it sentenced him to the statutory minimum prison sentence because he was eligible for safety-valve relief under 18 USC. § 3553(f). Pursuant to *Pulsifer v. US*, 601 US 124, 153 (2024), a defendant must satisfy each of the three safety-valve conditions in order to qualify for safety-valve relief. Because Townsen had a prior conviction for a 3-point offense (which precludes safety-valve relief pursuant to 18 USC. § 3553(f)(1)(B)), he was ineligible for safety-valve relief and there was no error.

***US v. Lazzaro*, 129 F.4th 514 (8th Cir. Feb. 25, 2025)**

Lazzaro was convicted after a jury trial of sex trafficking of minors and conspiring to sex traffic minors. Lazarro (29 years old) went on a website designed for older men wanting to give gifts to younger women for dates or sex and to connect with others to meet willing participants. Lazzaro asked an 18-year-old woman (Castro Medina) to meet him. Castro Medina asked if it was okay to bring 16-year-old G.L., and Lazzaro arranged for them to go to his condominium. Lazzaro first had sex with G.L. and then had sex with Castro Medina in exchange for money, and they repeated this conduct on a subsequent date. Castro Medina later agreed to recruit for Lazzaro girls between 16 and 18 years old. G.L. continued to have sex with Lazzaro for money, and Lazzaro would give G.L. envelopes of case for her and Castro Medina. Over time, Lazzaro gave more money to Castro Medina than G.L., and G.L. later stopped seeing Lazzaro due to her displeasure regarding payment discrepancies. Castro Medina thereafter continued to recruit girls who had sex with Lazzaro in exchange for money. Both Castro Medina and Lazzaro were indicted for sex trafficking of minors and conspiring to sex traffic minors, with Castro Medina pleading guilty and agreeing to testify against Lazzaro.

Lazzaro's argument that 18 USC. § 1591 is unconstitutionally vague. The two pertinent elements of § 1591(a) are: (1) that a defendant must knowingly "recruit[], entice[], harbor[], transport[], provide[], obtain[], advertise[], maintain[], patronize[], or solicit[] by any means a person," and (2) with knowledge, or with reckless disregard for the fact, that the victim is under 18 years old and "will be caused" to engage in a "commercial sex act." The court rejected the argument that this statute is unconstitutionally vague, as it provides adequate notice of the conduct it covers. The Court concluded that a person of ordinary intelligence would know that the statute covered Lazzaro's conduct that he "recruited" the victims. Because Lazzaro sent pictures of himself with money and expensive items and celebrities, a person of ordinary intelligence would know that he "enticed" and acted to "solicit" the victims. A person of

ordinary intelligence would likewise know that his actions would cause a person under the age of 18 to engage in a commercial sex act.

A statute could also be unconstitutionally vague if it is "so standardless that it authorizes or encourages seriously discriminatory enforcement." Section 1591(a) is not so standardless because its mens rea requirements adequately narrowed the scope of prosecutorial discretion. Thus, the Court concluded that § 1591 was not vague as applied to Lazzaro.

Sufficiency of the evidence: Taking the evidence in the light most favorable to the verdict, the Court concluded that the evidence was sufficient to support the convictions. Lazzaro argued that the evidence was insufficient to prove that he knew or recklessly disregarded the fact that his actions would cause these minor girls to engage in commercial sex acts. The Court noted that Lazzaro followed a consistent pattern of recruiting young women by promoting "sugar dating," which is "by its nature transactional." Further, he displayed large amounts of money and paid them in cash or valuables after having sex.

The district court's refusal to allow Lazzaro to introduce age of consent evidence under Minnesota law. The Court rejected Lazzaro's argument that the district court should have permitted him to introduce evidence of the age of consent under Minnesota law. Lazzaro claimed that this law was relevant to his good-faith attempt to conform his conduct to the law. The Court found that whether Lazzaro attempted to comply with Minnesota law would only confuse the issue of whether he violated the federal sex trafficking statute. Thus, the evidence was properly excluded under the Federal Rules of Evidence as its probative value is substantially outweighed by the danger of confusing the issues or misleading the jury. Fed. R. Evid. 403.

Alleged prosecutorial misconduct: Certain claims were neither objected to nor raised in a Rule 33 motion for new trial. Therefore, the Court reviewed these claims for plain error. Because the Court concluded that Lazzaro could not demonstrate a reasonable probability that the outcome would have been different but for the alleged errors, there was no plain error.

Another claim was raised in an untimely filed motion for new trial filed two months after trial. Rule 33 requires such motions to be filed within 14 days unless based on newly discovered evidence, in which case the time limitation is three years. Because this claim was not based on newly discovered evidence, the motion for new trial was properly denied by the district court as being untimely filed.

Lazzaro raised one fully preserved claim of prosecutorial misconduct, being his assertion that the government referred to the victims as being "underage" during its opening statement. The Court reviewed this claimed error for abuse of discretion. To obtain relief, Lazzaro was required to show that the argument was improper and that it prejudiced his right to a fair trial. Here, the district court responded to the objection by informing the jury that having sex with minors is not, by itself, a violation of federal law. Because this cautionary instruction sufficed to remedy any possible prejudice, the district court did not abuse its discretion in denying the motion for new trial on this claimed error.

Denial of the motion for new trial based on purported juror misconduct.
Lazzaro's claim of alleged juror misconduct was also not timely raised in his motion for new trial, as the motion was filed well after the 14-day deadline under Rule 33(b)(2) and was mostly not based on newly discovered evidence. If due diligence would have resulted in the evidence being timely discovered, such evidence is not deemed newly discovered. The bulk of these claims was based on evidence that was not newly discovered, and the district court did not err in denying the motion as being untimely.

One claim of juror misconduct in the motion for new trial was based on newly discovered evidence, thus rendering the motion timely filed for that claim. Lazzaro claimed that juror misconduct occurred because Juror 45 posted on social media that she "was one of the lucky 12 to be picked for the Anton Lazzaro federal child sex trafficking case." Lazzaro claimed that this post, in conjunction with that

juror's "strident support for the '#MeToo movement," rendered Juror 45's assertion that she could remain impartial false. In order to obtain relief, Lazzaro was required to show that the juror was dishonest during voir dire, that partiality was the motivation for the juror's dishonesty, and that the true facts would have supported striking that juror for cause. Juror 45's social media post did not suggest that her affirmation that she could be an impartial juror was dishonest. The district court's conclusion that no juror ever answered a material question dishonestly was not clear error.

***US v. McGhee*, 129 F.4th 1095 (8th Cir. Feb. 28, 2025)**

McGhee conditionally pleaded guilty to drug and firearms offenses and was sentenced to 60 months in prison. He challenged the denial of his motion to suppress and a sentencing enhancement on appeal.

Suppression: This case arose out of a shooting outside McGhee's house. He and his 6-year-old son were sitting in a parked vehicle outside their house and were shot at. The son suffered gunshot wounds to his hand. While they were at the hospital, officers responded to a shots-fired call at the house. They found eight shell casings, a bag of suspected narcotics, and bills on the street outside the house. Based on witness statements and the condition of the vehicle at the hospital, they believed the injured child was connected to the shots-fired call at the house.

Some investigators walked up the paved path leading the front door and knocked. Another officer stood in the front yard outside a chain link fence separating the front and side yards and watched the side door. There, he noticed several spots of blood splatter and an unknown white or brown powdery substance on the deck (in the side yard). The officer then walked through the gate & another officer entered the side yard and peeked through the window and saw blood splatter in the kitchen.

Law enforcement sought a search warrant for the house. The warrant affidavit described blood splatter on the porch leading to the side door, on the side door, on the house next to the door, on the door handle, and inside the door on the floor (visible through a window) & the white chalky-powdery substance on the ground.

McGhee moved to suppress the evidence found in his home, arguing that the bases for the warrant (blood splatter & powdery substance) were observed only after a trespass into the curtilage of his home. On appeal, the Eighth Circuit found that the front yard was not within the curtilage of McGhee's home – it was not protected by a fence or enclosure & no efforts were taken to shield it from public observation or entry. The court found that the side yard was part of the curtilage. (The court noted, but did not resolve, a dispute within the circuit over whether the curtilage determination is a factual finding reviewed for clear error or a legal conclusion reviewed de novo).

The court further found that officers did not violate the Fourth Amendment by viewing the blood splatter & powdery substance while standing in the front yard. Their entry into the side yard following the observation of the blood splatter & powdery substance was then justified by exigent circumstances. Officers responded to shots-fired calls, found eight shell casings, and had reason to believe there was at least one victim. They followed the blood trail to see if there were any victims that could have run into the house or into the backyard. The evidence was sufficient for a reasonable officer to believe that a person was in immediate aid, triggering the exigent circumstances exception. The district court did not err in denying the motion to suppress.

Sentencing enhancement**:** McGhee also challenged the 4-level enhancement for possessing a firearm in connection with another felony offense under USSG § 2K2.1(b)(6)(B). He argued that the commentary, which states that the enhancement applies when "a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia" and in most other circumstances "if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense" impermissibly expanded the text of the guideline, citing *Stinson v. US*, 508 US 36 (1993). The court found that because

it has repeatedly applied the commentary post-*Stinson* "without issue," the district court did not err in relying on it to apply the enhancement.

The court also found that to the extent McGhee challenged the factual underpinnings of the enhancement, the record sufficiently supported the district court's factual findings. Affirmed.

***US v. Al Sharairei*, 130 F.4th 656 (8th Cir. Mar. 7, 2025)**

Evidence was sufficient to support finding defendant knew about sale of controlled substance at his store, as would support convictions for maintaining premises and conspiracy to distribute analogues.

***US v. May*, 131 F.4th 633 (8th Cir. Mar. 12, 2025)**

Joe May was convicted by a jury of multiple counts of fraud against TRICARE, receiving kickbacks, aggravated identity theft, receiving kickbacks, false statements, and falsifying documents. Hudson worked on commission for CD Medical to promote the services of MedwoRx Compounding Pharmacy. MedwoRx could not fill prescriptions without a medical provider's signature, an essential component of the scheme was medical providers willing to participate. Over the course of May's participation in the conspiracy, he signed 226 prescriptions for compounded drugs dispensed by MedwoRx. May received approximately $10,000 to $15,000 in cash for rubber stamping pre-filled prescription forms. May assisted in falsifying medical history for patients. May falsely told the agents that he signed the MedwoRx prescriptions after he evaluated the patients in person at a hospital or after he talked to them on the phone.

May challenged the admission of some MedwoRx business records and the TRICARE claims records on authentication grounds, and he asserts their admission violated the Confrontation Clause. May objects to a limitation on his cross-examination of Clifton, to the absence of a good faith jury instruction, and to the language of the intent or knowledge jury instruction. He also challenges the government's reference to May's subpoena power during closing argument. Finally, May asserts there was insufficient evidence to convict him of conspiracy, violating the Anti-Kickback law, mail fraud regarding Holiman, and aggravated identity theft. The 8th Circuit held that the records were authenticated by employees and found no abuse of discretion in admitting the documents into evidence. Further, May asserts a violation of his Confrontation Clause rights. The 8th Circuit held that the records were not created for the purpose of establishing or proving some fact at trial and met the requirement of Rule 803(6) for business records and that prescription records are non-testimonial.

At trial, the district court limited cross-examination on Clifton regarding his daily use of drugs. Hospital intake records indication Clifton di not use drugs but one year later BOP records indicated he did. Prior misconduct which is probative of a witness' truthfulness is expressly entrusted to the trial court's discretion. Given the time lapse no abuse of discretion was found.

May requested the Eighth Circuit Model Criminal Jury Instruction 9.08A on good faith. When a doctor's defense is that she saw the patient on specific dates, but there is conflicting testimony that the patient was somewhere else on those dates, a good faith instruction is not required. May did not testify at trial. There was no evidence to support a good faith instruction. The district court did not abuse its discretion in denying the request for a standalone good faith instruction.

May also asserts that the formulation of intent or knowledge in Jury Instruction No. 30 was improper. The 8th Circuit found no abuse of discretion in giving a jury instruction explaining that there is never direct evidence of an individual's state of mind.

May appealed the denial of his motion for judgment of acquittal on the charges for conspiracy, mail fraud as to Holiman, and receiving kickbacks. There was abundant evidence that May joined and participated in a conspiracy with intent to defraud the TRICARE program. There was sufficient evidence for a rational jury to find guilt beyond a reasonable doubt on this mail fraud charge. The FBI's forensic accountant

provided circumstantial corroboration of the kickbacks through his testimony. The 8th Circuit concluded that a reasonable jury could have found May guilty beyond a reasonable doubt of receiving kickbacks.

Finally, May asserts that the evidence was insufficient to convict him of the two counts of aggravated identity theft because the government failed to prove that the misuse of another's means of identification was at the crux of the underlying crime. May did not make this argument in his motion for judgment of acquittal, and he did not object to the aggravated identity theft jury instruction. Regarding the first count, a co-conspirator stole identification to defraud TRICARE. The misuse of that persons means of identification furthered the underlying wire fraud offense. On the second count of identity theft, because the theory of May using Patterson's means of identification without lawful authority in relation to falsification of records was not submitted to the jury, we will not decide whether this theory has merit. The 8th Circuit reversed the second count of identity theft finding that the error on Count 40 made the difference in convicting May on one count, so it affected May's substantial rights and seriously affected the fairness, integrity, or public reputation of judicial proceedings.

No remand required because the sentence ran concurrently. All other matters raised on appeal affirmed.

***US v. Peck*, 131 F.4th 629 (8th Cir. Mar. 12, 2025)**

Peck entered a conditional guilty plea for intent to distribute marijuana and felon in possession of a firearm but reserved his to appeal his two motions to suppress.

After receiving an anonymous tip that Peck was selling drugs an officer showed to Peck's apartment complex in plain clothes with a drug sniffing dog. The apartment manager confirmed Peck lived there and allowed the officers to enter the building. The apartment was located on the third floor and the hallway was a communal space. The drug dog sniffed along the bottom of multiple apartments before alerting at Peck's apartment door. As the officers were leaving, they saw Peck open the door of his apartment and walk out. The officers used this information to obtain a warrant to search Peck's apartment. A search found marijuana, anabolic steroids, numerous guns, drug paraphernalia, and a bump stock device. In a motion to suppress Peck argued his apartment door was his curtilage and the sniff was warrantless in violation of his fourth amendment rights. The 8th Circuit held that the good fait exception applied. Peck also argued that his § 922(g)(1) count should be dismissed because it violated the Second Amendment as applied to him. Specifically, he argued that because his prior conviction for marijuana possession is nonviolent, the Second Amendment prohibits punishing his later possession of a firearm. Peck's argument is foreclosed by the 8th Circuit precedent. The 8th Circuit rejected the as-applied challenge. Affirmed.

KELLY, Circuit Judge, concurring. Judge Kelly agreed that the district court properly denied both motions to suppress under the good-faith exception. However, would further address the Fourth Amendment issue and conclude, as Judge Kelly have written elsewhere, that the area immediately surrounding Peck's front door was curtilage. See US v. Perez, 46 F.4th 691, 704–07 (8th Cir. 2022) (Kelly, J., concurring). Kelly found that Nacho's sniff violated Peck's Fourth Amendment rights but otherwise joined the court's opinion in full.

***US v. Sharkey*, 131 F.4th 621 (8th Cir. Mar. 12, 2025)**

Sharkey was convicted by a jury of two counts of felon in possession of a firearm and two counts of straw-purchasing conspiracy and was sentenced to 360 months. He argued his sentence was unconstitutional as his prior felony was nonviolent and that the straw purchasing charges were unconstitutional as they rested on the prohibition from possession a firearm as a felon. He challenged the use of acquitted conduct to increase his guideline range. The 8th Circuit precedent is that an acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence. The 8th Circuit held that even without the acquitted conduct the sentence would be proper.

Sharkey contests the procedural and substantiative reasonableness of his sentence. The district court considered Sharkey's conduct—including the acquitted conduct proved by a preponderance of the evidence—and concluded he was "too dangerous to have in the community any longer. No abuse found regarding the upward variance. Affirmed.

***US v. Williams*, 131 F.4th 652 (8th Cir. Mar. 18, 2025)**

Williams was convicted by a jury of two counts of felon in possession of a firearm. The two counts arose out of separate incidents. Williams was the passenger in a vehicle of which was reported to be at the scene of an assault with a firearm and attempted robbery. A search of the vehicle revealed a firearm and ammunition. On a later date, Williams' fiancé took her five-year old son to the hospital after sustaining a fatal gunshot wound to the head at her home of which Williams was also a resident. Williams was seen on security camera placing a backpack in a garbage bin outside the home. A warrant search recovered two firearms in the garbage bin.

Background: The issue of denial of his pretrial motion to dismiss based on § 922(g)(1) violates the Second Amendment, the 8th Circuit held that it is barred by Eight Circuit precedent. Affirmed.

For the first incident where Williams was a passenger in the vehicle, upon the stop of the vehicle the officer observed a strong odor of marijuana, Williams matched the description of the assailant given by the victim, and Williams was then detained. The officer also observed a small plastic bag on the driver's side which he believed to be narcotics and detained the driver. The victim was brought to the scene and identified Williams as that assailant. He was then arrested and the officer searched the vehicle and found drugs, a gun, and ammunition. DNA testing revealed the major DNA profile matched that of Williams. He was charged with possession of the handgun.

Upon the death of the 5-year-old boy investigators interviewed Williams, his fiancé and daughter. The daughter told the officers she found a purple and black gun next to the 5-year-old boy. Review of a neighbor's security camera showed Williams stayed at the house while his fiancé took the boy to the hospital and placed a black backpack in a garbage bin and covered it with a bag of trash. Officers obtained a warrant, searched the home, and found two firearms in the trash, drugs, drug paraphernalia and scales inside the home. He was charged with possession of the two guns found in the trashcan.

Officers obtained a warrant for Williams' phone. A photo of the purple and black gun was found along with a text message that said, "my new toy."

Williams has five prior Illinois felony convictions the government alleged were requisite predicate offenses. Prior to trial, Williams filed a motion in *limine* to exclude evidence of the five convictions because they are now invalid under Illinois law. The district court denied this motion as an impermissible collateral attack on a state conviction in federal court.

The SUV Search: Williams argued that the July 2020 stop of the SUV violated his Fourth Amendment right "to be secure . . . against unreasonable searches and seizures." Williams asserted that seizing witnesses to a crime "is a clearly established constitutional violation," Here, the officers did not stop the SUV solely because its occupants were witnesses. The district court credited Officer Eckberg's testimony that victim Bah, in his initial, frenetic recount of a terrifying assault, communicated that there were either "witnesses or other involved parties" inside the SUV. The 8th Circuit held this gave officers reasonable suspicion to make the investigatory stop and that it may be based on collective knowledge when multiple officers are involved. The 8th Circuit found no err in concluding the officer had reasonable suspicion to order the traffic stop.

The Cell Phone Search: In his motion to suppress Williams conceded the warrant application and affidavit provided sufficient basis for probable cause. Williams argued the cell phone warrant authorized a "general exploratory search," violating the Fourth Amendment requirement that a warrant "particularly

describ[e] . . . the persons or things to be seized." The district court, acknowledging that the warrant limited the files to be searched to a three-week time frame, nonetheless concluded that the warrant "was insufficiently particular and unconstitutionally overbroad" because the files to be searched were not limited to information related to felony gun and drug possession. However, the court held that the *Leon* good faith exception applied. On appeal he argued that no reasonable officer would believe that a warrant authorizing seizure of "any and all" information on his phone was consistent with the Fourth Amendment. The investigator who conducted the search also wrote the affidavit. The court agreed that the officer conducted a more circumscribed search than the language of the warrant literally authorized. However, the 8th Circuit held that the *Leon* good faith exception applied and affirmed the denial of the motion to suppress.

The Prior Illinois Felony Convictions: Williams's prior convictions were not automatically vacated and therefore remained valid predicate felony convictions for his federal felon-in-possession charges. A person challenging a conviction under an invalid statute still must "raise[] his or her challenge through an appropriate pleading in a court possessing jurisdiction over the parties and the case." Therefore, under Lewis and the 8th Circuit precedent applying that decision, the Court could not entertain the collateral attack on Williams's Illinois convictions. Section 921(a)(20) did not displace or overrule *Lewis*. Its analysis continues to apply in felon-in possession cases, as the Court recognized in Bena, Elliott, and Dorsch. Construing § 921(a)(20) in *Custis v. US*, 511 US 485, 491 (1994), the Supreme Court held that "[t]he provision that a court may not count a conviction 'which has been . . . set aside' creates a clear negative implication that courts may count a conviction that has not been set aside." Williams failed to clear his status before obtaining a firearm. The 8th Circuit concluded that the district court properly denied Williams's motion in *limine* because it is an impermissible collateral attack on an underlying state conviction that has not been vacated by an Illinois court with jurisdiction over the state criminal matters. Affirmed.

***US v. Quinn*, 131 F.4th 846 (8th Cir. Mar. 19, 2025)**

A jury found Quinn guilty of assault with a dangerous weapon in aid of racketeering in violation of 18 USC. § 1959(a)(3) (Count 1); use of a firearm in relation to a crime of violence in violation of 18 USC. § 924(c)(1)(A) (Count 2); and being a felon in possession of a firearm or ammunition in violation of 18 USC. §§ 922(g)(1) and 924(a)(2) (Count 3). It found Smith guilty of two counts of assault with a dangerous weapon in aid of racketeering in violation of 18 USC. §§ 2 and 1959(a)(3) (Counts 8 and 17) and two counts of use of a firearm in relation to a crime of violence in violation of 18 USC. §§ 2 and 924(c)(1)(A) (Counts 10 and 18).

Quinn and Smith appealed their convictions and sentences. Their primary issues raised on appeal were the convictions for counts charging violent crimes in aid of racketeering activity. Quinn and Smith were alleged members of a gang known as Savage Life Boys Gang ('SLB Gang') whose members engaged in various criminal activities. The indictment alleged Quinn "for the purpose of maintaining and increasing position in the SLB Gang . . . did commit an assault with a dangerous weapon…" It was alleged in the indictment that Smith "for the purpose of maintaining and increasing position in the SLB Gang" committed assault, and that Smith knowingly used and discharged a firearm during the assaults.

Quinn and Smith argued that there was insufficient evidence to prove they were members or associates of an enterprise, that they engaged in racketeering activity, or that they committed the alleged racketeering crimes "for the purpose of . . . maintaining or increasing position in an enterprise engaged in racketeering activity." At trial there were several witnesses that testified about the SLB Gang and its involvements. Smith argued that there was insufficient evidence of the requisite common purpose because the SLB Gang had no defined structure, no initiation, no leadership, no written rules, no organization that conducted drug sales, and no requirement to engage in violence. The 8th Circuit held that at trial evidence permitted a reasonable jury to find that the SLB Gang met the *Boyle* test for an enterprise at the times Quinn and Smith committed the violent assault crimes. Smith argued that the SLB Gang had neither a hierarchy with positions nor written rules. The 8th Circuit held that "[a]ll that matters is that [the SLB

Gang] had 'a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue [its] purpose.'" *Green*, 104 F.4th at 14, quoting *Boyle*, 556 US at 946.

Quinn and Smith argued the government's evidence was insufficient to prove the existence of an enterprise. The 8th Circuit held that the trial evidence was sufficient for a reasonable jury to find that the SLB Gang was a § 1959(b)(2) racketeering "enterprise."

Quinn and Smith further argued that there was insufficient evidence they committed the violent assaults for the purpose of maintaining or increasing "position" in the alleged enterprise, the SLB Gang. Because there was no hierarchical structure and no leadership roles, they argued their violent acts were undertaken personally, not to advance position within or to aid the SLB Gang. However, the 8th Circuit agreed with the district court that § 1959(a) "does not say 'a position.'

Next, Quinn and Smith requested a jury instruction defining the "enterprise" element of a § 1959(a) offense based on the three-prong test we set forth in *Crenshaw*. Instead, the district court adopted an instruction that approximated the *Boyle* test and aligned with Eighth Circuit Model Jury Instruction (Criminal) 6.18.1962D (2023). Smith argued that this instruction did not sufficiently require the jury to find that the enterprise, the SLB Gang, had a "continuity of structure." The 8th Circuit applied the governing law in *Boyle* and cases applying *Boyle* and disagreed with Smith and found that the provided instructions properly encapsulate the law defining "enterprise," and did not disturb the jury's verdict based on those instructions.

Quinn and Smith argued the district court erred in denying their post-verdict motions for new trial because inclusion of the crime of attempted murder in the jury instruction was a material variance from the Third Superseding Indictment and they were "prejudiced by the last-minute insertion of this crime into Final Jury Instruction No. 20." Unlike a constructive amendment, which changes the charge while the evidence remains the same, "a variance changes the evidence, while the charge remains the same." The 8th Circuit found that there was no constructive amendment, no material variance between the indictment and the proof at trial, and that there was no material variance and no actual prejudice to either defendant.

Smith next contended the district court improperly instructed the jury on the government's need to prove that his actions were "for the purpose of . . . maintaining or increasing position in an enterprise . . . ." § 1959(a). Smith argued this instruction left the definition too "open ended" because the phrase "maintaining or increasing" was undefined beyond a series of examples to consider in determining the phrase's "ordinary meanings." He failed to object to the instruction. The 8th Circuit found that the district court properly instructed the jury to give the words "maintain" and "increase" their ordinary meanings, considering all facts and circumstances in making that determination. The Court found no abuse of discretion and no plain error.

Quinn then appealed his sentence contending the district court erred in increasing his base offense level based on the attempted first-degree murder guideline, which defines first degree murder as "conduct that, if committed within the . . . territorial jurisdiction of the US, would constitute first degree murder under 18 USC. § 1111." USSG § 2A2.1, comment. (n. 1). The 8th Circuit held that the district court did not clearly err in finding that Quinn acted with intent to kill. As the court stated at sentencing, attempted first degree murder "is well supported in the record."

Lastly, Smith argued the district court erred in calculating the advisory guidelines sentencing range by denying Smith's request for a two-level reduction for acceptance of responsibility because, the court concluded, he "did not admit to committing the shootings . . . [or] to the actions that were required to be proven by the Government far beyond the existence of the enterprise." At trial, Smith did not merely defend by arguing the SLB Gang was not a racketeering "enterprise" nor did he stipulate to guilt for the

shootings and instead argued the jury had to determine whether or not those offenses occurred. The 8th Circuit found that the district court's factual determination that Smith is not entitled to an acceptance of responsibility reduction is not "so clearly erroneous as to be without foundation."

***US v. Patterson*, 131 F.4th 901 (8th Cir. Mar. 24, 2025)**

Defendants were part of a large, violent methamphetamine conspiracy. Sparks the alleged leader of the conspiracy was convicted at trial. Patterson and Ginnings both pled guilty.

Background: Sparks was involved with the meth trafficking ring for over a decade. Multiple co-defendants recounted delivering or storying meth at Spark's direction. Evidence at trial including witness testimony betrayed him as a violent man. Witnesses described his use of firearms and brutality to further his drug trafficking activities. Patterson was a childhood friend and worked as Sparks enforcer and debt collector. Sparks and his associates killed a man and then set the vehicle on fire. Sparks feared his girlfriend would tell and ordered her held. Eventually her body was found with gunshot wounds to her head. The jury convicted Sparks for conspiracy to commit money laundering, possession of firearms in furtherance of drug trafficking, and being a felon in possession of firearms and ammunition, and the court sentenced Sparks to two concurrent life terms, a concurrent 240-month term, plus a consecutive 60-month term of imprisonment. Co-conspirators were charged with conspiracy to distribute methamphetamine, conspiracy to commit money laundering, possession of firearms in furtherance of drug trafficking, and being a felon in possession of firearms and ammunition. Patterson pled guilty to all counts and was sentenced to a total term of imprisonment of 560 months, which consisted of concurrent terms of 500 months, 240 months, and 120 months, plus a consecutive term of 60 months. Ginnings also pled guilty to all counts and was sentenced to a total term of imprisonment of 520 months, which consisted of concurrent terms of 400 months, 240 months, 120 months, plus a consecutive term of 120 months.

Sparks' Appeal: Admission of Evidence Related to the Murders

Sparks contends the district court abused its discretion by allowing evidence about the uncharged murders. The 8th Circuit held that evidence of uncharged acts is admissible if it is "intrinsic" to a charged drug conspiracy. Evidence is "intrinsic" if it is part of the charged conspiracy, shows its inner workings, or completes the story of how the conspirators operated. Further, probative evidence is not subject to exclusion merely because it is prejudicial or graphic. No err found in denying Sparks' motion *in limine* to exclude the evidence, nor did it abuse its discretion in admitting the evidence.

Sufficiency of the Evidence: Sparks contended that the residence was not his. He pointed to the fact that he was not involved in any under cover guys. Sparks asserted the government's case rested on the testimony of unreliable witnesses and co-defendants. However, evidence tied Sparks to the home along with his role in the conspiracy. The 8th Circuit held that witness credibility is within the jury's sole discretion.

Jury Instructions: The district court declined to give two jury instructions that Sparks requested—a cautionary instruction about drug-user cooperators and a more recent version of the model reasonable doubt instruction that expressly cites "lack of evidence" as a basis for reasonable doubt. The deficiencies in testimony which Sparks raised concerns about, were issues he put before the jury. After considering the jury instructions as a whole, the 8th Circuit Found the district court did not abuse its discretion when it declined to give Sparks' requested instruction. Further, this Court has previously concluded that it is not an abuse of discretion to give the previous version of the model instruction.

Murder Cross-Reference under USS.G. § 2D1.1(d)(1): Sparks contends the district court erred when it overruled his objection to applying the cross reference for first-degree murder because the evidence is "incredibly clear" that Sparks did not shoot Broyles and the evidence is "incredibly unclear" regarding when and how Hampton was killed. The cross-reference does not require Sparks to be the murderer. The

8th Circuit found no error when it applied the murder cross-reference. Sparks also asserted application of the cross-reference violates his constitutional rights to a jury trial and due process. The 8th Circuit held there was no jury trial violation, as Sparks' sentence did not exceed a statutory maximum or increase a mandatory minimum. Finally, if any error existed, it would be harmless because enhancements for drug quantity, weapons, and Sparks' leadership role triggered the same Sentencing Guidelines range of life.

Reasonableness of the Sentence: Sparks asserted his life sentence was greater than necessary. The 8th Circuit found that a within-Guidelines sentence is reasonable, and Sparks had not rebutted that presumption.

Patterson's Appeal, Murder Cross-Reference under USS.G. § 2D1.1(d)(1)
Patterson contended the district court erred in applying the murder cross-reference because he was not involved in Hampton's death, Hampton's death was not foreseeable, and the murders exceeded the conspiracy's scope. However, evidence at trial contradicts his contentions. No error found in applying the cross-reference.

Drug Quantity Calculation: Patterson asserted the district court committed clear error when it attributed at least 15 kilograms of methamphetamine to him. However, co-conspirator testimony and Patterson's own admissions demonstrate this conspiracy moved ten kilograms weekly. Precedent explains that a district court may rely on such evidence (corroborated trial testimony and PSIR) at sentencing without violating due process. Lastly, any error in calculating Patterson's Sentencing Guidelines range was harmless because the district court stated it would impose the same sentence based on the sentencing factors set forth in 18 USC. § 3553(a).

Ginnings' Appeal; Ginnings contended that the district court erred when it calculated his applicable Sentencing Guidelines range because it relied on unspecified trial evidence, which is a departure from Rule 32 and a due process violation. Ginnings contended the nine-level increase under USS.G. § 2D1.1(d) for the murder cross-reference should not have been applied because the district court failed to sufficiently articulate its findings of fact. The 8th Circuit held that District courts may consider evidence from a co-defendant's trial at sentencing, including hearsay, provided it has "sufficient indicia of reliability to support its probable accuracy." No error found. Affirmed.

***US v. Dennis*, 131 F.4th 913 (8th Cir. Mar. 24, 2025)**
Rufus was convicted by a jury of four counts: attempted Hobbs Act robbery, possession of a firearm in furtherance of a crime of violence, possession of a firearm after having been convicted of a felony, and possession of a stolen firearm. He was sentenced to 270 months. He appealed and the 8th Circuit affirmed the convictions but vacated alleging the district court erred procedurally and impose a substantively unreasonable sentence.

Dennis planned to rob a drug dealer and enlisted help that happened to also be a confidential informant. The CI reported same to law enforcement. Dennis told the CI he wanted a gun for the robbery. Before the robbery took place his home was searched, and a rifle was located.

At resentencing, the district court applied a sentencing enhancement under USSG § 2B3.1(b)(2)(C), which provides for a five-level increase in offense level for a robbery count "if a firearm was brandished or possessed." With the enhancement, Dennis's advisory Guidelines range was 121 to 151 months' imprisonment. The district court denied Dennis's motion for a below-range sentence, granted in part the government's motion for an upward variance, and imposed a 240month sentence on the attempted robbery count, to run concurrently with 120-month sentences on each firearm count.

On appeal Dennis asserted a procedural error when the 5-level enhancement was applied. Dennis admitted to discussing getting the handgun but point to the fact he never obtained one. However, he was

convicted of attempted Hobbs Act robbery and the issues is whether the district court properly found that the government established "with reasonable certainty" that Dennis "intended" that a firearm would be "brandished or possessed." Concrete plans were made with the CI to obtain the gun and repeated words and actions, collectively, were sufficient to establish "with reasonable certainty" that he intended the offense conduct to include brandishing or possessing a firearm. The 8th Circuit found no error for applying the enhancement.

Next, he contended his sentence was substantively unreasonable as too much weight was placed on the nature and circumstances of the attempted robbery offense and that a substantial variance based on factors already taken into account in the guidelines. He also contended mitigating evidence was ignored. The 8th Circuit found no clear error of judgment and that the district court did not abuse its discretion.

***US v. Henry*, 132 F.4th 1063 (8th Cir. Mar. 25, 2025)**

Jordan pled guilty to unlawfully possessing a firearm as a convicted felon and was sentenced to 46 months in prison. Jordan appealed an enhancement applied for "reckless endangerment during flight" under USS.G. § 3C1.2. He argued the enhancement did not apply: "Armed flight, without more, is insufficient to warrant a reckless-endangerment enhancement." The government argued a loaded gun with a chambered round presented a risk of accidental discharge that endangers anyone in the vicinity. Henry fled police while carrying a gun in his pocket. The 8th Circuit held that because the loaded, chambered, unholstered gun created "the possibility of the weapon accidentally discharging," the court did not clearly err in applying the enhancement. Further, the presence of at least some, if not many, bystanders supports applying the enhancement.

***US v. Salinas*, 132 F.4th 1083 (8th Cir. Mar. 28, 2025)**

Salinas was found guilty by a jury of conspiracy to distribute a controlled substance, and possession with intent to distribute a controlled substance. He was sentenced to a life sentence. He argued that the district court procedurally erred in applying a two-level enhancement under USS.G. § 2D1.1(b)(13) and varying upward to a life sentence. Additionally, he asserts that his life sentence was substantively unreasonable.

Salinas was a passenger in a vehicle that was stopped on tribal land as officers found the vehicle to be suspicious. After arresting the driver, officers noticed Salinas throwing items inside the vehicle. After being instructed to exit the vehicle Salinas grabbed items and attempted to take them with him. They detained him as he had a revoked driver's license. Upon an inventory search of the vehicle $2,000,000 worth of fentanyl was found.

At sentencing, the district court began by calculating a base offense level of 34 based on the fentanyl's weight. Pursuant to USS.G. § 2D1.1(b)(13), the district court then applied a two-level special offense characteristic because Salinas "was trafficking counterfeit M-30 fentanyl pills that resembled oxycodone." The enhancement was supported the district noted: although who packaged the drugs were unknown, it was Salinas backpack; Salinas was not a "typical mule"; testimony from trial that Salinas possessed two cell phones and "was receiving a lot of calls . . . when he was in custody using these cell phones, or at least one of them."

The district court also added a role enhancement of two-levels to Salinas's offense level for being "an organizer, leader, manager, or supervisor" of Gonzales. After applying all the enhancements, the district court calculated a total offense level of 40. An offense level of 40, coupled with a criminal history category of I, resulted in a Guidelines range of 292 to 365 months' imprisonment. Throughout the sentencing hearing, the district court expressed its concern about Salinas's arrest with the fentanyl on the Lake Traverse Reservation. The Courted noted there was no evidence as to all the fentanyl going to Minneapolis and he was arrested on the reservation where fentanyl is out of control. The court stated that "[n]o GPS would ever take you through the Sisseton-Wahpeton Indian Reservation on the way to

Minneapolis." In short, the court concluded that, given the availability of preferable routes to Minnesota, Salinas entered the reservation specifically to distribute fentanyl.

The court overruled Salinas's motion for a downward departure or variance, stating, "If anything, he's entitled to an upward departure or an upward variance." The court then imposed a sentence of life imprisonment, stating that such sentence was "the appropriate sentence" "[w]hether [the court was] sentencing within the guidelines or based on the statutory factors, which [the court] ha[d] gone through in great detail." When defense counsel clarified that Salinas's total offense level was 40, resulting in a Guidelines range of 292 to 365 months' imprisonment, the court responded that it was "nevertheless imposing an upward variance, then, of life, based primarily . . . on what they were doing on the Sisseton-Wahpeton Indian Reservation with this amount of drugs." Defense counsel then objected to the life sentence, and the district court overruled the objection.

On appeal, Salinas challenged his life sentence. He argued that the district court procedurally erred in applying a two-level enhancement under USS.G. § 2D1.1(b)(13) and varying upward to a life sentence. He also maintains that his life sentence is substantively unreasonable.

Salinas first argued that the district court procedurally erred by applying a two-level enhancement for marketing or representing pills containing fentanyl as oxycodone pills. See USS.G. § 2D1.1(b)(13). Salinas asserts that no evidence exists that he "represented or marketed the fentanyl pills as oxycodone" and "nothing in the record establish[es] [that he] knew the backpack contained fentanyl let alone that there were pills marked M-30." The 8th Circuit found that this argument failed. No error found in applying the willful blindness doctrine as there was enough evidence here to support such.

Salinas argued that the district court procedurally erred by varying upward "based on clearly erroneous facts unsupported by the record." Specifically, he claims that the district court "applied an upward variance based solely on the fact that [he] was found on an Indian Reservation" and speculation "that some portion of the fentanyl was destined to be distributed on the Reservation." The district court commented that it considered Salinas's presence on the Sisseton-Wahpeton Indian Reservation with an enormous quantity of fentanyl the "most significant part of this case." The district court found that a portion of the fentanyl pills were intended to be distributed on the reservation. The 8th circuit concluded that sufficient evidence is lacking to support the court's fact finding. The 8th Circuit noted that presence alone does not establish that Salinas intended to distribute the fentanyl seized on the reservation.

In summary, although the government offered testimony about where the traffic stop occurred and how much the fentanyl would have sold for "on the reservations," it never offered evidence that the fentanyl in Salinas's possession was intended for distribution on the Lake Traverse Reservation. Instead, the testimony and documentary evidence showed only that Minnesota was the ultimate destination. Furthermore, the district court acknowledged the absence of evidence as to why Salinas was on the reservation. The 8th Circuit held there was clear error, and the error was not harmless.

The 8th Circuit found the application of the USS.G. § 2D1.1(b)(13) two-level enhancement was proper but procedurally erred in selecting a life sentence based on clearly erroneous facts. Salina's life sentence vacated and remanded for resentencing. Remanded.

***Sharp v. US*; 132 F.4th 1094 (8th Cir. Mar. 31, 2025)**

Sharp filed a 2255 motion claiming ineffective assistance of counsel. Sharp was arrested for a supervised release violation for selling synthetic cannabinoid. Sharp proffered and told officers that he regularly sold synthetic cannabinoids to an incense dealer named Hadi Sharairi. Sharp was indicted for conspiracy to manufacture and distribute a controlled substance and plead guilty without a plea agreement. While awaiting sentencing Sharp retained new council. He asserted that his previous counsel had advised him what he was doing was legal. Sharp claimed that Schwartz never warned him that the government had scheduled AB-FUBINACA as a controlled substance and that he had sent Schwartz a sample of THJ-011.

Schwartz, who also testified at the hearing, stated that Sharp had told him that he was selling synthetic cannabinoids and had sought representation "for a potential future criminal case"—not for advice on how to sell his herbal incense products legally. He testified that he told Sharp to stop selling synthetic cannabinoids and that he had no recollection of Sharp ever giving him a sample of THJ-011. At Sharp's sentencing, Sharp contested whether he was subject to an enhancement for obstruction of justice based on a letter he had authored to Sharairi before he was indicted. In the letter, Sharp informed Sharairi that he was going to be indicted and needed Sharairi to "quickly act on" that information. On appeal Sharp, argued in relevant part that he received ineffective assistance of counsel because Schwartz operated under an actual conflict of interest by acting as his attorney on the same matter in which he also was a potential witness. The 8th Circuit held that Sharp did not show the existence of an actual conflict based on Schwartz's prior representation of Sharairi.
Affirmed.

***US v. Red Elk*, 132 F.4th 1100 (8th Cir. Mar. 31, 2025)**

A jury convicted Anthony Red Elk on one count of aggravated sexual abuse of a minor and two counts of sexual abuse. Elk appealed and argued the court abused its discretion in admitting evidence of a prior sexual assault and erred in applying two sentencing enhancements. In July 2023, Red Elk was tried on three counts of sexual abuse spanning about a decade. Two victims tested as to accounts of rape by Elk. The jury found Red Elk guilty on all three counts. As relevant on appeal, the district court applied a four-level sentencing enhancement to Counts 2 and 3 for use of force. The Court sentenced him to life in prison on each count to run concurrently.

Elk first argued that the district court abused its discretion in admitting K.W.'s testimony under Federal Rules of Evidence 413 and 403. Evidence that is relevant under Rule 413 is also subject to Rule 403 balancing, under which the court must exclude evidence whose probative value is substantially outweighed by certain other factors. The 8th Circuit held that evidence of K.W.'s alleged assault was not an exact match to the charged conduct, but we cannot say the district court abused its discretion in finding K.W.'s testimony admissible. Rule 413 testimony does not need to be identical to the indictment's allegations to be relevant and potentially admissible. The district court was within its discretion to credit similarities between C.T.B.'s and K.W.'s allegations over any differences between them for purposes of determining admissibility. Though K.W.'s testimony "was undoubtedly prejudicial . . . Rule 403 . . . is concerned only with 'unfair prejudice, that is, an undue tendency to suggest decision on an improper basis.'"

Next, Elk argued that the district court erred in applying the Repeat and Dangerous Sex Offender Against Minors enhancement under USSG § 4B1.5(b)(1). He contended that the court should not have credited K.W.'s testimony and that even if it was proper to do so, her testimony did not describe "prohibited sexual conduct." The Guidelines provide a five-level enhancement for a defendant convicted of a "covered sex crime" who also "engaged in a pattern of activity involving prohibited sexual conduct." Elk did not dispute that his conviction on Count 1 is a covered sex offense for purposes of § 4B1.5(b)(1). Rather, he argued that K.W.'s testimony that Elk engaged in "prohibited sexual conduct" was uncorroborated and should not be believed. But the court found K.W.'s testimony to be credible, and that assessment was not clearly erroneous. Alternatively, Elk asserted that K.W.'s testimony was insufficient to support the enhancement because it "described a physical assault, not a sex crime." The Guidelines define "prohibited sexual conduct" as, in part, "any offense described in 18 USC. §§ 2426(b)(1)(A) or (B)." USSG § 4B1.5 comment. (n.4(A)). The 8th Circuit found no err by the district finding that the testimony established by a preponderance of the evidence an attempt to commit aggravated sexual abuse.

Finally, Elk argued that the district court erred in applying the use of force enhancement to Counts 2 and 3. However, the 8th Circuit found that Elk's total offense level would be the same with or without the force enhancement. Accordingly, any possible error in imposing the § 2A.3.1(b)(1) enhancements would be harmless. Affirmed.

***US v. Masood*, 133 F.4th 799 (8th Cir. Apr. 3, 2025)**

Muhammad Masood, a licensed physician from Pakistan, was charged with and later pled guilty to attempting to provide material support to a designated foreign terrorist organization in violation 18 USC. § 23339B—which requires that "a person must have knowledge that the organization is a designated terrorist organization . . ., that the organization has engaged or engages in terrorist activity . . ., or that the organization has engaged or engages in terrorism . . . ."

The PSR calculated his guidelines sentencing range at 292 to 365 months imprisonment, capped at the statutory maximum of 240 months. In calculating the guidelines range, the PSR recommended a 12-level enhancement USSG § 3A1.4(a) because the offense involved a federal crime of terrorism as defined under 18 USC. § 2332b(g)(5). It also recommended that Mr. Masood's criminal history category (CHC) should be increased from I to VI because his offense involved a federal terrorism charge under USSG § 3A1.4(b). After adopting the PSR, the district court varied downward and sentenced Mr. Masood to 216 months imprisonment.

On appeal, Mr. Masood argued that the district court procedurally erred at sentencing by applying the terrorism enhancement under §3A1.4, which increased both his total offenses level and his CHC, by failing to consider the 18 USC. § 3553(a) factors, and by failing to adequately explain his sentence.

Terrorism Enhancement : As to his first claim, Mr. Masood specifically argued that there was insufficient evidence that his offense is a "federal crime of terrorism" within the purview of § 3A1.4(a) because the government presented no evidence that he acted with the specific intent to violate § 2339B(a)(1), that is, evidence of conduct "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct," as the first prong of § 2332b(g)(5) requires.

The Eighth Circuit disagreed. The Court opined that when the defendant pleads guilty to offenses that "involved or were intended to promote crimes of terrorism . . . the requisite intent" exists under § 2332b(g)(5). The Court explained that Mr. Masood "planned his offense . . . with the purpose of influencing or affecting government conduct" and his violent communications reflected an intent to support ISIS terrorist activities against governments opposed to ISIS, including attacks within the US"—noting Mr. Masood's messages to confidential human sources where he stated that he wanted to attack "behind enemy lines," where other ISIS supporters "struggle to reach here to attack." The Court thus concluded that the district court did not clearly err in finding by a preponderance of the evidence that Mr. Masood's offense involved and was intended to promote a federal crime of terrorism and thus no error in applying the § 3A1.4 terrorism enhancement.

Consideration of the § 3553(a) factors: The Court also rejected Mr. Masood's arguments that the district court erred by failing to properly consider the § 3553(a) sentencing factors when it "ignored or summarily dismissed substantial mitigating evidence" -- his history of severe mental illness that made him susceptible to extremist influences, forensic evidence that those convicted of terrorism-related offenses have low rates of recidivism, evidence that defendants in more egregious terrorism cases "routinely" received sentences of ten years or less, evidence of family support and post-offense rehabilitation, and an order of removal upon completion of his sentence.

In rejecting this argument, the Court explained that before the sentencing hearing, the district court received the PSR and sentencing memoranda from the parties that comprehensively evaluated Mr. Masood's offense conduct, summarized his criminal and extensive personal history, including his personal, professional, and mental health struggles, and reviewed § 3553(a) factors that could warrant a departure or variance. The district court also provided the parties with a sentencing Order that stated it had "considered all of [the] factors in imposing Masood's sentence" and responded in detail to his contentions about mental health, aberrant behavior, and others issues. Because "the district court was aware of [Masood's] arguments," the Court presumed that the district court considered and rejected them."

Explanation of Sentence: As to Mr. Masood's claim that the district court did not adequately explain the reasons for the imposed sentence, the Court reviewed this claim for plain error because he didn't object at sentencing to the district court's explanation. After detailing the district court's explanation of the chosen sentence—noting, among other things, "notwithstanding mental illness, notwithstanding childhood

difficulties, notwithstanding all of that stuff that we have heard, you are sitting in this Court as a convicted terrorist, and that's the way it is. . . . [T]his Court must give consideration to deterrence at large"—the Court found the district court's explanation was sufficient to show that it considered the relevant sentencing factors.

Violation of Fed. R. Crim. P. 32(i) and Due Process Clause: Regarding Mr. Masood's claim that the district court violated Fed. R. Crim. P. 32(i) and the Due Process Clause of the Fifth Amendment by deciding all the disputed sentencing guidelines issues prior to the sentencing hearing, the Court found no error existed. The Court opined that the district court's announcement of preliminary findings about the guidelines range issues and allowing Mr. Masood's counsel to be heard on those issues, did not establish the district court "had already made up its mind" and that the sentencing hearing was meaningless. The Court noted that the district court invited Mr. Masood to make "comments . . . before penalty [was] imposed," which Mr. Masood accepted with a lengthy allocution, and thus there was no plain error violation of Rule 32(i) or the Due Process Clause. Affirmed.

***US v. Thompson*, 133 F.4th 779 (Apr. 3, 2025)**

Joseph Thompson was charged with second-degree murder after he repeatedly stabbed Marty LaRoche, who later died from his injuries. Following a jury trial, Mr. Thompson was convicted of voluntary manslaughter, in violation of 18 USC. §§ 1153 and 1112.

On appeal, Mr. Thompson argued that the district court erred in denying his proposed self-defense jury instruction based on South Dakota law and that the evidence was insufficient to support his conviction.

Proposed Self-Defense Instruction: Regarding the denial of Mr. Thompson's proposed self-defense instruction, the Eighth Circuit held that the district court did not abuse its discretion in rejecting his proposed self-defense instruction because it was within the district court's discretion to provide the jury with the Eighth Circuit Model Jury Instruction on self-defense.

Looking at its prior decisions, the Court explained that it has previously said that "federal courts usually look to state law to define the elements of self defense," *US v. Greer*, 57 F.4th 626, 629 (8th Cir. 2023), meaning that principle does not apply to every case. The Court also noted that *Greer* was a Guidelines case that ultimately held that there was no evidence of self-defense by the defendant; it did not involve the use of self-defense to a federal charge to second degree murder, like *US v. Milk*, 447 F.3d 593 (8th Cir. 2006) did. The Court opined that *Milk* makes clear that "the common law definition of self-defense" applies to "self-defense claims to murder charges under § 1111(a)." Further, the Court noted that in *Milk* and other cases where the defendants were charged with federal offenses, like Mr. Thompson, it upheld the same model self-defense instruction that the district court gave here.

Sufficiency of the Evidence: Mr. Thompson argued that the government failed to prove beyond a reasonable doubt that he did not act in self-defense in the stabbing death of LaRoche.

In support of this argument, Mr. Thompson contended that the evidence established that "[LaRoche], irate, armed with a firearm, and under the influence of methamphetamine, forcibly removed the storm window to [Grooms's] bedroom window, opened the window, reached inside to pull the window treatment aside, and screamed at [Grooms] to open the door." He also claimed that Grooms feared LaRoche "because she had been in an abusive relationship with [him], knew [him] to be jealous, and believed [he] had seen [Thompson], whom [LaRoche] hated." He also maintained that he "went outside and ultimately stabbed [LaRoche] and told [Grooms] that he had done so because [LaRoche] was trying to fight him."

Viewing the evidence in the light most favorable to the jury's verdict, the Court concluded that the government satisfied its burden to prove that Mr. Thompson was not acting in self-defense. The Court first explained that the government produced evidence that Mr. Thompson was inside Charmayne Grooms's (LaRoche was the father of Groom's kids) home when LaRoche began pounding on the bedroom window. Grooms never told Mr. Thompson that she was afraid of LaRoche, she didn't ask Thompson to go outside and get rid of LaRoche or to protect her from LaRoche. The Court next pointed out that Mr. Thompson went outside to confront LaRoche and had to unlock two doors to get outside to reach LaRoche. The Court also explained that an eyewitness testified that he saw "the big guy (Mr. Thompson) punch the little guy (LaRoche) about "five" times." The Court also found it significant that Mr. Thompson stabbed LaRoche multiple times and that "Thompson did not stay to ensure [Grooms], or her children, were safe." And

though LaRoche had a toxic level of methamphetamine in his system and an unloaded firearm was found in his belongings, there was no evidence that Mr. Thompson knew that LaRoche had used methamphetamine or that he had any firearm when Mr. Thompson stabbed LaRoche repeatedly.
Given that "the evidence established that Thompson was the person who left the safety of a locked residence, approached [LaRoche], brandished a weapon, and proceeded to stab" LaRoche multiple times, the Court held that sufficient evidence exists that Mr. Thompson was not acting in self-defense. Affirmed.

***US v. Gonzalez*, 133 F.4th 819 (8th Cir. Apr. 4, 2025)**

Jose Rolando Gonzalez conditionally pled guilty to conspiracy to distribute a controlled substance in violation 21 USC. § 841, reserving the right to appeal the denial of his suppression motion.

On September 25, 2022, someone reported to the Moody County Sheriff's Office that "a distracted or a drunk driver" was "heading north on I29" near exit 108. The car was identified as "a black, Volvo sedan of some kind," that "went onto the side on the shoulder and then went over into the left lane." A few minutes later, someone reported to Brookings Police Department that "a black car" with "black windows tinted, like you can't even see in the car" was "heading north" on I-29 by mile marker 127 that was "all over the road."

Two minutes after that call, the Brookings Police Department issued a radio dispatch to all officers, informing them of "a black car weaving from grass line to grass line" that had been spotted at "I-29 mile marker 127 northbound."

South Dakota State Trooper Mitchell Lang was stationed near exit 132 on I-29 north and radioed back that "I've got a black Volvo" with California plates that "just took . . . exit 132." Lang followed the car to a gas station. Brookings Police Officer Seth Bonnema also drove to the gas station and pulled in behind the black Volvo.

The driver, Jose Rolando Gonzalez, and the passenger, Marquez Gonzalez, were standing outside the Volvo. Bonnema told Mr. Gonzalez that he was "stopping [them]" because "some anonymous person called out on the interstate that you're all over the road." Mr. Gonzalez replied, "Oh, I might have been, yeah, I'm tired." During the stop, Bonnema also asked if he could check Mr. Gonzalez's identification and where he was coming from. Mr. Gonzalez replied that he was coming from California and that he was "going to the Iowa State Fair." Bonnema told Mr. Gonzalez that "You're past Iowa," and Mr. Gonzalez said, "I'm going down, yeah." Bonnema replied, "Well, you were going north on the Interstate. Iowa is . . . an hour and a half south of here." Bonnema continued to ask Mr. Gonzalez questions about the Iowa State Fair after Mr. Gonzalez provided his identification because he "thought it was odd that the [S]tate [F]air would be held in late September, when state fairs are usually held within the summer period."

After questioning passenger Marquez, who said that he and Mr. Gonzalez were going to Minnesota before traveling back to the Iowa State Fair, Bonnema walked his K-9 around the Volvo. The K-9 indicated to the odor of drugs near the driver's side door. When asked were there any drugs in the car, Marquez replied that there was probably some marijuana.

The officers then searched the car and found "approximately 32 pounds of methamphetamine," cash, drug paraphernalia, and cell phones.

Mr. Gonzalez filed a motion to suppress the evidence, arguing that the officers lacked reasonable suspicion to stop his car and that they unlawfully extended the stop. The district court denied the motion.

On appeal, Mr. Gonzalez argued that the officers lacked reasonable suspicion for a *Terry* stop because they lacked sufficient information to believe his car was the black car reported to be driving erratically on I-29.

Reviewing the factual findings for clear error and the legal conclusions de novo, the Eighth Circuit disagreed—concluding that the officers had reasonable suspicion to conduct the stop based on the two 911

reports of a black car driving erratically on I-29. The Court found that the consistent location of the car, taken together with the corroboration of the color and erratic driving, permitted a reasonable inference that the tips were about the same vehicle and that the officers could reasonably infer that the vehicle stopped was the subject of the complaints.

The Court also found that the stop was not unlawfully prolonged given Mr. Gonzalez's suspicious and contradictory statements about his travel plans. The Court noted that Mr. Gonzalez's stated destination of Iowa contradicted his location—already about an hour and a half north of Iowa and headed further north—and that his explanation that the two men were headed to the Iowa State Fair was suspicious because it was late September. The Court also noted that Marquez's statement that they were going to Minnesota first did not match Mr. Gonzalez's story. Taken all that together, the Court held that Bonnema had reasonable suspicion to expand the scope of the stop to walk his K-9 around Mr. Gonzalez's car. Affirmed.

***US v. Chambers*, 133 F.4th 812 (8th Cir. Apr. 4, 2025)**

Following a jury trial, Quincy Chambers was convicted of being a felon in possession of ammunition in violation of 18 USC. §§ 922(g)(1), after Nairobi Anderson, the mother of his child, was shot in the chest and struck in the head with a gun by a man wearing a ski mask.

In sentencing Mr. Chambers, the district court found that the object of the offense was first degree murder, setting Mr. Chamber's base offense level at 33. The district court also applied a 3-point enhancement under USSG § 2A2.1(b)(1) for Anderson's injuries and another 3-point enhancement under USSG §3C1.2 for obstructing justice. It was also determined that Mr. Chambers qualified for an enhanced sentence under the Armed Career Criminal Act (ACCA) based in part on a finding that his Arkansas offense for domestic battering in the second degree qualified as a violent felony.

On appeal, Mr. Chambers challenged his conviction on the grounds that the evidence was insufficient to prove that he shot Anderson and therefore possessed ammunition; that admission of text messages and still shots from a video visitation between Anderson and him were irrelevant and overly prejudicial; that Anderson's statements identifying him as the shooter was inadmissible hearsay; and that the district court violated his 6th Amendment right by forcing him either to proceed with conflicted counsel or to represent himself. Mr. Chambers also challenged his sentence on that grounds that the district court erroneously applied the cross-reference to attempted murder and the enhancement for severity of injuries, obstruction of justice, and the ACCA.

Insufficiency of the Evidence: Reviewing Mr. Chamber's insufficiency of the evidence claim de novo, the Eighth Circuit concluded that the jury had sufficient evidence to find Mr. Chamber's committed the shooting. In so concluding the Court noted the following evidence: body-camera footage of Anderson's repeated identifications of Mr. Chambers at the scene; multiple witnesses hearing these identifications; a car associated with Mr. Chambers fleeing the scene; messages from Mr. Chambers saying it won't "happen" again; and Mr. Chambers suggesting marriage to silence Anderson.

Irrelevant and Overly Prejudicial Evidence: Reviewing this claim for plain error because Mr. Chambers did not object on Fed. R. Evid. 403 grounds at trial, the Court found none, explaining that the messages and images were probative of Anderson's credibility—a key issue—and their prejudicial effect was lessened in the context of Mr. Chambers shooting the mother of his child with the child present—an egregious act at the core of the case.

Hearsay Evidence: As to Mr. Chamber's claim that Anderson's statements identifying him as the shooter were not excited utterances and thus inadmissible hearsay because too much time had lapsed between the shooting and the statements, the Court disagreed. The Court noted that the body-camera footage shows Anderson under stress—shot and repeatedly asking "am I going to be okay"—while making the statement about 10 minutes after the shooting.

Violation of 6th Amendment Right: Mr. Chambers argued a 6th Amendment violation because he was forced to proceed with conflicted counsel—i.e., his lawyer had previously represented a government

witness—or represent himself. Reviewing this claim de novo, the Court explained that "[t]he mere fact that a trial lawyer had previously represented a prosecution witness does not entitle a defendant to relief" and that "[t]he defendant must show that this successive representation had some actual and demonstrable adverse effect on the case, not merely an abstract or theoretical one." Because Mr. Chambers identified no actual adverse effect from his lawyer's prior representation, the Court found that he failed to show prejudice.

Attempted Murder Cross Reference: Mr. Chambers argued that the district court erroneously applied the attempted first-degree murder cross reference under §2A2.1 because he lacked the requisite intent, i.e., that he acted with malice aforethought and premeditation. The Court rejected this argument, explaining that attempted first-degree murder "requires the specific intent to kill" and "[a]mple case law shows that shooting at a particular person, or a group of people, demonstrates a specific intent to kill." The Court found that Mr. Chambers demonstrated a specific intent to kill by shooting Anderson in the chest, striking her on the head, and, after a pause, firing multiple shots at an apartment where she and their child took cover.

Severity of Injuries Enhancement: Mr. Chambers argued that Anderson's injuries warranted only a 2-point enhancement for a "serious bodily injury" rather than a 3-point enhancement for a bodily injury between "serious" and "permanent or life threatening." The Court concluded that the district court did not clearly err by finding Anderson's injuries—requiring staples in her head, surgery, and a month hospitalization—were more than serious.

Obstruction of Justice Enhancement: The Court concluded that Mr. Chamber's "scheme" to prevent Anderson from testifying—i.e., sending test messages suggesting that he and Anderson get married so the government could not "use" her against him—"amounts to aiding and abetting the obstruction of justice for purposes of § 3C1.1," which requires that the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice."

ACCA Enhancement: Mr. Chamber argued that his Arkansas offense for domestic battering in the second degree was not conviction because he pled nolo contendere. He also argued that this offense was not "violent" because it lacked the requisite mens rea.

In rejecting Mr. Chamber's first claim, the Court explained that Arkansas state law treats nolo contendere pleas as convictions. So, by pleading nolo contendere, Mr. Chambers was convicted of domestic battery.

In addressing Mr. Chamber's second claim, the Court noted that Mr. Chamber's charge did not identify which subsection he violated. But looking to the state plea hearing transcript in which the state court stated that "[t]he State alleges that . . .with the purpose of causing physical injury to a family or household member, you caused physical injury to [the victim]," the Court concluded that Mr. Chambers was convicted of purposeful domestic battery, a predicate crime and ACCA predicate offense. Affirmed.

***US v. Cheshier*, 134 F.4th 534 (8th Cir. Apr. 10, 2025)**

Following a jury trial, Armando Cheshier was convicted of distribution of a controlled substance resulting in serious bodily injury (Count 1) and possession of a controlled substance with intent to distribute (Counts 2 and 3), in violation of 21 USC. §§ 841(a)(1) and 841(b)(1)(C). Mr. Cheshier was sentenced to a total term of 240 months' imprisonment.

On appeal, he challenged his conviction on the grounds that the district court erred in rejecting his guilty plea; that the district court erred in instructing the jury; and that the evidence was insufficient to sustain his conviction.

Rejecting Guilty Plea: Reviewing for plain error because Mr. Cheshier didn't object in the district court, the Eighth Circuit found none. The Court explained that "[t]here is 'no absolute right to have a guilty plea accepted' and a district court 'may reject a plea in exercise of sound judicial discretion.'" "The discretion to reject a tendered guilty plea is most often exercised when the defendant cannot or will not provide the adequate factual basis for the plea." When Mr. Cheshier attempted to plead guilty to Count 1, distribution of a controlled substance resulting in serious bodily injury, he explicitly denied distributing fentanyl to

Victim 1, who died. Thus, the Court held that the district court did not plainly err in rejecting Mr. Cheshier's guilty plea.

Instructing the Jury: Reviewing for abuse of discretion, the Court rejected Mr. Cheshier's claim that the district court did not err in instructing the jury on intentional distribution of a controlled substance and in declining to give his instruction. In rejecting this argument, the Court explained that to convict for distribution of a controlled substance resulting in death or serious bodily injury, the government must prove that: "(1) the defendant knowingly or intentionally distributed a drug; and (2) the victim died or sustained a serious bodily injury caused by the use of the drug."
The district court instructed the jury: "For you to find Armando Angel Cheshier guilty of the offense of distribution of fentanyl resulting in death as charged in Count 1 of the Indictment, the prosecution must prove the following three essential elements beyond a reasonable doubt: One, that on or about September 29, 2021, Cheshier knowingly or intentionally transferred fentanyl to Victim #1" Because the district court's instruction was a correct statement of the law, the Court held the district court did not abuse its discretion in instructing the jury.

Sufficiency of the Evidence: The Court also rejected Mr. Cheshier argument that the government failed to prove beyond a reasonable doubt that he knowingly or intentionally distributed fentanyl—concluding there was sufficient evidence for the jury to reasonably conclude that Mr. Cheshier knowingly or intentionally distributed fentanyl to Victim 1. The Court noted that the jury heard evidence from Mr. Cheshier's 911 call that Victim 1 grabbed Xanax and fentanyl from his hand and ingested them. They saw body camera video from two responding officers and an investigating officer where Cheshier stated that he suggested to Victim 1 that they do drugs, that he offered her pills from his bag of Xanax and fentanyl, that she grabbed them from him, and that she took too many. There were text messages between Victim 1 and Mr. Cheshier in which they discussed distributing fentanyl and Xanax.
The Court also found that the evidence showed that Victim 1's death resulted from the fentanyl she received from Cheshier—noting Dr. Kenneth Snell, a forensic pathologist and the coroner, testimony that the fentanyl in Victim 1's system was "in and of itself" fatal and that based on Victim 1's prior history of meth usage and the lack of evidence of her meth use between midnight and 3 a.m., she could have survived the meth in her system, but not the fentanyl. The Court found that Dr. Snell's testimony was sufficient to show that the fentanyl Victim 1 obtained from Cheshier was independently sufficient to kill her. The Court further rejected Mr. Cheshier argument the evidence does not show that the fentanyl alone caused Victim 1's death—explaining that that is not required. The Court thus held that the evidence was sufficient for a reasonable juror to conclude that Victim 1's death resulted from Mr. Cheshier's knowing or intentional transfer of fentanyl to her. Affirmed.

***US v. Munoz*, 134 F.4th 539 (8th Cir. Apr. 15, 2025)**

Ashley Chacon pled guilty to possession with intent to distribute 50 grams or more of methamphetamine, and Emiliano Nava Munoz and Valentin Nava Munoz pled guilty to conspiracy to distribute, and to distribution of 50 grams or more of meth. The district court sentenced Ms. Chacon, Mr. Emiliano, and Mr. Valentin to 60, 280, and 180 months in prison, respectively.
On appeal, Ms. Chacon appealed the denial of her motion to suppress evidence from a car search, and Mr. Emiliano and Mr. Valentin appealed their sentences.

Suppression Issue: Suspecting drug traffic, an officer stopped Ms. Chacon for speeding. During the stop, the officer questioned Ms. Chacon about her rental car, travel plans, etc. Within about 5 minutes and 20 seconds, another officer arrived, and his drug-detection dog performed an open-air sniff. The dog alerted, and Ms. Chacon stated that the car contained a "little bit" of cocaine. During a search of the car, officers found 50,000 grams of meth.
Ms. Chacon argued that the stop was impermissibly extended. Reviewing the district court's findings of fact for clear error and whether there was a 4th Amendment violation de novo, the Eighth Circuit concluded that the stop was not impermissibly extended and did not violate the 4th Amendment. In so finding, the

Court noted the officer's questions were "ordinary inquires," and he worked to address the traffic violation before and during the sniff, taking a reasonable time to complete the related tasks.
The Court also rejected Ms. Chacon argument that the dog's contact with the car was an unlawful trespass, thus an unreasonable search. In rejecting this argument, the Court explained that "[t]he use of a well-trained narcotics-detection dog . . . during a lawful traffic stop, generally does not implicate legitimate privacy interests," and "[a]bsent police misconduct, the instinctive actions of a trained canine do not violate the Fourth Amendment." Because the dog acted instinctively, the Court concluded that his contact with the car did not violate the 4th Amendment.

Sentencing Enhancements: Mr. Emiliano argued that the district court erred in applying a 2-level enhancement under USSG §2D1.1(b)(12) for maintaining the premises of King Avenue and Amherst. He specifically argued that he did not maintain or control access to Amherst Street. The Court disagreed. The Court explained that "[a]mong the factors the court should consider in determining whether the defendant 'maintained' the premises are (A) whether the defendant held a possessory interest in (e.g., owned or rented) the premises and (B) the extent to which the defendant controlled access to, or activities at, the premises." The Court also noted Mr. Emiliano "freely accessed the property and visited the "stash house" immediately before multiple controlled buys to pick up drugs." As such, the Court held that the district court did not clearly err by concluding Mr. Emiliano "most actively control[led] and access[ed]" Amherst Street; thus, he "maintained drug premises at two locations; not only the Amherst location, but also his own residence on King Avenue."

Mr. Emiliano also argued that the district court erred in applying a 3-level role enhancement under USSG §3B1.1(b), which applies if the defendant was a manager or supervisor and the criminal activity involved five or more participants or was otherwise extensive. The Court explained that the "[f]actors the court should consider include the exercise of decision-making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others." The Court further noted that evidence of Mr. Emiliano's role included an undercover officer's testimony that Mr. Emiliano directed the "higher-level" agenda; recordings of him trying to recruit accomplices; and a shoebox of cash with a note allocating a larger share of the fruits to him. The Court thus held that the district court did not clearly err by finding Mr. Emiliano "was a manager or supervisor of a criminal activity that involved five or more participants."

Mr. Valentin also argued that the district court erred in applying a role enhancement under §3B1.1(b). In rejecting this argument, the Court noted that Mr. Valentin directed Mr. Emiliano to complete a transaction, advising him about the amount of meth and meeting location and that he "repeatedly tried to recruit others into the offense." The Court thus held that the district court appropriately applied the enhancement. Affirmed.

***US v. Grubb*, --- F.4th ---- 2025 WL 1154495 (8th Cir. Apr. 21, 2025)**

Grubb was charged with unlawful possession of a firearm as an unlawful user of a controlled substance, in violation of 18 USC. § 922(g)(3). He filed a motion to dismiss the indictment on the ground that the statute, on its face and as applied to him, violated his 2nd Amendment right as construed in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen,* 597 US 1 (2022). Specifically, he argued that § 922(g)(3) "should not apply to a person like [Grubb] who is a user of marijuana, and not a more addictive, dangerous controlled substance." The district court concluded that Mr. Grubb couldn't challenge the constitutionality of the statute as applied to him in a pretrial motion. The district court also ruled that the statue was constitutional on its face but held in abeyance Mr. Grubb's as-applied challenge pending trial.
After the district court rejected his request for an evidentiary hearing as it related to his as-applied challenge because it determined that if he sought to maintain an as-applied challenge "then he must await presentation of evidence at trial," Mr. Grubb entered a conditional guilty plea before a magistrate judge and reserved his

right to appeal the denial of the motion to dismiss. In his plea, he stipulated to the bare minimum facts required to establish the elements of the offense, but he did not "stipulate to the government's case."

Reconsidering its initial ruling on the motion to dismiss, the district court requested supplemental briefing on whether to resolve Mr. Grubb's motion before trial. The district court concluded that because Mr. Grubb stipulated to the facts that satisfied the elements of the offense, it could resolve his challenge to the constitutionality of the statute as applied to him. In accordance with Fed. R. Crim. P. 12(d), the district court stated its essential findings on the record, concluded that § 922(g)(3) was constitutional as applied to Mr. Grubb, denied the motion to dismiss the indictment, and accepted Mr. Grubb's conditional guilty plea.

On appeal, Mr. Grubb maintained that § 922(g)(3) is unconstitutional on its face and as applied to him. The Eighth Circuit concluded that the facial challenge was foreclosed by precedent. As to the as-applied challenge, the Court first explained that under Fed. R. Crim. P. 12(d), the district court must resolve every pretrial motion before trial "unless it finds good cause to defer a ruling" and deferral will not "adversely affect a party's right to appeal." The Court then concluded that the district court's ruling was premature because Mr. Grubb's challenge to the indictment could not properly be resolved without a trial on the merits. In so concluding, the Court noted there's no procedural in federal criminal cases equivalent to the motion for summary judgment in civil cases, and the government has no duty to reveal all of its proof before trial. The Court explained that "Rule 12 permits pretrial resolution of a motion to dismiss the indictment only when 'trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense.'" So, "[t]o warrant dismissal, it must be clear from the parties' agreed representations about the facts surrounding the commission of the alleged offense that a trial of the general issue would serve no purpose." And because it is possible that the government may be required to establish additional facts beyond the elements to defeat a constitutional challenge, the district court cannot say definitively that "trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense." The Court thus concluded that the district court was correct in its initial ruling that if Mr. Grubb seeks to maintain an as-applied challenge to the constitutionality of § 922(g)(3), then he must await the presentation of evidence at trial.

The Court also stated that if the parties seek to present evidence bearing on the constitutional question that is inadmissible at the trial, then the district court has mechanisms to receive that evidence outside the presence of a jury or separate from the trial of the charge.
In light of its decision in US *v. Turner*, 842 F.3d 602 (8th Cir. 2016)—where the Court concluded that where a district court resolved a pretrial motion on the merits when it should have deferred a ruling until trial, the proper disposition of the defendant's appeal was a remand for further proceedings— the Court remanded so that Mr. Grubb may choose either to adhere to his guilty plea and forego appellate review or move to vacate his guilty plea and proceed to trial on the original charge. The Eighth Circuit reversed the district court's order denying the motion to dismiss, vacated the judgment, and remanded for further proceedings.
Stras, concurred only in the judgment—noting, "I will not join any opinion treating the Second Amendment as a 'second class right, subject to an entirely different body of rules.'"

***US v. Loftin*, --- F.4th ---- 2025 WL 1154493 (8th Cir. Apr. 21, 2025)**

Loftin was charged with unlawful possession of a firearm as an unlawful user of a controlled substance, in violation of 18 USC. § 922(g)(3). He filed a motion to dismiss the indictment on the ground that the statute violated his 2nd Amendment right to possess the gun.
The district court concluded that Mr. Loftin's facial attack on the constitutionality of § 922(g)(3) was foreclosed by *US v. Seay*, 620 F.3d 919 (8th Cir. 2010), and to the extent he properly raised an as-applied challenge, such a challenge would be premature if raised in a pretrial motion and would be "incapable of resolution without a trial on the merits," citing Fed. R. Crim. P. 12(b)(1). The district court also told Mr. Loftin that it would "defer ruling on any as-applied challenge pending trial." Mr. Loftin then entered a conditional guilty plea, reserving his right to appeal the court's denial of his motion.
On appeal, Mr. Loftin maintained that § 922(g)(3) is unconstitutional as applied to him.

The Eighth Circuit concluded that there was no merit to Mr. Loftin's appeal because the district court did not rule on his as-applied challenge to the statute because the issue could not be determined without a trial on the merits, and he waived the as-applied challenge by pleading guilty—explaining that a defendant who pleads guilty conditionally "is not allowed to take an appeal on a matter which can only be fully developed by proceeding to trial."
The Eighth Circuit affirmed.

Stras, concurred in the judgment—noting that the case "should not have been hard" because Mr. Loftin's failure to "expressly reserve[]" the right to appeal his as-applied challenge is what dooms his appeal, not his failure to take it to trial.

***US v. Clark*, --- F.4th ---- 2025 WL 1187183 (8th Cir. Apr. 24, 2025)**

Mario Clark pled guilty to several drug-trafficking offenses, including a conspiracy to distribute cocaine between October 2019 and February 2023. The district court ultimately sentenced him to 86 months.
In calculating Mr. Clark's guidelines range at 108 to 135 months' imprisonment, the district court found that he was responsible for 5,017.8 grams of cocaine. In determining the drug quantity, the district court found that Mr. Clark made at least eleven trips to Chicago to obtain at least two ounces of cocaine on each trip, relying on paragraph 29(a) of the PSR, which recounted that Mr. Clark made eleven trips to Chicago between December 1, 2022, and January 31, 2023, and undisputed paragraph 17 of the PSR that alleged that "[f]urther investigation revealed that Clark traveled to the Chicago, Illinois, area to purchase cocaine and distributed it in the Quad Cities area including Davenport, Iowa. Clark distributed multi-ounce quantities (or more)." Based on eleven trips and multi-ounce quantities per trip, the district court attributed 22 ounces, or 623.7 grams, of cocaine. The district court also found that Mr. Clark was responsible for four kilograms of cocaine that he received from a supplier, replying on paragraph 30 of the PSR, which recounted Mr. Clark's disclosure to a confidential witness: "In early February 2023, CW1 provided additional information regarding Clark, including that Clark typically obtained two kilograms of cocaine at a time. CW1 said Clark disclosed he had recently been fronted two kilograms of cocaine with a debt of $46,000, or $23,000 per kilogram. Clark was able to immediately sell one kilogram for $30,000 to one customer. A second customer paid Clark $15,000 and transferred the title to a silver or gray Jeep (unknown model) with low mileage valued at more than $15,000. Clark returned to his supplier within two days of the front and received another two kilograms. Clark intended to sell the Jeep for approximately $15,000."
Relying on undisputed facts that Mr. Clark distributed cocaine that was stored at his residence in controlled transactions in October 2019 and November 2022, the district court also applied a 2-level enhancement for maintaining a drug premises under USSG §2D1.1(b)(12).
On appeal, Mr. Clark argued that the district court improperly relied on disputed facts in the PSR to determine drug quantity and erred in finding that he maintained a premises for the purpose of distributing cocaine.
Specifically, Mr. Clark disputed the district court's finding that he made at least eleven trips to Chicago to obtain at least two ounces of cocaine on each trip because he did not admit that he trafficked at least two ounces of cocaine on each trip to Chicago. In support of his claim, Mr. Clark cited his objection to paragraph 29(a) in which he admitted taking the eleven trips but denied "that each occasion of travel was solely for the purchase of cocaine," because "[t]he many trips to Chicago were to visit his Aunts, Uncles, and Cousins who live there, particularly around the holidays."
The Eighth Circuit concluded that the district court did not clearly err in attributing drug quantities for each trip to Chicago—explaining that an objection that each trip was not "solely" for the purchase of cocaine does not dispute that each trip was for the purchase of cocaine.
Mr. Clark also argued that he objected to the confidential witness' reported statements and that it was error for the district court to rely on them. In concluding that the district court did not err in relying on those statements, the Court pointed out that, as to paragraph 30, Mr. Clark disputed only the amount of cocaine that he "typically" obtained at one time, he did not object to the factual allegations that he obtained two kilograms of cocaine on two particular occasions.
Further, Mr. Clark argued that the district court erred in apply a 2-level enhancement for maintaining a drug premises under §2D1.1(b)(12), which applies to a defendant "who knowingly maintains a premises . . . for

the purpose of . . . distributing a controlled substance, including storage of a controlled substance for the purpose of distribution."
The Court concluded that the district court did not clearly err in finding that Mr. Clark maintained his residence for the purpose of distributing cocaine—noting that Mr. Clark distributed cocaine in his residence to a confidential informant in 2019; that a search of the residence revealed money that had been used in the controlled transaction stored with an additional $19,500 in cash; and that investigators witnessed Mr. Clark distribute cocaine in November 2022 shortly after entering and exiting the same residence, and they seized $3,000 in cash from his residence in February 2023. All things considered, the Court found that the district court reasonably could infer that the cash was the proceeds of similar drug transactions conducted with drugs stored at Mr. Clark's residence and that the amount of cash seized from the residence and the length of time over which the controlled transactions and seizures took place provided a sufficient basis for the district court's finding that Mr. Clark used his home for substantial drug-trafficking activity. Affirmed.

***US v. Armond*--- F.4th ---- 2025 WL 1187186 (8th Cir. Apr. 24, 2025)**

Dai-Kwon Armond pled guilty to distributing a controlled substance. Based on a total offense level of 11 and a criminal history category of I, the district court calculated Mr. Armond's guidelines range at 8-14 months. After considering the 18 USC. § 3553(a) factors, the district court sentenced him to 24 months' imprisonment, followed by a 3 years' supervised release.
On appeal, Mr. Armond argued that he was entitled to a two-level reduction in his offense level under the safety valve provision in USSG §5C1.2, which allows a district court to impose a sentence "without regard to a statutory minimum" in cases involving "first time non-violent drug offenders who meet certain requirements." The only requirement that was at issue is the final one, which requires that "not later than the time of the sentencing hearing, the defendant . . . truthfully provide[] to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." The "fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information [does] not preclude a determination by the court that the defendant has complied with this requirement." Since Mr. Armond did not timely object in the district court, the Eighth Circuit reviewed the district court's denial of the safety valve reduction for plain error and found none. While Mr. Armond acknowledged that he neither participated in a proffer interview nor disclosed any information he had concerning his offense, he argued that he was entitled to the safety valve reduction because he never had any information to provide. The Court disagreed—explaining that a defendant who merely makes a bald assertion like this falls far short of satisfying his burden of showing that he is affirmatively entitled to the safety valve reduction. The Court opined that to hold otherwise would permit a defendant to claim entitlement to the safety valve reduction by refusing to speak with the Government and assert after the fact that he never had any information to provide and that would render § 5C1.2(a)(5)'s "all information" requirement a nullity. The Court thus concluded that the district court did not plainly err in denying the safety valve reduction to Mr. Armond.

Mr. Armond also argued that his sentence was substantively unreasonable. Specifically, he argued that the district court abused its discretion by giving insufficient weight to his lack of criminal history. The Court disagreed—explaining that the district court noted that Mr. Armond's lack of criminal history was a "significant mitigator," but notwithstanding this "significant mitigator," the district court determined that an upward variance was warranted due to several aggravating factors. In particular, the district court noted that Mr. Armond's drug distribution offense involved both heroin and fentanyl and that Mr. Armond had sought to expand his drug distribution operations, planned extensively to avoid detection by law enforcement, and conducted drug transactions in locations which were a "recipe for disaster." Giving "due deference to the district court's decision," the Court concluded that the district court did not commit a clear error of judgment in determining that the aggravating factors outweighed the mitigating and thus did not abuse its discretion. Affirmed

***US v. Julian Bear Runner* --- F.4th ---- 2025 WL 1187173 (8th Cir. April 24, 2025)**

Julian R. Bear Runner, an enrolled member of the Oglala Sioux Tribe (OST), served as President from December 2018 through December 2020. Under the Tribe's travel policies, travelers were required to

complete a travel authorization form and submit a travel report upon their return. A travel specialist advanced the full amount of the estimated expenses to the traveler, and if the traveler didn't make the trip, they had to return the unused funds to the Tribe.

While President, Mr. Bear Runner pressured travel specialists to approve forms, submitted fraudulent travel requests, and ultimately embezzled travel funds. With advance payments of over $80,000, he traveled to and gambled at the Prairie Wind Casino in Pine Ridge, South Dakota.

Following a jury trial, Mr. Bear Runner was convicted of wire fraud, larceny, and embezzlement and theft from an Indian Tribal Organization and was sentenced to 22 months' imprisonment. He was also ordered to pay $82,484 in restitution.

On appeal, Mr. Bear Runner argued that the government failed to prove the requisite criminal intents for his offenses. Specifically, Mr. Bear Runner argued that his intent to defraud the Tribe was negated because "per [tribal] policy," he "would have expected any overpayments to be withheld from his pay." That is, he expected that his failure to file travel reports would result in a payroll deduction; thus, disproving any intent to defraud, steal, or embezzle funds.

The Eighth Circuit disagreed, explaining that it was Mr. Bear Runner—not the Tribe— who was responsible for ensuring funds not used for official travel were returned to the Tribe and that he never repaid any of the advance payments. The Court also opined that there was evidence of his intent to defraud—noting that he often submitted requests for travel to two different destinations at the same time, receiving funds for both, and despite requesting and receiving funds to travel to Nebraska, New Mexico, Montana, Ohio, South Carolina, Arizona, New York, and California, he exclusively visited the Prairie Wind Casino in South Dakota.

The Court further opined that Mr. Bear Runner's treatment of the travel specialist and his administrative assistant further defeats his argument. In particular, evidence suggested he used his position as Tribe president to manipulate the approval process in his favor—pressuring staff to fast-track approvals and to ignore red flags. He also visited the travel office after hours, and "hover[ed] over" specialists, rushing them to approve his requests. His administrative assistant also testified that she was asked to close out travel reports without the required receipts and that he directed her to draft memos justifying his travel. The Court thus held that sufficient evidence supported the jury's verdict that Mr. Bear Runner intended to defraud, steal, and embezzle.

Mr. Bear Runner also argued that the district court procedurally erred in sentencing him by "misconstru[ing] his statement to the court as indicative of a lack of acceptance of responsibility." The Court rejected this argument, pointing out that Mr. Bear Runner's own brief acknowledges a "refusal to accept responsibility" and that Mr. Bear Runner pled not guilty, explicitly told the court he did not accept responsibility, and shifted blame to employees in the accounting department for his actions. As such, the Court concluded that the district court did not procedurally err in sentencing Mr. Bear Runner.

Mr. Bear Runner further argued that the district court substantively erred in sentencing him by failing to consider sentencing disparities among similarly situated defendants. The Court rejected this argument, concluding that the district court acted within its discretion in considering similarly situated defendants and determining that Mr. Bear Runner's individual circumstances warrant a different outcome. Affirmed.

***US v. Madden*, --- F.4th ----, 2025 WL 1199346 (8th Cir. Apr. 25, 2025)**

In a diversion agreement, Matthew Madden stipulated to a number of facts, including that Mr. Madden discarded a fanny pack he was carrying while fleeing; and when officers searched the fanny pack and Mr. Madden's person, they discovered a small plastic bag containing 1.23 grams of a green leafy substance, a loaded .40 caliber semi-automatic handgun, and an extended round magazine containing twenty-seven live .40 caliber rounds. Mr. Madden also conceded he knew there was marijuana and a gun inside the fanny pack, and that he habitually used marijuana since he was about five years old, smoking approximately one to two marijuana cigarettes a day.

Because Mr. Madden violated the diversion agreement, the government reinitiated prosecution and used the stipulated facts against Mr. Madden in a bench trial. After the bench trial, Mr. Madden was convicted of unlawfully possessing a firearm as an unlawful drug user in violation of 18 USC. § 922(g)(3). Mr. Madden moved for a judgment of acquittal, arguing the government presented insufficient evidence to sustain a conviction and that § 922(g)(3) is unconstitutionally vague on its face and as applied to him.

The district court denied the motion, finding precedent dictated § 922(g)(3) was not unconstitutionally vague on its face and Mr. Madden "failed to show § 922(g)(3) is vague as applied to his conduct because he conceded that he knew he was an 'unlawful user' of a controlled substance in his diversion agreement."
On appeal, Mr. Madden argued that the district court erred in its denial of his motion for judgment of acquittal because § 922(g)(3) is unconstitutionally vague in violation of the 5th Amendment and violates the 2nd Amendment as applied to him.
Reviewing Mr. Madden's 5th Amendment vagueness claim de novo, the Eighth Circuit explained that it has observed that without a saving construction, § 922(g)(3) may be unconstitutionally vague as written. "Because the term 'unlawful user' 'runs the risk of being unconstitutionally vague,' the Court interprets it to 'require a temporal nexus' between the gun possession and regular drug use." With this narrowing construction, the Court has rejected facial Fifth Amendment void-for-vagueness challenges to § 922(g)(3) but have "left the door open for as applied challenges[.]"
The Court noted, as relevant here, that it has determined a defendant's as applied vagueness challenge failed when he "admitted that he frequently used marijuana and knew that he was a marijuana user when he possessed the gun." After noting that Mr. Madden "admitted that he frequently used marijuana and knew that he was a marijuana user when he possessed the gun[,]" the Court concluded that "he has failed to show that § 922(g)(3) is unconstitutionally vague as applied to him[.]" Thus, Mr. Madden's Fifth Amendment vagueness challenge fails.
To the extent Mr. Madden argued that § 922(g)(3) violates the 2nd Amendment as applied to him, the Court reviewed the claim for plain error and found none—explaining that while, under the 2nd Amendment, the constitutionality of § 922(g)(3) as applied to certain users of marijuana may be a valid question, Mr. Madden failed to show the district court committed plain error when it followed the Court's precedent at the time of its decision. Affirmed.

***US v. Unocic*, F.4th , 2025 WL 1215839 (8th Cir. Apr. 28, 2025)**

While incarcerated, Anthony Unocic told two inmates that he wanted to kill a federal agent named Tubbs who had investigated him. Concerned that Agent Tubbs's life was at risk, the inmates reported Mr. Unocic's threats to federal agents. Mr. Unocic was later charged with one count of threatening to assault a federal officer in violation of 18 USC. § 115(a)(1)(B), which provides: Whoever . . . threatens to assault, kidnap, or murder . . . a Federal law enforcement officer . . . with intent to retaliate against such . . . law enforcement officer on account of the performance of official duties, shall be punished as provided in subsection (b).
During Mr. Unocic's jury trial, the district court instructed the jury regarding the elements of the charged offense: One, . . . Mr. Unocic made a threat to assault Agent Tubb; Two, Mr. Unocic either knew or intended that others would regard his communication as threatening violence, or recklessly disregarded a substantial risk that others could regard his communication as threatening violence; Three, at the time Unocic issued the threat, Agent Tubbs was a federal law enforcement officer; and Four, Mr. Unocic made the threat with intent to retaliate against Agent Tubbs on account of the performance of his official duties.
The district court also included a definition as it relates to element two: "A person 'recklessly disregards' a substantial risk within the meaning of this offense when he is aware of the risk, but consciously, deliberately, or carelessly ignores it and decides to act anyway."
The jury subsequently convicted Mr. Unocic of threatening to assault a federal officer.
On appeal, Mr. Unocic argued that the district court erred when instructing the jury on the mental state required for the offense. Specifically, Mr. Unocic argued that the jury instruction's use of the word "carelessly" in defining "recklessly disregards" allowed the jury to convict him for speech that is protected by the First Amendment and that the instruction impermissibly allowed a conviction without a showing that he had a subjective understanding of the threatening nature of his statements.
Because Mr. Unocic did not raise this objection in the district court, the Eighth Circuit reviewed the claim for plain error and found none. The Court recognized that standing alone, the term carelessness connotes a different mens rea than does recklessness. "Someone who acts recklessly with respect to conveying a threat . . . is not merely careless." He is aware that others could regard his statements as a threat, but he delivers them anyway." Taking the jury instructions as a whole, however, the Court concludes that there was no obvious error.

In so concluding, the Court explained that the instruction did not advise the jury that Mr. Unocic could be convicted merely for acting carelessly with respect to conveying a threat. That is, the jury was required to find that Mr. Unocic "recklessly disregarded a substantial risk that others could regard his communication as threatening violence." The Court pointed out the jury was further advised that a person "recklessly disregards" a substantial risk only if he is "aware of the risk" and "decides to act anyway." Because the instruction still required proof that the defendant (1) was aware of the substantial risk that others could regard his statements as a threat and (2) decided to act anyway, the Court held that there was not a reasonable likelihood that the jury convicted Mr. Unocic for carelessly conveying a threat without a subjective understanding of the threatening nature of his statements.

Furthermore, the Court noted that the instruction required the jury to find the defendant "made the threat with intent to retaliate against Agent Tubbs." The Court opined that with the additional requirement of a subjective mental state, it is even more unlikely that a jury would have focused on the word "carelessly" in isolation to conclude that it could convict Mr. Unocic for intending to retaliate against the federal agent by making a "careless" threat without a subjective understanding of the true threat. The Court thus held that there was no obvious reasonable likelihood that the jury instructions, taken as a whole, misled the jury to convict Mr. Unocic based on an incorrect standard in violation of his rights under the First Amendment. Affirmed.

***US v. Maxfield*, F.4th , 2025 WL 1243888 (8th Cir. Apr. 30, 2025)**

Darold Maxfield was a supervisory veteran service representative at the US Department of Veterans Affairs. Mr. Maxfield submitted a falsified disability benefits questionnaire that allowed him to receive a higher monthly veteran's disability benefit.

At Mr. Maxfield's trial and over his objection, the district court allowed the government to question him about a memorandum of reprimand that Leah Burris, Mr. Maxfield's supervisor, issued to him for exhibiting a "lack of candor." Burris stated in the memo that Mr. Maxfield falsified time logs relating to a work trip by claiming that he had worked more hours than were reflected by the global positioning system ("GPS") in the government vehicle that he operated. The district court also allowed the government to call Burris as a rebuttal witness to contradict Mr. Maxfield's account of the circumstances surrounding the reprimand.

Mr. Maxfield was subsequently convicted of theft of public money and making a false statement or representation to a department or agency of the US.

On appeal, Mr. Maxfield argued that the district court abused its discretion by allowing the government to present "the very propensity evidence" that the court had deemed inadmissible character evidence under Rule 404(b) when it excluded the memorandum of reprimand before trial.

The Eighth Circuit concluded that there was no abuse of discretion, opining that the challenged evidence was not offered to prove Mr. Maxfield's character in order to show that on a particular occasion he acted in accordance with the character, as prohibited by Rule 403(b)(1), but rather admissible under Rule 608(b)(1)—which provides that the court may, on cross-examination, allow inquiry into specific instances of a witness's conduct if they are probative of the witness's character for truthfulness or untruthfulness. The Court also opined that Burris's allegation in the memorandum that Maxfield exhibited a lack of candor was probative of Mr. Maxfield's character for untruthfulness, and was thus a proper subject of inquiry on cross-examination under Rule 608(b).

The Court also found that the rebuttal testimony was properly admitted to impeach Mr. Maxfield's testimony by specific contradiction. In so finding, the Court noted that Burris contradicted Mr. Maxfield's claims that he told her about having a panic attack while driving and that he was allowed to log time for official travel once he began to get dressed.

The Court also found no abuse of discretion in allowing the government to elicit opinion and reputation testimony about Mr. Maxfield's character for truthfulness from Burris and another witness—noting under Rule 608(a), "[a] witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. Affirmed.

***US v. Thomas*, F.4th , 2025 WL 1243889 (8th Cir. Apr. 30, 2025)**

James Thomas's supervised release was revoked and he was sentenced to 9 months' imprisonment.

On appeal, Mr. Thomas argued that his sentence was procedurally unreasonable because the district court merely referenced the 18 USC. § 3553(a) factors and did not discuss those factors, the Chapter 7 policy statements, or defendant counsel's argument as to why Mr. Thomas needed impatient treatment rather than prison time.

Reviewing for plain error because Mr. Thomas did not raise the objections at sentencing, the Eighth Circuit found no plain error. The Court explained that the district court was familiar with Mr. Thomas's criminal history and background. The district court also had a memorandum before it that detailed his supervised release violations, the pertinent policy considerations, and the applicable Guidelines range. And in pronouncing the within-Guidelines sentence, the district court explicitly stated that it had considered the § 3553 factors and recommended that Mr. Thomas seek drug treatment while in prison. The Court was thus satisfied that the district court considered Mr. Thomas's arguments and rationally reached a reasonable sentence. Affirmed.