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United States v. Gammage: Eighth Circuit Agrees No "Second Bite at the Apple" for the Government at Resentencing

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UNITED STATES v. GAMMAGE: EIGHTH CIRCUIT AGREES NO "SECOND BITE AT THE APPLE" FOR THE GOVERNMENT AT RESENTENCING

INTRODUCTION

Imagine you are a district court judge who recently applied a sentencing enhancement to a defendant at sentencing. Further imagine that, on appeal, the appellate court found insufficient evidence to support the enhancement and remanded the case for resentencing. At resentencing, the government seeks to introduce additional evidence, not offered at the first sentencing hearing, that would support the sentencing enhancement. Should you allow the evidence?

Your first step would be to examine the appellate court's order. Although the appellate court clearly articulated the error of insufficient supporting evidence, it simply stated that the case was remanded for proceedings consistent with the opinion. You then look to circuit precedent, only to see restrictions implemented in some circumstances but not others, without a clear explanation of the distinction. What do you do?

What if, perhaps, the shoe was on the other foot? Imagine you are an appellate judge reviewing the propriety of an application of a sentencing enhancement. Assuming the sentencing enhancement was erroneously imposed due to the government's failure to meet its burden, what would you do? Would you allow the government another opportunity to introduce evidence at resentencing? Would certain circumstances change your opinion?

Until recently, conclusive, controlling authority on this subject has been absent. While, for more than two decades, much attention has been given to the United States Sentencing Guidelines and the appropriate weight judges should give to those Guidelines, this problem is simply beyond their scope.[1]

1. *See* Kimbrough v. United States, 552 U.S. 85, 110–11 (2007) (upholding sentencing outside the Sentencing Guidelines' range for crack cocaine); United States v. Booker, 543 U.S. 220, 245 (2005) (holding that the federal Sentencing Guidelines are advisory); Blakely v. Washington, 542 U.S. 296, 303–04 (2004) (defining a state statutory maximum to which a judge may sentence a defendant as the maximum a judge may impose without any additional fact finding); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (requiring a jury trial for sentences imposed above a state statutory maximum). For a brief discussion concerning the history of the Sentencing Guidelines, see U.S. SENTENCING COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 1–2, *available at* http://www.ussc.gov/About_the_Commission/index.cfm; *see also* 3 CHARLES ALAN WRIGHT, NANCY J. KING & SUSAN R. KLEIN, FEDERAL

Thankfully, the Eighth Circuit recently provided clear guidelines for the admission of additional evidence upon resentencing. In *United States v. Gammage*, the Eighth Circuit correctly crafted a clear rule preventing the government, absent special circumstances, from making multiple attempts to present sufficient evidence for sentencing enhancements at resentencing.[2] In *Gammage*, the district court erroneously imposed a sentencing enhancement under the Armed Career Criminal Act ("ACCA").[3] In reversing, the Eighth Circuit limited the government to the existing record at resentencing.[4] Unlike earlier, similar holdings, the Eighth Circuit discussed the applicable scope on resentencing and set forth guidelines for future courts in similar circumstances.[5]

Part I of this Note will discuss Eighth Circuit precedent prior to *Gammage*. Parts II and III will discuss the facts and holding of *Gammage*, as well as the legal principles that support the holding. Part IV of this Note will examine the current similarities and discrepancies among the circuits with this rule. Finally, Part V will discuss the subsequent Eight Circuit applications of *Gammage*.

I. CONFLICTING EIGHTH CIRCUIT PRECEDENT PRE-*GAMMAGE*

As an initial matter, Congress has prescribed, and courts have agreed, that district and appellate courts have the authority to resentence defendants in a variety of contexts.[6] The general contours of this authority are prescribed by statute and are not limitless.[7] Unfortunately, Eighth Circuit precedent before *Gammage* inconsistently applied limitations at resentencing, which *Gammage* confronted.[8]

A. Sentencing Enhancements Generally

In the federal context, a sentencing enhancement is ordinarily either statutorily authorized or provided for in the Sentencing Guidelines, as

PRACTICE AND PROCEDURE § 526.1 (3d ed. 2004) (summarizing the history and application of the Guidelines).

2. 580 F.3d 777, 779–80 (8th Cir. 2009).

3. *Id.* at 778–79; *see* 18 U.S.C. § 924(e)(1) (2006).

4. *Gammage*, 580 F.3d at 779.

5. *Id.* at 779–80.

6. *See, e.g.*, United States v. Cornelius, 968 F.2d 703, 706–07 (8th Cir. 1992) (remanding the case for resentencing to determine whether an enhanced sentence was proper).

7. *See infra* Part I.B.

8. *Compare, e.g.*, *Cornelius*, 968 F.2d at 706 (8th Cir. 1992) (refraining from limiting the scope of resentencing), *with* United States v. Hudson, 129 F.3d 994, 995 (8th Cir. 1997) (per curiam) (applying limitations on the scope of resentencing). *See also infra* Part I.D (discussing inconsistent applications of resentencing limitations in recent Eighth Circuit precedent).

promulgated by the United States Sentencing Commission.[9] A statutory sentencing enhancement imposes a stiffer mandatory minimum sentence after a defendant has committed the requisite predicate acts.[10] For example, the ACCA provides a mandatory minimum of fifteen years imprisonment if the defendant violated the requisite statute three times.[11] In sum:

> Various statutes provide for the enhancement of a sentence when certain criteria are present. Such a statute does not create a separate crime. It sets a mandatory minimum sentence, and increases the underlying sentence rather than imposing a distinct additional sentence. The terms "aggravating factors," "enhancing factors," "sentence enhancement factors," and "enhancement facts" mean the same thing and may be used interchangeably.[12]

A federal sentence is calculated via the Guidelines typically by analysis of "objective factors such as criminal history, acceptance of responsibility, weight of drug in drug cases, etc. These factors are put into a grid, and a sentence within a very limited range is derived. The Guidelines provide some bases for departure, but the specific departures are limited."[13]

The prosecutor has wide latitude to seek a sentence higher than provided in the Guidelines, although the sentencing judge retains authority over the final sentencing decision.[14]

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9. The United States Sentencing Commission is:

> An independent commission in the judicial branch of the federal government responsible for setting and regulating guidelines for criminal sentencing in federal courts and for issuing policy statements about their application. The President appoints its members with the advice and consent of the Senate. It was created under the Sentencing Reform Act of 1984.

BLACK'S LAW DICTIONARY 1571–72 (8th ed. 2004).

10. *See, e.g.*, 18 U.S.C. § 924(e)(1) (2006) (imposing a mandatory minimum sentence of fifteen years for defendants who violate 18 U.S.C. § 922(g) and who have three previous convictions for a violent felony or a serious drug offense, or both).

11. The statute provides:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

Id.

12. 24 C.J.S. *Criminal Law* § 2104 (2006) (internal citations omitted).

13. STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 1433 (Am. Casebook Ser., 8th ed. 2007).

14. *Id.*

B. Resentencing is Generally Constitutionally Permissive

An appellate court has the authority to set aside a sentence and remand the case for resentencing if the sentence:

> [W]as imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines . . . [or] is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable . . . .[15]

In all other circumstances, the appellate court must affirm the sentence.[16]

Additional provisions are available for the district court to immediately correct the defendant's sentence[17] or to reduce the defendant's sentence, upon motion by the government, for providing substantial assistance to the government.[18] A defendant has an absolute right to appeal his or her sentence even if the defendant pleaded guilty.[19]

It would seem that resentencing violates a defendant's rights against double jeopardy. It is well-established, however, that multiple sentencing hearings do not violate a defendant's constitutional right against double jeopardy.[20] The Supreme Court has specifically held that resentencing does not implicate double jeopardy concerns unless the defendant has a legitimate "expectation of finality in the original sentence."[21] The Eighth Circuit has accordingly recognized that resentencing generally does not constitute double jeopardy.[22] The Eighth Circuit has also explained that "permitting resentencing under present federal practice does little if any harm to the

15. 18 U.S.C. § 3742(f)(1), (2) (2006). In this instance, the appellate court must also "state specific reasons for its conclusions." *Id.* § 3742(f)(2).

16. *Id.* § 3742(f)(3).

17. FED R. CRIM. P. 35(a) ("Within 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.").

18. *Id.* R. 35(b) ("[T]he court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.").

19. *Id.* R. 32(j)(1)(B). For greater discussion on the interplay between the Sentencing Guidelines and downward departures for substantial assistance, see I. India Geronimo, Comment, *"Reasonably Predictable": The Reluctance to Embrace Judicial Discretion for Substantial Assistance Departures*, 33 FORDHAM URB. L.J. 1321 (2006).

20. *See infra* Part III.A.

21. United States v. DiFrancesco, 449 U.S. 117, 139 (1980).

22. *See, e.g.*, United States v. Alton, 120 F.3d 114, 116 (8th Cir. 1997) (upholding the district court's sentence correction); *see also* United States v. Handa, 122 F.3d 690, 692 (9th Cir. 1997) (holding that resentencing to impose an enhancement previously barred by a separate conviction did not constitute double jeopardy); United States v. Shue, 825 F.2d 1111, 1115 (7th Cir. 1987) (finding no double jeopardy at resentencing because the defendant had no legitimate expectation of finality).

interests served by the Double Jeopardy Clause."[23] Although the government is generally not prohibited from retrying a defendant who has successfully appealed his or her first conviction because of some error in the proceedings,[24] "the Double Jeopardy Clause bars retrial when a conviction is reversed due to insufficient evidence, because that decision is functionally equivalent to an acquittal."[25] Nevertheless, the courts have been reluctant to apply this holding in all situations.[26]

C. Limits on Resentencing Permissive

When setting aside a defendant's sentence and remanding the case for resentencing, an appellate court has the authority to provide "such instructions as the court considers appropriate."[27] This power coincides with the power of the Supreme Court and appellate courts to, upon lawful review, remand the case and mandate additional proceedings as justice may require.[28] The Eighth Circuit has recognized and examined its authority to limit the district court at resentencing: "Once a sentence has been vacated or a finding related to sentencing has been reversed and the case has been remanded for resentencing, the district court can hear any relevant evidence on that issue that it could have heard at the first hearing."[29] The Eighth Circuit has recognized, however, that it has "[o]n occasion . . . remanded with instructions to resentence a defendant on the existing record because the government, in the first sentencing proceeding, violated clearly settled legal principles . . . ."[30] Indeed, the court has the ability to "remand for resentencing 'with instructions to resentence the defendant on the existing record'"[31] in addition to its ability to "remand

23. Woodall v. United States, 72 F.3d 77, 80 (8th Cir. 1995).

24. *Id.* at 78 (quoting Lockhart v. Nelson, 488 U.S. 33, 38 (1988)).

25. *Id.* (citing Burks v. United States, 437 U.S. 1, 18 (1978)).

26. In *Woodall*, the Eighth Circuit noted that the U.S. Supreme Court has applied the bar to death penalty sentencing procedures while the Eighth Circuit has applied the bar to Missouri and Arkansas habitual offender enhancement statutes; however, the court declined to extend it further. *Id.* at 78–79. The court noted that those statutes "required proof beyond a reasonable doubt of all essential sentencing facts." *Id.*; *see also* Harrison v. Gillespie, 596 F.3d 551, 562 (9th Cir. 2010) (quoting Bullington v. Missouri, 451 U.S. 430, 439 (1981)) ("The Double Jeopardy Clause applies to capital sentencing proceedings that 'have the hallmarks of the trial on guilt or innocence.'").

27. 18 U.S.C. § 3742(f)(2)(A) (2006).

28. 28 U.S.C. § 2106 (2006). The statute further allows the Supreme Court or an appellate court to "affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review." *Id.*

29. United States v. Cornelius, 968 F.2d 703, 705 (8th Cir. 1992) (citing United States v. Smith, 930 F.2d 1450, 1456 (10th Cir. 1991), *cert. denied*, 502 U.S. 879 (1991)).

30. United States v. Dunlap, 452 F.3d 747, 749 (8th Cir. 2006).

31. United States v. Kendall, 475 F.3d 961, 964 (8th Cir. 2007) (quoting *Dunlap*, 452 F.3d at 749).

'without placing any limitations on the district court [in which case it] can hear any relevant evidence . . . that it could have heard at the first hearing.'"[32] The district court must consult the appellate court's opinion to properly determine the applicable scope of remand.[33] This inquiry is necessary because "[o]n remand for resentencing, all issues decided by the appellate court become the law of the case, and the sentencing court is bound to proceed within the scope of any limitations imposed . . . by the appellate court."[34]

D. Eighth Circuit Uncertainty

Although the court's *authority* to limit the district court on resentencing is well-settled, inconsistent *application* of that authority led to incompatible, irreconcilable results. A series of cases in the last two decades, while recognizing the ability to impose limitations at resentencing, failed to articulate a clear standard for limitations and, in some cases, failed to apply any limiting standard.

1. *United States v. Cornelius*

In *Cornelius*, the court contemplated the scope of resentencing after remanding the case to the district court for determination of the defendant's status as an armed career criminal based on a breaking and entering conviction.[35] After a jury convicted the defendant of illegally possessing a firearm, the government sought to enhance the defendant's sentence under the ACCA and the career offender enhancement in the Sentencing Guidelines.[36] The district court initially declined to impose the ACCA enhancement because the defendant's prior breaking and entering conviction did not constitute a predicate felony under the ACCA.[37] The district court did, however, classify the defendant as a career offender and sentenced the defendant to ten years

32. *Id.* (alteration in original) (quoting *Dunlap*, 452 F.3d at 750); *see also* United States v. Pepper, 570 F.3d 958, 963 (8th Cir. 2009) (explaining that the appellate court has "two options: (1) [the appellate court] may remand the case with instructions limiting the scope of the district court's discretion, or (2) [the appellate court] may remand without placing any limitations on the district court's discretion").

33. *Kendall*, 475 F.3d at 964.

34. *Id.* (alteration in original) (quoting United States v. Curtis, 336 F.3d 666, 669 (8th Cir. 2003)).

35. United States v. Cornelius, 968 F.2d 703, 705 (8th Cir. 1992).

36. *Id.* at 704; *see* 18 U.S.C. § 924(e) (2006) (stating that a person who has been convicted of three previous violent felonies or serious drug offenses will be imprisoned for no less than fifteen years for a subsequent conviction); U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2009) (defining "career offender" and providing the minimum amount of time a person will be imprisoned based on the offense).

37. *Cornelius*, 968 F.2d at 704.

imprisonment.[38] The government appealed, and the Eighth Circuit found the defendant's prior breaking and entering conviction sufficient under the ACCA, remanding the case to the district court for resentencing.[39] At resentencing, the district court did not allow the defendant to present additional evidence in his defense, stating that the Eighth Circuit's mandate limited the court to determine the proper sentence, and sentenced the defendant to thirty years imprisonment.[40] The defendant appealed, arguing that the district court was free to consider additional evidence at resentencing.[41]

In contemplating the defendant's appeal, the Eighth Circuit noted that, generally, a district court can hear additional relevant evidence at resentencing that it could have heard at the first hearing.[42] But, the court recognized its ability to limit the district court at resentencing: "The sentencing court must, however, *adhere to any limitations imposed on its function at resentencing by the appellate court*."[43] The court then examined its earlier mandate and acknowledged that it did explicitly hold that the defendant was a career offender under the Sentencing Guidelines.[44] However, it held that the district court erred because the mandate did not state that the defendant was an armed career criminal under the ACCA, but rather only stated that the prior breaking and entering conviction qualified as a predicate conviction.[45]

In sum, *Cornelius* recognized the Eighth Circuit's authority to limit the scope of resentencing, although there the court did not impose such a limitation.[46]

2. *United States v. Hudson*

In *Hudson*, the defendant pleaded guilty for conspiring to distribute methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 846.[47] She received a sentencing enhancement for possessing a firearm in connection with her crime, pursuant to the Sentencing Guidelines Manual Section

38. *Id.*
39. *Id.*
40. *Id.* at 704–05.
41. *Id.* at 705.
42. *Cornelius*, 968 F.2d at 705.
43. *Id.* (emphasis added).
44. *Id.* at 706.
45. *Id.* at 705–06.
46. *Id.*
47. United States v. Hudson, 129 F.3d 994, 994 (8th Cir. 1997) (per curiam). *See* 21 U.S.C. § 841(a)(1) (2006) (outlawing the manufacturing or distribution of controlled substances); *id.* § 846 (2006) (stating that anyone who conspires to commit a drug offense can receive the same sentence as someone who actually committed it).

2D1.1(b)(1).[48] The defendant objected to the enhancement and denied that she possessed a firearm on the requisite dates.[49] The district court denied the defendant's objections and imposed the enhancement.[50] The Eighth Circuit reversed, explaining that the district court's finding lacked support in its record and was therefore clearly erroneous.[51] In remanding the case, the court restricted the parties to "the existing sentencing record, with no opportunity for either party to reopen or add to that record."[52] The court explained that it imposed the restriction "[b]ecause [the court] . . . clearly stated the governing principles as to when and how disputed sentencing facts must be proved . . . ."[53] The court also noted that if the government failed to make evidence part of the sentencing record in the district court, then "it may not be made part of the sentencing record on remand."[54]

Thus, *Hudson* is an instance where the Eighth Circuit both recognized and applied limitations on the scope of resentencing. The court grounded its holding on the unambiguous requirements at sentencing and the government's lack of a valid excuse for failing to meet those requirements.[55]

3. *United States v. Poor Bear*

In *Poor Bear*, the defendant pleaded guilty to unlawfully touching a fifteen-year-old female while she was sleeping, in violation of 18 U.S.C. § 2244(a)(2).[56] At sentencing, the district court enhanced the defendant's sentence under the Criminal Sexual Abuse provision rather than the Abusive Sexual Contact provision, which resulted in a higher sentence.[57] The government and the defendant had agreed to the Abusive Sexual Contact enhancement, and the government did not seek the Criminal Sexual Abuse enhancement.[58] The presentence report ("PSR"), however, recommended the Criminal Sexual Abuse enhancement, and after calling the FBI agent who interviewed the defendant to testify, the district court applied the Criminal

48. *Hudson*, 129 F.3d at 994; *see* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(1) (1995) (stating that if the accused was in possession of a dangerous weapon when apprehended, his or her sentence will be enhanced by two levels).

49. *Hudson*, 129 F.3d at 994.

50. *Id.* at 994–95 (noting that the district court ultimately imposed the enhancement after finding that Hudson did possess a firearm in connection with her drug offense).

51. *Id.* at 995.

52. *Id.* (footnote omitted).

53. *Id.*

54. *Hudson*, 129 F.3d at 995 n.1.

55. *Id.*

56. United States v. Poor Bear, 359 F.3d 1038, 1039 (8th Cir. 2004); *see* 18 U.S.C. § 2244(a)(2) (2000) (stating that if someone has unlawful sexual contact with another, that person will be fined and/or imprisoned for up to three years).

57. *Poor Bear*, 359 F.3d at 1039–40.

58. *Id.* at 1039.

Sexual Abuse enhancement, sentencing the defendant to three years imprisonment.[59]

The defendant appealed the imposition of the Criminal Sexual Abuse enhancement, citing a lack of evidence supporting the enhancement.[60] The Eighth Circuit found insufficient evidence supporting the enhancement, as the only permissive evidence to support the enhancement was the FBI agent's testimony.[61] When the Eighth Circuit remanded the case for resentencing, it limited the district court to the existing record "without the opportunity to reopen or add to the record," because the sentencing enhancement requirements were undisputed, yet the predicate facts were clearly unproven by the government at sentencing.[62]

In sum, *Poor Bear* is in accord with *Hudson* in that the court limited the government to the existing record at resentencing because the sentencing enhancement requirements were unambiguous, and the government failed to meet those requirements.[63]

4. *United States v. Dunlap*[64]

In *Dunlap*, the defendant pleaded guilty to unlawfully possessing pseudoephedrine with knowledge that it would be used to manufacture methamphetamine.[65] The district court sentenced the defendant for possessing 27.8 grams of pseudoephedrine, despite the defendant's objection.[66] The defendant successfully appealed his sentence in light of the Supreme Court's holding in *United States v. Booker*.[67] At resentencing, however, the government introduced additional evidence to establish the requisite drug quantity, and the district court again imposed the same sentence.[68]

The defendant again appealed, this time arguing the government should not have been allowed to introduce new evidence at resentencing.[69] Because the Eighth Circuit gave no limiting instruction to the district court, the government

59. *Id.* at 1040.

60. *Id.*

61. *Id.* at 1041. Although the PSR contained allegations relevant to the sentencing enhancement determination, the PSR cannot be used as evidence. *Id.* (citing United States v. Wise, 976 F.2d 393, 404 (8th Cir. 1992) (en banc)).

62. *Poor Bear*, 359 F.3d at 1043–44.

63. *Id.*

64. 452 F.3d 747 (8th Cir. 2006).

65. United States v. Dunlap, 452 F.3d 747, 748 (8th Cir. 2006). The defendant pleaded guilty to violating 21 U.S.C. § 841(c)(2). *Id.*

66. *Id.*

67. *Id.* As the court explained, *Booker* "held that the federal sentencing guidelines did not violate the sixth amendment so long as they were applied in an advisory manner." *Id.* at 749; *see also* United States v. Booker, 543 U.S. 220 (2005).

68. *Dunlap*, 452 F.3d at 748.

69. *Id.* at 748.

could present new evidence at resentencing.[70] The court noted that the government and trial judge had reasonably interpreted the defendant's objections narrowly, so that the government had not been put on notice that it would have to put on evidence of quantity at the initial sentencing hearing.[71]

Dunlap expanded the prior line of resentencing cases in the Eighth Circuit. The court again recognized its authority to limit the resentencing scope, but found no such limitations because the court had not expressly imposed them and because the government was not sufficiently notified of its evidentiary deficiency at the first sentencing hearing.[72]

5. *United States v. Kendall*

In *Kendall*, the defendant pleaded guilty to possessing materials necessary to manufacture methamphetamine.[73] After applying the career offender sentencing enhancement, the district court sentenced the defendant to eighty-four months imprisonment.[74] The defendant successfully appealed his sentence, but on remand the district court judge again imposed an eighty-four-month sentence.[75] The Eighth Circuit again vacated the defendant's sentence, citing insufficient evidence for the upward variation.[76] On remand, the district court allowed the government to introduce evidence to establish the defendant's prior disputed D.W.I. offense, classified as a crime of violence, thereby supporting the career offender sentencing enhancement.[77] The Eighth Circuit set no limits defining the scope of resentencing in its mandate.[78] The defendant again appealed his sentence.[79]

70. *Id.* at 749–50.

71. *Id.* at 750. The court explained:

> Because nothing in our original remand order precluded the government from presenting its evidence at resentencing, we cannot say that the district court erred in allowing it to do so.
>
> We also think that the circumstances at the first sentencing in this case explain the government's failure to present evidence at that time. Once the court made its tentative findings in advance of the sentencing hearing and the defendant did not file a motion in opposition to them, the government had no reason to believe that it would be required to put on evidence at the sentencing proceeding.

Id. (internal citations omitted).

72. *Id.*

73. United States v. Kendall, 475 F.3d 961, 963 (8th Cir. 2007). The defendant pleaded guilty to violating 21 U.S.C. § 843(a)(6). *Id.*

74. *Id.* The sentencing enhancement was pursuant to the U.S. Sentencing Guidelines Manual Section 4B1.1. *Id.*

75. *Id.* The Eighth Circuit overturned the defendant's sentence in light of recent cases in which the court held a D.W.I. offense was not a crime of violence. *Id.*

76. *Id.*

77. *Id.* at 963.

78. *Kendall*, 475 F.3d at 963.

79. *Id.*

In affirming the sentence, the Eighth Circuit explained there was insufficient information to determine whether the defendant's crime was a violent crime and additional information was, therefore, necessary.[80] The Eighth Circuit also reasoned that it had not placed any "*express limitations*" on the district court's ability to consider evidence relevant to determining whether the defendant's crime was a crime of violence.[81]

Kendall, therefore, again recognized the court's ability to place limitations on the scope of resentencing, but as in *Cornelius*, the court did not impose any such limitations.[82] Additional evidence was also necessary in *Kendall* to determine whether the defendant's conviction satisfied the enhancement requirements.[83]

6. *United States v. Viezcas-Soto*

In *Viezcas-Soto*, the defendant pleaded guilty to illegal reentry after unlawfully reentering the United States following deportation.[84] The district court enhanced the defendant's sentence based on a prior unlawful sexual intercourse conviction in California.[85] The defendant appealed the imposition of the enhancement, arguing that his prior offense was not a violent felony, as required by the statutory enhancement.[86] The majority ultimately concluded that the district court improperly classified the prior conviction as a violent felony; therefore, it improperly applied the sentencing enhancement.[87] The majority then remanded the case for resentencing.[88]

In his dissent, Judge Gruender argued that the defendant's prior conviction was indeed a violent felony and that the court should affirm.[89] Judge Gruender concluded by noting that at resentencing, the district court would be allowed to hear any additional evidence regarding the classification of a prior crime that it could have heard at the first sentencing hearing.[90] Judge Gruender relied on

80. *Id.* at 964.

81. *Id.* (emphasis added).

82. *See Kendall*, 475 F.3d at 964.

83. *Id.*

84. United States v. Viezcas-Soto, 562 F.3d 903, 905 (8th Cir. 2009).

85. *Id.*

86. *Id.* at 906. The enhancement was pursuant to the U.S. Sentencing Guidelines Manual Section 2L1.2(b)(1)(A)(ii). *Id.*

87. *Id.*

88. *Id.* at 908.

89. *Viezcas-Soto*, 562 F.3d at 916 (Gruender, J., dissenting).

90. *Id.* at 916 n.11 ("With respect to the scope of the resentencing proceeding that the Court has ordered, I note that the district court is free to consider additional evidence that may conclusively resolve the question whether [the defendant's] prior conviction for violating California's statutory rape law qualifies as a felony.").

the majority's failure to place any express limitations on the district court at resentencing.[91]

Although the discussion on the scope of resentencing is limited to a footnote in the dissent, *Viezcas-Soto* is another example of inconsistent application of the Eighth Circuit's resentencing standard.[92] No discussion was given in the majority's opinion as to the resentencing scope, and therefore, the default of no limitations was applied.[93]

As the above cases illustrate, the Eighth Circuit recognized and analyzed the resentencing scope issue but failed to articulate and consistently apply a governing standard. At the outer limits, when no express limitations are imposed, no limitations are inferred.[94] In cases where the record is clearly established, the court may be more inclined to impose limitations.[95] In cases where the record is less certain, the court may be less likely to place restrictions on the scope at resentencing.[96] An additional inquiry underlies this determination: whether the defendant or the district court sufficiently put the government on notice of its sentencing obligations.[97]

II. EIGHTH CIRCUIT ARTICULATES RULE OF RESTRICTION

In *United States v. Gammage*,[98] the Eighth Circuit received another opportunity to limit the scope of resentencing on remand.[99] It found that the district court committed an error at sentencing.[100] Unlike in the aforementioned cases, the court in *Gammage* placed express limitations on the government at resentencing and thoroughly explained its reasoning.[101]

A. Background Facts

The government tried, and the jury convicted, Mr. Gammage of illegally possessing a firearm after he had previously been convicted of domestic

91. *Id.*

92. *See supra* text accompanying notes 36–88.

93. *Viezcas-Soto*, 562 F.3d at 905–08 (majority opinion).

94. *See, e.g.*, United States v. Kendall, 475 F.3d 961, 964 (8th Cir. 2007) (recognizing no limitations because the court had not imposed any express limitations on the district court).

95. *See, e.g.*, United States v. Poor Bear, 359 F.3d 1038, 1043–44 (8th Cir. 2004) (holding that resentencing must be conducted on the existing sentencing record without the opportunity to reopen or add to the record).

96. *See, e.g.*, *Kendall*, 475 F.3d at 964 (implying that courts tend not to place restrictions where there is ambiguity in the record).

97. *See* United States v. Dunlap, 452 F.3d 747, 749–50 (8th Cir. 2006).

98. 580 F.3d 777 (8th Cir. 2009).

99. *Id.* at 778–79.

100. *Id.* at 778–79.

101. *Id.* at 779–80.

violence.[102] At sentencing, the government sought to enhance Mr. Gammage's sentence based on his alleged three previous convictions of burglary.[103] The government introduced commitment orders[104] to establish two of the burglary convictions, both burglaries of houses, but introduced only the indictment for the third conviction, which alleged burglary of a pawn shop.[105] Despite Mr. Gammage's objection to the sufficiency of the evidence of the third conviction for enhancement, the district court granted the enhancement and sentenced Mr. Gammage to 180 months imprisonment.[106]

B. The District Court Incorrectly Applied the Sentencing Enhancement

On appeal, the Eighth Circuit recognized that the government only introduced the indictment to prove the third conviction, and "an indictment is simply an accusation. It is not evidence of anything."[107] Thus, the indictment, standing alone, was insufficient to prove the third conviction.[108] The government tried to supplement the record with a copy of the commitment order for the alleged third conviction.[109] The government claimed that it had presented a copy of the commitment order to the district court judge in chambers.[110] But any such meeting was off the record, and the district court judge could not attest to the presence of the commitment order during any meeting.[111] Finally, the government argued that Mr. Gammage did not object to the PSR, which detailed the facts surrounding his alleged third conviction and would support the necessary third conviction for the enhancement.[112] Even though Mr. Gammage did not object to the PSR, he *did* object to the conviction itself.[113] Therefore, the court determined that the government had failed to meet its burden and that the district court improperly applied the enhancement.[114]

102. *Id.* at 778. This was a violation of 18 U.S.C. § 922(g)(9) (2006).

103. The enhancement sought was pursuant to 18 U.S.C. § 924(e) (2006). *Gammage*, 580 F.3d at 778.

104. Black's Law Dictionary defines a "commitment document" as: "An order remanding a defendant to prison in order to carry out a judgment and sentence." BLACK'S LAW DICTIONARY 289 (8th ed. 2004).

105. *Gammage*, 580 F.3d at 778.

106. *Id.* at 778–79.

107. *Id.* at 779 (quoting EIGHTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS: CRIMINAL § 1.01 (2009)).

108. *Id.*

109. *Id.* at 778–79.

110. *Gammage*, 580 F.3d at 778–79.

111. *Id.* at 779.

112. *Id.*

113. *Id.*

114. *Id.*

C. Limited Scope on Remand

The Eighth Circuit limited the government to the existing record on remand.[115] This effectively meant that there would be no enhancement because the existing record was insufficient to support the enhancement.[116]

Writing for the court, Judge Arnold reasoned that because the government was on notice that it needed to prove Mr. Gammage's convictions to apply the enhancement and failed to do so, the government should be limited to the existing record on remand.[117] The court further explained that "[t]here were no arcane legal principles involved in this case, and the district court committed no legal error that misled the government or deflected it from introducing its evidence."[118] Finally, the court also relied on the fact that Mr. Gammage's attorney specifically objected to the indictment being used to prove the conviction.[119] The court recognized the higher standard involved here because the government committed an error in a criminal case.[120] The court also recognized that "[t]he law, from considerations of efficiency and fairness, does not generally favor do-overs, as various estoppel doctrines like *res judicata* and double jeopardy attest."[121] The court concluded that the government should not get "a second bite at the apple."[122]

III. UNDERLYING PRINCIPLES

Although the court discussed extensively its decision to limit the government, the scope is still somewhat blurry. One could interpret the holding to be limited only to cases in which the defendant specifically objected to the sufficiency of the evidence for the enhancement at sentencing. The holding also may not apply in more complex cases, such as those where the district court significantly contributed to the error or where the government is misled or deceived. At the same time, the court's rationale of double jeopardy and res judicata extend beyond those cases.

A. Double Jeopardy

The Fifth Amendment provides, in relevant part, that: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or

115. *Gammage*, 580 F.3d at 779.
116. *See id.* at 779.
117. *Id.* at 779–80.
118. *Id.* at 779.
119. *Id.*
120. *Gammage*, 580 F.3d at 779–80.
121. *Id.* at 780.
122. *Id.* at 779 (quoting United States v. Leonzo, 50 F.3d 1086, 1088 (D.C. Cir. 1995)).

limb . . . ."[123] Double jeopardy is, more concretely, "[t]he fact of being prosecuted or sentenced twice for substantially the same offense."[124]

In *Green v. United States*,[125] the Supreme Court articulated principles surrounding the constitutional prohibition on double jeopardy:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[126]

Although the Court was examining the permissibility of a second trial following a conviction and successful appeal,[127] the applicability of these concepts is far-reaching. Even though *Gammage* involved multiple sentencing hearings, rather than multiple trials, these concerns were generally articulated by the Eighth Circuit in its holding.[128] Although these concerns may be mitigated in the context of multiple sentencing hearings, their effects are still significant.

B. Res Judicata

Although not entirely dispositive of the government's ability to present additional evidence at resentencing, res judicata embodies the concepts of finality and efficiency:

> [R]es judicata is [the] principle inherent in all judicial systems which provides that "an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction."[129]

123. U.S. CONST. amend. V.

124. BLACK'S LAW DICTIONARY 528 (8th ed. 2004).

125. 355 U.S. 184 (1957).

126. *Id.* at 187–88.

127. *Id.* at 190. In *Green*, the defendant was initially charged with first-degree murder but was convicted of second-degree murder. *Id.* at 189–90. After a successful appeal, the defendant was again tried and found guilty, but of first-degree murder. *Id.* at 186. The defendant claimed double jeopardy barred this conviction, while the government contended that the defendant had waived his right to claim double jeopardy when he appealed his lesser conviction. *Id.* at 187, 191. The court found that because the defendant had already "run the gauntlet" of being found guilty of first-degree murder, the jury's acquittal of that charge barred subsequent trials for first-degree murder. *Id.* at 190.

128. *See* United States v. Gammage, 580 F.3d 777, 779 (8th Cir. 2009).

129. WARREN FREEDMAN, RES JUDICATA AND COLLATERAL ESTOPPEL 1 (1988) (footnote omitted).

Not only does res judicata bar relitigation of issues that were argued in the first case, "but also those claims and causes of action that could have been raised and decided in the first case."[130] Res judicata "is non-discretionary in nature because without res judicata the judgment lacks conclusiveness and essential finality."[131]

In the context of multiple sentencing hearings, res judicata would serve as a bar to the presentation of additional evidence not offered at the first hearing but used to argue an issue litigated at the first hearing. In effect, allowing additional evidence undermines the principle of res judicata, as such actions subvert the functions of finality and conclusiveness of determinations formed at the first sentencing hearing.

C. Judicial Economy

Federal courts experienced an increasingly large workload in the beginning of the twenty-first century.[132] The Eighth Circuit recognized that "[r]epetitive hearings, followed by additional appeals . . . waste judicial resources and place additional burdens on parole officers and personnel and on hardworking district and appellate judges."[133] What could be more repetitive than the following sequence: a criminal trial, followed by a conviction, followed by a sentencing hearing in which the government fails to meet its burden yet a sentencing enhancement is imposed, followed by a successful appeal by the defendant, followed by another sentencing hearing which is identical to the first sentencing hearing except at this hearing the government submits sufficient evidence to support its contentions, followed by additional appeals? By providing a clear schema for courts to follow when the government fails to meet its burden at sentencing, the Eighth Circuit has saved invaluable judicial resources. Simply put, by mandating that the government treat the first sentencing hearing as if it was the government's only opportunity to present evidence, the Eighth Circuit has reduced the number of repetitive hearings and ensured a greater number of proper sentences.

130. *Id.* at 5.

131. *Id.* at 4–5.

132. Heather Rickenbrode, *Expanding the Docket: The Fifth Circuit Disregards Judicial Economy in* Grant v. Chevron Phillips Chemical Co., 77 TUL. L. REV. 1453, 1461–62 (2003) (citing Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 687 (2001)).

133. United States v. Kendall, 475 F.3d 961, 963–64 (8th Cir. 2007) (quoting United States v. Santonelli, 128 F.3d 1233, 1238 (8th Cir. 1997)). The court went further, adding that "[s]pecific remands should be used to eliminate the need for additional appeals . . . ." *Id.* at 964 (citing *Santonelli*, 128 F.3d at 1238–39).

D. Collateral Estoppel

Collateral estoppel embodies many of the principles reflected in res judicata. Indeed, collateral estoppel "has the same general objective as res judicata, to wit: finality of litigation."[134] Collateral estoppel holds that "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."[135]

As with res judicata, allowing additional evidence at subsequent sentencing hearings undermines the principles of collateral estoppel. As the disputed issue was litigated and a judgment was found in the first sentencing hearing, allowing, in effect, a de novo rehearing voids the first, lawful judgment, possibly to the defendant's detriment.

IV. CIRCUIT SPLIT

While many circuits maintain rules of resentencing limitation, some circuits have not confronted or discussed the issue. Adding to the confusion is the Ninth Circuit, which confronted and thoroughly discussed the issue yet explicitly declined to adopt a limiting provision.[136]

A. Majority has Adopted Limited Scope at Resentencing

Nearly all the circuits that addressed the scope of resentencing issue have come to results similar to *Gammage*, although few have given extended discussion.[137] The rationale present in these holdings generally mirrors that of *Gammage*.[138]

1. Third Circuit—*United States v. Dickler*[139]

In *Dickler*, the defendants pleaded guilty to impeding the functions of the Resolution Trust Corporation, in violation of 18 U.S.C. § 1032(2).[140] There,

134. FREEDMAN, *supra* note 129, at 1.

135. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

136. United States v. Matthews, 278 F.3d 880, 886–87 (9th Cir. 2002).

137. *See, e.g.*, *id.* at 887 (stating the two Eighth Circuit cases on which the *Matthews* defendant relied provided little in the way of analysis).

138. *See supra* note 123 and accompanying text.

139. 64 F.3d 818 (3d Cir. 1995).

140. United States v. Dickler, 64 F.3d 818, 820–21 (3d Cir. 1995). 18 U.S.C. § 1032(2) reads:

> Whoever corruptly impedes or endeavors to impede the functions of [the Federal Deposit Insurance Corporation, acting as conservator or receiver or in the Corporation's corporate capacity with respect to any asset acquired or liability assumed by the Corporation under section 11, 12, or 13 of the Federal Deposit Insurance Act, the Resolution Trust Corporation, any conservator appointed by the Comptroller of the

the defendants operated an automotive repossession business, as well as a used automobile dealership.[141] The defendants entered into an agreement with two federally insured lenders, and the Resolution Trust Corporation became the conservator of one of the federally insured lenders.[142] Under the terms of the agreement, the defendants were required, upon repossession of an automobile, to solicit three bids for the car and send the bids to the lenders, who would either accept the bid or reject the bid and sell the car at auction.[143] The defendants, rather than following the agreement, submitted false bids for automobiles in order to repair and resell the automobiles for a profit.[144]

At sentencing, the dispute centered on the application of a sentencing enhancement under U.S. Sentencing Guidelines Manual Section 2F1.1 for a loss more than $120,000.[145] In an extended discussion, the Third Circuit determined that the loss calculation applied by the district court was improper and remanded the case for resentencing.[146]

The court then contemplated the scope of resentencing on remand.[147] The court chose to allow the district court to consider additional evidence and arguments regarding the loss calculation.[148] In doing so, the court recognized that "where the government has the burden of production and persuasion . . . [i]ts case should ordinarily have to stand or fall on the record it makes the first time around. It should not normally be afforded a second bite at the apple."[149] Here, however, the court determined that fairness dictated that the government have no limits at resentencing:[150]

> Where, as here, the government believes that it is not feasible to estimate the victim's loss and its evidence, in the absence of the defendant's evidence, would support a finding to that effect, it will frequently not be fair to expect the government to be prepared with evidence concerning any theory of loss calculation the defendant may advance at the sentencing hearing. If the

Currency or the Director of the Office of Thrift Supervision, or the National Credit Union Administration Board, acting as conservator or liquidating agent] . . . shall be fined under this title or imprisoned not more than 5 years, or both.

141. *Dickler*, 64 F.3d at 820.

142. *Id.* at 820–21.

143. *Id.*

144. *Id.* at 821.

145. *Id.* at 822.

146. *Dickler*, 64 F.3d at 831.

147. *Id.*

148. *Id.* (stating that "[w]e do not preclude the district court from permitting further development of the record and leave that for resolution by an exercise of the district court's informed decision").

149. *Id.* at 832 (quoting United States v. Leonzo, 50 F.3d 1086, 1088 (D.C. Cir. 1995)).

150. *Id.* The court stated that it saw "no constitutional or statutory impediment to the district court's providing the government with an additional opportunity to present evidence on remand if it has tendered a persuasive reason why fairness so requires." *Id.*

> government, for want of notice or any other reason beyond its control, does not have a fair opportunity to fully counter the defendant's evidence and the government's theory does not carry the day, the district court is entitled to permit further record development on remand.[151]

The court then deferred to the district court to determine whether the government should be permitted to submit additional evidence at resentencing.[152]

2. Fourth Circuit—*United States v. Parker*

In *Parker*, the Fourth Circuit found that the government failed to present evidence necessary for a conviction and sentence under 21 U.S.C. § 860(a).[153] Specifically, the defendant claimed that the government failed to prove that he distributed drugs near a "playground" within the meaning of 21 U.S.C. § 860(e)(1).[154] Even viewing the defendant's challenge of the sufficiency of the evidence in a light most favorable to the government,[155] the Fourth Circuit found insufficient evidence to support the enhancement.[156] The only evidence offered by the government to establish the presence of a playground was a vague inference contained in the defendant's testimony.[157]

151. *Dickler*, 64 F.3d at 832.

152. *Id.* The court explained:

> By making these observations, we do not suggest that the government should or should not be permitted to offer further evidence in this case on remand. The district court is in a far better position than we to assess the situation in light of the circumstances surrounding the original sentencing hearing.

Id.

153. United States v. Parker, 30 F.3d 542, 553 (4th Cir. 1994). 21 U.S.C. § 860 (2006) provides an increased penalty of "twice the maximum punishment" as the punishment provided in 21 U.S.C. § 841(b) (2006), which provides penalties for knowingly or intentionally distributing a controlled substance, as set forth in 21 U.S.C. § 841(a) (2009).

154. 21 U.S.C. § 860(e)(1) (2006) reads: "The term 'playground' means any outdoor facility (including any parking lot appurtenant thereto) intended for recreation, open to the public, and with any portion thereof containing three or more separate apparatus intended for the recreation of children including, but not limited to, sliding boards, swingsets, and teeterboards." The *Parker* Court recognized the statute as demanding four separate requirements be proven for the enhancement to apply, the last of which, "containing three or more separate apparatus intended for the recreation of children," was disputed. *Parker*, 30 F.3d at 552.

155. *Parker*, 30 F.3d at 551–52.

156. *Id.* at 553.

157. The government contended that the jury could have inferred from the defendant's references in his testimony that the park where he distributed cocaine base ("crack") "had at least two separate baskets and a blacktop where kids could play hopscotch as well as other games." *Id.* at 552. The government argued that "the two baskets plus the one blacktop constitute the requisite 'three or more separate apparatus.'" *Id.*

The Fourth Circuit then contemplated how the case should be handled on remand.[158] Based on its earlier ruling, the court entered the defendant's total offense level and guidelines imprisonment range.[159] Given the court's ruling, the government sought imposition of a similar sentencing enhancement.[160] The court, however, declined to institute the enhancement, given the government's evidentiary failures:[161]

> [T]he prosecution has already been given one full and fair opportunity to offer whatever proof about [the park] it could assemble. Having failed to seize that opportunity, the [g]overnment at resentencing should not be allowed to introduce additional evidence to prove that [the park] contained a playground. One bite at the apple is enough.[162]

The court accordingly reversed the defendant's conviction and sentence under 21 U.S.C. § 860 and remanded the case to the district court to resentence the defendant only under 21 U.S.C. § 841.[163]

3. Sixth Circuit—*United States v. Gill*

In *Gill*, the Sixth Circuit overturned the defendant's sentence due to an improper calculation of drug quantities and application of the Sentencing Guidelines.[164] At sentencing, the government sought an enhancement for the defendant's distribution of drugs, in violation of 21 U.S.C. § 841(a)(1),[165] pursuant to U.S. Sentencing Guidelines Manual Section 2D1.1(c)(13).[166] The government based its argument on statements made by the defendant and contained in the PSR that the defendant purchased and resold drugs to fuel his drug habit, even though those drugs were not found on the defendant's person.[167] The district court agreed that this was "relevant conduct" for the purposes of sentencing, and imposed the sentence accordingly.[168]

158. *Id.* at 553.

159. *Id.*

160. *Parker*, 30 F.3d at 553. The government sought to enhance the defendant's sentence under the U.S. Sentencing Guidelines Manual Section 2D1.2(a)(1), which provides for a two-level enhancement if the drug offense involved "a protected location or an underage or pregnant individual." U.S. SENTENCING GUIDELINES MANUAL § 2D1.2(a)(1) (1994).

161. *Parker*, 30 F.3d at 553.

162. *Id.* at 553–54.

163. *Id.* at 554.

164. United States v. Gill, 348 U.S. 147, 156 (6th Cir. 2003).

165. 21 U.S.C. § 841(a)(1) (2006) provides that "it shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."

166. *Gill*, 348 F.3d at 150. The defendant specifically argued that the district court improperly calculated his base offense level, provided under U.S. SENTENCING GUIDELINES MANUAL Section 2D1.1(c)(13) (2003). *Gill*, 348 F.3d at 150.

167. *Gill*, 348 F.3d at 150. The defendant stated that "for the five weeks preceding his arrest on the instant offense, he would buy approximately one-quarter ounce of 'soft' (powdered

The Sixth Circuit reversed, holding that the government failed to show that the defendant had the requisite intent to distribute the drugs.[169] The defendant argued that he used a portion of the drugs for personal use, and the government did not offer any contrary evidence.[170] The district court judge improperly concluded that, because the defendant intended to distribute at least some of the drugs, he should be held responsible for intending to distribute all of the drugs.[171] In remanding the case for resentencing, the Sixth Circuit limited the case to the existing record, thereby foreclosing an opportunity for the government to put on evidence showing the defendant's intent to distribute.[172] The court reasoned that "[t]he government was entitled to only one opportunity to present evidence on this issue."[173]

4. Seventh Circuit—*United States v. Wyss*

The Seventh Circuit has also confronted the scope of the resentencing issue.[174] Writing for the majority, Judge Posner limited the government at resentencing after it had failed to meet its evidentiary burden for a sentencing enhancement.[175] A jury convicted the defendant of possession with intent to distribute marijuana, in violation of 21 U.S.C. § 841(a),[176] and the judge enhanced the defendant's sentence due to the defendant's "purchase of cocaine for his personal consumption, rather than for sale."[177] The Seventh Circuit noted, however, that "[p]ossession of illegal drugs for personal use cannot be grouped with other offenses."[178] Accordingly, it was incorrect for the district

cocaine) and would sell out of that quantity to make a profit." *Id.* The probation officer calculated one-quarter ounce of the drugs, multiplied by five weeks, which yielded 35.4375 grams and resulted in a base offense level of 14. *Id.*

168. *Id.* at 151.

169. *Id.* at 156.

170. *Id.*

171. *Id.* at 150–51. The district court judge reasoned:

> [W]e'd end up with a situation in every case where a drug dealer caught up with a big bag of dope, all he's got to do is say, "Well, I had bought this as my private stash, and I was going to use a gram a week for the next six years," and it gets impossible to determine.

Id. at 151.

172. *Gill*, 348 F.3d at 156.

173. *Id.* (quoting United States v. Wyss, 147 F.3d 631, 633 (7th Cir. 1998)).

174. *See Wyss*, 147 F.3d 631.

175. *Id.* at 633.

176. The court noted that the defendant was convicted of additional crimes, which the court explained were "irrelevant to [the] appeal." *Id.* at 632 (internal citation omitted).

177. *Id.* This conduct was used to enhance the defendant's sentence via U.S. Sentencing Guidelines Manual Section 1B1.3(a)(2) (2003), which allows the district court to consider other relevant conduct, if it was part of the same course of conduct, in promulgating the defendant's sentence. *Wyss*, 147 F.3d at 632.

178. *Wyss*, 147 F.3d at 632.

court to consider the conduct in sentencing the defendant.[179] Because the government did not prove the quantity of drugs involved[180] and offered no evidence to rebut the defendant's testimony that he personally used at least half of the drugs he bought, the district court committed an error.[181]

The Seventh Circuit vacated the judgment and remanded the case for resentencing.[182] On remand, the district court could not conclude that the use of more than half of the cocaine was relevant conduct to the defendant's conviction.[183] The court reasoned that "[t]he government was entitled to only one opportunity to present evidence on the issue."[184]

5. Tenth Circuit—*United States v. Campbell*

In *Campbell*, the defendant pleaded guilty to unlawfully possessing a firearm.[185] At sentencing, the district court considered a sentencing enhancement via U.S. Sentencing Guidelines Manual Section 2K2.1(b)(1)(B) for possessing eight firearms.[186] The defendant objected to the enhancement because the indictment only claimed possession of seven firearms, one below the requisite number for the sentencing enhancement.[187] In lieu of seeking additional time to gather evidence to prove that the eighth firearm traveled in interstate commerce, the government argued that the possession of the eighth firearm was relevant conduct under U.S. Sentencing Guidelines Manual Section 1B1.3.[188] The district court agreed and applied the four-level enhancement.[189]

179. *Id.* The court also noted that the result "would be different . . . if the charge were conspiracy rather than possession." *Id.*

180. *Id.* at 633 ("[T]he burden is on the government to prove the amount of drugs involved in that conduct.").

181. *Id.* The court specifically declined to decide how to resolve a circumstance where "the defendant buys drugs both for his own consumption and for resale . . . [and says] to the government, 'I'm an addict, so prove how much of the cocaine that I bought I kept for my own use rather than to resell.'" *Id.*

182. *Id.*

183. *Wyss*, 174 F.3d at 633.

184. *Id.*

185. United States v. Campbell, 372 F.3d 1179, 1180 (10th Cir. 2004); *see also* 18 U.S.C. § 922(g)(1) (2006) (criminalizing possession of a firearm that had traveled in interstate commerce by one who has been convicted of a crime punishable by over one year of imprisonment); *id.* § 924(a)(2) (corresponding punishment).

186. *Campbell*, 372 F.3d at 1181. The district court relied on the PSR, which calculated the defendant's base offense level at twenty-two pursuant to U.S. Sentencing Guidelines Manual Section 2K2.1(a)(3). *Id.*; U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(b)(1)(B) (2010) (providing for a four-level enhancement for possessing eight to twenty-four firearms illegally).

187. *Campbell*, 372 F.3d at 1181.

188. *Id.*

189. *Id.*

On appeal, the government conceded that the district court erred in applying the sentence because the government did not prove that the eighth firearm traveled in interstate commerce.[190] The Tenth Circuit reversed the judgment and remanded the case for resentencing.[191]

The government, however, sought to have the appellate court remand for de novo sentencing so that it could proffer additional evidence to prove the requisite interstate nexus for the eighth rifle.[192] The Tenth Circuit denied the government's request: "The government failed to meet its burden of proof on the clearly established element of interstate nexus . . . ."[193] The court further explained that although the "[d]efendant alerted the government to the deficiency in its evidence, the government did not seek to cure the deficiency, and instead made patently erroneous legal arguments as to why such proof was not needed."[194] Finally, the court declared that its decision "[did] not invite an open season for the government to make the record that it failed to make in the first instance."[195]

6. D.C. Circuit—*United States v. Leonzo*

In *Leonzo*, a defendant pleaded guilty to bank fraud stemming from his mortgage to refinance his home.[196] After the first lender was declared insolvent, it was placed in receivership of the Resolution Trust Corporation.[197] The Resolution Trust Corporation subsequently put the loan in a portfolio with other non-performing loans, and sold the portfolio at auction.[198] The portfolio sold at auction for only 60.5% of the total principal balance.[199]

At sentencing, the government sought to enhance the defendant's sentence under the U.S. Sentencing Guidelines Manual Section 2F1.1(b)(1)(H), which provides an additional enhancement for actual losses over $120,000.[200] To prove the requisite loss,[201] the government successfully argued that the 60.5% sale price of the portfolio proved a 39.5% loss on the defendant's loan, thereby

190. *Id.* at 1182.

191. *Id.* at 1183.

192. *Campbell*, 372 F.3d at 1183.

193. *Id.*

194. *Id.* (footnote omitted).

195. *Id.* (quoting United States v. Torres, 182 F.3d 1156, 1164 (10th Cir. 1999)).

196. United States v. Leonzo, 50 F.3d 1086, 1087 (D.C. Cir. 1995). The defendant pleaded guilty to conspiring to commit bank fraud in violation of 18 U.S.C. § 371. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* The district court also imposed an enhancement under the U.S. Sentencing Guidelines Manual Section 2F1.1(b)(1)(G) for actual losses exceeding $70,000, and the defendant did not challenge this enhancement. *Id.*

201. *Leonzo*, 50 F.3d 1087–88 ("The government bears the burden of establishing 'loss' under § 2F1.1 by a preponderance of the evidence.").

establishing the $120,000 requirement of the U.S. Sentencing Guidelines Manual Section 2F1.1(b)(1)(H).[202] The D.C. Circuit held, however, that the 60.5% auction price of the portfolio was insufficient to prove a 39.5% loss on the sale of the defendant's loan.[203]

Having found error, the court next specifically addressed whether on remand the government could proffer additional evidence to support its claim of a loss on the defendant's loan exceeding $41,000, which would carry the total loss over $120,000.[204] The court saw "no reason why [the government] should get a second bite at the apple," given that "[t]he government had the burdens of production and persuasion."[205] The court further reasoned that "[n]o special circumstances justified, or even explained, the government's failure to sustain these burdens [of production and persuasion]."[206] The court accordingly remanded the case on the existing record, foreclosing the possibility of a sentencing enhancement under the U.S. Sentencing Guidelines Manual Section 2F1.1(b)(1)(H).[207]

B. Ninth Circuit Refuses to Adopt

Despite the strong support found in other circuits to limit scope on remand, the Ninth Circuit has intentionally refused to apply such limits.[208] In *United States v. Matthews*,[209] the court gave significant discussion to the scope on resentencing issue.[210] Although a three-judge panel limited the government to the existing record on remand for resentencing ("*Matthews I*"),[211] the court reheard the case en banc, and declined to implement such a rule ("*Matthews II*").[212]

202. *Id.* at 1087.

203. *Id.* at 1088. The court equated the government's argument to trying to accurately determine "the verbal SAT score of a specific high school student from information that her class averaged 615 on the verbal SAT." *Id.*

204. *Id.*

205. *Id.*

206. *Leonzo*, 50 F.3d at 1088.

207. *Id.* The court also noted that the remaining six-point enhancement under the U.S. Sentencing Guidelines Manual Section 2F1.1(b)(G) would remain in place because the evidence supported that loss calculation without the disputed evidence. *Id.*

208. United States v. Matthews (Matthews II), 278 F.3d 880, 888–89 (9th Cir. 2002).

209. *Matthews II*, 278 F.3d at 880; United States v. Matthews (Matthews I), 240 F.3d 806 (9th Cir. 2001).

210. *Matthews II*, 278 F.3d at 880, 885–90; *Matthews I*, 240 F.3d at 821–22.

211. *Matthews I*, 240 F.3d at 821–22.

212. *Matthews II*, 278 F.3d at 882.

1. *Matthews I*

In *Matthews I*, the defendant was convicted of unlawfully possessing a firearm.[213] The PSI recommended enhancing the defendant's sentence under the ACCA due to three prior violent felony convictions.[214] The defendant objected to the imposition of the sentencing enhancement, arguing that there was no evidence that the prior convictions used force, threat of force, or weapons, and therefore, could not be used to satisfy the ACCA requirements.[215] The defendant also objected in writing and at the sentencing hearing to the application of the sentencing enhancement in the absence of certified copies of the prior felony convictions.[216] Even though the government offered no additional evidence to support it, the district court imposed the sentencing enhancement.[217]

A three-judge panel heard the defendant's appeal, where the defendant challenged the sufficiency of the evidence of the prior convictions.[218] The court concluded that the district court erred in enhancing the defendant's sentence because the government failed to provide conviction records for the predicate judgments.[219] The court explained that when a defendant challenges previous convictions used as sentencing enhancements, "the court must examine the statutes of conviction or certified copies of conviction before imposing the enhancement."[220] The district court's failure to properly investigate the prior convictions constituted an error of law.[221] The court

213. *Matthews I*, 240 F.3d at 814; 18 U.S.C. § 922(g)(1) (2006). The defendant was convicted of three counts of unlawfully possessing a firearm, but the district court dismissed two of the three counts as multiplicitous. *Matthews I*, 240 F.3d at 814.

214. *Matthews I*, 240 F.3d at 814.

215. *Id.* For the sentencing enhancement to apply, the defendant must have at least three prior convictions for violent felonies or serious drug offenses. 18 U.S.C. § 924(e)(1) (2006). The statute further defines "violent felony" as

> any crime punishable by imprisonment for a term exceeding one year . . . that has as an element the use, attempted use, or threatened use of physical force against the person of another; or is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Id. § 924(e)(2)(B).

216. *Matthews I*, 240 F.3d at 814. According to the court, at the sentencing hearing defense counsel stated that "the defense would contend that you would have to have certified copies of these judgments of conviction. I believe this Court does not have certified copies of these documents." *Id.* at 820.

217. *Id.* at 814.

218. *Id.* at 819–22.

219. *Id.* at 821.

220. *Id.* at 821.

221. *Matthews I*, 240 F.3d at 821.

accordingly vacated the imposition of the sentencing enhancement and limited the government to the existing record at resentencing.[222]

The court reasoned that "[t]he government should have been aware of what it was required to introduce to meet its burden . . . and it patently failed to comply with a critical requirement."[223] The court then "agree[d] with many of [its] sister circuits that a party should not be able to do on remand what it has no excuse for failing to do the first time around"[224] and referenced a number of opinions from other circuits.[225] Relying on the fact that the defendant clearly objected to the lack of supporting evidence, and the government did nothing to remedy the problem,[226] the court held that "the government [did] not deserve a second bite of the apple."[227] The court further reasoned that additional, lengthy proceedings would waste judicial resources, and the government should have been more thoroughly prepared at the original proceeding.[228]

Although the court articulated a broad rule of restriction, it did outline certain boundaries for future cases which reflect the court's reasoning:

> We do not suggest that in all cases where the government's proof has failed the court must always resentence without reopening the record. In those cases where the government demonstrates a persuasive reason why fairness so requires, this court has the discretion to permit the government to introduce the omitted evidence on remand; where the record is unclear, we may remand with instructions to the district court to permit the government to supplement the record only if it makes the requisite persuasive showing in the district court.[229]

The court determined that the boundaries were not present in the case at bar and reversed the imposition of the sentencing enhancement with instructions to the district court to resentence based on the existing record.[230]

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222. *Id.*

223. *Id.* (internal citation omitted).

224. *Id.*

225. The court specifically relied on United States v. Leonzo, 50 F.3d 1086, 1088 (D.C. Cir. 1995); United States v. Parker, 30 F.3d 542, 553–54 (4th Cir. 1994); United States v. Dickler, 64 F.3d 818, 832 (3d Cir. 1995); United States v. Monroe, 978 F.2d 433, 435–36 (8th Cir. 1992). *See Matthews I*, 240 F.3d at 821.

226. *Matthews I*, 240 F.3d at 821 ("The defendant made patently clear to the district court and the government what our precedents require. The government did not seek to cure the deficiencies in its proof.").

227. *Id.*

228. *Id.*

> To allow the government to reopen proceedings at this stage would be to waste court resources. Parties before district courts are obliged to prepare their cases in a thorough manner. When a party's initial victory is reversed by the appellate court because the party failed to meet this obligation, we are obliged to bring to an end the wasteful process.

Id.

229. *Id.* at 822.

230. *Id.*

The panel's holding was not unanimous; Judge O'Scannlain concurred in part and dissented in part and gave extended discussion of the resentencing issue in the panel's amended opinion.[231] Judge O'Scannlain disagreed with the majority's determination that the statutory requirements were unambiguous and believed the majority had "oversimplified matters greatly."[232] Judge O'Scannlain also criticized the majority's "new exception to its new rule" because it would "provide little guidance to future panels, and little comfort to those of us who seek predictability and consistency in sentencing."[233] Finally, Judge O'Scannlain found the end result to be disconcerting, believing that the majority's rule undermined the statute's purpose.[234] In sum, the defendant should not have been permitted to escape harsher sentencing:[235]

> The process of criminal sentencing is not a game between the government and criminal defendants, in which one side or the other gets penalized for unskillful play. The goal of sentencing is to determine the most appropriate sentence in light of the characteristics of the crime and the defendant. If Matthews is an "armed career criminal" under the ACC statute (and the record makes clear that he is), then he should be sentenced as one. Because I cannot agree to bestowing a sentencing windfall upon a defendant with a long and extensive history of committing violent crimes, especially when equally culpable but less fortunate defendants have been subjected to the enhancement, I must respectfully dissent.[236]

2. *Matthews II*

The *Matthews I* majority did not stand for long. Four months later, the Ninth Circuit agreed to rehear the case en banc.[237] Upon rehearing, the en banc court reversed the three-judge panel's decision to limit the government on resentencing.[238]

231. *Matthews I*, 240 F.3d at 822 (O'Scannlain, J., dissenting).

232. *Id.* at 823. Judge O'Scannlain explained that "more careful examination of the issue discloses that these principles are quite complex, have spawned a great deal of litigation in the lower courts, and are far from 'clearly stated.'" *Id.*

233. *Id.* Judge O'Scannlain described the majority's holding as a "case by case approach." *Id.*

234. *Id.* ("This case by case approach contradicts the goals of both the ACC enhancement and the Sentencing Guidelines: The ACC enhancement was enacted in order to provide mandatory minimum sentences for armed career criminals. The Sentencing Guidelines were established in large part to reduce unwarranted sentencing disparities.") (citations omitted).

235. *Id.* ("In allowing Matthews to escape imposition of the ACC enhancement simply because of the fortuity (from Matthews's perspective) that his probation officer prepared a less-than-complete PSR, the majority flouts congressional intent with respect to both the ACC enhancement and the Sentencing Guidelines.").

236. *Matthews I*, 240 F.3d at 823 (O'Scannlain, J., dissenting).

237. United States v. Matthews (Matthews I), 254 F.3d 825, 825 (9th Cir. 2001).

238. United States v. Matthews (Matthews II), 278 F.3d 880, 882 (9th Cir. 2002).

As an initial matter, the court unequivocally concurred with the panel's earlier conclusion that the district court improperly applied the sentencing enhancement.[239] But the court disagreed with the panel's decision to limit the government at resentencing.[240] The court began by outlining its general rule regarding resentencing: "[A]s a general matter, if a district court errs in sentencing, we will remand for resentencing on an open record—that is, without limitation on the evidence that the district court may consider."[241] The government is, therefore, authorized to submit any evidence that it could have submitted at the first sentencing, as the district court is in effect conducting a de novo sentencing hearing.[242] The court reasoned that such a rule "furthers the goals of 'predictability and consistency in sentencing,' because it allows for the fullest development of the evidence relevant to a just sentence"[243] and is consistent with prior Ninth Circuit precedent.[244] The court recognized a number of cases in which it did limit the scope of resentencing, when either "additional evidence would not have changed the outcome," or "there was a failure of proof after a full inquiry into the factual question at issue."[245] The court concluded that neither of those circumstances were present in the case at bar.[246]

The court then turned its discussion to the out-of-circuit precedent on which the panel relied.[247] In dismissing these other holdings,[248] the court analyzed each case in turn. First, the court found its decision consistent with the Third Circuit's holding in *United States v. Dickler* because there the Third

239. *Id.* at 884.

240. *Id.* at 885.

241. *Id.* (citing United States v. Ponce, 51 F.3d 820, 826 (9th Cir. 1995)).

242. *Id.* at 885–86.

243. *Matthews II*, 278 F.3d at 886 (quoting United States v. Matthews (Matthews I), 240 F.3d 806, 823 (9th Cir. 2001) (O'Scannlain, J., dissenting)).

244. *Id.* (citing United States v. Martinez, 232 F.3d 728, 735 (9th Cir. 2000); United States v. Standard, 207 F.3d 1136, 1143 (9th Cir. 2000); United States v. Casterline, 103 F.3d 76, 80 (9th Cir. 1996); United States v. Gutierrez-Hernandez, 94 F.3d 582, 585 (9th Cir. 1996); United States v. Licciardi, 30 F.3d 1127, 1134 (9th Cir. 1994); United States v. Fernandez-Angulo, 897 F.2d 1514, 1516–17 (9th Cir. 1990) (en banc)).

245. *Id.* (citing United States v. Rivera-Sanchez, 247 F.3d 95, 909 (9th Cir. 2001); United States v. Reyes-Oseguera, 106 F.3d 1481, 1484 (9th Cir. 1997)).

246. *Id.* at 887.

247. *Id.*

248. *Matthews II*, 278 F.3d at 887. The court explained:

> In addition, the out-of-circuit cases that Matthews cites do not warrant a departure from our general practice. These cases do not persuade us to adopt a different general rule, because they either support our position or offer little helpful analysis to support any general limit on the district court's authority to consider additional evidence on remand. Nor do they persuade us to create an exception under the facts of this case, because they are factually distinguishable.

Id.

Circuit left discretion to the district court on the issue of additional evidence at resentencing.[249] The court next dismissed the Eighth Circuit's holdings in *United States v. Monroe* and *United States v. Hudson* because, although their holdings seemingly conflict with the Ninth Circuit's final decision, the Eighth Circuit did not provide sufficient explanation for its decisions in those cases.[250] The court then distinguished *United States v. Leonzo* and *United States v. Parker* on the grounds that both holdings "rely only on cases that are distinguishable both from the circumstances to which these two courts applied them and from the circumstances of the present case."[251] In distinguishing *Leonzo*, the Ninth Circuit noted that the D.C. Circuit had relied on a case, *United States v. Schneider*, in which the limited scope of resentencing was irrelevant because the government could not meet its burden even with additional evidence[252] and two cases "where consideration of additional evidence could not have changed the outcome."[253] In distinguishing *Parker*, the Ninth Circuit reasoned that the Fourth Circuit "erroneously relied on *Burks v. United States*," and in *Parker* the limited scope related "not just to a sentencing factor, but also to an element of a separate offense for which the defendant had already been tried," while the case at bar involved only a sentencing factor.[254] The court further reasoned that the Fourth Circuit "did not offer any other authority to support its decision."[255] The court then explained that in each case cited except *Hudson*, the district court had contemplated the relevant factual issue but ultimately reached an erroneous conclusion, while the district court in the case at bar erroneously believed it did not need to examine statutes or certified copies of conviction, which was a legal error.[256]

The court then grounded its holding in prior Ninth Circuit precedent, namely in *United States v. Standard*, in which the Ninth Circuit allowed the district court to consider additional evidence at resentencing concerning the government's tax loss, because the district court had erred at the first sentencing hearing and did not make any factual findings.[257] Based on this

249. *Id.* (discussing United States v. Dickler, 64 F.3d 818, 831–32 (3d Cir. 1995)).

250. *Id.* at 887–88 (discussing States v. Monroe, 978 F.2d 433, 435–36 (8th Cir. 1992); United States v. Hudson, 129 F.3d 994, 995 (8th Cir. 1997)).

251. *Id.* at 888 (discussing United States v. Leonzo, 50 F.3d 1086, 1088 (D.C. Cir. 1995); United States v. Parker, 30 F.3d 542, 552–54 (4th Cir. 1994)).

252. *Id.* (discussing United States v. Schneider, 930 F.2d 555, 557–59 (7th Cir. 1991)).

253. *Matthews II*, 278 F.3d at 888 (discussing United States v. Abud-Sanchez, 973 F.2d 835, 839 (10th Cir. 1992); United States v. Smith, 951 F.2d 1164, 1166 (10th Cir. 1991)).

254. *Id.* at 888 (discussing the application of Burks v. United States, 437 U.S. 1 (1978), by the Fourth Circuit in United States, v. Parker, 30 F.3d 542 (4th Cir. 1994)).

255. *Id.*

256. *Id.*

257. *Id.* at 888–89 (citing United States v. Standard, 207 F.3d 1136, 1142–43 (9th Cir. 2000)).

earlier holding, the court held that there was "no reason to limit the district court's authority to explore fully a factual issue at resentencing simply because it failed to do so during the first proceeding as a result of an erroneous legal ruling."[258] In doing so, the court explicitly declined to follow the Eighth Circuit's holding in *Hudson*.[259]

The court concluded by drawing some boundaries on its holding and by providing specific examples of restrictions.[260] The court stated that its holding "does not preclude this court from limiting the scope of the *issues* for which we remand, and thus limiting the district court's consideration to evidence and arguments relevant to those issues."[261] In addition, the court retained exceptions to its general rule "that the district court resentence de novo to 'preclude consideration of post-sentencing conduct'" and again emphasized its ability to limit review of "conduct beyond the scope of the issues [on] which we remand."[262] The court further explained that this list of exceptions is not exhaustive and that "there may be other circumstances under which it might be appropriate to limit the evidence that the district court may consider on remand, such as if the government engaged in deceptive, obstructive, or otherwise inappropriate conduct."[263] The court concluded by noting that none of the exceptions applied because Matthews's objection was "not entirely clear," which, at least in part, excused the government's failure to meet its burden.[264]

As this ruling was unfavorable to Matthews, he sought review by the Supreme Court via petition for certiorari, but the Court declined review.[265] Since *Matthews II*, subsequent Ninth Circuit cases have applied this holding.[266]

258. *Matthews II*, 278 F.3d at 889.

259. *Id.* at 889 n.3 ("We therefore decline to create an exception to our general practice based on *Hudson* . . . where, as in *Standard*, the district court erroneously failed to respond to the defendant's objections to the presentence report and adopted it without hearing additional evidence.") (citations omitted).

260. *Id.* at 889.

261. *Id.* (emphasis in original)

262. *Id.* (quoting United States v. Caterino, 29 F.3d 1390, 1394 (9th Cir. 1994)).

263. *Matthews II*, 278 F.3d at 889.

264. *Id.*

265. Matthews v. United States, 535 U.S. 1120, 1120 (2002).

266. *See, e.g.*, United States v. Valenzuela-Hernandez, 72 F. App'x 686 (9th Cir. 2003) (allowing the district court on resentencing to consider additional state court documents to determine if the defendant's prior conviction qualified as a violent crime for purposes of U.S. Sentencing Guidelines Manual Section 2L1.2(b)(1)(A)(ii)); United States v. Varela-Marquez, 45 F. App'x 820 (9th Cir. 2002) (allowing the district court on resentencing to review any state court documents to determine if the defendant's prior conviction was an aggravated felony for purposes of U.S. Sentencing Guidelines Manual Section 2L1.2(b)(1)(A)).

C. Eighth Circuit Rule Superior to Ninth Circuit Rule

The Eighth Circuit's holding in *Gammage* and the Ninth Circuit's holding in *Matthews II* could possibly be synthesized. On many issues, the holdings agreed on a course of action. The ability to restrict the district court regarding a tangential issue would likely be agreed upon.[267] If the successfully appealed issue was a novel question of law—one which the government would not have known to provide evidence—the Eighth Circuit and Ninth Circuit would likely agree on an open record. Similarly, if the district court erroneously misled the government into withholding evidence which would have sustained the issue or enhancement, the circuits would likely agree on an open record. Despite these similarities, the Ninth Circuit rejected the Eighth Circuit's holding in *Hudson* and instead applied a narrower set of circumstances in which it would limit the scope of resentencing to the existing record.[268] Clearly then, there are instances in which the circuits would disagree, and the facts of *Gammage* might be such an instance.

The Eighth Circuit's holding in *Gammage* is, unlike the Ninth Circuit's holding in *Matthews II*, supported by a series of holdings from other circuits and within the Eighth Circuit,[269] whereas the Ninth Circuit's holding in *Matthews II* distinguishes and rejects those cases, and ultimately relies on prior Ninth Circuit holdings.[270] The Eighth Circuit's holding in *Gammage* is also supported by a number of fundamental legal principles which dictate, in effect, that the government should not be permitted to make multiple attempts at meeting its evidentiary burden in a criminal case.[271] Although no single principle dominates, the spirit of these principles mandates fairness, finality, and repercussions, each of which is offended when the government enjoys a "second bite at the apple" at the defendant's expense. This concept seems so embedded in the fabric of fundamental fairness that it is difficult to believe otherwise.

267. United States v. Gammage, 580 F.3d 777, 779–80 (8th Cir. 2009) (recognizing the court's broad ability to limit the government on remand); *Matthews II*, 278 F.3d at 889 (recognizing the court's ability to limit issues considered by the district court on remand).

268. *Matthews II*, 278 F.3d at 889 n.3.

269. *Gammage*, 580 F.3d at 779 (citing United States v. Poor Bear, 359 F.3d 1038, 1043–44 (8th Cir. 2004); United States v. Houston, 338 F.3d 876, 882 (8th Cir. 2003); United States v. Hudson, 129 F.3d 994, 995 (8th Cir. 1997) (per curiam); United States v. Leonzo, 50 F.3d 1086, 1088 (D.C. Cir. 1995); United States v. Otey, 259 F. App'x 901, 902–03 (8th Cir. 2008)).

270. *Matthews II*, 278 F.3d at 887–89 (citing United States v. Standard, 270 F.3d 1136, 1142–43 (9th Cir. 2000); discussing United States v. Dickler, 64 F.3d 818, 831–32 (3d Cir. 1995); distinguishing and dismissing United States v. Monroe, 978 F.2d 433 (8th Cir. 1992); *Hudson*, 129 F.3d at 995; *Leonzo*, 50 F.3d at 1088; United States v. Parker, 30 F.3d 542, 553–54 (4th Cir. 1994)).

271. *See supra* notes 122–34.

The Eighth Circuit's holding also places the responsibility on the government, while the Ninth Circuit places the responsibility on the district court without repercussions to the government.[272] While the Eighth Circuit's rule provides for an open record when the district court misleads the government, the Ninth Circuit's rule provides for an open record anytime the district court commits an error of law and does not make factual findings.[273] Whether the law is "clearly established" might always be a point of contention, but ultimately, the government bears the burden when seeking a sentencing enhancement.[274] As the Supreme Court explained in *Green*, the government should rarely, if ever, have an excuse for failing to meet its burden.[275] The Eighth Circuit's holding reflects that reality.

V. SUBSEQUENT EIGHTH CIRCUIT APPLICATION OF *GAMMAGE*

Since deciding *Gammage*, the Eighth Circuit has had occasion to apply the principles contained therein. Each of the cases employed a different aspect of *Gammage*, yet led to consistent results.

A. United States v. King

In *King*, the defendant pled guilty to illegally possessing a firearm.[276] The district court found the defendant had three violent felony convictions and imposed a longer sentence under the ACCA.[277] The Eighth Circuit considered whether the defendant's prior juvenile delinquency adjudication qualified as a violent felony under the ACCA.[278] The government presented the district court with the defendant's delinquent conduct adjudication order and predisposition report as evidence that the juvenile adjudication was a violent felony.[279] Although the order and report were ambiguous, the district court found that under the Eighth Circuit's holding in *United States v. Vincent*, the defendant's juvenile adjudication was a violent felony.[280]

272. *Compare Gammage*, 580 F.3d at 779, *with Matthews II*, 278 F.3d at 888–89.

273. *Compare Gammage*, 580 F.3d at 779–80, *with Matthews II*, 278 F.3d at 889–90.

274. *See, e.g.*, United States v. Khang, 904 F.2d 1219, 1222 (8th Cir. 1990) ("Once we embrace the adversarial nature of a sentencing procedure, the burden of proof falls on the party asserting the sentencing adjustment."), *abrogated by* United States v. Anderson, 618 F.3d 873 (8th Cir. 2010).

275. Green v. United States, 355 U.S. 184, 191 (1957).

276. United States v. King, 598 F.3d 1043, 1044 (8th Cir. 2010). The defendant violated 18 U.S.C. § 922(g). *Id.*

277. *Id.*

278. *Id.*

279. *Id.* at 1045.

280. *Id.* at 1045–46 (citing United States v. Vincent, 519 F.3d 732 (8th Cir. 2008), *vacated*, 129 S. Ct. 996 (2009)).

The Eighth Circuit reversed, explaining that *Vincent* did not hold that every conviction for violating the relevant juvenile statute was a violent felony, and that the district court misapplied the categorical approach for determining whether a conviction falls within the "otherwise" clause of the ACCA.[281]

Applying *Gammage*, the court explicitly placed no limitations on the scope of evidence the district court could consider at resentencing.[282] The court recognized that this was "a departure from what [it had] described as 'the traditional path' of limiting the [g]overnment to one bite at the apple."[283] The court reasoned that because the government and district court "mistakenly relied on an excessively broad interpretation of *Vincent I*, which might have impeded full development of the record," and because "defense counsel did not clearly explain his objection to the sentence enhancement," although his "objection was sufficient to preserve the issue for appellate review," there was sufficient confusion of the applicable legal principles to warrant an open record on remand.[284]

Thus, *King* is an example of the outer bounds of *Gammage*, and it contains additional reasoning for imposing and, when the circumstances require, not imposing restrictions on the district court on remand.

B. United States v. Van Nguyen

In *Van Nguyen*, the defendant appealed the district court's order requiring him to forfeit his automobile, home, and $500,000 after he and his family members were convicted of drug-related crimes stemming from his family's marijuana business.[285] The Eighth Circuit found the government did not establish that the automobile was sufficiently connected to the continuing criminal enterprise.[286] After conceding the lack of a sufficient connection between the automobile and the continuing criminal enterprise, the government argued on appeal that the automobile was a "substitute asset" that could be applied against the $500,000 money judgment.[287]

The Eighth Circuit recognized that the district court did not order the forfeiture of the automobile as a substitute asset and made no finding that the

281. *King*, 598 F.3d 1047–50. For greater discussion of the "otherwise" clause of the ACCA and application of the categorical approach, see Begay v. United States, 553 U.S. 137, 141–47 (2008); Taylor v. United States, 495 U.S. 575, 600–02 (1990).

282. *King*, 598 F.3d at 1050.

283. *Id.* (quoting United States v. Gammage, 580 F.3d 777, 779–80 (8th Cir. 2009)).

284. *Id.*

285. United States v. Van Nguyen, 602 F.3d 886, 892, 893 (8th Cir. 2010). There were three defendants, one who appealed his sentence, one who appealed her conviction, and one who appealed his conviction and the district court's forfeiture order. *Id.* at 890.

286. *Id.* at 903.

287. *Id.*

$500,000 money judgment was unavailable.[288] Further, the government did not establish the fair market value of the automobile, and the Eighth Circuit, therefore, would not be able to accurately apply the value of the automobile against any of the possibly uncollected money judgment.[289] Thus, the Eighth Circuit reversed the forfeiture order and applied *Gammage* in "declin[ing] to give the government two bites at the forfeiture apple" on remand.[290]

Although *Van Nguyen* is an unusual application of *Gammage*, the principles the Eighth Circuit invoked are clear, as the court explained that it limited the government on remand "in the interest of finality."[291] The Eighth Circuit's emphasis on finality is consistent with the reasoning of *Gammage* and lends itself to a potentially broader future application.

C. United States v. Thomas

In *Thomas*, the district court relied on the PSR in finding that the defendant's prior conviction of escaping custody qualified as a crime of violence, and imposed a longer sentence under the ACCA.[292] The Eighth Circuit reversed, holding that the district court improperly relied on the PSR, which summarized a police report that would have been inadmissible at sentencing.[293]

Despite the government's request to the contrary, the Eighth Circuit held that because the government knew and failed to meet its burden at the original sentencing, the government could not offer additional evidence at resentencing.[294] The court further explained that despite the government's awareness of its burden, it "came to sentencing with acceptable documents but conceded that the documents it had been able to obtain were insufficient."[295]

Thomas stands as a straight-forward application of *Gammage* in that the government could not establish any extenuating circumstances that would allow it to reopen the record on remand. The Eighth Circuit's emphasis on the government's knowledge of its burden was consistent with the underlying principles of *Gammage*.

CONCLUSION

The Eighth Circuit's holding in *Gammage* provides much-needed guidance to future courts with respect to the scope of resentencing on remand.

288. *Id.*
289. *Id.*
290. *Van Nguyen*, 602 F.3d at 903.
291. *Id.*
292. United States v. Thomas, 630 F.3d 1055, 1056 (8th Cir. 2011) (per curiam).
293. *Id.* at 1057 (citing United States v. Williams, 627 F.3d 324, 328 (8th Cir. 2010)).
294. *Thomas*, 630 F.3d at 1057.
295. *Id.*

Inconsistencies within the Eighth Circuit itself and among courts around the country created an aura of uncertainty, which *Gammage* dispelled by articulating a clear, logical rule for courts to follow.

Although the specific contours of the permissible scope of resentencing remain somewhat undefined, the legal principles set forth in *Gammage*[296] provide sufficient guidance for courts in cases with varying facts. Further, subsequent Eighth Circuit holdings have aided in the interpretation and application of *Gammage*. Nevertheless, to avoid any future confusion and to insure uniformity among the circuits, when the opportunity arises, the Supreme Court should accept the opportunity to adopt the holding of *Gammage* and hold the government accountable for meeting its burden in its first bite at the apple.

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296. *Gammage*, 580 F.3d at 779–80; *see generally supra* notes 122–34.

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