

No. 23-1295

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

IAN GOOD LEFT,

Defendant/Appellant.

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA

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APPELLEE'S BRIEF

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## **SUMMARY OF THE CASE AND WAIVER OF ORAL ARGUMENT**

The appellant, Ian Good Left, was charged with assault of an intimate partner resulting in substantial bodily injury in violation of 18 U.S.C. §§ 113(a)(7) and 1153, assault of an intimate partner by strangulation and suffocation in violation of 18 U.S.C. §§ 113(a)(8) and 1153, and domestic assault by a habitual offender in violation of 18 U.S.C. § 117(a). Good Left pled guilty to Count Two charging assault by strangulation or suffocation and Count Three that charged domestic assault by a habitual offender.

Good Left's initial Sentencing Guideline range called for a term of imprisonment of 57 to 71 months based upon a total offense level of 21 and criminal history category IV. The district court departed upward under USSG § 4A1.3 to a criminal history category VI based upon Good Left's prior tribal criminal history, resulting in a Guideline range of 77 to 96 months. The district court sentenced Good Left to a 90-month term of imprisonment on Count Two and a concurrent 60-month term of imprisonment on Count Three.

Good Left now appeals his sentence arguing that the district court committed procedural error by departing upward and that his sentence was substantively unreasonable. The United States believes the record and applicable law is sufficient to resolve the issues and waives oral argument.

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## STATEMENT OF THE ISSUES

- I. Whether the District Court Committed Procedural Error when it Departed Under USSG § 4A1.3 Based Upon Appellant's Tribal Criminal History.

United States v. Cook, 615 F.3d 891 (8th Cir. 2010)

United States v. Walking Eagle, 553 F.3d 654 (8th Cir. 2009)

United States v. Gonzalez, 550 F.3d 1319 (11th Cir. 2008)

United States v. Johnson, 619 F.3d 910 (8th Cir. 2010)

- II. Whether Good Left's Sentence was Substantively Unreasonable.

United States v. Grimes, 702 F.3d 460 (8th Cir. 2012)

United States v. Timberlake, 679 F.3d 1008 (8th Cir. 2012)

United States v. Ballard, 872 F.3d 883 (8th Cir. 2017)

United States v. Miles, 499 F.3d 906 (8th Cir. 2007)

## STATEMENT OF THE CASE

The Appellant, Ian Good Left (“Good Left”), was charged in a three-count indictment in United States District Court for the District of North Dakota. (R. Doc. 2) Count One charged Good Left with assault of an intimate partner resulting in substantial bodily injury in violation of 18 U.S.C. §§ 113(a)(7) and 1153. Count Two charged Good Left with assault of an intimate partner by strangulation and suffocation in violation of 18 U.S.C. §§ 113(a)(8) and 1153. Count Three charged Good Left with domestic assault by a habitual offender in violation of 18 U.S.C. § 117(a).

The charges stemmed from an incident that occurred on July 11, 2022, in which Good Left assaulted the victim at her residence. (R. Doc. 39 - Change of Plea Transcript (“COP TR.”) at pp. 19-21; R. Doc. 27 - Presentence Investigation Report (“PSR”) at pp. 3-4 - ¶¶ 5-7)<sup>1</sup> Good Left forced his way into the victim’s residence and proceeded to throw her down and choke her. (COP TR. at p. 19) He also struck the victim and pulled her hair. (Id.) Good Left knocked the victim down causing her to strike her head on the toilet. (Id.) He then choked and struck the victim causing her to lose consciousness. (Id.) Good Left grabbed a broomstick, presumably with the intention of using it to assault the victim. (Id. at

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<sup>1</sup> Good Left acknowledged the facts stated by the Assistant United States Attorney were accurate and provided a sufficient factual basis for a jury to find him guilty. (COP TR. 21-22)

pp. 19-20) The victim's sister, who had arrived at the residence, forced her way into the house through a window and observed Good Left holding the broomstick over the victim. (Id. at p. 20). Good Left fled the residence. (Id.) As he fled, he told the victim that he would kill her the next time. (Id.) The victim suffered a "nasal fracture and a third-degree AC tear/separation to her right shoulder." (PSR at p. 4 - ¶ 8)

The parties entered into a plea agreement in which Good Left would plead guilty to Counts Two and Three - assault by strangulation or suffocation and domestic assault by a habitual offender. (R. Doc. 23 at pp. 2-3) The parties believed Good Left's crimes would result in a total offense level of 21 and a Criminal History Category IV, with a sentencing guideline range of 57-71 months. (Id. at pp. 6-7; COP TR. at p. 7) The government agreed to recommend a sentence on the low end of the guideline range while Good Left could ask for any sentence he believed reasonable. (R. Doc. 23 at p. 9, COP TR. at pp. 7-8) The plea agreement also provided Good Left could appeal a sentence above the applicable guideline range. (R. Doc. 23 at p. 12) Good Left pled guilty to Counts Two and Three. (COP TR. at p. 18)

A PSR was prepared. As contemplated by the parties, the probation officer found a total offense level of 21 and a Criminal History Category IV based upon



eight criminal history points, resulting in a sentencing guideline range of 57-71 months. (PSR at pp. 6 - ¶ 26, 9 - ¶ 37, 18 - ¶ 77)

The PSR noted a possible ground for an upward departure from the sentencing guideline range under USSG § 4A1.3 for Good Left's criminal history being under-represented. (Id. at p. 20 - ¶ 94) Specifically, the probation officer noted 26 tribal court convictions, some of which involved behavior similar to his instant offense. (Id. at pp. 10-14 - ¶¶ 38-63, 20 - ¶¶ 94-95)

Good Left raised two objections to the PSR. (Id. at pp. 23-24; R. Doc. 30) He objected to paragraph 27 of the PSR (incorrectly noted as Paragraph 26 in the objections) Paragraph 27 provides that on the night before the instant offense conduct, a witness saw Good Left drag the victim by her hair and take her cellular phone. (PSR at p. 4 - ¶ 27) Good Left argued the information was not part of the instant offense conduct and should not be considered. (Id. at p. 23) He also argued the information was mere allegation that had not been adequately proven. (Id.)

Good Left objected to the use of the tribal court convictions as grounds for an upward departure. (Id. at p. 23; R. Doc. 30 at pp. 5-6) He argued there was no indication he was represented by a lawyer in any of the tribal cases and, as such, there was insufficient evidence to show he received adequate due process. Good Left also argued that, even if such cases could otherwise be counted, 14 of the 26 cases would not count for criminal history points because they were too old. He

went on to argue that ten of the remaining 12 cases would only count as one point, and the guidelines at Section 4A1.1(c) limits the number of one-point convictions to four.

On January 31, 2023, a sentencing hearing was held. The district court rejected both objections by Good Left. It first found the information concerning Good Left's assaultive conduct the night before the instant offenses was sufficiently reliable and should be included in the PSR. (R. Doc. 40 - Sentencing TR. at pp. 5-6)

The district court also rejected Good Left's objections regarding his criminal history category being under-represented. (Sentencing TR. at pp. 6-7) It found the tribal convictions listed in paragraphs 56-62, if they could be counted, would result in six additional points based upon two points for each conviction involving incarceration of 60 days or more.<sup>2</sup> (Sentencing TR. at p. 7) The district court noted this would result in 14 criminal history points and a Criminal History Category VI. (Id.) The district court then determined the appropriate analogous

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<sup>2</sup> The tribal convictions that would result in two criminal history points, if they could be counted in criminal history, are found at paragraphs 57, 62, and 63 of the PSR. (PSR at pp. 13-14) The conviction at Paragraph 57 for Simple Assault and Hindering a Law Enforcement Officer resulted in a 60-day term of incarceration. For the conviction in Paragraph 62, Aggravated Assault and Family Violence, Good Left received a 180-day term of incarceration. He also received a 180-term of incarceration for the conviction in Paragraph 63 for Aggravated Assault, Hindering a Law Enforcement Officer, and Criminal Contempt.

guideline range was 77-96 months based upon a Criminal History Category VI.

(Id.) The district court sentenced Good Left to a 90-month term of imprisonment on Count Two and a concurrent 60-month term of imprisonment on Count Three, followed by a three-year term of supervised release, a \$200 special assessment, and restitution in the amount of \$2,122.00. (Id. at pp. 17, 20-22; R. Doc. 34 at pp. 3-4, 7)

Good Left now appeals his sentence. He argues the district court committed procedural error in imposing sentence and the sentence imposed is substantively unreasonable.

## SUMMARY OF THE ARGUMENT

### I.

The district court did not commit procedural error, plain or otherwise, when basing its upward departure on Good Left's prior tribal criminal history. Contrary to Good Left's argument the district court simply adopted the probation officer's suggestion Good Left's tribal criminal history was a basis for an upward departure under USSG 4A1.3 without conducting an appropriate analysis and adequately explain the basis for the departure, the record and applicable law demonstrates the district court considered Good Left's arguments, but rejected them. Furthermore, there was no duty by the district court to consider factors set forth in the Commentary Note 2(C) to USSG 4A1.3 as it is written in the permissive.

### II.

The district court's sentence was substantively reasonable. Good Left argues the district court failed to adequately consider his mitigating circumstances. However, the record demonstrates the court was aware of, and considered, those arguments but choose to give more weight to the number and violent nature of past tribal convictions. In essence, Good Left's claim is a disagreement of how the district court weighed the 18 U.S.C. § 3553(a) factors and is insufficient to find the district court abused its discretion in imposing the 90-month term of imprisonment.

## ARGUMENT

### **I. There was No Procedural Error, Plain or Otherwise, in the District Court's Upward Departure Under USSG § 4A1.3 Based Upon Good Left's Tribal Criminal History.**

#### **A. Standard of Review**

Good Left argues the district court both committed procedural error and imposed a substantively unreasonable sentence. Normally, in reviewing for procedural error, a district court's findings of fact are reviewed for clear error while its application of the sentencing guidelines are reviewed *de novo*. United States v. Rooney, 63 F.4th 1160, 1170 (8th Cir. 2023). Plain error review arguably applies here, however, as Good Left's argument on appeal challenging how the district court facilitated the upward departure was not presented to the district court.

Good Left's objected to any upward departure under USSG § 4A1.3 based on the age of 14 of the 26 tribal convictions, the allegedly minor severity of the 10 of the remaining 12 tribal convictions, and the lack of information regarding the due process protections afforded relative to the tribal convictions. (PSR at p. 23 (objection based on age and severity), R. Doc. 30 (objection based on age, severity, and due process).) Good Left did not offer a further basis for objection at sentencing. (Sentencing TR. at 4.)

But on appeal, Good Left argues the district court failed to effectuate the upward departure following the procedures outlined by this Court and failed to explain sufficiently its rationale for departing upward. (Appellant Br. 13–14.) Good Left did not object on either basis in the district court. (See Sentencing TR. at 6-7, 10-21.)

When asked by the district court at the end of the sentencing if there was anything else, Good Left’s counsel only stated, “”Just to reiterate for the record the objections that we previously made.” (Sentencing TR. at p. 21)

“The rationale of reviewing for plain error under these circumstances is that without an objection at sentencing, the district court had no opportunity to clarify its comments or to correct any potential error in the first instance.” United States v. Walking Eagle, 553 F.3d 654, 657 (8th Cir. 2009). Here too, without any specific objection to the procedure by which the district court departed upward or request by Good Left for further explanation of its rationale, the district court could not correct any error in the first instance. Under such circumstances, review should be for plain error. United States v. Black, 670 F.3d 877, 881 (8th Cir. 2012) (plain error review where defendant “failed to object with any specificity to district court’s alleged failure to consider argument [raised in sentencing memorandum that defendant did not reiterate at sentencing and did not ask court to address argument] or to explain in any detail the reasons for the sentence.”); Walking

Eagle, 553 F.3d at 657 (plain error review where defendant fails to object to the adequacy of a sentencing court’s explanation for the sentence).

To establish plain error, a defendant must show an error that is plain – one that is clear or obvious under current law, and one that affects the defendant’s substantial rights. Black, 670 F.3d at 881; United States v. Brown, 676 F.3d 1138, 1139 (8th 2012). If that a showing is made, the error should then be corrected “only if it seriously affects the fairness, integrity or public reputation of the proceedings.” Id. (internal quotations omitted). Under either standard the claim should fail.

## **B. Merits**

The district court did not commit a plain procedural error in departing upward from a criminal history category IV to a category VI based upon his tribal court convictions. Procedural error occurs where a district court fails to calculate or improperly calculates a defendant’s guideline range, treats the Guidelines as mandatory, fails to consider the factors set forth in 18 U.S.C. § 3553(a), imposes a sentence based upon clearly erroneous fact, or does not adequately explain the chosen sentence including an explanation for a departure/variance from the Guideline range. United States v. Isler, 983 F.3d 355, 341 (8th Cir. 2020). This is not an exhaustive list of procedural errors and other types of procedural errors may exist. United States v. Azure, 536 F.3d 922, 930 (8th Cir. 2008).

The probation officer indicated possible grounds for an upward departure, specifically Good Left's extensive tribal court history. (PSR at p. 20 – ¶¶ 93-95)

The PSR provided –

The defendant has 26 adult tribal arrests, many of which involved similar violent behavior. Because these were charged and convicted in tribal court, they were not countable offenses.

(Id. at ¶ 95) Good Left objected to a departure based upon Good Left's tribal court convictions. In response, the probation officer provided –

Paragraph 93 identifies the defendant's tribal criminal history and the ability for the Court to consider such information for an upward departure pursuant to USSG §4A1.3(a). Outlined in Paragraphs 37 through 62 of this report outline the defendant's tribal arrests and convictions. Paragraphs 56 through 62, if used for calculation purposes, would have resulted in six additional criminal history points: two points for each additional conviction resulting in 60 days or more of incarceration. This is a significant increase in criminal history points, which if applied, would have resulted in a total of 14 criminal history points and a criminal history category of VI, rather than IV, with a Guideline range of 77 months to 96 months, rather than 57 months to 71 months. The probation officer notes the objection, but the report remains unchanged.

(Id. at p. 24) The district court overruled the objection, noted the probation officer's comments, and found a departure warranted based upon his criminal history. (Sentencing TR. at pp. 6-7) The district court agreed with the probation officer's response to the objection, stating stated –

Paragraphs 56 through 62 would result in six additional criminal history points, two points for each additional conviction resulting in 60 days or more of incarceration. This is, in the words of the



probation officer, a significant increase in criminal history which if applied would have resulted in 14 criminal history points and a Criminal History Category of VI rather than V with a guideline range of 77 to 96 months rather than 57 to 71 months.

(Id. at p. 7)<sup>3</sup> Good Left did not object to the procedure by which the district court reached this conclusion or to an alleged lack of explanation.

Now on appeal, Good Left complains the district court simply adopted the findings of the probation officer that Good Left's lengthy tribal criminal history as a basis for an upward departure. He also argues the district court committed additional error when it failed to consider smaller departure or lesser sentence, and did not explain why a lesser sentence or an intermediate criminal history category was inappropriate. Good Left also complains the district court failed consider factors set out in Commentary Note 2(C) to USSG § 4A1.3 in using the prior tribal convictions, and in particular whether he was represented by counsel.

USSG § 4A1.3 provides –

If reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of

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<sup>3</sup> The tribal court convictions that would hypothetically add six criminal history points include: 1) Simple Assault and Hindering a Law Enforcement Officer (12/02/2013) – 180 days in jail with 120 days suspended, 1 year of probation, and pay fines/fees; 2) Aggravated Assault and Family Violence (05/31/2016) – 360 days in jail with 180 days suspended, 1 year of probation, and pay fines/fees; and 3) Aggravated Assault, Hindering a Law Enforcement Officer, and Criminal Contempt (04/12/2017) – 360 days in jail with 180 days suspended, 1 year of probation, and pay fines/fees. (PSR at pp. 13-14 - ¶¶ 57, 62-63)

the defendant's criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.

Included in information the district court may consider are “prior sentences not used in computing the criminal history category,” such as tribal court convictions.

USSG § 4A1.3(a)(2)(A). The commentary to Section 4A1.3 contains guidance for consideration of tribal court convictions. The Commentary Note 2(C) provides –

**Upward Departures Based on Tribal Court Convictions.**—In determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate, the court shall consider the factors set forth in § 4A1.3(a) above and, in addition, may consider relevant factors such as the following:

- (i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.
- (ii) The defendant received the due process protections required for criminal defendants under the Indian Civil Rights Act of 1968, Public Law 90-284, as amended.
- (iii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Public Law 111-211.
- (iv) The tribe was exercising expanded jurisdiction under the Violence Against Women Reauthorization Act of 2013, Public Law 113-4.
- (v) The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this Chapter.

- (vi) The tribal court conviction is for an offense that otherwise would be counted under § 4A1.2 (Definitions and Instructions for Computing Criminal History).

USSG § 4A1.3, comment. (n. 2(C)).

USSG § 4A1.3(a)(4) directs a court to determine the extent of an upward departure “by using, as a reference, the criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles that of the defendant’s.” USSG § 4A1.3(a)(4) (emphasis added).

In those cases where a district court departs under USSG § 4A1.3 for underrepresentation of a defendant’s criminal history, this Court has set out a process to use in determining the extent of an upward departure under Section 4A1.3 in which the district court “proceeds along the criminal history axis of the sentencing matrix, comparing the defendant’s criminal history to criminal histories of other offenders in each higher category.” Azure, 536 F.3d at 930. A district court need not mechanically address each criminal history category it finds inadequate in reaching the selected category. Id. at 931. The court must, however, provide an adequate explanation why the intermediate categories were inadequate. Id.

Good Left argues the district court erred when it did not consider a lesser sentence or criminal history category and failed to adequately explain why an

intermediate criminal history category or lesser sentence was insufficient. Good Left did not object on this basis in the district court.

Two cases Good Left relies upon are Azure and United States v. Sullivan, 853 F.3d 475 (8th Cir. 2017). In Azure, the defendant was convicted of two counts of assault with a dangerous weapon in violation of 18 U.S.C. § 113(a)(3), while a charge of second-degree murder was dismissed. 536 F.3d at 925-26. Prior to sentencing, the district court heard evidence that included information surrounding the events that resulted in the dismissed murder charge as well as other violent acts committed by the defendant against others. Id. at 926-27. The district court determined a sentencing guideline range of 37 to 46 months, finding a Category I criminal history based upon one criminal history point. Id. at 928. However, the district court departed upward to a category VI under USSG § 4A1.3. Id. In so doing, the court found the defendant's Category I did not sufficiently reflect the defendant's past conduct or the likelihood she would commit additional violent acts in the future. Id. The court found a Category VI criminal history was more appropriate based up her long history of violence that included the use of weapons and other objects. Id. As a result, the district court increased the defendant's guideline range was increased from 37-46 months to 77-96 months. Id. The district court then went on to sentence the defendant to consecutive sentences of 96

month and 84 months resulting in a 180-month term of imprisonment. Id. at 928-29.

On appeal this Court found the district court committed procedural error in its departure under § 4A1.3. Id. at 930-32. This Court first addressed the defendant's prior convictions that were too old to count. Id. at 931. One of those convictions, and the most serious, was for assault by striking, beating, or wounding for the defendant received a two-month sentence. Id. The district court concluded this conviction was a basis for finding the Defendant's criminal history category inadequate. Id. Had the conviction not been too old, it would have resulted in criminal history points. Id. The other two prior convictions that were too old would most likely not have resulted in any additional criminal history points had they been within the time limitation. Id. This Court noted that, had the assault conviction been a countable sentence, it would have resulted in two additional criminal history points and a Category II criminal history. Id.

This Court then proceeded to consider the district court's reliance on the defendant's prior violent conduct for which the defendant had not been convicted. Id. at 931-32. The Court first noted the Sentencing Guidelines allow district courts to consider other reliable information in assessing the adequacy of a defendant's criminal history that includes similar prior adult conduct for which the defendant was not convicted. Id. at 931. The Court went on to address the information relied

upon by the district court in departing upward to a Category VI including the defendant's assaultive behavior, elementary and middle school acts of bullying, violence, and theft, and that the defendant is violent when she drinks alcohol; and the district court's determination this past violent history warranted a departure from Category I to a Category VI criminal history. Id. at 931-32. The Court noted the district court's failure to "assign hypothetical points to the conduct that did not result in conviction, and then determine what the appropriate criminal history category would be." Id. at 932. The Court then noted the district court's failure to "discuss intermediate categories II-V before assigning a Category VI. Id. While acknowledging the district court was "not required to engage in a ritualistic exercise in which the sentencing court mechanically discusses each criminal history category it rejects enroute to the category it selects," [citation omitted], [it] must provide sufficient indicia of why the intermediary categories are inappropriate." Id. (internal quotations omitted). The Court emphasized this is "particularly important" when the district court departs from the lowest criminal history category to the highest. Id. The Court also pointed out that the district court failed to compare the defendant's criminal history category to others assigned a Category VI criminal history, and that such a comparison "would provide support for the court's decision to use a Category VI," instead of an intermediate category. Id.

This Court held the district court committed procedural error in that it failed to adequately explain the upward departure. Id. In so doing, the Court noted the defendant had only one prior conviction that was relatively serious, but that a large portion of the defendant's past conduct relied upon by the district court involved alcohol-related assaults, many of which involved mutual aggression in domestic violence situations and conduct during the defendant's childhood. Id. The Court concluded the district court's analysis was inadequate to explain and support its departure to a Category VI criminal history. Id.

Good Left also relies on United States v. Sullivan, 853 F.3d 475 (8th Cir. 2017). In that case the defendant had three criminal history points based upon three prior misdemeanor convictions, resulting in a criminal history Category II. Id. at 479. The defendant had no other prior convictions. Id. There was also a related charge in Kansas plus five other arrests.<sup>4</sup> Id. The district court heard testimony of additional instances of conduct similar to the conduct for which the defendant was convicted. Id. at 479-80. The district court departed upward from a Category II to a Category VI criminal history. Id. at 480. The district court based the departure on its belief the defendant had received lenient treatment in state court, and he had committed the same type of fraud on several occasions. Id.

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<sup>4</sup> Charges from two of the five arrests were dismissed and the disposition of the other three were unknown.

This Court held the district court committed procedural error for failing to adequately explain its reasons for the departure to a Category VI. Id. With respect to the district court’s finding the defendant received lenient treatment in his state court convictions, the Court pointed to the district court’s failure to explain what sentence the district court believed the defendant should have received or how many points should have been assigned to the prior convictions. Id. The Court considered the district court court’s reliance on conduct for which the defendant was not convicted and again pointed to the district court’s failure to hypothetically determine the number of criminal history points that should be assigned to the conduct. Id. The Court then noted the district court “failed to explain how Sullivan’s criminal history equated with the criminal history of other defendants assigned criminal history category VI.” Id. The Court concluded the district court’s analysis failed to adequately explain and support the significant departure from a Category II criminal history to a Category VI, one that resulted in a sentence almost 2½ times the sentence recommended by the parties. Id.

Sullivan and Azure are distinguishable. First, the district court departed only two criminal history categories (from a Category IV to a Category VI) and based its departure on Good Left’s prior tribal convictions. Azure involved a five-category departure from Category I to Category VI. Sullivan involved a four-category depart from Category II to Category VI. Furthermore, information relied



upon in both Azure and Sullivan involved “uncharged or irrelevant conduct,” whereas the district court here relied on convictions. This Court has noted the significant levels of departure and type of information at issue as distinguishing features. United States v. Jackson, 740 F. App’x 856, 858 (8th Cir. 2018) (unpublished) (noting this case was unlike Sullivan or Azure because the district court’s upward departure was three criminal history categories and did not rely on “uncharged or irrelevant conduct, but rather grounded its decision on numerous tribal court convictions”); United States v. Cook, 615 F.3d 891, 894 (8th Cir. 2010) (finding case unlike Azure, the case involved upward departure of two criminal history categories and was based upon a “dismissed charge and on Cook’s tribal court convictions”).

In Cook, the district court imposed an upward departure of two criminal history categories from a Category III to a Category V, the same category increase as here. Id. Relying on Azure, the defendant claimed the district court committed procedural error by considering information concerning a charge that was dismissed. Id. The Court recounted its findings in Azure –

We remanded for resentencing in that case because the district court failed to provide sufficient indicia of why the intermediary [criminal history] categories [were] inappropriate, and because we doubted evidence the defendant was a playground bully in elementary school was relevant to her criminal history category, observed that much of the uncharged conduct were alcohol related assaults and mutual aggression in domestic violence situations, and

concluded the district court erred in allocating the burden of proof for self defense to the dismissed murder charge.

Id. (internal quotations omitted). The Court went on to note that “that stating sufficient indicia of why intermediate categories are inappropriate is ‘particularly important when the upward departure takes the defendant from the lowest to the highest criminal history category.’” Id. (quoting Azure 536 F.3d at 932).

Here, the upward departure was two criminal history categories. The district court can properly rely upon Good Left’s prior tribal court convictions as a basis for an upward departure. Id. at 893; Jackson, 740 F. App’x at 858. USSG § 4A1.3 (a)(4)(A) provides that “the court shall determine the extent of a departure under this subsection by using, as a reference, the criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles that of the defendant's.” “In other words, the sentencing court should be guided, at least in part, by the criminal history category which would have applied had the uncounted prior convictions been computed.” United States v. Harlan, 368 F.3d 870, 875 (8th Cir. 2004).

That is what the district court did in this instant case. It found three prior tribal court convictions that would add an additional six points to Good Left’s criminal history score if they could be counted. (Sentencing TR. at p. 7) Those convictions included –

- 1) Simple Assault and Hindering a Law Enforcement Officer (12/02/2013) – 180 days in jail with 120 days suspended, 1 year of probation, and pay fines/fees;
- 2) Aggravated Assault and Family Violence (05/31/2016) – 360 days in jail with 180 days suspended, 1 year of probation, and pay fines/fees; and
- 3) Aggravated Assault, Hindering a Law Enforcement Officer, and Criminal Contempt (04/12/2017) – 360 days in jail with 180 days suspended, 1 year of probation, and pay fines/fees.

(PSR at pp. 13-14 - ¶¶ 57, 62-63) This would have resulted in 14 criminal history points and a Criminal History Category VI. The district court found the Category VI most analogous. In short, the district court’s determination a guideline range based upon a Criminal History Category VI was clearly in line with the language of Section 4A1.3(a)(4). Cook, 615 F.3d at 893 (“Standing alone, Cook’s tribal convictions, including seven that were alcohol related, support the district court’s departure finding” that defendant’s criminal history category I was underrepresented and upward departure to Category III appropriate).

Good Left complains the district court “rotely” adopted the probation officer’s finding that his criminal history could be underrepresented, and that district court did not explain why a lesser sentence or the intermediate criminal history category (Category V) was not appropriate. In essence, he is arguing the district court failed to adequately explain its analysis. Good Left did not object on this basis in the district court.

The district court need not explicitly state it has considered the intermediate category, but must make findings that are adequate to explain and support the upward departure. Walking Eagle, 853 F.3d at 1037. Good Left fails to point out additional comments in the record that adequately explain the departure. Initially the district court noted the numerous arrest and convictions in tribal court, and then commented that convictions in paragraphs 56-62 would add another six points if counted. (Sentencing TR. at p. 7) The district later pointed to the violence of Good Left's history and that the victim in this case was also the victim in a prior incident of domestic abuse. The district court noted Good Left had pled guilty to assaulting an intimate partner by strangulation or suffocation and to domestic assault by a habitual offender. (Sentencing Tr. at p 15) It then recited the convictions underlying his designation as a habitual offender – (1) a 2021 state court conviction for domestic assault in which the victim was the same as in the instant case; and a 2013 tribal court conviction for domestic abuse. (Id.) When discussing the 3553(a) factors, the district court noted Good Left's violent and abusive past stating –

With regard to the seriousness of the offense, the defendant demonstrated assaultive behavior while under the influence. He has a significant criminal history and a significant history of violent behaviors. Hopefully they can be addressed through programming and/or counseling.

With regard to just punishments, the defendant's history of aggression and violent behaviors is reoccurring. He is a habitual abuser of individuals. The defense has noted the defendant suffers from fetal alcohol syndrome and, unfortunately, this is the result of that unfortunate situation for the defendant. However, he has not, apparently, addressed his long history of abuse of others.

(Id.)

This is supported by the record. The PSR lists three non-tribal convictions for assaultive behavior which included a federal conviction for assault with a dangerous weapon and a state court domestic violence conviction. (PSR at pp. 7-9 - ¶¶ 31, 32, and 34) Good Left's tribal history includes 12 assault convictions or domestic violence dating back to 2005, including three aggravated assaults. (Id. at pp. 10-14 - ¶¶ 38-39, 42-45, 48, 53, 56-57, and 62-63) These statements by the district court adequately explain its upward departure from a criminal history Category IV to a Category VI. Jackson, 740 Fed. Appx. at 858-59 (district court adequately explained upward departure of three criminal history categories where it took "into account Jackson's extensive criminal history of tribal convictions, his history of violence, and the repeated nature of his alcohol-related offenses); United States v. Shillingstad, 632 F.3d 1031, 1038 (8th Cir. 2011) (district court adequately explained upward departure of two criminal history categories where court based its decision on extensive criminal record that included multiple

convictions for violent behavior including two that involved the same victim and was similar to the instant offense); Walking Eagle, 553 F.3d at 658.

In Walking Eagle, the defendant was convicted of assault with a dangerous weapon. Id. at 655. At sentencing, the district court departed upward from a criminal history category IV to a Category VI and a one-level increase to his offense level. Id. at 656. In so doing, the district court noted the defendant's various tribal court convictions in tribal court that included simple assaults, multiple assault and batteries as well as an assault on an officer. Id. at 658. The court also considered a prior federal conviction for assault with a dangerous weapon and assault resulting in serious bodily injury. Id. The court then outlined the defendant's convictions in Sioux Falls that included disorderly conduct, domestic abuse and simple assault, as well as an incident in Billings, Montana, where he assaulted a police officer, and the fact he was disciplined in prison. Id. The court found the assaults demonstrated the defendant was a dangerous person and that he will commit other crimes. Id. The Eighth Circuit agreed with the district court that the defendant's extensive criminal history made him dangerous and likely to commit future crimes, and held there was no procedural error. Id.

Here too, while the district court did not address Good Left's prior convictions individually, it recognized he had "extensive history of violent behavior," that his "aggressive and violent behavior was recurring" and that he is a

“habitual abuser of individuals.” Although the district court did not use the magic words that it found Good Left is a dangerous person or that he would commit additional crimes, it is implicitly clear the district court recognized this where the court stated Good Left “has not, apparently, addressed his long history of abuse of others.” In short, there was no procedural error plain or otherwise.

To the extent Good Left complains the district court did not consider the six factors (i-vi) spelled out in Commentary Note 2(C), it provides no basis for finding error. The Commentary provides the district court “*shall* consider the factors set forth in § 4A1.3(a) above and, in addition, “*may*” consider relevant factors such as [(i) – vi].” Use of the term “shall” in this context connotes “discretionless obligations.” Lopez v. Davis, 531 U.S. 230, 241 (2001) (contrasting use of the term “may” and “shall” in 18 U.S.C. § 3621). The use of the term “may” is permissive and “connotes discretion.” Biden v. Texas, 142 S. Ct. 2528, 2541 (2022). The term “may” gives authority, but does not impose a duty. Lopez, 531 U.S. at 241. By using the term “may,” the Commentary does not require the district court to engage in any such analysis, and, as such, there is “no error, plain or otherwise.” United States v. Gonzalez, 550 F.3d 1319, 1323 (11th Cir. 2008) (commentary to USSG § 2L1.2 uses permissive term “may” and defendant could not point to any authority requiring district court to make specific finding).

In addition, there is nothing in the record to show the district court failed to consider the objections regarding use of Good Left's tribal convictions to depart upward. United States v. Pair, 327 F. App'x 444, 446 (4th Cir. 2009) (unpublished). To the contrary, the district court noted both parties had filed sentencing memorandums. (Sentencing TR. at 4) The fact the district court did not mention the argument by counsel does not mean it ignored it or failed to consider it. See United States v. Amedeo, 487 F.3d 823, 833 (11th Cir. 2007) (although court did not mention mitigating circumstances does not mean it ignored or failed to consider the evidence). Furthermore, the district court asked defense counsel if there were any objections to the PSR to which counsel indicated it had objected to the portion indicating Good Left's tribal convictions could be used as a basis for an upward departure. This too indicates the district court was aware of the argument, considered it, and rejected it. See United States v. Johnson, 619 F.3d 910, 922 (8th Cir. 2010) (Where defendant raised issues in sentencing memorandum and, when asked defense if there was anything to consider before imposing the sentence, to which counsel referred to their sentencing memorandum, district court was aware of arguments and is presumed to have considered and rejected them).



The record and applicable case law demonstrates the district court committed no procedural error, plain or otherwise, in basing its upward departure on Good Left's tribal criminal history. This issue should be rejected.

## **II. Good Left's Sentence was Substantively Reasonable.**

### **A. Standard of Review**

The substantive reasonableness of a sentence is reviewed by this Court for an abuse of discretion. United States v. Petersen, 22 F.4th 805, 807 (8th Cir. 2022). A district court abuses its discretion when it (1) fails to consider a relevant factor that should have received significant weight; (2) gives significant weight to an improper or irrelevant factor; or (3) considers only appropriate factors but in weighing those factors commits a clear error of judgment. Id. It is an unusual case when this Court reverses a district court's sentence – whether within, above, or below the applicable Guidelines range – as substantively unreasonable. Id.

### **B. Merits**

Good Left argues his sentence was substantively unreasonable. Good Left's claim essentially challenges the weight the district court afforded different sentencing factors. He argues the district court placed too much weight on his tribal convictions, specifically that there was no indication whether he was represented by counsel, many were too old, as well as less serious in nature. He also argues the district court did not give adequate weight to his mitigating

evidence including his mental health issues that included several mental health diagnoses, his difficult upbringing that included alcoholic parents and a father who was not involved in his upbringing, personnel losses of the deaths of his mother and sister, and his excessive use of alcohol due to the deaths of his mother and sister.

A district court has wide latitude in weighing sentencing factors and the weight assigned those factors to which appellate courts afford due deference. United States v. Morrow, 50 F.4th 701, 704 (8th Cir. 2022). The fact a district court did not weigh the factors as Good Left prefers does not warrant reversal. Id.; United States v. Wickman, 988 F.3d 1065, 1067 (8th Cir. 2021) (“a defendant’s dissatisfaction with a district court’s balancing of the § 3553(a) factors does not indicate the district court abused its discretion.”).

In reviewing for an abuse of discretion, an appellate court considers the totality of the circumstances, “including the extent of any variance from the Guideline range.” Id. (internal quotations omitted). However, an extraordinary deviation from the guideline range does not require extraordinary circumstances. United States v. Ross, 29 F.4th 1003, 1008 (8th Cir. 2022).

The record demonstrates the district court considered Good Left’s arguments related to the 3553(a) factors when sentencing Good Left. The district court heard arguments from both Good Left and his attorney on the information related to his fetal alcohol syndrome, the loss of his mother and sister, lack of a stable home, and

his alcohol abuse. (Sentencing TR. at pp. 10-14) Good Left's attorney initially made these arguments in a sentencing memorandum supplement. (R. Doc. 30 at pp. 3-5). This Court "presumes the district court considers such matter presented to it." United States v. Grimes, 702 F.3d 460, 471 (8th Cir. 2012) (citing United States v. Timberlake, 679 F.3d 1008, 1012 (8th Cir. 2012)); .

Furthermore, the district court specifically noted some of Good Left's mitigating circumstances when considering 3553(a) sentencing factors. The district court noted Good Left's fetal alcohol syndrome that it was "the result of an unfortunate situation for the defendant." (Sentencing TR. 16) The district court also considered Good Left's history of alcohol abuse and use of illegal substances noting Good Left's "violent behaviors are mostly the result of excessive alcohol use and lack of impulse control" and that he would benefit from substance abuse treatment while incarcerated. (Id.) The district court went on to note Good Left "has a history of reoccurring aggressive behaviors which will need to be addressed through anger management programming, mental health counseling, or other types of counseling." (Id.) The district court's recognition and discussion of these circumstances and factors at sentencing indicates demonstrates the district court considered those factors and counsel's argument. United States v. Ballard, 872 F.3d 883, 885 (8th Cir. 2017); United States v. Miles, 499 F.3d 906, 909 (8th Cir. 2007) (court's recommendation that defendant be designated for BOP substance

abuse treatment program evidence the district court considered defendant's arguments).

The record demonstrates the district court considered Good Left's arguments but chose to weigh his history of violence toward others, a concern the defendant had apparently not addressed, and specifically noting his long history of violence against others, including the same victim as in this case.

In short, Good Left's claim his sentence is substantively unreasonable is simply a disagreement over the weight the district court afforded the different 3553(a) factors. This is insufficient to find the district court abused its discretion and imposed a substantively unreasonable sentence. Grimes, 702 F.3d at 471 (finding sentence was not an unreasonable variance where court determined defendant's long history of the same type of violence over his mitigating circumstances of military service and mental health issues).

## CONCLUSION

The district court committed no procedural error, plain or otherwise, and the sentence imposed was substantively reasonable. Therefore, Good Left's sentence should be affirmed.

Dated: June 16, 2023

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## CERTIFICATE OF SERVICE

I hereby certify that an electronic copy of this brief has been submitted for review and approval on June 16, 2023, to the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system.

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