APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	22-CR-1028
	)	
KAYNE DONATH,	)	
	)	
Defendant.	)	

APPEARANCES:

ATTORNEY JASON DORVAL NORWOOD, U.S. Attorney's Office, 111 Seventh Avenue S.E., Box 1, Cedar Rapids, Iowa 52401, appeared on behalf of the United States.

ATTORNEY CHRISTOPHER J. NATHAN, Federal Public Defender's Office, 222 Third Avenue S.E., Suite 290, Cedar Rapids, Iowa 52401, appeared on behalf of the Defendant.

SENTENCING HEARING,

HELD BEFORE THE HON. C.J. WILLIAMS,

on the 17th day of April, 2023, at 111 Seventh Avenue S.E., Cedar Rapids, Iowa, commencing at 1:00 p.m., and reported by Patrice A. Murray, Certified Shorthand Reporter, using machine shorthand.

Transcript Ordered: 5/1/23
Transcript Completed: 5/22/23

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MR. NATHAN: Yeah, I think what I meant was that she put her foot on the accelerator. Yeah, I saw the video obviously.

THE COURT: Okay, all right. I just wanted to clarify that because if that was the case, then I missed that.

MR. NATHAN: I misspoke.

THE COURT: All right. Let's turn first to the base offense level. I understand that Mr. Nathan has done some research and found the *Hauck* case, 908 N.W.2d at 880, that in theory, if you read into the facts of the case, it is possible that this is the hypothetical case that the case -- or that the Eighth Circuit found in *Hamilton* didn't exist. I'm not buying it. I could be wrong, and if the Eighth Circuit finds that this is this theoretical case that proves that it's possible to be convicted of assault with intent to commit bodily injury or mental illness under these circumstances, then they can tell me I'm wrong, but that's not what *Hauck* held. That wasn't the subject of *Hauck.* That wasn't what was going on in *Hauck.* And I get that a district court judge accepted a guilty plea of a charge, but we don't have in front of me the minutes of testimony or a factual basis of the guilty plea at the district court level for me to discern what the district court found or didn't find,

what facts were relied upon to determine what facts were sufficient for a conviction under this statute.

And so I found -- I find I'm still bound by *Hamilton*, and I don't find -- find that there's one case out there that, if read liberally in favor of defendant, could constitute the hypothetical case that the Eighth Circuit didn't find existed. I'm not -- I'm not persuaded. And so that can be taken to the Eighth Circuit, and they can tell me I'm wrong, but I don't -- I don't buy it at this point.

And so I am overruling the defendant's objection to paragraph 9. I find the correct base offense level is 20 because I find the defendant did commit this offense after a crime of violence or a controlled substance offense.

Turning to the factual question on the 4-level enhancement for possession of a firearm in connection with another offense, I am overruling the defendant's objection to paragraph 10. I find the defendant committed both assault with a dangerous weapon and intimidation with a dangerous weapon.

So let me walk through the facts as I find them. And, you know, first of all, Mr. Nathan has done an outstanding job of viewing the evidence in the light most favorable for the defendant. That's not my job. My job

As far as paragraph 5, I'm overruling the defendant's objection to paragraph 5, and I find the facts as set forth there to be accurate.

The defendant has objected to paragraph 6, a portion of that, and there's no evidence to the contrary, and so I'm sustaining that objection.

I'm overruling the defendant's objection to paragraph 7. I find that Harris is a victim of this offense.

And I'm overruling the defendant's objection to paragraph 10, finding the defendant committed this offense -- possessed the firearm in commission of the offense of assault and intimidation with a dangerous weapon.

That gives us an adjusted offense level of 24.

Mr. Norwood, what is the government's position about acceptance of responsibility?

MR. NORWOOD: Your Honor, based on the evidence, the government -- and the judge's ruling in this case, the government is not moving for the additional third level and would argue that the defendant should not receive any acceptance of responsibility. Your Honor, that would be based on the fact that the instant offense included the conduct where the defendant held Ms. Harris at gunpoint and that was the operative

facts in the case. And so the government's position is that is a factual dispute as it relates to the instant offense and that Mr. Donath should not receive any levels for acceptance of responsibility.

THE COURT: Mr. Nathan?

MR. NATHAN: Thank you, Your Honor. In terms of the government's objections, in their sentencing memo on page 6, they had included our objection to the base offense level as a basis to not award acceptance. Of course, that's not a reason to deny acceptance.

Turning to the defendant's objection to the plus 4, obviously, the defense understands Your Honor's ruling and respects it as well. This objection to (b)(6)(B) was not a frivolous objection. And the objection was based on two factors that I think at least -- the least that could be said is that they were made in good faith. The video -- which again, Your Honor, we understand it; disagree with it -- but Your Honor reconciled the video with Ms. Harris's statements, but, of course, it's not the defendant's job to reconcile the statements, and so the video does show a good faith basis to object to the plus 4.

Additionally, again, understanding and respecting but disagreeing with Your Honor's reconciliation of the argument toward the end of Exhibit A, that's another

objection and/or denial that was made in good faith.

And then, what I'll simply note is that there's some tension in the federal courts between the emphasis on finding the truth and then taking away acceptance for objections that are made in good faith. Of course, frivolous objections have no place in the search for truth, but good solid objections that are based on evidence, review of discovery, and have a good faith basis do have a place in the Court's search for the truth. Again, that Your Honor has found that that is what happened does not make it frivolous, and there ought to be a difference between losing an objection and losing acceptance of responsibility.

And to go further, what happened here was that Your Honor found Ms. Harris credible. And that's, of course, the basis for the Court's decision in overruling our objection to (b)(6)(B). But, of course, the defense isn't in a position to know whether or not Ms. Harris is credible until she actually hits the stand. So the defense does not believe that this denial is a basis to take away the acceptance.

Turning to the third level, if the Court does award Mr. Donath acceptance, I did want to touch on the government's decision to not award a third level. I think, as the Court is aware -- I'm just looking at my

phone because that's where the information is, but as the Court is aware, starting on November 1st -- assuming that Congress does not amend or modify the unanimous proposal from the Sentencing Commission, withholding a third level beginning on the 1st of November may only be for trial-related issues. And as the withholding of the third level here is not related to trial, the defense would ask that if the Court awards acceptance, that the Court vary downward by 1 level. Thank you.

THE COURT: Thank you. In my view, this is a close call, but I am not going to deny the 2-level reduction for acceptance of responsibility. I agree with Mr. Nathan. Were the Court to routinely deny a 2-level reduction for acceptance of responsibility every time a defendant challenged the government's evidence or challenged -- or put the government to the test of proving up an enhancement, that would effectively deter defendants from ever challenging the government, and that's not what I believe was intended by the third level off for acceptance of responsibility. This was not a frivolous contesting of facts here. There was a basis that Mr. Nathan did a fine job of displaying during the -- during this hearing for challenging the 4-level enhancement here, and so I think it would be inappropriate to deny the defendant a reduction for

acceptance of responsibility simply because he challenged it when I don't find it to be frivolous. It was a debatable issue. I found against the defendant. And I agree with Mr. Nathan, my finding is based in very large measure on my assessment of the credibility of the witness, having the opportunity to observe her testify here in front of me, and that's not something that the defendant is charged with responsibility for, nor is he able to assess the credibility in advance of a hearing.

The government at this point -- and I know the law is changing or the guidelines may change in this respect -- but at this point, the government is the only person with the authority -- or the only authority able to move for the third level off under 3E1.1(b). It has not done so here. And so that changes the total offense level. Instead of 21, it will be 22. So with a total offense level of 22, criminal history category VI, the advisory guideline range of imprisonment is 84 to 105 months.

Mr. Norwood, do you agree with my calculation?

MR. NORWOOD: Yes, Your Honor.

THE COURT: And Mr. Nathan?

MR. NATHAN: Yes, Your Honor.

THE COURT: And Officer Sanchez?

PROBATION OFFICER: Yes, Your Honor.

UNITED STATES DISTRICT COURT

Northern District of Iowa

UNITED STATES OF AMERICA) **JUDGMENT IN A CRIMINAL CASE**
)
v.) Case Number: **0862 2:22CR01028-001**
)
KAYNE RUSSELL DONATH) USM Number: **16560-029**
)

■ **ORIGINAL JUDGMENT**
☐ **AMENDED JUDGMENT**
Date of Most Recent Judgment:

Christopher J. Nathan
Defendant's Attorney

THE DEFENDANT:

■ pleaded guilty to count(s) **1 of the Indictment filed on August 17, 2022**

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 922(g)(1) and 924(a)(2)	**Possession of a Firearm by a Felon**	**06/02/2022**	**1**

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ is/are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

C.J. Williams
United States District Court Judge
Name and Title of Judge

April 17, 2023
Date of Imposition of Judgment

Signature of Judge

April 18, 2023
Date

DEFENDANT: **KAYNE RUSSELL DONATH**
CASE NUMBER: **0862 2:22CR01028-001**

PROBATION

☐ The defendant is hereby sentenced to probation for a term of:

IMPRISONMENT

■ The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
90 months on Count 1 of the Indictment.

■ The court makes the following recommendations to the Federal Bureau of Prisons:
It is recommended that the defendant be designated to a Bureau of Prisons facility as close to the defendant's family as possible, commensurate with the defendant's security and custody classification needs.

It is recommended that the defendant participate in the Bureau of Prisons' 500-Hour Comprehensive Residential Drug Abuse Treatment Program or an alternate substance abuse treatment program.

■ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant must surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant must surrender for service of sentence at the institution designated by the Federal Bureau of Prisons:

☐ before 2 p m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the United States Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **KAYNE RUSSELL DONATH**
CASE NUMBER: **0862 2:22CR01028-001**

SUPERVISED RELEASE

■ Upon release from imprisonment, the defendant will be on supervised release for a term of:
3 years on Count 1 of the Indictment.

MANDATORY CONDITIONS OF SUPERVISION

1) The defendant must not commit another federal, state, or local crime.

2) The defendant must not unlawfully possess a controlled substance.

3) The defendant must refrain from any unlawful use of a controlled substance.
The defendant must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future controlled substance abuse. *(Check, if applicable.)*

4) ■ The defendant must cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

5) ☐ The defendant must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where the defendant resides, works, and/or is a student, and/or was convicted of a qualifying offense. *(Check, if applicable.)*

6) ☐ The defendant must participate in an approved program for domestic violence. *(Check, if applicable.)*

The defendant must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: **KAYNE RUSSELL DONATH**
CASE NUMBER: **0862 2:22CR01028-001**

STANDARD CONDITIONS OF SUPERVISION

As part of the defendant's supervision, the defendant must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for the defendant's behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in the defendant's conduct and condition.

1) The defendant must report to the probation office in the federal judicial district where the defendant is authorized to reside within 72 hours of the time the defendant was sentenced and/or released from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.
2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when the defendant must report to the probation officer, and the defendant must report to the probation officer as instructed. The defendant must also appear in court as required.
3) The defendant must not knowingly leave the federal judicial district where the defendant is authorized to reside without first getting permission from the court or the probation officer.
4) The defendant must answer truthfully the questions asked by the defendant's probation officer.
5) The defendant must live at a place approved by the probation officer. If the defendant plans to change where the defendant lives or anything about the defendant's living arrangements (such as the people the defendant lives with), the defendant must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6) The defendant must allow the probation officer to visit the defendant at any time at the defendant's home or elsewhere, and the defendant must permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.
7) The defendant must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment, the defendant must try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about the defendant's work (such as the defendant's position or the defendant's job responsibilities), the defendant must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8) The defendant must not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9) If the defendant is arrested or questioned by a law enforcement officer, the defendant must notify the probation officer within 72 hours.
10) The defendant must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11) The defendant must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12) As directed by the probation officer, the defendant must notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and must permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
13) The defendant must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: **KAYNE RUSSELL DONATH**
CASE NUMBER: **0862 2:22CR01028-001**

SPECIAL CONDITIONS OF SUPERVISION

The defendant must comply with the following special conditions as ordered by the Court and implemented by the United States Probation Office:

1. **The defendant must not have contact during the defendant's term of supervision with the individual(s) set forth in paragraph 85 of the presentence report, in person or by a third party. This includes no direct or indirect contact by telephone, mail, email, or by any other means. The United States Probation Office may contact the aforementioned individual(s) to ensure the defendant's compliance with this condition.**

2. **The defendant must submit the defendant's person, property, house, residence, vehicle, papers, computers [as defined in 18 U.S.C. § 1030(e)(1)], other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. The defendant must warn any other occupants that the premises may be subject to searches pursuant to this condition. The United States Probation Office may conduct a search under this condition only when reasonable suspicion exists that the defendant has violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.**

3. **The defendant must participate in a mental health evaluation. The defendant must complete any recommended treatment program, and follow the rules and regulations of the treatment program. The defendant must take all medications prescribed to the defendant by a licensed medical provider.**

4. **The defendant must participate in an evaluation for anger management and/or domestic violence. The defendant must complete any recommended treatment program, and follow the rules and regulations of the treatment program.**

5. **The defendant must participate in a substance abuse evaluation. The defendant must complete any recommended treatment program, which may include a cognitive behavioral group, and follow the rules and regulations of the treatment program. The defendant must participate in a program of testing for substance abuse. The defendant must not attempt to obstruct or tamper with the testing methods.**

6. **If not employed at a lawful type of employment as deemed appropriate by the United States Probation Office, the defendant must participate in employment workshops and report, as directed, to the United States Probation Office to provide verification of daily job search results or other employment related activities. In the event the defendant fails to secure employment, participate in the employment workshops, or provide verification of daily job search results, the defendant may be required to perform up to 20 hours of community service per week until employed.**

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them. Upon a finding of a violation of supervision, I understand the Court may: (1) revoke supervision; (2) extend the term of supervision; and/or (3) modify the condition of supervision.

Defendant	Date
United States Probation Officer/Designated Witness	Date

DEFENDANT: **KAYNE RUSSELL DONATH**
CASE NUMBER: **0862 2:22CR01028-001**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	AVAA Assessment[1]	JVTA Assessment[2]	Fine	Restitution
TOTALS	**$ 100**	**$ 0**	**$ 0**	**$ 0**	**$ 0**

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss[3]	Restitution Ordered	Priority or Percentage

TOTALS $ _____ $ _____

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

[1]Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
[2]Justice for Victims of Trafficking Act of 2015, 18 U.S.C. § 3014.
[3]Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: **KAYNE RUSSELL DONATH**
CASE NUMBER: **0862 2:22CR01028-001**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ■ $ **100** due immediately;

☐ not later than _____ , or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant must pay the cost of prosecution.

☐ The defendant must pay the following court cost(s):

■ The defendant must forfeit the defendant's interest in the following property to the United States:
As set forth in the Preliminary Order of Forfeiture filed on December 1, 2022, Document No. 30.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

United States Court of Appeals
For the Eighth Circuit

No. 23-1912

United States of America

Plaintiff - Appellee

v.

Kayne Russell Donath

Defendant - Appellant

Appeal from United States District Court
for the Northern District of Iowa - Eastern

Submitted: January 11, 2024
Filed: July 12, 2024

Before SMITH, Chief Judge,[1] GRUENDER and SHEPHERD, Circuit Judges.

SMITH, Chief Judge.

Kayne Russell Donath pleaded guilty to unlawful possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1). On appeal, he challenges the district

[1]Judge Smith completed his term as chief judge of the circuit on March 10, 2024. *See* 28 U.S.C. § 45(a)(3)(A).

court's[2] categorization of two previous state offenses as "crime[s] of violence" under U.S.S.G. §§ 2K2.1(a)(4)(A) and 4B1.2(a). He also challenges the district court's decision to decrease his offense by two levels, rather than three, for acceptance of responsibility under U.S.S.G. § 3E1.1. On both issues, we affirm.

I. *Background*

On June 2, 2022, Donath rode as the front-seat passenger in a vehicle driven by Jade Danyell Harris, a Facebook friend who had offered Donath a car ride. Police officers initiated a traffic stop. They identified the driver as Harris and the passenger as Donath. Officers conducted a routine warrant check. Harris was clear, but Donath had an outstanding warrant. Officers asked Donath to exit the vehicle. He refused to comply. Instead, he grabbed the gearshift, shifted the vehicle into drive, and commanded Harris to drive away. Harris did so, and officers pursued them.

When officers caught the vehicle, only Harris remained inside. She told officers that Donath had pulled a firearm during the traffic stop, held it to her side, and threatened to shoot her if she did not drive away. She said the firearm had not been visible to officers because Donath had concealed it under a durag. After Harris and Donath fled, Donath threw the firearm into an alleyway and ran.

Officers searched the alleyway and found a Taurus G2C 9mm pistol with one chambered round and a 12-round magazine. A black cloth, consistent with Harris's description of Donath's durag, was tied around the trigger guard. Officers searched the surrounding area for Donath. When they saw a residence with an open door, they went to the doorway and asked an apparent resident for permission to enter and search for a runaway suspect. The resident consented. Officers entered, detected Donath upstairs, ordered him to come downstairs, and arrested him.

At the time of his arrest, Donath had a prior felony conviction and was therefore prohibited from possessing a firearm. Based on his possession of the pistol,

[2]The Honorable C.J. Williams, then United States District Judge for the Northern District of Iowa, now Chief Judge.

the government charged Donath with being a felon in possession. Donath pleaded guilty to the offense. However, he challenged the government on two sentencing matters. First, he disputed whether two of his prior offenses under Iowa law constituted "crime[s] of violence." *See* U.S.S.G. §§ 2K2.1(a)(4)(A), 4B1.2(a). Second, he denied pointing his firearm at Harris. *See id.* § 2K2.1(b)(6)(B).

As to the crimes of violence, the Sentencing Guidelines assigned a base offense level of 20 if Donath "committed any part of the instant offense subsequent to sustaining one felony conviction of . . . a crime of violence." *Id.* § 2K2.1(a)(4)(A). A "crime of violence" includes "any offense under federal or state law, 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." *Id.* § 4B1.2(a). Donath conceded his two prior convictions for assaulting correctional officers in violation of Iowa Code § 708.3A(3).[3] However, he argued that assaulting a correctional officer is not a crime of violence because it does not require proof that the offender used, attempted to use, or threatened to use physical force against the victim. The district court rejected this argument as speculative.

Donath also argued that he never pointed his firearm at Harris. If Donath had pointed his firearm at Harris, he would receive a four-level increase. *See* U.S.S.G. § 2K2.1(b)(6)(B) (directing a four-level increase if the defendant used his firearm "in connection with another felony offense"); Iowa Code §§ 708.1(2)(c); 708.2(3)

[3]Although Iowa law gives the designation "aggravated misdemeanor" to the state offense of assaulting a correctional officer, a federal court treats the offense as a felony when it calculates the defendant's recommended sentence. *See* Iowa Code §§ 708.3A(3), 903.1(2) (imposing a maximum prison term of two years); U.S.S.G. § 2K2.1 n.1 (describing felonies as offenses "punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed").

(assault with a dangerous weapon).[4] By a preponderance of the evidence, the government proved that Donath pointed his firearm at Harris. Accordingly, the court increased Donath's offense level from 20 to 24.

Next, the court heard the parties' arguments about whether Donath accepted responsibility. A two-level decrease applies if a "defendant clearly demonstrates acceptance of responsibility for his offense." U.S.S.G. § 3E1.1(a). And if "the defendant has assisted authorities in the[ir] investigation or prosecution of his own misconduct," the government may move for an additional one-level decrease, and the court may grant it. *Id.* § 3E1.1(b). Here, the government said that it was "not moving for the additional third level and would argue that the defendant should not receive any acceptance of responsibility" because, despite his guilty plea, he contested "the operative facts" of the case. R. Doc. 61-1, at 112–13. Donath argued that, after pleading guilty, he made only non-frivolous and good-faith objections, which did not relate to his offense but only to sentencing matters. He asserted that promptly pleading guilty should entitle him to the additional level.

The court ruled: "In my view, this is a close call, but I am not going to deny the 2-level reduction for acceptance of responsibility." *Id.* at 115. "Were the Court to routinely deny a 2-level reduction for acceptance of responsibility every time a defendant . . . put the government to the test of proving up an enhancement, that would effectively deter defendants from ever challenging the government . . . ." *Id.* But, the court continued: "[T]he government is the only person with the authority—or the only authority able to move for the third level off under [§] 3E1.1(b). It has not done so here." *Id.* at 116. Finding that Donath accepted responsibility sufficient for a two-level decrease but noting the absence of a government motion for a three-level decrease, the court calculated a total offense level of 22.

[4]As with the preceding footnote, Iowa law treats assault with a dangerous weapon as an aggravated misdemeanor, but a federal court treats it as a felony during sentencing. *See* Iowa Code §§ 708.2(3), 903.1(2); U.S.S.G. § 2K2.1 n.1.

Given a total offense level of 22 and a criminal history category of VI, the Guidelines advised a sentencing range of 84 to 105 months' imprisonment. The government asked the court for 90 months. Donath asked for "a sentence at the low end of the range." *Id.* at 128. The court sentenced Donath to 90 months' imprisonment.

II. *Discussion*

On appeal, Donath raises two issues. First, he argues that his prior assaults of correctional officers, in violation of Iowa Code § 708.3A(3), are not "crime[s] of violence" under U.S.S.G. §§ 2K2.1(a)(4)(A) and 4B1.2(a). Second, he argues that the district court erred when it adjusted his offense level downward by two levels, instead of three, for acceptance of responsibility under U.S.S.G. § 3E1.1. Both issues are questions of law, which require us to interpret the Guidelines. "[T]he most appropriate standard for reviewing a district court's interpretation and application of the [G]uidelines is the de novo standard." *United States v. Mashek*, 406 F.3d 1012, 1016 (8th Cir. 2005); *see also United States v. Pulley*, 75 F.4th 929, 930 (8th Cir. 2023) (crimes of violence); *United States v. Wattree*, 431 F.3d 618, 623 (8th Cir. 2005) (acceptance of responsibility), *abrogated on other grounds by United States v. Jordan*, 877 F.3d 391, 394–95 (8th Cir. 2017).

A. *Crimes of Violence*

The first issue is whether Donath committed crimes of violence, within the meaning of the Guidelines, when he assaulted two correctional officers in violation of Iowa Code § 708.3A(3). The base offense level is 20 if "the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of . . . a crime of violence." U.S.S.G. § 2K2.1(a)(4)(A). A "crime of violence" includes "any offense under federal or state law, 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." *Id.* § 4B1.2(a)(1).

Under Iowa law, § 708.3A(3) assault carries a maximum sentence of two years' imprisonment. Iowa Code § 903.1(2). Thus, for federal sentencing purposes, we treat it as a felony. U.S.S.G. § 2K2.1 n.1. On appeal, we must decide whether

Donath's convictions for § 708.3A(3) assault are crimes of violence because they "ha[d] as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2(a)(1).

Precedent controls this issue. In *United States v. Hamilton*, we held that § 708.3A(3) assault is a crime of violence. 46 F.4th 864, 870 (8th Cir. 2022). Applying the categorical approach, we said that "'[p]hysical force' is 'force capable of causing physical pain or injury to another person.'" *Id.* at 869 (quoting *Johnson v. United States*, 559 U.S. 133, 140 (2010)). "If only conduct involving physical force can support a conviction under the statute, then the crime has a physical-force element." *Id.* (quoting *United States v. Quigley*, 943 F.3d 390, 394 (8th Cir. 2019)). A speculative reading of a criminal statute will not suffice. *Id.* To establish that a defendant's prior offense is not a crime of violence:

> [T]here must be a non-fanciful, non-theoretical manner to commit the offense without so much as the threatened use of physical force. To make this showing, a defendant must at least point to his own case or other cases in which the state courts did in fact apply the statute in the special (nongeneric) manner for which he argues.

Id. (cleaned up).

Defendant Hamilton could not show a non-fanciful, non-theoretical manner of assaulting a government officer—in his case, a police officer—without even the threatened use of physical force. *Id.* at 868–70. He could "not identify any Iowa cases or his own case where section 708.3A(3) was applied in a way that did not involve at least the threatened use of physical force." *Id.* at 870. Accordingly, we held that § 708.3A(3) assault "qualifies as a crime of violence." *Id.*

Here, Donath argues that he has identified Iowa precedent that Hamilton did not identify. Donath points to an unpublished 2017 decision of the Iowa Court of Appeals. *State v. Hauck*, 908 N.W.2d 880 (Iowa Ct. App. 2017) (unpublished table decision). According to Donath, *Hauck* shows that it is possible to assault a person,

in violation of Iowa law, without so much as the threatened use of physical force. Given *Hauck*, Donath asks us to revisit *Hamilton*.

We will not examine *Hauck* or revisit *Hamilton*. "It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel." *Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc) (quoting *Owsley v. Luebbers*, 281 F.3d 687, 690 (8th Cir. 2002) (per curiam)). A prior panel has held that § 708.3A(3) assault is a crime of violence. *Hamilton*, 46 F.4th at 870. Donath committed § 708.3A(3) assault. Therefore, he committed a crime of violence.

On questions of federal law, we have said that our cardinal rule is not absolute. "A limited exception to the prior panel rule permits us to revisit an opinion of a prior panel if an intervening Supreme Court decision is inconsistent with the prior opinion." *McCullough v. AEGON USA, Inc.*, 585 F.3d 1082, 1085 (8th Cir. 2009). The same is true when an intervening decision of the en banc court is inconsistent with a prior panel opinion. *See Cottier v. City of Martin*, 604 F.3d 553, 556 (8th Cir. 2010) (en banc) ("When sitting en banc, the court has authority to overrule a prior panel opinion, whether in the same case or in a different case.").

On questions related to state law, a similar exception may exist when there is an intervening decision from a state court. We are aware of such an exception in some other circuits. *See, e.g.*, *World Harvest Church, Inc. v. Guideone Mut. Ins. Co.*, 586 F.3d 950, 957 (11th Cir. 2009); *Rutherford v. Columbia Gas*, 575 F.3d 616, 619 (6th Cir. 2009); *FDIC v. Abraham*, 137 F.3d 264, 268–69 (5th Cir. 1998). And this exception may already exist in our circuit.[5] However, the parties have not briefed

[5]*Compare Beckon, Inc. v. AMCO Ins. Co.*, 616 F.3d 812, 820 (8th Cir. 2010) ("When the highest court of a state disposes of an issue of state law contrary to the resolution of the issue theretofore suggested by a federal court, the latter ruling must give way." (quoting *Smith v. F.W. Morse & Co.*, 76 F.3d 413, 429 n.12 (1st Cir. 1996)), *with Arena Holdings Charitable, LLC v. Harman Pro., Inc.*, 785 F.3d 292, 296 (8th Cir. 2015) ("[O]ur circuit has never specifically determined the binding effect of a state law determination by a prior panel . . . ." (quoting *AIG Centennial Ins. Co. v. Fraley-Landers*, 450 F.3d 761, 767 (8th Cir. 2006))). We do not regard

the issue. *See Ahlberg v. Chrysler Corp.*, 481 F.3d 630, 634 (8th Cir. 2007) ("[P]oints not meaningfully argued in an opening brief are waived."). Even if they had, Donath does not point to an intervening state case. He points to *Hauck*, and the state court's decision in *Hauck* predates our decision in *Hamilton*, so it is unavailing.

Regardless of what effect an intervening state case may have, we hold that an old state case—a state case decided before a prior panel opinion—cannot overcome our circuit's prior panel rule. *Washington v. Countrywide Home Loans, Inc.*, 747 F.3d 955, 958 (8th Cir. 2014); *Neidenbach v. Amica Mut. Ins. Co.*, 842 F.3d 560, 566 n.2 (8th Cir. 2016). If a conflict existed, we would afford a more recent panel opinion controlling weight over a less recent state case. Following *Hamilton* and disregarding *Hauck*, we conclude that Donath committed crimes of violence when he assaulted two correctional officers in violation of § 708.3A(3).

Alternatively, Donath argues that we should revisit *Hamilton* in light of *United States v. Taylor*, 596 U.S. 845 (2022). The problem here is almost identical. The Supreme Court decided *Taylor* on June 21, 2022, and the circuit panel decided *Hamilton* on August 30, 2022. *Taylor* does not intervene between *Hamilton* and the present case. An older Supreme Court decision does not overcome the binding nature of a newer opinion filed by a three-judge panel of our court. *See McCullough*, 585 F.3d at 1085. Accordingly, we decline to examine *Taylor* as well.

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as binding the comment that our court previously made in an unpublished opinion. *See United States v. Holston*, 773 F. App'x 336, 337 (8th Cir. 2019) (unpublished per curiam) ("[W]here a state court answers a question of state law contrary to a previous decision of our Court, we no longer follow the previous panel decision."); 8th Cir. R. 32.1A ("Unpublished opinions are decisions a court designates for unpublished status. They are not precedent.").

B. *Acceptance of Responsibility*

The second issue Donath raises is whether his guilty plea warranted a three-level decrease for acceptance of responsibility under U.S.S.G. § 3E1.1.[6] Subsection (a) of this Guideline provides: "If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels." *Id.* § 3E1.1(a). When Donath's sentence was imposed, subsection (b) provided:

> If the defendant qualifies for a decrease under subsection (a) . . . and *upon motion of the government* stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.

Id. § 3E1.1(b) (as of Apr. 17, 2023) (emphasis added).

After Donath's sentence was imposed, the Sentencing Commission amended subsection (b) by adding the following language:

> The term "preparing for trial" means substantive preparations taken to present the government's case against the defendant to a jury (or judge, in the case of a bench trial) at trial. "Preparing for trial" is ordinarily indicated by actions taken close to trial, such as preparing witnesses for trial, in limine motions, proposed voir dire questions and jury instructions, and witness and exhibit lists. Preparations for pretrial proceedings (such as litigation related to a charging document,

[6]The government argues that Donath did not preserve his claim of error because he did not object when the district court granted a two-level decrease for acceptance of responsibility. We disagree. At sentencing, Donath clearly made his desire for an additional level known to the court. *See* Fed. R. Crim. P. 51(b) ("A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, *or* the party's objection to the court's action and the grounds for that objection." (emphasis added)); *see also United States v. Wallace*, 377 F.3d 825, 826 (8th Cir. 2004) (holding that a claim of error was preserved under similar circumstances).

> discovery motions, and suppression motions) ordinarily are not considered "preparing for trial" under this subsection. Post-conviction matters (such as sentencing objections, appeal waivers, and related issues) are not considered "preparing for trial."

Id. (effective Nov. 1, 2023).

Whether we apply the Guideline as it existed at sentencing or as subsequently amended depends on the character of the amendment. Subsection 1B1.11(a) states: "The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced." *Id.* § 1B1.11(a). However, § 1B1.11(b)(2) states: "[T]he court shall consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive changes." *See United States v. King*, 280 F.3d 886, 891 (8th Cir. 2002) ("A defendant sentenced under one version of the Guidelines may be given the benefit of a later revision if the revision merely clarifies, rather than substantively changes, the Sentencing Commission's earlier intent."). We have held that an amendment effects a clarifying change, rather than a substantive change, "if it does not conflict with the preexisting [G]uideline," even if it "changes the law of this circuit." *United States v. Hansen*, 859 F.3d 576, 578 (8th Cir. 2017). We will find no conflict, treat an amendment as clarifying rather than substantive, and apply it retrospectively to the defendant, unless the amendatory language is "plainly at odds," *United States v. Diaz-Diaz*, 135 F.3d 572, 581 (8th Cir. 1998), or "fundamentally inconsistent" with the preexisting Guideline, *United States v. Lambros*, 65 F.3d 698, 700 (8th Cir. 1995).

Comparing the old and new versions of the Guideline, we see no conflict. The new language simply defines the term "preparing for trial," and it is not "plainly at odds" or "fundamentally inconsistent" with the Guideline's earlier version, which did not define this term. *See* U.S.S.G. § 3E1.1(b); *Diaz-Diaz*, 135 F.3d at 581; *Lambros*, 65 F.3d at 700. Thus, we review Donath's sentence under the current Guideline, inclusive of the new "preparing for trial" definition.

Our circuit reads "black-letter Guidelines" together with their comments and application notes. *United States v. Rivera*, 76 F.4th 1085, 1089–91 (8th Cir. 2023),

cert. denied, 144 S. Ct. 861 (2024). A lawfully adopted, noncontradictory comment or application note that interprets or explains a Guideline will be given controlling weight unless plainly erroneous. *United States v. Mendoza-Figueroa*, 65 F.3d 691, 693 (8th Cir. 1995) (en banc); *see Stinson v. United States*, 508 U.S. 36, 38 (1993) ("[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline."); *Rivera*, 76 F.4th at 1089–91 (reaffirming our adherence to *Mendoza-Figueroa* and *Stinson*, notwithstanding "significant developments" in recent case law).

Here, the acceptance-of-responsibility Guideline on which Donath relies has an application note. Application Note 6 says:

> Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) *may only* be granted upon a formal motion by the Government at the time of sentencing. *See* section 401(g)(2)(B) of Pub. L. 108-21.

U.S.S.G. § 3E1.1 n.6 (emphasis added). This note was enacted by Congress, it interprets or explains the Guideline, and it is not a plainly erroneous reading of the Guideline. *See Rivera*, 76 F.4th at 1090 (discussing the note's enactment).

We give controlling weight to the words "may only." Thus, the acceptance-of-responsibility Guideline permits, but never requires, the government to move for an additional one-level reduction. "A defendant . . . is not entitled to an additional level of reduction as a matter of right." *United States v. Smith*, 422 F.3d 715, 726 (8th Cir. 2005). Because a three-level decrease "may only be granted upon a formal motion by the Government," U.S.S.G. § 3E1.1 n.6, and the government did not formally move here, Donath is not entitled to the additional third level.

A court may compel a government motion for a three-level decrease, contrary to the plain language of Application Note 6, only if the government's decision not to move is based on an unconstitutional motive or irrational. *Jordan*, 877 F.3d at

394. Donath "has presented no evidence that the [government's] decision was based on an unconstitutional motive, such as his race or his religion." *United States v. Smith*, 574 F.3d 521, 525 (8th Cir. 2009) (affirming the denial of a downward departure for substantial assistance). And the government had a rational basis for withholding its motion. Specifically, Donath showed a lack of candor and remorse on a factual issue that was central to the determination of his sentencing range. He denied that he threatened and pointed his firearm at Harris. A defendant "may not minimize conduct or partially accept responsibility" and still expect to receive a three-level decrease. *United States v. Zeaiter*, 891 F.3d 1114, 1123 (8th Cir. 2018) (quoting *United States v. Fischer*, 551 F.3d 751, 755 (8th Cir. 2008)). "[T]he district court's generous award of a two-level reduction did not compel the government to move for a third." *United States v. Gaye*, 902 F.3d 780, 789 (8th Cir. 2018).

The Commission's recent amendment to the acceptance-of-responsibility Guideline does not change our view. Again, the amendment simply clarifies what "preparing for trial" means. This amendment narrows the government's discretion to move *for* a three-level decrease,[7] but it does not affect the government's decision *against* a motion. Under Application Note 6, the government has broad discretion to withhold its motion. A court may compel the government to move for a three-level decrease only under the rarest circumstances, not present here.[8]

III. *Conclusion*

Following *Hamilton*, we hold that Donath committed crimes of violence when he assaulted two correctional officers in violation of Iowa Code § 708.3A(3). *See*

[7]Before the recent amendment, a prosecutor potentially could have moved for a three-level decrease based on a defendant's assistance with pretrial proceedings or on post-conviction matters. By the amendment, the Commission has now clarified that such a motion would be improper and should be denied. Thus, the amendment narrows the availability of three-level decreases to defendants.

[8]In other words, the black-letter Guideline controls when the government *may move for* a three-level decrease. Application Note 6 controls when the government *may decline to move*. The recent amendment does not alter Application Note 6.

Hamilton, 46 F.4th at 870. Following Application Note 6, we hold that Donath was not entitled to a three-level decrease for acceptance of responsibility. *See* U.S.S.G. § 3E1.1 n.6. On both issues, the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-1912

United States of America

Plaintiff - Appellee

v.

Kayne Russell Donath

Defendant - Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Eastern
(2:22-cr-01028-CJW-1)

JUDGMENT

Before SMITH, Chief Judge, GRUENDER, and SHEPHERD, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

July 12, 2024

Order Entered in Accordance with Opinion:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

Adopted April 15, 2015
Effective August 1, 2015

Revision of Part V of the Eighth Circuit Plan to Implement the Criminal Justice Act of 1964.

V. Duty of Counsel as to Panel Rehearing, Rehearing En Banc, and Certiorari

Where the decision of the court of appeals is adverse to the defendant in whole or in part, the duty of counsel on appeal extends to (1) advising the defendant of the right to file a petition for panel rehearing and a petition for rehearing en banc in the court of appeals and a petition for writ of certiorari in the Supreme Court of the United States, and (2) informing the defendant of counsel's opinion as to the merit and likelihood of the success of those petitions. If the defendant requests that counsel file any of those petitions, counsel must file the petition if counsel determines that there are reasonable grounds to believe that the petition would satisfy the standards of Federal Rule of Appellate Procedure 40, Federal Rule of Appellate Procedure 35(a) or Supreme Court Rule 10, as applicable. *See Austin v. United States,* 513 U.S. 5 (1994) (per curiam); 8th Cir. R. 35A.

If counsel declines to file a petition for panel rehearing or rehearing en banc requested by the defendant based upon counsel's determination that there are not reasonable grounds to do so, counsel must so inform the court and must file a written motion to withdraw. The motion to withdraw must be filed on or before the due date for a petition for rehearing, must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for rehearing, and must request an extension of time of 28 days within which to file pro se a petition for rehearing. The motion also must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for writ of certiorari.

If counsel declines to file a petition for writ of certiorari requested by the defendant based on counsel's determination that there are not reasonable grounds to do so, counsel must so inform the court and must file a written motion to withdraw. The motion must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for writ of certiorari.

A motion to withdraw must be accompanied by counsel's certification that a copy of the motion was furnished to the defendant and to the United States.

Where counsel is granted leave to withdraw pursuant to the procedures of *Anders v. California,* 386 U.S. 738 (1967), and *Penson v. Ohio*, 488 U.S. 75 (1988), counsel's duty of representation is completed, and the clerk's letter transmitting the decision of the court will notify the defendant of the procedures for filing pro se a timely petition for panel rehearing, a timely petition for rehearing en banc, and a timely petion for writ of certiorari.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-1912

United States of America

Appellee

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Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Eastern
(2:22-cr-01028-CJW-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 29, 2024

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik