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The United States Sentencing Guidelines

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THE UNITED STATES SENTENCING GUIDELINES

INTRODUCTION

During the survey period, September 1994 through September 1995, the Tenth Circuit decided eleven noteworthy cases involving sentencing in federal courts. In each of these decisions, the Tenth Circuit addressed issues of first impression involving the United States Sentencing Guidelines (Guidelines).[1] This Survey contains nine sections.

Part I provides a brief background and history of the Guidelines. Part II discusses the Guidelines application. The remaining Parts (III through IV) survey Tenth Circuit decisions on the following sentencing guideline issues: (1) what conduct a sentencing court may review in making sentencing determinations; (2) how a sentencing court should apply sentencing enhancements for crimes involving "special skill" or "sophisticated means";[2] (3) when the Guidelines limit a sentencing court's discretion to impose a concurrent sentence prior to an undischarged prison term;[3] (4) whether a court must apply a sentence consecutive to a state prison term when a defendant committed the offense while on release or when a defendant used firearms, piercing ammunition, or explosives in committing the crime;[4] (5) under what circumstances a court should apply a sentence enhancement for an offender's misrepresentation that she was acting on behalf of a charitable organization;[5] (6) whether the commencement of trial precludes sentence reductions for substantial assistance;[6] and (7) whether placing a juvenile under the custody of the state Secretary of Social and Rehabilitation Services constitutes a "confinement" for sentence reduction purposes.[7]

I. BACKGROUND

The United States Sentencing Commission (Commission)[8] promulgated the United States Sentencing Guidelines pursuant to the Sentence Reform Act

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1. United States Sentencing Commission, *Guidelines Manual*, (Nov. 1995) [hereinafter U.S.S.G.].

2. *See* U.S.S.G. §§ 3B1.3, 2T1.3(b)(2).

3. *See* U.S.S.G. § 5G1.3(b)-(c).

4. *See* U.S.S.G. § 2J1.7 (Commission of an Offense While on Release); *id.* § 2K2.4 (Use of Firearm, Armor-piercing Ammunition, or Explosive, During or in Relation to, Certain Crimes).

5. *See* U.S.S.G. § 2F1.1(b)(3)(A).

6. *See* U.S.S.G. § 3E1.1(b)(1)-(2).

7. *See* U.S.S.G. § 4A1.2(d)(2)(A).

8. "The United States Sentencing Commission ('Commission') is an independent agency in the judicial branch composed of seven voting and two non-voting, ex officio members," three of whom must be federal judges. U.S.S.G. Ch.1, Pt.A(1), intro. comment.; 28 U.S.C. § 991(a) (1994). The Commission is charged with "establish[ing] sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed Guidelines prescribing the appropriate sentences for offenders convicted of federal crimes." U.S.S.G. Ch.1, Pt.A(1), intro. comment.

of 1984 (SRA).[9] The SRA charged the Commission to develop determinant sentencing guidelines that further four "basic purposes of criminal punishment: incapacitation, deterrence, just punishment, and rehabilitation."[10]

The Guidelines represent the culmination of a reform movement aimed at achieving honesty, uniformity, and proportionality in sentencing.[11] Congress sought honesty by curbing the broad sentencing discretion that accompanied the previous indeterminate sentencing system.[12] That system resulted in the imposition of indeterminate sentences, and allowed the parole commission to determine the actual time served.[13] The Guidelines attain uniformity by embracing a "real-offense model" that bases punishment decisions on a defendant's actual conduct rather than on the conviction offense.[14] This model attempts to curb sentencing disparity for "similarly situated offenders."[15] Finally, Congress realized proportionality by establishing different sentences for differently situated offenders according to the relative seriousness of their conduct.[16]

The Guidelines apply to all federal offenses committed on or after the effective date of November 1, 1987.[17] They employ a sophisticated array of empirical, quasi-mathematical formulas for calculating sentences.[18] With the passage of the Guidelines, Congress abolished parole, thereby requiring that convicts actually serve the sentences imposed by the court, less a permissible good behavior reduction of approximately fifteen percent.[19]

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9. The Sentencing Reform Act of 1984, Title II of the Comprehensive Crime Control Act of 1984, was passed as Pub. L. No. 98-473, §§ 211-239, 98 Stat. 1837, 1976, 1987-2040 (codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 (1988 & Supp. V 1993) and 28 U.S.C. §§ 991-998 (1988 & Supp. V 1993)).

10. U.S.S.G. Ch.1, Pt.A(2), intro. comment. (The Statutory Mission).

11. U.S.S.G. Ch.1, Pt.A(3), intro. comment. (p.s.) (The Basic Approach).

12. *See id.*; David A. Hoffman, *The Federal Sentencing Guidelines and Confrontation Rights*, 42 DUKE L.J. 382, 387-88 (1992); *see also* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 92-93 (1973) (criticizing the indeterminate sentencing system for its "rehabilitative" objective).

13. U.S.S.G. Ch.1, Pt.A(3), intro. comment. (p.s.).

14. For a general discussion about the choice to embrace a real-offense-based model as opposed to a conviction-based scheme, see Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 8-12 (1988); Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 925-27 (1990). Through the real-offense mechanism, the Commission sought to prevent prosecutors from "circumventing" the Guidelines by charge bargaining. *See* Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 278-79 (1989).

15. U.S.S.G. Ch.1, Pt.A(3), intro. comment. (p.s.).

16. *Id.*

17. *See* S. REP. NO. 225, 98th Cong., 2d Sess. 189 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3372; U.S.S.G. Ch.1, Pt.A(2), intro. comment. For an analysis of applying sentencing procedures to offenses committed prior to November 1, 1987, see James L. Slear, Project, *Twentieth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1989-90*, 79 GEO. L.J. 591, 1162-71 (1991).

18. U.S.S.G. Ch.1, Pt.A(3), intro. comment. (p.s.); *cf.* Note, *An Argument for Confrontation Under the Federal Sentencing Guidelines*, 105 HARV. L. REV. 1880 (1992) (arguing that judges retain discretion even under the Guidelines because Congress left intact informal procedures for gathering "facts relevant to sentencing").

19. U.S.S.G. Ch.1, Pt.A(3), intro. comment. (p.s.).

II. APPLICATION OF THE FEDERAL SENTENCING GUIDELINES[20]

The Guidelines consist of a sentencing scheme centered around a 258-cell grid, or "Sentencing Table."[21] Each box contains the presumptive sentencing range, also known as a "heartland": a "set of typical cases embodying the conduct that each guideline describes."[22] The sentencing matrix consists of two axes. An offender's offense level forms the vertical axis and ranges from a low of one to a high of forty-three.[23] An offender's criminal history forms the horizontal axis and ranges in severity from category level I to VI.[24]

Before calculating the applicable sentence under the Guidelines, a judge must first determine the "sentencing range" using this sentencing matrix.[25] To determine the sentencing range, judges must: (1) establish the vertical axis;[26] (2) establish the horizontal axis;[27] and (3) plot the vertical and horizontal axis lines on the sentencing matrix.[28] After determining the sentencing range, judges have limited discretion to consider statutorily permissible departures from the sentencing guideline matrix.[29] Federal law prohibits judges from imposing prison terms that vary from the sentencing guideline matrix more than twenty-five percent or six months, whichever is greater.[30] Thus, offenders with similar criminal histories, convicted of the same crime under similar circumstances, will receive fairly uniform sentences.

A. *Establishing the Vertical Guideline Axis*

Section 1B1.1 of the Guidelines sets forth the steps used in establishing the vertical axis value, or offense level.[31] Establishing the offense level requires consideration of not only conduct constituting an element of the offense charged, but also the totality of the "relevant" criminal conduct.[32] As defined by section 1B1.3, "relevant conduct" includes all "acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the commission of the

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20. *See generally* U.S.S.G. Ch.1 (providing a mission statement and philosophical, historical, and other background information); Hoffman, *supra* note 12, at 388-90 (using a money laundering hypothetical to illustrate the application of the Guidelines).

21. U.S.S.G. Ch.5, Pt.A (Sentencing Table), *reprinted infra* app. 1.

22. U.S.S.G. Ch.1, Pt.A(4)(b), intro. comment. (p.s.). The Guidelines require the judge to impose a sentence within this range unless the court finds an aggravating or mitigating circumstance of a kind (or to a degree) not adequately considered by the Commission. *Id.*

23. U.S.S.G. Ch.5, Pt.A, comment. (n.1); *see supra* note 21.

24. U.S.S.G. Ch.5, Pt.A, comment. (n.1); *see supra* note 21.

25. U.S.S.G. Ch.5, Pt.A, comment. (n.1); *see supra* note 21.

26. U.S.S.G. § 1B1.1(a)-(e) (Application Guidelines); *see infra* notes 31-67 and accompanying text.

27. U.S.S.G. § 1B1.1(f); *see infra* notes 68-80 and accompanying text.

28. U.S.S.G. § 1B1.1(g); *see infra* notes 81-83 and accompanying text.

29. U.S.S.G. § 1B1.1(i); *see infra* notes 84-99 and accompanying text.

30. 28 U.S.C. § 994(b)(2) (1994); U.S.S.G. Ch.1, Pt.A(2), intro. comment.

31. U.S.S.G. § 1B1.1(a)-(e).

32. U.S.S.G. § 1B1.3 (Relevant Conduct) (listing "factors that determine the guideline range"); *see also* U.S.S.G. § 1B1.3, comment. (backg'd.) (explaining the difference between the breadth of information relevant in determining the guideline range and that relevant in determining the ultimate sentence under § 1B1.4).

offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense" and any harm caused thereby.[33] The scope of "relevant conduct" in a "jointly undertaken criminal activity,"[34] for example, is very broad and includes "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity."[35]

To establish the vertical guideline axis within this broad definitional parameter, judges must first locate the base offense level from the appropriate guideline in Chapter Two and apply any relevant offense-specific and nonoffense-specific adjustments.[36] A judge then gives these classifications numerical weight and applies them to the vertical grid axis.[37]

1. The Base Offense Level

Each statutorily defined federal offense corresponds to one of forty-three base offense levels.[38] To find the corresponding level for a specific offense, a judge must find the applicable "offense guideline section" from Chapter Two of the Guidelines using the Statutory Index in Appendix A.[39] The offense guideline section gives the base offense level for the offense.[40] For example, burglary, an offense covered by section 2B2.1, has a base offense level of seventeen if the offender burglarizes a residence but only twelve if the burglary involves a structure other than a residence.[41]

2. Offense-Specific Adjustments to the Base Offense Level

Each offense guideline section in Chapter Two may contain specific offense characteristics that adjust the base offense level upward or downward.[42] For example, the specific offense characteristics for burglary include: (1) an offender used "more than minimal planning" (two-level increase); (2) the loss exceeded $2,500 (one- to eight-level increase); (3) an offender stole a "firearm, destructive device, or controlled substance" (one-level increase); and (4)

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33. U.S.S.G. § 1B1.3(a)(1)-(2).

34. *See* U.S.S.G. § 1B1.3(a)(1)(B).

35. *Id.*; *see also* U.S.S.G. § 1B1.3, comment. (n.2(c)) (providing examples of "jointly undertaken" conduct for which an offender may be accountable).

36. *See* U.S.S.G. § 1B1.1(a)-(e) (Application Instructions); U.S.S.G. § 1B1.2(b) (Applicable Guidelines) (directing sentencing judge to consult § 1B1.3 when determining the applicable guideline range); *see also* U.S.S.G. § 1B1.1, comment. (n.1(l)) (including "relevant conduct," as defined in § 1B1.3 in the definition of "offense," unless otherwise stated or apparent from the context).

37. *See* U.S.S.G. § 1B1.1(g) (instructing sentencing judge on how to plot the vertical and horizontal axes on the matrix); U.S.S.G. Ch.5, Pt.A, comment. (n.1).

38. *See supra* note 21.

39. U.S.S.G. § 1B.1(a); *see* U.S.S.G. App. A. Each guideline section may cover multiple statutes, while a single statute may reference multiple guideline sections. U.S.S.G. App. A., intro. comment. The introductory commentary to the Statutory Index explains how to determine the correct guideline section when a statute corresponds to multiple guidelines. *Id.*

40. U.S.S.G. § 1B.1(a).

41. U.S.S.G. § 2B2.1(a). Specific adjustments for nominal loss value over $2500 vary from one to eight levels as the amount increases. U.S.S.G. § 2B2.1(b)(2).

42. U.S.S.G. § 1B1.2(b); *see also* U.S.S.G. § 1B1.2, comment. (nn.2-4) (directing a court to determine specific offense characteristics based on the offender's "relevant conduct," defined in § 1B1.3).

an offender possessed a dangerous weapon during the offense (two-level increase).[43]

3. Non-offense-Specific Adjustments to the Base Offense Level

Chapter Three describes non-offense-specific characteristics that may warrant upward or downward adjustments.[44] Part A prescribes victim-related adjustments for cases where the victim was especially vulnerable,[45] or had an official status,[46] where an offender physically restrained a victim,[47] or where an offense could constitute a hate crime.[48] Parts B and C contain adjustments for an offender's role in the offense.[49] The Guidelines increase the sentence if an offender had a significant role in an offense,[50] or abused a position of trust or used special skill.[51] If the offender was an "insignificant participant" in the offense, Part B directs the judge to reduce the offense level.[52] Part C provides sentencing enhancements for offenders who: (1) "willfully obstructed . . . or attempted to obstruct . . . the administration of justice during the investigation, prosecution, or sentencing of the . . . offense";[53] or (2) "recklessly create[d] a substantial [threat] of serious bodily injury to another person [while] fleeing from a law enforcement officer."[54]

For sentencing on multiple counts, the Commission created Chapter Three, Part D, which provides incremental sentence enhancements for "significant additional criminal conduct."[55] Section 3D1.1 outlines the requisite procedure for calculating a single combined offense level which encompasses multiple offenses committed by one offender.[56] The most serious offense determines

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43. U.S.S.G. § 2B2.1 Specific offense characteristics for nominal loss value include the following adjustments: (A) $2,500 or less, no increase; (B) more than $2,500, add 1 point; (C) more than $10,000, add 2 points; (D) more than $50,000, add 3 points; (E) more than $250,000, add 4 points; (F) more than $800,000, add 5 points; (G) more than $1,500,000, add 6 points; (H) more than $2,500,000, add 7 points; and (I) more than $5,000,000, add 8 points.

44. *See* U.S.S.G. Ch.3, Pt.A, intro. comment. (providing that section 3A.1 adjustments are nonoffense-specific and may apply to a wide variety of offenses); U.S.S.G. § 1B1.3(a) (declaring Chapter Three adjustments relevant in determining the guideline range).

45. U.S.S.G. § 3A1.1(b) (establishing a two-level enhancement for offenders who "knew or should have known that a victim . . . was unusually vulnerable due to age, physical or mental condition, or . . . otherwise particularly susceptible to the criminal conduct").

46. U.S.S.G. § 3A1.2 (providing for three-level enhancement for offenses against government officers or employees or their family members, and for offenses involving an assault on a law enforcement officer).

47. U.S.S.G. § 3A1.3 (providing for a two-level enhancement).

48. *See* U.S.S.G. § 3A1.1(a) (establishing a three-level enhancement for crimes motivated by the victim's actual or perceived class status).

49. U.S.S.G. Ch.3, Pt.B, intro. comment. (instructing a trial court to determine an offender's role on the basis of all relevant conduct within the scope of § 1B1.3).

50. U.S.S.G. § 3B1.1 (providing sentence enhancements for an offender's role as organizer or leader in crimes committed by multiple offenders).

51. U.S.S.G. § 3B1.3 (providing a two-level enhancement for offenders who abused a position of trust or used a special skill "in a manner that significantly facilitated the commission . . . of the offense").

52. U.S.S.G. § 3B1.2 (providing reductions for offenders who had a minimal or minor role in the offense).

53. U.S.S.G. § 3C1.1 (establishing a two-level enhancement).

54. U.S.S.G. § 3C1.2 (establishing a two-level enhancement).

55. U.S.S.G. Ch.3, Pt.D, intro. comment.

56. U.S.S.G. § 3D1.1 (instructing a sentencing judge to group closely related counts pursuant

the basis for establishing the base offense level,[57] and additional counts increase the offense level.[58]

Section 3D1.2 mandates "grouping" of offenses charged in multiple-count indictments when the offenses "involve substantially the same harm."[59] Section 3D1.3 treats "grouped" offenses as a single combined offense for determining the applicable sentencing range.[60] The range for each group will correspond either to the offense level of the most serious offense or to the range determined by the combined total of Chapter Two and Chapter Three adjustments for the "aggregate" criminal conduct for all offenses.[61] For example, under section (a), counts are "grouped" if they "involve the same victim and the same act or transaction."[62] Therefore, if a defendant kidnaps a victim and assaults the victim during the kidnapping, the counts of kidnapping and assault are grouped for sentencing purposes.[63]

A sentencing judge then makes a final adjustment to the offense level depending on the offender's acceptance of responsibility for the offense.[64] Section 3E1.1(a) provides a two-level sentence reduction for offenders who "clearly demonstrate acceptance of responsibility."[65] Section 3E1.1(b) provides an additional one-level reduction for offenders who also assist the authorities in the investigation or prosection.[66] Offenders qualify for these additional reductions either by providing timely notice of an intention to enter a guilty plea or by timely disclosure of all relevant information pertaining to their role in the offense.[67]

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to § 3D1.2 and then determine the offense level applicable to each group under § 3D1.3-.4).

57. U.S.S.G. Ch.3, Pt.D, intro. comment.

58. *Id.*

59. U.S.S.G. § 3D1.2. Counts involve substantially the same harm:

> When counts involve the same victim and the same act or transaction.
>
> (b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.
>
> When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.
>
> When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm . . . .

Id.

60. U.S.S.G. § 3D1.3.

61. *See* U.S.S.G. § 3D1.3(a) (prescribing use of the count creating the highest offense level as the offense level for counts grouped under § 3D1.2(a)-(c)); U.S.S.G. § 3D1.3(b) (prescribing use of the offense level determined by the offender's behavior as a whole as the offense level for counts grouped under § 3D1.2(d)).

62. U.S.S.G. § 3D1.2(a).

63. U.S.S.G. § 3D1.2, comment. (n.3(1)).

64. U.S.S.G. § 3E1.1 (Acceptance of Responsibility).

65. U.S.S.G. § 3E1.1(a). Examples of an offender demonstrating acceptance of responsibility include: "truthfully admitting" the crime; "voluntary payment of restitution" before trial; prompt and "voluntary surrender to authorities"; "voluntary assistance to authorities" in recovering contraband; "voluntary resignation from the office or position held during the commission of the offense"; and "post-offense rehabilitative efforts." U.S.S.G. § 3E1.1, comment. (n.1).

66. U.S.S.G. § 3E1.1(b).

67. *Id.*

B. *Establishing the Horizontal Guideline Axis*

Section 4A1.1 of Chapter Four ("Criminal History and Criminal Livelihood") provides instructions on determining the offender's criminal history category.[68] An offender receives points for each prior sentence.[69] The longer the sentence, the more points a defendant receives.[70] Generally, a defendant receives three points for each prior sentence of more than thirteen months; two points for each sentence between sixty days and thirteen months; and one point for all other prior sentences.[71] A judge calculates the criminal history category by identifying an offender's prior sentences, assigning each a numerical value, and totalling the values.[72] Factors that affect the weight given to each prior sentence in computing the total include: the defendant's age at sentencing;[73] the type of crime;[74] the similarity of the past crime to the current crime;[75] whether the offender is a career offender;[76] whether the offender is an armed career offender;[77] and whether the offender "committed an offense as part of a pattern of criminal conduct engaged in as a livelihood."[78] After totalling the points to determine the proper criminal history category,[79] a judge may further enhance the sentence if the offender committed the instant offense during the period of a prior sentence, during an escape, or within two years of release from incarceration.[80]

C. *Plotting the Vertical and Horizontal Axis Lines on the Sentencing Matrix*

A sentencing judge applies the sentencing matrix to calculate the appropriate guideline range.[81] The intersection of the offense level on the vertical axis and the criminal history category on the horizontal axis identifies the applicable sentencing range in "months of imprisonment."[82] For certain categories of offenses and offenders, Chapter Five of the Guidelines permits the court to

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68. U.S.S.G. § 4A1.1.
69. *See id.*
70. *See id.*
71. *See id.* The Guidelines exclude or limit certain prior convictions from a trial court's sentencing determination, for example: "sentence[s] imposed more than ten years prior to the defendant's commencement of the instant offense" and "adult or juvenile sentence[s] imposed for an offense committed prior to the defendant's eighteenth birthday" occurring five years prior to the defendant's commencement of the instant offense. U.S.S.G. § 4A1.1, comment. (nn.1-3); U.S.S.G. § 4A1.2(d)-(e). *See generally* U.S.S.G. § 4A1.2 (instructing the trial judge on how to compute criminal history).
72. U.S.S.G. § 4A1.1, comment; U.S.S.G. Ch.5, Pt.A, comment. (n.3). Ranges for the six criminal history categories are as follows: category I, 0-1 points; category II, 2-3 points; category III, 4-6 points; category IV, 7-9 points; category V, 10-12 points; and category VI, 13 or more points. *See* U.S.S.G. Ch.5, Pt.A (Sentencing Table), *reprinted infra* app. 1.
73. *See* U.S.S.G. § 4A1.2(d).
74. *See* U.S.S.G. § 4A1.2(b).
75. U.S.S.G. § 4A1.1, comment. (backg'd) (n.6).
76. *See* U.S.S.G. § 4B1.1.
77. *See* U.S.S.G. § 4B1.4.
78. *See* U.S.S.G. § 4B1.3.
79. *Id.*
80. U.S.S.G. § 4A1.1(d)-(e).
81. *See* U.S.S.G. § 1B1.1(f)-(g).
82. U.S.S.G. Ch.5, Pt.A, comment. (n.1).

impose either imprisonment, probation, restitution, or some other sanction or combination of sanctions.[83]

D. *Determining Applicable Departures from the Sentencing Guideline Matrix*

Section 5K2.0 permits departures from the presumptive range in exceptional circumstances.[84] The Guidelines authorize departures only if a judge finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines."[85] To decide whether the Commission adequately considered a circumstance, a judge must rely entirely on "the sentencing Guidelines, policy statements, and official commentary of the Commission."[86] Chapter 5, Part K, identifies several factors the Commission expressly identified as grounds for departure from the Guidelines, including: a defendant's "unusually heinous, cruel or brutal conduct" toward the victim;[87] an offender's substantial assistance in the prosecution of others;[88] an offender who created or threatened the harm that the criminal statute sought to prevent;[89] and highly provocative behavior by a victim.[90]

Part H further delineates a list of "specific offender characteristics" which may justify a departure from the Guidelines' prescribed sentencing range.[91] Specific offender characteristics include an offender's advanced age[92] or "extraordinary physical impairment."[93] The Commission warned, however, that these characteristics are rarely relevant in establishing a sentence outside the applicable guideline range.[94] Moreover, the Guidelines expressly prevent a sentencing judge from considering the offender's "race, sex, national origin, creed, religion, socioeconomic status,"[95] or "disadvantaged upbringing."[96]

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83. U.S.S.G. § 1B1.1(h) (instructing sentencing court to consider the sentencing options delineated in Chapter Five, Parts B through G); *see* U.S.S.G. §§ 5B1.1, 5D1.1, 5E1.1, 5F1.1 (listing, respectively, circumstances in which a court can impose probation, supervised release, restitution, and other "sentencing options").

84. U.S.S.G. § 5K2.0, p.s. (Grounds for Departure).

85. *Id.* (quoting 18 U.S.C. § 3553(b) (1994)).

86. 18 U.S.C. § 3553(b) (1994).

87. U.S.S.G. § 5K2.8, p.s.

88. U.S.S.G. § 5K1.1, p.s.

89. U.S.S.G. § 5D2.11, p.s.

90. U.S.S.G. § 5K2.10. Other bases for a sentencing departure include: refusal to assist authorities, § 5K1.2, p.s.; abduction or restraint of a victim, § 5K2.4, p.s.; use of weapons or dangerous instrumentalities, § 5K2.6, p.s.; disruption of a governmental function, § 5K2.7, p.s.; concealment of a prior offense by committing an additional offense, § 5K2.9, p.s.; commission of the offense under coercion or duress, § 5K2.12, p.s.; diminished mental capacity, § 5K2.13, p.s.; commission of the offense posed a "significant" risk to public health or welfare, § 5K2.14, p.s.; voluntary admission and disclosure of the offense to authorities, § 5K2.16, p.s.; or the offense resulted in death, § 5K2.1, p.s., serious bodily injury, § 5K2.2, p.s., extreme psychological injury, § 5K2.3, p.s., or extreme property loss, § 5K2.5, p.s.

91. *See* U.S.S.G. § 5H1.1-.11, p.s. (providing policy statements outlining 11 "specific offender characteristics" that may justify a departure from the prescribed guideline range).

92. U.S.S.G. § 5H1.1, p.s. (justifying a sentence departure when an offender is "elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration").

93. U.S.S.G. § 5H1.4, p.s.

94. U.S.S.G. Ch.5, Pt.H, intro. comment.

95. U.S.S.G. § 5H1.10, p.s.

The Guidelines do not authorize any departure in the absence of sufficiently "atypical circumstances or characteristics" that warrant divergence from the required sentencing range.[97] The Sentencing Commission, while not foreclosing the possibility of an atypical circumstance, specifically stated that such circumstances are "extremely rare."[98] A judge's dissatisfaction with the mandatory sentencing range or preference for an unauthorized sentence are inappropriate bases for departing from the Guidelines.[99]

III. DECISIONS LIMITING THE SCOPE OF CONDUCT REVIEWABLE IN MAKING SENTENCING DETERMINATIONS

A. United States v. Warner[100]

1. Facts

Warner received a sentence for unlawful machine gun possession.[101] During the initial sentencing, the trial court improperly allowed a downward departure under the "sporting and collection" exception in section 2K2.1(b)(2).[102] The Tenth Circuit vacated the sentence and remanded for de novo resentencing.[103] On resentencing, the trial court allowed a section 5K2.0 downward departure.[104] The trial court justified the downward departure, in part, because the defendant had already successfully completed a rehabilitation program and a six-month period of home confinement.[105]

2. Decision

The Tenth Circuit reversed the district court's resentencing determination, concluding that it was impermissible to consider evidence of conduct occurring after initial sentencing.[106] Instead, in making de novo resentencing determinations, the trial court may consider only those factors arising out of evidence that the court could have heard at the original sentencing hearing.[107]

In *Warner*, the government asked the court to extend the Fourth and Ninth Circuits' rationales in *United States v. Apple*[108] and *United States v. Gomez-Padilla*,[109] which held that trial courts cannot consider post-sentencing

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96. U.S.S.G. § 5H1.12, p.s.
97. U.S.S.G. § 5K2.0, comment.
98. *Id.*
99. *Id.*
100. 43 F.3d 1335 (10th Cir. 1994).
101. *Warner*, 43 F.3d at 1336; *see* 18 U.S.C. § 922(o) (1994).
102. *Warner*, 43 F.3d at 1340; *see* U.S.S.G. § 2K2.1(b)(2).
103. *Warner*, 43 F.3d at 1336.
104. *Id.* Section 5K2.0 permits departures in exceptional circumstances. *See supra* text accompanying notes 84-96 (discussing § 5K2.0).
105. *Warner*, 43 F.3d at 1336-37. The court also believed that the "unshootable" collectable nature of the gun qualified the defendant for the "lesser harms" departure in § 5K2.11. *Id.*
106. *Id.* at 1336-37, 1340.
107. *Id.* at 1340.
108. 962 F.2d 335 (4th Cir. 1992).
109. 972 F.2d 284 (9th Cir. 1992); *see Warner*, 43 F.3d at 1340 (distinguishing *Apple* and *Gomez-Padilla*).

conduct upon a limited remand for resentencing.[110] The *Warner* court distinguished *Apple* and *Gomez-Padilla* because those cases did not involve fully de novo resentencing.[111]

B. United States v. Gacnik[112]

1. Facts

Three defendants pleaded guilty to conspiring to manufacture explosive materials without a license.[113] Defendants Gade and Sandoval manufactured aluminum flash powder, and then sold the volatile explosive to juveniles.[114]

Gade was in custody for an unrelated charge when law enforcement officials received information that he was manufacturing explosives.[115] The officers obtained a search warrant and returned to Gade's residence to search for the explosives.[116] Meanwhile, unaware of the impending search, defendants Sandoval and Gacnik had concealed the explosive materials.[117] As a result, the district court enhanced Gacnik's conspiracy offense level by two points for obstructing the investigation, pursuant to section 3C1.1.[118]

2. Decision

The Tenth Circuit overturned the trial court's decision to apply section 3C1.1 by looking to the section's plain language. Section 3C1.1 articulates a two-part "nexus requirement": the obstructive conduct must "relate to the offense of conviction" and occur during the investigation.[119] The Tenth Circuit concluded that "obstructive conduct undertaken prior to the investigation . . . [or] prior to any indication of an impending investigation . . . does not fulfill this nexus requirement."[120]

The court expressly disagreed with the Eighth Circuit's holding in *United States v. Dortch*,[121] which read section 3C1.1 more broadly.[122] The Eighth Circuit reasoned that the "offense of conviction may not be what initially attracts police attention," and that an act intended to conceal the "instant offense," even when the offender is aware only of an investigation into another offense, meets section 3C1.1 requirements.[123]

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110. *Warner*, 43 F.3d at 1339; *Gomez-Padilla*, 972 F.2d at 285-86; *Apple*, 962 F.2d at 336.
111. *Warner*, 43 F.3d at 1340.
112. 50 F.3d 848 (10th Cir. 1995).
113. *Gacnik*, 50 F.3d at 850; *see* 18 U.S.C. § 371 (1994).
114. *Gacnik*, 50 F.3d at 851.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*; *see* U.S.S.G. § 3C1.1 (mandating that "[i]f the defendant willfully obstructed or impeded, or attempted to obstruct or impede the administration of justice during the investigation, prosecution, or sentencing of the instant offense," a judge must "increase the offense level by two levels").
119. *Gacnik*, 50 F.3d at 852.
120. *Id.*
121. 923 F.2d 629 (8th Cir. 1991).
122. *Gacnik*, 50 F.3d at 852; *see Dortch*, 923 F.2d at 632.
123. *Gacnik*, 50 F.3d at 852; *see Dortch*, 923 F.2d at 632.

According to the Tenth Circuit, the Eight Circuit overlooked the plain language of section 3C1.1 which provides a sentence enhancement for "willful" obstructive conduct pertaining to "the investigation . . . of the instant offense."[124] Obstructing an investigation into an unrelated offense does not sufficiently relate to the "instant offense" and therefore does not warrant a section 3C1.1 sentencing enhancement.[125] The record must demonstrate that the offender possessed actual knowledge of a possible investigation into the instant offense to fulfill the section 3C1.1 nexus requirement.[126]

C. *Analysis*

The requirement of proof of actual knowledge presents a difficult standard for prosecutors. Moreover, facilitating investigations into criminal conduct and the subsequent apprehension of the offender appear to be the underlying purposes of section 3C1.1. Obstructive conduct not motivated by knowledge of a pending investigation will thwart investigative efforts just as obstructive conduct initiated by an offender's knowledge of the investigation.[127]

Cumulatively, *Warner* and *Gacnik* clarify the parameters for the types of conduct a sentencing court may examine in making sentencing determinations. Post-sentencing rehabilitative conduct no longer justifies a reduced sentence. This outcome removes an incentive for an offender subject to de novo resentencing to engage in post-sentencing rehabilitative conduct. Despite this probable outcome, the Tenth Circuit's decision in *Warner* is consistent with decisions of the Fourth Circuit[128] and the Eighth Circuit.[129]

IV. DECISIONS APPLYING SENTENCE ENHANCEMENTS IN SECTIONS 3B1.3[130] AND 2T1.1(B)(2)[131]

A. United States v. Gandy[132]

1. Facts

Gandy, a licensed podiatrist, pleaded guilty to falsifying health insurance claims.[133] The trial court applied a two-level sentence enhancement under section 3B1.3 because Gandy used his special skill as a podiatrist to falsify

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124. *Gacnik*, 50 F.3d at 852 (citing U.S.S.G. § 3C1.1).
125. *Id.*
126. *Id.*
127. The author acknowledges, however, that some could argue that "willful" requires knowledge that the conduct will thwart any potential effort to investigate the offender's crime, but not that the offender actually knew that the investigation has been initiated.
128. United States v. Bell, 5 F.3d 64, 67 (4th Cir. 1993).
129. United States v. Cornelius, 968 F.2d 703, 705 (8th Cir. 1992).
130. U.S.S.G. § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).
131. U.S.S.G. 2T1.1(b)(2) (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents) ("If sophisticated means were used to impede discovery of the existence or extent of the offense, increase by 2 levels.").
132. 36 F.3d 912 (10th Cir. 1994).
133. *Gandy*, 36 F.3d at 913; *see* 18 U.S.C. § 1001 (1994).

Medicare forms for various reimbursable procedures he did not perform.[134] Gandy appealed the enhancement.[135]

2. Decision

The Tenth Circuit applied a two-part test to determine the applicability of the special skill enhancement under section 3B1.3. The offender must "possess a special skill," and must actually employ the special skill to "significantly facilitate the commission or concealment of his offense."[136] The court noted that the commentary to section 3B1.3 defines "special skill" as "a skill not possessed by members of the general public and usually requiring substantial education, training or licensing."[137] Additionally, the section lists physicians among its examples of persons with special skill along with "pilots, lawyers, . . . accountants, chemists, and demolition experts."[138] Gandy did not dispute that his podiatry license qualified as a "special skill," so the first part of the test was undisputed.[139] However, section 3B1.3 also requires that the offender use that special skill to "significantly facilitate the commission or concealment of the offense."[140]

Because the Guidelines fail to define "facilitate," the Tenth Circuit relied upon the common definition of the word: to "make easier."[141] The Tenth Circuit found that the trial court failed to adequately determine whether Gandy actually employed his skill as a podiatrist to make the crime of Medicare fraud easier.[142] The trial court therefore had an insufficient factual basis to justify an enhancement under section 3B1.3.[143]

B. United States v. Rice[144]

1. Facts

Rice, a certified public accountant, was convicted of making false claims for income tax refunds and filing false income tax returns.[145] Rice used various Subchapter S corporations in order to facilitate a "complicated scheme of

134. *Gandy*, 36 F.3d at 913. Section 3B1.3 provides in part:

> If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic.

U.S.S.G. § 3B1.3.

135. *Gandy*, 36 F.3d at 914.

136. *Id.* at 915.

137. *Id.* at 914 (quoting U.S.S.G. § 3B1.3, comment. (n.2)).

138. *Id.* (quoting U.S.S.G. § 3B1.3, comment. (n.2)).

139. *Id.* at 915.

140. *Id.*

141. *Id.* at 914 (citing *United States v. Young*, 932 F.2d 1510, 1513 (D.C. Cir. 1991)). The D.C. Circuit adopted its definition from WEBSTER'S NEW COLLEGIATE DICTIONARY 410 (5th ed. 1977). *Young*, 932 F.2d at 1513.

142. *Gandy*, 36 F.3d at 915.

143. *Id.*

144. 52 F.3d 843 (10th Cir. 1995).

145. *Rice*, 52 F.3d at 844; *see* 18 U.S.C. § 287 (1994); 26 U.S.C. § 7206(1) (1994).

tax fraud."[146] The trial court calculated Rice's sentence using both section 2T1.1 (Tax Evasion) and section 2F1.1 (Fraud or Deceit), and each calculation resulted in the same total adjusted offense level.[147] The total adjusted offense level included enhancements under three guideline provisions: section 3B1.3,[148] providing an enhancement for use of a "special skill"; section 2T1.1(b)(2),[149] providing an enhancement for using "sophisticated means" in tax evasion crimes; and section 2F1.1(b)(2)(A),[150] providing an enhancement where the defendant used "more than minimal planning" in committing fraud.[151]

2. Decision

Relying on the two-part test established in *Gandy*,[152] the Tenth Circuit affirmed the district court's application of section 3B1.3 for the defendant's use of a special skill.[153] Rice's status as an accountant satisfied step one of the *Gandy* inquiry, since the Commission specifically listed accountants as persons possessing a special skill.[154] As for the second step, the trial court failed to make specific factual findings regarding how Rice used his certified public accounting skills to facilitate tax evasion.[155] Nonetheless, the Tenth Circuit concluded that the record, taken as a whole, demonstrated that Rice's actions satisfied the second step of the *Gandy* inquiry.[156]

The Tenth Circuit then examined the applicability of the sophisticated means enhancement. The commentary to section 2T1.1(b)(2) defines "sophisticated means" as "conduct that is more complex or demonstrates greater intricacy or planning than a routine tax evasion case."[157] Because the Tenth Circuit found that Rice's fraud was the "functional equivalent" of simply claiming excessive itemized deductions, the court held that the tax evasion scheme did not constitute "sophisticated means."[158] To categorize this conduct as sophisticated, the court reasoned, would require sentencing courts to apply section 2T1.1(b)(2) to virtually every fraudulent tax return scheme.[159] The Tenth Circuit determined that the Guidelines did not contemplate this result.[160]

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146. *Rice*, 52 F.3d at 844.
147. *Id.*
148. *See* U.S.S.G. § 3B1.3.
149. *See* U.S.S.G. § 2T1.1(b)(2).
150. *See* U.S.S.G. § 2F1.1(b)(2)(A).
151. *Rice*, 52 F.3d 848-50. For a general discussion on sentencing guidelines for multiple counts, see *supra* notes 55-63 and accompanying text.
152. For a discussion of the two-prong test set forth in *Gandy*, see *supra* text accompanying note 136.
153. *Rice*, 52 F.3d at 850.
154. *Id.* (citing U.S.S.G. § 3B1.3, comment. (n.2)).
155. *Id.*
156. *Id.*
157. *Id.* at 849; *see* U.S.S.G. § 2T1.1, comment. (n.4).
158. *Rice*, 52 F.3d at 849. The court relied on examples in the commentary to § 2T1.1 suggesting that a proper "sophisticated means" enhancement requires a level of sophistication associated with the utilization of offshore bank accounts or transactions through corporate shells for tax-evasion purposes. *Id.*; *see* U.S.S.G. § 2T1.1, comment. (n.4).
159. *Rice*, 52 F.3d at 849.
160. *Id.*

Finally, the Tenth Circuit analyzed whether the district court's application of the special skill enhancement, along with either the "sophisticated means" or "more than minimal planning" enhancements, constituted "impermissible double counting."[161] The court concluded that each provision served a distinct purpose.[162] Criminals who use their special talents to commit even the simplest of crimes deserve an upward adjustment under the special skill enhancement.[163] In contrast, the "sophisticated means" and "more than minimal planning" enhancements are intended to punish offenders who use complex criminal schemes.[164] Therefore, the simultaneous application of the special skill enhancement along with one of the other two enhancements did not constitute impermissible double counting.[165]

C. *Analysis*

The Tenth Circuit's determination that the sophisticated means enhancement and the special skills enhancement did not constitute impermissible double counting is somewhat problematic. An offender who engages in a sophisticated criminal scheme most likely possesses a special skill acquired through specialized education, experience, or self-teaching. An expansive interpretation of "special skill" would encompass the common burglar who through experience and self-teaching acquired a particular skill for breaking and entering. While the Tenth Circuit's adoption of such an expansive view is unlikely, the *Gandy* decision supports this conclusion.

V. DECISIONS IMPOSING A CONCURRENT SENTENCE ON A DEFENDANT SUBJECT TO GUIDELINE SECTIONS 5G1.3(B)[166] AND 5G1.3(C)[167]

A. United States v. Johnson[168]

1. Facts

Oklahoma officials arrested Johnson for driving a stolen vehicle.[169] While confined in county jail, Johnson and another prisoner escaped and were recaptured.[170] Johnson pleaded guilty to operating a stolen vehicle and eight

161. *Id.* at 850. The court had defined "impermissible double counting" as using the same conduct to support separate sentencing enhancements having identical purposes. *Id.* at 850-51 (citing United States v. Flinn, 18 F.3d 826, 829 (10th Cir. 1994)).

162. *Id.* at 851.

163. *Id.*; *see* U.S.S.G. § 3B1.3, comment. (backg'd.).

164. *Rice*, 52 F.3d at 851; *see, e.g.*, U.S.S.G. § 2T1.1, comment. (n.4).

165. *Rice*, 52 F.3d at 851.

166. U.S.S.G. § 5G1.3(b).

167. U.S.S.G. § 5G1.3(c), p.s. (providing that in cases not covered by subsections (a) and (b), "the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense").

168. 40 F.3d 1079 (10th Cir. 1994).

169. *Johnson*, 40 F.3d at 1080. The escapees fired a volley of gunshots and tossed numerous incendiary devices at state officials during their escape. *Id.*

170. *Id.*

escape-related state law violations.[171] He received various state sentences and the trial court ordered the sentences to run concurrently.[172] Johnson also pleaded guilty to two federal law violations,[173] and the trial court ordered the federal sentence to begin upon completion of the state sentence.[174]

2. Decision

The Tenth Circuit noted that section 5G1.3(b) limits the court's traditionally broad discretion in sentencing defendants.[175] When the offense in question is committed during a term of imprisonment, subsection (a) requires consecutive sentencing.[176] Conversely, subsection (b) requires a concurrent sentence when subsection (a) does not apply and the court fully considers the conduct underlying the undischarged term of imprisonment.[177]

Johnson argued that because the presentence report fully detailed the conduct underlying the undischarged state-related escape sentence, section 5G1.3(b) required the district court to impose a concurrent sentence.[178] The Tenth Circuit rejected this argument and concluded that section 5G1.3(b) applies when an offender is prosecuted in both state and federal court for the same criminal conduct or for different criminal transactions that constitute part of the same course of conduct.[179]

The other issue examined by the Tenth Circuit in *Johnson* involved the trial court's departure from the methodology for applying section 5G1.3(c).[180] The commentary to section 5G1.3(c) instructs the trial court to establish the total punishment for all the prior and instant offenses as if section 5G1.2 (Sentencing on Multiple Counts of Conviction) applied.[181] Thus, the court should calculate a reasonable incremental sentence for the instant

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171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 1082.
175. U.S.S.G. § 5G1.3(b). This subsection provides:

> If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.

Id.
176. U.S.S.G. § 5G1.3(a).
177. U.S.S.G. § 5G1.3(b).
178. *Johnson*, 40 F.3d at 1082-83.
179. U.S.S.G. § 5G1.3, comment. (n.2).
180. *Johnson*, 40 F.3d at 1083-84. Subsection (c) permits the trial imposition of a concurrent, partially concurrent, or consecutive sentence prior to the undischarged term of imprisonment "[t]o the extent necessary to achieve a reasonable incremental punishment for the offense." U.S.S.G. § 5G1.3(c).
181. *Johnson*, 40 F.3d at 1083. Application note (3) states:

> To the extent practicable, the court should consider a reasonable incremental penalty to be a sentence for the instant offense that results in a combined sentence of imprisonment that approximates the total punishment that would have been imposed under § 5G1.2 . . . had all the offenses been federal offenses for which sentences were being imposed at the same time.

U.S.S.G. § 5G1.3, comment. (n.3).

offense.[182] This should result in a combined sentence that approximates the total punishment in accordance with section 5G1.2 had all offenses been federal offenses.[183] Following the Eighth Circuit's reasoning in *United States v. Haney*,[184] the Tenth Circuit in *Johnson* relied upon the methodology in the commentary to section 5G1.3(c) to interpret and explain how courts should apply this provision.[185]

The Tenth Circuit determined that although the trial court should consider subsection (c) in imposing a sentence, a court may depart from the methodology.[186] The Commission itself recognized that sometimes the comprehensive application of subsection (c) would be "impracticable."[187] Certain factors, such as insufficient information about prior offenses, warrant a sentencing court's discretion. [188] In such circumstances, a trial court may employ a simpler sentencing determination method that constitutes the "functional equivalent of more complex computations."[189] In other words, the court may make rough estimates.

A trial court departing from the analysis required by section 5G1.3(c), however, must state its reasons for doing so."[190] In *Johnson*, the Tenth Circuit found that the trial court impermissibly departed from the methodology of section 5G1.3(c) and failed to justify such a departure.[191]

B. United States v. Yates[192]

1. Facts

Charles Yates pleaded guilty to abusive sexual contact with a minor on an Indian Reservation.[193] The trial court sentenced Yates to seven years of confinement with an additional three-year period of supervised release.[194] Yates appealed the sentence, and the Tenth Circuit remanded for resentencing.[195] While the resentencing was pending, Yates received an eighteen-year state court sentence for two counts of criminal sexual penetration and one count of kidnapping.[196]

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182. *Johnson*, 40 F.3d at 1083.
183. *Id.*
184. 23 F.3d 1413 (8th Cir.), *cert. denied*, 115 S. Ct. 253 (1994).
185. *Johnson*, 40 F.3d at 1083. This determination is also consistent with the Sixth Circuit's holding in United States v. Coleman, 15 F.3d 610 (6th Cir. 1994) (holding that a trial court should employ the methodology set forth in the commentary of U.S.S.G. § 5G1.3(c) to determine whether a consecutive sentence results in a reasonable incremental punishment).
186. *Johnson*, 40 F.3d at 1084.
187. *Id.; see* U.S.S.G. § 5G1.3, comment. (n.3) (providing a list of factors for courts to consider in order to "achieve a reasonable punishment").
188. *Johnson*, 40 F.3d at 1084.
189. *Id.*
190. *Id.*
191. *Id.*
192. 58 F.3d 542 (10th Cir. 1995).
193. *Yates*, 58 F.3d at 543.
194. *Id.*
195. *Id.*
196. *Id.*

On resentencing the trial court applied section 5G1.3(c) and ordered the federal sentence to run consecutively with the state term of imprisonment, amounting to a total of twenty-five years of imprisonment.[197] Yates appealed on the grounds that the section 5G1.3 application methodology provides for a seventeen to twenty-one year total combined sentence for the analogous federal offense levels under section 2A1.3.[198]

Yates asserted that since the eighteen-year state sentence fell within this sentencing range, an additional seven years of consecutive imprisonment was unnecessary for a reasonable incremental punishment under section 5G1.3(c).[199] The trial court determined that Yates did not qualify for a concurrent sentence under section 5G1.3(c).[200] Assuming good time credits, the court reasoned, Yates would effectively serve a only nine to twelve years of state imprisonment, rendering his total combined sentence to approximately twenty-two years in length.[201]

2. Decision

The Tenth Circuit held that in applying section 5G1.3(c), courts may consider the actual term of a state sentence rather than the nominal state sentence.[202] This is only permissible, however, if a trial court can reliably determine the real or effective term of state imprisonment.[203] A sentencing judge must make a factual determination on the basis of the available evidence and provide rational explanations for that determination.[204] In *Yates*, the record did not support the trial court's assumption that the real or effective term of the defendant's sentence would constitute only twelve years.[205] The Tenth Circuit noted that application note three in the Guidelines indicates that a lack of information concerning an offender's prior state offense prevents an accurate estimate of the total sentence required by the Guidelines.[206] Therefore, the Tenth Circuit vacated the sentencing decision and remanded the matter for resentencing.[207]

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197. *Id.* Section 5G1.3(c) mandates that a trial court impose a consecutive sentence for the instant offense prior to the undischarged term of imprisonment to the "extent necessary to achieve a reasonable incremental punishment for the instant offense." U.S.S.G. § 5G1.3(c), p.s. If the trial court can achieve a reasonable incremental punishment by imposing a concurrent sentence with the remainder of an unexpired term of imprisonment, a consecutive sentence is not warranted. *See* U.S.S.G. § 5G1.3(c), p.s. (permitting concurrent, partially concurrent, or consecutive sentences to achieve "reasonable incremental punishment").

198. *Yates*, 58 F.3d at 544.

199. *Id.*

200. *Id.*

201. *Id.* at 546-47.

202. *Id.* at 548-49.

203. *Id.*

204. *Id.* at 549.

205. *Id.*

206. *Id.* at 544; U.S.S.G. § 5G1.3(c), comment. (n.3); *see also* United States v. Hunter, 993 F.2d 127, 131 (6th Cir. 1993) (Ryan, J., concurring) (setting forth examples when application of the methodology is impracticable and stating that a trial court should calculate an offender's sentence under section 5G1.3(c) only to the "extent practicable" and in a manner that does not "unduly complicate or prolong the sentencing process").

207. *Yates*, 58 F.3d at 550.

C. *Analysis*

In establishing the section 5G1.3(c) methodology, the Sentencing Commission anticipated the complexity of applying this provision.[208] This complexity, however, does not justify a trial court's refusal to consider subsection (c)'s methodological implications.[209]

The *Yates* and *Johnson* decisions exemplify not only the complexity and arbitrariness of applying section 5G1.3(a)-(c), but also the Tenth Circuit's reliance on the commentary to the Guidelines and the underlying congressional goals. The Tenth Circuit also relied heavily on other circuits to verify the accuracy of their sentencing guideline interpretations.

In *Yates*, the Tenth Circuit required the trial court to determine reasonable incremental punishment based on a preponderance of the evidence.[210] The Tenth Circuit reiterated the holding of the Eighth Circuit in *United States v. Brewer*,[211] that a trial court must make more than a mere educated guess in determining the "likely" real or effective term of imprisonment.[212] The trial court must determine the reasonableness of the incremental punishment pursuant to section 5G1.3(c) upon establishing the real or effective sentence.[213] While no specific criteria exist for making this determination, the trial court must state its findings and explain its rationale for determining the reasonableness of the incremental punishment.[214]

VI. DECISIONS ADDRESSING WHETHER THE APPLICATION OF GUIDELINE SECTIONS 2J1.7[215] AND 2K2.4[216] REQUIRE THE SENTENCING COURT TO IMPOSE ENHANCED SENTENCES CONSECUTIVELY TO A STATE IMPRISONMENT TERM

A. United States v. McCary[217]

1. Facts

An Oklahoma state court sentenced Tommy McCary to 211 months for possession of and intent to distribute methamphetamine.[218] McCary also received a forty-six month federal sentence for possession of a firearm while a

208. U.S.S.G. § 5G1.3, comment. (n.5).
209. *Id.*
210. *Yates*, 58 F.3d at 549.
211. 23 F.3d 1317 (8th Cir. 1994).
212. *Brewer*, 23 F.3d at 1319.
213. U.S.S.G. § 5G1.3.
214. *Id.*
215. U.S.S.G. § 2J1.7 (Commission of Offense While on Release) ("If an enhancement under 18 U.S.C. § 3147 applies, add three levels to the offense level for the offense committed while on release as if this section were a specific offense characteristic contained in the offense guideline . . . ."). *Id.*
216. U.S.S.G. § 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) ("In each case, the statute requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment."). *Id.*
217. 58 F.3d 521 (10th Cir. 1995).
218. *McCary*, 58 F.3d at 522.

fugitive of justice,[219] and for knowing possession of a stolen vehicle that had crossed state lines.[220]

On remand, the trial court imposed a seventeen-month enhancement pursuant to section 2J1.7, which applies 18 U.S.C. § 3147 (Penalty for an Offense Committed While on Release).[221] The trial court ordered the enhancement to run consecutively with the federal charges and concurrently with the 211-month state court sentence.[222]

2. Decision

The Tenth Circuit vacated the trial court's sentencing decision and remanded the matter for resentencing.[223] Section 3147 requires trial courts to impose an additional sentence of not more than ten years upon a person convicted of an offense while released on another federal charge.[224] The application notes of section 2J1.7 clarify that § 3147 mandates imprisonment in addition to the sentence for the underlying offense.[225] The notes also require that the additional sentence "run consecutively to any other sentence of imprisonment."[226]

The Tenth Circuit held that the phrase "any other sentence of imprisonment" clearly encompasses the state court sentence.[227] The trial court therefore erred in failing to order the § 3147 enhancement to run consecutively to the 211-month state court sentence.[228]

The Tenth Circuit's plain language interpretation is consistent with the holdings of the Eighth Circuit in *United States v. Lincoln*[229] and the Ninth Circuit in *United States v. Galliano*.[230] In *United States v. Wilson*,[231] the Seventh Circuit also held that a trial court must impose a § 3147 enhancement consecutively to a state sentence.[232]

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219. 18 U.S.C. § 922(g)(2) (1994).
220. 18 U.S.C. § 2313(a) (1994).
221. *McCary*, 58 F.3d at 522.
222. *Id.*
223. *Id.* at 525.
224. 18 U.S.C. § 3147(1) (1994).
225. U.S.S.G. § 2J1.7, comment. (n.2) ("Under 18 U.S.C. § 3147, a sentence of imprisonment must be imposed in addition to the sentence for the underlying offense, and the sentence of imprisonment imposed under 18 U.S.C. § 3147 must run consecutively to any other sentence of imprisonment.").
226. *Id.*
227. *McCary*, 58 F.3d at 524.
228. *Id.*
229. 956 F.2d 1465, 1473-74 & n.8 (8th Cir.) (holding that pursuant to 18 U.S.C. § 3147 (1988), an offender may not serve a term of such an enhancement concurrently to any other term of imprisonment), *cert. denied*, 506 U.S. 891 (1992).
230. 977 F.2d 1350, 1351 (9th Cir. 1992), *cert. denied*, 507 U.S. 966 (1993).
231. 966 F.2d 243 (7th Cir. 1992).
232. *Wilson*, 966 F.2d at 248.

B. United States v. Gonzales[233]

1. Facts

Defendants Gonzales, Perez, Hernandez-Diaz, and Leon all received sentences ranging from 120 to 147 months for various drug charges, including the "use of a firearm during a drug trafficking offense" pursuant to 18 U.S.C. § 924(c)(1).[234] Each offender also received state sentences stemming from the same incidents.[235] For each offender, the trial court imposed a five-year sentence enhancement under section 2K2.4, which in turn applies 18 U.S.C. § 924(c)(1).[236] The enhanced sentences were to run consecutively with both the federal and state sentences.[237] The defendants, except Leon, appealed, charging that the trial court erred in ordering the federal sentence under § 924(c) to run consecutively with the state offenses.[238]

A provision in § 924(c) requires the imposition of an additional five-year consecutive sentence for persons possessing a firearm "during a crime of violence or a drug trafficking offense."[239] The application notes of section 2K2.4 provide that under § 924(c)(1), a trial court must impose the additional term of imprisonment consecutively to "any other term of imprisonment."[240]

2. Decision

The Tenth Circuit reversed the trial court, although it noted that the trial court's decision was consistent with every circuit that previously had considered the issue.[241] The Tenth Circuit recognized two possible interpretations for the phrase "any other term of imprisonment."[242] The literal interpretation of the phrase encompasses both federal and state sentences.[243] Alternatively, a court could read the phrase to apply only to federal sentences, excluding any consideration of state imposed sentences in applying 18 U.S.C. § 924(c).[244]

Adopting the latter view, the *Gonzales* court relied upon the stated congressional purpose of § 924(c).[245] The *Gonzales* court stated that an offender initially sentenced in state court and serving the state court sentence cannot possibly serve a subsequently imposed federal sentence under § 924(c) prior to the preexisting state sentence.[246]

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233. 65 F.3d 814 (10th Cir. 1995).
234. *Gonzales*, 65 F.3d at 817.
235. *Id.*
236. *Id.* For the text of § 2K2.4, comment. (n.1), see *supra* note 216.
237. *Gonzales*, 65 F.3d at 817.
238. *Id.*
239. *Id.* at 820.
240. U.S.S.G. § 2K2.4, comment. (n.1).
241. *Gonzales*, 65 F.3d at 819.
242. *Id.* at 820.
243. *Id.*
244. *Id.*
245. *Id.*; *see also* S. REP. NO. 225, 98th Cong., 2d Sess. 313-14 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3492 (including a Senate report that reads in part that a defendant must serve the additional sentence prior to the beginning of the sentence for any other offense).
246. *Gonzales*, 65 F.3d at 820. It is implausible to suggest that an offender can serve a federal sentence slated to begin prior to a previously existent state sentence.

The *Gonzales* court also reasoned that a literal reading of the statutory language in § 924(c) produced another absurd result not contemplated by Congress.[247] Upon calculating the defendant's total sentence under the Guidelines, the *Gonzales* court determined that a combined reading of § 924(c) resulted in more than twice the custodial price intended by Congress for the totality of the defendants' criminal conduct in this case.[248] The *Gonzales* court concluded that the prohibition against concurrent sentences under § 924(c) refers only to federal sentences.[249] Under this reading, an offender begins serving the mandatory five-year sentence pursuant to § 924(c) immediately upon the federal court's final sentencing decision.[250] Under this interpretation, the trial court erred in ordering the § 924(c) five-year sentence to run consecutively to the defendants' state court sentences.[251]

C. *Analysis*

After *McCary* and *Gonzales*, the Tenth Circuit's position as to whether application of Title 18 sentencing enhancements requires consecutive state sentencing is unclear. The absence of any clear factual distinctions or policy differences precludes a simple explanation for the Tenth Circuit's inconsistent holdings. The plain language of the Title 18 sentencing enhancements, coupled with the plain language of the Guideline sections that effectuate these enhancements, suggest the accuracy of the *McCary* decision. Further, as previously noted, the vast majority of circuit courts that have addressed the issue agree with the *McCary* approach.[252]

VII. DECISIONS ADDRESSING THE APPLICATION OF SECTION 2F1.1(B)(3)(A)[253]

A. United States v. Frazier[254]

1. Facts

Gregory Frazier was the former president of the National Indian Business Counsel, doing business as the United Tribe Service Center (UTSC), a nonprofit corporation assisting the education of American Indians.[255] The UTSC received funding from the United States Department of Labor (DOL) pursuant to the Job Training Partnership Act.[256] Frazier was convicted of "intentionally misapplying property valued at $5,000 or more and owned by or under the

247. *Id.*
248. *Id.* at 821.
249. *Id.*
250. *Id.* All other federal sentences for any additional substantive offenses begin immediately after the expiration of the mandatory 18 U.S.C. § 924(c) five-year sentence. *Id.*
251. *Id.*
252. *See supra* notes 229-32 and accompanying text.
253. U.S.S.G. § 2F1.1(b)(3)(A) (providing an enhancement for offenses involving a misrepresentation that a defendant was acting on behalf of a charitable organization).
254. 53 F.3d 1105 (10th Cir. 1995).
255. *Frazier*, 53 F.3d at 1108.
256. *Id.*

care, custody or control of the UTSC," under 18 U.S.C. § 666.[257] The trial court imposed a section 2F1.1(b)(3)(A) enhancement on the basis that Frazier committed the offense while acting on behalf of an educational affiliated agency.[258] Frazier appealed the enhancement.[259]

2. Decision

The plain language of section 2F1.1(b)(3)(A) penalizes the offender who "misrepresent[s]" that he "acted on behalf of a governmental agency or a charitable, educational, religious or political organization, or a government agency."[260] The Tenth Circuit used the *Random House Dictionary* to define "misrepresent" as making a false representation that generally involves a "deliberate intention to deceive for either profit or advantage."[261] The phrase "on behalf of" means, in this context, a "representative of, or in the interest or aid of."[262] An offender therefore receives an enhanced punishment if she either (a) falsely claims to represent the organization, or (b) falsely claims to act "in the interest or aid of" the organization.[263]

The *Frazier* court, however, rejected this literal interpretation as overly expansive.[264] Instead, the Tenth Circuit examined Application note four, the Commentary adjoining section 2F1.1(b)(3)(A), and the hypothetical examples they contained, to establish the parameters of conduct intended to fall within the purview of the guideline.[265] The conduct falling within the scope of section 2F1.1(b)(3)(A) is "exploitative conduct which induces victims to act upon their charitable or trusting impulses."[266] The Tenth Circuit determined that section 2F1.1(b)(3)(A) applies only to offenders who misrepresent their authority to act on behalf of a governmental agency or a charitable organization, if the offender's conduct "induces" the victim to contribute funds.[267]

The hypothetical examples accompanying section 2F1.1(b)(3)(A) suggest that the offender must also utilize "exploitive" conduct in furthering the offense of conviction.[268] Section 2F1.1(b)(3)(A) applies, for example, to offenders who seek donations under the guise of fundraising for a parochial school, soliciting contributions for a nonexistent charitable organization, or collecting delinquent student loan funds while posing as a federal collection agent.[269]

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257. *Id.*; 18 U.S.C. § 666 (1994).
258. *Frazier*, 53 F.3d at 1109.
259. *Id.*
260. U.S.S.G. § 2F1.1(b)(3)(A). "If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency, or (B) violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the Guidelines, increase by two levels." *Id.*
261. *Frazier*, 53 F.3d at 1112.
262. *Id.*
263. *Id.*
264. *Id.* at 1113.
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*; U.S.S.G. § 2F1.1, comment. (n.4).
269. *Frazier*, 53 F.3d at 1112; U.S.S.G. § 2F1.1, comment. (n.4).

The defendant, as the former president of an educational organization, misappropriated the organization's DOL grant funds.[270] The defendant did not engage in "exploitive" conduct by affirmatively soliciting contributions from the public.[271] The trial court therefore erred in imposing a section 2F1.1(b)(3)(A) sentencing enhancement.[272]

The Tenth Circuit stated that paragraph four of section 2F1.1(b)(3)(A) applies to offenders who engage in "false pretenses" and "exploit" the generosity of their victims.[273] In adopting this narrow interpretation, the Tenth Circuit specifically rejected the Fourth Circuit's holding in *United States v. Marcum*.[274]

VIII. ACCEPTANCE OF RESPONSIBILITY: DECISIONS ADDRESSING WHETHER THE COMMENCEMENT OF TRIAL PRECLUDES THE APPLICATION OF SECTION 3.E1.1(B)(1)-(2)[275]

A. United States v. Ortiz[276]

1. Facts

Julio Ortiz, when found with the possession of a stolen handgun with a filed-off serial number, pleaded to "unlawful possession of a firearm with an obliterated manufacturer's serial number" under 18 U.S.C. § 922(k).[277] Ortiz asserted that this "acceptance of responsibility" entitled him to a large downward adjustment of his sentence, but the trial court refused to award a sentencing reduction under section 3E1.1(b).[278] Despite the defendant's admitted knowledge of the obliterated serial number, the trial court determined that the commencement of trial before the admission precluded application of section 3E1.1(b)(2).[279]

2. Decision

The Tenth Circuit determined that the trial court, while correct in its reading of section 3E1.1(b)(2), erred in failing to determine the applicability of a section 3E1.1(b)(1) sentencing reduction. The Tenth Circuit noted that section 3E1.1(b) of the Guidelines permits an additional one-level reduction for offenders who assist authorities in the investigation or prosecution of the instant

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270. *Frazier*, 53 F.3d at 1114.
271. *Id.*
272. *Id.*
273. *Id.* at 1112.
274. *Id.* at 1114; *see* United States v. Marcum, 16 F.3d 599 (4th Cir.) (holding that U.S.S.G. § 2F1.1(b)(3)(A) applies where a defendant misrepresents to the public that he was conducting the bingo games wholly on behalf of the charitable organization, when, in fact, he was acting in part for himself and his fellow deputies in skimming the charitable proceeds), *cert. denied*, 115 S. Ct. 137 (1994).
275. U.S.S.G. § 3E1.1(b)(1)-(2) (providing a downward adjustment for an offender's acceptance of responsibility).
276. 63 F.3d 952 (10th Cir. 1995).
277. *Ortiz*, 63 F.3d at 953.
278. *Id.* at 955.
279. *Id.*

offense.[280] Pursuant to that section, an offender assists authorities by: "(1) timely providing complete information to the government concerning his own involvement in the offense; or (2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently."[281]

Application note three provides that the commencement of trial precludes the application of section 3E1.1(b)(2).[282] The Tenth Circuit determined that the commencement of trial, which renders a guilty plea "untimely" under section 3E1.1(b)(2), does not affect the "timeliness" of complete information under section 3E1.1(b)(1).[283] Subsection (1) and subsection (2) are disjunctive;[284] as a result, the Tenth Circuit stated that "language referencing the commencement of trial applies only to section 3E1.1(b)(2)."[285] Therefore, the commencement of trial precludes application of a sentence reduction under section 3E1.1(b)(2) but does not likewise prevent the application of section 3E1.1(b)(1).[286]

B. *Analysis*

The Tenth Circuit's holding is consistent with the First, Fifth, and Ninth Circuits' holdings in *United States v. Tallandino*,[287] *United States v. Tello*,[288] and *United States v. Stoops*,[289] respectively. Generally, conduct qualifying for a sentencing reduction under subsection (b)(1) or (b)(2) occurs during the investigation into the instant offense.[290] Section 3E1.3(b) recognizes "society's legitimate social interest" in defendants who accept responsibility

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280. U.S.S.G. § 3E1.1(b).

281. *Id.*

282. U.S.S.G. § 3E1.1, comment. (n.3). Application Note 3 provides:

> Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (see Application Note 1(a)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.

Id.

283. *Ortiz*, 63 F.3d at 956.

284. *Id.*; U.S.S.G. § 3E1.1(b)(1), (2) (allowing a reduction for "(1) timely providing complete information to the government concerning his own involvement in the offense; or (2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently").

285. *Ortiz*, 63 F.3d at 956.

286. *Id.*

287. 38 F.3d 1255 (1st Cir. 1994) (holding that § 3E1.1(b)(1) and § 3E1.1(b)(2) are disjunctive).

288. 9 F.3d 1119 (5th Cir. 1993) (finding that the commencement of trial only precludes an application of § 3E1.1(b)(2)).

289. 25 F.3d 820 (9th Cir. 1994) (holding that the language referencing the commencement of trial applies only to § 3E1.1(b)(2)).

290. U.S.S.G. § 3E1.1, comment. (nn.1-6).

for their actions, the government's need to avoid making trial preparations, and the court's reduction of the number of cases on court dockets.[291]

A sentencing court can apply section 3E1.3(b) in conjunction with section 3E1.3(a).[292] Subsection (a) provides a two-level reduction for offenders who "clearly demonstrate acceptance of responsibility."[293] Application note 1(b) to subsection (a) provides several examples of conduct which indicate a clear acceptance of responsibility, including: "a voluntary payment of restitution prior to the adjudication of guilt"; "a voluntary surrender to authorities promptly after the commission of the offense"; or "a voluntary termination or withdrawal from criminal conduct."[294]

IX. DECISIONS ADDRESSING WHETHER SECTION 4A1.2(D)(2)(A)[295] APPLIES TO A JUVENILE PLACED IN THE CUSTODY OF THE STATE SECRETARY OF SOCIAL SERVICES

A. United States v. Birch[296]

1. Facts

In *Birch*, the defendant received a sentence for committing a violent crime while possessing a firearm.[297] The trial court assessed two criminal history levels for each of the defendant's two prior juvenile convictions pursuant to section 4A1.2(d)(2)(A).[298] The defendant served his juvenile convictions in the custody of the State Secretary of Social and Rehabilitation Services.[299] The defendant appealed on the grounds that the trial court improperly imposed a two-level enhancement under section 4A1.2(d)(2)(A) rather than a one-level enhancement pursuant to section 4A1.2(d)(2)(B).[300]

2. Decision

The Tenth Circuit decided that section 4A1.2(d)(2)(A) requires the imposition of a two-level criminal history adjustment for each juvenile or adult "sentence of 'confinement' of at least sixty days."[301] Section 4A1.2(d)(2)(B) provides a one-point criminal history adjustment for a "juvenile sentence imposed within five years to the defendant's commencement of the instant offense."[302] Subsection (B) does not require the existence of a period of

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291. U.S.S.G. § 3E1.1, comment. (n.6).
292. U.S.S.G. § 3E1.1(b).
293. *Id.*
294. *Id.*
295. U.S.S.G. § 4A1.2. (Definitions and Instructions for Computing Criminal History).
296. 39 F.3d 1089 (10th Cir. 1994).
297. *Birch*, 39 F.3d at 1090.
298. *Id.* at 1095. U.S.S.G. § 4A1.2(d)(2)(a) applies a two-level enhancement for each adult or juvenile sentence resulting in a "confinement" that exceeds 60 days. Johnson contested the court's determination that placement into the custody of the state secretary of Social and Rehabilitation Services constitutes a "confinement" within the purview of the guideline section. *Id.*
299. *Id.*
300. *Id.*
301. *Id.*; *see* U.S.S.G. § 4A1.2(d)(2)(A).
302. U.S.S.G. § 4A1.2(d)(2)(b).

"confinement."[303] The propriety of the trial court's application of subsection (A) depends on whether an offender's commitment to the custody of a state juvenile authority constituted a "confinement."[304] The commentary to section 4A1.2(d)(2)(A), however, fails to define the term "confinement."[305] The Tenth Circuit held that confinement includes a commitment to the custody of a state juvenile authority within the scope of section 4A1.2(d)(2)(A), and affirmed the trial court's sentencing determination.[306]

B. *Analysis*

Guideline sections 4A1.2(d)(2)(A) and (B) provide enhancements for both an offender's adult and juvenile convictions.[307] Section 4A1.2(d) limits the use of juvenile convictions.[308] A sentencing court may only consider an offense committed prior to age eighteen that resulted in the imposition of an adult sentence of imprisonment exceeding thirteen months.[309] Additionally, a sentencing court may not count juvenile or adult offenses occurring more than five years prior to the commencement of the instant offense.[310] These limitations were designed in part to "avoid large sentencing disparities resulting from the differential availability" of juvenile records among jurisdictions.[311]

C. *Other Circuits*

The Tenth Circuit's holding is consistent with the Sixth Circuit's holdings in *United States v. Hanley*[312] and *United States v. Kirby*,[313] and with the Eleventh Circuit's holding in *United States v. Fuentes*.[314] In each of these decisions, the offender's criminal history also included a juvenile conviction for which a state agency obtained custody of the offender.[315]

CONCLUSION

The foregoing discussion demonstrates the complexity of applying the Guidelines' determinative sentencing scheme. Perhaps the complexity explains the pervasive nature of Guidelines issues on the Tenth Circuit's docket sheets.

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303. *Birch*, 39 F.3d at 1095.
304. *Id.*
305. *Id.*
306. *Id.*
307. U.S.S.G. §§ 4A1.2(d)(2)(A), (B).
308. *Id.*
309. *Id.*
310. *Id.*
311. *Id.*
312. 906 F.2d 1116 (6th Cir.) (concluding that the term "confinement" in § 4A1.2(d)(2)(a) included placement into custody of the state's juvenile authority), *cert. denied*, 498 U.S. 945 (1990).
313. 893 F.2d 867 (6th Cir. 1990) (holding that commitment to the custody of the state's juvenile authority constitutes a "confinement" under U.S.S.G. §4A1.2(d)(2)(a).
314. 991 F.2d 700 (11th Cir. 1993) (finding that the defendant's commitment to a state juvenile authority in excess of 60 days was a "confinement").
315. *Birch*, 39 F.3d 1095; *see Fuentes*, 991 F.2d at 202; *Hanley*, 906 F.2d at 119; *Kirby*, 893 F.2d at 868.

The Tenth Circuit continues to struggle with the Guidelines as the Sentencing Commission continually adopts new amendments and as factual scenarios not contemplated by the Guidelines arise.

In the face of this uncertainty, the Tenth Circuit has generally adopted an extremely restrictive interpretation of Guideline principles. Perhaps, the only exceptions to this conclusion are the Tenth Circuit's holdings in *Frazier*[316] and *Gonzalez*,[317] where the Tenth Circuit abandoned its strict reliance on the plain language of the Guidelines and opted for a more liberal reading of the guideline provisions.

David A. Forkner

316. United States v. Frazier, 53 F.3d 1105 (10th Cir. 1995). For a discussion of *Frazier*, see *supra* text accompanying notes 255-74.

317. United States v. Gonzales, 65 F.3d 814 (10th Cir. 1995). For a further discussion of *Gonzales*, see *supra* text accompanying notes 234-52.

SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category I	II	III	IV	V	VI
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3*a*	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8*b*	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10*c*	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	92-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

a. Probation available (see U.S.S.G. § 5B1.1(a)(1).
b. Probation with conditions of confinement available (see U.S.S.G. § 5B1.1(a)(2)).
c. New "split sentence" available (see U.S.S.G. §§ 5C1.(c)(3), (d)(2)).