

PROPOSED AMENDMENT: DISCHARGED TERMS OF IMPRISONMENT

Synopsis of Proposed Amendment: *This is a three part proposed amendment that addresses a number of issues in §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment). First, the amendment amends §5G1.3(b) to allow the court to adjust the length of the sentence for any prior period of imprisonment that “resulted from offenses that have been fully taken into account in the determination of the offense level for the instant offense”. Currently, this subsection only applies to undischarged terms of imprisonment for any such prior period of imprisonment. As a conforming amendment, the proposed amendment deletes the downward departure provision in Application Note 7 for prior discharged terms of imprisonment.*

In addition to adding discharged terms of imprisonment to the operation of subsection (b), this amendment proposes two options to clarify the rule for application of subsection (b) to a prior term of imprisonment. There has been litigation regarding what “fully taken into account” means. See United States v. Garcia-Hernandez, 237 F.3d 105, 109 (2d Cir. 2000) (determining that a prior offense is “fully taken into account” if and only if the Guidelines provide for sentencing as if both the offense of conviction and the separate offense had been prosecuted in a single proceeding); United States v. Caraballo, 200 F.3d 20, 25 (1st Cir. 1999) (holding that the term “fully” cannot be read as synonymous with the term “relevant conduct” because this would be over-inclusive). Cf. United States v. Fuentes, 107 F.3d 1515, 1524 (11th Cir. 1997) (finding that a prior offense has been “fully taken into account” when the prior offense is part of the same course of conduct, common scheme, or plan). Option 1 makes clear that subsection (b) shall apply only to prior offenses that are relevant conduct to the instant offense of conviction and that resulted in an increase in the offense level for the instant offense. Option 2 makes clear that subsection (b) shall apply in cases in which the conduct of the prior offense is (1) incorporated in the base offense level for the instant offense, (2) covered by a specific offense characteristic in the guideline for the instant offense, or (3) covered by a Chapter Three adjustment applicable to the instant offense. Option 2 does not require that the Chapter Two or Three offense level necessarily be increased by the prior offense.

Finally, this proposed amendment makes clear that an instant offense committed while the defendant is on federal or state probation, parole, or supervised release, and has had such probation, parole, or supervised release revoked, shall be imposed to run consecutively to the undischarged term of imprisonment. In doing so, this amendment resolves a circuit conflict on the issue. The majority of circuits to consider the issue have held that imposition of consecutive sentence is required by Application Note 6. See, e.g., United States v. Smith, 282 F.3d 1045, 1048 (8th Cir. 2002) (stating that Application Note 6 requires consecutive sentences); United States v. Alexander, 100 F.3d 24, 27 (5th Cir. 1996) (same); United States v. Gondek, 65 F.3d 1, 3 (1st Cir. 1995) (same); United States v. Bernard, 48 F.3d 427, 431 - 32 (9th Cir. 1995) (same). See also United States v. Campbell, No. 01-5661, 2002 U.S. App. LEXIS 23024 (6th Cir., Nov. 6,

2002) (affirming imposition of consecutive sentence as consistent with guideline commentary); *United States v. Walker*, 98 F.3d 944, 945 (7th Cir. 1996) (noting a strong presumption in favor of consecutive sentence). Three circuits, however, have disagreed. The second, third, and tenth circuits held that the word “should” in Application Note 6 renders the commentary non-binding. See *United States v. Maria*, 186 F.3d 65, 70 - 73 (2d Cir. 1999); *United States v. Swan*, 275 F.3d 272, 279 - 83 (3d Cir. 2002); *United States v. Tisdale*, 248 F.3d 964, 977 - 79 (10th Cir. 2001).

Proposed Amendment:

Option 1:

§5G1.3. Imposition of a Sentence on a Defendant Subject to an Undischarged or Discharged Term of Imprisonment in Cases Involving an

- (a) If the instant offense was committed while the defendant was (1) serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, or (2) on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.
- (b) If subsection (a) does not apply, and the undischarged a term of imprisonment resulted from another offense that have been fully taken into account in the determination of the offense level for the instant offense (1) is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct); and (2) was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments), the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment as follows:
 - (A) If the term of imprisonment for that other offense is undischarged—
 - (i) the court may adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and
 - (ii) the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.
 - (B) If the term of imprisonment is discharged, the court may adjust the

sentence for any period of imprisonment already served.

- (c) (Policy Statement) In any other case, 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.

Commentary

Application Notes:

~~1. Consecutive sentence - subsection (a) cases. Under subsection (a), the court shall impose a consecutive sentence when the instant offense was committed while the defendant was serving an undischarged term of imprisonment or after sentencing for, but before commencing service of, such term of imprisonment.~~

1. Revocations under Subsection (a).—In a case in which the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked, the sentence for the instant offense shall be imposed to run consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of probation, parole, or supervised release. See subsection (f) of §7B1.3(Revocation of Probation or Supervised Release).

~~2. Adjusted concurrent sentence - subsection (b) cases. When a sentence is imposed pursuant to subsection (b), the court should adjust the sentence for any period of imprisonment already served as a result of the conduct taken into account in determining the guideline range for the instant offense if the court determines that period of imprisonment will not be credited to the~~
~~federal sentence by the Bureau of Prisons. Example: The defendant is convicted of a federal offense charging the sale of 30 grams of cocaine. Under §1B1.3 (Relevant Conduct), the defendant is held accountable for the sale of an additional 15 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for the state offense and has served six months on that sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 10-16 months (Chapter Two offense level of 14 for sale of 45 grams of cocaine; 2-level reduction for acceptance of responsibility; final offense level of 12; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the three months remaining on the defendant's state sentence, achieves this result. For clarity, the court should note on the Judgment in a Criminal Case Order that the sentence imposed is not a departure from the guideline range because the defendant has been credited for guideline purposes under §5G1.3(b) with six months served in state custody that will not be credited to the federal sentence under 18 U.S.C. §~~

2. Subsection (b) Cases.—

- (A) In General.— Subsection (b) applies in cases in which (i) all of the prior offense is relevant conduct to the instant offense under the provisions of subsection (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct); and (ii) such prior offense has resulted in an increase in the Chapter Two or Three offense level for the instant offense. Cases in which only part of the prior offense is relevant conduct to the instant offense are covered under subsection (c).
- (B) Inapplicability of Subsection (b).—Subsection (b) does not apply in cases in which the prior offense increased the Chapter Two or Three offense level for the instant offense, but was not relevant conduct to the instant offense under §1B1.3(a)(1), (a)(2), or (a)(3) (e.g., the prior offense is an aggravated felony for which the defendant received an increase under §2L1.2 (Unlawfully Entering or Remaining in the United States), or the prior offense was a crime of violence for which the defendant received an increased base offense level under §2K2.1(Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)).
- (C) Imposition of Sentence.—If subsection (b) applies, the court should note on the judgment order (i) the amount of time by which the sentence is being adjusted; (ii) the undischarged or discharged term of imprisonment for which the adjustment is being given; and (iii) that the sentence imposed is a "sentence reduction pursuant to §5G1.3(b), Application Note 2(C), for a period of imprisonment which will not be credited by the Bureau of Prisons."
- (D) Examples.—The following are examples in which subsection (b) applies and adjustments to the sentence are appropriate:
- (i) The defendant is convicted of a federal offense charging the sale of 40 grams of cocaine. Under §1B1.3, the defendant is held accountable for the sale of an additional 15 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for the state offense and has served six months on that sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 12-18 months (Chapter Two offense level of 16 for sale of 55 grams of cocaine; 3-level reduction for acceptance of responsibility; final offense level of 13; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the three months remaining on the defendant's state sentence, achieves this result.

- (ii) *The defendant is convicted of a federal offense charging the sale of 150 grams of cocaine. Under §1B1.3, the defendant is held accountable for the sale of an additional 50 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The state term was discharged after the defendant served 6 months of imprisonment. The guideline range applicable to the defendant is 24-30 months (Chapter Two offense level of 20 for sale of 200 grams of cocaine; 3-level reduction for acceptance of responsibility; final offense level of 17; Criminal History Category I). The court determines that a sentence of 24 months provides the appropriate total punishment. Because the defendant has already served six months on the discharged state term, a sentence of 18 months on the instant offense achieves this result.*

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6. ~~*Revocations. If the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked, the sentence for the instant offense should be imposed to run consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of probation, parole, or supervised release. See §7B1.3 (Revocation of Probation or Supervised Release) (setting forth a policy that any imprisonment penalty imposed for violating probation or supervised release should be consecutive to any sentence of imprisonment being served or subsequently imposed).*~~
7. ~~*Downward Departure Provision. In the case of a discharged term of imprisonment, a downward departure is not prohibited if subsection (b) would have applied to that term of imprisonment had the term been undischarged. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.*~~

Option 2:

§5G1.3. Imposition of a Sentence on a Defendant Subject to an **in Cases Involving an Undischarged or Discharged** Term of Imprisonment

- (a) If the instant offense was committed while the defendant was (i) serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, **or (ii) on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked,** the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.
- (b) If subsection (a) does not apply, and ~~the undischarged~~ a term of imprisonment

resulted from another offense that ~~have been fully taken into account in the determination of the offense level for the instant offense~~ is covered by the applicable Chapter Two guideline or an applicable Chapter Three adjustment for the instant offense of conviction, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment as follows:

- (1) If the term of imprisonment for that other offense is undischarged—
 - (A) the court may adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and
 - (B) the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.
 - (2) If the term of imprisonment is discharged, the court may adjust the sentence for any period of imprisonment already served.
- (c) (Policy Statement) In any other case, 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.

Commentary

Application Notes:

~~1. Consecutive sentence - subsection (a) cases. Under subsection (a), the court shall impose a consecutive sentence when the instant offense was committed while the defendant was serving an undischarged term of imprisonment or after sentencing for, but before commencing service of, such term of imprisonment.~~

1. Revocations under Subsection (a).—In a case in which the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked, the sentence for the instant offense shall be imposed to run consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of probation, parole, or supervised release. See subsection (f) of §7B1.3 (Revocation of Probation or Supervised Release).

~~2. Adjusted concurrent sentence - subsection (b) cases. When a sentence is imposed pursuant to subsection (b), the court should adjust the sentence for any period of imprisonment already served as a result of the conduct taken into account in determining the guideline range for the instant offense if the court determines that period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons. Example: The defendant is~~

~~convicted of a federal offense charging the sale of 30 grams of cocaine. Under §1B1.3 (Relevant Conduct), the defendant is held accountable for the sale of an additional 15 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for the state offense and has served six months on that sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 10-16 months (Chapter Two offense level of 14 for sale of 45 grams of cocaine; 2-level reduction for acceptance of responsibility; final offense level of 12; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the three months remaining on the defendant's state sentence, achieves this result. For clarity, the court should note on the Judgment in a Criminal Case Order that the sentence imposed is not a departure from the guideline range because the defendant has been credited for guideline purposes under §5G1.3(b) with six months served in state custody that will not be credited to the federal sentence under 18 U.S.C. § 3585(b).~~

2. Subsection (b) Cases.—

- (A) In General.— Subsection (b) applies in cases in which the conduct comprising all of the prior offense is covered by the applicable Chapter Two guideline or an applicable Chapter Three adjustment for the instant offense of conviction. Such conduct is covered by the Chapter Two guideline or a Chapter Three adjustment if the conduct is (i) incorporated in the base offense level for the instant offense of conviction, (ii) covered by a specific offense characteristic in the guideline for the instant offense of conviction, or (iii) covered by a Chapter Three adjustment applicable to the instant offense of conviction. Cases in which only part of the prior offense is covered are addressed under subsection (c).
- (B) Inapplicability of Subsection (b).—Subsection (b) does not apply in cases in which the base offense level or the specific offense characteristic in the applicable Chapter Two offense guideline is an enhancement for a prior conviction (e.g., the prior offense is an aggravated felony for which the defendant received an increase under §2L1.2 (Unlawfully Entering or Remaining in the United States), or the prior offense was a crime of violence for which the defendant received an increased base offense level under §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)).
- (C) Imposition of Sentence.—If subsection (b) applies, the court should note on the judgment order (i) the amount of time by which the sentence is being adjusted; (ii) the undischarged or discharged term of imprisonment for which the adjustment is being given; and (iii) that the sentence imposed is a "sentence reduction pursuant to §5G1.3(b), Application Note 2(C), for a period of imprisonment which will not be credited by the Bureau of Prisons."

(D) Examples.—The following are examples in which subsection (b) applies and adjustments to the sentence are appropriate:

- (i) The defendant is convicted of a federal offense charging the sale of 30 grams of cocaine. Under §1B1.3, the defendant is held accountable for the sale of an additional 15 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for the state offense and has served six months on that sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 10-16 months (Chapter Two offense level of 14 for sale of 45 grams of cocaine; 2-level reduction for acceptance of responsibility; final offense level of 12; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the three months remaining on the defendant's state sentence, achieves this result.
- (ii) The defendant is convicted of a federal offense charging the sale of 150 grams of cocaine. Under §1B1.3, the defendant is held accountable for the sale of an additional 50 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The state term was discharged after the defendant served 6 months of imprisonment. The guideline range applicable to the defendant is 24-30 months (Chapter Two offense level of 20 for sale of 200 grams of cocaine; 3-level reduction for acceptance of responsibility; final offense level of 17; Criminal History Category I). The court determines that a sentence of 24 months provides the appropriate total punishment. Because the defendant has already served six months on the discharged state term, a sentence of 18 months on the instant offense achieves this result.

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~~6. Revocations. If the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked, the sentence for the instant offense should be imposed to run consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of probation, parole, or supervised release. See §7B1.3 (Revocation of Probation or Supervised Release) (setting forth a policy that any imprisonment penalty imposed for violating probation or supervised release should be consecutive to any sentence of imprisonment being served or subsequently imposed).~~

~~7. Downward Departure Provision.—In the case of a discharged term of imprisonment, a downward departure is not prohibited if subsection (b) would have applied to that term of~~

imprisonment had the term been undischarged. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.