

approximation because the information available about the previously sentenced offense may be limited. For example, if the undischarged term of imprisonment resulted from a state offense, the information available may permit only a rough estimate of the total punishment guideline range. If the undischarged term of imprisonment resulted from a federal offense to which the guidelines applied, the task will be somewhat more straightforward, although a precise determination may not be possible even in these cases. It is not intended that the above methodology be applied in a manner that unduly complicates or prolongs the sentencing process. If a reasonable estimate of the applicable total punishment guideline range under § 5G1.2 cannot be made from the information available, the court may use any reasonable method to determine an appropriate total punishment.

The purpose of this provision is illustrated by the following examples. Example (1): A defendant with no prior convictions robs two banks in different federal judicial districts. The first offense is a level 27 offense; the second offense is a level 24 offense. The charges are consolidated and the defendant pleads guilty and accepts responsibility for his conduct. The final offense level is 27 (the two offenses result in a level 29 under the multiple count rules, reduced by two levels for acceptance of responsibility). The defendant is in Criminal History Category I. The applicable guideline range is 70–87 months. There are no aggravating or mitigating factors sufficient to warrant a guideline departure. Example (2): The same circumstances exist as in Example (1) except that the charges are not consolidated. The defendant first pleads guilty and accepts responsibility for the level 27 offense. The guideline range is 57–71 months (final offense level 25, Criminal History Category I). The defendant is sentenced to 65 months. Shortly thereafter, the defendant pleads guilty and accepts responsibility for the level 24 offense. The guideline range is 46–57 months (final offense level 22, Criminal History Category II). The defendant has served 2 months on the first sentence at the time of sentencing on the second offense. If, in Example 2, the sentencing court imposed a sentence within the applicable guideline range for the second offense, and ordered that sentence to run consecutively to the first sentence, the aggregate term of imprisonment (between 111 and 122 months) would be substantially higher than the guideline range of 70–87 months that would have been applicable

had the defendant been sentenced for both offenses at the same time. On the other hand, if such sentence were imposed to run concurrently, the aggregate term of imprisonment (65 months) would provide no additional punishment for the second offense and would be lower than the guideline range of 70–87 months that would have been applicable had the defendant been sentenced for both offenses at the same time. Subsection (c) is designed to provide a methodology to allow the court, to the extent practicable, to impose a total punishment that approximates the total punishment that would have been imposed had the sentences both been federal sentences imposed at the same time under § 5G1.2 (Sentencing on Multiple Counts of Conviction).

4. The application of subsection (c) has the following steps:

(1) the court determines the guideline range for the instant offense (as in any case);

(2) the court determines, to the extent feasible, the total punishment that it would have imposed under § 5G1.2 (Sentencing on Multiple Counts of Conviction) had all the offenses (the instant offense and any offense resulting in the undischarged term of imprisonment) been federal offenses for which sentences were being imposed at the same time. If a reasonable estimate of the total punishment guideline range cannot be made using this method, the court may use any reasonable method for determining an appropriate total punishment;

(3) the court then determines the specific sentence for the instant offense, and whether that sentence will run concurrently, partially concurrently, or consecutively to the remainder of the undischarged term of imprisonment. The objective is to impose a sentence that (i) is consistent with the guideline range for the instant offense (assuming no aggravating or mitigating factors warranting a departure), and (ii) is structured in such a way that the resulting aggregate term of imprisonment will reflect the appropriate total punishment.

The form of the sentence that will best accomplish the objectives of this provision will depend upon the length and type of the undischarged term of imprisonment and the amount of time the defendant has served on that sentence. The following examples show the application of this provision to a variety of typical cases.

Examples:

(A) The guideline range applicable to the instant offense is 24–30 months. Sufficient information is available to

establish that the combined guideline range would have been 30–37 months if both the instant offense and the offense resulting in the undischarged term of imprisonment had been federal offenses that were being sentenced at the same time. The court determines that a sentence of 36 months' imprisonment would provide the appropriate total punishment. The undischarged term of imprisonment is an indeterminate sentence of imprisonment with a 60-month maximum. At the time of sentencing on the instant offense, the defendant has served 10 months on that sentence. In this case, a sentence of 26 months' imprisonment to be served concurrently with the remainder of the undischarged term of imprisonment would (1) be within the guideline range for the instant offense, and (2) achieve the appropriate total punishment.

(B) The guideline range applicable to the instant offense is 24–30 months. Sufficient information is available to establish that the combined guideline range would have been 30–37 months if both the instant offense and the offense resulting in the undischarged term of imprisonment had been federal offenses that were being sentenced at the same time. The court determines that a sentence of 36 months' imprisonment would provide the appropriate total punishment. The undischarged term of imprisonment is a six-month determinate sentence. At the time of sentencing on the instant offense, the defendant has served 3 months on that sentence. In this case, a sentence of 30 months' imprisonment to be served consecutively to the undischarged term of imprisonment would (1) be within the guideline range for the instant offense, and (2) achieve the appropriate incremental penalty.

(C) The guideline range applicable to the instant offense is 24–30 months. Sufficient information is available to establish that the combined guideline range would have been 30–37 months if both the instant offense and the offense resulting in the undischarged term of imprisonment had been federal offenses that were being sentenced at the same time. The court determines that a sentence of 36 months' imprisonment would provide the appropriate total punishment. The undischarged term of imprisonment is an indeterminate sentence with a 60-month maximum. At the time of sentencing on the instant offense (April 1, 1994), the defendant has served 2 months on that sentence. In this case, a sentence of 30 months' imprisonment to commence upon the defendant's release from imprisonment on the undischarged term of imprisonment, or on August 1, 1994,