

Legislative history pertaining to the new 18 U.S.C. § 3584 indicates that this section was intended to allow the sentencing court the authority to determine whether the federal sentence was to run concurrently or consecutively to a state sentence of imprisonment. 'This \* \* \* [section 3584] changes the law that now applies to a person sentenced for a Federal offense who is already serving a term of imprisonment for a state offense.' S. Rep. No. 225, supra at 127. 'Thus, it is intended that this provision be construed contrary to the holding in *United States v. Segal*.' Id. at 127 (n.314). See *United States v. Hardesty*, 958 F.2d 910, 914 (stating that, under section 3584, 'Congress has expressly granted federal judges the discretion to impose a sentence concurrent to a state prison term'), aff'd. en banc, 977 F.2d 1347 (9th Cir. 1992)."]

[Option 2: Section 5G1.3(c) is deleted and the following inserted in lieu thereof:

"(c) If—

(1) neither subsection (a) nor subsection (b) applies;

(2) the prior undischarged term of imprisonment resulted from a federal sentence imposed pursuant to the Sentencing Reform Act; and

(3) such sentence was not a departure from the guidelines,

the applicable range shall be determined by application of the guidelines to the instant offense(s) and the federal offense(s) for which the defendant is serving an undischarged term of imprisonment as if the sentences were being imposed at the same time. A sentence under this subsection shall be imposed to run concurrently to the undischarged term of imprisonment, except to the extent a consecutive sentence is necessary to achieve the appropriate total punishment.

(d) In any other case, the court may use any reasonable method to determine whether the sentence for the instant offense should be imposed to run concurrently or consecutively to the undischarged term of imprisonment."

The Commentary to § 5G1.3 captioned "Application Notes" is amended in Note 2 by deleting the second paragraph and inserting in lieu thereof:

"When a sentence is imposed pursuant to subsection (b) or (c), 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 that period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons. Example: The

defendant has been 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 that is part of the same course of conduct for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for this state offense and has served six months 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 remainder of 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 guidelines 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)."

The Commentary to § 5G1.3 captioned "Application Notes" is amended by renumbering Note 4 as Note 6; and by deleting Note 3 and inserting in lieu thereof:

"3. If neither subsection (a) nor (b) applies, and the defendant is subject to an undischarged term of imprisonment resulting from a non-departure sentence for a federal offense imposed pursuant to the Sentencing Reform Act, subsection (c) applies.

Under subsection (c), the court determines the guideline range that would have been applicable had all the offenses (the instant offense and the offense(s) resulting in the undischarged term of imprisonment) been offenses for which sentences were being imposed at the same time.

The purpose of subsection (c) 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.

4. When determining the applicable guideline range under subsection (c), use the offense level determinations previously established for the offense resulting in the undischarged term of imprisonment. That is, this provision does not contemplate a re-examination of the offense level determinations for the offense resulting in the undischarged term of imprisonment. Note also that no criminal history points for the offense resulting in the undischarged term of imprisonment are added in determining the criminal history category under this subsection.

In the unusual case in which there is insufficient information for the court to