

Sentence on a Defendant Subject to an Undischarged Term of Imprisonment).

First, this amendment clarifies the rule for application of subsection (b) (mandating a concurrent term of imprisonment) with respect to a prior term of imprisonment by stating 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. By clarifying the application of subsection (b), this amendment addresses conflicting litigation regarding the meaning of "fully taken into account." Compare, e.g., *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), with *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).

Second, this amendment addresses how this guideline applies in cases in which an instant offense is committed while the defendant is on federal or state probation, parole, or supervised release, and has had such probation, parole, or supervised release revoked. Under this amendment, the sentence for the instant offense may be imposed concurrently, partially concurrently, or consecutively to the undischarged term of imprisonment; however, the Commission recommends a consecutive sentence in this situation. This amendment also resolves a circuit conflict concerning whether the imposition of such sentence is required to be consecutive. The amendment follows holdings of the Second, Third, and Tenth Circuits stating that imposition of sentence for the instant offense is not required to be consecutive to the sentence imposed upon revocation of probation, parole, or supervised release. 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).

Third, this amendment provides a new downward departure provision in § 5K2.23 (Discharged Terms of Imprisonment) regarding the effect of discharged terms of imprisonment. This provision replaces the departure provision previously set forth in Application Note 7 of § 5G1.3. By placing the departure provision in

Chapter Five, Part K, this amendment brings structural clarity to § 5G1.3 because the guideline applies to undischarged, rather than discharged, terms of imprisonment. For ease of application, the new commentary in § 5G1.3 provides a reference to § 5K2.23.

Finally, this proposed amendment addresses a circuit conflict regarding whether the sentencing court may grant "credit" or adjust the instant sentence for time served on a prior undischarged term covered under subsection (c). Compare *Ruggiano v. Reish*, 307 F.3d 121 (3d Cir. 2002) (federal sentencing court may grant such credit), with *United States v. Fermin*, 252 F.3d 102 (2d Cir. 2001) (court may not grant such credit). The amendment makes clear that the court may not adjust or give "credit" for time served on an undischarged term of imprisonment covered under subsection (c). However, the amendment adds commentary to § 5G1.3 to provide that courts may consider a downward departure in an extraordinary case, in order to achieve a reasonable punishment for the instant offense.

10. Amendment: Section 1B1.1 is amended by inserting before subsection (a) the following new paragraph:

"Except as specifically directed, the provisions of this manual are to be applied in the following order:".

The Commentary to § 1B1.1 captioned "Application Notes" is amended by striking Note 4 and inserting the following:

"4. (A) Cumulative Application of Multiple Adjustments within One Guideline.—The offense level adjustments from more than one specific offense characteristic within an offense guideline are applied cumulatively (added together) unless the guideline specifies that only the greater (or greatest) is to be used. Within each specific offense characteristic subsection, however, the offense level adjustments are alternative; only the one that best describes the conduct is to be used. For example, in § 2A2.2(b)(3), pertaining to degree of bodily injury, the subdivision that best describes the level of bodily injury is used; the adjustments for different degrees of bodily injury (subdivisions (A)-(E)) are not added together.

(B) Cumulative Application of Multiple Adjustments from Multiple Guidelines.—Absent an instruction to the contrary, enhancements under Chapter Two, adjustments under Chapter Three, and determinations under Chapter Four are to be applied cumulatively. In some cases, such enhancements, adjustments, and determinations may be triggered by the

same conduct. For example, shooting a police officer during the commission of a robbery may warrant an injury enhancement under § 2B3.1(b)(3) and an official victim adjustment under § 3A1.2, even though the enhancement and the adjustment both are triggered by the shooting of the officer."

The Commentary to § 1B1.1 captioned "Application Notes" is amended by adding at the end the following:

"7. Use of Abbreviated Guideline Titles.—Whenever a guideline makes reference to another guideline, a parenthetical restatement of that other guideline's heading accompanies the initial reference to that other guideline. This parenthetical is provided only for the convenience of the reader and is not intended to have substantive effect. In the case of lengthy guideline headings, such a parenthetical restatement of the guideline heading may be abbreviated for ease of reference. For example, references to § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) may be abbreviated as follows: § 2B1.1 (Theft, Property Destruction, and Fraud)."

The Commentary to § 2A3.1 captioned "Application Notes" is amended in Note 1 by striking "'Prohibited sexual conduct'" and all that follows through "child pornography." and inserting the following:

"'Prohibited sexual conduct' means any sexual activity for which a person can be charged with a criminal offense. 'Prohibited sexual conduct' includes the production of child pornography, but does not include trafficking in, or possession of, child pornography."

The Commentary to § 2B1.1 captioned "Statutory Provisions" is amended by inserting "19 U.S.C. 2401f;" before "29 U.S.C.":

The Commentary to § 2C1.3 captioned "Statutory Provisions" is amended by inserting "; 40 U.S.C. 14309(a), (b)" after "1909".

Section § 2D1.1(e)(1) is amended in the subdivision captioned "List I Chemicals" by striking the period after "Gamma-butyrolactone" and inserting a semi-colon; and by adding at the end the following:

"714 G or more of Red Phosphorus."

Section 2D1.1(e)(2) is amended in the subdivision captioned "List I Chemicals" by adding at the end the following:

"At least 214 G but less than 714 G of Red Phosphorus;"