

APPENDIX

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**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 22-2024

United States of America

Appellee

v.

Kevin Lynn Tucker

Appellant

Appeal from U.S. District Court for the Eastern District of Arkansas - Central
(4:20-cr-00155-JM-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 07, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 22-2024

United States of America

Plaintiff - Appellee

v.

Kevin Lynn Tucker

Defendant - Appellant

Appeal from U.S. District Court for the Eastern District of Arkansas - Central
(4:20-cr-00155-JM-1)

JUDGMENT

Before SHEPHERD, ERICKSON, and GRASZ, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the appeal is dismissed in part and the judgment of the district court is otherwise affirmed in accordance with the opinion of this Court.

May 25, 2023

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

United States Court of Appeals
For the Eighth Circuit

No. 22-2024

United States of America

Plaintiff - Appellee

v.

Kevin Lynn Tucker

Defendant - Appellant

Appeal from United States District Court
for the Eastern District of Arkansas - Central

Submitted: March 13, 2023

Filed: May 25, 2023

[Unpublished]

Before SHEPHERD, ERICKSON, and GRASZ, Circuit Judges.

PER CURIAM.

Kevin Lynn Tucker was indicted on one count of being a felon in possession of a firearm. He pled guilty pursuant to a plea agreement that contained an appeal waiver. After accepting his plea, the district court¹ sentenced Tucker to 60 months'

¹The Honorable James M. Moody Jr., United States District Judge for the Eastern District of Arkansas.

imprisonment followed by 3 years' supervised release. Tucker appeals, arguing that the district court erred by not reducing his sentence under United States Sentencing Guidelines (USSG) § 5G1.3(b) in light of time already served in state custody and by imposing an upward variance. Having jurisdiction under 28 U.S.C. § 1291, we dismiss the appeal in part based on the appeal waiver and otherwise affirm.

In December 2019, while on state parole, Tucker was arrested in his home pursuant to a state warrant for aggravated robbery. During the execution of the warrant, law enforcement recovered a firearm in Tucker's home. Tucker's parole was revoked, and he was taken into state custody. In June 2020, Tucker was charged in federal court with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), based on the firearm found in his residence. The state aggravated robbery charges were subsequently dropped. In July 2021, Tucker entered federal custody after having already served roughly 30 months in state custody. In February 2022, he pled guilty to the felon-in-possession charge pursuant to a plea agreement. Under the terms of his plea agreement, Tucker waived his right to appeal his conviction on any non-jurisdictional basis, except for claims of prosecutorial misconduct or a challenge to the substantive reasonableness of his sentence if the district court imposed an above-Guidelines-range sentence. At Tucker's sentencing hearing, the district court calculated the advisory Guidelines range as 30 to 37 months' imprisonment. The district court then sentenced Tucker to 60 months' imprisonment followed by 3 years' supervised release. Tucker now appeals his sentence.²

Tucker first argues that the district court erred by failing to consider his time spent in state custody in its decision to vary upward. Specifically, Tucker points to USSG § 5G1.3(b), which "permits a departure to account for time already served

²After Tucker filed his opening brief, the government filed a motion to dismiss Tucker's appeal in part on the basis that it is barred in part by the appeal waiver in his plea agreement. After receiving Tucker's response, we entered an order accepting the government's motion for consideration with the merits of Tucker's appeal, and we now dispose of both.

where the current and prior offenses involve the same conduct.” United States v. White, 354 F.3d 841, 845 (8th Cir. 2004) (citing USSG § 5G1.3(b), comment. (n.7)). The government contends that Tucker’s argument is barred by the appeal waiver in his plea agreement. “We review questions regarding the interpretation and enforcement of plea agreements de novo.” United States v. Guzman, 707 F.3d 938, 941 (8th Cir. 2013) (citation omitted).

The merits of Tucker’s argument are dubious. For example, the Guidelines provision Tucker cites permits *departures*, while the district court here imposed a *variance*. Regardless, Tucker’s appeal on this ground is barred by his plea agreement. We enforce appeal waivers if an “appeal falls within the scope of the waiver and . . . both the waiver and plea agreement were entered into knowingly and voluntarily.” United States v. Knight, 939 F.3d 933, 935 (8th Cir. 2019) (per curiam) (quoting United States v. Andis, 333 F.3d 886, 889-90 (8th Cir. 2003) (en banc)). We must also ensure that enforcing a waiver would not “result in a miscarriage of justice.” Id. (citation omitted). Tucker’s plea agreement states:

[T]he defendant waives the right to appeal all non-jurisdictional issues including, but not limited to, any issues relating to pre-trial motions, hearings and discovery and any issues relating to the negotiation, taking or acceptance of the guilty plea or the factual basis for the plea, including the sentence imposed or any issues that relate to the establishment of the Guideline range, except that the defendant reserves the right to appeal claims of prosecutorial misconduct and the defendant reserves the limited right to appeal the substantive reasonableness of the sentence of imprisonment if the sentence is above the Guideline range established at sentencing and if the defendant makes a contemporaneous objection[.]

R. Doc. 35, at 3. By the plain language of his plea agreement, Tucker preserved his right to appeal on only three bases: (1) a lack of jurisdiction, (2) prosecutorial misconduct, and (3) a substantively unreasonable sentence if the sentence is above the Guideline range established at sentencing and he made a contemporaneous objection.

These exceptions do not encompass Tucker’s first argument on appeal—that the district court erred by failing to consider USSG § 5G1.3(b) in its variance determination. Tucker insists that this is a substantive reasonableness challenge, but we routinely consider challenges to the district court’s application of the Guidelines as procedural, not substantive. See, e.g., United States v. Carter, 652 F.3d 894, 896 (8th Cir. 2011) (analyzing district court’s failure to apply USSG § 5G1.3(b) in its Guidelines calculations as procedural error); cf. United States v. Feemster, 572 F.3d 455, 461 (8th Cir. 2009) (en banc) (“‘Procedural error’ includes ‘failing to calculate (or improperly calculating) the Guidelines range’” (quoting Gall v. United States, 552 U.S. 38, 51 (2007))). Further, the record indicates that Tucker knowingly and voluntarily entered into the plea agreement. See United States v. Cooney, 875 F.3d 414, 416 (8th Cir. 2017) (“A defendant signing a plea agreement and assenting again at a plea hearing generally indicate a knowing and voluntary waiver.”). Moreover, enforcing the waiver would not result in a miscarriage of justice. See United States v. St. Pierre, 912 F.3d 1137, 1144 (8th Cir. 2019) (finding no miscarriage of justice in enforcing appeal waiver when the “appeal is grounded in alleged errors by the district court in applying the Sentencing Guidelines”). Thus, we dismiss this portion of Tucker’s appeal as barred by the appeal waiver in his plea agreement.

Tucker also argues that his sentence was substantively unreasonable. Namely, he contends that the district court erred in imposing an upward variance from the Guidelines range without considering the mitigating impact of his time spent in state custody. “When we review the imposition of sentences, whether inside or outside the Guidelines range, we apply ‘a deferential abuse-of-discretion standard.’” Feemster, 572 F.3d at 461 (citation omitted). “A district court abuses its discretion when it (1) ‘fails to consider a relevant factor that should have received significant weight’; (2) ‘gives significant weight to an improper or irrelevant factor’; or (3) ‘considers only the appropriate factors but in weighing those factors commits a clear error of judgment.’” Id. (citation omitted). “When reviewing an above-Guidelines sentence, we ‘consider the extent of the deviation, but must give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent

of the variance.’” United States v. Mitchell, 825 F.3d 422, 426 (8th Cir. 2016) (per curiam) (quoting Gall, 552 U.S. at 51).

Here, Tucker has not identified any abuse of discretion. The district court considered the § 3553(a) factors and explained its reasons for the upward variance: namely, Tucker’s lengthy and wide-ranging criminal history, including several violent offenses, which the district court concluded was not adequately captured by the Guidelines calculation. As we have previously noted, “[§] 3553(a) allows courts to vary upward based on an underrepresented criminal history or recidivism.” United States v. Barrett, 552 F.3d 724, 726 (8th Cir. 2009). Though Tucker argues that the district court did not adequately consider his argument regarding his prior incarceration, the sentencing court “need not specifically respond to every argument made by the defendant or mechanically recite each § 3553(a) factor.” United States v. Ballard, 872 F.3d 883, 885 (8th Cir. 2017) (per curiam) (citation omitted). “[The] district court has ‘wide latitude’ to assign weight to give[n] factors, and ‘[t]he district court may give some factors less weight than a defendant prefers or more weight to other factors, but that alone does not justify reversal.’” United States v. Noriega, 35 F.4th 643, 651 (8th Cir. 2022) (second and third alterations in original) (citation omitted). Accordingly, we find that Tucker’s above-Guidelines-range sentence is substantively reasonable.

For the foregoing reasons, we dismiss the appeal in part and otherwise affirm the judgment of the district court.

UNITED STATES DISTRICT COURT

Eastern District of Arkansas

MAY 16 2022
TAMM H. DOWNS, CLERK
By: *Tamm H. Downs* DEP CLERK

UNITED STATES OF AMERICA

v.

KEVIN LYNN TUCKER

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:20-cr-00155-JM-1

USM Number: 02873-509

Degen D. Clow

Defendant's Attorney

THE DEFENDANT:☒ pleaded guilty to count(s) 1 of Indictment☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 922(g)(1)	Felon in possession of a firearm, a Class C felony	12/10/2019	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.☐ The defendant has been found not guilty on count(s) _____☐ Count(s) N/A ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

5/13/2022

Date of Imposition of Judgment

Signature of Judge

JAMES M. MOODY JR., U.S. DISTRICT JUDGE

Name and Title of Judge

Date

5/16/22

DEFENDANT: KEVIN LYNN TUCKER

CASE NUMBER: 4:20-cr-00155-JM-1

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

60 MONTHS

☒ The court makes the following recommendations to the Bureau of Prisons:
The Court recommends the defendant participate in residential substance abuse treatment, and educational and vocational programs during incarceration. The Court recommends designation to a facility near Little Rock, Arkansas, to allow the defendant to remain near his family.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____ , with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: KEVIN LYNN TUCKER

CASE NUMBER: 4:20-cr-00155-JM-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

THREE (3) YEARS

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: KEVIN LYNN TUCKER
CASE NUMBER: 4:20-cr-00155-JM-1**STANDARD CONDITIONS OF SUPERVISION**

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: KEVIN LYNN TUCKER
CASE NUMBER: 4:20-cr-00155-JM-1

ADDITIONAL SUPERVISED RELEASE TERMS

14) The defendant must participate under the guidance and supervision of the probation office in a substance abuse treatment program which may include drug and alcohol testing, outpatient counseling, and residential treatment. The defendant must abstain from the use of alcohol during treatment. The defendant will pay for the cost of treatment at the rate of \$10 per session, with the total cost not to exceed \$40 per month, based on ability to pay. In the event the defendant is financially unable to pay for the cost of treatment, the co-pay requirement will be waived.

DEFENDANT: KEVIN LYNN TUCKER
CASE NUMBER: 4:20-cr-00155-JM-1**CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS	\$ 100.00	\$ 0.00	\$ 0.00	\$ 0.00	\$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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TOTALS	\$ _____	0.00	\$ _____	0.00
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☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: KEVIN LYNN TUCKER
CASE NUMBER: 4:20-cr-00155-JM-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payment of \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- ☐ Joint and Several

Case Number
Defendant and Co-Defendant Names
(including defendant number)

Total Amount

Joint and Several
Amount

Corresponding Payee,
if appropriate

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVT A assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

U.S.S.G § 5G1.3 (Annotated 2021)

§5G1.3. Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment

(a) If the instant offense was committed while the defendant was 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, 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 a term of imprisonment resulted from another offense that 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), the sentence for the instant offense shall be imposed as follows:

(1) the court shall 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

(2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

(c) If subsection (a) does not apply, and a state term of imprisonment is anticipated to result from another offense that 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), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.

(d) (Policy Statement) In any other case involving an undischarged term of imprisonment, 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.

2. Application of Subsection (b).—

(A) In General.—Subsection (b) applies in cases in which 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). Cases in which only part of the prior offense is relevant conduct to the instant offense are covered under subsection (d).

(B) Inapplicability of Subsection (b).—Subsection (b) does not apply in cases in which the prior offense was not relevant conduct to the instant offense under §1B1.3(a)(1), (a)(2), or (a)(3) (e.g., the prior offense is a prior conviction 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, and the court adjusts the sentence for a period of time already served, the court should note on the Judgment in a Criminal Case Order (i) the applicable subsection (e.g., §5G1.3(b)); (ii) the amount of time by which the sentence is being adjusted; (iii) the undischarged term of imprisonment for which the adjustment is being given; and (iv) that the sentence imposed is a sentence reduction pursuant to §5G1.3(b) for a period of imprisonment that will not be credited by the Bureau of Prisons.

(D) Example.—The following is an example in which subsection (b) applies and an adjustment to the sentence is appropriate:

The defendant is convicted of a federal offense charging the sale of 90 grams of cocaine. Under §1B1.3, the defendant is held accountable for the sale of an additional 25 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 level 16 for sale of 115 grams of cocaine; 3 level reduction for acceptance of responsibility; final offense level of level 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.

3. Application of Subsection (c).—Subsection (c) applies to cases in which the federal court anticipates that, after the federal sentence is imposed, the defendant will be sentenced in state court and serve a state sentence before being transferred to federal custody for federal imprisonment. In such a case, where the other offense 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), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.

4. Application of Subsection (d).—

(A) In General.—Under subsection (d), the court may impose a sentence concurrently, partially concurrently, or consecutively to the undischarged term of imprisonment. In order to achieve a reasonable incremental punishment for the instant offense and avoid unwarranted disparity, the court should consider the following:

- (i) the factors set forth in 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a));
- (ii) the type (e.g., determinate, indeterminate/parolable) and length of the prior undischarged sentence;

- (iii) the time served on the undischarged sentence and the time likely to be served before release;
- (iv) the fact that the prior undischarged sentence may have been imposed in state court rather than federal court, or at a different time before the same or different federal court; and
- (v) any other circumstance relevant to the determination of an appropriate sentence for the instant offense.

(B) Partially Concurrent Sentence.—In some cases under subsection (d), a partially concurrent sentence may achieve most appropriately the desired result. To impose a partially concurrent sentence, the court may provide in the Judgment in a Criminal Case Order that the sentence for the instant offense shall commence on the earlier of (i) when the defendant is released from the prior undischarged sentence; or (ii) on a specified date. This order provides for a fully consecutive sentence if the defendant is released on the undischarged term of imprisonment on or before the date specified in the order, and a partially concurrent sentence if the defendant is not released on the undischarged term of imprisonment by that date.

(C) Undischarged Terms of Imprisonment Resulting from Revocations of Probation, Parole or Supervised Release.—Subsection (d) applies in cases 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. Consistent with the policy set forth in Application Note 4 and subsection (f) of §7B1.3 (Revocation of Probation or Supervised Release), the Commission recommends that the sentence for the instant offense be imposed consecutively to the sentence imposed for the revocation.

(D) Complex Situations.—Occasionally, the court may be faced with a complex case in which a defendant may be subject to multiple undischarged terms of imprisonment that seemingly call for the application of different rules. In such a case, the court may exercise its discretion in accordance with subsection (d) to fashion a sentence of appropriate length and structure it to run in any appropriate manner to achieve a reasonable punishment for the instant offense.

(E) Downward Departure.—Unlike subsection (b), subsection (d) does not authorize an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment. However, in an extraordinary case involving an undischarged term of imprisonment under subsection (d), it may be appropriate for the court to downwardly depart. This may occur, for example, in a case in which the defendant has served a very substantial period of imprisonment on an undischarged term of imprisonment that resulted from conduct only partially within the relevant conduct for the instant offense. In such a case, a downward departure may be warranted to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings. Nevertheless, it is intended that a departure pursuant to this application note result in a sentence that ensures a reasonable incremental punishment for the instant offense of conviction.

To avoid confusion with the Bureau of Prisons' exclusive authority provided under 18 U.S.C. § 3585(b) to grant credit for time served under certain circumstances, the Commission recommends that any downward departure under this application note be clearly stated on the Judgment in a Criminal Case Order as a downward departure pursuant to §5G1.3(d), rather than as a credit for time served.

5. Downward Departure Provision.—In the case of a discharged term of imprisonment, a downward departure is not prohibited if the defendant (A) has completed serving a term of imprisonment; and (B) subsection (b) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. See §5K2.23 (Discharged Terms of Imprisonment).

Background: Federal courts generally "have discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences that they impose, or that have been imposed in other proceedings, including state proceedings." See Setser v. United States, 132 S. Ct. 1463, 1468 (2012); 18 U.S.C. § 3584(a). Federal courts also generally have discretion to order that the sentences they impose will run concurrently with or consecutively to other state sentences that are anticipated but not yet imposed. See Setser, 132 S. Ct. at 1468. Exercise of that discretion, however, is predicated on the court's consideration of the factors listed in 18 U.S.C. §

3553(a), including any applicable guidelines or policy statements issued by the Sentencing Commission.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (amendment 289); November 1, 1991 (amendment 385); November 1, 1992 (amendment 465); November 1, 1993 (amendment 494); November 1, 1995 (amendment 535); November 1, 2002 (amendment 645); November 1, 2003 (amendment 660); November 1, 2010 (amendment 747); November 1, 2013 (amendment 776); November 1, 2014 (amendments 782, 787, and 789); November 1, 2016 (amendment 802).