

## §5G1.3 – Imposing Sentence When the Defendant is Serving or Will Serve an Undischarged Term of Imprisonment or Has an Anticipated State Term of Imprisonment

### When the Defendant is Subject to an Undischarged Term of Imprisonment

The court imposes a **consecutive** sentence when the defendant:

- commits the instant offense while serving a term of imprisonment or while on work release, furlough, or escape status, OR
- after sentencing for, but before beginning service of such term of imprisonment.
- See §5G1.3(a).

The court imposes a **concurrent** sentence when:

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The court will **adjust** the sentence for:



the undischarged term of imprisonment resulted from another offense that is **relevant conduct** to the instant offense.



any period of imprisonment already served on the undischarged imprisonment term **if the court determines** that the time served on the undischarged term **will not be credited** to the federal sentence by the Bureau of Prisons.

- See §5G1.3(b).

The court has the discretion to impose a **concurrent**, **consecutive**, or **partially concurrent** sentence:

- In any other case not covered above.
- See §5G1.3(d).

### Key Points: Applying §5G1.3(b)

Section 5G1.3(b) is the **ONLY** section of the guideline that authorizes an adjustment to the federal sentence. **No** adjustment is authorized under any other subsection.

The conduct underlying the undischarged term of imprisonment must be relevant conduct to the instant offense under the provisions of §1B1.3(a)(1), (a)(2), or (a)(3).

When the court adjusts the sentence for the instant federal offense based upon the time the defendant has served on the undischarged term of imprisonment, this is not a departure or a variance from the guidelines. It is an adjustment under §5G1.3.

The court can adjust a sentence even if the adjustment would take the defendant's sentence below the mandatory minimum penalty.

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### Undischarged Terms of Imprisonment – Special Rules

If the undischarged term of imprisonment **results from a revocation** of probation, parole, or supervised release, the guideline recommends that the sentence for the instant offense shall be imposed to run consecutively to the sentence imposed for the revocation.

When a defendant is subject to **multiple undischarged terms of imprisonment** that call for the application of different rules, the court has the discretion under §5G1.3(d) to run the sentence for the instant offense concurrently, consecutively, or partially concurrently to the undischarged terms of imprisonment.

### When the Defendant is Subject to an Anticipated State Term of Imprisonment

The court imposes a **concurrent** sentence when the anticipated state term of imprisonment is relevant conduct to the instant offense under the provisions of §1B1.3(a)(1), (a)(2), or (a)(3). See §5G1.3(c).

The Supreme Court, in *Setser v. United States*, 132 S.Ct. 143 (2010) stated that federal courts generally “have discretion to select whether the sentence 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.” The Supreme Court held that 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.

### What if the Defendant Has a Discharged Term of Imprisonment that is Relevant Conduct to the Instant Offense?

If the defendant has completed serving the term of imprisonment and §5G1.3(b) would have applied had that term of imprisonment been undischarged at the time of sentencing for the instant offense, a departure may be warranted. See §5K2.23.

This document is a supplement to the United States Sentencing Commission's podcast episode 22.2 titled, "Imposing a Sentence When the Instant Offense was Committed While Serving a Term of Imprisonment or When the Undischarged Term is Relevant Conduct."

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