whichever is earlier, would (1) be within the guideline range for the instant offense and (2) achieve the appropriate total penalty. Note that if the defendant was released from state custody prior to August 1, 1994, the sentence for the instant offense will be fully consecutive to the state sentence. If the defendant is still in state custody as of August 1, 1994, the sentence for the instant offense will be concurrent with the remainder of the state sentence beginning on that date. See Application Note 5 below for the procedure to use in imposing a partially concurrent sentence.

(D) The applicable guideline range for 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 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 state sentence with a 60-month maximum. At the time of sentencing on the instant offense (April 1, 1994), the defendant has served 24 months on the state sentence. In this case, a downward departure to a sentence of 12 months' imprisonment to be served concurrently with the remainder of the undischarged term of imprisonment would be appropriate to achieve the appropriate total punishment.

(E) The guideline range applicable to the instant offense is 24-30 months. Because of a lack of information, the combined guideline range (had both the instant offense and the offense resulting in the undischarged term of imprisonment offenses been federal offenses that were being sentenced at the same time) cannot reasonably be determined from the information available. Only a rough estimate of from 30 to 63 months can be made. The court may use any reasonable method to determine the appropriate total punishment and then impose sentence using the methods set forth in Examples (A), (B), (C), or (D) above, as

appropriate.

To impose a partially concurrent sentence, the court may provide in the Judgment and Commitment Order that the sentence for the instant offense shall commence (A) when the defendant is released from the prior undischarged sentence, or (B) on a specified date, whichever is earlier. 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. See Background Commentary.

6. If a defendant is serving an unexpired term of imprisonment in connection with a probation, parole, or supervised release violation, the revocation policy statements in Chapter Seven (Violations of Probation and Supervised Release) shall be used in determining the appropriate total punishment as if the defendant had been on federal probation or supervised release at the time of the violation (i.e., the guideline range applicable to the violation of probation, parole, or supervised release is to be added to the guideline range for the instant offense to determine the total punishment guideline range). Note that the conduct resulting in the revocation of probation, parole, or supervised release (rather than the offense that resulted in the period of probation, parole, or supervised release) is considered in determining the total punishment range. The sentence for the offense that resulted in the period of probation, parole, or supervised release is treated as prior criminal history.

7. In an unusual case, the instant offense may include a count to which subsection (a) applies and a count to which subsection (b) or (c) applies. For example, a defendant subject to an unexpired federal term of imprisonment for a drug offense may be sentenced for two additional federal offenses—one count pertaining to a drug offense committed about the same time as the drug offense for which the defendant is currently serving the unexpired term of imprisonment and one count for possession of contraband in prison during the unexpired term of imprisonment. In this case, subsection (a) will apply to the second count, and subsection (b) or (c) (depending on the specifics of the case) will apply to the first count. In such a case, in order to achieve an appropriate total punishment, the determinations under this section will need to be made separately for the counts to which subsection (a) applies and the counts to which subsections (b) and (c) apply. In the above example, subsection (a) will require that any term of imprisonment on the first count run consecutively to the unexpired term of imprisonment. Subsections (b) and (c) may call for a different result (e.g., a concurrent or partially concurrent sentence) on the second count.

8. Occasionally, a defendant may receive a sentence of imprisonment on another offense after the completion of the instant offense, yet be released from imprisonment on that sentence before sentencing on the instant offense. For example, after the completion of the instant federal offense, the defendant receives an eighteen-month term of imprisonment for a state offense. While in state custody, the defendant is convicted of the instant offense, but sentencing is not scheduled until after the defendant is released from imprisonment on the state offense. If subsection (b) would have applied but for the defendant's release from imprisonment prior to sentencing on the instant offense, subsection (b) shall continue to apply; i.e., the defendant is to be given credit for guideline purposes for the time imprisoned on the prior sentence. If subsection (c) would have applied but for the defendant's release from imprisonment prior to sentencing on the instant offense, subsection (c) shall continue to apply to guide the determination of an appropriate total punishment.".

The Commentary to § 5G1.3 captioned "Background" is amended by inserting the following additional paragraphs at

the end:

"Overlapping sentences, as described in Application Note 5, were not authorized in the federal system prior to the Sentencing Reform Act of 1984. The Congress, however, in enacting 28 U.S.C. § 994(l)(1), clearly contemplated that the new 18 U.S.C. § 3584 would allow the imposition of overlapping (partially concurrent) sentences in addition to fully concurrent or consecutive sentences. S. Rep. No. 225, 98th Cong., 1st Sess. 177 (1983) ('It is the Committee's intent that, to the extent feasible, the sentences for each of the multiple offenses be determined separately and the degree to which they should overlap be specified.'). Without the ability to fashion such a sentence. the instruction to the Commission to provide a reasonable incremental penalty for additional offenses in 28 U.S.C. § 994(l)(1) could not be successfully implemented, particularly if the defendant's release date on the undischarged term of imprisonment cannot readily be determined in advance (e.g., in the case of an indeterminate sentence subject to parole release).

Prior to the Sentencing Reform Act of 1984 (SRA), only the Bureau of Prisons had the authority to commence a federal sentence before the defendant's release from imprisonment on a state sentence. See, e.g., United States v. Segal, 549 F.2d 1293, 1301 (9th Cir. 1977).