

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4227

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARK TAYLOR WARREN,

Defendant-Appellant.

Appeal from the United States District Court for
the Western District of Louisiana
(92-CR-50064(01))

(December 22, 1993)

Before REAVLEY and DAVIS, Circuit Judges and ROSENTHAL*, District Judge.

PER CURIAM:**

The district court sentenced Mark T. Warren to eighteen months imprisonment, running consecutively to a thirty-six month sentence he is currently serving in Alabama state prison. Warren argues that § 5G1.3(b) of the Federal Sentencing Guidelines requires that these sentences run concurrently.

* District Judge of the Southern District of Texas sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Section 5G1.3(b) mandates concurrent sentencing when:

the undischarged term of imprisonment resulted from offense(s) that constituted part of the same course of conduct as the instant offense and have been fully taken into account in the determination of the offense level for the instant offense

The commentary to § 5G1.3(b) further illuminates "fully taken into account" to mean that the conduct was included in the offense level calculation under § 1B1.3. In this case, Warren's Alabama conviction was not used in the calculation of his offense level. Thus, § 5G1.3(c), and not § 5G1.3(b), applies.

Under § 5G1.3(c), it is within the district court's discretion to impose a consecutive sentence to Warren's undischarged prison term.¹

AFFIRMED.

¹ While note 4 of the commentary to § 5G1.3(c) offers some direction on the determination of a defendant's sentence, the extent to which the sentence runs consecutively to the unexpired term is ultimately within the district court's discretion. See *United States v. Headrick*, 963 F.2d 777, 782 (5th Cir. 1992) (stating that policy statements are merely "advisory" when they "do not interpret or explain any statute or guideline"); 18 U.S.C. § 3584(a).