FEDERAL PUBLIC DEFENDER
DISTRICT OF NEW JERSEY

22 South Clinton Avenue
Station Plaza 4, 4th Floor
Trenton, New Jersey 08609

RICHARD COUGHLIN
FEDERAL PUBLIC DEFENDER

CHESTER M. KELLER
FIRST ASSISTANT

(609) 989-2160 Telephone
(609) 989-2153 Facsimile

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Hon. Amy Berman Jackson
United States District Judge

via ECF and email

RE: United States v. Michael Rusyn
Crim. No. 21-202 (ABJ)

Dear Judge Jackson:

The Court has inquired whether the law permits imposition of up to 14 days intermittent confinement as a condition of probation under 18 U.S.C. § 3563. While Mr. Rusyn continues to submit that no incarceration is necessary to meet the sentencing goals set forth in 18 U.S.C. § 3553(a), he is constrained to agree that the statue permits the Court to impose intermittent confinement of up to 14 days. The Court should not, however, impose a straight 14-day period of "intermittent confinement" as a condition of probation because to do so would violate the spirit of the intermittent confinement condition, which Congress intended as an alternative to incarceration so that individuals would be able to continue to work, etc. *See United States v. Mize*, No. 97-40059-01-RDR; 1998 WL 160862 *2 (D. Kan. Mar. 18, 1998).

A. The Court may impose intermittent confinement as a condition of probation in a Class B misdemeanor.

Under 18 U.S.C. § 3551, Congress has set forth authorized sentences for individuals convicted of "an offense described in any Federal statute." While some exceptions are set forth, none apply here. The statute breaks down the authorized sentences as follows:

> (b) Individuals.-- An individual found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to—
>
> (1) a term of probation *as authorized by subchapter B*;
> (2) a fine as authorized by subchapter C; or
> (3) a term of imprisonment as authorized by subchapter D.

18 U.S.C.A. § 3551 (West) (emphasis added). As the Court is aware, because the statute of conviction here is a Class B misdemeanor, the law does not permit incarceration with supervised release to follow. 18 U.S.C. § 3583(b)(3).

Section 3551(b) points the Court to subchapter B when the Court imposes a term of probation. Subchapter B sets forth, in 18 U.S.C. § 3563(a) and (b), both mandatory and

discretionary conditions of probation available to the Court. While the Court may not, given the disjunctive language of 3551, impose both imprisonment and probation, the Court may, given the plain language of § 3563, impose any condition of probation set forth once the Court determines that a term of probation is appropriate. *See, e.g., United States v. Hobbs*, 983 F.2d 1058 (4th Cir. 1993) (upholding district court's imposition of discretionary probation conditions and holding that, for a Class C misdemeanor, . . 18 U.S.C § 3563(b)(10) [sic] permits probation with a condition of mental health treatment.).

There is support in the language of the statute that intermittent confinement as a condition of probation is permitted for a statute with a statutory maximum under one year. Subsection ten states that the term of intermittent confinement may total "no more than the lesser of one year or the term of imprisonment authorized for the offense." This language certainly suggests that offenses that carry less than one year in prison, such as the Class B misdemeanor here, can be subject to a probation condition of intermittent confinement.

B. Intermittent confinement as a condition of probation should not be imposed in one consecutively-served period of days but should be truly "intermittent" to be faithful to the spirit of the provision.

Intermittent confinement shall not, however, be used by the Court to effectuate a split sentence. *Mize* at *2. The district court in *Mize* held that imposing a 30 consecutive day term of prison as a condition of probation is too similar to the "split sentence" approach which Congress intended to abolish with the Comprehensive Crime Control Act of 1984." *Id.*

The *Mize* court went on to explain that Congress's intent:

> Flexibility is provided by permitting confinement in split intervals, thus authorizing, for example, weekend imprisonment with release on probation during the week for educational and employment purposes, or nighttime imprisonment with release for such purposes during working hours. This condition could be used only to deprive the defendant of his liberty to the extent "reasonably necessary" for the purposes set forth in section 3553(a)(2). It could also be used, for example, to provide a brief period of confinement, e.g., for a week or two, during a work or school vacation. It is not intended to carry forward the split sentence provided in 18 U.S.C. 3651, by which the judge imposes a sentence of a few months in prison followed by probation. If such a sentence is believed appropriate in a particular case, the judge can impose a term of imprisonment followed by a term of supervised released under section 3583.

Id. at *1. Thus, intermittent confinement should not be imposed in one consecutively-served set of days because the reason for imposition of intermittent confinement is to use the least restrictive conditions necessary to effectuate the factors set forth in § 3553. The term "intermittent" means "occurring at irregular intervals; not continuous or steady." See, e.g., https://www.google.com/search?client=firefox-b-1-d&q=intermittent+definition. If the Court were to impose an interval of up to 14 consecutive days, Mr. Rusyn would likely lose his job and he would not be there to take care of his elderly grandmother. As such, if the Court is inclined to

impose jail time as a condition of probation under § 3563(b), the defense asks the Court to impose a truly intermittent period of weekends so that he can continue working and taking care of his grandmother.

Finally, to the extent the Government raises concerns about intermittent confinement in the age of the pandemic, the defense points out 1) virtually *any* ingress and egress into the jail creates Covid risk; 2) home confinement for 30 days obviates that risk; and 3) the Court's obligation is to impose a sentence that is "sufficient but not greater than necessary;" as such, the sentence should not be made more onerous on Mr. Rusyn because the pandemic creates increased Covid risk with any period of incarceration.

The Court's consideration is appreciated.

Respectfully submitted,

Andrea Dechenne Bergman
Assistant Federal Public Defender

C: Michael Romano, Esq. (SAUSA) (via email and ECF)
Ms. Jessica Reichler, (USPO) (via ECF and email)
Mr. Michael Rusyn