IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	Case No. CR-21-549-ABJ
TANNER BRYCE SELLS, Defendant.	)	

SUPPLEMENTAL BRIEF

Defendant Tanner Bryce Sells, respectfully submits the following supplemental brief on the issue of a "split sentence" for a pretty offense. This Supplement is filed pursuant to the Court's order of January 12, 2022. In short, a split sentence in a petty offense is impermissible under either theory the Government proposes. Mr. Sells renews his request for 12 months of probation.[1]

Split Sentence

Mr. Sells pled guilty to 40 USC § 5104(e)(2)(G), a petty offense, for which a term of supervised release is unavailable. 18 U.S.C. § 3583(b)(3). The general statute governing federal sentences is found at 18 U.S.C. § 3551:

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

[1] Should the Court disagree and decide on imprisonment, Mr. Sells now requests a continuous term of imprisonment, as opposed to intermittent confinement as previously requested. Mr. Sells has considered the costs and benefits of both and believes continuous imprisonment would better allow him to minimize the collateral consequences to his employment and relationship with his son.

> (2) a fine as authorized by subchapter C; or
>
> (3) a term of imprisonment as authorized by subchapter D.
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> A sentence to pay a fine may be imposed in addition to any other sentence. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

18 U.S.C. § 3551(b). The three different sentencing alternatives are separated by "or", rendering them mutually exclusive alternatives to sentencing. Fines are explicitly permitted to be in addition to any other sentence. *Id*.

Section 3553(b) makes clear Congress' intent to abolish "split sentences." *Cf. United States v. Mize*, No. 97–40059–01–RDR, 1998 WL 160862, *1 (D. Kan. Mar. 18, 1998) (quoting Senate Report 225, 984 U.S. CODE CONG. & ADMIN.NEWS 3281 (1984)). The statute provides a choice between "three alternative punishments." *United States v. Martin*, 363 F.3d 25, 35 (1st Cir. 2004). As further elaborated in *Martin*:

> If a court chooses to impose probation, it does so pursuant to the terms of § 3561. That section prohibits imposition of probation when 'the defendant is sentenced at the same time to a term of imprisonment' (emphasis added), further emphasizing the alternative nature of incarceration and probation in any one sentencing decision. Thus, both § 3551(b) and § 3561 require a district court to choose between probation and imprisonment when imposing its original sentence. *Id*. (footnotes omitted).

Imposition of both probation and straight imprisonment is unavailable under the law. *See, e.g.*, *United States v. Lopez-Pastrana*, 889 F.3d 13, 22 n. 6 (1st Cir. 2018); *United States v. Forbes*, 172 F.3d 675, 676 (9th Cir.1999) ("The statute precludes the imposition of both probation and straight imprisonment."); *United States v. Castro-Verdugo*, 750 F.3d 1065, 1068 (9th Cir. 2014); *United States v. Medenbach*, 729 F. App'x 606, 607 (9th Cir.

2018) (unpublished); *United States v. Andrade-Castillo*, 585 F. App'x 346, 347 (9th Cir. 2014) (unpublished). *See also* 12A CYC. OF FEDERAL PROC. § 50:203 (3d ed.) § 50:203. *Capacity of court to impose probationary sentence on defendant in conjunction with other sentence that imposes term of imprisonment* ("Specifically, pursuant to statute, a district court is prohibited from imposing a term of probation on a defendant when the offender is sentenced at the same time to a term of imprisonment for the same offense, or a different offense that is not a petty offense.") (footnotes omitted).

In an attempt to circumvent this clear prohibition against split sentences, the Government submits a strained reading of 18 U.S.C. § 3561. In further support, the Government cites to an unpublished decision from the United States Court of Appeals for the Fourth Circuit. (Doc. 32, p.1, *citing United States v. Posley*, 351 F. App'x 801, 809 (4th Cir. 2009) (unpublished)). A review of the statute confirms a split sentence is unavailable.

Section 3561 reads:

> (a) In general.--A defendant who has been found guilty of an offense may be sentenced to a term of probation unless—
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> (1) the offense is a Class A or Class B felony and the defendant is an individual;
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> (2) the offense is an offense for which probation has been expressly precluded; or
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> (3) the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense that is not a petty offense.

This section outlines under what circumstances a defendant may be sentenced to a period of probation. Under Section 3561(a)(1) and (a)(2), probation is unavailable to a defendant sentenced for certain types of felonies and for offenses with an explicit statutory prohibition for probation. The last phrase prohibits imposing probation upon a defendant who is sentenced at the same time to imprisonment for the same or a different offense that is not a petty offense. The phrase "that is not a petty offense" modifies the second object in the section – "a different offense."

In other words, in a case with a single petty offense, if a defendant receives a sentence of imprisonment for the same offense, probation is unavailable. That is the situation in Mr. Sells' case. Should the Court sentence Mr. Sells to imprisonment, he will have received "imprisonment for the same offense" and is thus ineligible for additional probation. Only when a defendant faces sentencing for two or more offenses does the phrase "other than a petty offense" come into play because it modifies the phrase "a different offense."

The unpublished case cited by the Government is summarily unhelpful in its analysis. *Posley* affirmed a split sentence of six months continuous incarceration followed by probation. Its entire analysis involved a modified parenthetical quote of the statute, omitting the key language in Section 3561(a)(3) regarding a different offense. *See Posley*, 351 F. App'x at 809 ("*See id*. § 3561(a)(3) ("A defendant who has been found guilty of an offense may be sentenced to a term of probation unless-... (3) the defendant is sentenced at the same time to a term of imprisonment for the same ... offense that is not a petty offense.")." *Posley* failed to offer any meaningful discussion, did not reference 18 U.S.C.

§ 3551, nor even attempt to explain how "other than a petty offense" modifies "a different offense" in Section 3165(a)(3). It is unpersuasive.

In sum, Congress's prohibition on split sentences is evident. Section 3561 prohibits a period of probation for a defendant sentenced to incarceration for the same offense.

Intermittent Confinement

The Government has also proposed that a sentence of 14 days followed by months of probation is permissible if the incarceration is considered "intermittent" and therefore authorized under 18 U.S.C. § 3563(b)(10). (Doc. 37, pp. 2-3). Mr. Sells submits a sentence of 14 consecutive days is an impermissible condition of probation under Section 3563(b)(10). That section provides:

> (b) Discretionary conditions.--The court may provide, as further conditions of a sentence of probation, to the extent that such conditions are reasonably related to the factors set forth in section 3553(a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2), that the defendant—
> . . .
>
> > (10) remain in the custody of the Bureau of Prisons during nights, weekends, or *other intervals of time*, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense, during the first year of the term of probation or supervised release;

18 U.S.C. § 3563(b)(10) (emphasis added).

Mr. Sells submits intermittent confinement should not be used to impose a lump sentence of consecutively served weeks in order to circumvent the prohibition on split sentences. The statute clearly refers to regular intervals of time, such as nights or weekends. Counsel has been unable to locate a case in which a period of two weeks was

held to be an acceptable interval of time under Section 3563(b)(10). Other cases have concluded a consecutive period of 30 days is not a permissible interval of time. *United States v. Mize*, No. 97-40059-01-RDR, 1998 WL 160862, at *1 (D. Kan. Mar. 18, 1998). *See also United States v. Forbes*, 172 F.3d 675, 676 (9th Cir. 1999) ("No doubt Forbes could have been imprisoned nights or weekends but a straight sentence of six months is not the intermittent incarceration that this statute permits."); *United States v. Anderson*, 787 F. Supp. 537, 539 (D. Md. 1992) ("[A] period of 'straight' imprisonment cannot be imposed at the same time as a sentence of probation, 18 U.S.C. § 3561(a)(3), nor is it expressly allowed as a condition of probation under 18 U.S.C. § 3563(b).").

The Court in *Mize* quoted the Congressional intent behind intermittent imprisonment as a condition of probation:

> [Paragraph 10] permits short periods of commitment to a training center or institution as a part of a rehabilitative program. *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[.]

Mize, 1998 WL 160862, at *1–2 (quoting 1984 U.S. CODE CONG & ADMIN NEWS at 3281) (emphasis added). Weeks long continuous incarceration is not the type of "reasonably necessary" deprivation of liberty intended to permit continuation of educational or employment purposes.

Conclusion

A split sentence is not permitted under the law, whether by a strained reading of 18 U.S.C. § 3561, or imposition of a continuous period of imprisonment titled as intermittent confinement under the discretionary condition of probation in 18 U.S.C. § 3563(b)(1).

Respectfully submitted,

/s Kyle Wackenheim
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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2022, a true and correct copy of the foregoing Supplement was sent via this court's electronic court filing system to Jacob Strain, Assistant United States Attorney.

/s Kyle Wackenheim
KYLE WACKENHEIM