

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA )  
 )  
v. ) Criminal No. 23-cr-10311-JEK  
 )  
HERBERT SMALL, )  
 )  
 )  
 )  
Defendant. )

**GOVERNMENT’S SENTENCING MEMORANDUM**

The defendant sold cocaine and firearms to an ATF cooperating witness. For the reasons discussed herein and in accordance with the plea agreement, the government recommends the guideline sentence of 24 months, followed by six years of supervised release, and a mandatory special assessment of \$300.

**I. ADVISORY SENTENCING GUIDELINES**

As reflected in the PSR, the defendant sold cocaine and cocaine base. The resulting base offense level is 24. PSR ¶ 21. The base offense level is increased by 2-levels because the defendant possessed (and sold) firearms during one of these drug deals. PSR ¶ 12, 22. The defendant is entitled to a three-level reduction due to his acceptance of responsibility. PSR ¶¶ 28-29. The government acknowledges the PSR has calculated the defendant as a career offender. PSR ¶ 27. For the reasons discussed below, the government moves the Court to vary downward from the career offender guidelines.

The resulting offense level as calculated by the parties is 23. Plea Agreement at 2. The defendant has six criminal history points placing him in criminal history category III. PSR ¶ 39. The government urges the Court not to apply the career offender guidelines, which would place

the defendant in criminal history category VI. *Id.* A total offense level of 23 and criminal history category III results in a guideline sentencing range of 57- 71 months.

The government further urges the Court to vary downward because the Department of Justice supports the elimination of the powder-to-crack disparity.<sup>1</sup> Plea Agreement at 2. Without the crack-to-powder disparity, the defendant would be responsible for at least 50 grams but less than 100 grams of cocaine. This results in a base offense level of 14. USSG § 2D1.1(c)(13). The same 2-level increase is warranted because the defendant possessed a firearm during the offense. Accounting for the defendant's acceptance of responsibility, the total offense level would be 13. The resulting guideline sentencing range for criminal history category III is 18-24 months.

## **II. SENTENCING FACTORS UNDER 18 U.S.C. § 3553(a)**

Consideration of the § 3553(a) factors demonstrates that a sentence of 24 months is sufficient, but no greater than necessary, to address the defendant's crimes and criminal history.

### **A. Nature of the Offense**

The defendant engaged in very dangerous behavior. There is no question that mixing drug dealing with firearm dealing is a threat to communities across this District. The defendant sold firearms and cocaine to someone he thought was a drug dealer. This person was in fact an ATF cooperating witness. The violence associated with drug dealing cannot be understated. Firearms only increase the probability and lethality of drug-related violence.<sup>2</sup> The guidelines

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<sup>1</sup> [https://www.justice.gov/d9/2022-12/attorney\\_general\\_memorandum\\_-\\_additional\\_department\\_policies\\_regarding\\_charges\\_pleas\\_and\\_sentencing\\_in\\_drug\\_cases.pdf](https://www.justice.gov/d9/2022-12/attorney_general_memorandum_-_additional_department_policies_regarding_charges_pleas_and_sentencing_in_drug_cases.pdf) at 4-5.

<sup>2</sup> Drug Dealing and Gun Carrying go Hand in Hand. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8011595/> (last accessed August 23, 2024).

reflect a 2-level increase because of this very fact. USSG § 2D1.1 n.11(A). The defendant's crimes not only increased the supply of dangerous drugs in his own neighborhood, but he also made his own neighborhood even more dangerous by selling firearms with those drugs.

**B. Characteristics of the Defendant**

The defendant is 32 years old and has yet to “age-out” of criminal behavior and criminal networks. The defendant attributes some of his criminality to his mental health struggles. PSR ¶ 73. Yet, the defendant continues to return to criminal associates that “take advantage” of his disability.

As noted in the PSR, the defendant was previously arrested and convicted in a multi-defendant indictment targeting the Columbia Point Dawgs street gang. PSR ¶ 35, 72. This is, undoubtedly, a serious offense, for which the defendant served 37 months of imprisonment. During supervised release for this offense, the defendant had multiple instances of non-compliance, ultimately resulting in another 24 months of imprisonment.

The government acknowledges that the PSR determines that the defendant is a career offender because of the above-mentioned conviction and the conviction in South Boston Court (PSR ¶ 36). The South Boston Court case is related to the above-mentioned conviction. PSR ¶ 35. To assign the defendant as a career offender because of the South Boston Court and federal convictions is unwarranted because he was essentially punished for the same conduct in state and federal court. While this technically resulted in two separate convictions separated by two arrest dates, the convictions are for the same (or related) offense conduct.

Further, the government supports varying downward from the career offender guidelines because the career offender guidelines do not adequately reflect the defendant's crime and

culpability.<sup>3</sup> Here, the defendant's crimes and prior convictions were nonviolent controlled substances offenses. The government therefore supports a variance to consider the guidelines absent career offender considerations.

The parties are recommending a high-end guideline sentence after downward variances to the career offender status and crack-to-powder disparity. The government submits that a 24-month sentence more accurately reflects the defendant's criminal history and culpability.

### **C. Specific and General Deterrence**

A significant sentence of imprisonment is warranted to deter the defendant and others similarly situated to him from continuing to engage in criminal conduct. A sentence of 24 months is necessary to specifically deter this defendant from continued criminal behavior in the future. The defendant stated that he intends to further his education, obtain gainful employment, and work on his relationship with his children. PSR ¶ 73.

The defendant ought to use this significant sentence to examine whether he is ready to put his intention into action and make a positive contribution to his community. Certainly, armed drug dealing exposes his children, and many other children to dangerous environments that only foster violence and addiction. A significant sentence will ensure that the defendant and others similarly situated to him know that armed drug dealing is a top priority for law enforcement and will be met with harsh consequences when brought to justice.

The government further recommends a lengthy, six-year period of supervised release. This is the mandatory minimum term of supervision given the defendant's prior criminal history.

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<sup>3</sup> [https://www.justice.gov/d9/2022-12/attorney\\_general\\_memorandum\\_-\\_additional\\_department\\_policies\\_regarding\\_charges\\_pleas\\_and\\_sentencing\\_in\\_drug\\_cases.pdf](https://www.justice.gov/d9/2022-12/attorney_general_memorandum_-_additional_department_policies_regarding_charges_pleas_and_sentencing_in_drug_cases.pdf) at 3-4.

PSR ¶ 99. The defendant had a spotty (at best) record of supervised release following his prior federal conviction. PSR ¶ 35. The government, however, suggests that the defendant has gained more life experience since his last term of supervised release. Perhaps the defendant will now see the probation department as an asset to put his intentions for positive change into action. A lengthy term of supervised release will also encourage the defendant to find more positive associations in his life.

### III. CONCLUSION

The government's sentencing recommendation takes into account the various factors set forth in § 3553(a) and the sentencing guidelines. The United States recommends that the Court sentence the defendant to 24 months in prison to be followed by six years of supervised release, and that the defendant be ordered to pay a mandatory special assessment of \$300.

Respectfully submitted,

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Dated: August 23, 2024

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and copies will be sent to those indicated as non-registered participants.

/s/ Philip Cheng  
Philip C. Cheng  
Assistant United States Attorney

Date: August 23, 2024