

III. PSR and Guidelines Calculation

The government and defendant are in agreement on the Guidelines calculation that should be adopted by the Court for Count One:

Count One: Possession of Cocaine Base with Intent to Distribute

Base Offense Level (§§ 2D1.1(a)(5) & (c)(13))	14
Less: Acceptance of Responsibility (§ 3E1.1(a))	<u>-2</u>
Total:	<u>12</u>

For Count Two, the Guideline provision for the § 924(c) conviction is § 2K2.4(b), which specifies that a term of imprisonment between five years and life must run consecutively to the sentence imposed on Count One.

The PSR differs from the parties' Guidelines calculation principally in the conclusion that the defendant is a Career Offender under Guidelines § 4B1.1. The defendant has filed an objection to that designation by the PSR. The government joins in that objection only as it relates to the defendant's 2015 conviction for criminal sale of a controlled substance in the third degree, in violation of N.Y. Penal Law § 220.39(1).¹ Under controlling Circuit precedent, this drug offense is not a "controlled substance offense" under the Guidelines because the New York drug statute currently criminalizes the sale of certain substances that are not criminalized under federal law. In United States v. Townsend, 897 F.3d 66 (2d Cir. 2018), the Second Circuit held that Guidelines § 4B1.2(b)'s definition of "controlled substance offense" does not include a violation of a state statute that prohibits more substances than are prohibited under federal law, regardless of what substance was actually at issue in the underlying state conviction. Id. at 71. There is no dispute that in May 2015, the New York State definitions of "controlled substances" and "narcotic" drugs swept more broadly than the corresponding federal definitions, and thus the defendant's conviction is not a controlled substance offense under the Guidelines. See also United States v. Swinton, No. 6:15-CR-06055-EAW, 2020 WL 6107054, at *7 (W.D.N.Y. Oct. 15, 2020) ("Like its counterpart found at NYPL § 220.31, this Court concludes that NYPL § 220.39(1) is indivisible and thus, applying Townsend, the categorical approach must be used and the inquiry is limited to whether a "narcotic drug" under NYPL § 220.39(1) is a

¹ The defendant's alternative argument that his prior conviction for assault in the second degree does not qualify as a crime of violence was explicitly rejected by the Second Circuit in United States v. Tabb, 949 F.3d 81, 85 (2d Cir. 2020) ("[W]e find that the substantive crime of second degree assault under N.Y.P.L. § 120.05(2) 'has as an element the use, attempted use or threatened use of physical force against the person of another' and is categorically a crime of violence under U.S.S.G. § 4B1.2.").

categorical match with the [Controlled Substances Act's] definition."); see also id. ("New York's definition of a 'narcotic drug' is broader than its federal counterpart. Specifically, schedule II(b)(1) under New York law regulates '[o]pium and opiate, and any salt, compound, derivative, or preparation of opium or opiate,' but excludes 'apomorphine, dextrorphan, nalbuphine, nalmefene, naloxone, and naltrexone, and their respective salts[.]'" (citations omitted)).

Because the defendant is not a career offender, his criminal history category is IV. PSR ¶ 49. With offense level 12, the advisory Guideline range is 21 to 27 months' imprisonment for Count One. With the addition of the five-year mandatory minimum term, the effective Guidelines range is 81 to 87 months' imprisonment.

IV. Applicable Law

In United States v. Booker, the Supreme Court held that the Guidelines are advisory and not mandatory, and the Court made clear that district courts are still required to consider Guidelines ranges in determining sentences, but also may tailor the sentence in light of other statutory concerns. See 543 U.S. 220 (2005); see also 18 U.S.C. § 3553(a). Subsequent to Booker, the Second Circuit held that "sentencing judges remain under a duty with respect to the Guidelines . . . to 'consider' them, along with the other factors listed in section 3553(a)." United States v. Crosby, 397 F.3d 103, 111 (2d Cir. 2005). Although the Court declined to determine what weight a sentencing judge should normally give to the Guidelines in fashioning a reasonable sentence, the Court cautioned that judges should not "return to the sentencing regime that existed before 1987 and exercise unfettered discretion to select any sentence within the applicable statutory maximum and minimum." Id. at 113.

Later, in Gall v. United States, the Supreme Court elucidated the proper procedure and order of consideration for sentencing courts to follow: "[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." 552 U.S. 38, 49 (2007) (citation omitted). Next, a sentencing court should "consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, [the court] may not presume that the Guidelines range is reasonable. [The court] must make an individualized assessment based on the facts presented." Id. at 49-50 (citation and footnote omitted).

V. The Appropriate Sentence

The government submits that a term of imprisonment within the Guidelines range of 81 to 87 months is appropriate. Such a sentence is warranted here because each of the defendant's offenses were serious and the defendant's history and characteristics reveal no prior dissuasion from shorter periods of incarceration or community supervision.

The defendant's crimes are unquestionably serious. And the interplay of them—drug dealing coupled with possession of a firearm—exponentially increased the