No. 19-

IN THE

Supreme Court of the United States

DAVID GREENBERG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Second Circuit err in affirming Petitioner David Greenberg's sentence without addressing (1) the sentencing court's failure to consider the proper weight to be given Greenberg's breach of his cooperation agreement and the sentences of other defendants in order to locate its sentence within the "boundaries of reasonableness" and (2) the unwarranted disparity of Greenberg's 180-month sentence, a sentence more than double that imposed on any other defendant, without adequate explanation and without consideration of those other sentences?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court whose judgment is sought to be reviewed are Petitioner David Greenberg and Respondent United States of America.

STATEMENT OF RELATED CASES

United States v. David Greenberg, No. 13 Cr. 718 (KMK), United States District Court for the Southern District of New York. Judgment entered May 24, 2018.

United States v. David Greenberg, No. 18-1768, United States Court of Appeals for the Second Circuit. Judgment entered May 16, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David Greenberg petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming his conviction and sentence.

OPINIONS BELOW

The summary order of the United States Court of Appeals for the Second Circuit dated May 16, 2019, affirming the district court's judgment in this case, is reported at ___ Fed. Appx. ____, 2019 WL 2147698 (2d Cir. 2019). A copy of the order is included in the Appendix submitted herewith. (A. 1a-9a).[1]

The District Court's sentencing decision is unreported. Relevant excerpts of it are included in the Appendix. (A. 10a-38a).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Second Circuit issued a summary order and entered a judgment mandate affirming the judgment of the district court on May 16, 2019, and June 6, 2019, respectively. The Supreme Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This petition involves Section 3553(a)(6) of Title 18 of the United States Code, which provides:

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1. Citations to the Appendix and the page number submitted herewith are denoted by "A.__."

> **(a) Factors to be considered in imposing a sentence.-**
>
> The court shall impose a sentence sufficient, but no grater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider-
>
> ...
>
> **(6)** the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

STATEMENT OF THE CASE

A. Preliminary Statement

David Greenberg, now 38 years old, was arrested on or about June 17, 2013, in Newburgh, New York, and charged in a complaint with participating in a narcotics conspiracy involving cocaine under 21 U.S.C. § 891(b)(1)(B). He decided at once to enter into a cooperation agreement with the Government and thereafter rendered assistance and provided intelligence and cooperation that was truly extraordinary and led to the arrest and conviction of a group of narco-traffickers with whom he was associated (referred to herein as the "Hernandez Organization"). As required by his cooperation agreement, Greenberg pleaded guilty to participating in a narcotics conspiracy pursuant to 21 U.S.C. § 841(b)(1)(A).

Greenberg also engaged in acts of misconduct that breached the terms of his cooperation agreement, and, when the misconduct was discovered, the Government refused to provide a motion under 18 U.S.C. § 3553(e) and U.S.S.G. 5K1.1. Greenberg thus received no benefit for the substantial assistance he provided. To make matters worse, the sentence imposed on him by the District Court, 15 years in prison, not only was harsh in and of itself but was more than double the length of the longest sentence received by any member of the Hernandez Organization, even the most culpable. Greenberg contends that his sentence was palpably unreasonable and out of proportion to the Hernandez sentences, and deserves to be set aside.

B. Greenberg's Guilty Plea and Cooperation

Immediately after his arrest, Greenberg began to provide information and render assistance to the Government. As a would-be cooperator, Greenberg was required to disclose his past criminal misconduct. It did not involve any form of violence but included trafficking in various drugs such as cocaine, heroin, ecstasy, marijuana, oxycodone and phencyclidine, beginning when he was a teenager. (Greenberg was 32 years old when he was arrested). Many if not most of the details of Greenberg's criminal history, particularly those not involving an arrest, were not known to the Government before he disclosed them. Greenberg's history also included criminal convictions in federal and state courts and for which he received and served prison sentences. He also was gravely wounded in a shooting during a drug transaction in August, 2008. Greenberg recovered from his wounds and resumed his illicit trafficking, which continued with only short interruptions until his arrest in this case in June, 2013.

As a cooperator, Greenberg was released on bail and instructed to participate in a number of controlled drug transactions between June and October, 2013. His cooperation focused on the Hernandez Organization led by an individual named Esmeraldo Hernandez and ultimately led to the arrest and successful prosecution of Hernandez and thirteen other traffickers in the Hernandez Organization.[2]

Greenberg's work for the Government was dangerous but highly effective. He was ultimately offered a plea and cooperation agreement to which he pleaded guilty on September 20, 2013. The guilty plea was to an Information charging a controlled substances conspiracy under 21 U.S.C. § 841(b)(1)(A) and including the trafficking crimes about which Greenberg informed the Government in his proffer sessions leading up to his plea. The criminal activity described in the Information to which he pleaded guilty was far more extensive, and carried the potential for a far more substantial punishment, than the criminal activity described in the original complaint against him.

David Greenberg's relationship with the Government as a cooperator fell apart in October, 2013, shortly after his guilty plea. He was taken into custody and accused by the Government of multiple breaches of the cooperation agreement, including the following: (1) tipping off a target not to speak to him over a phone that was being monitored, (2) supplying a cutting agent for heroin to the Hernandez defendants, (3) failing to disclose a drug stash house at

2. The prosecution of the Hernandez defendants was conducted before a different judge in the Southern District of New York under docket number 13 Cr. 740 (VB).

which cocaine, an inoperable firearm and a rifle had been stored, (4) engaging in unauthorized cocaine transactions and collections, (5) unreported and unapproved contracts with multiple targets, and (6) failure to make required disclosures to the Government. Although Greenberg ultimately "came clean" as to his misconduct, the Government declined to move under 18 U.S.C. § 3553(e) and U.S.S.G. 5K1.1 to afford Greenberg any sentencing relief or benefit for the substantial assistance he had rendered.

C. The Hernandez Organization

As noted above, Greenberg's assistance to the Government resulted in the takedown and conviction of the drug traffickers known as the Hernandez Organization. That organization dealt cocaine and heroin in Hudson Valley cities such as Newburgh, Beacon and Middletown and in New York City. Through intelligence and controlled transactions, Greenberg was able to assist the Government in building a case against the members of the Hernandez Organization. His cooperation was of critical importance; indeed, without him the case would not have been made. At least ten members were convicted and sentenced to prison terms, with the lengthiest term being 87 months imposed on Esmeraldo Hernandez.

It is worth pausing to note that Esmeraldo's sentence is less than half of the 180-month sentence that Greenberg received. It is clear that the Hernandez Organization convictions were fully the result of Greenberg's cooperation, and equally clear that Greenberg got no benefit at all from his cooperation or the results directly attributable to it. Whether Greenberg's sentence comports with traditional

notions of reasonableness or justice is addressed below. It nevertheless has never been disputed that, as a result of David Greenberg's efforts, a dangerous drug organization was dismantled and its members put in prison.

D. Greenberg's Sentencing

Greenberg appeared before District Judge Kenneth Karas for sentencing on March 12, 2018.[3] A Presentence Report ("PSR") was prepared by the Probation Department and the parties submitted extensive letter briefs before sentencing. The PSR recommended a sentence of 210 months, and the Government requested a sentence within the Sentencing Guidelines range of 210-262, with a ten-year mandatory minimum prison term also applicable under 21 U.S.C. § 841(b)(1)(A). Greenberg, relying on the safety valve provisions of 18 U.S.C. § 3553(f) and U.S.S.G. 5C1.2, his total reform and rehabilitation as a result of a religious awakening, and the four and a half years he had already spent in pre-sentence detention, argued for a sentence of time-served.

The sentencing court faced two issues at Greenberg's sentencing: (1) the applicability of the safety valve to Greenberg's case, and (2) depending on the outcome of the first issue, the appropriate sentence to impose on Greenberg. After considering the parties' arguments and written submissions, the sentencing court rejected

3. The delay in sentencing, at defendant's request, was mainly to await the conclusion of the Hernandez case to see if any of those defendants opted for trial, which might have afforded Greenberg a renewed opportunity to cooperate by giving testimony at a trial. All of those defendants, however, pleaded guilty and there was no trial.

Greenberg's request for safety valve relief. The Court then imposed a sentence of 180 months imprisonment, a term of supervised release of 5 years, and a $100 special assessment. An Order of Forfeiture also was entered.

A timely notice of appeal was filed on Greenberg's behalf.

E. The Appeal

Greenberg appealed his sentence to the Second Circuit, contending in the first instance that the District Court erred in denying him relief under the safety valve and further contending that the sentence imposed on him was both procedurally and substantively unreasonable, disproportionate, and "greater than necessary" to meet the objectives of sentencing.

In its May 16, 2019, Summary Order, the Second Circuit rejected Greenberg's arguments. It affirmed the District Court's denial of safety valve relief. It also concluded that Greenberg's sentence was not procedurally unreasonable since there was no miscalculation of the Sentencing Guidelines. As to the substantive unreasonableness of his sentence, Greenberg contended that his breach of the cooperation agreement, although serious, was not of sufficient gravity to sustain the 15-year sentence imposed on him as a result and as to the length of his sentence, he argued that it far exceeded the sentences imposed in the case against the Hernandez defendants that he had made for the Government. The Second Circuit sidestepped Greenberg's arguments and focused instead on the District Court's attention to other sentencing factors such as the seriousness of the narcotics conspiracy

and Greenberg's failure to comply with his cooperation agreement; his prior criminal history and the non-violence of his conduct; the substantial cooperation Greenberg rendered and the letters attesting to his character and rehabilitation, among other considerations. None of the factors had been disputed. The Second Circuit stated it would not substitute its judgment for the district court's on the issue of a sufficient sentence. It did not address whether Greenberg's cooperation agreement breach could support the weight that was assigned to it by the District Court or whether there was any significance in the length of Greenberg's term of imprisonment as compared to those imposed on Hernandez Organization defendants.

REASONS FOR GRANTING THE PETITION:

GREENBERG'S 15-YEAR SENTENCE WAS IMPOSED (A) WITHOUT REGARD TO WHETHER THE PRIMARY FACTOR DRIVING THE SENTENCE COULD BEAR THE WEIGHT OF SUCH A SENTENCE AND WHETHER IT WAS PROPORTIONATE TO THE HERNANDEZ DEFENDANTS' SENTENCES, AND THEREFORE WAS SUBSTANTIVELY UNREASONABLE, AND (B) AT A LEVEL THAT CONSTITUTED UNWARRANTED DISPARITY WITH THESE OTHER SENTENCES, CONTRARY TO THE MANDATE OF 18 U.S.C. § 3553(a)(6).

Whenever a sentence seems excessive or out of proportion with the offense or other relevant sentences, there is a distinct possibility that something went wrong. Such was the case with David Greenberg's sentence, and something did go wrong. At 180 months, it was excessive

and out of proportion because the District Court sentenced Greenberg without any regard to the sentences that the Hernandez Organization defendants received. The Court imposed a sentence on Greenberg that was far greater than necessary to achieve the goals of sentencing and more than double the longest sentence that a Hernandez case defendant received.

Greenberg's sentence therefore suffers from (A) substantive unreasonableness, and (B) unwarranted disparity with the sentences of the other defendants. These defects could easily have been avoided if the District Court had heeded the relevant provisions of 18 U.S.C. § 3553(a) and the other sentences imposed in this case. It did not, nor did it explain why it did not. Other Circuits would have required it; but not the Second Circuit, which affirmed the District Court's judgment without regard to these defects. (A. 1a-7a). Greenberg submits that a new sentence and corrective instruction from the Supreme Court are needed.

A. Substantive Unreasonableness

The District Court sentenced Greenberg to 180 months (15 years) in prison. Greenberg maintained in his appeal to the Second Circuit that such a sentence was substantively unreasonable, pointing out that it bore no relation to the sentences imposed on the other similarly situated defendants associated with Greenberg's case, and that the driving factor for his sentence, Greenberg's breach of his cooperation agreement, while serious, was not of such gravity that it could bear the weight assigned to it to support such a lengthy sentence. The District Court did not address either of these arguments, and neither did the Second Circuit.

The Second Circuit, in its Summary Order, pointed out that the District Court had fully considered various sentencing factors relevant to Greenberg: "the seriousness of his conspiracy and his prior criminal history; his nonviolent conduct; his extensive cooperation, as well as the need to protect the integrity of the cooperation process; and the letters attesting to Greenberg's character." (A. 8a-9a). None of these issues were disputed. These factors plainly justified a variance from the Sentencing Guidelines range, found by the District Court to be 210-262 months (A. 31a), and a variance was granted by the District Court.

However, once the variance was deemed in order, the District Court had no direction or guidance as to where the actual sentence to be imposed should be located. A mandatory minimum prison term of 10 years under 21 U.S.C. § 841(b)(1)(A) was applicable, but if a sentence below 210 months and a minimum at or above 120 months was to be imposed, what should the sentence be? The District Court settled on 180 months but without explanation of how that term was selected, as opposed to some other term, which imparted to that sentence an arbitrary quality and a result out of proportion to the offense and to the sentences received by any of the defendants in the Hernandez case.

In connection with his sentencing, Greenberg informed the District Court in written submissions and at the sentencing of the case involving the Hernandez Organization and the sentences that had been imposed in that matter. (A.14a-15a, 19a), as did the Government in its sentencing submission. The Court was thus aware from both sources that the longest sentence given to any defendant in that case was 87 months, and that others

received less. The Court also was directed by 18 U.S.C. § 3553(a)(6) to avoid unwarranted disparities, which required it to consider the sentences that other defendants received. However, all the District Court stated as to the Hernandez defendants was that "those individuals didn't have to proffer the entirety of the sentence" [sic] (A. 15a), which was utterly inadequate and was offered without knowing. There was no stated basis for the Court's remark, and in fact the Government had informed the Court in its written submission that one of the Hernandez defendants had cooperated, which would have involved the kind of proffer the Court said had not taken place, so the Court's remark likely was wrong in addition to being insufficient and unexplained.

The Court then proceeded without boundaries within the range it had for sentencing Greenberg, the bottom of Guidelines range, 210 months, to the 120-month mandatory minimum prison term. It settled on 180 months, but for no stated reason. The sentence certainly bore no relation to any other sentence any defendant in Hernandez received. The District Court recognized in passing the need to avoid unwarranted disparity (A. 36a-37a) but did not relate it to the sentences in any way to the far lower sentences imposed on the Hernandez defendants. There also was no explanation as to how Greenberg's breach of his cooperation justified the sentence imposed.

The Second Circuit, like the District Court, avoided any discussion as to how Greenberg's sentence was or should have been determined. Without explanation of the sentence as to these issues, the Second Circuit was in no position to evaluate the District Court's sentencing determination.

It is established in the Second Circuit that a sentence that relies on a factor that cannot bear the weight of the imposed sentence is not permitted and must be set aside. United States v. Cavera, 550 F.3d 180 (2d Cir. 2008); United States v. Jenkins, 854 F.3d 181 (2d Cir. 2017); see also United States v. Sawyer, 672 Fed. App. 63, 65 (2d Cir. 2016). Comparisons to similar cases are important, United States v. Brooks, 889 F.3d 95 (2d Cir. 2018), and assist in the determination of where the "boundaries of reasonableness" lie in a particular case. United States v. Singh, 877 F.3d 107, 115-116 (2d Cir. 2017).

Here, the record makes manifest that the factor driving the District Court was Greenberg's sentence was his failure to abide by the terms of his cooperation agreement, leading the Government to refuse to make a motion on his behalf under 18 U.S.C. 3553(e) and U.S.S.G. 5K1.1. (A.33a-37a). Had there been no breach, Greenberg would have received the benefit of such a motion, and his sentence would have been far different from the one he received. Thus, his sentence was driven by his cooperation breach, but the increased sentence was far in excess of what that factor could legitimately support. While the matter of the breach was serious and deserved discussion, as was the Hernandez case and the sentences of those similarly situated defendants, none of them were factors in the Second Circuit's affirmance of the District Court's judgment.

Other Circuits have found it important to consider co-defendant sentences in arriving at a reasonable sentence for the defendant under consideration. See, e.g., United States v. Vinson, 852 F.3d 333 (4th Cir. 2017) (approving a variance for the defendant but a sentence still greater

than the co-defendants based on the defendant's higher level of culpability); United States v. Sierra-Villegas, 774 F.3d 1093 (6th Cir. 2014) (all co-defendants cooperated, so despite variance, a higher sentence was warranted for the defendant). In Greenberg's case, his level of culpability for the crime of conviction was not higher than his co-defendants, at least some of them, so a sentence that was double the highest sentence a co-defendant received was not warranted, even if it involved a cooperation breach. Neither did all of the co-defendants cooperate, although the Government disclosed that at least one Hernandez defendant did, but it clearly was not any defendant at the high end of the sentencing spectrum. A careful review of those other sentences should have placed Greenberg's conduct along that spectrum, although his sentence still had a 120-month minimum, but not far beyond the spectrum where Greenberg's sentence ultimately was located.

The failure of the District Court to undertake any meaningful review of the Hernandez defendants' sentences and of the Circuit Court even to mention the issue contributed to a substantively unreasonable result in Greenberg's case. Other District Courts and Circuits would not have done it this way, and the guidance of Supreme Court is needed to mandate such a review in order to prevent a sentence from going beyond the boundaries of reasonableness and into a zone of excessiveness, which Greenberg's surely did.

B. Unwarranted Disparity/Procedural Error

The District Court was required to guard against unwarranted disparities among defendants by the

provision of 18 U.S.C. § 3553(a)(6). That section states in relevant part

> (a) The court, in determining the particular sentence to be imposed, shall consider -
>
> ...
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

Greenberg's sentence was disparate from the sentences received by the defendants in the Hernandez case. The court made no effort to determine the similarity of records or conduct, although similarities were apparent. The District Court was advised of the other sentences by Greenberg's counsel and the Government, yet gave it only the scantest, most cursory attention (A. 15a, 36a-37a). The Second Circuit gave it none.

A court commits procedural error and abuses its discretion by "failing to adequately explain the chosen sentence." Gall v. United States, 552 U.S. 38, 51 (2007); see also 18 U.S.C. § 3553(c). In Greenberg's case, the chosen sentence was 180 months but was not adequately explained and there was no effort to differentiate Greenberg from the Hernandez defendants to justify the vastly more punitive sentence given to Greenberg. The Hernandez defendants, at least some of them, are home now (A. 19a); Greenberg is still in prison. There is nothing in the record to satisfy any appellate court that this disconnect has a reasoned basis. See Rita v. United States, 551 U.S. 338,

356 (2007). The Second Circuit, in its summary order, elided past these requirements.

This procedure predictably resulted in disparity that is at once unjust and unjustifiable. The circumstances are similar, although not identical, to those described in United States v. Robles-Alvarez, 874 F.3d 46 (1st Cir, 2017). In that case, a drug trafficking case much like Greenberg's, the defendant requested a variance from the Sentencing Guidelines, which called for a life sentence, noting that his co-conspirators received sentences ranging from 46 to 210 months. He was given a life sentence and, worse, it was imposed by the sentencing court "without so much as mentioning the disparity issue." Id. at 52. The First Circuit noted that procedural error may occur and warrant remand when a sentencing judge fails to explain its rejection of an argument for a variance, id at 52-53, and cited case law other circuits (but not the Second Circuit) consistent with that requirement including United States v. Pietkiewicz, 712 F.3d 1057, 1062 (7th Cir. 2013); United States v. Smith, 541 Fed. Appx. 306, 308 (4th Cir. 2013) and United States v. Wallace, 597 F.3d 794, 804 (6th Cir. 2010). In the Robles-Alvarez case, the leader of the conspiracy who recruited Robles-Alvarez and who engaged in more drug smuggling than he did, received a 46-month sentence. Robles-Alvarez got life and "the sentencing judge did not even provide a cursory explanation for its rejection of his argument." Id. at 53. The First Circuit vacated Robles-Alvarez's sentence and remanded the case for resentencing.

Greenberg's case recalls Robles-Alvarez, but, unlike the First Circuit, the Second Circuit required no explanation from the District Court as why a disparate

sentence was appropriate for Greenberg. The issue of disparity was placed squarely before both the sentencing court and appellate court, but was not adequately addressed by the District Court and was not even mentioned by the Second Circuit. Robles-Alvarez got a life sentence; Greenberg came away with a 180-month sentence, more than double the 87-month sentence given to the leader of the drug trafficking organization Esmeraldo Hernandez. The disparity of the 180-month sentence was not explained and thus cannot be evaluated on appeal. Much like Robles-Alvarez, the District Court here committed procedural error. Vacatur and a remand should have been the result of Greenberg's appeal to the Second Circuit as it was in Robles-Alvarez's First Circuit appeal.

However, that was not the result in Greenberg's case. The Second Circuit did not require any explanation of the disparity with the sentences previously imposed. Even in the Second Circuit's laundry list of factors the sentencing court did consider, avoidance of unwarranted disparity is conspicuously absent. (A. 8a-9a). The Circuit Court was not asked to "substitute [its] own judgment for the district court's," as it suggested (A. 9a), only to make sure that the § 3553(a) considerations were addressed and adequately explained. The unwarranted disparity described at § 3553(a)(6) was not.

The issue is an important one and has significance in how fairness and rationality are achieved and perceived in the exercise of sentencing. Where there are significant disparities, where the leaders of drug-trafficking organizers get significantly lower sentences than those below them in culpability, and where the differences are

not sufficiently explained and not reviewed, sentences are viewed skeptically and rightly so, and confidence in the fairness and rational administration of justice cannot be guaranteed. It is a procedural error to give short shrift to such a visible issue, especially when it is placed squarely before the court as it was in Greenberg's case. The Supreme Court's guidance and supervisory power are in critical need to address this requirement for the benefit of all the Circuit Courts and to reinforce a procedure that is meant to protect and insure confidence that sentences are imposed in a way that bespeaks fairness and proportion, not randomness.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

DATED: White Plains, New York
August 14, 2019

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MAY 16, 2019

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

18-1768

UNITED STATES OF AMERICA,

Appellee,

-v.-

DAVID GREENBERG,

Defendant-Appellant.

May 16, 2019, Decided

PRESENT: DENNIS JACOBS,
PIERRE N. LEVAL,
Circuit Judges,
JESSE M. FURMAN,*
District Judge.

Appeal from a judgment of the United States District Court for the Southern District of New York (Karas, *J.*).

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* Judge Jesse M. Furman, of the United States District Court for the Southern District of New York, sitting by designation.

Appendix A

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be **AFFIRMED**.

David Greenberg appeals from a judgment of the United States District Court for the Southern District of New York (Karas, *J.)* sentencing him principally to 180 months' imprisonment after Greenberg pleaded guilty to one count of conspiracy to distribute narcotics in violation of 21 U.S.C. § 846. On appeal, Greenberg argues that he was entitled to relief from the applicable mandatory minimum sentence pursuant to the "safety valve" provisions of 18 U.S.C. § 3553(f) and United States Sentencing Guidelines § 5C1.2, and that his sentence was procedurally and substantively unreasonable. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

In early 2013, Greenberg was surveilled by New York state police during their investigation of drug trafficking in the Bronx. Investigators saw Greenberg make about twenty visits to a suspected "stash house" in Newburgh, New York, emerging each time with at least one paper bag. Greenberg was arrested in June 2013 after investigators observed him handing a paper bag to an individual in a car who was arrested shortly thereafter and found to be in possession of more than 100 grams of cocaine. After posting bail, Greenberg remained at liberty until October 2013, during which time he cooperated with the government by, *inter alia,* recording conversations and

participating in controlled narcotics purchases at the direction of the Federal Bureau of Investigation.

In September 2013, Greenberg pleaded guilty (pursuant to a cooperation agreement) to conspiracy to traffic more than five kilograms of cocaine, more than one kilogram of heroin, and quantities of marijuana, MDMA, oxycodone, and PCP between 1995 and 2013. The cooperation agreement required that Greenberg "truthfully and completely disclose all information with respect to the activities of himself and others concerning all matters about which [the government] inquire[d] of him," and "commit no further crimes whatsoever."

In October 2013, in large part due to Greenberg's cooperation, the government unsealed an indictment charging fourteen defendants, each of whom was convicted. Shortly thereafter, the government learned that Greenberg violated his cooperation agreement by, *inter alia,* failing to disclose to law enforcement a stash house where narcotics, firearms, and ammunition were stored; and instructing another investigative target, John Zgrodec, to dispose of Greenberg's firearm after his arrest. Greenberg confessed his misconduct and was remanded to custody in October 2013. He subsequently informed the government that Zgrodec kept a "duffel bag with guns" at the stash house.

The offense of Greenberg's conviction carries a ten-year mandatory minimum sentence. Prior to sentencing, Greenberg's counsel advised the government that he considered Greenberg potentially eligible for relief from

the mandatory minimum sentence pursuant to the "safety valve" provisions of 18 U.S.C. § 3553(f) and United States Sentencing Guidelines ("U.S.S.G." or "Guidelines") § 5C1.2. The government responded that Greenberg's possession of a firearm as part of the offense conduct disqualified him from safety valve relief. Nevertheless, Greenberg participated in a "safety valve proffer" during which he informed the government that the duffel bag at the stash house contained an assault rifle, and that Greenberg also kept a handgun -- which he claims was inoperable -- at the stash house.

At sentencing, the district court determined that Greenberg was ineligible for safety valve relief because he possessed a firearm in connection with the offense of conviction. The court imposed a sentence principally of 180 months' imprisonment.

On appeal, Greenberg argues that the district court erred in denying safety valve relief, because: (A) it incorrectly adopted a *per se* rule that constructive possession of a firearm in a drug stash house qualifies as possession "in connection with" a narcotics conspiracy; and (B) there was no proof or finding that the firearm at issue was possessed "in connection with" Greenberg's offense of conviction. He additionally argues that his sentence was procedurally and substantively unreasonable.

We review the sentencing court's factual findings for clear error, but we review the court's interpretation of the safety valve provisions *de novo*. *United States v. Ortiz*, 136 F.3d 882, 883 (2d Cir. 1997). Review for procedural

and substantive reasonableness is akin to a "deferential abuse-of-discretion standard." *United States v. Cavera,* 550 F.3d 180, 189 (2d Cir. 2008) (in banc) (quoting *Gall v. United States,* 552 U.S. 38, 41, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007)). However, "[a] sentencing court's legal application of the Guidelines is reviewed de novo." *United States v. Desnoyers,* 708 F.3d 378, 385 (2d Cir. 2013).

1. The safety valve provisions set forth in 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2 instruct a district court to sentence without regard to an applicable statutory mandatory minimum if the defendant establishes that:

> (i) the defendant has no more than one criminal-history point; (ii) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense; (iii) no one was killed or seriously hurt as a result of the offense; (iv) the defendant was not an organizer, leader, manager, or supervisor in the offense and was not engaged in a continuing criminal enterprise; and (v) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense [or offenses that were part of the same course of conduct or of a common scheme or plan].

Ortiz, 136 F.3d at 883 (internal quotation marks and alterations omitted); U.S.S.G. § 5C1.2; 18 U.S.C. § 3553(f). The burden is on the defendant to prove entitlement to

safety-valve relief by a preponderance of the evidence. *See United States v. Jimenez,* 451 F.3d 97, 102 (2d Cir. 2006).

For a firearm to be used "in connection with the offense" under § 5C1.2, thereby precluding safety valve relief, the firearm "at least must facilitate, or have the potential of facilitating, the drug trafficking offense." *United States v. DeJesus,* 219 F.3d 117, 122 (2d Cir. 2000) (quoting *Smith v. United States,* 508 U.S. 223, 238, 113 S. Ct. 2050, 124 L. Ed. 2d 138 (1993)). For purposes of the safety valve, possession includes "constructive possession, at least where the defendant keeps the weapon under his personal dominion and control." *United States v. Herrera,* 446 F.3d 283, 287 (2d Cir. 2006).

The district court found Greenberg ineligible for safety valve relief because he admittedly had constructive possession of the rifle at the stash house, which (as the court emphasized) was "ground zero of the drug operation" and where Greenberg had access to the rifle. Greenberg argues that the district court thus adopted a *per se* rule that a firearm possessed at a stash house is possessed "in connection with" a drug offense. Such a categorical rule would be inconsistent with the principle that "the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." *See DeJesus,* 219 F.3d at 122 (quoting *Smith,* 508 U.S. at 238). We reject the argument. The district court did not adopt such a rule. To the contrary, the court indicated at sentencing that the analysis might have been different if the rifle had been stored in a less accessible place, such as the attic or garage of the stash house.

In any event, the court's factual finding that Greenberg's account of the firearms was inconsistent and lacked credibility was not clearly erroneous. Greenberg argued that his possession of the rifle was unconnected to the narcotics conspiracy because the rifle was merely stored in the stash house by Zgrodec and was not there for the purpose of furthering the drug business. However, the district court expressly declined to credit Greenberg's factual claims, finding that they were undermined by his inconsistent representations regarding the firearms in the stash house. As the district court observed, Greenberg gave "a number of different versions about how many guns were in the bag," "whether [a] handgun was at the stash house . . . or just the rifle," and "when he disposed of the handgun." Accordingly, we see no clear error in the district court's finding that Greenberg's factual claims were insufficient to show entitlement to safety valve relief.

2. "A district court commits procedural error where it fails to calculate (or improperly calculates) the Sentencing Guidelines range, treats the Sentencing Guidelines as mandatory, fails to consider the [18 U.S.C.] § 3553(a) factors, selects a sentence based on clearly erroneous facts, or fails adequately to explain the chosen sentence." *United States v. Robinson,* 702 F.3d 22, 38 (2d Cir. 2012) (citing *Gall,* 552 U.S. at 51).

Greenberg argues that his sentence was procedurally unreasonable because the district court erroneously denied him safety valve relief, and accordingly denied him a two-level offense level reduction under U.S.S.G. § 2D1.1(b)(18). Because the district court did not err in finding that Greenberg failed to establish his entitlement

to safety valve relief, the district court did not commit procedural error by declining to grant a two-level reduction pursuant to § 2D1.1(b)(18).

3. "In examining the substantive reasonableness of a sentence, we review the length of the sentence imposed to determine whether it cannot be located within the range of permissible decisions." *United States v. Matta,* 777 F.3d 116, 124 (2d Cir. 2015) (internal quotation marks omitted). We will "set aside a district court's substantive determination only in exceptional cases." *Cavera,* 550 F.3d at 190 (emphasis omitted).

Greenberg argues that the principal motivating factor for his 180-month sentence was his breach of the cooperation agreement, and that this factor was insufficient to justify his sentence, which was far higher than it would have been had he complied with the cooperation agreement. To support the notion that his sentence was greater than necessary, Greenberg cites his substantial assistance to the government, the fact that his crimes did not involve violence, and his rehabilitation while incarcerated.

The transcript of Greenberg's sentencing hearing demonstrates that the district court fully considered the relevant sentencing factors in imposing Greenberg's sentence. The court discussed, *inter alia:* the seriousness of Greenberg's narcotics conspiracy and his prior criminal history; the nonviolent nature of his conduct; the substantial cooperation he provided the government; the failure to comply with his cooperation agreement

and the importance of protecting the integrity of the cooperation process; and letters submitted to the court attesting to his character. The district court clearly gave thoughtful consideration to the relevant sentencing factors when concluding that a below-Guidelines sentence of 180 months was appropriate, and we will not "substitute our own judgment for the district court's on the question of what is sufficient to meet the § 3553(a) considerations." *Cavera,* 550 F.3d at 189.

We have considered Greenberg's remaining arguments and conclude they are without merit. Accordingly, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

/s/

APPENDIX B — EXCERPTS OF TRANSCRIPT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED MARCH 12, 2018

[1]UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES of AMERICA,

– against –

DAVID GREENBERG,

Defendant.

13 CR 718
Sentence
(SEALED)

United States Courthouse
White Plains, New York

March 12, 2018

Before: HONORABLE KENNETH M. KARAS
District Court Judge

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[33]THE COURT: Yeah. I thought that was just a mistake.

MR. CALHOUN: I don't think it makes a difference, but I'm-- we're kind of on the knife's edge. I don't want to give away any points either so ...

THE COURT: Yeah.

MR. CALHOUN: I would just ask that that be--

MR. GERBER: Your Honor, the government has no objection to that.

THE COURT: All right. So paragraph 36 and 37 should say criminal history score of zero. And then, of course, Criminal History Category remains one, but comfortably so.

Any other issues?

MR. CALHOUN: No, your Honor mentioned the safety valve.

THE COURT: Right. That's preserved for sure, of course. All right. The government reviewed the report. And any objections?

MR. GERBER: We've reviewed and no objections.

THE COURT: Do you agree with that, Mr. Graff?

ATTORNEY3 [sic]: Yes, your Honor.

THE COURT: All right. Just making sure.

All right. Go ahead, Mr. Calhoun.

MR. CALHOUN: Thank you, Judge. Judge, we've been a long time coming to this day. Mr. Greenberg is now 37 years old. He's a married man, gets to [34]see his wife periodically at the facility where he's been detained but certainly has maintained family support. They're in court with him today. And a number of family members and friends submitted letters to the Court that quite movingly spoke of David's devotion to his family and sort of the remaking of himself that David has done. And I'll mention that in a few minutes.

But I think it's fair to say and I think all of the certificates and diplomas that have been submitted to the Court in connection with the sentencing today shows the effort that David has put into trying to become worthy of the support that his family has given him and really to be worthy of himself to -- and to become a better man. I think he has -- I think he has remade himself and I think he has become a better man. There's a lot there and a lot of substance that is, to my mind, of what I've seen very impressive in terms of how long the effort has persisted and the depth of that effort.

He essentially runs a ministry now at GO and helps other inmates, in addition to himself, with their struggles and with their problems and attempts to inject faith and devotion into their lives and maintain it in his own life.

He had a very rough childhood and adolescence. It's summarized in the presentence report, but there was little

or no guidance or parental direction for him. It just wasn't part of his life. And the unfortunate turn that he made as a result [35]of that was to the streets and he became immersed in the drug culture.

He went there not just for the finances, but for acceptance, as well. I think as human beings, it's something that we all need and we seek out the places where you find it and this is where he turned. And it was it was a bad turn and it's led to untold legal problems.

He was nearly killed in 2008, shot and had to have multiple surgeries. And by luck and grace he survived and is a healthy man. But he has not just turned in that direction for money and support, but that's where he got his values, too. And it's not a culture that embraces honesty or forthrightness. And those values that are sort of inculcated into a person, I just don't think you shake off overnight.

And his -- I think the end result was the failure of his cooperation agreement by not being forthright with the government and not doing the things correctly that he was told to do, and doing things that he was told not to do and then not answering honestly when Mr. Gerber and Mr. Graff asked him questions. It took a number of sessions. This is in October of 2013 when he was brought in.

He essentially poisoned the relationship. It was on track, it was -- by the time he was brought in in October, he had pleaded guilty before your Honor just some weeks prior, but he had been out and working with the agents

for I guess about [36]three months or thereabouts. He had -- he was released on bail on June 20, I believe, give or take a day. And in the short amount of time that he had between June 20 and the October date when he was brought in, he did a lot of good in terms of coop -- he did some things that the government, I think, correctly and I certainly would characterize a substantial assistance; namely bringing in the case that for shorthand purposes I'll call it the Hernandez case, but it involved about a dozen defendants, all drug traffickers. Every single one of them was ultimately convicted before Judge Briccetti. They all pleaded guilty, which I think speaks well of the case the government put together. But a central part of that was the information and assistance that came from Mr. Greenberg.

So there was a real contribution, I would say, to societal good that came out of the cooperation and then something that benefited the government and indeed benefited all of us.

And the sentences that were imposed in that case, there was a high sentence of 87 months, but there were a number of sentences in the 60- month, 66-month range. It looks to be about six or seven of the defendants got prison terms in that range. So he did render substantial assistance.

He also engaged in misconduct in that basically he acted outside the bounds of his agreement. He didn't tell the government what he was doing when he should. And in the end, [37]despite a lot of meetings and a lot of

arguments and cajoling and other efforts of advocacy, I'll put it that way, the government ultimately declined to write a 5K letter in Mr. Greenberg's favor. And we're not taking issue with that. It's unfortunate, but that's their decision and they've been quite firm about that throughout. So that really is not a surprise.

What is a surprise and a disappointment is the sentence that is being recommended. It's the same sentence that was recommended in the presentence report, but the probation officer didn't -- I don't think she had access to the information about the cooperation and the substantial assistance.

But I can't help but feel that a sentence of that magnitude which starts at 210 months, which is something over 16 years and then travels northward up to the 21-year range, is just far more than what is necessary in this case. It's more than anybody -- it's further, by far, than what anybody in the Hernandez case got by some multiple. And there you had, like I said, a dozen defendants who were basically engaged in the same kind of conduct as Mr. --

THE COURT: Look, here's the difference. Those individuals didn't have to proffer the entirety of their sentence. So that's the double edged sword of anybody who either does safety valve or otherwise cooperation proffering is [38]that the government makes you come clean. And so the quantities go up and that's what's driving this.

MR. CALHOUN: That's correct. An awful lot of the criminal misconduct came from Mr. Greenberg.

THE COURT: Right.

MR. CALHOUN: And I think the government indicated in a letter, and I know I did in mine, that a lot of it was misconduct and crimes that they didn't even know about until Mr. Greenberg told them.

I understand how it affects the guidelines and it drives them up, but I'm not -- it seems like punishing a defendant for crimes that he disclosed --

THE COURT: Right.

MR. CALHOUN: --without the government's prior knowledge is -- it's a little tough to take. I'm not saying that the guideline calculation is wrong and I'm not saying they're not entitled to make the recommendations that they certainly are. But I think it is important for the Court to consider where that information came from and how they got ahold of it.

THE COURT: But the incentive system is that if someone is going to admit to the scope of conduct on that level, then it gives them all the more reason to make sure that they comply with their obligations under the agreement because otherwise the consequences are so severe.

[39]MR. CALHOUN: You would hope.

THE COURT: Right. That's the idea, right.

MR. CALHOUN: That certainly is and I think it was the hope of everybody that this was going to be successful. And as I indicated at the outset, it looked to be --

THE COURT: Yeah.

MR. CALHOUN: -- successful. It just didn't stay that way.

But I submit that if you take a step back and look at the offenses that Mr. Greenberg admitted to and pleaded guilty to, it's -- the sentence that is being recommended, I submit, is higher than it needs to be. There's -- of course there's the parcimony clause in 3553(a) that's sort of the guiding principal. But I don't see any indication at all in the government's extensive letter that any consideration was given to something less than that. I think something less than that would be more than ample.

I've submitted that because Mr. Greenberg has already been incarcerated four and a half years, that the Court could consider time served, of course. With your Honor's ruling on the safety valve, that doesn't remain a viable option, but certainly at the mandatory minimum level, I submit it's more than enough to punish him for what he did, which was drug trafficking.

Again, and I said this in the safety valve context, [40] but there was no violence, no physical injury. There was certainly misconduct and I understand the government's need to show that they mean business when they enter into these plea and cooperation agreements. But I submitted

in my March 2nd letter that I also think it's important to show that they can deal fairly and not harshly and not excessively when they come across somebody who has breached the agreement and that was not going to get a 5K letter. I think that is an important consideration, too, in terms of maintaining the integrity of the process that they, rightly so, are concerned with.

Just -- just historically, Judge, Mr. Greenberg came into the system in this case in June of 2013. It was a (b)(1)(B) case, not the greatest but not the worst. But he made an immediate decision to help the government. I mean, that was done very quickly and he was assisted and made bail and got right to work. And, again, in very short order had made a significant case for the government. It ended up taking a number of drug traffickers and a significant quantity of drugs off the streets.

And, again, he did undermine his cooperation agreement and that's the reason that he -- I'm not standing here asking for the full benefit of a 5K letter. Mr. Greenberg is really in a bad position today with respect to the guidelines.

I also think that because the guidelines [41]calculation -- this gets a little hazy, but the guidelines are so bound up with the anticipated cooperation. I mean, that's the only reason that he pleaded guilty to all of the crimes that he did, that it with the idea that the 5K letter would ultimately help in terms of sentencing to bring the ultimate sentence back down to earth.

But I think without the 5K and without the return to earth, the guidelines really don't, in the end, serve a very useful function as a sentencing tool.

I do think that Mr. Greenberg likely would be home by now if he had maintained his cooperation agreement. Again, he's been incarcerated for four and a half years. I think it's noteworthy that a number of the Hernandez defendants are coming home now and at least one of them has resumed contacting Mr. Greenberg's family and bothering them because the word really got out at some point that, at least among some of the Hernandez defendants, that David Greenberg was a cooperator. And, obviously, it doesn't set well with a certain population and with this one individual in particular.

As I mentioned, David has worked hard. I think the Court can see -- see that effort that David has made to remake himself. I guess if there's any silver lining, I think the four and a half years that he's done to date really gave him an opportunity to examine his life and where he was heading and guided him to taking a different rout. And I think that's [42]exactly what he has done. I believe, I really do, that he's become a new man and I think he's left his old ways behind. He'll get a chance some day to prove that to everyone. It's hard now to cite any particular proof, except the effort that he has made and all of the achievements that he has gathered and the activities that he's engaged in including a letter from the warden, which I don't see too terribly often. But I would ask the Court simply to take all of this into consideration.

I know there's a mandatory minimum that is applicable, but I do think that the full extent, the good and the bad, should be taken into consideration. And I certainly, under the Court's ruling today, feel that a sentence not in excess of the mandatory minimum would be more than enough in this case to achieve the goals and the purposes of sentencing. Thank you.

THE COURT: Thank you, Mr. Calhoun.

Mr. Gerber?

MR. GERBER: I want to -- first, I want to both summarize our position and also respond to certain arguments from defense counsel in his submission today.

To be clear at the outset, the defendant rendered substantial assistance many times over. But for the defendant's cooperation, the Hernandez case, which was a significant 14-defendant prosecution, it almost certainly would never have happened but for his cooperation.

[43]He also engaged in extraordinary misconduct while working with law enforcement. And what's very important here is that this was not a one-time mistake, it was not a discrete lie. This was a month-long systematic effort to engage in criminal activity while acting as a cooperator, never to deceive the government and to some extent obstruct the investigation. He shielded a target. He supplied a cutting agent for drugs. He failed to disclose cocaine, firearms. He was complicit in the distribution of those drugs and those drugs have never been recovered.

He provided cocaine to an associate to sell on consignment. He gave a drug dealer a cocaine press. He collected thousands of dollars in drug debts.

None of this was known to law enforcement before the defendant pleaded guilty. To the extent defense counsel suggests in his submission that the government knew about this before the defendant signed his cooperation agreement and pled guilty, counsel is mistaken.

Now there was other lesser misconduct predating the cooperation that was disclosed during the proffer sessions leading up to the cooperation agreement. And there was an initial failure to disclose drugs stored in a trap in a car. And that was disclosed in some later proffer session, again, before the cooperation agreement.

There's a sentence or two in the defense submission [44]suggesting that the defendant had revealed the stash house to the government before he pled guilty just to be clear about what happened. There are multiple stash houses here. There was a stash house on South Street. We knew about that before the defendant was arrested. He talked about that. He also talked about a stash house on West Stone Street.

But what the defendant knew and didn't tell us is that after his arrest the stash house on West Stone Street was cleared out and its contents were shifted, were moved to West Street. That's where the new stash house was while he was cooperating with the government. We only learned of that location after we confronted the defendant about

his lies. And just to be clear, even when the defendant talked about the West Stone Street stash house there was no mention of the guns that were there.

So there were certain disclosures during the proffer process. And certainly, I mean, voluminous disclosures regarding his prior drug activity going back many years, but nothing follows from this.

The defendant was required to make those disclosures. That's what he was supposed to do. He doesn't get points for that. When confronted regarding his lies, so post cooperation agreement, post plea, when he was finally confronted by the government, when we, through various means, began to discover what he had been doing, when he was confronted, he lied about [45]it more. And it was only after meeting with us over an extended period of time after multiple meetings, that he finally came clean. Basically, when confronted with the fact that we knew.

Now, defense counsel's core argument as we understand it is that the defendant's substantial assistance, which is very significant, ideally it should be weighed against his misconduct and that his assistance to law enforcement outweighs his wrongdoing.

Now, it's very hard to know how to weigh those things. But the real point is -- here is we reject the premise. The message to defendants, to defense counsel, to judges, to juries, what AUSAs have said in this courtroom many many times is that cooperation is all or nothing. If you lie, if you commit crimes, certainly if you engage in sorts of

serial lies, serial criminal conduct at issue here, you will bear the full weight of your crimes that you have pleaded guilty to and all of your relevant conduct no matter how much assistance you gave to the government.

And we would be taking this position irrespective of the assistance he gave to the government. That's the whole point. It's not a balancing. So if he had fled to be there for 100 targets, the seizure of hundreds of kilograms of heroin, we would not be up here conceding sort of the defendant's argument that, well, it's in the wash, the good [46]outweighs the bad. That's actually a very dangerous idea. It's an incredibly dangerous idea.

What it leads to ex-ante, ex-ante is the idea that for a potential cooperator to think well, you know, the more I give the government the more latitude I have in terms of the misconduct in terms of the lies. And here, if I give them a lot, well, hopefully I won't be caught. But if I'm caught, you know, I did all of this good stuff. It will all come out in the wash. That's an incredibly dangerous idea.

Now do we always hold cooperators to this no matter how limited the lie, the criminal conduct? No, we don't. That's the truth of it. But the defendant's conduct here in its gravity, in its duration, in its deliberateness, is really towards one end of the spectrum and is far, far, far over the line.

The defense says in their sort of a reply letter that the government's position is not likely to encourage future defendants to want to cooperate. That's okay. The message

this sends is precisely that you should either tell the truth or don't cooperate. And this is, in part, an issue of general deterrence. When we say that cooperation is all or nothing, we mean it and it's not just words.

And defense counsel, also in his reply letter – and this was echoed today -- this idea that the defendant would never have pled to all these offenses unless he could rely on [47]the 5K letter. There was sort of oh, this whole – everything he pled to was bound up with cooperation, bound up with the expectation of the 5K letter. And we just -- we fundamentally reject this way of thinking which is at odds with the defendant's cooperation agreement, his Plea Allocution. Every conversation he had with the government throughout this entire process, the defendant knew, as every cooperator in this district knows, that the 5K letter comes if he tells the truth, if he doesn't commit crimes. If a cooperator does what the defendant here did here, there is no 5K letter, he has to bear the full weight of his criminal conduct. The defendant knew that. He just didn't think he was going to be caught.

Now, the defense also argues that a guideline sentence is too high, it's unduly harsh. It is characterized, our position, as breathtaking in its excessiveness. That's from the sentencing submission.

The bottom of the guidelines is 210 months, and that is a tremendous amount of time to say the least. I would note, just as an aside, probation has the same recommendation, and probation was aware-- is aware of the cooperation. I'll state for the record that's on page 18 of the PSR, justification second -- the second paragraph.

Also, defense counsel does not address some very important facts about the guidelines range and how we got here. There was a PFI in this case. We Nolle'd it. There is an [48]uncharged 924c here. Had the defendant told the truth when he proffered back in the day, pre-cooperation agreement, he would have to plead to a 924c. Defense counsel concedes as much when they admit that there's a two-level bump in the guidelines range. So if we had kept the PFI, if the defendant had pleaded guilty to the 924c, his mandatory minimum would be 25 years.

Now it is in that context that the government is asking for a guideline sentence where the guidelines mandatory minimum are much lower, much lower than they otherwise would be, in part, because of the defendant's lies. In part because we thought Nolle-ing the PFI was the right thing to do.

A few miscellaneous points I just want to address, again, just responding to a few points on the defense letter. First, this issue, just so the record is clear, referring to the gun as an assault rifle. Just so we're clear, that comes from the language that the defendant used at the safety valve proffer. That's in the contemporaneous notes. Maybe that's wrong. Maybe that's not an assault rifle. That's where we got that from. Nothing turns on that. But that's where that language came from.

The defense says in their submission there's no evidence the defendant personally enriched himself. That's not true. At the very least, he collected thousands in dollars excuse me thousands of dollars in drug debt, drug

debt from Zgrodec. He also was paid for cocaine that was sold by an [49]associate on consignment. At page five of the defense submission, the defense points out that in one place we clipped a sentence from the defense submission in a way that changes the meaning. That is a fair criticism. When we were editing our submission, we made a mistake with the quote. We apologize for that.

Finally, we also found an additional error in our submission which we want to correct. On page three, footnote four, describing the drugs that were at the stash location.

So the way it's written, it says that the stash location -- that we didn't -- well, so page three, footnote four, we described the drugs maintained at the stash location that we knew about from the investigation of the defendant. That's not correct.

The drugs ln that footnote are the drugs that we obtained at the other stash location, the one that the defendant lied about. This doesn't really matter. There were drugs at both stash houses. It's not in dispute. We just wanted to correct the error for the record.

Let me just end with the following. We get no pleasure in this. This is a sad day and we are very sensitive to what the defendant did for the government. But at bottom, this is about the integrity of the cooperation process for this defendant and for every defendant. And for that reason and for all the reasons discussed, we believe that a guideline sentence [50]is appropriate. Thank you.

THE COURT: Thank you, Mr. Gerber.

Anything else, Mr. Calhoun, before we give your client the last word?

MR. CALHOUN: Just a few brief comments. It hasn't been our position, ever expressed in writing or orally, that we've taken the position that it's okay to hold back on your cooperation if you're also doing good things. That's just not an argument that even occurred to me to make, much less, you know, would say out loud. It's just not correct and certainly if I -- in the future, I will have the case of David Greenberg not -- I'm not going to, obviously, mention his name, but I'm going to tell clients that based on personal experience, I have seen what can happen if the cooperation is anything less than everything it should be.

But I certainly don't think anybody at this table would even contemplate arguing that it's okay to hold back as long as you're doing good things, you can take your chances with the cooperation agreement. That's just not so.

The argument really was intended to place before the Court for consideration the substantial assistance that is a fact in this case. And that's really the beginning and the end of it. It wasn't intended to justify or to make any kind of end-run around the cooperation agreement obligations that exist.

[51]I should also say it's -- I understand Mr. Gerber's point about the withdrawal of the prior felony statement

and the fact that Mr. Greenberg was not charged with a 924c offense. It's hard to feel -- I'm certainly glad those things occurred the way they did. I don't think anybody was charged with a 924c for the -- with a weapon, the rifle or the handguns. So Mr. Greenberg is paying a price for it today in terms of the guideline enhancement and an adverse decision on his safety valve eligibility.

But to my knowledge, he's the only one who has suffered any kind of penalty even though other people had access to the stash house and I suppose could have been charged but nobody, to my knowledge, was.

It remains our position that the guidelines really are elevated by Mr. Greenberg's extensive drug dealing. But a lot of the drug dealing that goes into the guidelines calculation came from him and the government didn't know about. And I suppose if he had done more, he would have told more and the guidelines would be even higher. And there just comes a point, I submit, where it's out of proportion to the offense itself that is before the Court for sentencing. And I submit that, again, based on your Honor's earlier ruling today, that the mandatory minimum it's still -- it's a very lengthy extensive sentence. And I submit it's just enough for what he has done and what he's admitted to. It's a ten-year sentence. [52]He's still got years --years to go before --before he would be eligible for release.

And if he doesn't get the message that he violated the agreement and didn't do the things that he was supposed to do with the sentence that I'm proposing to your Honor,

I don't think he's going to get it by the sentence they're proposing either. It's just -- again, it's -- I can't say it any better than a statute. It's sufficient. It's sufficient.

I have my own opinion about whether it's more than necessary, but there's a mandatory minimum. Congress has spoken and I can't contradict them, of course, but that really is my response to Mr. Gerber.

THE COURT: Okay. Thank you very much, Mr. Calhoun.

Mr. Greenberg, is there anything you'd like to say before the Court imposes sentence?

THE DEFENDANT: Yes, your Honor. Your Honor, is there any way I could speak to my family before I speak?

THE COURT: That's up to the marshals.

THE DEFENDANT: I love you.

Your Honor, this is a hard day today, your Honor. As the government said -- first and foremost, I just want to apologize to the Court, I want to apologize to Michael Gerber, Ilan Graff and Andrei, and I want to apologize to my family. I can't go back in time and take away the things I did. All I can do is work on myself.

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[56]the heart. You could read through people. I know you could read, I know you could see the sincerity in my

words. I stand before a changed man and I ask for grace. Because whatever you give me, I don't deserve. I just plead for grace, plead for grace. Thank you, your Honor.

THE COURT: Okay. Thank you, Mr. Greenberg.

The Court's task is to determine what sentence is sufficient but no more than necessary to achieve the goals of the sentencing laws as they apply to Mr. Greenberg and to his case.

To do that, I have considered, as required, all the factors set forth in 18 U.S.C. Section 3553(a). In doing that, I have carefully considered the presentence report as well as the substantial written submissions that have been filed in this case. And of course I've considered what everyone has had to say here today.

Now in terms of the 3553(a) factors, we're told by the higher courts that the starting point is what the guideline calculation yields. That calculation is set forth as modified, but without objection, except for the safety valve issue at paragraphs 16 through 37 of the presentence report.

The base offense level is 36. And we get to that by doing a marijuana equivalency calculus of all of the narcotics that Mr. Greenberg is responsible for selling. That's discussed at paragraph 17 of the presentence report and I adopt [57]it.

The bottom line is the marijuana equivalent of the weight involved here is 35,371-kilograms. And so

consulting the drug quantity table at Section 2D.1(c)2, that's how we get to 36. Because Mr. Greenberg was in possession of a firearm, the two-level enhancement pursuant to Section 2D1.1(b)(1) applies. And also because Mr. Greenberg maintained premises for the purpose of distributing a controlled substance, a two-level enhancement is warranted pursuant to 2D1.1(b)12.

This adjusts the offense level to 40, but three levels come off because of Mr. Greenberg's acceptance of responsibility as reflected in his timely guilty plea. That's pursuant to Sections 3E1.1(a) and (b).

Notwithstanding several prior convictions, Mr. Greenberg's criminal history score is zero and his Criminal History Category is I, that's because his prior convictions have been deemed to be relevant conduct.

So a total offense level of 37 and a Criminal History Category of I, the guideline range we talked about is appropriately calculated at 210 to 262 months, again, with the asterisk being the objection related to safety valve. So that's the math.

In terms of the other 3553(a) factors, starting with Mr. Greenberg's personal history and characteristics and as is often the case it's complicated here. Mr. Greenberg rightly [58]focuses on and Mr. Calhoun, of course, amplifies this point on what it is Mr. Greenberg has done since he was remanded in this case.

The history before then, going back to Mr. Greenberg's childhood and up through his long run of narcotics dealing,

is obviously very troubling. But it's better, I think, to focus on what Mr. Greenberg has done since then. There's no doubt, Mr. Greenberg, in my mind that when you were remanded after the relationship with the government collapsed, that that was a profound wake-up call for you. You were looking at a substantial amount of time, mandatory minimum. The PFI was Nolle'd when?

MR. GERBER: At some point in the past year, your Honor.

THE COURT: So at the time, you were looking at mandatory 20. And there are some people who can wilt, understandably, when faced with that belief future and there are some who can try to seize the moment. And I think you've -- the record is pretty clear you have done the latter.

Now this is not completely out of character. The letters that are submitted on your behalf speak volumes about your many fine qualities. And I don't disagree with you that if you had made different choices earlier in life you could be standing where Mr. Calhoun is standing, you could be the lawyer, you could be the doctor, you could be a business person [59]or an architect or whatever. There's no doubt in my mind in terms of your intelligence and your personal charisma that the path could have been very different. And you're going to have to believe in that so you can make sure you pick the right path going forward.

No doubt you have the unconditional support of the people in the back and the others who wrote letters for you

who couldn't be here I'm sure for perfectly understandable reasons. You're going to need to rely on that support because nobody can do it alone.

But, you know, the warden's letter, just as an example, obviously speak volumes about what you could do when you put your mind to it. It's not every day a warden writes a letter for someone getting sentenced. Its not unheard of, but it's not every day.

I don't know what to make of some of the decisions you made after pleading guilty because they were reckless in the sense that they were not going to ultimately bear fruit. They were self-destructive because as Mr. Gerber mentioned, you know, the way these things work is that you're in for a penny, you're in for a pound. You have to bear your soul and fess up to everything you've done because that could subject you to liability. And the government needs that when it presents a cooperator that -- the story it wants to tell is this individual has only one incentive and that is to tell the truth [60]because if they don't tell the truth, they're looking at this amount of time. And of course the reason they're looking at this amount of time is because of all the crimes that have been admitted to and committed.

And the reason they need to be able to tell that story is because the Mr. Calhoun's of the world will tear apart any witness who goes 50/50 on them, right, and you understand that. And it makes this case, I think, so tragic because your a moment of redemption. This is one, but there was an earlier one, right, that's the -- that's one of the things

that that process does is it offers redemption because by bearing your soul, you hope to wipe the slate as much as possible. And it would not be unheard of for someone to -- having spent four plus years in jail to get a sentence of time served to acknowledge the redemption. And that's the tragedy in this case, is that I just wish you could have seen the moment a little earlier and to capitalize on the chance at redemption.

Now in terms of some of the other factors on the 3553(a) that focus on the offense conduct, the need to impose a sentence and promote respect for the law, provides for just punishment, accounts for the seriousness of the criminal conduct. This was, obviously, very serious conduct that you were involved in, narcotics distribution on a grand scale, which is really nothing other than profiting on other people's addictions. And the people whose lives were ruined or [61]adversely affected are not here today, but they're out there. They don't -- they're not identified in a case like this. But the reason why the law has things like very harsh mandatory minimums and high guidelines is to reflect the impact that this type of activity has on society.

Now Mr. Calhoun rightly makes the point, this is not a case where you are believed to have engaged in any violence. The gun possession issue is significant legally for reasons you know and we've discussed, but there's no evidence that you used the gun, that you threatened the use of the gun. Now of course all of that is reflected in the guidelines. The guidelines would be higher if a firearm was discharged or if somebody got hurt. But nonetheless, it certainly bears noting for the record.

Deterrence. General deterrence, right, is the notion that people who engage in this should understand that this type of conduct should understand that there is a potentially high price to be paid. Again, that's why the high sentence ranges are what they are and the high mandatory minimums to try to convey that message.

Relatedly, here there's the point that Mr. Gerber made about protecting the integrity of the cooperation process. The message can't be that you can tell the truth at an 80 percent level or you can tell 100 percent of the truth about your past but then do 80 percent compliance in terms of letting [62]the government know about things you're doing that you're not supposed to be doing. You can't bargain that. It's got to be all or nothing and I've explained why, because it's a very delicate process, this cooperation process. The stakes are high. Someone sitting at the defense table may be looking at mandatory 10, mandatory 20, mandatory life. And from the government's perspective, the process has to play out with 100 percent integrity because the justice system has to strive as much as possible for 100 percent in terms of getting the right answer. And if the incentives are such that if people feel like they have wiggle room to lie, then it's not just a fact -- the government isn't the victim, it's the system of justice that's the victim. It may be a person who's wrongly convicted who's the victim. The whole system suffers when its integrity is threatened.

And so I understand the government's position here. And this is -- to be honest with you, this is the first time I've had a case -- I'm been doing this job now, what, 14

years where I've had anything like this. And I understand the government's viewpoint that it feels it needs to -- it's the sort of flip side of deterrence. It needs to -- it feels it needs to defend the process so it sends the message to people if you don't want to cooperate, you don't have to cooperate. It's fine. And you can go to trial and plead guilty to whatever the charge is. But if you're going to cooperate, [63]you've got to come clean and you've got to stay clean and you've got to make sure you don't break the law and you've got to be brutally honest about everything, and anything short of that is not viable. And that's a message they want sent here and I understand that.

Now on the other hand, I think it would be unfair to you to pretend like your cooperation wasn't helpful, because it was. Mr. Calhoun talked at length about the case that is all done, the case in front of Judge Briccetti. The information, Mr. Calhoun surmises, was compelling enough where people didn't even go to trial. There was lots of reasons why people don't go to trial, but it's certainly one reason that the person said well, there's a lot of evidence against me here so I'm going to try to cut the best deal I can.

So I think that's a factor here. I think it's tricky because it does risk sort of the bargaining of that information and sort of saying but I -- so I should get credit for that and the weight has sort of excused the misconduct. But I still think it would not be right to pretend that your information wasn't helpful.

The need to avoid unwarranted disparity of course is a factor, not only comparing you to the hypothetical person

that's charged with similar conduct, but also to the would-be cooperator. You know, I think a sentence that comes close to how I might have sentenced a cooperator who did everything [64]right would yield unwarranted disparity, because the cooperator who goes all the way has earned that sentence reduction. And it's hard to quantify. Can we say, okay, the cooperation here was at an 80 percent level, a 75 percent level so, therefore, there should be that much reduction? No. Because I do think that the government is right. It doesn't work on a sliding scale. So I've considered that as well.

Where I come out on all of this, is that I think that the biggest mitigating factor for Mr. Greenberg is the work he's done since his remand in this case. And it's been a lot of work, which is another way of saying I don't give as much weight to the cooperation. I think it should be considered, but I'm more persuaded by the government's view on protecting the integrity of the cooperation process.

And I'm very troubled by the combination of the substantial criminal history because even though Mr. Greenberg has a Criminal History I, he's got an extensive criminal history. And the probation department notes this in its recommendation, right. This is, what, the fourth conviction and that combined with the recidivous conduct.

You were sitting on the perfect moment. You controlled what you were going to do once you were -- entered this opportunity at redemption, the cooperation agreement. And you dropped the ball on a number of occasions in ways that are very serious, and that to me is troubling.

[65]And so in considering all of the 3553(a) factors, it's the judgment of the Court that the sentence that is sufficient but no more than necessary is that Mr. Greenberg be sentenced to the custody of the attorney general for a period of 180 months to be followed by five years of supervised release. I'm not going to impose a fine because he can't afford one. There's no restitution and the forfeiture is in the amount of?

MR. GERBER: It's actually for specific property, your Honor. It's a certain dollar amount and a car.

THE COURT: Yes. So it's -- all rights, title and interest in what's defined as the specific property in the preliminary agreement. And the specific to property is defined as $3,000 in US currency, $199 in US currency, $3,000 in US currency, $500 in US currency, $5,035 in US currency, $100 in US currency and a 2012 Acura TL with a VIN number of 19UUA9F5XCA002666. And that's the entirety of the specific property; is that right?

MR. GERBER: Yes, your Honor.

THE COURT: Okay. The special assessment is $100. The mandatory conditions of supervised release are that Mr. Greenberg not commit another federal, state or local crime and that he not unlawfully possess a controlled substance, a firearm or destructive device.

I'm going to suspend the normal drug testing

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