

No. _____

In the Supreme Court of the United States

GAYLE McNAMARA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT

*ON PETITION FOR A WRIT OF CERTIORARI
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT*

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A defendant who has shown that the district court mistakenly deemed applicable an incorrect, higher Guidelines range has demonstrated a reasonable probability of a different outcome. Here, the district court mistakenly classified the petitioner in a higher criminal history category than he should have, and mistakenly concluded that an offense level enhancement was appropriate. Nonetheless, the court of appeals found that the “downward-variant sentence ultimately imposed was ‘untether[ed]’ from any error as to criminal history category, to the extent any such error occurred,” and made no finding at all as to the offense level enhancement. Therefore, the court of appeals dismissed petitioner’s appeal. Should the petitioner’s appeal be reinstated?

(I)

PARTIES TO THE PROCEEDING

Petitioner is Gayle McNamara, who was appellant in the court of appeals.

Respondent is the United States of America, which was appellee in the court of appeals.

DIRECTLY RELATED PROCEEDINGS

United States v. Ramon Rodriguez, U.S. District Court, D.N.H., Case No. 1:16-cr-00161-01-JL, Judgment on July 21, 2017.

United States v. Amy Tremblay, U.S. District Court, D.N.H., Case No. 1:16-cr-00161-02-JL, Judgment on June 5, 2020.

United States v. Judith Ardolino, U.S. District Court, D.N.H., Case No. 1:16-cr-00161-03-JL, Judgment on November 20, 2017.

United States v. Mary Levis, U.S. District Court, D.N.H., Case No. 1:16-cr-00161-04-JL, Judgment entered on September 30, 2019.

United States v. Gayle McNamara, U.S. District Court, D.N.H., Case No. 1:16-cr-00161-05-JL, Judgment entered on September 12, 2018.

United States v. Kevin Roche, U.S. District Court, D.N.H., Case No. 1:16-cr-00161-06-JL, Judgment entered on November 1, 2018.

United States v. Jessica Sederquest, U.S. District Court, D.N.H., Case No. 1:16-cr-00161-07-JL, Judgment entered on March 22, 2019.

United States v. Eric Sederquest, U.S. District Court, D.N.H., Case No. 1:16-cr-00161-08-JL, Judgment entered on August 1, 2017.

III

United States v. Stephen Tolmie, U.S. District Court, D.N.H., Case No. 1:16-cr-00161-09-JL, Judgment entered on July 19, 2018.

United States v. Gayle McNamara, U.S. Court of Appeals for the First Circuit, Case No. 18-1921.

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No. _____

GAYLE McNAMARA, PETITIONER,

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UNITED STATES OF AMERICA, RESPONDENT

*ON PETITION FOR A WRIT OF CERTIORARI
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT*

PETITION FOR WRIT OF CERTIORARI

Gayle McNamara respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINION BELOW

The judgment and opinion of the United States Court of Appeals for the First Circuit (Appendix (“A”) 1-2) is unreported. The judgment of the district court (A 3-9) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 2020. On March 19, 2020, this Court ordered the deadline to file any petition for a writ of certiorari due on or after March 19, 2020 to be extended to 150 days from the date of the lower court judgment. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

(1)

STATUTORY PROVISIONS

U.S.S.G. § 2D1.1(b)(12) (2016) provides as follows:

(12) If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by 2 levels.

U.S.S.G. § 4A1.2(m) (2016) provides as follows:

(m) Effect of a Violation Warrant

For the purposes of §4A1.1(d), a defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (e.g., a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence if that sentence is otherwise countable, even if that sentence would have expired absent such warrant.

STATEMENT

Gayle McNamara was, at the time of sentencing, a 57-year-old woman with a troubled past (Record (“R”) 94).¹ She was a lifelong addict who allowed her apartment to be used by drug runners in exchange for heroin to support her habit (R 94). She ended up charged in a one count indictment with knowingly and intentionally conspiring to distribute and to possess with intent to distribute controlled substances including heroin in violation of 21 U.S.C. §§ 841(a)(1) and 21 U.S.C. § 846 (R 14-15). The district court had original jurisdiction pursuant to 18 U.S.C. § 3231, which gives federal district courts jurisdiction over offenses against federal laws.

McNamara signed a plea agreement, in which she waived her right to appeal her sentence with exceptions not relevant here, and pleaded guilty (R 16-27).

¹ Petitioner cites to the Record Appendix, filed in the U.S. Court of Appeals for the First Circuit, pursuant to Supreme Court Rule 12.7.

According to the plea agreement, in exchange for heroin, McNamara allowed drug runners to deliver heroin to customers at her residence (R 17). Sometimes, McNamara initiated the transactions by calling a trafficker and placing orders on behalf of customers (R 17). Other times, a trafficker would call McNamara to ask if she (the trafficker) could send customers to meet runners at McNamara's residence (R 17). McNamara was responsible for facilitating the distribution of between one and three kilograms of heroin (R 18).

McNamara was ultimately sentenced to a term of 48 months imprisonment and a term of three years supervised release (R 113-114). Only two issues concerned the calculation of the Guidelines at sentencing (A 13). The first issue was whether the district court should enhance McNamara's offense level, pursuant to U.S.S.G. § 2D1.1(b)(12), for maintaining a premises for the purposes of distributing a controlled substance (A 14). As to that issue, the district court found that, based on the facts set forth in the presentence report, the enhancement applied (A 30). Nonetheless, the district court found that the facts supporting the enhancement were contested and that the government had failed to prove those facts (A 30-31).

The second issue was whether the district court should count criminal history points because McNamara had a very old probation violation warrant for a non-countable sentence outstanding at the time she committed her federal crime, where the warrant was withdrawn immediately following her arrest in this case (A 25). The district court found that because McNamara had a probation warrant at the time she committed her crime, she was under a criminal justice sentence (A 28). As a result,

the district court increased her criminal history category from I to II (A 19). The district court declined to depart downward from criminal history category II to category I, but allowed a variance (A 28-30).

As a result of the court's decisions regarding the premises enhancement and criminal history points, McNamara's offense level was 24, her criminal history category was II, and her Guidelines sentencing range was 57 to 71 months imprisonment (A 31-32). At criminal history category I, her sentencing range would have been 51 to 63 months imprisonment. U.S.S.G. Chapter 5, Part A (2016).

Based on her substantial post-arrest efforts to obtain help for her addiction, among other things, McNamara argued for a time-served, six-month sentence of incarceration (A 34-39).

The district court imposed a sentence of 48 months imprisonment, explaining the considerations which guided its discretion as follows:

The Court has considered the defendant[]'s arguments and the probation officer's comments pertaining to the length of time she lived in her apartment relative to the conspiracy; her very difficult childhood in an abusive home and followed by foster care; her violent and abusive first marriage; the loss of her husband in her second marriage, which I remember from her time in LASER Docket, was very traumatic for her; the relative brevity of her previous incarceration; the age of some of her older convictions; her ill health; and her rehabilitative efforts through the Strafford County House of Corrections Therapeutic Community Program.

These factors, whether viewed separately or collectively, viewed in the context of the offense conduct, the defendant's history, the need for deterrence, respect for the law, and public protection make a variance below the guideline sentencing range appropriate in this case for the following reasons.

First is what the Court has already noted with respect to what appears to be a highly technical and not necessarily warranted bump in her criminal history category to a Category II.

Second, all the factors I just set forth in that long laundry list I set forth, to me -- all of which, to some degree, contribute to the justification for a variance.

And, third, the ones briefed by defense counsel and discussed in court today.

And, third -- but why not -- [I] guess the question becomes why not a greater variance than the Court's imposed.

The Court's view is that this is just a very, very serious offense. The fact is that the adjustment for allowing a premises to be utilized as a drug trafficking hub probably was warranted in this case. The Court declined to provide it based not on its understanding of the evidence, but just based on the quality of the proof at a sentencing hearing.

And I -- you know, I hope the Court's approach to that issue is familiar to counsel and I -- I know it is familiar to counsel, so I -- I draw certain inferences from the fact sometimes whether and the extent to which the parties present evidence. But that adjustment could have easily been applied, which would have resulted in, even with the same type of variance, a much more severe sentence.

So the Court, in declining to apply that adjustment, approached the sentence in a way that mitigated the conduct involved here.

This was a -- having seen a -- having seen a fair number of drug rings and drug trafficking organizations and conspiracies over, you know, a decade as a judge and many years as a drug prosecutor, this was one of the more sophisticated operations the Court has seen. It really was. It had facilities.

It wasn't just a bunch of people running around in cars delivering heroin. I mean, people like the defendant and [other codefendants] facilitated this conspiracy in a major way, yes, not with much of an economic motive, but more as a way of feeding an addiction, but in a way that allowed this conspiracy to operate with a level of cover and protection not normally enjoyed by many drug rings.

There were -- there were stores to visit this conspiracy to buy heroin and the defendant's home was one of them. It's a very serious offense and it

requires a serious sentence and it's a very serious drug that has plagued this community to the great detriment and danger to the public.

So that's why the Court's allowing a variance, but that's also why the Court's not allowing a greater variance[.]

(A 51-54).

In the court of appeals, McNamara argued that her appeal waiver ought not be enforced because the district court had made errors in calculating her Guidelines range, and that those errors meant that enforcing her appeal waiver would work a miscarriage of justice (Brief (“B”) 11-13). In particular, she argued, *citing Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016), that, even though the court had granted a variance from the Guidelines range, the Guidelines were “in a real sense the basis for the sentence” and that by demonstrating errors in the application of the Guidelines, she therefore demonstrated prejudice (B 12-13). As to the district court’s error in calculating her criminal history, McNamara cited *United States v. Blocker*, 612 F.3d 413, 416 (5th Cir. 2010) for the proposition that it was plain error to “consider a probation revocation warrant that related to a 1987 conviction, [even though the conviction was] uncountable because it was outside of the 10 or 15 year time frame allowed under the sentencing Guidelines” (B 13-15). As to the premises enhancement, McNamara argued that “[i]f there was insufficient evidence to allow an upward adjustment for use of the premises, the reasonable inference is that there was also insufficient evidence to allow use of the premises to be a factor decreasing the amount of the variance that would be granted” (B 16-17).

Noting that McNamara “does argue that enforcement of the waiver would work a miscarriage of justice because the district court made certain errors when

calculating her criminal history category,” the court of appeals nonetheless dismissed McNamara’s appeal, holding as follows:

We need not definitively decide whether the district court made those errors. McNamara received a sentence below even the range she pressed at sentencing, and it is sufficiently clear from the district court’s statements at sentencing that the downward-variant sentence ultimately imposed was “untether[ed]” from any error as to criminal history category, to the extent any such error occurred. *Cf. United States v. Taylor*, 848 F.3d 476, 498 (1st Cir. 2017) (applying *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016), in plain error context).

(A 1). Notably, the court of appeals did not acknowledge McNamara’s arguments concerning the premises enhancement.

REASONS FOR GRANTING THE PETITION

The court of appeals has decided an important federal question in a way that conflicts with the relevant decisions of this Court. In this case, the court of appeals finding that the downwardly variant sentence was “untethered” from any Guidelines computation errors flies in the face of this Court’s holding, in *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1348 (2016), that a “defendant can rely on the application of an incorrect Guidelines range to show an effect on his substantial rights.” In this case, McNamara’s sentence was not in any sense “untethered” from the Guidelines calculations. The district court calculated the Guidelines range at 57 to 71 months, and then varied downward from that Guidelines range to 48 months, explicitly putting on the record the reasons he had varied downward by nine, but only by nine, months. Notably, the district court’s sentence was only three months lower

than the low-end of the Guidelines had the district court accepted her calculations, rather than erroneously inflating her criminal history category.²

As this Court held in *Molina-Martinez*, 136 S. Ct. at 1346, “the Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar.” Such was the case here. The Guidelines clearly “inform[ed] and instruct[ed] the district court’s determination of an appropriate sentence.” *Id.* This is not a case where “the district court thought the sentence it chose was appropriate irrespective of the Guidelines range.” *Id.* Instead, “the record is silent as to what the district court might have done had it considered the correct Guidelines range.” *Id.*, 136 S. Ct. at 1347. As a result, the court of appeals should have found that the incorrect range sufficed to show an effect on McNamara’s substantial rights. Indeed, the district court explicitly stated that it had considered “the advisory sentencing range established by the U.S. Sentencing Guidelines” (A 54-55). *See, e.g., United States v. Feldman*, 793 Fed. Appx. 170, 175 (4th Cir. 2019) (plain error where district court “reiterated that this sentence was imposed only after having ‘carefully calculated’ [defendant’s] Guidelines range and with the Guidelines ‘calculation very much in mind’”); *contrast United States v. Green*, 798 Fed. Appx. 527, 530-532 (11th Cir. 2020) (no need to review Guidelines calculation for error pursuant to *Molina-Martinez* where district court explicitly stated “it’s the sentence I would impose regardless of the objections or the rulings thereto”).

² A contention the court of appeals did not decide but rather dodged by dismissing McNamara’s appeal.

While the court of appeals was reviewing McNamara’s appellate issues under a waiver of appeal rather than the plain error standard at issue in *Molina-Martinez*, the analysis is the same. Although the First Circuit will not grant relief from an appeal waiver for “garden variety” error, a miscarriage of justice is grounds for such relief. *United States v. Cabrera-Rivera*, 893 F.3d 14, 23-24 (1st Cir. 2018). As *Molina-Martinez* held, an erroneously high Guidelines range will ordinarily suffice to demonstrate a violation of the defendant’s substantial rights – a more rigorous standard than garden variety error. The same court of appeals, applying *Molina-Martinez* in another case, has already held that an erroneously high Guidelines range “compromised the fairness and integrity of [the defendant’s] sentencing.” *United States v. Taylor*, 848 F.3d 476, 499 (1st Cir. 2017). Likewise, the court of appeals has previously recognized that a difference in potential jail time arising from a sentencing calculation error threatens a miscarriage of justice. *United States v. Torres-Rosario*, 658 F.3d 110, 117 (1st Cir. 2011).

Here, like in *Molina-Martinez*, 136 S. Ct. at 1347, the court of appeals opinion in this case has prevented McNamara “from establishing on appeal that there is a reasonable probability the Guidelines range applied by the sentencing court had an effect on [her] within-Guidelines sentence.” Although the court of appeals cited *Molina-Martinez* in dismissing McNamara’s appeal, the court’s opinion directly conflicts with the holding of that case. As a result, the court of appeals decided an important federal question in a way that conflicts with the relevant decision of this Court (*i.e.*, *Molina-Martinez*).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Petitioner
Gayle McNamara
By her Attorney,

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United States Court of Appeals For the First Circuit

No. 18-1921

UNITED STATES,

Appellee,

v.

GAYLE McNAMARA,

Defendant - Appellant.

Before

Torruella, Lynch and Kayatta,
Circuit Judges.

JUDGMENT

Entered: April 1, 2020

Defendant-appellant Gayle McNamara challenges her below-Guidelines sentence of forty-eight months' imprisonment, imposed after she pled guilty to conspiracy to distribute and to possess with intent to distribute controlled substances, in violation of 21 U.S.C. §§ 841(a)(1) and 846. The government has moved for summary disposition of the appeal based on an appeal waiver.

In her Plea Agreement (D. Ct. Dkt. #84), McNamara waived any appeal of her sentence so long as the sentence ultimately imposed was "consistent with the drug quantity stipulation specified [elsewhere] in" the Plea Agreement. On appeal, McNamara does *not* argue that the appeal waiver was invalid on its face, that it was unknowing or involuntary, or that the sentence ultimately imposed did not trigger the waiver. Nonetheless, she does argue that enforcement of the waiver would work a miscarriage of justice because the district court made certain errors when calculating her criminal history category. We need not definitively decide whether the district court made those errors. McNamara received a sentence below even the range she pressed at sentencing, and it is sufficiently clear from the district court's statements at sentencing that the downward-variant sentence ultimately imposed was "untether[ed]" from any error as to criminal history category, to the extent any such error occurred. Cf. United States v. Taylor, 848 F.3d 476, 498 (1st Cir. 2017) (applying Molina-Martinez v. United States, 136 S. Ct. 1338 (2016), in plain error context).

Accordingly, the government's motion for summary disposition is allowed, and the appeal is dismissed. See 1st Cir. R. 27.0(c).

By the Court:

Maria R. Hamilton, Clerk

cc:

Robert Barney Mann
Gayle McNamara
Donald A. Feith
Seth R. Aframe

UNITED STATES DISTRICT COURT

SEP 12 2018

District of New Hampshire

UNITED STATES OF AMERICA

v.

Gayle McNamara

JUDGMENT IN A CRIMINAL CASE

FILED

Case Number: 16-cr-00161-JL-5

USM Number: 15483-049

Robert S. Carey, Esq.

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) 1 of the Indictment

pleaded nolo contendere to count(s) _____ which was accepted by the court.

was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 846 and 841(a)(1)	Conspiracy to Distribute and to Possess with Intent to Distribute	10/12/16	1

The defendant is sentenced as provided in pages 1 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) _____ is are dismissed on the motion of the United States.

Count(s) _____

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

8/16/2018

Date of Imposition of Judgment

Signature of Judge

Joseph N. Laplante U.S. Chief Judge

Name and Title of Judge

Date

9/12/18

DEFENDANT: **Gayle McNamara**
CASE NUMBER: **16-cr-00161-JL-5**

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
48 months

The court makes the following recommendations to the Bureau of Prisons:

- It is recommended to the Bureau of Prisons that the defendant participate in the intensive drug education and treatment program.
- The Court calls to the attention of the custodial authorities that the defendant has a history of mental health issues and recommends the defendant be allowed to participate in any available mental health treatment programs while incarcerated.
- The Court further recommends that defendant be placed at FMC Devens, MA or FCI closest to district of NH.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

- at _____ a.m. p.m. on _____.
- as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- before 2 p.m. on _____.
- as notified by the United States Marshal.
- as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Gayle McNamara
CASE NUMBER: 16-cr-00161-JL-5

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

3 years

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(Check, if applicable.)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3363 and 3663A or any other statute authorizing a sentence of restitution. *(Check, if applicable.)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(Check, if applicable.)*
7. You must participate in an approved program for domestic violence. *(Check, if applicable.)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Gayle McNamara
CASE NUMBER: 16-cr-00161-JL-5

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at the www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: Gayle McNamara
CASE NUMBER: 16-cr-00161-JL-5

SPECIAL CONDITIONS OF SUPERVISION

1. You must participate in a mental health treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). You must pay for the cost of treatment to extent you are able, as determined by the probation officer.
2. You must take all mental health medications that are prescribed by your treating physician. You must pay for the cost of treatment to extent you are able, as determined by the probation officer.
3. You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030 (e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. The probation officer may conduct a search under this condition only when reasonable suspicion exists that you have violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.
4. You must participate in a substance abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). You must pay for the cost of treatment to extent you are able, as determined by the probation officer.
5. You must submit to substance abuse testing to determine if you have used a prohibited substance. You must pay for the cost of treatment to extent you are able, as determined by the probation officer. You must not attempt to obstruct or tamper with the testing methods.
6. You must not use or possess any controlled substances without a valid prescription. If you do have a valid prescription, you must disclose the prescription information to the probation officer and follow the instructions on the prescription.
7. You must not go to, or remain at any place where you know controlled substances are illegally sold, used, distributed, or administered without first obtaining the permission of the probation officer.

DEFENDANT: Gayle McNamara
CASE NUMBER: 16-cr-00161-JL-5

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

<u>TOTALS</u>	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
	\$ 100.00	\$	\$	\$

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportionate payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
TOTALS	\$ 0.00	\$ 0.00	

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Gayle McNamara

CASE NUMBER: 16-cr-00161-JL-5

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A Lump sum payment of \$ 100.00 due immediately, balance due
 not later than _____, or
 in accordance C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk, U.S. District Court, 55 Pleasant Street, Room 110, Concord, N.H. 03301. Personal checks are not accepted.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.
 The defendant shall pay the following court cost(s):
 The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

* * * * *

UNITED STATES OF AMERICA

v.

GAYLE McNAMARA

* * * * *

* 1:16-cr-161-05-JL
* August 16, 2018
* 10:10 a.m.

*

*

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE JOSEPH N. LAPLANTE

Appearances:

For the Government:

Donald A. Feith, AUSA
United States Attorney's Office

For the Defendant:

Robert S. Carey, Esq.
Orr & Reno PA

Probation Officer:

Sean Buckley

Court Reporter:

Liza W. Dubois, RMR, CRR
Official Court Reporter
United States District Court
55 Pleasant Street
Concord, New Hampshire 03301
(603) 225-1442

1 P R O C E E D I N G S

2 (Chambers conference from 10:10 a.m. until 10:25 a.m.)

3 THE CLERK: The Court has before it for
4 consideration this morning a sentencing in criminal case
5 16-cr-161-05-JL, United States of America versus Gayle
6 McNamara.

7 THE COURT: All right. We're here for
8 Ms. McNamara's sentencing. Robert Carey is here for the
9 defendant. AUSA Donald Feith is the prosecutor on the
10 case and is here in court today.

11 For the record, what the Court has reviewed in
12 preparation for this sentencing hearing is the
13 presentence report -- there are two addenda to the
14 report. I've reviewed all the correspondence between
15 the probation officer and counsel in the case, where
16 they -- counsel asserted their respective positions
17 regarding the PSR and prior drafts of the PSR. And the
18 Court has reviewed three sentencing memoranda, documents
19 277 -- I'm sorry, 2 -- hmm. Document 233, document 225,
20 and document 277, two memoranda filed by the defendant
21 and one by the prosecution.

22 All right. Ms. McNamara, good morning.

23 THE DEFENDANT: Good morning.

24 THE COURT: The first thing that the Court has
25 to do -- I know you've had some eye problems and you've

1 had a surgery. Can you see me okay today?

2 THE DEFENDANT: I can see out of my left eye.

3 THE COURT: Okay. And you're wearing some
4 special glasses there. Those are to shield you from the
5 light, right?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Okay. The first thing the Court
8 has to do in this case, in every case, is determine what
9 the United States Sentencing Guidelines recommend for
10 your case. I don't have to impose the sentence that the
11 guidelines recommend. They're advisory guidelines.
12 They're not mandatory. But I do have to determine what
13 the guidelines recommend for your case.

14 You've talked about the guidelines with
15 Mr. Carey, right? You understand how they work?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: All right. One of the tools I use
18 to determine what the guidelines recommend is this
19 Presentence Investigation Report. In this case, it's 24
20 pages long. It's written by a probation officer, Sean
21 Buckley. There's also a couple of addenda that he
22 followed up with and added to the report.

23 Have you read these?

24 THE DEFENDANT: Yes, I have, sir.

25 THE COURT: And did you go over them with

1 Mr. Carey?

2 THE DEFENDANT: Excuse me?

3 THE COURT: Did you go over them with

4 Mr. Carey?

5 THE DEFENDANT: Yes.

6 THE COURT: All right. Do you have any
7 questions you want to ask me about the reports?

8 THE DEFENDANT: No, sir.

9 THE COURT: All right.

10 Mr. Carey, I've read your sentencing
11 memoranda. As far as I can tell, there appear to be two
12 objections you have to findings in the report. Am I
13 right?

14 MR. CAREY: Yes. I believe there are three
15 that are --

16 THE COURT: One's a departure, depending on
17 what the Court decides about one of your objections.

18 MR. CAREY: Correct.

19 THE COURT: That's my -- that's how I look at
20 it.

21 MR. CAREY: Oh, the criminal history
22 calculations.

23 THE COURT: Yeah.

24 MR. CAREY: Correct.

25 THE COURT: So why don't we take them in

1 order. Why don't we start with -- why don't we start
2 with the total offense level one. It appears that you
3 have an objection to the guideline adjustment upward
4 based on Section -- guideline section 2B1.1(b) (12).
5 That's because the probation officer -- the PSR and the
6 probation officer recommended an adjustment regarding
7 the premises where Ms. McNamara lived and its
8 utilization for drug trafficking activities. Right?

9 MR. CAREY: Correct.

10 THE COURT: Go ahead.

11 MR. CAREY: Sure. Thank you, your Honor.

12 This is a factual determination and I cited
13 the *Jones* case out of the Fifth Circuit -- or
14 First Circuit for support.

15 The question is whether this apartment in
16 Lawrence on Tremont Street --

17 THE COURT: Yeah.

18 MR. CAREY: -- that Ms. McNamara had been
19 in --

20 THE COURT: Go ahead. I'm listening.

21 Go ahead.

22 MR. CAREY: -- for many years, rented it for
23 many years before she was involved in this activity
24 which began in 2014 and that she remained in after she
25 was charged in this activity and her involvement ended.

1 The question is whether the drug -- her
2 letting her apartment be used as sort of a -- for drug
3 runners to make transactions of heroin with users was
4 the principal use or primary use of this apartment or
5 whether it was incidental. I believe it's incidental
6 for a number of reasons.

7 This was Ms. McNamara's primary residence.
8 She received -- nobody else paid the rent. She didn't
9 receive any drug proceeds, she didn't package drugs, she
10 didn't process drugs, she didn't -- all she did was get
11 drugs to feed her addiction for letting the suppliers
12 use her apartment.

13 I was trying to think of -- I haven't seen
14 this in the cases, but I think one way the Court can
15 look at the factual determination of whether this was a
16 primary or incidental use over the entire time that she
17 was in this apartment is to say -- I know in 2016 there
18 were --

19 THE COURT: Let me stop you right there,
20 though, because it's an interesting point you've made --

21 MR. CAREY: Yup.

22 THE COURT: -- the conspiracy period,
23 vis-a-vis her length of residence there. But you just
24 said -- you just said whether it's the collateral or
25 incidental use for her time in the apartment -- is the

1 measure the time the person occupied the premises or is
2 the measure the time of the offense of the conviction?

3 MR. CAREY: It's the time -- it's the offense
4 of conviction, but in some cases they say, look, was
5 this apartment just rented for this purpose.

6 THE COURT: Uh-huh.

7 MR. CAREY: In other words, did they get --

8 THE COURT: Right.

9 MR. CAREY: And that's not the case here.

10 THE COURT: That's not the case here. I don't
11 even think the prosecutor would argue that that's the
12 case here, that it was rented for this purpose, although
13 maybe over time it became that, but it was -- it was her
14 home.

15 MR. CAREY: And I think another way to look at
16 this is if you say the -- and I think this overstates
17 the activity there -- but if you said every day for an
18 hour a day, there was drug activity in her apartment.
19 So for one hour a day for a week, there's drug activity.

20 THE COURT: Yeah.

21 MR. CAREY: The other 23 hours, there's
22 nothing.

23 If you extrapolate that, that's four percent
24 of the time that the apartment's involved in drug
25 activity. That clearly would be incidental. That's not

1 primary or the main purpose of the apartment.

2 THE COURT: Yeah.

3 MR. CAREY: And I think based on the actual
4 transactions that the government has alleged, it's far
5 less than four percent of the time that there's any drug
6 activity at this apartment during that period of the
7 conspiracy.

8 So in -- for those reasons, and I -- I also --
9 for those reasons, I think the facts established that
10 this was just incidental activity. Ms. McNamara
11 didn't -- as I said, didn't package drugs, didn't weigh
12 drugs, didn't handle cash for drugs, and didn't rent
13 this apartment just for the sake of this activity. I
14 think those are the -- those are the most compelling
15 facts.

16 There's one other thing I had an objection to
17 in the PSR which related to a statement made by
18 Ms. McNamara's son Patrick.

19 THE COURT: Yeah.

20 MR. CAREY: Who the PSR says he says something
21 in his proffer about the length of drug activity at the
22 apartment. I don't see it in the proffer statement I
23 received in discovery.

24 THE COURT: Patrick says -- Patrick brings it
25 back ten years.

1 MR. CAREY: Yes. And there's -- I don't see
2 that in his -- in his proffer, in the redacted proffer I
3 have, and I can't extrapolate it.

4 THE COURT: Yeah.

5 MR. CAREY: I would note he was arrested.

6 THE COURT: What's Patrick's last name? Is he
7 McNamara?

8 MR. FEITH: Yes.

9 MR. CAREY: He's McNamara.

10 THE COURT: Okay.

11 MR. CAREY: He was not living at that
12 apartment. In fact, in 2012 -- he's arrested in Maine
13 in 2015. In 2012, Ms. McNamara calls the police on him
14 because he's -- he has broken into the apartment and has
15 taken her car.

16 So if there's drug activity going on in that
17 period, there's no way Ms. McNamara would call the
18 police to bring any sort of scrutiny of law enforcement
19 on herself.

20 So I think Patrick's statements, I don't see
21 them in the proffer and I think the Court could find
22 that they're self-serving and not supported by the
23 record.

24 THE COURT: But Patrick was not a codefendant
25 in this case?

1 MR. FEITH: He was not.

2 THE COURT: Can you tell -- can I learn -- I'm
3 just curious about the circumstances under which Patrick
4 gives a proffer, if we can even talk about that on the
5 record. Is that --

6 MR. FEITH: His proffer was given to state
7 authorities after he had been stopped and arrested by
8 state authorities, the Maine Drug Enforcement Agency.

9 THE COURT: MDEA?

10 MR. FEITH: Yes.

11 So he gave, actually, two statements in that
12 context and those statements were written by state
13 authorities and provided to the federal DEA as part of
14 the case.

15 THE COURT: I see. Thank you.

16 And I'm just -- I mean, what's his status now?
17 Is he incarcerated in Maine?

18 MR. FEITH: I believe he was prosecuted in
19 Maine, your Honor. I don't know what his sentence was.
20 And I don't believe that Maine authorities used him as a
21 cooperating witness in any of their cases, but I'm
22 not -- I'm not sure on that.

23 THE COURT: Okay. And is that -- not that it
24 matters a lot, but I'm curious because drug prosecutions
25 can have a lot of arms and tentacles.

1 Is that case, you know, part of your, I don't
2 know, operation or is it related to this case or your
3 investigation?

4 MR. FEITH: Well, to the extent that Patrick
5 McNamara made statements concerning some of the sources
6 of his heroin that he got, some of those touch what was
7 Operation Crystal Clear, but not all of them, and some
8 of the activity was contemporaneous to the activity in
9 Crystal Clear, but there were also times when it was
10 not.

11 THE COURT: Is this Crystal Clear?

12 MR. FEITH: This is Crystal Clear.

13 THE COURT: Thanks.

14 Go ahead.

15 MR. CAREY: So I believe he was prosecuted --
16 I think he was prosecuted and did a state sentence in
17 Maine, is my understanding. I'm not sure if he's still
18 in custody or not.

19 MR. FEITH: Right.

20 THE COURT: That's what he said.

21 MR. FEITH: I don't know his current status.

22 THE COURT: Thank you.

23 All right. Government's adjustment --

24 MR. FEITH: Well, your Honor, to start off
25 with, I believe the relevant period is the period of

1 conspiracy. So it's from 2013 to 2016. We're not
2 relying on anything Patrick McNamara said to support the
3 premises enhancement.

4 What we're relying on is, in fact, the very
5 decision that is cited by Attorney Care, which is the
6 *Jones* decision, because *Jones* cites two other cases.
7 And I outlined the language from those cases in our
8 sentencing memorandum.

9 One of those was a Seventh Circuit case,
10 *United States vs. Flores-Olague*, O-l-a-g-u-e, which, you
11 know, has facts that are very similar to these facts --

12 THE COURT: Yeah.

13 MR. FEITH: -- which is that -- that in that
14 case, the defendant, you know, was found that he sold
15 and stored drugs nearly on a daily basis over a
16 three-year period. And, you know, that is essentially
17 what is our argument here is that the -- Ms. McNamara
18 allowed her place to be used as a delivery point over
19 the three-year period that she pled guilty to in the
20 conspiracy and although it wasn't on a daily basis, the
21 PSR indicates at least 92 deliveries, so that would be
22 every -- you know, every several days. And we think
23 that means that the premises -- it was not incidental to
24 the premises.

25 And I think you have to reject the -- the

1 analysis offered by the defense of do we need sort of a
2 temporal -- you know, how many minutes of drug
3 activity --

4 THE COURT: Yeah.

5 MR. FEITH: -- versus how many minutes in a
6 day because --

7 THE COURT: It would seem to me if someone
8 allowed their premises to be used once a day for five
9 minutes over a long period of time, that could support
10 the adjustment.

11 MR. FEITH: Right. Exactly. And --

12 THE COURT: Irrespective of his correct point
13 about the percentage of time involved, I don't think the
14 percentage of time is really the analysis.

15 MR. FEITH: I -- I would urge the Court not to
16 accept that as the analysis --

17 THE COURT: Yeah.

18 MR. FEITH: -- because it -- in this case, it
19 wouldn't encapsulate all the phone calls and, you know,
20 it would just encapsulate the times that people were
21 actually there delivering.

22 THE COURT: Yeah.

23 MR. FEITH: And so it becomes, I think, it's
24 more us to try to really figure out what the percentage
25 is.

1 THE COURT: Let me ask you this though,
2 Mr. Feith, because I read that number, too, that you
3 just referred to, the 90-something transactions.

4 MR. FEITH: Uh-huh.

5 THE COURT: I read that in the explanation in
6 the PSR of the adjustment involved here, which is
7 paragraph -- well, paragraph 22 is where the
8 adjustment's made to the number.

9 At the bottom of paragraph 15, page 11 of the
10 PSR --

11 MR. FEITH: Okay.

12 THE COURT: -- is where this is addressed.

13 MR. FEITH: Yup.

14 THE COURT: The second to the last sentence in
15 that paragraph: She allowed the DTO, the drug
16 trafficking organization, to conduct drug transactions
17 at her residence over many years, which included at
18 least 92 transactions during a one-year period.

19 Now, I think the many years -- that seems to
20 be relying on Patrick McNamara's statement because the
21 conspiracy didn't even last many years. So that --
22 that's not really the answer to my question, though.
23 That's just an observation. And if you disagree, I'm
24 sure you'll tell me.

25 But the 92 transactions, because I -- the 92,

1 where does that come from? Is that from paragraph 14
2 where there are toll records that suggest 92? Because I
3 couldn't find it in the --

4 MR. FEITH: That's how I took it, your Honor.

5 THE COURT: Okay. Okay.

6 MR. FEITH: The -- the 92 contacts that are
7 referenced in 14 comes from the -- well, from the T3
8 records that captured the calls as well as from some
9 other, I believe, toll records that preceded the T3.
10 But that's where the contacts come from. And I just
11 took it that the 92 contacts were the 92 transactions.
12 And I think that's a fair analysis.

13 As far as many years, your Honor, I think
14 three and a half years --

15 THE COURT: Yeah.

16 MR. FEITH: -- you know, falls within the
17 spectrum of many.

18 THE COURT: Yeah. All right. That's
19 reasonable. That's -- you know, that's -- I don't want
20 to call it semantics. It's advocacy. Reasonable minds
21 can differ. All right.

22 I think I understand the applicable law there
23 and the facts.

24 All right now you have another argument under
25 the PSR, Mr. Carey, regarding the criminal history

1 category involved here.

2 MR. CAREY: I do, your Honor. And it's my
3 view that the -- assigning her criminal history points
4 for the 1986 conviction and the 1991 probation violation
5 should not be used to calculate her -- she should not
6 receive criminal history points for those -- for those
7 incidents, those matters.

8 I rely on the *Blocker* case, which had similar
9 facts where they said, look, the offense that you're
10 trying to count is beyond the 10- or 15-year window so
11 it can't be counted. So you can't count that probation
12 violation as under the -- under the guidelines to add
13 points for criminal history.

14 THE COURT: Yeah.

15 MR. CAREY: The record's also very clear that
16 not only is this a 1991 probation violation warrant that
17 was out there, she was in court on October 25th, 2016.
18 The next day, that was withdrawn. And so that was, I,
19 think a bureaucratic oversight that that warrant was
20 still out there, that she was still considered in
21 violation of probation. It was certainly something that
22 the -- Merrimack County decided not to pursue at all and
23 withdrew it immediately when they learned about it.

24 THE COURT: Yes.

25 MR. CAREY: So I believe that that's a basis

1 for a downward departure because that overstates her
2 criminal history. There may be other ways for the Court
3 to find that she is more appropriately a Criminal
4 History Category I than the II.

5 THE COURT: Give me a moment. There it is.
6 And your -- you have an alternate argument which is that
7 if the Court declines -- if the Court applies the
8 adjustment or if the Court counts the point, I guess is
9 what you're saying, you think it warrants a departure on
10 the grounds that the criminal history category
11 overrepresents the severity of her criminal record.

12 MR. CAREY: Correct, your Honor.

13 THE COURT: All right. And that's in your
14 memorandum. I understand it.

15 All right, Mr. Feith, what do you say about
16 that one?

17 MR. FEITH: Your Honor, the government doesn't
18 have any quarrel with the fact that -- you know, of the
19 facts, which is that this warrant was in existence and
20 then was immediately withdrawn. We believe the PSR
21 correctly calculated her -- the defendant's criminal
22 history category. And so as far as any argument that it
23 was incorrectly calculated, we -- we object to that and
24 believe that as the facts are laid out, it was correctly
25 calculated.

1 When it comes to the departure request, the
2 departure requires a finding that a -- the Criminal
3 History Category II substantially overstates or
4 overrepresents the defendant's criminal history or
5 likelihood of recidivism and we don't believe that it
6 meets the necessary requirements for a departure because
7 I don't know that the Court could find based on these
8 facts and looking at the defendant's criminal history in
9 its entirety that the one-point difference between
10 category II and I is a substantial overrepresentation.

11 And as defense counsel noted, you know, the
12 Court may have other ideas in mind because, admittedly,
13 this was a 1991 warrant, so it was approximately 25
14 years old at the time of her arrest.

15 But I guess as a pure guidelines matter, we
16 believe it was correctly calculated --

17 THE COURT: Uh-huh.

18 MR. FEITH: -- and that there are not
19 sufficient facts to support a departure.

20 THE COURT: Okay. I think that exhausts the
21 guideline arguments.

22 Am I right, Mr. Carey?

23 MR. CAREY: Yes, your Honor.

24 THE COURT: All right. Just give me a moment
25 here. I want to look at the chart.

1 Okay. I'm going to work in reverse order
2 here, first on the criminal history category.

3 This is one of those times where the change in
4 the law, I guess, about the -- the mandatory nature of
5 the guidelines, allowing the Court to exercise some
6 judgment and discretion is helpful because on one hand,
7 I think Mr. Feith is right; the guidelines -- the
8 probation officer correctly calculated the criminal
9 history points. There was an active warrant and that
10 makes her under a criminal justice -- under a criminal
11 justice sentence. That's number one. So I think the
12 points are counted correctly.

13 Number two, a departure does feel intuitively
14 appropriate in this case because -- because it seems
15 like that point artificially inflates her criminal
16 history from a I to a II. That said, under the standard
17 for the departure that Mr. Feith points out, a II
18 doesn't seem to substantially overrepresent the
19 seriousness of this defendant's criminal record in
20 anyway, shape, or form. She has a lengthy criminal
21 record that -- that in no way suggests a number -- a
22 category II overstates -- overstates it.

23 So here's the bottom line. I'm going to adopt
24 the PSR's calculation of the points and its adoption of
25 the category II. I'm going to decline to award the

1 departure, but I am going to reflect in the sentence
2 what amounts to the same thing, which is a reduction in
3 her criminal history from a II to a I in the form of a
4 variance. I'm going to allow a variance.

5 But before it's even been argued, okay, I'm
6 going to -- at the end of the day, when I come up with a
7 total offense level and criminal history category, I'm
8 going to sentence her as a I rather than a II to reflect
9 what I think is a situation where -- and I'll point to
10 the PSR where I realized this -- where her -- her points
11 were increased, triggering a category level increase
12 based on a really old warrant that the authorities had
13 no intention of enforcing and literally withdrew as soon
14 as they noticed it because she had been arrested or
15 somebody brought it to their attention.

16 It looks like at the -- in the PSR, you take a
17 look at the very old conviction at paragraph 34, at the
18 very end of the column, the third column where date
19 sentence

20 imposed/disposition, at the very bottom it says
21 October 26th, 2016, warrant withdrawn.

22 That's a strong indication to me that
23 Mr. Carey's right; that -- that this is not a warrant --
24 I don't know if you'd call it a -- a bureaucratic
25 oversight; it's just a realization by law enforcement

1 authorities that it had no intention of enforcing the
2 warrant.

3 So while -- while the -- the objection is
4 overruled to the PSR and the departure is declined, the
5 Court will -- is going to allow a variance to reflect a
6 sentence at category I rather than II in the form of a
7 variance when it gets to that point.

8 Now, as to the premises, the Court's view of
9 this is that in terms of the inferences to be drawn
10 under the applicable law, I think that the PSR draws the
11 right inferences. They're the same inferences that the
12 prosecution is arguing for, that -- that the adjustment
13 here at guideline section 2B1.1(b)(12) reflected in the
14 PSR at the bottom of paragraph 15 and in the
15 calculations section of the PSR at paragraph 22, it
16 should apply. The problem is we're dealing with a
17 situation here, though, where we have contested
18 evidence.

19 My understanding of this argument is that you
20 contest the idea that 92 transactions took place during
21 this period and I just think that it's a matter of --
22 when there's a contested piece of -- when there's a
23 contested factual finding with an inference to be drawn,
24 the Court generally requires evidence, live evidence,
25 testimony that -- presented by the prosecution,

1 cross-examined by the defense, on which to base such a
2 finding.

3 I do think were the Court -- were the Court to
4 defer to the PSR's factual findings here, I think that
5 the adjustment would be warranted, but because it's a
6 contested issue and the Court hasn't heard evidence, the
7 Court is just not persuaded by the applicable standard
8 that the facts as presented in the PSR have been proven.

9 So the Court declines to -- declines to adjust
10 in the fashion set forth at paragraph 22 and the
11 adjustment will not apply.

12 So what that leaves the Court with is a total
13 offense level 24 and a Criminal History Category II,
14 because the Court overruled the defendant's objection on
15 the criminal history category.

16 So a 24-II, that yields a guideline sentencing
17 range of 57 to 71 months, three years' supervised
18 release.

19 Mr. Buckley, do you know the fine range under
20 a 24, category II?

21 THE PROBATION OFFICER: It should be \$20,000
22 with a floor -- let me just double-check on that.

23 THE COURT: 20,000.

24 THE PROBATION OFFICER: Yes. It would be --
25 the range would be 20,000 to \$1 million.

1 THE COURT: To one million. And a \$100
2 statutory assessment.

3 THE PROBATION OFFICER: Correct.

4 THE COURT: Now -- okay.

5 Without waiving any of your objections on
6 either side, given that the Court has found a total
7 offense level 24, category II, does anyone disagree with
8 those ranges that the Court just went over?

9 MR. FEITH: Not the United States, your Honor.

10 MR. CAREY: No, your Honor.

11 THE COURT: All right. All right.

12 The Court, therefore, adopts the Presentence
13 Investigation Report with only the following exceptions:
14 The Court does not adopt paragraph 22 of the PSR for the
15 adjustment, guideline section 2B1.1(b)(12) and any
16 mathematical implications thereafter that must be
17 changed and the Court disregards the second to last
18 sentence in paragraph 15 of the PSR -- actually, the
19 last -- the -- of the last three sentences of
20 paragraph 15, the Court disregards the second to last
21 and the third to the last sentence, the sentences
22 starting with "the base offense" and "she allowed."

23 All right. So we know where we are.

24 What that means, Ms. McNamara, is this: As I
25 told you at step one, I have to determine what the

1 guidelines recommend for your case. What I have found,
2 adopting some of the arguments advanced by your lawyer,
3 but rejecting another one advanced by your lawyer, is
4 that your total offense level is 24, that's on a scale
5 of one to 43, and the criminal history category is II.
6 That's on a scale of I to VI. That yields a guideline
7 sentencing range of 57 months at the low end, up to 71
8 months in federal prison. That's primarily driven by
9 your -- the quantity of drugs involved in this case,
10 involving kilos of heroin.

11 All right. Now what we do is we have
12 arguments that are -- arguments for what are called
13 departures and variances. A departure is an argument
14 that the Court should change your offense level or your
15 criminal history category based on factors set forth in
16 these U.S. Sentencing Guidelines. The guidelines have
17 grounds to do that and your lawyer can make arguments
18 based on that.

19 A variance is something different. A variance
20 is a request that the Court should just disregard the
21 guidelines altogether and impose a sentence based on
22 other factors that are set forth in the U.S. Criminal
23 Code and in the decisional law of the United States.

24 Now, your lawyer made one argument that the
25 Court should reduce your criminal history category from

1 a II to a I. That's a departure argument. I've already
2 rejected that, but I've informed him and you that I do
3 plan to reflect the same adjustment as a variance. I
4 will sentence you as a category I because I believe you
5 were sort of the -- not the victim, but you were the --
6 your calculation was the result of a very old warrant
7 that no one had any intention of enforcing against you.

8 So that's -- you don't need to make the
9 departure argument, Mr. Carey, because that one's
10 already been granted in the form of a variance.

11 But you also have a general variance request
12 based on several factors that you briefed and I'm happy
13 to hear from you about that now if you want to be heard.

14 MR. CAREY: Yes, your Honor. Thank you.

15 We are asking for a variance that would enable
16 the Court to impose Ms. McNamara to a time-served
17 sentence of six months with three years of supervised
18 release and up to six months as a condition that she
19 remain in a halfway house, most likely Hampshire House,
20 which has beds and is close in Manchester, where she
21 could continue with her mental health counseling,
22 continue with substance abuse counseling, and even
23 though she is disabled and was disabled before her
24 eye -- her vision issues, perhaps have some productive
25 volunteer activity.

1 My request is not -- I'm not asking for six
2 months as a negotiation to try to meet somewhere in the
3 middle. I know the government's at a much higher
4 number. I'm asking for six months because I think
5 that's a just sentence and is a sentence that is
6 appropriate under the facts that the Court must consider
7 and the facts of this case.

8 Her -- her only offense is what it is. She
9 was an addict and she made choices that many addicts
10 made and she takes responsibility for those choices.
11 Her role is the same role that she -- that she had when
12 the Court initially accepted her into the LASER program.
13 And so based on her role in the offense, she did have
14 the possibility of walking out of this courtroom, if she
15 had successfully completed LASER, with a -- with a
16 no-time sentence.

17 For a number of reasons, and mostly hers,
18 almost exclusively hers, she failed LASER. And she
19 self-surrendered and in February was sent to the
20 Strafford County House of Correction.

21 We had a court conference and the Court gave
22 her a second chance and said, look, if she can get into
23 the TC Program, that's something that will be in
24 consideration when it comes time for sentencing. The
25 Court made no representations or promises as to what the

1 disposition would be but that the TC Program would be --
2 if she could get into it and complete it would be a
3 factor and certainly would be something that would be
4 beneficial to her regardless of what happened to her.
5 She has taken full advantage of every opportunity the TC
6 Program has offered her.

7 For the first time in many years, she's clean.
8 When she was undergoing the LASER program, she had
9 problems with illicit drug use and she also was taking
10 daily methadone. She has not taken methadone since she
11 reported to jail in February of this year.

12 Not everybody succeeds in the TC Program, even
13 though it's -- it's done where you're -- under -- in an
14 incarcerated setting and you have no choice, or little
15 choice, but to complete it, but she did. She will tell
16 you about the other courses that she took to spend her
17 time productively while incarcerated at Strafford
18 County.

19 She -- so what we're proposing is almost like
20 a LASER 2.0 variation. She's not walking out of here
21 with no sentence, which she would if she had
22 successfully completed LASER, but a six-month sentence
23 is -- is punishment for what she did, appropriate
24 punishment for what she did, and a six-month -- up to
25 six-month period at a halfway house like Hampshire House

1 would enable her to continue building on the foundation
2 of the TC Program and also again give her the
3 opportunity to further her rehabilitation and
4 demonstrate that it's going to -- that it's going to
5 take.

6 She would have support to hopefully help her
7 succeed with that supervised release and that
8 arrangement at a halfway house.

9 A halfway house has another factor, too. When
10 I spoke to Hampshire House, I talked about her vision
11 issues. Since she's been incarcerated, she's had two
12 eye surgeries and she's lost most of her vision in her
13 right eye, which may or may not come back, and there's
14 follow-up treatment that's going to be provided at Tufts
15 Health -- at Tufts in Boston.

16 Hampshire House said for somebody with eye
17 issues, we can address her safety concerns by having her
18 on the first floor of our facility. So safety is
19 something that is a factor and could be addressed in a
20 halfway house setting.

21 I don't minimize and I don't mean to minimize
22 or have the Court interpret my remarks as minimizing
23 what she did and what her role was. It was a serious
24 offense and other codefendants have pled to similar
25 serious offenses in this case.

1 But she's 57 years old. The deterrence to
2 be gained from somebody who is a lifelong addict and
3 used to -- received heroin to support her addiction in
4 return for letting her house be used by drug runners,
5 there's not a lot of deterrence that a long
6 incarcerative sentence is going -- is going to give in
7 this situation or to other people in her situation to do
8 what they can to feed their addiction.

9 She was not involved in the planning or
10 profiting of this offense at all. She was in the second
11 tier, the lower tier, of people involved in this
12 activity, like her other codefendants, many of whom
13 successfully completed LASER and probably will face no
14 incarceration.

15 She does have an addict's record. I believe
16 the last conviction was 1999. It is for petty offenses,
17 drug-related offenses, shoplifting, those kind of
18 things.

19 THE COURT: Uh-huh.

20 MR. CAREY: There are no violent offenses --
21 recent violent offenses.

22 She has not been in prison for any length of
23 time before. She's not been in prison at all before.
24 She's done small house sentences here and there.

25 With the foundation that she's gotten with the

1 TC Program, I think she can benefit and continue to take
2 advantage of the opportunity that a halfway house
3 sentence would provide her.

4 And so for these reasons and the factors set
5 north in 18 3553 and recited in my sentencing
6 memorandum, I ask the Court to impose a time-served,
7 six-month sentence, followed by three years of
8 supervised release with up to six months at a halfway
9 house with full compliance with all conditions of
10 probation for substance abuse and mental health
11 counseling.

12 Thank you, your Honor.

13 THE COURT: Thank you.

14 MR. CAREY: Ms. McNamara does -- would like to
15 address the Court when the Court believes it's
16 appropriate. She has a letter she'd like to read.

17 THE COURT: Absolutely. Just give me a second
18 here.

19 Go ahead, Mr. Feith.

20 MR. FEITH: Thank you, your Honor.

21 In light of the Court's findings today, the
22 United States would ask for a sentence of 51 months,
23 which is a guideline sentence at the lowest end of the
24 applicable guideline.

25 I note, you know, that in February the

1 defendant submitted a sentencing memorandum indicating
2 that a sentence of 33 months would satisfy all of the
3 sentencing factors of 3553(a) --

4 THE COURT: Yeah.

5 MR. FEITH: -- and the only thing that has
6 changed in those six months was that Ms. McNamara was
7 incarcerated on her bail violation and completed the TC
8 Program and has had some medical issues.

9 In the government's eyes, those two -- those
10 two changes do not support the significant variance that
11 the defense is seeking in this case, from 51 months to
12 essentially six months.

13 None of the other factors that were prevalent
14 in February have disappeared and we submitted a
15 sentencing memo then that asked for a low end guideline
16 sentence of 70 months, but we're amending that in light
17 of the findings that the Court made today.

18 THE COURT: Uh-huh.

19 MR. FEITH: But for the reasons that we put in
20 our sentencing memorandum in February, certainly a
21 sentence of 51 months is sufficient, but not greater
22 than necessary, to meet all of the factors set forth at
23 3553(a).

24 THE COURT: Okay. Let me ask you this,
25 Mr. Feith. Have you -- have you been pretty much the

1 prosecutor handling the over -- the overarching
2 investigation prosecution?

3 MR. FEITH: Yes, since shortly after the
4 indictments were -- and the arrests were made.

5 THE COURT: Okay.

6 MR. FEITH: I've been the guy.

7 THE COURT: The reason I ask is that there's a
8 companion case, it looks like, with Judge Barbadoro.

9 MR. FEITH: Yes.

10 THE COURT: Many sentences imposed.

11 MR. FEITH: Yes.

12 THE COURT: And I'm just -- so do you have --
13 do you feel -- and I don't want to put you on the spot
14 if you need to think. Do you have a decent
15 understanding or at least an opinion about relative
16 culpability between the various players in this drug
17 ring?

18 MR. FEITH: Yes. I mean -- yes, I do, your
19 Honor.

20 THE COURT: Is it -- is the case with Judge
21 Barbadoro, which is 16-criminal-162, many, many
22 defendants, how closely related is it to this case?

23 MR. FEITH: It's closely related in this way.

24 When we -- when we made the prosecutorial
25 decision, your Honor, we broke the case into two based

1 on one important fact. The case that had more
2 defendants than that was assigned -- ended up being a
3 assigned to Judge Barbadoro were the business people.
4 None of those people had addictions, none of those
5 people were motivated to support a current addiction.

6 THE COURT: Yeah.

7 MR. FEITH: They were running a business and
8 they had very different roles in the business. You
9 know, some were very, very minor roles; others,
10 obviously, were the leaders. And as the Court may know,
11 the ultimate leader of the organization is going to
12 arrive in the United States tonight from the Dominican
13 and that is a case that is assigned to your Honor.

14 So we -- that was the business side.

15 THE COURT: That's an extradition?

16 MR. FEITH: That was an extradition, your
17 Honor.

18 THE COURT: Interesting.

19 MR. FEITH: And in Judge Barbadoro's case, the
20 leader, Santos Guerrero Morillo, was also extradited and
21 already made an appearance here. We have a trial
22 scheduled for him in December. So that's the business
23 side of the organization from the very top leaders who
24 ran things from the Dominican down to minor players.

25 The conspiracy that this defendant was charged

1 in were people who were, in the -- in the government's
2 view, motivated in large part by their addiction --

3 THE COURT: I see.

4 MR. FEITH: -- in various different ways, but,
5 for example, Eric Sederquest was a New Hampshire
6 resident who made very significant purchases, but he
7 would bring it back up to New Hampshire and sell it to a
8 few customers, all the time supporting his habit.

9 THE COURT: I see.

10 MR. FEITH: The trap house operators, such as
11 the defendant and Ms. Ardolino and Ms. Levis, also were
12 in large part motivated by addiction issues as opposed
13 to just business issues.

14 THE COURT: Yeah.

15 MR. FEITH: And so that's how we broke it.

16 THE COURT: What's the name of the defendant
17 that's been extradited from the Dominican?

18 MR. FEITH: It's sealed.

19 THE COURT: It's sealed. Okay.

20 MR. FEITH: Until tonight.

21 THE COURT: That's fine. So he's not on my
22 list here, though.

23 MR. FEITH: Not yet.

24 THE COURT: Okay. By my list, I'm referring
25 to pages 6, 7, 8 and 9 of the -- and 10 -- that's a lot

1 of defendants --

2 MR. FEITH: Correct.

3 THE COURT: -- of the PSR.

4 MR. FEITH: Correct.

5 THE COURT: All right. Okay. So let's
6 continue with this, though.

7 So I'm looking at -- I'm looking at this list
8 of defendants here and I made some notes. Judith
9 Ardolino got a 60-month sentence after a variance, Eric
10 Sederquest got a 92-month sentence. Three of them are
11 in LASER, ^ Stephen Tolli, who graduated from the LASER
12 program. Jessica Sederquest who's, I believe, in phase
13 3 or 4, and Mary Levis, who I think is in phase 3. And
14 so we've really got a couple of sentences to look at
15 here.

16 How do you -- how do you assess -- I've -- I
17 have a view of how I assess their relative culpability,
18 but I want -- I'm curious as to how you assess the
19 relative culpability of, say, Ardolino and Eric
20 Sederquest and this defendant.

21 MR. FEITH: Well, Eric Sederquest was a
22 criminal history category VI, so we took a more
23 stringent view. And he was not offered LASER even,
24 though he asked for it. He was not a LASER candidate
25 that the United States would approve.

1 THE COURT: Yeah.

2 MR. FEITH: And I informed his lawyer of that
3 early on. His criminal history category represented a
4 criminal history that was certainly different from this
5 defendant's in the sentence; it involved more violent
6 activity and such. So his sentence was the result of a
7 drug weight that we could prove based on the purchases
8 he made over a period of time and his criminal history
9 category.

10 Ms. Ardolino, Ms. Levis, and this defendant
11 are as probably closely -- similarly situated as anybody
12 in the -- in that conspiracy. We did not offer
13 Ms. Ardolino LASER or consider her as a candidate
14 because her involvement was more significant --

15 THE COURT: Okay.

16 MR. FEITH: -- and had a bit of a -- a -- a
17 bit of a different factual pattern with respect to her,
18 your Honor, in that she was actually in -- you know, not
19 only just feeding her habit, but financially profiting
20 from her participation through deceit, mostly. So we
21 did not offer her LASER.

22 Obviously Ms. Levis is in LASER and
23 Ms. McNamara was a candidate. So we've sort of treated
24 them similarly as best we could.

25 THE COURT: Okay.

1 MR. FEITH: But under the current situation, I
2 think a 51-month sentence is -- is consistent with the
3 way Ms. Ardolino was treated, at least by the
4 United States.

5 THE COURT: Thank you.

6 I'll hear -- I'll give the defendant an
7 opportunity for allocution here in a minute, but if
8 there's anything else you want to say, Mr. Carey, I'm
9 happy to hear -- I'm happy to listen. I don't know if
10 you do.

11 MR. CAREY: No, I think our -- it's my
12 understanding Ardolino had a little more -- as Attorney
13 Feith represented, a little more involvement and a
14 little more of a business involvement in this -- in this
15 conspiracy or this case. She was a much more
16 significant criminal history, she's a IV, and she
17 received a 60-month sentence.

18 It does provide the Court with some context to
19 look at Ms. McNamara's situation and circumstances and
20 also the fact that she, while not completing LASER, did
21 complete -- successfully complete a different program.

22 THE COURT: TC.

23 MR. CAREY: Correct.

24 THE COURT: It's good that she did that.

25 Let me ask this question, Mr. Feith.

1 This is not really -- this is more just a law
2 of the case kind of question. I'm trying to remember.

3 Mr. -- obviously the Court granted a
4 continuance of sentencing to allow TC. And sometimes I
5 consider TC, sometimes I don't. It depends on the
6 performance, it depends on the situation, the case, the
7 defendant.

8 Mr. Carey said that the Court represented that
9 it would consider TC performance in imposing sentence.
10 Is that your recollection as well?

11 MR. FEITH: I don't have that recollection. I
12 have a -- a recollection that at the time of the -- when
13 Ms. McNamara was detained on the bail violation, LASER
14 was not ruled out as a possibility, but I don't remember
15 further statements about TC being considered in the
16 overall sentence. But, you know, I -- I don't pretend
17 to have a perfect memory on that either, your Honor,
18 so ...

19 THE COURT: Sure.

20 Mr. Carey.

21 MR. CAREY: It -- and I want to be clear that
22 the Court made no promises, no representations, no
23 guarantees whatsoever.

24 At the time that she was scheduled to be
25 sentenced in February after she self-surrendered, she

1 was a mess. She was a mess. It was the reason why
2 probation wanted to revoke her, her status, and -- she
3 was still using methadone, she was still receiving
4 different prescriptions that -- with no coordination and
5 she was in a bad place and she'd spent I think two or
6 three weeks in Lawrence General Hospital --

7 THE COURT: Yeah.

8 MR. CAREY: -- with a respiratory issue.

9 So the TC Program was -- was a way for her to
10 actually try to get to a place where she could begin her
11 recovery that she was not able to do when she was out on
12 the street during -- at the -- doing LASER or just out
13 on the street on her own.

14 And so it -- -- it is something -- regardless
15 of what this Court does, she has taken advantage of that
16 and she does -- she's very grateful for the opportunity
17 because it has put her in a place that she hasn't been
18 in many, many years. But I do think it should be
19 considered as a factor in terms of what I call the LASER
20 2.0. She couldn't do LASER, but she's done something
21 that's not comparable, but something that is significant
22 and should be considered.

23 THE COURT: I see. Thank you.

24 All right, Ms. McNamara. You don't have to
25 say a word today, but you're allowed to. It's your

1 right to speak and I know we're acquainted with each
2 other because you participated in the LASER Docket
3 program months and months ago. So we are -- we do know
4 each other and I'm happy to listen to you now. You can
5 say whatever you want to say.

6 THE DEFENDANT: Thank you, your Honor.

7 Well --

8 THE COURT: You can sit, if you'd like. You
9 don't need to stand. Whatever makes you more
10 comfortable.

11 THE DEFENDANT: I'll stand.

12 Okay. Your Honor, when I was first
13 recommended to the TC Program, my feeling was basically
14 that I was too old to learn anything new about my
15 addiction. I thought I knew it all.

16 Much to my surprise, I've learned quite a bit.
17 I've learned how to process my feelings, how to work
18 through the guilt, shame, and grief that I have for --
19 that I've been using drugs to suppress for many years.

20 I spent hours upon hours sitting with myself
21 and my thoughts, learning to get through these times
22 without the use of illicit substances and without
23 shutting down or getting angry.

24 I've done 40 hours of drug and alcohol
25 treatment with a licensed LADC counselor, 30 hours of

1 psychology classes teaching me the impact of drug use on
2 the brain, 40 hours of drug addiction and how it affects
3 parenting and other relationships, three to five hours
4 -- three to five NA/AA meetings a week, positive options
5 and many other addiction-based classes.

6 Also I've completed all these classes and the
7 entire program with the sight in only one eye. I've
8 endured multiple trips to Tufts Medical Center in
9 Boston, had eye surgery and need another surgery in the
10 late fall.

11 I know that my actions have caused me to be
12 where I am today and I take responsibility. However, I
13 feel like a completely different person than the last
14 time I was -- I stood before your Honor. I would
15 greatly appreciate the opportunity to transition back
16 into society using the tools I now have.

17 Thank you.

18 THE COURT: Thank you.

19 All right. The Court is going to grant a
20 variance, which I'm sure is welcome news to the
21 defendant, but it's -- it's not nearly the variance
22 requested by the defendant, which will be a
23 disappointment, I'm sure, but I don't think a variance
24 to a time-served sentence or anything close to it would
25 be justice in this case.

1 The sentence the Court's going to impose is
2 going to be 48 months. I'll explain the Court's
3 rationale right now.

4 What the Court has attempted to do here is
5 fashion a sentence that is sufficient, but not more
6 severe than necessary, to meet the following purposes.

7 First, to reflect the seriousness of the
8 offense, promoting respect for the law, and providing
9 just punishment for the offense.

10 Second, to afford adequate deterrence to
11 criminal conduct.

12 Third, to protect the public from further
13 crimes.

14 And, fourth, to provide the defendant with
15 needed educational and vocational training, medical care
16 and other correctional treatment in the most effective
17 manner.

18 The Court has considered the defendant's
19 arguments and the probation officer's comments
20 pertaining to the length of time she lived in her
21 apartment relative to the conspiracy; her very difficult
22 childhood in an abusive home and followed by foster
23 care; her violent and abusive first marriage; the loss
24 of her husband in her second marriage, which I remember
25 from her time in LASER Docket, was very traumatic for

1 her; the relative brevity of her previous incarceration;
2 the age of some of her older convictions; her ill
3 health; and her rehabilitative efforts through the
4 Strafford County House of Corrections Therapeutic
5 Community Program.

6 These factors, whether viewed separately or
7 collectively, viewed in the context of the offense
8 conduct, the defendant's history, the need for
9 deterrence, respect for the law, and public protection
10 make a variance below the guideline sentencing range
11 appropriate in this case for the following reasons.

12 First is what the Court has already noted with
13 respect to what appears to be a highly technical and not
14 necessarily warranted bump in her criminal history
15 category to a Category II.

16 Second, all the factors I just set forth in
17 that long laundry list I set forth, to me -- all of
18 which, to some degree, contribute to the justification
19 for a variance.

20 And, third, the ones briefed by defense
21 counsel and discussed in court today.

22 And, third -- but why not -- at guess the
23 question becomes why not a greater variance than the
24 Court's imposed.

25 The Court's view is that this is just a very,

1 very serious offense. The fact is that the adjustment
2 for allowing a premises to be utilized as a drug
3 trafficking hub probably was warranted in this case.
4 The Court declined to provide it based not on its
5 understanding of the evidence, but just based on the
6 quality of the proof at a sentencing hearing.

7 And I -- you know, I hope the Court's approach
8 to that issue is familiar to counsel and I -- I know it
9 is familiar to counsel, so I -- I draw certain
10 inferences from the fact sometimes whether and the
11 extent to which the parties present evidence. But that
12 adjustment could have easily been applied, which would
13 have resulted in, even with the same type of variance, a
14 much more severe sentence.

15 So the Court, in declining to apply that
16 adjustment, approached the sentence in a way that
17 mitigated the conduct involved here.

18 This was a -- having seen a -- having seen a
19 fair number of drug rings and drug trafficking
20 organizations and conspiracies over, you know, a decade
21 as a judge and many years as a drug prosecutor, this was
22 one of the more sophisticated operations the Court has
23 seen. It really was. It had facilities.

24 It wasn't just a bunch of people running
25 around in cars delivering heroin. I mean, people like

1 the defendant and Ardolino and Levis facilitated this
2 conspiracy in a major way, yes, not with much of an
3 economic motive, but more as a way of feeding an
4 addiction, but in a way that allowed this conspiracy to
5 operate with a level of cover and protection not
6 normally enjoyed by many drug rings.

7 There were -- there were stores to visit this
8 conspiracy to buy heroin and the defendant's home was
9 one of them. It's a very serious offense and it
10 requires a serious sentence and it's a very serious drug
11 that has plagued this community to the great detriment
12 and danger to the public.

13 So that's why the Court's allowing a variance,
14 but that's also why the Court's not allowing a greater
15 variance, despite some excellent advocacy by defense
16 counsel here and the prosecutor. This is one of the
17 more helpful sentencing hearings we've conducted. And I
18 know it's taken a long time, but -- we've been at this
19 for like an hour now, but I think it was well worth it.
20 The Court is confident that it's imposing a just
21 sentence.

22 The Court has also considered the following
23 statutory factors set forth at 18 U.S. Code Section
24 3553(a) in imposing the sentence.

25 First, the nature and circumstances of this

1 offense; second, the history and characteristics of this
2 defendant; third, the kinds of sentences statutorily
3 available; fourth, both the kinds of sentences and the
4 advisory sentencing range established by the U.S.
5 Sentencing Guidelines; fifth, the policy statements
6 issued by the U.S. Sentencing Commission under the
7 applicable guidelines which the Court has reviewed and
8 considered; sixth, the need to avoid unwarranted
9 sentencing disparities in situations involving similar
10 conduct and similar criminal records; and seventh, the
11 need to provide restitution to victims, which the Court
12 has not considered in this case because it's not a
13 restitution-type indication.

14 The Court really focused on item number 6, by
15 the way, and -- by inquiring as to the two related cases
16 and trying to assess the defendant's conduct within the
17 spectrum of culpability of all the defendants in this
18 case and the Court hopes, but is confident, that it
19 arrived at a just sentence accounting for the need to
20 avoid unwarranted sentencing disparities.

21 The fact that the sentence involved the
22 calculation of and then a variance from the applicable
23 guideline sentencing range ensures that the
24 consideration of each factor which the Court has
25 undertaken independently as well is reflected by the

1 sentence. A sentence below the guideline sentencing
2 range is sufficient, but not more severe than necessary,
3 to facilitate and serve the statutory and traditional
4 functions of sentencing.

5 That's the rationale for the sentence
6 including the variance. Are there any questions from
7 counsel regarding the rationale?

8 MR. FEITH: Not from the United States. Thank
9 you.

10 MR. CAREY: No, your Honor.

11 THE COURT: All right, then. The Court will
12 impose sentence.

13 Ms. McNamara, I have a document here. It's
14 called an acknowledgment. And it says that you have
15 received, reviewed, and understand the proposed
16 sentencing options filed by the U.S. Probation Office in
17 this case. It has your signature on it and that of your
18 counsel.

19 You signed this?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: And you went over it with
22 Mr. Carey?

23 THE DEFENDANT: Yes.

24 THE COURT: What it tells me is that you've
25 read these conditions of supervised release that will be

1 imposed -- that the probation officer is proposing for
2 your case, the conditions you live under after your
3 release from prison.

4 What this tells me is that you've read these
5 and you understand them. Is that true?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Mr. Carey, do you have any
8 objections or know of any reason your client should
9 object to any of these conditions?

10 MR. CAREY: No, your Honor.

11 THE COURT: All right. That acknowledgment
12 will be placed on the docket at document number 284.

13 Pursuant to the Sentencing Reform Act of 1984,
14 it's the judgment of this Court that the defendant,
15 Gayle McNamara, is hereby committed to the custody of
16 the Bureau of Prisons, the BOP, to be imprisoned for a
17 term of 48 months.

18 The Bureau of Prisons is informed and notified
19 that the defendant should participate in the intensive
20 drug education and treatment program which is
21 recommended by the Court.

22 The Court also calls to the attention of the
23 custodial authorities that the defendant has a history
24 of mental health issues and recommends that the
25 defendant be allowed to participate in any available

1 mental health treatment programs while incarcerated.

2 Upon supervised release -- upon release from
3 prison, the defendant will be placed on supervised
4 release for a period of three years. While on
5 supervised release, the defendant must comply with the
6 stated conditions -- the standard conditions, I should
7 say -- of supervised release that have been adopted by
8 this Court and must comply with the mandatory and
9 proposed special conditions attached to the presentence
10 report and attached to the defendant's acknowledgment
11 which is docketed at document 284.

12 The defendant shall pay to the United States a
13 special assessment of a hundred dollars. It's due in
14 full immediately.

15 Ms. McNamara does not have the ability to pay
16 a fine and paying a fine would undermine her reentry
17 after serving a prison sentence, so the Court will not
18 impose a fine in this case.

19 Ms. McNamara, you have the right to appeal
20 this sentence to the U.S. Court of Appeals located in
21 Boston. Any appeal you take must be taken within 14
22 days of the entry of the judgment.

23 Do you understand?

24 THE DEFENDANT: Yes.

25 THE COURT: All right. Anybody have any

1 questions about the terms of the sentence?

2 MR. FEITH: Not from the United States, your
3 Honor.

4 MR. CAREY: No, your Honor, but Ms. McNamara
5 would request --

6 THE COURT: A recommendation of location.

7 MR. CAREY: Yes.

8 THE COURT: The Court recommends -- the Court
9 recommends specifically that the defendant be
10 incarcerated at the federal correctional facility at
11 Devens, Massachusetts, which is a medical facility. The
12 defendant has some medical problems, and that would
13 facilitate her care. And also it would facilitate
14 visitation to the extent she wants that.

15 So the Court recommends Devens or, if not
16 Devens, the federal correctional facility closest to the
17 district of New Hampshire and Massachusetts.

18 All right. Thank you, Counsel. I appreciate
19 your excellent presentations.

20 Ms. McNamara, I do wish you well.

21 THE DEFENDANT: Thank you.

22 THE COURT: The Court should also make this
23 point. It's a very important point.

24 The defendant in good faith tried to
25 participate in the LASER Docket program. It didn't

1 work. It's not for everybody. I think there's
2 sometimes a fear among defendants, and defense counsel
3 maybe, that failure to successfully graduate from LASER
4 could undermine -- could negatively impact the sentence
5 one receives resulting in a more severe sentence.
6 Nothing could be further from the truth.

7 The Court in no way considered the defendant's
8 LASER performance in imposing this sentence. In fact,
9 the Court credits the defendant with her willingness to
10 attempt the LASER Docket program. So no one should be
11 concerned about that at all. What the Court has tried
12 to do is impose a sentence that's consistent with
13 applicable sentencing law and not any other
14 considerations.

15 We're adjourned.

16 MR. CAREY: Thank you, your Honor.

17 THE COURT: Thank you, Counsel.

18 (Proceedings concluded at 11:27 a.m.)

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C E R T I F I C A T E

I, Liza W. Dubois, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 11/30/18

Liza W. Dubois
Liza Dubois, RMR, CRR
Licensed Court Reporter No. 104
State of New Hampshire