**No. 13-1152**

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**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

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**UNITED STATES,**

**Plaintiff-Appellee,**

**v.**

**JIMMY RAY VALENTINE,**

**Defendant-Appellant.**

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On Appeal from the United States District Court
for the Western District of Michigan
Case No. 1:99-CR-01-RJJ

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# BRIEF OF APPELLANT JIMMY RAY VALENTINE

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**ORAL ARGUMENT REQUESTED**

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## STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant Jimmy Ray Valentine requests oral argument. This case involves a detailed factual record and an extraordinary procedural history. Oral argument will aid the Court by allowing the parties to explore the issue presented in this appeal and respond to any inquiries raised.

## STATEMENT OF JURISDICTION

This is an appeal from a district court decision denying a motion for reduction of sentence under 18 U.S.C. § 3582(c). This Court has jurisdiction under 18 U.S.C. § 3742(a). *See United States v. Bowers*, 615 F.3d 715, 722 (6th Cir. 2010). A timely notice of appeal was filed on February 5, 2013.

## STATEMENT OF THE ISSUE

Whether the district court erred in concluding that Mr. Valentine was ineligible for a sentence reduction under 18 U.S.C. § 3582(c) on the ground that he was responsible for distributing at least 8.4 kilograms of crack cocaine.

## STATEMENT OF THE CASE

### A. Nature of the Case

Jimmy Ray Valentine, who is nearly fifty years old, has already spent more than fourteen years in prison. After his conviction for conspiracy to distribute crack cocaine, the United States Sentencing Commission concluded that the Sentencing Guidelines applicable to crack were overly harsh and unjustified, particularly when compared with the applicable sentences for powder cocaine. Mr. Valentine accordingly moved for a sentence reduction. The district court initially granted the reduction after concluding that the judge who presided over Mr. Valentine's original sentencing proceeding had found that he was responsible for only 1.5 kilograms. However, the Government appealed, and this Court reversed. On remand, the district court issued the decision under review in this case, finding that Mr. Valentine was responsible for at least 8.4 kilograms. That new, vastly higher drug-quantity finding prevented Mr. Valentine from benefitting from the revised crack Guidelines. Mr. Valentine now appeals.

### B. Prior Proceedings

In 1999, Mr. Valentine was arrested and incarcerated until his trial in February 2000, where he was convicted of conspiracy to distribute crack cocaine in violation of 21 U.S.C. §§ 841(a) & 846. (R. 247, Verdict.) Judge Richard A. Enslen presided over the fourteen-day trial. Judge Enslen also presided over Mr. Valentine's sentencing hearing and sentenced Mr. Valentine to 292 months, the lowest sentence available under the then-mandatory Guidelines. (*See* R. 436, ID# 1612, Sentencing Tr. at 35:25.)

In 2008, Mr. Valentine moved for a sentence modification pursuant to 18 U.S.C. § 3582(c)(2) based on the U.S. Sentencing Commission's 2007 amendments to the crack-cocaine Guidelines, which were made retroactively effective on March 3, 2008. (R. 659, Defendant's Motion for Reduction of Sentence.) Judge Robert J. Jonker granted Mr. Valentine's motion on March 2, 2011, reducing Mr. Valentine's sentence to 235 months. (R. 802, Order Granting Defendant's Motion for Reduction of Sentence.) The Government appealed, and this Court reversed and remanded for further proceedings. *See United States v. Valentine*, 694 F.3d 665 (6th Cir. 2012).

On remand, Judge Jonker denied Mr. Valentine's motion for sentence modification after finding that Mr. Valentine distributed at least 8.4 kilograms of crack—a drug quantity that is sufficiently high to prevent a sentence reduction

even under the most recently revised Guidelines promulgated in 2010. Mr. Valentine now appeals.

## STATEMENT OF FACTS

In 1999, Mr. Valentine and a number of other individuals were indicted in the Western District of Michigan for conspiracy to distribute crack cocaine and other controlled substances in violation of 21 U.S.C. §§ 841(a) & 846. (R. 150, Second Superseding Indictment.) No amount of drugs was specified in the indictment.

***Trial.*** Judge Enslen presided over a nearly three-week trial in 2000. (*See* R. 385-90, Trial Tr. Vols. I-VI.) Even though it alleged a vast narcotics conspiracy and raided alleged "crack houses" as part of its investigation, the Government adduced only a very small amount of physical evidence. (*See* R. 485 at ID# 3969, Government's Opening Argument at 16 (discussing the government's house searches, car searches, and electronic surveillance).) According to the Government and its witnesses, Mr. Valentine was primarily involved in the alleged conspiracy's Arkansas-based distribution chain, as opposed to its California-based and other operations. (*See generally id*. at ID# 3975, Tr. at 22 (opening argument); R. 436 at ID# 1592, Sentencing Tr. at 15 (sentencing argument).)

The Government's case rested primarily on cooperating witnesses who received plea deals and lenient sentencing treatment in exchange for their

testimony. For example, Jerry Lee Butler was one of the Government's principal witnesses both at trial and at sentencing. Though Butler asserted that he played a major role in the alleged conspiracy, he was ultimately sentenced to only 121 months. (R. 385, ID# 2373, Trial Tr. Vol. II at 345:9-19.) Moreover, only two witnesses—Butler and Yusef Phillips—testified about large drug quantities.

The jury found Mr. Valentine and others guilty of conspiracy, but the jury did not attribute any particular amount of drugs to any defendant or to the conspiracy as a whole. (R. 247, Verdict.)

***Sentencing.*** Judge Enslen sentenced Mr. Valentine in 2000. For the proceedings, the Probation Office submitted a Presentence Report ("PSR"). The PSR noted testimony from Butler that the conspiracy was responsible for "over 50 kilograms of crack cocaine." (PSR § 121.) Based largely on that testimony, the PSR alleged that Mr. Valentine was responsible for "more than 1.5 kilograms." (*Id*. § 137.) The PSR recommended a base offense level of 38, which at that time applied to cases involving "at least 1.5 kilograms" of crack.

Mr. Valentine objected to the PSR's quantity allegations and recommendations, arguing that the evidence did not support a finding that he was responsible for 1.5 kilograms. (*See* PSR Addendum at 2-3; R. 335 at ID# 1472-73, Defendant's Sentencing Memorandum at 1-2; R. 436 at ID# 1585-89, 1593-95, Sentencing Tr. at 8-12, 16-18.) For its part, the Government asserted that "over 50

kilograms of crack cocaine" could be attributed to Mr. Valentine. (PSR Addendum at 1-3.) The Government attempted to substantiate that view at the sentencing hearing by relying on the trial testimony of Butler. (*See* R. 436 at ID# 1591-92, Sentencing Tr. at 14:23-15:22.)

Judge Enslen expressed doubts about many of the Government's witnesses from the trial. For example, Judge Enslen discounted testimony from Lubert Brock, who had testified about the alleged California arm of the conspiracy. (R. 436 at ID# 1607, Sentencing Tr. at 30:18-21.) Judge Enslen thought that the witnesses' quantity figures "may well be inflated." (R. 435 at ID# 1552, Johnny Valentine Sentencing Tr. at 14:1-2; *accord* R. 399 at ID# 1487, Corey Valentine Sentencing Tr. at 6:1; R. 417 at 1518, Kenneth Valentine Sentencing Tr. at 13:2-3.) He further "note[d] the absence of any significant amount of drugs or money found on the defendants when they were arrested." (R. 399 at ID# 1487, Corey Valentine Sentencing Tr. at 6:1-2; *accord* R. 435 at ID# 1552, Johnny Valentine Sentencing Tr. at 14:2-4; R. 417 at ID# 1518, Kenneth Valentine Sentencing Tr. at 13:3-5.) And he believed it was "certainly possible that many of the witnesses did not tell all of the truth." (R. 399 at ID# 1500, Corey Valentine Sentencing Tr. at 19:8-9.) Indeed, Judge Enslen expressed "serious misgivings" about the estimates. (R. 417 at ID# 1517, Kenneth Valentine Sentencing Tr. at 12:25.) Ultimately, Judge Enslen credited the testimony of only one witness, Butler, and only insofar as

Judge Enslen recalled Butler asserting that he had sold at least one kilogram of crack to Mr. Valentine on at least three occasions. (R. 436 at ID# 1607, Sentencing Tr. at 30:11-14, 19-22.)

Based on both this Court's precedents and his own serious "misgivings" about the far higher quantities asserted by the PSR and the Government, Judge Enslen took care to err on the side of caution when sentencing Mr. Valentine. (R. 436 at ID# 1607, Sentencing Tr. at 30:19-24.) In light of those concerns and his assessment of the record, Judge Enslen declined to find any amount between 1.5 kilograms and the Government's allegations of "50 to 60 kilos." (*Id*.) Instead, Judge Enslen found only that Mr. Valentine was responsible for "at least 1.5 kilograms." (*Id*.) That finding placed Mr. Valentine at a base offense level of 38.

Judge Enslen also considered the Government's requests for a four-level enhancement for an alleged leadership role in the conspiracy and a two-level enhancement for an alleged use of a firearm in the offense. Judge Enslen denied both of the Government's requests. First, Judge Enslen made clear that he was "unconvinced that [Mr. Valentine] was an organizer [or] leader" of the conspiracy. (*Id*. at ID# 1610, Tr. at 33:17-18.) Second, Judge Enslen also made clear that he found "no evidence" that Mr. Valentine "ever possessed [a] shotgun during any of his criminal conduct." (*Id*. at ID# 1608, Tr. at 31:20.) Instead, Judge Enslen imposed only a two-level enhancement for role in the offense based solely on his

finding that Mr. Valentine "appears to have organized some of the major crack purchases," *id*. at ID# 1611, Tr. at 34:5, presumably meaning Butler's alleged purchases of one-kilogram quantities from Mr. Valentine. (*See* R. 436 at ID# 1607, Sentencing Tr. at 30:11-14, 19-20.)

Judge Enslen's findings resulted in a total offense level of 40. (*Id*. at ID# 1612, Tr. at 35:15-19.) Because of Mr. Valentine's lack of prior criminal activity, he was placed in Criminal History Category I. The combination, however, nonetheless triggered a then-mandatory sentencing range of 292 to 365 months' imprisonment—*i.e.*, a minimum of 24 years and 4 months. (*Id*.) Judge Enslen sentenced Mr. Valentine to that minimum—but still decades-long—term, noting that this was "the least permitted by the [then-binding] guideline I have found." (*Id*. at Tr. at 35:25-36:1.)

***Direct Appeal.*** Just a month after Mr. Valentine was sentenced, the Supreme Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which held that the Sixth Amendment requires all facts that increase a defendant's sentence beyond the statutory maximum to be found beyond a reasonable doubt. Under *Apprendi*, Mr. Valentine should have been subject to a statutory maximum sentence of 240 months because the jury had not found him responsible for a specific amount of crack cocaine. *See* 21 U.S.C. § 841(b)(1)(C) (establishing a twenty-year maximum for conspiracy to distribute). Thus, on direct appeal to this

Court, Mr. Valentine argued that his 292-month sentence violated *Apprendi*, but because his trial counsel had neglected to object to this error at sentencing, plain-error review applied. *See United States v. Valentine*, 70 F. App'x 314, 330 (6th Cir. 2003). While holding that Mr. Valentine's sentence in excess of the 240-month statutory maximum constituted plain error, this Court "decline[d] to notice the error" due to the strict standard for plain-error review. *Id*. at 331. But in addressing quantity issues, and as relevant here, the Court agreed with the trial court that the conspiracy was responsible for "at least 1.5 kilograms of crack" and noted that the court "properly erred on the side of caution" in finding the "quantity of drugs for which [the defendants were] more likely than not actually responsible." *Id.* at 320, 329-30.

***Post-conviction Proceedings***. After Mr. Valentine's appeal concluded and his sentence became final, the Supreme Court held in *United States v. Booker*, 543 U.S. 220 (2005), that the Sixth Amendment rule announced in *Apprendi* applied to the Sentencing Guidelines. In his motion under 28 U.S.C. § 2255, Mr. Valentine sought post-conviction relief under *Booker*. As Judge Martin noted in dissenting from the denial of relief on this ground, no jury found the specific drug quantity attributed to Mr. Valentine beyond a reasonable doubt; therefore, under *Booker*, Mr. Valentine would have been subject to a maximum Guidelines sentence of 16 months, not the vastly higher 292-month sentence that Mr. Valentine actually

received pursuant to the mandatory, pre-*Booker* sentencing regime. *See Valentine v. United States*, 488 F.3d 325, 350 (6th Cir. 2007) (Martin, J., concurring in part and dissenting in part). Again because of timing, however, Mr. Valentine obtained no relief: *Booker* did not apply to him because it did not apply retroactively. *See Valentine*, 488 F.3d at 330.

Mr. Valentine did obtain some relief in his § 2255 appeal. The Court unanimously found that Mr. Valentine was entitled to pursue a claim that he had received ineffective assistance of counsel when his trial counsel thwarted his efforts to accept a plea agreement offered by the Government, and the Court ordered a remand for an evidentiary hearing on that issue. *See Valentine*, 488 F.3d at 327, 334. Because Judge Enslen was no longer handling post-conviction proceedings, the remand proceedings—begun in 2008—were assigned to Judge Jonker, his first exposure to this case. After a hearing, Judge Jonker ultimately concluded that he could not find ineffective assistance of counsel and denied relief. (R. 694, Order.)

***Mr. Valentine's First § 3582(c)(2) Motion.*** Meanwhile, in 2007, the Sentencing Commission amended the Sentencing Guidelines to ameliorate the 100:1 disparity between sentences for crack-cocaine and powder-cocaine offenses. The Commission could not fully eliminate the disparity, which stemmed from the governing statutes. Still, the Commission's Amendment 706 reduced, by two

levels, the base offense levels for defendants held accountable for less than 4.5 kilograms of crack cocaine. *See* U.S.S.G. Amend. 706 (as amended by technical and conforming Amendment 711). Thus, under the amended Guidelines, a finding of 1.5 kilograms subjected a defendant to base offense level 36—not 38, as that amount had been when Mr. Valentine was sentenced. U.S.S.G. § 2D1.1 (Nov. 1, 2009). To be subject to level 38 under Amendment 706, the defendant must have been found responsible for at least 4.5 kilograms. *Id.*

Once Amendment 706 was made retroactive, Mr. Valentine moved to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2). *See* U.S.S.G. Amend. 713 (making Amendments 706 and 711 retroactive effective March 3, 2008); R. 659, Defendant's Motion for Reduction of Sentence. Mr. Valentine argued that, based on the record evidence and Judge Enslen's findings at the original sentencing hearing, no more than 1.5 kilograms could be attributed to him. Because Judge Jonker was already handling Mr. Valentine's case on remand from this Court, Mr. Valentine's § 3582(c)(2) motion was assigned to him as well.

Pursuant to District procedures, the Probation Office issued a Sentence Modification Report ("SMR") setting forth its recommendation on whether a reduction should be granted. In the four-page SMR, the Probation Office recommended against a reduction. Although the SMR reiterated that the trial court only found Mr. Valentine responsible for at least 1.5 kilograms of crack cocaine,

*see* SMR at 1, the report concluded that he should be held responsible for at least 4.5 kilograms. (*Id.* at 2.) The Government concurred with the SMR's recommendation, but Mr. Valentine objected. (R. 759, Defendant's Response to Sentence Modification Report & exhibits thereto; R. 760, Government's Response; R. 771, Defendant's Reply in Support of Sentencing Reduction.)

In support of his motion for a reduction, Mr. Valentine also put forward evidence of his contrition and rehabilitation, noting that he has had no disciplinary issues in prison, has been progressively moving to lower security facilities, has continuously worked while in custody, and has been taking numerous classes to prepare himself for a successful reintegration into society upon his release. (R. 759 at ID# 1128-32, Defendant's Response to Sentence Modification Report at 11-14 & exhibits thereto.) He further noted that, upon release, a job would be waiting for him. (*Id.* at ID# 1129.) Accordingly, consistent with his original sentence, Mr. Valentine requested a new sentence at the low end of the new guideline range.

In a detailed, written opinion, Judge Jonker granted Mr. Valentine's motion, reducing his sentence to 235 months. (R. 802, Order Granting Motion for Reduction of Sentence.) The court determined that, at Mr. Valentine's original sentencing, Judge Enslen had resolved the parties' dispute about drug quantity by holding Mr. Valentine responsible for "at least 1.5 kilograms" of crack cocaine and not any higher amount. Under Amendment 706, that amount reduced

Mr. Valentine's base offense level by two levels, with a total offense level of 38 and a corresponding guideline range of 235 to 293 months. Judge Jonker then exercised his discretion to reduce Mr. Valentine's sentence to 235 months—"the lowest possible sentence in the newly computed guideline range, which corresponds to Judge Enslen's original placement of the Defendant at the lowest possible level of the original guideline range." (*Id*. at ID# 1325-26, Sentencing Order at 8-9.) The Government appealed.

***The Government's Appeal of Mr. Valentine's First § 3582(c)(2) Motion.*** This Court reversed and remanded. Whereas Judge Jonker had found that he was bound by Judge Enslen's earlier finding of "at least 1.5 kilograms," this Court held that a "new factual finding of [a] higher quantity is not inconsistent with the court's determination at the defendant's original sentencing." *Valentine*, 694 F.3d at 673 (quoting *United States v. Moore*, 582 F.3d 641, 646 (6th Cir. 2009)). In response to Judge Jonker's conclusion that *Moore* was distinguishable because it involved no disputed issue as to drug quantity, this Court responded in part that "the government did not have an incentive to prove anything more than 1.5 kilograms at [Mr. Valentine's] original sentencing." *Id*. at 672 n.5. Determining that Judge Jonker erred in viewing Judge Enslen's quantity finding as a ceiling, this Court remanded for Judge Jonker to "determine whether the record shows by a preponderance of the evidence that Jimmy Ray Valentine was responsible for at

least 4.5 kilograms of crack cocaine." *Id*. at 675. The Court further directed that, "if the amount cannot be easily determined, it is the duty of the District Court to estimate the amount, making sure to err on the side of caution." *Id*. at 674 n.6 (internal quotation marks and citation omitted).

***Mr. Valentine's Second § 3582(c)(2) Motion.*** While Mr. Valentine's Amendment 706 proceedings were pending, the Sentencing Commission in 2010 promulgated an additional Guidelines amendment modifying the Guidelines applicable to crack cocaine. Under Amendment 750, the Commission used an 18:1 ratio, thus further reducing, but still not entirely eliminating, the sentencing disparity between crack and powder cocaine. Accordingly, Amendment 750 eliminated the 1.5-kilogram and 4.5-kilogram thresholds; instead, three new ranges using the 18:1 ratio are relevant here: 840 grams to 2.8 kilograms (base offense level 34), 2.8 to 8.4 kilograms (base offense level 36), and 8.4 kilograms or higher (base offense level 38). Thus, the Sentencing Guidelines now assign a base offense level of 34 to defendants held responsible for 1.5 kilograms of crack cocaine. *See* U.S.S.G. § 2D1.1.

Once Amendment 750 became retroactive in November 2011, *see* U.S.S.G. Amend. 759, Mr. Valentine moved to reduce his sentence based on that Amendment. (R. 849.) At the time, the Government's appeal of Mr. Valentine's first sentence reduction motion was pending before this Court. On May 17, 2012,

the Probation Office issued a new SMR confirming Mr. Valentine's eligibility for a reduction under Amendment 750. (R. 873, ID# 3750, SMR at 4.) The SMR noted that Mr. Valentine's new total offense level was 36—given the new base offense level 34 applicable to offenses involving 1.5 kilograms, and the two-point enhancement for role in the offense pursuant to Judge Enslen's determination. (*Id.* at ID# 3749, SMR at 2-3.) Combined with Mr. Valentine's Criminal History Category I, his revised guideline range was 188 to 235 months. (*Id.* at ID# 3749, SMR at 3.) The Probation Office recommended that a reduction be granted and that Mr. Valentine be sentenced at "[t]he bottom of the new amended guideline range"—*i.e.*, a term of 188 months. (*Id.* at ID# 3750, SMR at 4.)

***The District Court's Sentencing Reduction Decision.*** Judge Jonker did not decide Mr. Valentine's second motion until the Government's appeal on the first motion concluded. With that motion on remand for further consideration in light of this Court's opinion, Judge Jonker, with the parties' agreement, consolidated proceedings on that motion with Mr. Valentine's motion under Amendment 750.

Judge Jonker denied both motions, thus leaving Mr. Valentine at his 292-month sentence. Judge Jonker began by noting that, "[o]f course, this Court does not have the benefit of hearing and observing the witnesses in the first instance"; therefore, Judge Jonker explained, he could "only reflect on the written record." (R. 892 at ID# 3918, Order at 4.) Nonetheless, Judge Jonker suggested that the

"sheer duration and scope of the conspiracy support an inference of significant quantities." (*Id*.) The Judge also relied without qualification on the testimony of Butler and Phillips, even though he acknowledged that other witnesses provided information involving smaller drug-quantity figures. (*Id*.) Because he ultimately found that the record "overwhelmingly" supported an 8.4 kilogram drug-quantity finding, *id*., and because that finding precluded relief even under the new Guidelines, Judge Jonker denied both of Mr. Valentine's sentence-reduction motions without determining whether, and by how much, to grant a reduction based on the sentencing factors outlined at 18 U.S.C. § 3553.

## STANDARD OF REVIEW

Pure questions of law and mixed questions of law and fact are reviewed *de novo*; pure questions of fact, by contrast, are reviewed for clear error. *See United States v. Layne*, 324 F.3d 464, 468 (6th Cir. 2003) (explaining that this Court reviews both pure questions of law and mixed questions *de novo*, while reviewing pure factual findings for clear error); *United States v. Clark*, 982 F.2d 965, 968 (6th Cir. 1993) (explaining that "mixed questions," including whether proceedings are "fundamentally unfair," are reviewed *de novo*).

*De novo* review is appropriate here because the district court was legally mandated to conduct a cautious analysis when assessing the factual record and entering its drug-quantity finding, *see United States v. Valentine*, 694 F.3d at 674

n.6 (quoting *United States v. Zimmer*, 14 F.3d 286, 290 (6th Cir. 1994)); *United States v. Hernandez*, 227 F.3d 686, 699 (6th Cir. 2000); *United States v. Walton*, 908 F.2d 1289, 1302 (6th Cir. 1990), and the failure to apply that standard constitutes an error of law.

In addition, the district court's specific drug-quantity finding in this case constitutes a mixed question of law and fact. To be sure, drug-quantity findings often pose pure questions of fact that are reviewable for clear error. *E.g.*, *United States v. Jeross*, 521 F.3d 562, 570 (6th Cir. 2008). Here, however, the court was obligated to ask whether the factual record satisfied the cautious legal standard applicable in this case. That constitutes a mixed question subject to *de novo* review *Cf. Layne*, 324 F.3d at 468 ("Whether the district court properly found the existence of a substantial risk of harm to human life or the environment within the meaning of [U.S.S.G.] § 2D1.1(b)(6)(A) is a mixed question of law and fact, and, as such, it is subject to *de novo* review."); *United States v. Georgia*, 279 F.3d 384, 386 (6th Cir. 2002) ("The determination that a defendant knowingly created a substantial risk of injury as set forth in Guidelines § 2K1.4(a)(1)(A) is a mixed question of law and fact, and, as such, it is subject to *de novo* review.").

## SUMMARY OF ARGUMENT

**I.** The district court's drug-quantity finding should have rested on a cautious analysis. Even though the Government alleged a massive narcotics

conspiracy involving dozens of kilograms of crack cocaine, absolutely no physical evidence supports that speculation or the district court's drug-quantity finding. Nor has Mr. Valentine conceded any drug quantities at any time. The Government has therefore been forced to rely on the testimony of cooperating witnesses—that is, of alleged co-conspirators who provided the Government with crucial testimony in exchange for generous plea bargains. These witnesses had an obvious incentive to exaggerate their drug-quantity estimates—yet the district court did not evaluate whether those witnesses were credible on the stand. In fact, the court had no way of doing so because the district-court judge below was *not* the judge who presided over Mr. Valentine's trial in 2000. As a result, the district court had to rely on the stale and cold record from the original sentencing hearing, in which Mr. Valentine had no interest in disputing whether he was responsible for 1.5 as opposed to 8.4 kilograms of crack. Yet the district court never considered the resulting weaknesses in the evidentiary record. Even worse, the district court failed to account for the credibility determinations arrived at by the original sentencing judge, who *did* have the opportunity to observe witness demeanor. By uncritically accepting the outlier testimony of the Government's most supportive cooperators, the district court committed an error of law.

No careful examination of the record in this case can substantiate the Government's drug-quantity allegations. Only two witnesses—Butler and

Phillips—testified about large drug quantities. Yet Butler expressly acknowledged the uncertainty of his own drug-quantity estimates. And even if Butler's most inflated testimony were accepted in its entirety, it *still* would show only that Mr. Valentine was responsible for barely 2.0 kilograms. The original sentencing court recognized that fact, but the judge who heard Mr. Valentine's sentence reduction motions failed to do so. As for Phillips, his supposed observations concerned events unconnected to Mr. Valentine. Indeed, even the Government did not invoke Phillips's testimony at Mr. Valentine's original sentencing hearing—and that was when the highest threshold went only to 1.5 kilograms rather than 2.8, 4.5, or 8.4. In any event, Phillips's discredited testimony was marked by inconsistencies with the statements of other witnesses. The district court listed the names of other witnesses and gave a nod to the much more limited quantities that they discussed, but the district court did not discuss or attempt to reconcile any of that testimony, nor did the Government at the original sentencing hearing. In short, the Government's proffered testimony does not even *purport* to substantiate the drug-quantity finding necessary to sustain the judgment below.

**II.** The district court committed an independent error of law by attributing co-conspirators' conduct to Mr. Valentine without making *either* of two legally necessary findings. Both the Sentencing Guidelines and this Court's precedents are crystal clear that conspirators can be held accountable for actions

undertaken pursuant to a conspiracy only after a sentencing court has found *both* the scope of the defendant's consent to participate in the conspiracy *and* that the defendant could foresee the relevant conduct undertaken by his co-conspirators. These procedural requirements are indispensible because they help prevent individuals from being unfairly punished for the actions of others. Yet the district court on remand—unlike the judge in Mr. Valentine's original sentencing proceeding—utterly failed to address either of the procedural requisites established by this Court and the Sentencing Guidelines. That clear, *per se* procedural error necessitates reversal and remand. The district court's error is particularly egregious given the record and prior judicial findings in this case, which raise serious questions as to whether Mr. Valentine could possibly have consented to or foreseen the actions of other alleged conspirators.

## ARGUMENT

### I. THE WITNESS TESTIMONY RELIED ON BELOW CANNOT SUPPORT THE DISTRICT COURT'S DRUG-QUANTITY FINDING

This Court has already recognized that the district court had an obligation to "mak[e] sure to err on the side of caution" when making factual findings regarding drug quantity in close cases like Mr. Valentine's. *Valentine*, 694 F.3d at 674 n.6 (quoting *United States v. Zimmer*, 14 F.3d 286, 290 (6th Cir. 1994)); *see also United States v. Battle*, 706 F.3d 1313, 1320 (10th Cir. 2013) (reversing denial of sentencing reduction because, "given the complete absence of evidence of drug

quantity [between 1.8 and 3.4 kilograms], the district court was required to 'err on the side of caution'"). The district court failed to heed that admonition and so committed an error of law. Moreover, an examination of the record in this case reveals that the district court's drug-quantity finding of 8.4 kilograms is clearly erroneous. For both of these reasons, this Court should reverse the judgment below and remand for new fact-finding.

### A. The District Court Had A Legal Duty To Err On The Side Of Caution When Making Its Drug-Quantity Determination

Section 3582(c)(2) authorizes a district court to reduce a defendant's sentence pursuant to an amended guideline if (1) the defendant is eligible based on applicable policy statements issued by the Sentencing Commission, and (2) the court, pursuant to the "factors to be considered in imposing a sentence" set forth in 18 U.S.C. § 3553(a), finds a reduction is warranted. *See* 18 U.S.C. § 3582(c)(2). Under the first step, § 1B1.10 of the Sentencing Guidelines directs the resentencing judge to "determine the amended guideline range that would have been applicable" if the amended guideline "had been in effect at the time the defendant was sentenced." U.S.S.G. § 1B1.10(b)(1); *see also Dillon v. United States*, 130 S. Ct. 2683, 2691 (2010) (stating that any factual determinations made by the original trial court remain unaffected and are binding in the resentencing proceedings). The judge may make new findings, but only if such findings would not be "inconsistent" with the findings of the trial judge. *Moore*, 582 F.3d at 646. If the defendant is

eligible for a reduction, the resentencing judge proceeds to the second step: determining whether a reduction is warranted by considering the factors set forth in § 3553(a). *See United States v. Watkins*, 625 F.3d 277, 280 (6th Cir. 2010).

At the first step, the Government has "the burden of proving by a preponderance of the evidence the amount of drugs for which a defendant is accountable." *United States v. Mahaffey*, 53 F.3d 128, 131 (6th Cir. 1995); *see also Valentine*, 694 F.3d at 674. Moreover, "the guidelines do not permit the District Court to hold a defendant responsible for a specific quantity of drugs unless the court can conclude the defendant is more likely than not *actually* responsible for a quantity greater than or equal to the quantity for which the defendant is being held responsible." *United States v. Walton*, 908 F.2d 1289, 1302 (6th Cir. 1990); *see also id*. ("While this may result in an underestimation of the quantity of drugs involved in some few cases, we believe it is nonetheless constitutionally required to prevent excessive sentences."). Therefore, "when choosing between a number of plausible estimates of drug quantity, none of which is more likely than not the correct quantity, a court must err on the side of caution." *Id*.; *see also United States v. McGee*, 494 F.3d 551, 555 (6th Cir. 2007) (same).

Congress has provided another legal reason why caution is necessary when evaluating the drug quantity in this case. Mr. Valentine's current sentence is predicated on what all now acknowledge to have been an "overly severe"

sentencing regime that irrationally punished crack-related offenses far more drastically than powder-related ones. *United States v. Hameed*, 614 F.3d 259, 266 (6th Cir. 2010). Here, Mr. Valentine has requested a sentencing reduction pursuant to 18 U.S.C. § 3582(c)(2) and the Sentencing Commission's Amendments, which attempt to mitigate the injustice of the Guidelines under which Mr. Valentine was sentenced. Only by erring on the side of caution can courts honor the Sentencing Commission's efforts "to alleviate the unwarranted sentencing disparity between powder and crack cocaine offenses." *Id*.

### B. The Drug-Quantity Allegations In This Case—Which Turn Entirely On Self-Interested Testimony Conducted In A Different Proceeding And Evaluated On A Cold Record—Particularly Compel Caution

This case poses a truly unique situation: The judge who entered the new drug-quantity finding in this case has *never* had the opportunity to assess the live testimony on which the drug-quantity finding entirely depended. Mr. Valentine has *never* had the benefit of a judicial forum in which he had both notice and opportunity to challenge the Government's claim that he is responsible for 8.4 kilograms. Moreover, the testimony in this case consists of highly suspect admissions by co-conspirators obtained in exchange for favorable treatment by the Government. And the resulting testimony does not even paint a consistent or persuasive picture of the alleged magnitude of the charged conspiracy. If caution is ever appropriate in a resentencing case, surely it is appropriate here.

At least six distinct circumstances set this case apart from mine-run cases involving drug-quantity assessments. Individually and in combination, these circumstances establish that this case does indeed pose a unique situation warranting special caution in attributing a drug quantity to Mr. Valentine.

*1. Only Miniscule Physical Or Other Direct Evidence Was Involved*. This case is exceptional because it involves almost no physical evidence going to drug quantity. Even after alleging a protracted and elaborate conspiracy involving well over a dozen individuals and over 50 kilograms of illegal narcotics, the Government managed to seize only about 0.13 kilogram of crack cocaine. (*See* PSR at 8-9, 13-14.) Moreover, the Government lacked any other form of direct evidence. It proffered no photographs, wiretaps, laboratory materials, fingerprints, or other objective evidence demonstrating the alleged drug quantity. As a result, the Government's drug-quantity arguments in this case—unlike in many other cases—depended entirely on witness testimony.

The Government's lack of direct evidence is enough in itself to justify heightened judicial scrutiny and to distinguish this case from those that permit a more mechanistic approach to determining drug quantity. *Compare, e.g.*, *United States v. Coots*, 408 F. App'x 968, 969 (6th Cir. 2011) (affirming sentence where "officers searched [the defendant's] home and discovered 1,233 marijuana plants growing on the property, as well as several bags of processed marijuana and other

controlled substances"), *with United States v. Chase*, 499 F.3d 1061, 1070 (9th Cir. 2007) (explaining that because "no physical evidence . . . corroborated" a witness's drug-quantity estimate, the district court erred in relying on it), *and United States v. Culps*, 300 F.3d 1069, 1076-77 (9th Cir. 2002) (reversing a district court for failing to apply an appropriate degree of caution where the "total" drug quantity "actually seized in the entire three-year investigation comprised less than one kilogram").

The surprising absence of physical evidence corroborating the Government's extravagant drug-quantity allegations should trigger special skepticism: Where many dozens of kilograms of drugs have allegedly been distributed by many people over a long period of time, courts should reasonably expect that much more than 0.13 kilogram will be produced. In the face of such a small showing, courts should be reluctant to make vastly higher drug-quantity findings.

*2. There Were No Relevant Defense Admissions*. In the unusual cases where physical evidence is lacking, the Government typically relies on defense admissions in order to substantiate its burden of proof. *E.g.*, *United States v. Moore*, 582 F.3d at 642-43 (noting that the defendant had "admitted to the probation officer preparing the PSR that 'his overall involvement in the distribution of drugs exceeded 1.5 kilograms of crack cocaine'"); *United States v. Stafford*, 258 F.3d 465, 476 (6th Cir. 2001) (A "defendant's statement of no objections to a presentence report constitutes an express admission of the amount

and type of drugs attributed to the defendant in the PSR.") (internal quotation marks omitted). But Mr. Valentine has vigorously disputed the Government's drug-quantity allegations at every stage of this case. (*See* R. 335 at ID# 1472-73, Defendant's Sentencing Memorandum at 1-2; R. 436 at ID# 1585-89, 1593-95 Sentencing Tr. at 8-12, 16-18.) Without any relevant concessions or direct evidence going to drug quantity, the Government found itself in the highly unusual position of having to meet its burden of proof based entirely on testimonial evidence.

*3. The Government's "Proof" Relied On Co-Conspirators With A Powerful Incentive To Lie.* The Government had to rely almost exclusively on witness testimony to meet its burden of proof. But that evidence was highly suspect. Indeed, the witnesses on whom the Government relied were almost all under investigation or prosecution for the same alleged conspiracy.

This Court has clearly instructed that such "cooperating witnesses" have a "strong motivation to implicate" their alleged co-conspirators in exchange for favorable treatment and, therefore, that their statements "about the defendant's involvement in the crime should be viewed with 'special suspicion.'" *United States v. Gomez-Lemos*, 939 F.2d 326, 330 (6th Cir. 1991) (quoting *Lee v. Illinois*, 476 U.S. 530, 541 (1986)); *see also Bruton v. United States*, 391 U.S. 123, 136

(1968) (noting the "inevitably suspect" credibility of co-conspirator testimony "given the recognized motivation to shift blame onto others").

Suspicion particularly attaches to the only two witnesses who testified about large drug quantities: Butler and Phillips. The Government asserted that these witnesses were important *leaders* of the conspiracy, and that portrayal gave those witnesses an extra incentive to exaggerate their involvement and information in order to secure favorable treatment. (*See, e.g.*, R. 389 at ID# 2050, Trial Tr. Vol. VI at 1794:11-13 (Phillips testifying that he was a "major contributor" to a narcotics venture).) Butler and Phillips testified to outlandish drug-quantity estimates that were orders of magnitude higher than those advanced by other witness. *See infra* pp. 38-47 (discussing witness testimony in detail). Other witnesses' unimpressive drug-quantity estimates, and the lack of *any* support in tangible evidence for the elaborate conspiracy alleged, suggest a conspiracy far less impressive than the Government and its premier witnesses alleged.

In sum, each of the Government's principal witnesses had an obvious and powerful incentive to exaggerate his ability to provide useful first-hand information, particularly when linking the alleged conspirators together by discussing the magnitude of drug transactions.

*4. No Fact-Finder Has Ever Considered Whether Live Testimony Supports a Finding of 8.4 Kilograms*. The drug-quantity finding in this case

depended on credibility determinations made *entirely* without the benefit of live testimony. That circumstance is truly extraordinary. In some contexts, this Court and other courts have gone so far as to hold that "[f]ederal courts *cannot* determine a genuine issue of material fact which depends upon a witness's credibility without hearing the relevant testimony." *Caldwell v. Lewis*, 414 F. App'x 809, 817 (6th Cir. 2011) (emphasis added) ("The district court erred by presuming on a cold record that [the witness] was telling the truth . . . ."). Here, Judge Jonker was assigned responsibility for this case in 2008, long after Mr. Valentine's trial and sentencing in 2000. Indeed, Judge Jonker was not even on the bench at the time the trial took place in Judge Enslen's court. As the new trier of fact, Judge Jonker completely lacked access to material live testimony.

As the Supreme Court has often emphasized, "only words can be preserved for review" and "no transcript can recapture the atmosphere" in which live testimony occurs. *Gomez v. United States*, 490 U.S. 858, 875 (1989). The limitations inherent in reviewing a "cold record" underscore the critical importance of hearing, seeing, and scrutinizing live-witness testimony:

> The most careful note must often fail to convey the evidence fully in some of its most important elements. . . . It cannot give the look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; . . . the dead body of the evidence, without its spirit; which is supplied, when given openly and orally, by the ear and eye of those who receive it.

*United States v. Raddatz*, 447 U.S. 667, 679 (1980) (internal quotation marks and citations omitted). Because there is no way to know what insights into credibility could have been gained through direct observation of live testimony, "courts must always be sensitive to the problems of making credibility determinations on the cold record." *Id*.; *see also Beavers v. Sec'y of Health, Educ. & Welfare*, 577 F.2d 383, 387 (6th Cir. 1978) ("The opportunity to observe the demeanor of a witness, evaluating what is said in the light of how it is said, and considering how it fits with the rest of the evidence gathered before the person who is conducting the hearing, is invaluable . . . .").

Even when the same judge handles both the original sentencing and a subsequent § 3582(c) proceeding, the passage of time can erode memories and effectively make the resentencing record "cold." Indeed, the need to assess the record as a whole in order to evaluate witness testimony, as well as the inherent limitations of conducting this fact-intensive review years after the fact, explain why resentencing courts have well-recognized "discretion not to make additional findings" based on records—like the one in Mr. Valentine's case—that are "more than a decade" old. *United States v. Mann*, 709 F.3d 301, 307 (4th Cir. 2013). Courts thus recognize that it is impossible to make new findings many years later, even when the same judge is presiding.

In this case, the district-court judge who found that 8.4 kilograms of crack were attributable to Mr. Valentine was not the same judge who heard testimony during trial and initial sentencing. As a result, Judge Jonker could not *possibly* benefit from the kind of credibility evaluation that district courts are normally expected to perform. Judge Jonker's ability to evaluate the relevant witnesses was severely curtailed by the need to rely on a cold record.

*5. The Cold Record In This Case Is Distorted Because, At The Original Sentencing Hearing, Mr. Valentine Had No Notice Of, Or Reason To Anticipate, The Government's New Arguments As To Drug Quantity*. The court's inquiry in this proceeding is profoundly skewed because, when the drug-quantity record was created, different drug-quantity thresholds existed. Accordingly, Mr. Valentine had no basis for engaging in testimony pertaining to quantities beyond a 1.5-kilogram threshold. That same, undeveloped record, however, has become the basis for the Government's argument that 8.4 kilograms should be attributed to Mr. Valentine. Mr. Valentine has thus been denied notice and a full opportunity to challenge the drug-quantity arguments that the Government has advanced in these resentencing proceedings.

The unique procedural history of this case has undermined Mr. Valentine's ability to defend himself against the Government's drug-quantity allegations. At trial and the original sentencing proceeding, where the highest threshold was 1.5

kilograms, Mr. Valentine had no incentive to introduce evidence or argument that he was responsible for (only) a quantity *between* 1.5 and 2.8 kilograms, or *between* 2.8 and 8.4 kilograms.[1] Under the then-applicable Guidelines, Mr. Valentine's *only* incentive was to introduce evidence and argument that he was responsible for less than 1.5 kilograms—the highest drug-quantity threshold in effect at that time. Because of the newly applicable Guidelines, by contrast, Mr. Valentine could have obtained a lower sentence by successfully introducing evidence or argument that he was responsible for only 2.0 kilograms, or for any other quantity less than 8.4 kilograms. Mr. Valentine has been denied the opportunity to make such credibility arguments based on live testimony.

For example, once Butler's testimony provided Judge Enslen a basis to conclude that Mr. Valentine was responsible for transacting at least two kilograms, Mr. Valentine had no incentive to argue that Butler's serious inconsistencies and lack of credibility precluded the higher drug-quantity finding at issue here. (*See* R. 436 at ID# 1605, 1607, Sentencing Tr. at 28:14-18, 30:11-14, 19-20 (Judge Enslen crediting Butler as to specific transactions); *see also infra* pp. 41-44 (discussing the

[1] Because Judge Jonker denied both of Mr. Valentine's sentencing reduction motions, this Brief, as here, generally refers to the thresholds and ranges of amounts applicable to the latest Guidelines under Amendment 750, as opposed to the earlier revised Guidelines established by Amendment 706. *See supra* pp. 9-13. Under the latest Guidelines, the operative drug-quantity thresholds are 840 grams, 2.8 kilograms, and 8.4 kilograms. *See* U.S.S.G. § 2D1.1. (Nov. 1, 2011).

many defects in Butler's testimony). Indeed, Butler's testimony regarding two-kilograms of crack, once accepted, eliminated any reason for either Mr. Valentine or Judge Enslen to explore the remainder of Butler's testimony, or even the testimony of the other witnesses. Yet that unevaluated testimony is now heavily relied on by the Government and by Judge Jonker.

There has also been a dramatic change in the Government's litigation position. In the original sentencing proceeding, the Government's sentencing memorandum contained no argument whatsoever on drug quantity. (*See* R. 336, ID#3932, Government Sentencing Memorandum.) That pattern continued during the sentencing hearing, when the Government identified only two witnesses by name—Butler and Phillips—and discussed the substance of only Butler's testimony. (R. 436 at ID# 1586-91, Sentencing Tr. at 9:6-12, 11:4-14, 14:23-15:2.) Moreover, the Government's arguments were focused on the then-relevant drug threshold of 1.5 kilograms. Because the Government has the burden of proof, it should not benefit from the fact that *neither* party was focused on the now-relevant drug thresholds at the time the record was created. Instead, this Court should construe the resulting record ambiguities in Mr. Valentine's favor.

This Court has already noted that, at the original sentencing hearing, "the government did not have an incentive to prove anything more than 1.5 kilograms," even though it could in principle have sought to prove a far higher quantity.

*Valentine*, 694 F.3d at 672 n.5. That reasoning, once accepted, applies equally to Mr. Valentine: Though he could in theory have combated arguments as to higher drug-quantity levels, his actual incentives and notice were limited to the Government's arguments regarding 1.5 kilograms. The stale, cold record must be viewed in that light.

*6. In Evaluating Live Witnesses In This Case, Judge Enslen Previously Made Credibility Determinations That Must Be Respected*. When Judge Enslen had access to live testimony, he made factual findings and witness evaluations. In particular, Judge Enslen, who presided over both the trial and the original sentencing proceeding, made express findings that undermined the testimony of Butler and Phillips.

First, Judge Enslen wholly declined to credit Phillips's statements regarding the total drug quantities at issue, as well as their relationship to Mr. Valentine. (R. 436 at ID# 1605, Sentencing Transcript, at 28:7-14 (not crediting Phillips); *id*. at ID# 1607 (same).) Judge Enslen's decision not to rely on Phillips's testimony was well-supported by the events at trial and sentencing. After Mr. Valentine's trial counsel leveled an extensive critique of Phillips's manifest lack of credibility, the Government chose not to raise any directly responsive counterargument whatsoever and instead chose to invoke the testimony of only a single other witness—namely, Butler. (*See id*. at ID# 1586, 1588, Sentencing Hearing at 9:6-

12, 11:4-25 (defense's critique); *see also id*. at ID# 1591-92, Sentencing Hearing at 9:14:23-25 (Government expressly noting defense arguments against Phillips and then immediately invoking only Butler's testimony).)

Second, Judge Enslen chose to credit only certain aspects of Butler's generally dubious testimony. (R. 436 at ID# 1607, Sentencing Tr. at 30:18-20.) According to the cold record, Butler said the conspiracy involved: "Nothing more than 50. Maybe less than 50. It wouldn't be—I don't think it would be more than 50, but it could be. But be no more than 50." (R. 385 at ID# 2382, Trial Tr. Vol. II at 354:16-18.) After hearing these and other statements, Judge Enslen declined to credit Butler's lofty estimate of the total amount of crack involved. (R. 436 at ID# 1607, Sentencing Transcript, at 30:21 (expressing "misgivings" about Butler's estimate that he sold 50 kilograms to the various defendants).)

The need to defer to Judge Enslen's credibility determinations finds support in appellate courts' practice of deferring to credibility determinations by district courts that have observed live witnesses. The Supreme Court explains:

> Face to face with living witnesses, the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.

*United States v. Oregon State Medical Soc'y*, 343 U.S. 326, 339 (1952) (internal

quotation marks and citation omitted); *see also Casey v. Sec'y of Health & Human Servs.*, 987 F.2d 1230, 1234 (6th Cir. 1993) (per curiam) (noting the deference awarded to those who have observed witness demeanor).

Just as an appellate court cannot "say" that a trial judge is "wrong" in his or her assessment of a witness's demeanor, *Oregon State*, 343 U.S. at 339, Judge Jonker could not say that Judge Enslen was wrong to discount the testimony offered by the Government's witnesses. So long as a credibility determination *could have* supported Mr. Valentine's position, Judge Jonker—who had no opportunity to make such a finding—had an obligation to defer to Judge Enslen's credibility determinations and "err on the side of caution." *Valentine*, 694 F.3d at 674 n.6. Deference and caution are especially critical here, for Judge Enslen only had to evaluate whether Mr. Valentine was responsible for 1.5 kilograms—not the vastly higher quantities at issue in this case. And even on that number, Judge Enslen refrained from fully accepting the testimony offered by the Government's central witnesses. *See Valentine*, 70 F. App'x at 329-30 (acknowledging that Judge Enslen "properly erred on the side of caution" when assessing drug quantity).

To be sure, Judge Enslen ultimately concluded that Mr. Valentine was responsible for at least 1.5 kilograms of cocaine. But in arriving at that relatively low drug-quantity figure, Judge Enslen reached numerous conclusions that should have been a caution to subsequent judges reviewing this cold record. It is

impossible to know whether Judge Enslen would have stated these conclusions even more forcefully if he had been required to determine whether the record could support a higher drug-quantity threshold. Given Judge Enslen's findings and the real possibility that observation of the live witnesses could have supported an even more extensive rejection of the witnesses' credibility, Judge Jonker had an obligation to "err on the side of caution." *Valentine*, 694 F.3d at 674 n.6.

### C. By Uncritically Accepting Discredited, Self-Interested Witnesses Without The Benefit of Live Testimony, The District Court Failed To Apply Legally Mandated Caution

Despite the myriad reasons for caution in this case, Judge Jonker applied a rote, mechanical analysis that uncritically adopted the high-end drug-quantity estimates of patently unreliable witnesses and attributed those entire estimates to Mr. Valentine. Judge Jonker's error of law necessitates at least a remand for new fact-finding pursuant to the correct legal standard.

In the central portion of his opinion, Judge Jonker acknowledged that "cooperating witnesses" provided virtually all the drug-quantity evidence against Mr. Valentine. (R. 892 at ID# 3918, Op. at 4.) Judge Jonker even noted that most of the Government's witnesses testified only to very small drug-quantity purchases, thereby casting doubt on the larger estimates of other witnesses. (*Id*. at ID# 3919, Op. at 5 (remarking that most of the witnesses who offered testimony bearing on drug quantity "provided information regarding more limited time frames or more

limited aspects of the conspiracy").) But instead of exhibiting even a modicum of skepticism regarding the Government's witnesses, Judge Jonker adopted wholesale the most aggressive drug-quantity estimates available. That rote approach is the opposite of caution.

What Judge Jonker's opinion does *not* say is just as revealing. At no point in his opinion did Judge Jonker note that Judge Enslen, who observed live testimony, had cast doubt on the Government's key witnesses. Nor did Judge Jonker acknowledge that, at the original sentencing hearing, Mr. Valentine lacked an incentive to argue for drug quantities between 1.5 and 8.4 kilograms. The closest Judge Jonker came to addressing these systematic challenges was at the outset of his opinion, which noted that he, "[o]f course," did not "have the benefit of hearing and observing the witnesses in the first instance" and so could "only reflect on the written record." (R. 892 at ID# 3918, Op. at 4.) And even that isolated comment trivialized ("[o]f course") this case's unique challenges.

The district court's error here is comparable to the analysis recently rejected by the Tenth Circuit in *United States v. Battle*, 706 F.3d 1313 (10th Cir. 2013). There, the defendant argued that he should be resentenced according to the finding at the original sentencing hearing that he was responsible for at least 1.5 kilograms. Instead, the district court reviewed the original PSR and simply added up the quantities allegedly distributed by every member of the conspiracy. *See id*. at 1320.

The Court of Appeals reversed. *See id*. ("The [district] court's decision to combine these totals is clearly in error."). Citing this Court's decision in *Walton*, 908 F.3d 1289, the Tenth Circuit held that "[w]hen choosing between a number of plausible estimates of drug quantity, none of which is more likely than not the correct quantity, a court must err on the side of caution." *Id*. at 1320 (internal quotation marks omitted). True, the defendant "was responsible for somewhere between 1.8 and 3.4 kilograms." *Id*. But "given the complete absence of evidence of drug quantity within that range, the district court was required to 'err on the side of caution,' and not rely on a 'theoretical maximum amount' of cocaine base involved." *Id*. (citations omitted). Thus, "the supplemental drug quantity calculations made by the district court at [the defendant's] § 3582(c)(2) proceeding were unsupported by the facts found at his original sentencing." *Id*. at 1319.

The district court's evaluation of the record in this case should similarly be rejected. In responding to this Court's directive to make a new drug-quantity finding, Judge Jonker failed to heed a critical aspect of that directive—namely, to "err on the side of caution." *Valentine*, 694 F.3d at 674 n.6 (internal quotation marks omitted). Instead of exhibiting cautious judgment, Judge Jonker applied an uncritical, rote analysis. Simply adding up the various estimates adduced during highly suspect testimony is antithetical to the cautious analysis that is "constitutionally required to prevent excessive sentences." *Walton*, 908 F.2d at

1302. Indeed, Judge Jonker's willingness to "combine" asserted drug-quantity "totals" is incompatible with the Government's burden to establish drug quantity by a preponderance of the evidence. *See Battle*, 706 F.3d at 1320; *see also id*. at 1321 ("On the record before us, we cannot properly attribute any quantity above 1.8 kilograms to [the defendant] under a preponderance of the evidence standard."). Judge Jonker's complete failure to discount the drug-quantity testimony against Mr. Valentine necessitates a remand for new factual findings pursuant to the correct legal standard.

### D. The Witness Testimony In This Case Cannot Support The District Court's Drug-Quantity Finding of 8.4 Kilograms

Even under the proper standard, none of the witnesses or evidence offered by the Government supports a finding that Mr. Valentine can be held responsible for the distribution of 8.4 kilograms. That conclusion is particularly apparent in light of the six special circumstances in this case, *see supra* Sections I.A-C, and this Court's directive to err "on the side of caution," *Valentine*, 694 F.3d at 674 n.6. But even setting aside all of the other reasons to proceed with caution, Judge Jonker at the very least had an obligation to determine whether the testimony from Butler and Phillips on which he relied could be credited. Simply saying something does not make it true. *See Parhat v. Gates*, 532 F.3d 834, 848-49 (D.C. Cir. 2008) ("[T]he fact that the government has 'said it thrice' does not make an allegation true." (quoting LEWIS CARROLL, THE HUNTING OF THE SNARK 3 (1876)). As shown,

their testimony on its face is patently unreliable and thus cannot come close to demonstrating that Mr. Valentine is responsible for distributing 8.4 kilograms.

*1. Testimony From Phillips Does Not Support The District Court's Drug-Quantity Finding*. Remarkably, Phillips—the first witness that Judge Jonker discussed—had not been credited by Judge Enslen and was not relied on by the Government during the original sentencing proceeding.

In his testimony, Phillips consistently attempted to exaggerate his role in the alleged conspiracy and to increase the value of his supposed insider information. (*See, e.g.*, R. 389 at ID# 2050, Trial Tr. Vol. VI at 1794:11-13 (Phillips testifying that he was a "major contributor" to a narcotics venture); *id*. at 1830 (Phillips boasting that he "didn't split [his] profits").) These exaggerations helped Phillips obtain a favorable deal from the Government but compromised his testimony. For example, Phillips asserted the existence of a conspiracy of far greater proportions than what other witnesses claimed—as Judge Jonker had to acknowledge. (*Compare* R. 892 at ID# 3919, Op. at 5 (recounting Phillips's estimate that the conspiracy involved "quantities of 75 kilograms of cocaine"), *with id*. at 5-6 (noting the far smaller estimate of other witnesses).) As another example, Phillips testified that while he did not negotiate purchases with Butler alone, he did directly deal with Butler. (*See* R. 389 at ID# 2064-65, Trial Tr. Vol. VI at 1808:3-1810:18.) Yet Butler testified that he and Phillips had only one dealing. (*See* R. 385 at

ID# 2352, Trial Tr. Vol. II at 324.) Faced with these inconsistencies and uncorroborated assertions, Judge Enslen wholly declined to credit Phillips's statements. (*See* R. 436 at ID# 1605, Sentencing Transcript, at 28:7-14.)

Without noting any of the defects explicit in Phillips's testimony, however, Judge Jonker expressed confidence in Phillips's version of events. According to Judge Jonker, Phillips's testimony was "bolstered" by "relatively detailed quantity and dollar value estimates," by the fact that he offered "specific names of involved persons," and by the "facially reasonable time frames" he offered "for various aspects of the conspiracy." (R. 892 at ID# 3919, Op. at 5.) Yet intricate exaggerations are no more reliable than simple ones, and the mere fact that Phillips offered estimates that are "facially reasonable" hardly establishes their accuracy. Judge Jonker erroneously credited Phillips's outlandish version of events simply because it could conceivably have been accurate. That analysis failed to acknowledge the inconsistencies and unreliable assertions in Phillips's testimony, or to hold the Government to its burden of proof. *See Valentine*, 694 F.3d at 674.

Finally, the district court failed to appreciate that Phillips's testimony—even if accepted as accurate—is immaterial because it overwhelmingly concerned purchases in California that never involved Mr. Valentine or other Valentines, or that involved only marijuana. (R. 389 at ID# 2069-79, Trial Tr. Vol. VI at 1813:5-1823:3.) Thus, most of Phillips's testimony simply does not pertain to the legal

question at issue in this case. *See infra* Part II (explaining that drug quantities may be attributed to Mr. Valentine only if the district court makes record-supported findings as to *both* the scope of Mr. Valentine's alleged agreement to participate in the crack conspiracy *and* the foreseeability of his alleged co-conspirators' actions).

*2. Butler's Testimony Does Not Support The District Court's Drug-Quantity Finding.* Judge Jonker also relied on testimony offered by Butler. But Butler's drug-quantity estimates were patently unreliable; and, once again, Judge Enslen acknowledged as much during the original sentencing proceeding.

Butler's memory of drug quantities was hazy at best. Butler repeatedly testified that he was "not for sure" about his testimony: he could not remember the amount of drugs he claimed to have sold to Mr. Valentine, their conversations, or the locations of the alleged sales. (R. 385 at ID# 2340, Trial Tr. Vol. II at 312:6-20 ("I can't really say . . . ."), *id.* at ID# 2341, Tr. at 313:21-24 ("I'm not for sure."), *id.* at ID# 2348, Tr. at 320:2-3 ("I'm not for sure . . . ."); *see also id.* at ID# 2343, Tr. at 315:15 ("I just don't remember").)

Recognizing Butler's avowed uncertainty as to the critical issue at sentencing, Judge Enslen did not fully believe Butler's tentative estimates and expressly declined to credit Butler's estimation of the total amount of crack involved. (*See* R. 436 at ID# 1607, Sentencing Tr. at 30:21 (expressing "misgivings" about Butler's estimation that he sold 50 kilograms to the various

defendants).) And, since Judge Enslen failed to fully credit Butler's total estimation as to drug quantity, the only reasonable inference is that Judge Enslen also failed to fully credit Butler's testimony about the amounts involved in individual transactions. *See, e.g.*, *United States v. Clark*, 388 F. App'x 513, 519 (6th Cir. 2010) (approving the district court's "discounting [a witness's] estimate by 40 percent"). Even without Judge Enslen's determinations, Judge Jonker should have reached the same conclusion—namely, that Butler's testimony should be heavily discounted.

By instead applying a rote analysis—looking solely at numbers asserted by Butler—Judge Jonker effectively accepted all of Butler's drug-quantity estimates, even estimates *that Butler himself* expressly indicated might be substantially incorrect. (R. 892 at ID# 3919, Op. at 5.) For example, Butler equivocated as to his claim that the conspiracy involved 50 kilograms, saying: "Maybe less than 50. It wouldn't be—I don't think it would be more than 50 but it could be. But be no more than 50." (R. 385 at ID# 2382, Trial Tr. Vol. II at 354:16-18.) Yet the district court unqualifiedly cited Butler for the proposition that the conspiracy involved "approximately 50 kilograms." (R. 892 at ID# 3919, Op. at 5.)

At another juncture, Butler made the following circuitous statements regarding his transactions with Mr. Valentine: "It was never more than two or two and a half, something like that. You know, might be one and a half, one, two,

something like that. *I just don't remember*." (R. 385 at ID# 2343, Trial Tr. Vol. II at 315:13-15 (emphasis added); *see also id*. at ID# 2345, Tr. at 317 (discussing drug quantities only at "every time that I can remember").) Needless to say, this dubious testimony is, at best, unspecific. Indeed, it includes an express disclaimer: "*I just don't remember*." Yet Judge Jonker cited those very passages for the confident—and high-end—assertion that Butler engaged in at least three transactions with Mr. Valentine, "each involving 2-2.5 kilograms of crack." (R. 892 at ID# 3919, Op. at 5.)

Remarkably, the district court's reading of Butler's alleged transactions with Mr. Valentine does not even comport with the figures that Butler rather hazily expressed. At the outset, Butler made clear that his first transaction with Mr. Valentine involved "at the most" 8 or 9 ounces (that is, about 0.22 kilograms).[2] (R. 385 at ID# 2340, Trial Tr. Vol. II at 312:7-21.) Butler then said that his total number of transactions—including that first one—numbered "three to five." (*Id*. at ID# 2343, Tr. at 315:5-10.) And Butler said that the magnitude of each transaction *after* the first one was "one, two [kilograms], something like that." (*Id*.) Thus, in actuality, Butler testified to one purchase of roughly 0.22 kilogram and two purchases of about 1 kilogram, or about 2.22 kilograms total—a figure far below the now-applicable 2.8-kilogram and 8.4-kilogram sentencing thresholds that the

[2] One kilogram is equal to approximately 35 ounces.

district court ultimately applied in this case. Judge Jonker clearly erred by saying that Butler testified to "3-4 sales directly to [Mr. Valentine], each involving 2-2.5 kilograms of crack," which would total at least 6 kilograms. (R. 892 at ID# 3919, Op. at 5.)

That error necessitates reversal under any conceivable standard of review. To be clear, *even if* Butler's confused and unreliable estimates were accepted at face value, they would attribute to Mr. Valentine barely more than 2 kilograms. Judge Jonker's blatant misapprehension of the record caused him to *nearly triple* the already inflated estimates offered by the Government's witnesses. This clear error alone demonstrates that Judge Jonker failed both to apply the legally mandated degree of caution in this case and to hold the Government to its burden of proof.

*3. Testimony From All Other Witnesses Undermines, And Does Not Support, The District Court's Drug-Quantity Finding*. The only other evidence referenced by the district court was a fleeting mention that the Government adduced witnesses other than Butler and Phillips. (R. 892 at ID# 3919, Op. at 5.) However, the district court discussed *none* of these other witnesses' testimony. This drive-by treatment of the record indicates the implausibility of relying on these witnesses' assertions. Indeed, these witnesses in no way substantiate—and, if anything, cast significant doubt on—the district court's drug-quantity finding.

For example, the district court referred to Bryant Farmer, but he testified that his three purchases from Mr. Valentine were as little as 1/4 ounce (or 0.007 kilogram) each time. (R. 386 at ID# 2810, 2815, Trial Tr. Vol. III at 758, 763.) And Farmer's portrayal of Mr. Valentine's role in the conspiracy was essentially limited to saying that he "talk[ed] in [a] store" with another alleged co-conspirator—hardly evidence of a large-scale conspiracy, much less one attributable to Mr. Valentine. (*Id*. ID# 2819, Tr. at 767.)

The district court also mentioned Myron Bennett, but he testified that he purchased 1 ounce (or 0.028 kilogram) of crack cocaine from Mr. Valentine. (*Id*. at ID# 3049, Tr. at 997:6-11.) Indeed, Bennett ultimately attributed to himself purchases totaling mere ounces in crack cocaine—thereby suggesting that his more general assertions about the size and organization of the alleged conspiracy were exaggerated. (*See id*. at ID# 3038, 3047, Tr. at 986, 994-95; *see also id*. 3069, Tr. at 1016:22-24 (Bennett conceding that his lack of direct information on the overall size of the alleged conspiracy).)

The district court next alluded to Lubert Brock, but he too testified about only fractional-ounce purchases from Johnny and Kenneth Valentine, and about *none at all* from Mr. Valentine. (*See* R. 387 at ID# 3146, 3148, Trial Tr. Vol. IV at 1094:18-25, 1096:5-8.) Furthermore, Judge Enslen specifically discredited much of Brock's drug-quantity testimony. (*See* R. 436 at ID# 1607, Sentencing Tr. at

30:18-19 (Judge Enslen: "Brock says some from California. I don't credit that worth much.").)

Finally, the district court mentioned Scott Langford and Joseph Malone. But they had almost nothing to say about Mr. Valentine, and they both acknowledged on the stand that they had materially changed their stories. (*See* R. 388 at ID# 1758, Trial Tr. Vol. V at 1500-01; R. 385 at ID# 2545-46, Trial Tr. Vol. II at 517-18.) Malone even stated at one point that he had had no dealings with any of the Valentines. (R. 385 at ID# 2545-46, Trial Tr. Vol. II at 517-18.)

Judge Jonker stated that the foregoing witnesses offered testimony "consistent" with the "broader story" provided by Butler and Phillips. (R. 892 at ID# 3919, Op. at 5.) Plainly, however, the mere consistency of multiple witnesses testifying to a conspiracy (and an ill-defined one at that) cannot support an affirmative finding that Mr. Valentine is responsible for a specific drug quantity. And, if anything, Farmer, Bennett, Brock, Langford, and Malone actually *undermine* the district court's drug-quantity conclusion. All these witnesses testified to relatively small-scale narcotics transactions and so paint a picture that is inconsistent with the more extravagant conspiracy and drug-quantity estimates that were offered by Butler and Phillips and asserted by the Government. Erring on the side of caution, *see Valentine*, 694 F.3d at 674 n.6, the district court should have

inferred from the testimony of the Government's other cooperating witnesses that Butler and Phillips were engaged in self-serving exaggerations.

In light of the fraught, inconsistent, and highly suspect drug-quantity testimony in this case, the district court erred in finding that 8.4 kilograms were attributable to Mr. Valentine. Indeed, that finding is error whether it is viewed (appropriately) as a mixed question of law and fact subject to *de novo* review or (alternatively) as a pure question of fact reviewed for clear error. *See Layne*, 324 F.3d at 468 (a court's application of a legal rule to a factual record is a mixed question of law and fact requiring de novo review); *Georgia*, 279 F.3d at 385 (same). Particularly given the degree of caution legally mandated in this unique situation, this Court—which has the same ability to evaluate a cold record as Judge Jonker—should instruct the district court that an 8.4-kilogram finding is unsustainable on this record and then remand for further proceedings regarding Mr. Valentine's § 3582(c) motions.

## II. THE DISTRICT COURT SEPARATELY FAILED TO MAKE EITHER OF TWO PROCEDURALLY NECESSARY FINDINGS BEFORE HOLDING MR. VALENTINE RESPONSIBLE FOR HIS CO-CONSPIRATORS' ACTIONS

Because Mr. Valentine's only conviction is for conspiracy, *no* drug quantity could be attributed to him until the district court entered two "particularized findings." *United States v. Campbell*, 279 F.3d 392, 400 (6th Cir. 2002). First, the district court had to find the scope of Mr. Valentine's consent to the conspiracy.

Second, the district court had to find whether the actions of the alleged co-conspirators were foreseeable to Mr. Valentine. Yet the district court failed to adhere to these bright-line procedural requirements and, instead, simply *assumed* that alleged co-conspirators' actions could be attributed to Mr. Valentine. That was clear legal error. Co-conspirators are liable for one another's drug transactions only where particularized findings have been made, and the district court failed to adhere to that procedural requirement. That failure represents an independent reason to reverse the judgment below and remand for new fact-finding.

### A. This Court And The Sentencing Guidelines Require "Particularized Findings" Before An Individual Can Be Held Responsible For The Conduct Of Co-Conspirators

This Court has imposed—and repeatedly enforced—clear procedural requirements that must be satisfied before *any* drug quantities may be attributed to one member of a conspiracy based on the actions of others.

When a sentencing court encounters a jointly undertaken criminal activity, each individual defendant is accountable only for the reasonably foreseeable acts and omissions that co-conspirators undertake in furtherance of the joint criminal activity. *See* U.S.S.G. § 1B1.3(a)(1)(B).[3] An application note establishes a clear

[3] As § 1B1.3 of the U.S. Sentencing Guidelines puts it, base offense levels should be determined in part as follows:

> [I]n the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in

two-part test, explaining that "a defendant is accountable for the conduct (acts and omissions) of others that was both: (A) in furtherance of the jointly undertaken criminal activity; and (B) reasonably foreseeable in connection with that criminal activity." U.S.S.G. § 1B1.3, app. note 2. This requirement is further explained as follows: "Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the criminal activity jointly undertaken by the defendant . . . is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant." *Id*.

Based on the above Guideline and application note, this Court has concluded that district courts must "make *particularized* findings with respect to *both* the scope of the defendant's agreement *and* the foreseeability of his co-conspirators' conduct before holding the defendant accountable for the scope of the entire conspiracy." *Campbell*, 279 F.3d at 400 (emphases added); *see United States v. Hutchinson*, 406 F. App'x 960, 963 (6th Cir. 2011); *United States v. Swiney*, 203

(continued…)

> concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.

F.3d 397, 402 (6th Cir. 2000); *see also United States v. Jenkins*, 4 F.3d 1338, 1346 (6th Cir. 1993) (construing an earlier version of § 1B1.3).

This Court requires both of these "particularized findings" in order to ensure basic fairness at sentencing: "Without the requirement that the district court make these two particularized findings, we [would] expose defendants to being sentenced on conspiracies whose activities they did not agree to jointly undertake or could not foresee." *Campbell*, 279 F.3d at 400. Every drug conspiracy involves the distribution of narcotics. But not every act of distribution is within the scope of each conspirator's consent, much less reasonably foreseeable by each participant in the conspiracy. *See United States v. Orlando*, 281 F.3d 586, 600 (6th Cir. 2002) ("[T]he scope of conduct for which a defendant can be held accountable under the sentencing guidelines is significantly narrower than the conduct embraced by the law of conspiracy.").

Here, the legal question before the district court was not whether Mr. Valentine was a conspirator. Nor was the legal question whether the conspiracy was responsible for distributing 8.4 kilograms. Rather, the question was whether, given his conviction for conspiracy, Mr. Valentine could be held responsible for distributing a specific quantity of drugs. To answer that question, particularized findings on consent and foreseeability were required.

### B. The District Court Failed To Make Either Of The Particularized Findings Necessary Under This Court's Precedents

In attributing 8.4 kilograms to Mr. Valentine, the district court made neither of the "particularized findings" that this Court requires before drug-quantity assessments can be shared among co-conspirators. *Campbell*, 279 F.3d at 400. Applying the requisite *de novo* standard of review appropriate for errors of law, *see Paulino v. United States*, 352 F.3d 1056, 1058 (6th Cir. 2003), this Court should reverse and remand.

The district court's lapse is particularly egregious given that, at the original sentencing involving a much lower drug-quantity finding, Judge Enslen took care to make both legally necessary findings after specifically noting that both the Sentencing Guidelines and Sixth Circuit precedent required him to do so. (*See* R. 436 at ID# 1606-07, Sentencing Tr. at 29-30.) Judge Jonker, however, did not even cite the applicable Guideline or the relevant precedents of this Court.

Nor can the required findings be inferred anywhere in Judge Jonker's opinion. First, Judge Jonker made no comment whatsoever on the "scope of the defendant's agreement." *Campbell*, 279 F.3d at 400. Instead, he simply observed that Mr. Valentine was convicted of being a member of the alleged conspiracy. (R. 892 at ID# 3920, Op. at 6.) Yet that fact does *nothing* to differentiate Mr. Valentine's case from any other conspiracy case in which a district court must make a particularized finding as to the scope of the defendant's agreement. Even

"[t]he fact that the defendant is aware of the scope of the overall operation is not enough to satisfy the first prong of the test and therefore, is not enough to hold him accountable for the activities of the whole operation." *United States v. Tocco*, 306 F.3d 279, 289 (6th Cir. 2002) (internal quotation marks omitted). If Judge Jonker's non-finding as to the scope of the alleged agreement were adequate, then *Campbell*'s first prong would become dead letter.

Second, Judge Jonker failed to assess whether Mr. Valentine could have foreseen the drug quantities allegedly distributed by his co-conspirators. *See Campbell*, 279 F.3d at 400. The purpose of this requirement is to ensure that each person in a potentially far-flung conspiracy is punished only for what he or she could reasonably have anticipated. Here, Judge Jonker should have asked whether adequate evidence demonstrated that Mr. Valentine either was or should have been aware of his alleged co-conspirators' actions.

The unanswered questions of consent and foreseeability loom especially large in this case. The Government alleged a conspiracy with distinct distribution channels, one arising from California and another from Arkansas. *See supra* p. 3. And the Government's own witnesses testified that the conspiracy's participants exercised considerable autonomy in terms of just what and when they sold. (*See, e.g.*, R. 389 at ID# 2050, Trial Tr. Vol. VI at 1794:11-13; *id*. at 1830.) Thus, even the Government's version of events raises serious questions as to whether

individual participants could *possibly* have been aware of the drug quantities that other conspirators were transacting.

Moreover, the true nature of Mr. Valentine's role in the alleged conspiracy remains highly uncertain. As Judge Jonker observed, Judge Enslen imposed a two-point role enhancement on Mr. Valentine. (R. 892 at ID# 3920, Op. at 6.) But the Government had asked for a four-point enhancement, and Judge Enslen rejected that request, stating that he was wholly "unconvinced" that Mr. Valentine was an "organizer" or "leader" of the alleged conspiracy. (R. 436 at ID# 1610, Sentencing Tr. at 33:17-18; *see also id*. at ID# 1611, Tr. at 34:3-8.) Notwithstanding the enhancement, in Judge Enslen's "judgment, the defendant is not more or less culpable than other co-conspirators" and, in fact, was not a leader of the conspiracy. (*Id*.) The two-point enhancement appears to have been predicated on Judge Enslen's conclusion that, while Mr. Valentine was no more responsible than the other defendants, certain evidence indicated that he "organized" several large crack purchases—specifically, the three purchases "of one to two kilograms per transaction" involving Butler.[4] (*Id*. at ID# 1607, 1611, Tr. at 30:13-15, 34:5-6.) That conclusion supported Judge Enslen's finding that Mr. Valentine should be held responsible for 1.5 kilograms. But that conclusion provides no support for the

[4] The record indicates that even this three-kilogram estimate is unsupported by Butler's testimony. *See supra* pp. 41-44.

Government's argument that he should now be held responsible for 4.5 kilograms, much less for the 8.4 kilograms ultimately found by Judge Jonker.

In any event, nothing either in Judge Jonker's opinion or in Judge Enslen's appraisal of the record at the original sentencing proceeding demonstrates that Mr. Valentine could have foreseen that other members of the alleged conspiracy would distribute 8.4 kilograms—or, for that matter, anything more than 1.5 kilograms. Responsibility for narcotics conspiracies is not dispensed in gross. Rather, each individual must be found accountable for specific drug quantities. *See Campbell*, 279 F.3d at 400. The district court's willingness to view Mr. Valentine as automatically responsible for the diffuse actions of any and all members of the ill-defined and uncoordinated conspiracy is utterly inconsistent with the Sentencing Guidelines' requirement of particularized consent and foreseeability findings, *see* U.S.S.G. § 1B1.3, app. note 2, as well as with this Court's case law, *see Campbell*, 279 F.3d at 400; *Swiney*, 203 F.3d at 402. The district court's failure to enter "particularized findings" necessitates reversal, particularly on a record such as this one where there is serious doubt as to whether the necessary findings can be made. *Campbell*, 279 F.3d at 400.

It is also worth noting what Judge Jonker did *not* find in this case. Near the opening of his analysis, Judge Jonker suggested that the "sheer duration and scope" of the charged drug conspiracy might "support an inference of significant

quantities" of drugs. (R. 892 at ID# 3918, Op. at 4.) For the reasons stated above, that conclusion would be a plainly erroneous basis for making a drug-quantity finding in a conspiracy case: Generalized inferences regarding the magnitude of a narcotics conspiracy cannot substitute for the particularized findings required by the Sentencing Guidelines and this Court's case law. *See* U.S.S.G. § 1B1.3, app. note 2; *see also Campbell*, 279 F.3d at 400. But even the district court declined to conclude that the mere existence of the alleged conspiracy could, in itself, support a finding of 8.4 kilograms, or any other specific amount. (R. 892 at ID# 3918, Op. at 4.) Clearly, 1.5 kilograms—that is, the drug-quantity figure found by the original sentencing court and not at issue here—is in itself a "significant quantit[y]" of narcotics.[5] (*Id*.) So, even under the district court's flawed reasoning, the charged conspiracy's "duration and scope" cannot possibly support an *upward* modification in drug quantity. (*Id*.)

The district court committed *per se* reversible error by assuming that Mr. Valentine could be held responsible for every action of the alleged conspiracy—to the fullest extent alleged by each and every witness—simply because he was convicted of being a member of that conspiracy. *See United States*

[5] For instance, 1.5 kilograms used to be the highest threshold in the Guidelines. That drug quantity was worth roughly $65,000 in inflation-adjusted dollars. *See* R. 386 at ID# 2833; *see also United States v. Turner*, 909 F.3d 1187, 1196 (7th Cir. 2013) (providing a similar current-market rate).

*v. Tocco*, 306 F.3d at 289; *Campbell*, 279 F.3d at 400. Instead, the district court should have specifically assessed the scope of Mr. Valentine's agreement and the degree of his knowledge. What is more, the district court should have evaluated the alleged actions of Mr. Valentine's co-conspirators in light of the six separately unusual circumstances that individually and collectively call for special care when reviewing the record in this case. *See supra* Part I.

Again, the relevant question was not whether Mr. Valentine was connected to a conspiracy that distributed 8.4 kilograms of drugs. Rather, the legally relevant questions were whether Mr. Valentine agreed to a conspiracy of that scope and whether he could foresee the alleged conduct of his co-conspirators. The district court's failure to address those critical attribution questions—particularly in the face of an ambiguous record on these key points—supplies an independent basis for this Court to reverse and remand for further proceedings, so that the district court may review the relevant legal issues under the correct standard and with an appropriate degree of caution.

* * *

In sum, the district court's findings cannot be sustained and should be reversed, particularly given the six unusual reasons for caution in this case. *See supra* Part I. In the alternative, the only way to potentially substantiate the district court's drug-quantity finding would be for Judge Jonker to hold a new evidentiary

hearing where the Government bears the burden of proof. The Sixth Circuit has not endorsed this procedure in the ordinary case, where the existing record is adequate to resolve drug-quantity issues. *See Valentine*, 694 F.3d at 671. As Judge Jonker's rote analysis demonstrates, however, only a new hearing could possibly supply Mr. Valentine with a fair opportunity to contest the Government's unsupported allegations.

## CONCLUSION

The Court should reverse the decision below and remand for further consideration of Mr. Valentine's consolidated sentencing reduction motions, with instructions that the record cannot support a finding of 8.4 kilograms. In the alternative, the Court should reverse and remand for a new evidentiary hearing.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limit set forth in Fed. R. App. P. 32(a)(7)(B)(i) because, according to the word-count feature of Microsoft Word 2003 SP2, it contains 13,548 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 SP2 in Times New Roman 14 point font.

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## CERTIFICATE OF SERVICE

I certify that I electronically filed this Brief of Appellant Jimmy Ray Valentine with the Clerk of the Court using the CM/ECF system, which sent electronic notification to the counsel of record.

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# DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

## Documents

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|---|---|---|---|
| N/A | Docket Sheet | | |
| N/A | Presentence Report (confidential) | | |
| N/A | Sentence Modification Report (confidential) | | |
| 150 | Second Superseding Indictment | 7/22/1999 | 1618-25 |
| 247 | Verdict | 2/11/2000 | 1626-29 |
| 335 | Defendant's Sentencing Memorandum | 5/15/2000 | 1472-81 |
| 336 | Government's Sentencing Memorandum | 5/19/2000 | 3932 |
| 343 | Judgment | 5/24/2000 | 1468-71 |
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| | | | |
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| | Report & exhibits thereto | | |
| 760 | Government's Response to Defendant's Motion or Sentence Modification Pursuant to 18 U.S.C. § 3582(c)(2) | 10/5/2010 | 1140-57 |
| 771 | Defendant's Reply in Support of Sentence Reduction | 10/20/2010 | 1207-19 |
| 802 | Order Granting Motion for Reduction of Sentence | 3/2/2011 | 1318-26 |
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**Transcripts**

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| 386 | Trial Transcript, Volume III | 1/31/00-2/1/2000 | 2800-2895<br>2996-3124 |

| | | | |
|---|---|---|---|
| 387 | Trial Transcript, Volume IV | 2/2-3/2000 | 3029-3230 |
| 388 | Trial Transcript, Volume V | 2/4-7/2000 | 1711-92 |
| 389 | Trial Transcript, Volume VI | 2/8-11/2000 | 2028-2163 |
| 399 | Corey Valentine Sentencing Transcript | 5/16/2000 | 1487, 1500-02 |
| 435 | Johnny Valentine Sentencing Transcript | 5/17/2000 | 1552 |
| 436 | Jimmy Valentine Sentencing Transcript | 5/19/2000 | 1578-1616 |
| 417 | Kenneth Valentine Sentencing Transcript | 6/5/2000 | 1517-18 |
| 485 | Government Opening and Closing | 2/02/2004 | 3969 |