

**UNITED STATES COURT OF APPEALS**

**FOR THE SECOND CIRCUIT**

August Term, 2012

(Argued: December 17, 2012            Decided: February 14, 2013)

Docket No. 11-5194-cr

UNITED STATES OF AMERICA,  
Plaintiff-Appellant,

- v. -

MARK DESNOYERS,  
Defendant-Appellee.

Before:            JACOBS, Chief Judge, CALABRESI, and  
                         LEVAL, Circuit Judges.

The United States appeals from a judgment entered in the United States District Court for the Northern District of New York (Hurd, J.) re-sentencing Mark Desnoyers to five years' probation and assessing \$45,398 in restitution. Desnoyers was convicted of offenses arising from his malfeasance as an air monitor for asbestos abatement projects in and around Plattsburgh, New York. Desnoyers was initially sentenced to five years' probation (and

1 restitution of \$34,960) after the district court granted his  
2 motion under Rule 29 to dismiss the conspiracy charge (Count  
3 I). On appeal, we reinstated the conviction for Count I and  
4 remanded for re-sentencing. For the following reasons, we  
5 conclude that the sentence was procedurally unreasonable; we  
6 therefore vacate and again remand for re-sentencing.

7 RAJIT S. DOSANJH, (Craig A.  
8 Benedict, on brief), for Richard  
9 S. Hartunian, United States  
10 Attorney for the Northern  
11 District of New York, Syracuse  
12 New York, for Appellant, United  
13 States of America.

14  
15 JOHN B. CASEY, Dreyer Boyajian  
16 LLP, Albany, New York, for  
17 Appellee, Mark Desnoyers.

18  
19 DENNIS JACOBS, Chief Judge:

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21 The United States takes this appeal from the sentence  
22 imposed following our reinstatement of a count of conviction  
23 dismissed by the district court under Federal Rule of  
24 Criminal Procedure 29. The re-sentencing has resulted in  
25 imposition of the same term of probation and an increase in  
26 restitution of about \$10,000.

27 Desnoyers was convicted by a jury in the United States  
28 District Court for the Northern District of New York (Hurd,  
29 J.) of offenses arising from his malfeasance as an air

1 monitor for asbestos abatement projects in and around  
2 Plattsburgh, New York. The grant of Desnoyers's post-trial  
3 motion to vacate Count I--the conspiracy charge--left four  
4 substantive violations.

5 On the government's initial appeal, we reinstated the  
6 jury verdict, and remanded for re-sentencing. United States  
7 v. Desnoyers ("Desnoyers I"), 637 F.3d 105, 112 (2d Cir.  
8 2011).

9 On remand, the district court imposed the same five-  
10 year term of imprisonment and increased the restitution  
11 amount to \$45,398. The government now attacks the  
12 procedural and substantive reasonableness of the sentence,  
13 arguing mainly that the district court improperly excluded  
14 new evidence that was not submitted at the initial  
15 sentencing. The government also contests the restitution  
16 calculation.

17 For the reasons that follow, we conclude that the  
18 sentence was procedurally unreasonable; we therefore vacate  
19 and remand to the district court for re-sentencing.

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### **BACKGROUND**

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Desnoyers's conviction arose out of his work as an air  
monitor on ten asbestos removal projects in 2005 and 2006.

1 An air monitor conducts air sampling to ensure that the  
2 asbestos was removed properly and that no asbestos fibers  
3 remain suspended in the air. See N.Y.S. Indus. Code Rule  
4 56-17.8. The conspiracy count (Count I) that was dismissed  
5 post-trial and reinstated after appeal arises from eight  
6 asbestos removal projects that Desnoyers conducted together  
7 with his codefendants: John Wood; one of Wood's associates,  
8 Curtis Collins; and one of Desnoyers's employees, Tom  
9 Marble. Wood, Collins, and Marble all testified at trial  
10 that abatement at these jobs was performed improperly: The  
11 asbestos was ripped out haphazardly causing asbestos fibers  
12 to fill the air; the debris was carried out in plastic bags  
13 covered in asbestos dust; and chunks of asbestos debris were  
14 left in the work area. Marble testified that he never saw  
15 Desnoyers take air samples, and Wood testified that  
16 Desnoyers assured Wood that the air samples "w[ould] come  
17 back clean" immediately after the work concluded. Trial Tr.  
18 316, Sept. 10, 2008. The air samples did, in fact, "come  
19 back clean" despite large amounts of loose asbestos  
20 littering the properties.

21 Two other counts of conviction arise from the same "rip  
22 and run" pattern: a violation of the Clean Air Act (Count V)  
23 at a commercial building in Oneonta, New York, the so-called

1 "Da'Vida" project; mail fraud (Count VI) in connection with  
2 a project at the High Peaks Hospice ("Hospice") in Port  
3 Henry, New York; and making false statements to the  
4 Environmental Protection Agency ("EPA") (Counts XII, XIII,  
5 and XIV) concerning two of the projects giving rise to the  
6 conspiracy count.

7 The jury verdict, rendered on September 19, 2008,  
8 convicted Desnoyers on Counts I, V, VI, XII, and XIII.<sup>1</sup> The  
9 district court granted Desnoyers' Rule 29 motion for a  
10 judgment of acquittal as to Count I only. United States v.  
11 Desnoyers, No. 06-CR-494, 2009 WL 1748730 (N.D.N.Y. June 19,  
12 2009).

13 At sentencing on December 18, 2009, the district court  
14 calculated Desnoyers's offense level using the fraud section  
15 of the United States Sentencing Guidelines Manual  
16 ("U.S.S.G." or "Guidelines"), U.S.S.G. § 2B1.1. The court  
17 calculated the loss amounts under U.S.S.G. § 2B1.1(b)<sup>2</sup> as  
18 \$34,960, which was the contract value of the Hospice and  
19 Da'Vida projects plus the estimated clean-up cost for the

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<sup>1</sup> The jury acquitted Desnoyers on Count XIV.

<sup>2</sup> Section 2B1.1 provides that the sentencing range be determined in part by the amount of loss that a defendant causes.

1 Hospice; the Da'Vida victim provided no clean-up estimate.  
2 This yielded a six-level increase in the base offense level.  
3 U.S.S.G. § 2B1.1(b)(1)(C).

4 The court accepted the Probation Office's  
5 recommendations for sentencing enhancements except for a  
6 two-level enhancement under U.S.S.G. § 3B1.1(c) for  
7 Desnoyers's role as an organizer of conduct involving fewer  
8 than five participants. With a total offense level of  
9 twenty-one and a criminal history category of I, Desnoyers  
10 was subject to a Guidelines range of 37 to 46 months'  
11 imprisonment.

12 A non-Guidelines sentence (five years' probation and  
13 \$34,960 restitution) was imposed on the grounds that  
14 Desnoyers was a "novice in the asbestos removal business,"  
15 that he had been "duped and misled" by Wood and Collins,  
16 Sentencing Tr. 26, Dec. 18, 2009, that he was doing  
17 creditable work at the New York State Department of Mental  
18 Retardation and Developmental Disabilities helping disabled  
19 people get services, and that he had performed similar work  
20 at the Advocacy Resource Center.

1           On the government's appeal, we reversed the grant of  
2 the Rule 29 motion and remanded with instructions "to  
3 reinstate the jury verdict, enter a judgment of conviction  
4 on the conspiracy count, and resentence Desnoyers  
5 accordingly." Desnoyers I, 637 F.3d at 112.

6           Before re-sentencing, the government provided the  
7 Probation Office with loss amounts for the victims of the  
8 eight projects listed in the reinstated Count I. These loss  
9 amounts included victims' payments for the improper asbestos  
10 removal and clean-up cost estimates. Most of this  
11 information had been provided to the district court for the  
12 November 2009 sentencing of Wood, who was also convicted on  
13 Count I. However, one estimate was new: One victim, Nancy  
14 Page, provided a bid for \$19,800. The government also  
15 provided new information relevant to the loss amounts for  
16 Counts V and VI: The Da'Vida victim provided clean-up bids  
17 totaling \$43,786, and High Peaks Hospice increased its  
18 clean-up total by \$2,500. All of this new information  
19 submitted by the government would have brought Desnoyers's  
20 total loss amount to \$213,732.23.

21           The government also submitted new affidavits from  
22 people who knew Desnoyers from the Advocacy Resource Center  
23 and had contacted the government after hearing news reports

1 of Desnoyers's first sentence: Lester Parker and Theresa  
2 Garrow. The Parker and Garrow affidavits--which referred to  
3 events that took place both before and after the original  
4 sentencing--called into question Desnoyers's account of his  
5 work at the Advocacy Resource Center. The government also  
6 submitted a "joint letter" dated September 16, 2011, sent by  
7 employees of the Advocacy Resource Center to the director of  
8 Sunmount Developmental Disability Services Organization,  
9 where Desnoyers worked as a Medicaid Services Coordinator,  
10 detailing problems they had with Desnoyers. The joint  
11 letter referred only to conduct that took place after the  
12 first sentencing. At a telephone conference on October 11,  
13 2011, the district court ruled that it would not consider  
14 evidence of events that took place before the initial  
15 sentencing because there was insufficient justification for  
16 the government's failure to introduce that evidence at the  
17 first sentencing. Telephone Conf. Tr. 14, Oct. 11, 2011.  
18 Evidently confused about the import of that ruling, the  
19 government did not submit these documents at re-sentencing.

20 Desnoyers was re-sentenced on October 28, 2011. First,  
21 the loss amounts were recalculated, taking into account the  
22 reinstated conviction for the eight projects that were the  
23 subject of Count I. However, the government's suggested



1 loss amounts were not adopted. Instead, the court decided  
2 that Desnoyers's loss amount for Count I "should be no more  
3 than the [restitution] amount ordered for co-defendant John  
4 Wood," which was \$111,259.83. Re-sentencing Tr. 8, Oct. 28,  
5 2011. The court refused, without further explanation, to  
6 consider the clean-up estimate that Ms. Page submitted  
7 subsequent to Wood's sentencing. After making several other  
8 rulings on the loss amount that are not at issue on appeal,<sup>4</sup>  
9 the district court calculated the loss amount for Count I as  
10 \$80,245.83.

11 Next, the district court "decline[d] to consider  
12 additional expense claims, clean-up quotes, submitted by  
13 victims with regards to [Counts V and VI] that had not been  
14 submitted by the government prior to [Desnoyers's] original  
15 sentencing." Id. at 10-11. The resulting total loss amount  
16 on all counts was \$115,205.83. Again, the court applied all

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<sup>4</sup> Those rulings were as follows: First the district court said that the proposed loss amount included a bid for clean-up services for the Alexander residence project that was "the highest of multiple estimates related to these expenses." Id. Second, the district court refused to include \$3,175 in "payments for background air sampling, pre-abatement air sampling, and environmental air sampling" because that work is required prior to any asbestos removal project--whether legitimate or not. Id. at 10. Third, the district court refused to consider a loss of \$3,600 from one project because the building was demolished after the asbestos was removed. Id.

1 the recommended enhancements except as to Desnoyers's role  
2 as an organizer.<sup>5</sup> This resulted in a total offense level of  
3 25 and a Guidelines range of 57 to 71 months' imprisonment.

4 Despite a Guidelines range that was substantially  
5 higher than the one computed at the original sentencing, the  
6 district court sentenced Desnoyers to the same five-year  
7 term of probation. The district court found that  
8 Desnoyers's "conduct is unchanged from that which was  
9 evaluated and considered at the time of the original  
10 sentence," and that "[i]n the nearly two years since that  
11 sentence, the defendant has been in full compliance with the  
12 terms and conditions of probation." Id. at 21. The court  
13 also considered the factors under 18 U.S.C. § 3553(a),  
14 relying on "all of the statements that [it] made on the  
15 record at the original sentence." Id.

16 As for restitution, the district court began with the  
17 \$34,960 figure from Desnoyers's original sentence, finding  
18 that this amount was appropriate for the projects underlying  
19 Counts V and VI--without, however, discussing the upward  
20 revisions submitted by the government for those projects.  
21 With respect to Count I, the conspiracy count, the court

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<sup>5</sup> The district court did not explain this decision at the re-sentencing hearing.

1 included only the \$4,275 that Desnoyers personally received  
2 for those projects, reasoning that Desnoyers was "less  
3 culpable than his co-defendants and received just a small  
4 percentage of the proceeds." Id. at 11. Moreover, the  
5 court refused to include any amount received by Desnoyers  
6 for background and pre-abatement monitoring. Similarly, the  
7 court declined to hold Desnoyers jointly and severally  
8 liable for the clean-up costs related to Count I--totaling  
9 \$69,476--concluding that Desnoyers was responsible only "for  
10 his proportionate liability" of those costs, which the court  
11 calculated as nine percent, or \$6,163,<sup>6</sup> "based on his  
12 limited role and his receipt of a limited percentage of the  
13 proceeds." Id. at 12-13. Without explanation, Ms. Page's  
14 clean-up costs, which had been excluded from the loss  
15 calculation, were included in the calculation of  
16 restitution.

17 The government now appeals the sentence, arguing that  
18 it is both procedurally and substantively unreasonable.  
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<sup>6</sup> Nine percent of \$69,476 is actually \$6,252.84.

1 **DISCUSSION**

2 On appeal, the government first challenges the  
3 Guidelines range on the grounds that the district court (1)  
4 miscalculated the loss amount by refusing to consider Ms.  
5 Page's clean-up costs and the new information concerning the  
6 losses suffered in Counts V and VI; and (2) refused to apply  
7 the enhancement for being an organizer of the criminal  
8 activity. Second, the government contends that it should  
9 have been allowed to submit newly discovered character  
10 evidence. Third, the government argues that the non-  
11 Guidelines sentence was substantively unreasonable.  
12 Finally, the government argues that the restitution  
13 calculation (1) failed to consider the new submissions for  
14 Counts V and VI; (2) should have included payments made for  
15 pre-abatement air sampling; and (3) should have imposed  
16 joint and several liability for all the Count I losses.

17 The government's arguments challenge the procedural and  
18 substantive reasonableness of Desnoyers's sentence.  
19 Procedural reasonableness is reviewed for abuse of  
20 discretion. United States v. Cavera, 550 F.3d 180, 187 (2d  
21 Cir. 2008).

22 A district court commits procedural error where it  
23 fails to calculate the Guidelines range . . . ,  
24 makes a mistake in its Guidelines calculation, or

1 treats the Guidelines as mandatory. It also errs  
2 procedurally if it does not consider the § 3553(a)  
3 factors, or rests its sentence on a clearly  
4 erroneous finding of fact. Moreover, a district  
5 court errs if it fails adequately to explain its  
6 chosen sentence, and must include "an explanation  
7 for any deviation from the Guidelines range."  
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9 Id. at 190 (citation omitted) (quoting Gall v. United  
10 States, 552 U.S. 38, 51 (2007)). "A sentencing court's  
11 legal application of the Guidelines is reviewed de novo."  
12 United States v. Cossey, 632 F.3d 82, 86 (2d. Cir. 2011).

13 Substantive reasonableness is also reviewed for abuse  
14 of discretion, Gall, 552 U.S. at 51, and is judged in light  
15 of the factors listed in 18 U.S.C. § 3553(a)(2), Cavera, 550  
16 F.3d at 195. In considering substantive reasonableness,  
17 this Court "take[s] into account the totality of the  
18 circumstances, giving due deference to the sentencing  
19 judge's exercise of discretion, and bearing in mind the  
20 institutional advantages of district courts." Cavera, 550  
21 F.3d at 190. Given the range of considerations, "the duty  
22 of a reviewing court is not to identify the 'right' sentence  
23 but, giving due deference to the district court's exercise  
24 of judgment, to determine whether the sentence imposed falls  
25 within the broad range that can be considered reasonable  
26 under the totality of the circumstances." United States v.  
27 Jones, 531 F.3d 163, 174 (2d Cir. 2008).

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**I**

As to the Guidelines calculation, the government argues that the loss amount was miscalculated and that the organizer enhancement should have been applied.

**A**

The government alleges two mistakes in the district court's loss amount calculation: failure to include the Nancy Page clean-up estimate and failure to consider new loss estimates for Counts V and VI. We review the district court's factual findings with respect to the loss amount under U.S.S.G. § 2B1.1 for clear error and its conclusions of law de novo. See United States v. Carboni, 204 F.3d 39, 46 (2d Cir. 2000).

**1**

At re-sentencing, Nancy Page's clean-up costs (the "Page Estimate") were omitted--without explanation--from the loss amount for Desnoyers's reinstated conspiracy conviction. Ms. Page had submitted this estimate after Desnoyers's codefendant Wood was sentenced, so the court did not consider it when it previously calculated the losses for the projects giving rise to Count I.

The district court's failure to include the Page Estimate was clear error. The Guidelines require

1 calculation of the loss "based on available information,  
2 taking into account . . . the cost of repairs to damaged  
3 property." U.S.S.G. § 2B1.1 cmt 3(C)(iii). While the  
4 Guidelines require only a "reasonable estimate of the loss,"  
5 the district court's estimate was not reasonable because no  
6 explanation was given for omitting the Page Estimate.

7 Desnoyers argues that it was proper for the court to  
8 refuse to consider the Page Estimate because it was not  
9 available at the sentencing of co-defendant Wood. We reject  
10 this argument. Since Wood was sentenced under the  
11 environmental section of the Guidelines, U.S.S.G. § 2Q1.2,  
12 not (as Desnoyer was) under the fraud section, there was no  
13 "loss amount" calculation for Wood. The starting point for  
14 Desnoyers's loss calculation was the amount of Wood's  
15 restitution, which played no role in the length of Wood's  
16 sentence. The calculation for Wood's sentencing is  
17 therefore inapposite.

18 We vacate the Count I loss amount calculation and  
19 remand with instructions for the district court to consider  
20 the Page Estimate in calculating the loss amount for Count  
21 I.

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2 At re-sentencing, the district court refused to  
3 consider new clean-up cost estimates for the Da'Vida and  
4 Hospice projects that had not been submitted at the original  
5 sentencing. The district court did not explain its refusal.

6 "[W]here the government knew of its obligation to  
7 present evidence [at the original sentencing] and failed to  
8 do so, it may not enter new evidence on remand," absent some  
9 justification for failing to present the evidence in the  
10 first instance. United States v. Archer, 671 F.3d 149, 168-  
11 69 (2d Cir. 2011). The government offered no justification  
12 for failing to submit the full loss amounts for the Da'Vida  
13 and Hospice projects, which were at issue at the initial  
14 sentencing. Under Archer, therefore, the district court did  
15 not err in refusing to consider these new estimates at re-  
16 sentencing.

17 The government argues that the district court's refusal  
18 was error because it was required to re-sentence Desnoyers  
19 de novo. Typically, the defendant is entitled to de novo  
20 sentencing when the court of appeals reverses a conviction,  
21 because a change in the "constellation of offenses of  
22 conviction" alters the "factual mosaic related to those



1 offenses." United States v. Rigas, 583 F.3d 108, 115 (2d  
2 Cir. 2009) (internal quotation marks omitted).

3 Thus, de novo sentencing was required in Rigas. The  
4 two defendants had been initially sentenced to fifteen and  
5 twenty years' imprisonment (respectively) on each of two  
6 counts of bank fraud, to run concurrently. Rigas, 583 F.3d  
7 at 112. After one of the bank fraud counts was reversed on  
8 appeal, the district court "held that it was not required to  
9 resentence defendants de novo because [the overturned bank  
10 fraud conviction] was a small part of the overall conviction  
11 and ran concurrently with [the other bank fraud conviction],  
12 which this Court upheld."<sup>7</sup> Id. at 113. Rigas did not  
13 involve an effort to expand the record with evidence that  
14 could have been submitted at the original sentencing.  
15 Rather, the issue was whether the district court erred in  
16 concluding that the reversal of one count did not require  
17 reconsideration of the overall sentence. Id.

18 Rigas prohibits a district court from *automatically*  
19 imposing the same sentence on remand after one or more

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<sup>7</sup> The sentencing court in Rigas made an alternative holding that, even if it sentenced the defendants de novo, the sentence would be the same. Id. The Rigas court dealt with that holding in a different part of its opinion that is not relevant to this appeal.

1 counts are reversed (or reinstated) on appeal. Here,  
2 however, the district court considered the reinstated  
3 conspiracy count, calculated a new Guidelines range, and  
4 then, exercising discretion, decided to impose the same  
5 sentence as it had at the initial sentencing. The refusal  
6 to consider the newly submitted loss amounts for Counts V  
7 and VI did not violate the duty to re-sentence de novo.<sup>8</sup>

8 We therefore conclude that the district court acted  
9 within its discretion in refusing to consider the newly  
10 submitted loss amounts for the projects underlying Counts V  
11 and VI.

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<sup>8</sup> The government also cites United States v. Bryce, 287 F.3d 249 (2d Cir. 2002). In Bryce, the defendant successfully challenged one of his convictions and the case was remanded for re-sentencing. Id. at 252. While the appeal was pending, he was indicted and later acquitted for murdering someone who was supposed to testify at his first trial. Id. The district court resentenced the defendant de novo, finding that he had murdered the witness and imposing a substantially higher sentence. Id. The Second Circuit affirmed, holding that "we have adopted a mandate rule that permits, if it does not require, de novo sentencing unless the mandate specifically limits the scope of the resentencing." Id. at 253. Clearly, Bryce is not on point because it does not *require* the court to consider new evidence, but simply permitted it in that case. Moreover, in Bryce, the main witness for the murder trial did not step forward until after the original sentencing, justifying the government's failure to raise the issue in the first instance. Id. at 254.

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**B**

The government argues that Desnoyers was subject to a Guidelines enhancement under U.S.S.G. § 3B1.1(a) for being an organizer of the criminal activity. We review a ruling on the organizer enhancement de novo; the underlying fact-finding is reviewed for clear error. United States v. Paccione, 202 F.3d. 622, 624 (2d Cir. 2000).

At the original sentencing, the district court refused to apply the organizer enhancement because Desnoyers had been "convinced to take part in this criminal endeavor by more criminally predisposed individuals." Sentencing Tr. 7, Dec. 18, 2009. At re-sentencing, however, the district court never mentioned the organizer enhancement notwithstanding the reinstatement of a count of conviction that involved eight additional projects. Although the district court stated at re-sentencing that it "adopt[ed] all of the statements that [it] made on the record at the original sentence," Re-sentencing Tr. 21, Oct. 28, 2011, it did so in the context of its consideration of the factors contained in 18 U.S.C. § 3553(a), not the Guidelines enhancements, which were discussed earlier in the hearing.

1 In refusing to consider the organizer enhancement at  
2 re-sentencing, the district court made the error made in  
3 Rigas: It failed to consider that the reinstatement of Count  
4 I had changed the "factual mosaic related to th[e] offenses  
5 [of conviction]" such that it was required to analyze the  
6 organizer enhancement anew. 583 F.3d at 118 (internal  
7 quotation marks omitted). We remand with instructions for  
8 the district court to consider the organizer enhancement in  
9 light of the reinstatement of Count I.

## 11 II

12 The government argues that the district court violated  
13 18 U.S.C. § 3661 when it refused to consider character  
14 evidence that was not submitted prior to the initial  
15 sentencing: the Parker and Garrow affidavits and the joint  
16 letter.

17 The statute provides that "[n]o limitation shall be  
18 placed on the information concerning the background,  
19 character, and conduct of a person convicted of an offense  
20 which a court of the United States may receive and consider  
21 for the purpose of imposing an appropriate sentence." Id.;  
22 see also U.S.S.G. § 1B1.4. The word "may" confers

1 discretion in deciding what character evidence to consider.  
2 As explained supra, Archer holds that a district court  
3 should not consider evidence at re-sentencing that could  
4 have been submitted at the original sentencing absent  
5 justification. 671 F.3d at 168-69. The district court  
6 heard the government's argument that it would have been  
7 extremely difficult for it to have found out about Parker,  
8 who did not come forward until after the initial sentencing,  
9 but nonetheless exercised its discretion in concluding that  
10 the government's proffered justification was insufficient.  
11 The district court acted within the bounds of its  
12 discretion.

13 The government asserts that the district court's ruling  
14 at the October 11, 2011, telephone conference was  
15 inconsistent with the written Order issued the following  
16 day. Both directives allowed that "[p]re-sentencing  
17 submissions may refer to the defendant's acts or relevant  
18 events occurring subsequent to December 18, 2009." Order,  
19 Oct. 12, 2011. However, at the conference, the district  
20 court stated that "these affidavits and the joint letter  
21 refer to events mainly before the original sentence."  
22 Telephone Conf. Tr. 12, Oct. 11, 2011. This was partly

1 incorrect--the Joint Letter referred only to events that  
2 occurred after the original sentencing. The government  
3 moved for reconsideration, hoping to clarify whether it  
4 could submit the Joint Letter and affidavits if it redacted  
5 the affidavits to remove references to events that took  
6 place prior to the initial sentencing; but the district  
7 court denied it, referring to the quoted language from the  
8 October 12, 2011, Order. The government withdrew the  
9 character evidence lest it violate the Order. Although the  
10 district court might have been clearer in its ruling at the  
11 telephone conference, the Order is itself clear and the  
12 government should have submitted the Joint Letter and  
13 redacted affidavits. The government is arguing that the  
14 district court should have considered evidence that the  
15 government never submitted. We affirm on this point.

### 17 III

18 We have our doubts as to the substantive reasonableness  
19 of a sentence of probation, especially given that the  
20 offenses of conviction exposed many persons to prolonged  
21 risk of insidious and fatal disease. That the district  
22 court did not amend its sentence after we reinstated a

1 conspiracy count based on eight additional abatement  
2 projects heightens our discomfort.

3       However, we decline to rule on the issue of substantive  
4 reasonableness at this time because the sentence contains  
5 procedural error.    See Gall v. United States, 552 U.S. 38,  
6 51 (2007) (“*Assuming that the district court’s sentencing*  
7 *decision is procedurally sound*, the appellate court should  
8 *then consider the substantive reasonableness of the*  
9 *sentence.*” (emphasis added)); United States v. Cavera, 550  
10 F.3d 180, 189-90 (2d Cir. 2008) (“This degree of deference  
11 [for substantive review] is only warranted, however, once we  
12 are satisfied that the district court complied with the  
13 Sentencing Reform Act’s *procedural* requirements.”).

14       We therefore leave it to the district court to correct  
15 its procedural errors and consider Desnoyers’s sentence  
16 again before we rule on substantive reasonableness in any  
17 further appeal.

#### 19   IV

20       The Mandatory Victims Restitution Act (“MVRA”)  
21 requires: “[T]he court shall order restitution to each  
22 victim in the full amount of each victim’s losses as

1 determined by the court." 18 U.S.C. § 3664(f)(1)(A). We  
2 review awards of restitution for abuse of discretion, United  
3 States v. Lucien, 347 F.3d 45, 52 (2d Cir. 2003); but a  
4 district court lacks discretion under the MVRA "to deny an  
5 award of restitution or to award restitution for anything  
6 less than the full amount of the victim's losses," United  
7 States v. Walker, 353 F.3d 130, 131 (2d Cir. 2003).

8 **A**

9 The government argues that the district court erred by  
10 refusing to consider newly submitted clean-up costs for the  
11 projects underlying Counts V and VI when it calculated the  
12 restitution amount.

13 Under 18 U.S.C. § 3664(d)(5), "[i]f the victim  
14 subsequently discovers further losses, the victim shall have  
15 60 days after discovery of those losses in which to petition  
16 the court for an amended restitution order. Such order may  
17 be granted only upon a showing of good cause for the failure  
18 to include such losses in the initial claim for  
19 restitutionary relief." The government never demonstrated  
20 that the victims in Counts V or VI petitioned the court  
21 within sixty days after discovering the additional losses;  
22 nor did the government demonstrate good cause for failing to



1 include the losses at the first sentence. We therefore  
2 affirm the restitution calculation for Counts V and VI.

3 **B**

4 In New York, the person conducting air monitoring for  
5 certain asbestos abatement projects is required to take  
6 samples before abatement begins ("pre-abatement sampling"),  
7 after abatement is complete ("post-abatement sampling"),  
8 and, for some projects, while abatement is taking place (so-  
9 called "durings"). See N.Y. Indus. Code Rule 56-17. In  
10 calculating the restitution amount, the district court  
11 refused to include the payments victims made for "pre-  
12 abatement" samplings and "durings," reasoning that these  
13 "were services unrelated to the offense of conviction, final  
14 clearances."<sup>9</sup> Re-sentencing Tr. 12, Oct. 28, 2011.

15 Although there was no finding that the pre-abatement  
16 sampling or durings were themselves conducted improperly,  
17 they were an integral part of the overall scheme. An  
18 analogous situation was recently presented in United States  
19 v. Paul, 634 F.3d 668 (2d Cir. 2011), in which the defendant

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<sup>9</sup> The government does not argue that these payments should have been included in the Guidelines' loss amount calculation, as opposed to the restitution calculation. We therefore limit our discussion of pre-abatement sampling and durings to the restitution issue.

1 committed securities fraud by artificially raising a stock  
2 price through trades among his multiple accounts. Id. at  
3 670. To finance the scheme, he obtained margin loans from  
4 banks secured by the artificially valuable stock. Id. Paul  
5 argued that the district court should not have imposed  
6 restitution in favor of the banks because they were not  
7 victims of the securities fraud, the only offense of  
8 conviction. Id. at 677. We disagreed and concluded that  
9 the banks were victims because they "would not have made the  
10 loans to Paul had they known that the collateral for the  
11 loans was the stock he manipulated." Id.

12 Paul's broad view of restitution controls. The pre-  
13 abatement sampling was akin to the margin loans in Paul;  
14 both were necessary to the overall scheme even though  
15 neither was integral to the offense of conviction. The  
16 victims here would not have paid for the pre-abatement  
17 sampling had they known that the asbestos removal would be  
18 fraudulent, just as the banks in Paul would not have made  
19 loans if the value of the securities had not been  
20 artificially raised.

21 We therefore vacate and remand with instructions for  
22 the district court to include in its restitution calculation

1 all income received by Desnoyers for his role in the scheme,  
2 including that for pre-abatement sampling and durings.

3 **C**

4 Wood was required to pay restitution in the amount of  
5 \$854,166.06 with the proviso that Wood "shall be jointly and  
6 severally liable for \$250,302.22 of this restitution with  
7 co-defendant, Mark Desnoyers." Wood Sentencing Tr. 19, Feb.  
8 6, 2009. The latter amount related only to the eight  
9 projects in Count I (Wood was not involved in the projects  
10 underlying Counts V and VI). However, at Desnoyers's re-  
11 sentencing, Judge Hurd imposed a restitution amount for the  
12 contract values of the Count I projects equal only to the  
13 amount Desnoyers received for his work on those projects  
14 (\$4,275), not the total contract value of all of the Count I  
15 projects. Re-sentencing Tr. 11-12, Oct. 28, 2011.  
16 Moreover, the court concluded that Desnoyers was personally  
17 responsible for only "nine percent" of the Count I clean-up  
18 costs--which it calculated as \$6,163<sup>10</sup>--not the total clean-  
19 up costs of \$69,476. Id. at 12-13.

20 While the district court has discretion to decide  
21 whether defendants should be jointly and severally liable

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<sup>10</sup> Nine percent of \$69,476 is \$6,252.84.

1 for restitution, see United States v. Amato, 540 F.3d 153,  
2 163 (2d Cir. 2008), the district court did not explain how  
3 it arrived at the nine percent figure, or why it held that  
4 Desnoyers would be jointly and severally liable for  
5 \$250,302.22 at Wood's sentencing but abandoned this position  
6 at Desnoyers's re-sentencing. The district court therefore  
7 abused its discretion in calculating the restitution amount  
8 for the projects in Count I. We vacate and remand for the  
9 district court to calculate the restitution amount for Count  
10 I with a full explanation for its reasoning.

11  
12 **V**

13 At oral argument, we asked the parties for letter  
14 briefs on the question whether we should assign the case to  
15 a different district judge on remand, as we have sometimes  
16 done. E.g., United States v. Schwartz, 500 F.2d 1350, 1352  
17 (2d Cir. 1974). We decline to take that extraordinary step  
18 before affording the district court an opportunity to  
19 formulate a sentence after correction of procedural errors.

