

United States of America
First Circuit Court of Appeals

NO. 2015-1838

UNITED STATES OF AMERICA

Appellee,

v.

STANLEY GONSALVES

Defendant/Appellant.

APPEAL FROM FEDERAL DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BRIEF OF DEFENDANT/APPELLANT STANLEY GONSALVES

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STATEMENT OF JURISDICTION

Following 18 days of trial between September 8 and October 9, 2014, the United States District Court for the District of Massachusetts entered final judgment against Stanley Gonsalves on June 22, 2015. Stanley and his brother, co-defendant and alleged co-conspirator Joshua Gonsalves, were charged with multiple conspiracies and substantive crimes in a 21-count second superseding indictment, which also sought forfeiture of cash and various properties.

Stanley Gonsalves was found guilty of conspiracy to possess with intent to distribute and to distribute oxycodone, contrary to 21 U.S.C. §846; conspiracy to money laundering, contrary to 18 U.S.C. §1956(h); twelve counts of concealment money laundering, contrary to 18 U.S.C. §1956(a)(1)(B); six counts of unlawful monetary transaction, contrary to 18 U.S.C. § 1957; and possession of a rifle in furtherance of a drug trafficking conspiracy, contrary to 18 U.S.C. § 924. The jury acquitted Stanley Gonsalves of possession of a handgun in furtherance of a drug trafficking conspiracy.

Stanley Gonsalves filed a notice of appeal of the final judgment on July 10, 2015. The First Circuit Court of Appeals has jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF ISSUES

- I. Whether the evidence was sufficient to sustain a conviction.
- II. Whether the court unlawfully sentenced Stanley Gonsalves using criminal history that is now barred by *Johnson v. United States*?
- III. Whether the court should have granted a mistrial based on the prosecutor's closing argument in which the government brought up Stanley Gonsalves's prior incarceration.
- IV. Whether the court's calculation of drug quantity for purposes of sentencing over-counted quantity by relying on the forfeiture verdict, and ignoring facts showing lesser quantities.

STATEMENT OF FACTS

I. Evidence Against Stanley and Joshua Gonsalves

The government presented 34 witnesses at the trial of co-defendants Joshua and Stanley Gonsalves. Of these, 13 were alleged co-conspirators who testified as a result of agreements with the government regarding their own prosecutions and convictions; 13 were law enforcement officers who testified to their observations, arrests, and seizures of money and pills (none of the arrests and seizures was of Stanley Gonsalves); one was a chemist who analyzed a few pills seized during one stop; two were IRS agents who testified as to various financial transactions; one was a lawyer who had records regarding the purchase and sale of a house; one was a former girlfriend of Stanley; two were relatives of the brothers; and the remaining witness was a friend of Stanley who assisted him in acquiring a cashier's check.

Much of the testimony related to a man named John Willis, who was alleged to be a supplier of oxycodone pills to the Gonsalves brothers. Willis was a defendant in a separate conspiracy case, which was concluded prior to the trial in this case. The conspiracy charge against the Gonsalves brothers was a result of the investigation of the Willis conspiracy. *See Pretrial Conf.* (Sept. 2, 2014) at 41-43.

At the end of the government's case, the defense rested without putting on any witnesses.

II. The Willis Conspirators

The first two cooperating witnesses, Anavey Duffy and Michael Shaw, had worked for John Willis and explained the alleged nature of the conspiracy and its operation, including stating that Stanley and Joshua were a part of it.

A. Anavey Duffy

Anavey Duffy was a former stripper and adult film actress who, from the time she was fourteen years old, used drugs, including Percocet, Vicodin, cocaine, marijuana, and ecstasy. *Day 1* at 137.¹ She pled guilty to a charge of conspiracy to distribute and possess a controlled substance in February of 2012. *Day 1* at 140. On that charge, she was facing a sentence of 12½ years. *Day 1* at 142; *Day 2* at 91 and 97. Under an agreement with the government, she had served only 5 days in jail, was testifying in return for a recommendation of leniency in sentencing, and was hoping for probation. *Day 2* at 91, 96-97.

Duffy worked for John Willis, initially flying from Boston to Fort Lauderdale to meet Willis or his associates, delivering money, and then returning to Boston with oxycodone pills packed in vitamin bottles. *Day 1* at 143-145, 149-150, 155-158. This was between August of 2010 and March of 2011; Duffy guessed she made 20 to 25 round trips. *Day 1* at 145, 150, 159.

Duffy placed Stanley and Joshua among those working in the conspiracy. *Day 1* at 145. Duffy testified that she would bring between 1,000 and 5,000 pills per trip from

¹Citations to trial transcripts, contained in the joint appendix filed by the co-defendant, are cited by trial day and page number.

Florida, with an average of 3,000 to 4,000. *Day 2* at 4. She would count pills with others before leaving Florida with the pills, and again after arriving in Massachusetts. *Day 2* at 9-11. Stanley received most, but not all, of the pills. *Day 2* at 7. Duffy said she met Joshua on several occasions at her apartment in Rhode Island and once at a Ramada Inn in Dorchester, where they would count pills and she would transfer them in return for money. *Day 2* at 19-20. She said she would contact Joshua by text message. *Day 2* at 20. A phone was seized from Duffy at the time of her arrest, and photographs of texts on the phone were introduced into evidence. She identified several messages as coming from or going to Joshua. *Day 2* at 26, 29, 31, 33. A couple of messages mentioned “meeting for drinks,” which she said was code for swapping pills for money. *Day 2* at 29, 33, 37-38, 44, 46. Duffy also stated that Joshua had set up a meeting with another alleged co-conspirator, Vincent Alberico, which occurred on March 22, 2011, at which time she exchanged pills for money. *Day 2* at 50-51. After the meeting, Alberico was arrested with the pills, and Willis concluded that Duffy had informed the police of the transfer (or was a “rat”). Duffy stopped working for Willis at that time. *Day 2* at 53, 67-68.

Duffy was arrested two months later in May 2011; she then began to cooperate with the police. *Day 2* at 70. At the time of trial, Duffy could not recall if she told the police about Stanley and Joshua. *Day 2* at 73. When confronted with omissions regarding the Gonsalves brothers in some of her earlier statements, Duffy indicated on cross-examination that her memory was better at trial, with help from the government, than earlier when she was in a “drug-haze.” *Day 2* at 115.

B. Michael Shaw

Michael Shaw was the second cooperating witness to testify. He had a prior record, having been convicted of mailing steroids to a fraternity brother – a misdemeanor. *Day 2* at 138. Shaw pled guilty to conspiracy to distribute oxycodone and money laundering in the Willis conspiracy, and was awaiting sentencing. *Day 2* at 138-139. He could get up to 20 years on each count, but he was out of jail when testifying, had made a deal with the government to testify in this case, and was hoping the government would file for a reduction of his sentence based on his cooperation. *Day 3* at 22-23, 89, 92-93.

Michael Shaw testified that he was a “runner” for Willis and transported oxycodone pills in vitamin bottles from Florida to the Boston area. *Day 3* at 26-30. He testified that there was an agreement between Willis and Stanley. *Day 3* at 76. Shaw flew on his first trip in December 2010 or January 2011, but drove on the remainder of the 8 to 10 trips he made. *Day 3* at 26, 33, 36. Shaw testified that, on the first trip he made to the Boston area, he went to Duffy’s apartment, at which time Duffy called someone. *Day 3* at 37. Within an hour of the call, Joshua and a girlfriend arrived to pick up the pills, count them, and pay Duffy for them. *Day 3* at 37-39. Shaw said he went to Duffy’s apartment two or three more times carrying pills from Florida, and, usually, Joshua and a girlfriend would pick up the pills. *Day 3* at 40.

Shaw also testified that, at one point, he traveled with Willis to a room in a Comfort Inn near Boston where he met Joshua and his girlfriend to exchange pills for

money. *Day 3* at 41, 43-46. About a week after that, he met Willis and Stanley in Florida, rented a car, and made a trip up to Duffy's apartment with another shipment, and Joshua and his girlfriend arrived to collect the pills. *Day 3* at 49-65. Shaw then met Willis in Boston and they drove a rental car back to Florida, but were stopped by police in South Carolina for improper use of a lane. \$98,000 in cash was seized from the car. *Day 3* at 49-50. At the request of Willis, Shaw filled out a form to contest the seizure. *Day 3* at 51-52.

Shaw testified to three other trips where he exchanged pills for money from Joshua and his then-girlfriend. One was with Duffy at her apartment, *Day 3* at 58-59, and another was at a Courtyard Marriott where Joshua and a girl picked up some pills but did not pay any cash for them. *Day 3* at 61-63. The last trip was in May 2011, when he met Joshua and a girl at the Hampton Inn near the Providence Airport to exchange pills for money. *Day 3* at 72-73.

On cross-examination, Mr. Shaw was impeached with an earlier statement that he had made 5 trips for Willis, as opposed to the 8 to 10 to which he testified at trial. *Day 3* at 122, 128. He was also impeached with an error regarding a pretrial identification of a photograph. *Day 3* at 132-133.

III. Stanley and Joshua's Former Girlfriends

Two cooperating witnesses held strong personal feelings towards Stanley and Joshua. Alexa Doran, once Stanley's girlfriend, and Crystal Flaherty, once Joshua's girlfriend, were both bitter because, although each had a child and lived with one of the brothers, their relationships ended when each brother began seeing another woman. *Day 8* at 101-103, 125, *Day 10* at 20, 84, *Day 11* at 62-63, 68, 123.

A. Alexa Doran

Alexa Doran met Stanley around January 2010 and, around April, moved with him into a house in Quincy, Massachusetts. *Day 8* at 10. Later they moved to Onset, Massachusetts. *Day 8* at 26-27. Most of Doran's testimony dealt with Stanley and his buying and reselling of oxycodone pills, including her involvement moving pills between Florida and Boston, and Boston and the Cape. *Day 8* at 8-90. Doran testified that in late September or early October 2010, Joshua moved into her and Stanley's home in Onset. *Day 8* at 91. According to her, Joshua would help them count and bag pills, *Day 8* at 91, and, at Stanley's direction, would carry pills to other people. *Day 8* at 92. Doran said that because the supply of pills was drying up, Stanley sought additional suppliers beyond Willis, and also that Willis began making pills out of other substances including heroin. *Day 7* at 165-66. With regard to weapons, Doran testified that, while Joshua was living there, Stanley brought a rifle into their Onset home. *Day 8* at 98-99. At times, Stanley also talked about having another gun somewhere else, and having fired it. *Day 8* at 141-142. Doran said that one night Stanley called and told her someone robbed him, hurt

him, and a car flipped over. *Day 8* at 78.

On April 8, 2011, Doran drove Stanley to a parking lot in Onset to meet Tiffany Sharp, who also helped him in the pill business. Stanley and Sharp were going to Foxwoods to conduct some business. *Day 8* at 73-76. Doran and Stanley had been quarreling, and Stanley told her that he was cheating on her with Sharp. Doran was four to five months pregnant with Stanley's child at the time. She dropped him off, and then rear-ended Sharp's car. *Day 8* at 73-75. After that, she left Stanley. *Day 8* at 77. Crystal Flaherty, during her testimony, stated that Doran had threatened to talk to the police about Stanley because she was pregnant and he was leaving her for another woman. *Day 10* at 9. Additionally, although Doran denied it, *Day 8* at 118, 133, Flaherty testified that Doran had once held a knife to Stanley's throat during a row in the car, *Day 11* at 41-42, 126, and, on another occasion while fighting with Stanley, Doran kicked out a car window. *Day 8* at 117.

Doran admitted that she was addicted to oxycodone and had been in rehab on four or five occasions. *Day 8* at 103-104, 110-114. She had used heroin, but mostly used oxycodone. *Day 8* at 106-107. She admitted she lied to the various rehabilitation programs so she would not be under-medicated during the program. *Day 8* at 108-114. At the time of trial, she was in a methadone maintenance program and could not get off methadone because she was seven months pregnant with another child. *Day 7* at 160, 167-168. Doran voluntarily gave custody of her children to her mother because she was an addict and had to go into drug programs. At one point, there was an investigation by the Department

of Children and Families, but she never had an open case. *Day 8* at 114-117.

Doran signed several agreements with the government in which she agreed to help with the investigation and testify at trial. She was approached in June 2011, *Day 8* at 124-125, and talked with police again in late 2011. *Day 8* at 133-134. Doran again agreed to cooperate after assault and battery charges were filed against her in October 2012. *Day 8* at 101, 143. In December 2012, she talked to the police, following which the charges against her were dismissed in January 2013. *Day 8* at 121-122. Doran testified that the federal government had nothing to do with those charges being dismissed and has done nothing regarding the custody of her children. *Day 8* at 140. She signed yet another agreement in 2014. *Day 8* at 5-7. At trial, Doran said she was hoping, based on her testimony, not to be prosecuted for her involvement with Stanley. *Day 8* at 123.

B. Crystal Flaherty

Crystal Flaherty, the former girlfriend and mother of one of Joshua's children, also testified. *Day 9* at 160. Joshua began to see Flaherty when he first returned to the Cape Cod area, and she would spend a couple of nights a week with him in the Onset house where he, Stanley, and Doran lived. *Day 11* at 41. Flaherty testified to the operation of the conspiracy in much the same way that Duffy had, stating that Joshua was a runner or driver for Stanley, transporting pills and money. *Day 10* at 11-21, 27-42, 48-53. Flaherty also testified about guns. She said that while living at the house in Onset, Joshua once brought out a rifle from his bedroom and asked Sameer Gandhi, who was a friend of Joshua and Stanley's, to get rid of it. *Day 10* at 43-47. She also said that, on one

occasion, Joshua told her he and Stanley were robbed when trying to obtain pills from a new source, and that Joshua had a gun in the car at the time they were robbed. *Day 10* at 72-73.

Joshua and Flaherty were not without personal problems. Joshua often would cheat on Flaherty with another woman named Lianne Agnew. *Day 8* at 133; *Day 10* at 20. Despite moving in together in July 2011 to a house in Dennis, Massachusetts, Flaherty said that Joshua was still with other women. *Day 11* at 62. In March 2011, during a trip to Disney World with their daughter, Joshua and Flaherty had an altercation, largely over his cheating on Flaherty with another woman named Briana, which caused the involvement of Disney security officers and the police. *Day 10* at 60-66; *Day 11* at 68, 123. Later, according to Flaherty, Joshua cheated on her with Katelyn Shaw. *Day 10* at 84. At the time of trial, Flaherty was seeking sole custody of their daughter. *Day 11* at 64.

Flaherty was also an addict. She started using marijuana when she was 15, and later moved to cocaine, mushrooms, and finally, oxycodone. *Day 10* at 22. In February 2012, Flaherty's house was searched and pills were found. After that, she began to cooperate with the police. *Day 10* at 91; *Day 11* at 38. In March 2012, she gathered money from a number of people, including Joshua and Sameer Gandhi, but not Stanley. Most of the money came from a man known as Mizz, and was to be used for purchasing pills from a new supplier. Flaherty informed the police of the plan, and they arranged to stop her car and seize the \$75,000 in cash. In order to cover up the fact that her own money was not seized (she was supposed to have put in \$20,000), she changed a "7" to a "9" on the

receipt they gave her, making it seem that \$95,000 was seized. *Day 10* at 91-97.

After she began cooperating with the police, Flaherty continued in the drug business in violation of her agreement. *Day 10* at 98. In July 2012, Flaherty was arrested for possession with intent to distribute 18 balloons containing heroin, after which she began cooperating with the DEA instead of the Barnstable police. *Day 10* at 113; *Day 11* at 45, 90. In October 2012, she entered into a cooperation agreement with the United States Attorney to testify in this case. *Day 10* at 116-117. She was paid \$1,100 by the government to get a new apartment, *Day 11* at 111, but complained about the “measly \$500 a month” government allowance. *Day 11* at 50. Flaherty testified before a federal grand jury in November 2012, *Day 10* at 113, but a couple of weeks later was caught with heroin and methadone in her car. *Day 10* at 113; *Day 11* at 38. Flaherty was placed on probation after that case was continued without a finding, and she complained to the DEA for not adequately protecting her interests. *Day 11* at 47-50; *Day 10* at 114. Flaherty was again arrested, for shoplifting, on January 13, 2014, and was again placed on probation. *Day 10* at 114-115; *Day 11* at 112.

Various conversations with police and prosecutors, and her grand jury testimony, were used in cross-examination to impeach Flaherty with prior inconsistent statements and inconsistent omissions regarding the guns, the robbery, and other parts of her trial testimony. *Day 11* at 52-61, 93-104. In addition, Flaherty testified she was interested in nursing school, and that this episode threatened her plans. *Day 11* at 48-49, 94.

C. Katelyn Shaw

Katelyn Shaw, another of Joshua's girlfriends (no relation to witness Michael Shaw), also testified. Katelyn was called before a grand jury in September 2013. She refused to testify and requested a lawyer. After that, federal agents talked to her and told her that if she didn't testify, because of her arrest with oxycodone on her person, her child (Joshua was the father) could be taken away from her and she could go to prison for 5 to 10 years on a state charge and for 20 years on a federal charge. She then agreed to cooperate and testify. *Day 7* at 4-10, 20, 28.

Katelyn first met Joshua around October 2011, and moved in with him soon thereafter. They lived in Dennisport, Massachusetts, until May 2012. Katelyn testified that during that time, Joshua was selling pills. *Day 6* at 126. Katelyn stated that Joshua would buy pills from two men he knew – one named “Moe” and the other named “D.” Sometimes she would help count them into groups of 100. She said Joshua traveled to D's house five to ten times to purchase oxycodone pills. *Day 7* at 127-131. Joshua also bought pills from Moe, who got them somewhere off Cape. Moe would come to Katelyn and Joshua's house to deliver pills once or twice a week. *Day 7* at 131-133. Joshua would divide the pills into groups of 100 and sell them to different people, including Sameer Ghandi and Crystal Flaherty. The pills were sometimes hidden in Joshua's Cadillac. Katelyn would at times do an exchange for Joshua if he asked. Flaherty and a man called “Mizz” would put their money in with Joshua's to purchase pills. *Day 7* at 134-138. On occasion Katelyn overheard Joshua or others talking about the seizure of money from others by

the police, such as \$60,000 taken from Sameer Gandhi and Mizz. *Day 7* at 140-144. Katelyn and Joshua would sometimes socialize with his brother Stanley and his girlfriend Tiffany Sharp. *Day 7* at 127, 147.

On February 27, 2012, Katelyn was arrested with Joshua and another as they were driving back to their home on Cape Cod. *Day 6* at 117. The three had been to Acushnet, Massachusetts, near New Bedford, to visit Joshua's friend "D," but were stopped by police on their return to Dennisport. *Day 6* at 118. During the stop, the police searched the car, and after 30 or 40 minutes, Katelyn heard an officer say a drug dog was on its way to the scene. At D's place Joshua had stashed oxycodone pills in Katelyn's bra, and during the stop she tried to throw them into a nearby wooded area. The officers observed this and recovered the pills. During a later search, 15 more pills were found in her bra. *Day 6* at 123-125. The police also searched the car and found some money. *Day 7* at 122-123.

IV. Distribution Network

Five additional witnesses testified against Stanley. All of them participated in drug trafficking, testified in exchange for leniency or immunity, or had animus against Stanley for events in their history.

A. Vincent Alberico

Vincent Alberico has a long criminal record, and was part of the Willis conspiracy. *Day 3* at 174; *Day 4* at 7, 17-25. The government recorded him on the phone from jail in 2009 with Stanley, who bragged about availability of women resulting from a plentiful supply of oxycodone. TRN. OF PHONE CONV. (Dec. 22, 2009), Exh. 117a, *Joint Appx.* at 2811-12. Upon his release in February 2010, Alberico joined up with Stanley. *Day 3* at 175, 4 at 10-17. Alberico was initially a distributor, getting 100 to 200 pills per week from Stanley for approximately \$15 each and reselling them to users for \$20. *Day 4* at 18-20, 51, 90. Alberico testified that Stanley also had a substantial marijuana business, bringing, for example, \$60,000 for a purchase of “Kush” to Cambridge, buying it for \$2,800 per pound and selling it for \$5,800. *Day 4* at 116-19. In March 2011 when Stanley and Joshua were at Disney World, Stanley called Alberico to ask a favor: take \$20,000 from the refrigerator at the house in Onset and deliver it to Anevay Duffy in Rhode Island, then take pills from Duffy to a hotel on the Cape. *Day 3* at 175; *Day 4* at 53-57. Stanley later asked the favor again: Alberico met Willis at a bowling alley in Dorchester, picked up 6,000 oxycodone pills in vitamin bottles at a hotel near the Boston Museum of Science, and brought them to a hotel in Hyannis where he collected money. *Day 4* at 58-61. Stanley asked the favor a third time: Alberico gave some of the money to Willis in a

parking lot in Dorchester, gave the rest to Duffy in Braintree, and was supposed to take pills from Duffy to the Cape. But while driving his grandmother's blue Corvette, in a set-up traffic stop the car was searched, and 4,600 oxycodone pills were found. Alberico was arrested, and, panicking because he was on parole, tussled with the officers. *Day 4* at 61-64. Because the arrest occurred after a meeting with Duffy, Stanley suspected she was a rat, and paid for Alberico's lawyer. *Day 3* at 171; *Day 4* at 25, 63-64, 78.

Alberico admitted his long criminal record includes a variety of violent robberies and arson – “everything but rape and murder.” *Day 3* at 167, 173; *Day 4* at 102-108. By the time of his testimony, he pleaded to the March 2011 assault on the arresting officers, *Day 3* at 173; *Day 4* at 92-92, and had reached an agreement with the government in exchange for his testimony against Stanley. Although he faced 20 or 30 years, he was hoping the government would recommend a more lenient sentence of 13 years. *Day 3* at 173-174; *Day 4* at 94-101.

B. Samantha Poitras

Samantha Poitras was a shopkeeper on the Cape and Alberico's girlfriend who believed he worked in a furniture store. *Day 5* at 29-32, 49, 54. She testified that Stanley came to her apartment with a duffel bag which, from the smell, she understood contained marijuana. *Day 5* at 55. After Alberico's re-incarceration, she set up 3-way phone calls to facilitate Stanley paying for his lawyer. *Day 5* at 34, 40. Listening in, she learned about the robbery. *Day 5* at 43. The government threatened Poitras with charges of perjury and obstruction of justice, and she testified in exchange for immunity. *Day 5* at 29-30, 50-51.

C. Brandon Garner

In 2009 Brandon Garner was living with Stanley's sister and their children in West Yarmouth, and knew all the members of the Gonsalves family. *Day 5* at 75-77. He observed Stanley keeping a backpack full of marijuana in a closet, hiding pills in baggies stuffed into Fluffernutter jars, and transacting sales of cocaine and a variety of other drugs from the house. *Day 5* at 78-79, 84. His disagreements with Stanley culminated in a fistfight in which Stanley "got the better of me." *Day 5* at 140. Later, in March 2011 when Garner and the sister were living in Florida with the Gonsalves's mother, Stanley arranged for Garner to exchange cash for pills from a man who collected them in Florida. Garner made a side deal with a neighbor who turned out to be an occasional confidential informant. *Day 5* at 110-123, 139.

Garner and Stanley's sister began driving north to Massachusetts in a car in which they had hidden \$25,000 cash. They were pulled over; the police found 900 pills in Garner's backpack, as well as the hidden cash. *Day 5* at 123-126. Both were arrested. Stanley hired a lawyer for his sister. Garner was convicted, and was incarcerated at the time of his testimony. *Day 5* at 36, 126-129. Although he faced 25 years, in anticipation of his testimony he was sentenced to a reduced term of 12 years. *Day 5* at 73, 130-136.

D. Danielle LeBaron

Danielle LeBaron, a 20-year old addict, met Stanley in late 2009. In February 2010, because Stanley did not have a license, she began as his driver, for which Stanley paid her in oxycodone pills. Accompanying him everywhere and everyday, she saw and met his suppliers and distributors. Driving between Quincy and Cape Cod essentially all the time, she was “living out of a suitcase.” In June 2010, over Stanley’s objection, Willis asked her to fly to Florida, and she became a courier, flying with money and pills between 12 and 20 times. In October, LeBaron said something to someone that caused Stanley to distrust her, and her involvement ended. *Day 5* at 148-159; *Day 6* at 26-115.

During her time in the conspiracy, LeBaron’s habit was up to 20 pills per day. *Day 5* at 151. She faced up to 20 years incarceration, but for her testimony the government gave her immunity and declined to charge her. *Day 6* at 106.

E. Mathew Hernon

Mathew Hernon is Alexa Doran’s younger brother, a teenager at the time of the conspiracy. *Day 7* at 94, 98. Hernon helped Stanley in a variety of ways: counting oxycodone pills, running cash-counting machines, and driving Stanley to his supply and distribution meetings. He saw thousands of pills and piles of money. *Day 7* at 102-118.

At the time of his testimony, Hernon was a member of the National Guard hoping to pursue a career in law enforcement. Given his post-conspiracy training, he was able to identify with specificity the gun he said Stanley kept behind the couch at the house in Onset. *Day 7* at 118-129. He testified in exchange for the government’s help in

advancing his career, *Day 7* at 143-147, immunity from prosecution, *Day 7* at 155, and – obviously angry during trial – an opportunity to get back at Stanley for leaving his pregnant sister Alexa Doran for another woman. *Day 7* at 141-142.

V. The Robbery

Two cooperating witnesses testified to a robbery of \$225,000 from Stanley when he thought he was meeting a new source of oxycodone pills in Bourne, Massachusetts. One was Michael Fula, *Day 9* at 11 at 70, who was either a fellow robber or a witness to the robbery; the other was Joseph Guarneri, *Day 12* at 61-165, *Day 13* at 7-54, who was an admitted robber. Both witnesses said the Gonsalves brothers were present at the robbery, and that they brought a gun with them.

A. Michael Fula

First Michael Fula testified. Fula stated that on May 13, 2011, Joseph Guarneri picked him up and took him to the home of a man named Francisco Montiero, *Day 9* at 15-16. Fula claimed to be surprised when Guarneri and Montiero, with the help of at least one other person called “L.G.,” robbed Stanley of the money. *Day 9* at 19-23, 56. Fula also testified that two other men he did not know were in the basement of Montiero’s house at the time of the robbery. *Day 9* at 20. Guarneri set Stanley up for the robbery by telling him they were going to purchase oxycodone pills from a new source, which was who Montiero was supposed to be. *Day 9* at 22. After arriving at Montiero’s home, L.G., as pre-arranged, jumped out of a closet with a pistol and took the money, striking Stanley on the head with the gun. *Day 9* at 27-28, 32-33. Fula said that Joshua

was with Stanley, and that at some point Guarneri went out to the car in which Joshua and Stanley arrived, and removed a gun from their car. *Day 9* at 34-35. After the robbery, Stanley and Joshua left the house, and those remaining in the house then left in two cars. *Day 9* at 36-37. Fula testified that, soon after leaving, Stanley's car sped up from behind them and rammed the Volvo containing the two men from the basement, causing it to spin and roll over. *Day 9* at 38-39. The two men in the Volvo were not hurt and ran away. *Day 9* at 40-41.

Fula, who was not charged as one of the robbers, *Day 9* at 51-53, agreed to testify in this case in order to get probation on another charge in return for his testimony. *Day 9* at 11-14. He was impeached with his prior inconsistent statements, *Day 9* at 58, 64, a prior conviction for assault with a firearm, *Day 9* at 60, his earlier failure to identify Joshua from a photograph, *Day 9* at 67, and with statements of Joseph Guarneri who also testified. *Day 9* at 50, 66.

B. Joseph Guarneri

Next, cooperating witness Joseph Guarneri testified that he and Francisco Montiero planned the robbery. Guarneri first met Stanley through Stanley's cousin David Gonsalves, whom Guarneri knew and from whom he had obtained oxycodone. *Day 12* at 66-71. David told Guarneri that Stanley was the source of his pills. *Day 12* at 74. Later, Guarneri told David that he could supply pills to Stanley, and Stanley purchased some pills through Guarneri's Florida source. *Day 12* at 75-89. Thereafter, Guarneri talked to Montiero, another supplier of pills, and they came up with the plan to rob

Stanley. *Day 12* at 100-102. The plan was for Stanley to go to Montiero's house in Bourne, in order to exchange \$225,000 for 15,000 pills. *Day 12* at 103, 107.

Guarneri said he took Fula with him to Montiero's house because Fula had a gun and Guarneri did not trust Montiero. *Day 12* at 108, 149. When Guarneri and Fula arrived at the house, L.G. was there. There were also two other men in the basement. *Day 12* at 109-110. Guarneri testified that the plan was that after Stanley arrived, L.G. would emerge from the closet with a gun and rob him. When Stanley was close to the house, he called from a gas station and Guarneri went to meet him. Guarneri testified that there was a woman driving Stanley's car and another man in the passenger seat, whom Guarneri identified at trial as Joshua. Stanley got in Guarneri's car and both cars went to Montiero's house.

Stanley first went in the house with Guarneri alone, and without the cash. Guarneri stated that he then went back out to Stanley's car to tell Joshua that Stanley said to bring in the cash, but not the gun. *Day 12* at 110-117. Joshua retrieved the money, in three bags, out of the trunk and took it into the house. *Day 12* at 118-119. After the money was inside, L.G. then came out of a closet with a gun. L.G. held his gun on Joshua while Fula pulled his gun and held it on Stanley. *Day 12* at 120-123. Then L.G. hit Stanley on the head with his pistol and took the money from him. Montiero told Guarneri to go back out to the car and get the gun. Guarneri retrieved the gun and gave it to Montiero. *Day 12* at 123-127. Stanley and Joshua then left the house, and the remaining six men went out the back basement door and left in two cars. *Day 12* at

128-129. Guarneri testified that after driving down the road a bit, Stanley's car passed the car containing Fula, Guarneri, L.G. and Montiero, and rammed the Volvo with the other two men from the basement. The Volvo flipped over on the highway, and the other two cars then traveled in different directions. *Day 12* at 130-132. L.G. called the two men in the Volvo and found out they were OK. *Day 12* at 137.

On cross-examination, Guarneri said he was cooperating with the DEA, initially to get information to use against Montiero. *Day 12* at 141. It was not the first time, as he had cooperated with the DEA in 2007 when he was facing a distribution of heroin charge. *Day 12* at 146. Guarneri admitted to other arrests after he began cooperating with the DEA. *Day 12* at 146. In the past, Guarneri had been involved in trafficking oxycodone, heroin, and cocaine, and had also been involved in another robbery. Guarneri had entered a guilty plea to distribution of oxycodone as a supervisor of others, was awaiting sentencing, and was testifying in order to get a reduced sentence based on his cooperation, as he had after the first time he worked with the DEA. *Day 12* at 61-65; *Day 12* at 145-146. He was also given \$3,000 to relocate. *Day 13* at 24.

On cross-examination, Guarneri was impeached with his prior statements to the DEA and the Grand Jury. In his many statements before trial, he made comments inconsistent with his trial testimony and omitted many things. For example, he did not mention Stanley or David Gonsalves in early statements. *Day 12* at 159-160. Although he told DEA agents about the robbery, he never mentioned Stanley until May of 2014. *Day 12* at 162. Then he said Stanley arrived at Montiero's house with other males in the

car. *Day 13* at 16. Guarneri did not mention there was a woman in Stanley's car. *Day 13* at 20. He also did not mention Stanley bringing or having a gun. *Day 12* at 154, 156, *Day 13* at 20 (the first mention of the gun was in May 2014, *Day 12* at 163). He didn't mention Fula or that he had a gun. *Day 13* at 19. He neglected mention of the other men in the basement, the Volvo, and the car chase. *Day 13* at 20-21, 26. He said he could not identify the man who was with Stanley. *Day 13* at 30. He also could not identify a photograph of Joshua as the other man with Stanley. *Day 13* at 31, 38. He said he assumed the person was Stanley's brother. *Day 13* at 17, 51.

VI. Duffle of Money and Purchases

A. Karen Swift

Karen Swift was Stanley's highschool sweetheart. They had a child together, but at the time of events in this case she had no relationship with him for a decade. On the night of the robbery, Stanley showed up at her house in Bourne, bleeding from a head wound, and told her he had been robbed and involved in a car chase. Stanley hid a duffle bag in her rafters. She peeked and confirmed it was full of \$100 bills sealed in plastic. After two weeks she became so nervous she drove to his house and returned the bag. *Day 8* at 144-157.

B. Christopher Beasley, Bruce Bierhans, Penny Ellis, Nicole Gonsalves, Aleah Nasah

The remaining five witnesses testified regarding helping Stanley transfer money by check, and acquire real estate. *Day 7* at 55-76 (Christopher Beasley); *Day 10* at 117-126 (Bruce Bierhans); *Day 10* at 127-159 (Penny Ellis); *Day 9* at 110-159 (Nicole Gonsalves);

Day 9 at 81-98 (Aleah Nasah). Stanley purchased two cars which, because he did not have a license and thus could not register a car in Massachusetts, he put into his sister's and mother's names. *Day 5* at 86-87; *Day 7* at 17-18; *Day 8* at 31, 72.

SUMMARY OF ARGUMENT

Stanley Gonsalves argues that the entirety of the evidence against him was impeached and self-interested, and thus tainted to the extent that the verdict is not reliable.

He then notes the recent supreme court decision in *Johnson v. United States*, and argues that under plain error review, several of Mr. Gonsalves's prior convictions were unlawfully counted as predicate offenses as "crimes of violence" under the guidelines.

Mr. Gonslaves then argues the court should have granted him a mistrial based on the prosecutor's statements in closing that informed the jury he had previously been incarcerated.

Finally, Mr. Gonsalves notes that the sentencing court calculated drug quantity by working back from the forfeiture verdict, thereby introducing several errors of counting, including streams of income unrelated to oxycodone distribution, erroneous pricing, and pills that were consumed rather than distributed.

ARGUMENT

I. Government's Case Comprised of Testimony by Impeached Self-Interested Witnesses

The entirety of the government's case was based on impeached testimonial evidence. Nine of the ten witnesses who said Stanley had some role in distributing drugs were facing prosecution. All of them got their charges dismissed or reduced, and the ones who remained under prosecution got or were hoping for vastly shortened sentences. Most were addicts. Two faced removal of their children to state agencies if they refused to speak. One risked the impossibility of working as a nurse unless she testified, and another sought advancement in his military career with help of the government for his testimony. All of the witnesses made their bargain in exchange for testimony against Stanley. One was a jilted girlfriend who Stanley left when she was pregnant, and one was that woman's brother. Two were at the scene of the robbery, and both essentially admitted their role as robbers.

Beyond some photographs of various actors, there was no documentary or other evidence involving Stanley. This is not a case where the tainted testimony of a few cooperating impeached criminals was supplemented with other evidence. *See, e.g., United States v. Trinidad-Acosta*, 773 F.3d 298, 308 (1st Cir. 2014) (contract showing defendant leased crack house, documents showing bank deposits into account of leader of conspiracy, controlled sales to confidential informant); *United States v. Hicks*, 575 F.3d 130 (1st Cir. 2009) (drug paraphernalia in home, cell phone records fitting pattern of drug dealer, ammunition and cash in defendant's possession); *United States v. De Jesus*

Mateo, 373 F.3d 70 (1st Cir. 2004) (audio recordings of defendant arranging drug transactions, discussing debts, and working for leader of conspiracy).

Here, all the witnesses had much to gain, primarily their freedom, from implicating Stanley in the oxycodone and money laundering conspiracies. They also were impeached with their past involvements in crime, the deals they got for testifying, prior inconsistent statements and omissions, and personal animosity toward the brothers. Two of the witnesses, Fula and Guarneri, were clearly not believed by the jury, resulting in the acquittal of both brothers on a handgun charge which was based on their testimony.

As to Stanley's conviction for a rifle, there was conflicting testimony on where it was kept – either in the bedroom or behind the couch in the living room. And the verdict form manifests the jury's confusion; on the form the jury wrote: “? Were any guns seized?” Beyond the rifle's existence, there is no evidence it was ever used, brandished, or even implied, as part of any transaction.

Accordingly, this court should reverse the convictions.

II. Prior Convictions are Not Predicates for Career Offender Status After *Johnson*

A. Plain Error Review

In the lower court Mr. Gonsalves did not raise any issue regarding vagueness of the Armed Career Criminal Act, 18 U.S.C. 924(e)(2), or 18 U.S.C. 16(b), or the sentencing guidelines, U.S.S.G. 4B1.2(a); see *Johnson v. United States*, _ U.S. _, 135 S. Ct. 2551 (June 26, 2015). Mr. Gonsalves was sentenced on June 12, 2015, two weeks before the United States Supreme Court issued its decision in *Johnson*.

Accordingly, review for vagueness of the residual clause of U.S.S.G. 4B1.1 and its “crime of violence” designation,² is for plain error. *United States v. Hudson*, 823 F.3d 11, 18 (1st Cir. 2016) (guidelines calculation overstated in view of *Johnson* may be plain error).

[A] reviewing court may set aside a challenged portion of a criminal sentence if, and only if, the appellant succeeds in showing (1) that an error occurred (2) which was clear or obvious and which not only (3) affected the defendant’s substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings.

United States v. Padilla, 415 F.3d 211, 218 (1st Cir. 2005) (quotations omitted); *United States v. Castro-Vasquez*, 802 F.3d 28 (1st Cir. 2015). In this case there was error, now plain in light of *Johnson*. The error may affect Mr. Gonsalves’s sentence because, although the court deviated downward, the court would have started its sentencing calculation at a lower starting point had the error not occurred. After *Johnson*, a defendant

²Whether a “crime of violence” is governed by *Johnson* will be decided by the Supreme Court this coming term. See *Beckles v. United States*, 616 F. App’x 415 (11th Cir. 2015), cert. granted, 136 S. Ct. 2510 (2016).

erroneously sentenced impairs the integrity and public reputation of judicial proceedings.

Accordingly, this court may consider the *Johnson* issues on direct appeal.

B. Predicate Convictions

Mr. Gonsalves was found to qualify as a career offender.

The defendant was at least 18 years old at the time of the instant offense of conviction; the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense; therefore, the defendant is a career offender.

PRE-SENTENCE INVESTIGATION REPORT (“PSI”) ¶ 155; STATEMENT OF REASONS at ¶ I.A., *Addendum* at 56 (“The court adopts the presentence investigation report without change.”).

The PSI identified six prior Massachusetts state convictions that it says qualify Stanley Gonsalves as career offender predicates. PSI ¶ 190.

1. May 4, 1997. Larceny from a Person. PSI ¶ 170.
2. July 19, 2000. Assault & Battery, Assault & Battery with a Dangerous Weapon (Rock). PSI ¶ 179.
3. August 6, 2002. Resisting Arrest, and Disorderly Person. PSI ¶ 181.
4. February 28, 2003. Possession to Distribute Cocaine, and Possession of Marijuana. PSI ¶ 182.
5. July 19, 2003. Assault with Dangerous Weapon (Knife). PSI ¶ 184.
6. December 20, 2004. Unarmed Robbery, and Assault & Battery with a Dangerous Weapon (Shod Foot). PSI ¶ 185.

1. May 1997 Larceny

The May 1997 larceny conviction does not qualify as a crime of violence pursuant to U.S.S.G. 4B1.1, because none of its elements, G.L. c. 266, § 25, are listed in the

guidelines' elements clause, and larceny does not match any of the crimes in the enumerated offenses clause. Although this court has held that larceny is a crime of violence pursuant to the residual clause, *United States v. Oliveira*, 493 F. App'x 145 (1st Cir. 2012); *United States v. De Jesus*, 984 F.2d 21 (1st Cir. 1993), those holdings have been effectively undone by *Johnson*. Accordingly, Mr. Gonsalves's May 1997 larceny conviction is not a predicate for career offender status, and the prior conviction must be disregarded for those purposes.

2. July 2000 Assault & Battery

The July 2000 assault and battery conviction does not qualify as a crime of violence pursuant to U.S.S.G. 4B1.1, because a conviction can be had by proof of merely a touching "however slight," *Commonwealth v. Porro*, 458 Mass. 526, 529 (2010), or an "offensive touching" that is not physically harmful, *Commonwealth v. Burke*, 390 Mass. 480, 482-483 (1983), G.L. c. 265, § 115A, rather than the use or threatened use of physical force as required by the guideline's elements clause. Assault and battery also does not match any of the crimes in the enumerated offenses clause. In *Johnson v. United States*, 559 U.S. 133, 138 (2010), the Supreme Court considered a Florida battery offense permitting conviction if one "actually and intentionally touched the victim" with physical contact "no matter how slight." The Court found the Florida offense did not constitute violent physical force. *Id.* at 145. Accordingly, Stanley Gonsalves's July 2000 assault and battery conviction must be disregarded for career offender purposes.

The July 2000 assault and battery with a rock also does not qualify as a crime of

violence pursuant to U.S.S.G. 4B1.1, because although pre-*Johnson* assault and battery with a dangerous weapon was considered a crime of violence under the residual clause, see *United States v. Glover*, 558 F.3d 71, 79-82 (1st Cir. 2009); see also *United States v. Hart*, 674 F.3d 33, 40-44 (1st Cir. 2012), after *Johnson* it no longer does. See *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016). This is because a conviction can be had by “a touching, however slight,” *Commonwealth v. Appleby*, 380 Mass. 296, 308 (1980), whereas U.S.S.G. 4B1.1 requires the more severe “use, attempted use, or threatened use of physical force” under the elements clause. To the extent that the crime was previously used as a predicate under the residual clause, that has been effectively undone by *Johnson*. Accordingly, Mr. Gonsalves’s July 2000 assault and battery convictions are not predicates for career offender status, and the prior convictions must be disregarded for those purposes.

3. August 2002 Resisting and Disorderly

The August 2002 resisting arrest conviction does not qualify as a crime of violence pursuant to U.S.S.G. 4B1.1, because a conviction can be had by “creating a substantial risk” of injury, G.L. c. 268, § 32B, rather than the use or threatened use of physical force, as required by the guideline’s elements clause. Resisting arrest does not match any of the crimes in the enumerated offenses clause. Although this court has held that resisting arrest is a crime of violence pursuant to the residual clause, *United States v. Almenas*, 553 F.3d 27, 34 (1st Cir. 2009), that holding has been effectively undone by *Johnson*. Accordingly, Mr. Gonsalves’s August 2002 resisting arrest conviction is not a predicate

for career offender status, and the prior conviction must be disregarded for those purposes.

Similarly, the August 2002 disorderly conduct conviction does not qualify as a crime of violence pursuant to U.S.S.G. 4B1.1, because a conviction can be had if the defendant merely “creates a hazardous or physically offensive condition,” G.L. c. 272, § 53; *Sheehy v. Town of Plymouth*, 191 F.3d 15, 22 (1st Cir. 1999), *abrogated on other grounds by Devenpeck v. Alford*, 543 U.S. 146 (2004), rather than the use or threatened use of physical force as required by the guideline’s elements clause. Disorderly conduct also does not match any of the crimes in the enumerated offenses clause. To the extent that any court has held that disorderly conduct is a crime of violence pursuant to the residual clause, such holding has been undone by *Johnson*. Accordingly, Mr. Gonsalves’s August 2002 disorderly conduct conviction is not a predicate for career offender status, and the prior conviction must be disregarded for those purposes.

4. February 2003 Drug Crime

The February 2003 conviction for “Possess to Distribute Class B Drug” listed in the PSI, § 182, is too indefinite to determine whether the crime has an intent requirement, as required by U.S.S.G. 4B1.1. Thus it should not be considered a predicate.

Even if the intent requirement were met, this court, post-*Johnson*, has not ruled that a conviction under G.L. 94C, § 32A, is a “controlled substance offence” or a “crime of violence.” Thus it should not be considered a predicate.

Mr. Gonsalves informed the sentencing court in this case that he pleaded guilty to straight *possession*, as noted on the plea tender form and accepted by the Massachusetts court. Thus, the drug crime cannot serve as a basis for an intent to distribute.

5. July 2003 Assault

As to battery with a knife, see, *supra*, regarding the July 2000 charges.

6. December 2004 Robbery and Assault

As to battery with a shod foot, see, *supra*, regarding the July 2000 charges.

As to unarmed robbery, the December 2004 conviction does not qualify as a crime of violence pursuant to U.S.S.G. 4B1.1, because a conviction can be had by the slightest of touching or apprehension by the victim, *Commonwealth v. Davis*, 7 Mass. App. Ct. 9 (1979), rather than the use or threatened use of physical force as required by the guideline's elements clause. Unarmed robbery also does not match any of the crimes in the enumerated offenses clause. To the extent that any court has held that unarmed robbery is a crime of violence pursuant to the residual clause, such holding has been undone by *Johnson*. Accordingly, Mr. Gonsalves's December 2004 unarmed robbery conviction is not a predicate for career offender status, and the prior conviction must be disregarded for those purposes.

III. Court Should Have Granted a Mistrial Based on Prosecutor's Statements in Closing

In his brief, Joshua Gonsalves argues that the court should have granted a mistrial based on the three statements of witnesses who mentioned that Joshua had been in jail prior to allegations here. The court had granted *limine* motions preventing such disclosures. *Pre-Trial Conference* (Sept. 2, 2014), *passim*. Stanley argued in the trial court that the disclosures with regard to Joshua had spillover effects on him, and affected him to the same degree. *Day 10* at 26.

A fourth such statement, however, directly implicated Stanley. In his closing, the prosecutor said:

“[B]ack in December, 2009, you heard a telephone call between Stanley Gonsalves and Vincent Alberico, who testified later in the trial, and that was the phone call. Vinnie is still in jail, Stanley is out of jail, and Stanley is –.”

Counsel objected and the judge immediately said, “Yes, I strike that.” *Day 15* at 13-14.

Following the government's closing, defense counsel moved for a mistrial based on the jail comment. The judge found the objection timely made, but denied the motion. *Day 15* at 42-43.

Stanley joins the argument of co-defendant Joshua Gonsalves, and suggests the court should have granted a mistrial. Because re-trial would violate Stanley's rights against double jeopardy, the charges should be dismissed. *United States v. Lara Ramirez*, 519 F.3d 76, 83 (1st Cir. 2008).

IV. In Sentencing Calculation, Court Overstated Quantity Using Inaccurate Assumptions

In determining his sentence, the district court's methodology for calculating the quantity of drugs for which Stanley Gonsalves was responsible was to work backward from the amount of money the jury determined was attributable to him: \$3,552,203. FORFEITURE VERDICT FORM ¶ 7 (Oct. 9, 2014), *Addendum* at 49; *Sent. Trn.* at 6. The sentencing court divided that amount of money by \$20 per pill, resulting in 177,610 pills. These were then added to the 18,437 seized pills attributed to Stanley, for a total of 196,047 pills. The court then converted to a marijuana equivalent, and applied the sentencing guidelines to produce a base offense level of 36. PSI ¶¶ 146, 147; *Sent Trn.* at 6-7.

We review the district court's factual decisions regarding drug quantity for clear error. Drug quantity findings may be based on approximations as long as those approximations represent reasoned estimates of drug quantity. A defendant may be held responsible only for drug quantities foreseeable to that individual. Foreseeability encompasses not only the drugs the defendant actually handled but also the full amount of drugs that he could reasonably have anticipated would be within the ambit of the conspiracy.

United States v. Ramirez-Negron, 751 F.3d 42, 53 (1st Cir.), *cert. denied*, 135 S. Ct. 276, and *cert. denied sub nom. Alvarado-Merced v. United States*, 135 S. Ct. 283, 190 (2014) (citations and quotations omitted).

This court defers to the sentencing court regarding choice among methodologies to determine quantity. *United States v. Bernier*, 660 F.3d 543 (1st Cir. 2011); *United States v. French*, No. 1:12-CR-00160, 2016 WL 1446135, at *6 (D. Me. Apr. 12, 2016) (quantity of fertilizer to determine number of marijuana plants).

The calculation of drug quantities is not an exact science, and a sentencing court charged with that responsibility need not be precise to the point of pedantry. Rather, a sentencing court may make reasoned estimates based on historical data.

United States v. Platte, 577 F.3d 387, 392 (1st Cir. 2009).

The court erred at several junctures in its sentencing calculations.

A. Quantity of Pills Based on Unreliable Testimony

To establish the number of pills, the sentencing court relied on the forfeiture calculation in the pre-sentence investigation report, which in turn rested on the testimony of co-conspirators Anevay Duffy, Michael Shaw, and Danielle LeBaron. PSI ¶ 145. The court assigned a total of 109,000 pills (almost a third of the total number of pills) to those three individuals as “runners” for the drug conspiracy.

[A]ccomplices sometimes have their own agendas, trying to shift blame, minimize culpability, or accommodate prosecutors in order to better their own lot. For this reason, accomplice testimony must be viewed with special caution.

United States v. Bernier, 660 F.3d 543, 546 (1st Cir. 2011).

Anavey Duffy testified she was in a “drug haze” during her time counting pills, and although she faced a sentence of 12½ years, she was more likely to get probation. Michael Shaw got 20 years, but was hoping for a reduction, for his part in the Willis conspiracy. He could not provide accurate pill counts, and lied about how many trips he ran. Danielle LeBaron faced 20 years, but got immunity. She was also an addict, and could not be sure how many runs she made.

B. Runners Supplied Distributors Other Than Stanley Gonsalves

In addition to the 109,000 pills attributed to those three (Duffy, Shaw, and LeBaron), the other runners (Baranowski, Melendez, Ross, Hamlyn, Jordan, and Durden) were said to account for another 228,890 pills. PSI ¶ 145.

The error in including all of these pills when calculating Stanley Gonsalves's sentence is that the runners did not supply oxycodone to only him. They worked for John Willis, whom the government acknowledges operated the acquisition and transportation conspiracy, separate from Stanley Gonsalves's distribution conspiracy. PSI ¶¶ 8-15, 40.

For instance, the 7,878 pills seized from Steven Le in January 2011 were taken while he was boarding a flight in Florida as a courier for John Willis. PSI ¶ 48. Similarly, Brandon Garner, on one of his runs, had a side-deal for a portion of the pills he carried. *Day 5* at 116-17.

If the court considered only those 5,186 seized pills unconnected to Willis and with some testimony connecting them to Stanley (Garner & C.Gonsalves, Alberico, J.Gonsalves & Shaw), plus the 15,000 expected to be transferred at the robbery (Monteiro), the total would be 20,186 oxycodone pills, and would have resulted in a base offense level of 32.

C. Stanley Gonsalves Had Sources of Income Other Than Oxycodone Distribution

The court’s calculation is based on the assumption that Stanley Gonsalves’s entire income was derived from trafficking oxycodone pills.

While the court appropriately did not include income from his stonemason work, *Day 12* at 52-60, Mr. Gonsalves carried on a significant business in drugs – uncharged – other than oxycodone. Samantha Poitras testified Stanley showed up at her apartment with a duffel of marijuana. *Day 5* at 55. Brandon Garner, who was living with Stanley’s sister, observed that Stanley kept a backpack full of marijuana in a closet, and transacted sales of cocaine from their house. *Day 5* at 78-79, 84. Vincent Alberico testified Stanley had a substantial marijuana business, making \$3,000 per pound on a \$60,000 purchase.

The jury was not confined to oxycodone proceeds in its forfeiture verdict, SECOND SUPERSEDING INDICTMENT at 17-20, *Joint Appx.* at 49, whereas the court was sentencing according to oxycodone quantity. Because the scope of the crimes and conspiracy included in the forfeiture is wider than oxycodone quantity, the court’s methodology of counting backward from the forfeiture verdict is flawed.

D. Sentence Calculated Ignoring Pills Stanley Consumed for Addiction

The government recognizes that Stanley himself was an addict with a 40 pill per day habit. PSI ¶ 245. Over the approximately three years charged in count 1 of the indictment, SECOND SUPERSEDING INDICTMENT at 2 (“from at least in or about late 2009, and continuing thereafter until at least on or about November 9, 2012”), Stanley’s consumption accounted for over 40,000 pills. The government’s calculation neglected to calculate these pills and deduct them from the quantity for which he was sentenced.

E. Not All Pills Were 30mg Pills, Some Were 15mg

The only pills that can be proven to be pure oxycodone, and the only pills for which the milligrams of oxycodone per pill were known, were those seized and tested, which totaled 18,437 pills. If only these pills were attributed to Stanley, it would result in a base offense level of 32.

Further, the government acknowledged that of the pills actually seized, some consisted of 30 milligrams of oxycodone per pill, but many were just 15 milligrams. PSI ¶¶ 17, 33, 111, 112, 113, 115. The court calculated, however, on the assumption that all were 30 milligrams. Thus, the court over-counted oxycodone to some unknown degree. Because there were a substantial number of 15 milligram pills among those seized, *Day 11* at 12-13 (government chemist measured 15 milligram pills from seizure), the court's calculation is greatly overstated.

F. Some Pills Were Self-Made From Heroin, and Contained No Oxycodone

Alexa Doran testified that when the supply of oxycodone pills became scarce, Willis began supplying Stanley pills he made from heroin. These pills did not contain oxycodone, and therefore cannot be counted for sentencing. The court erred; it made no effort to estimate the quantity of these non-oxycodone pills, and no effort to deduct them from its total count.

G. Price Per Pill for Calculating Number of Pills Should Have Been \$30, Not \$20

The court arrived at a number of pills by using the forfeiture verdict and dividing by \$20 per pill: “[T]he best way to approach this ... is to take the amount of drugs, the amount that the jury found, and divide it by \$20.” *Sent. Trn.* at 6.

The price of the pills, however, was \$30. PSI ¶¶ 26, 31 (citing retail price of \$30 for 30-milligram pills). The government’s attorney acknowledged in argument that “the street cost is a dollar a milligram. ... It’s \$30 on the street.” *Day 14* at 104-05; *Day 7* at 79; *see also Day 4* at 89 (Alberico); *Day 6* at 32 (LeBaron); *Day 8* at 34 (Doran); *Day 12* at 89 (Guarneri: “went up to around \$30 for one 30-milligram” pill). Because Stanley was operating a distribution network, it is appropriate to use the street price.

The court should have divided by \$30 rather than \$20. By this error it overcounted the number of pills for which Stanley Gonsalves is responsible.

CONCLUSION

For the foregoing reasons, this Court should reverse Stanley Gonsalves's convictions.

Respectfully submitted,

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By his Attorney,
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/s/

Dated: August 15, 2016

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CERTIFICATIONS

Stanley Gonsalves requests that Attorney Joshua L. Gordon be allowed oral argument.

I hereby certify that on August 15, 2016, I will forward via the ECF/PACER system an electronic version of this brief to the United States Court of Appeals for the First Circuit, and by the same method to the office of the United States Attorney.

I hereby certify that this brief complies with the type-volume limitations contained in F.R.A.P. 32(a)(7)(B), that it was prepared using WordPerfect version X6, and that it contains no more than 9,849 words, exclusive of those portions which are exempted.

Dated: August 15, 2016

/s/

Joshua L. Gordon, Esq.

ADDENDUM

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