No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RASHAD WOODSIDE,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respectfully submitted,

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ATTORNEY FOR PETITIONER

QUESTION PRESENTED FOR REVIEW

Whether a defendant has the right to be present with counsel at a resentencing hearing where the reasons for the sentence are stated in open court after a limited remand when the issues on remand were not previously addressed and the issues on remand are in dispute?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

Constitutional Provisions:

No. _____

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

Petitioner Rashad Woodside ("Petitioner") respectfully prays that a writ of certiorari will issue to review the opinion and order of the United States Court of Appeals for the Sixth Circuit entered in Case No. 17-5125 on July 18, 2018.

OPINION BELOW

The original judgment with opinion of the District Court, which was unpublished, was issued on March 13, 2015, and is attached hereto. (App. 1a). On February 10, 2016, a three-judge panel of the United States Court of Appeals for the Sixth Circuit filed its opinion and order, which was unpublished and attached hereto, vacating and remanding Petitioner's conviction and sentence for conspiracy to possess with intent to distribute oxycodone and other prescription medications, in violation of 21 U.S.C. §§ 841 and 846. (App. 7a).

After remand, the District Court issued a judgment with opinion, which was unpublished, on January 8, 2017, and is attached hereto. (App. 22a). On July 18, 2018, a different

three-judge panel of the United States Court of Appeals for the Sixth Circuit filed its opinion and order, which was published and is attached hereto, affirming Petitioner's conviction. (App. 26a).

JURISDICTION

Petitioner seeks review of the opinion and order of the United States Court of Appeals for the Sixth Circuit entered on July 18, 2018. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Federal Rule of Criminal Procedure 43

> (a) WHEN REQUIRED. Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:
>
> (1) the initial appearance, the initial arraignment, and the plea;
> (2) every trial stage, including jury impanelment and the return of the verdict; and
> (3) sentencing.

18 U.S.C. § 3553(c)

> The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence

STATEMENT OF THE CASE

1. Facts Giving Rise To Rise To The Case.

Kenneth Stafford ("Stafford") and his girlfriend, Kaycee Breeden ("Breeden"), got involved in dealing drugs in late 2008 or early 2009. The couple sold a variety of prescription pain pills. They obtained their pills from multiple suppliers.

One such supplier was a Florida resident named Frederick McGregor ("McGregor"). In 2009, Stafford began doing business with McGregor directly. Over the course of the next two years, McGregor provided Stafford and his girlfriend with a steady stream of oxycodone and Lortab pills. McGregor required payment up front. Stafford would wire the money to McGregor, who would then ship the pills by commercial courier a day or two later.

McGregor obtained his supply of pills by paying individuals to visit doctors' offices and obtain prescriptions for the medication. Petitioner was alleged to be one of these individuals.

The relationship between Stafford/Breeden and McGregor soured when McGregor began shorting the number of pills in each shipment. Petitioner learned about the tension between them and perceived an opening to take some of the business away from McGregor.

Petitioner surreptitiously retrieved Stafford's telephone number from an unattended cell phone McGregor had left in his vehicle. He next contacted Stafford at this number, introduced himself, and offered to sell him Roxicodone pills for a dollar less per pill than what McGregor was charging.

Stafford agreed to deal with Petitioner, but did not want to burn any bridges with McGregor. He secretly began purchasing pills from Petitioner while continuing to use McGregor as source of supply. McGregor was unaware of Petitioner's involvement and neither Petitioner nor McGregor interacted with one another.

Their payment and delivery arrangements were similar. Stafford would send money to Petitioner by wire transfer or direct deposit to his bank account. Petitioner would then send the pills to Stafford by postal service or commercial courier, such as FedEx and the U.S. Postal Service. Stafford eventually stopped working with McGregor.

At some point, the local investigators requested the assistance of the DEA. After the federal authorities entered the picture, the United States Attorney filed applications for warrants to intercept telephone conversations on a total of ten target phones.

While monitoring the call activity, the case agents overheard several drug-related conversations between Stafford and an individual in Florida using the alias "Goma." Based on information gleaned from those conversations, the federal agents intercepted two packages of pills sent from Florida to an address in Lebanon. Each package contained 180 Roxicodone pills. The investigators were able to identify "Goma" as Petitioner by tracing deposits made by Stafford and Breeden into his bank account.

Following Petitioner's arrest, he was interviewed by the case agents. He admitted his role in selling pills to Stafford and Breeden.

2. The District Court Proceedings.

On May 29, 2013, the federal grand jury for the Middle District of Tennessee returned a single-count indictment against Stafford, Breeden, Woodside, and 21 other individuals, charging them with conspiracy to distribute, and to possess with intent to distribute, Schedule II controlled substances from July 2010 to the date of the indictment. Petitioner ultimately pled guilty to the conspiracy count. There was no plea agreement.

A PSR was conducted. Thereafter, the district court scheduled an evidentiary hearing to resolve objections to Petitioner's PSR regarding the drug quantity calculation.

The government called three witnesses to support the probation officer's calculations - Stafford, Breeden, and the case agent. The cooperating co-defendants admitted that their chronic drug use affected their memories. Their estimates of drug quantity were, to put it mildly, all over the board. Their recollections regarding frequency, time frame, and pill counts wilted under close scrutiny.

The case agent admitted he had not prepared a statistical analysis of the drug amounts discussed during the monitoring of the telephone calls. He conceded the two intercepted packages of drugs do not support the quantities discussed by Stafford during his proffer.

At the conclusion of the witness testimony, an exasperated district judge commented that "the numbers do jump around, and I'm sure as I'm listening to the testimony, you'll probably notice me up here with my calculator. And I keep going back and forth in doing these calculations because it does keep moving."

The judge realized that the calculation of drugs "come off different depending on whether you're going with a straight Stafford or a straight Breeden or Agent Lewis."

The judge ultimately decided to "give [Petitioner] the benefit of the doubt, and [] go with Ms. Breeden, even though at times her testimony was not as clear as Mr. Stafford's. I think he most of the time had a better memory, but Ill give Mr. Woodside a break and go with her number."

After expressing his frustration with the uncertainty of the numbers, the judge fixed the marijuana equivalency of the pills distributed by Woodside at 28,000 kilograms. This number fell within a range (at least 10,000, but less than 30,000, kilograms of marijuana) corresponding to a base offense level of 34 on the Drug Quantity Table. The judge did not explain his methodology for arriving at this figure.

After adjusting the base offense level for the role enhancement and acceptance of responsibility, the district judge arrived at a total offense level of 34 and an advisory range of 168 to 210 months. The court sentenced Woodside

to a 170-month prison term, and a three-year term of supervised release. Petitioner timely appealed his sentence.

3. Direct Appellate Court Proceeding.

On the initial direct appeal, Petitioner raised two main issues. First, that the district court committed procedural error when it held that Petitioner was accountable for a quantity of Oxycodone equivalent to 28,000 kilograms of marijuana thereby setting his base offense level at 34. Second, the district court committed procedural error when it increased Petitioner's base offense level by four levels for a leadership role under U.S.S.G. §3B1.1(a).

After review, the Sixth District upheld the district court's imposition of the organizer or leader enhancement but vacated the sentence for recalculation of the drug quantity attributable to Petitioner. In support of this Court's remand, the Court held that "absence in the record of the numbers the district court used render[ed] its methodology totally opaque, and compel[led this Court] to vacate Defendant's sentence and remand for a better explanation of the district court's calculation, or for recalculation of the quantity of drugs for which Defendant [was] to be held accountable." The Court further noted that the issue of whether Petitioner should be held accountable for McGregor's drugs was never addressed at sentencing. As such, the court instructed the district court to "make particularized findings with respect to both the scope of the defendant's agreement and the foreseeability of his co-conspirators' conduct before holding the defendant accountable for the scope of the entire conspiracy."

4. The District Court Proceeding After Remand.

On January 13, 2017, Petitioner, with the assistance of newly retained counsel, different from his counsel at the initial sentencing hearing, filed a Motion for Hearing and Memorandum in Support of Defendant's Request for Resentencing Hearing to address this Court's concerns. Petitioner's newly retained counsel requested an evidentiary hearing so he and the government may have an opportunity to address the issue of whether he should be held responsible for McGregor's supply of drugs. Petitioner's newly retained counsel also requested an evidentiary hearing given that the testimony and evidence presented at the initial sentencing hearing was insufficient in detail and specificity to allow the district court to reach a drug quantity calculation that Petitioner was more likely than not responsible for.

On January 18, 2017, the district court issued an Order denying Petioner's request for an oral hearing. Without an "open court" hearing and without Petitioner being present at his resentencing, the district court issued a written order resentencing Petitioner to the same 170 months. Interestingly enough, rather than continue to use Breeden to calculate the drug quantity as the court did previously, the court decided to use Stafford this time to make its calculation and referenced Stafford throughout the decision. Further, the judge failed to make a particularized finding as to whether McGregor's acts were in furtherance of a jointly undertaken criminal activity with Woodside. Petitioner timely appealed his resentencing.

5. Subsequent Appellate Proceeding.

On July 18, 2018, a three-judge panel of the United States Court of Appeals for the Sixth Circuit filed its opinion and order affirming Petitioner's conviction. The court held that the district court did not commit any procedural error when it denied Petitioner's request for a new sentencing hearing because the remand order was limited; the Petitioner's prior sentencing

hearing and his presence at it satisfied 18 U.S.C.S. § 3553(c) because the section did not apply on limited remand; and further any error in the calculation of the number of drugs attributable to Petitioner rather than a conspirator was harmless.

In a concurring opinion, Judge Stranch, stressed the importance of the Petitioner's presence at a sentencing hearing, but ultimately stated it was up to the discretion of either the trial court or the appellate court whether to grant a hearing on a limited remand.

REASONS WHY THE WRIT OF CERTIORARI SHOULD ISSUE

A DEFENDANT HAS A CONSTITUTIONAL RIGHT TO BE PRESENT WITH COUNSEL AT A RESENTENCING HEARING WITH THE REASONS FOR THE SENTENCE STATED IN OPEN COURT, EVEN AFTER A LIMITED REMAND, WHERE A DEFENDANT REQUESTS TO BE PRESENT, THE ISSUES ON REMAND HAVE NOT PREVIOUSLY BEEN ADDRESSED, AND ARE IN DISPUTE.

This Court should grant writ of certiorari in order to resolve the scope of when a defendant is entitled to be present with counsel at a resentencing after a limited remand. There is considerable statutory authority and federal case law precedent requiring a defendant to be present and for the court to state the reasons for the sentence in open court at a resentencing after a general remand. However, there does not appear to be developed federal case law when it comes to limited remands to guide federal district courts. In fact, the concurring opinion in this case suggests it should just be left up to the discretion of either the trial or appellate court. Sentencing of criminal defendant's invokes one of the most critical stages of a criminal case. As such, the issue of a defendant's rights upon resentencing when it comes to limited remands is of great importance.

As this Court is well aware, Defendants have a constitutional right to be present at all stages of their trial. *Illinois v. Allen*, 397 U.S. 337, 338 (1970). This is particularly so "where his absence might frustrate the fairness of the proceedings." *Faretta v. California*, 422 U.S.

806, 819, n. 15 (1975). The right to be present "is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, but [the Supreme Court has] recognized that this right is [also] protected by the Due Process Clause." *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (citations omitted). Sentencing is a critical stage of the criminal process. *Mempa v. Rhay*, 389 U.S. 128, 133-134 (1967). A defendant has a constitutional right to be present [during resentencing] because technically a new sentence is being imposed in place of the vacated sentence." *United States v. Arrous*, 320 F.3d 355, 359 (2nd Cir. 2003). And it is "clear that the sentencing process . . . must satisfy the requirements of the Due Process Clause." *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

In accord with these rights, Federal Rule of Criminal Procedure 43 mandates the presence of the defendant at sentencing unless one of the Rule's enunciated exceptions applies. This Rule's requirement is "a fundamental procedural guarantee that places the defendant before the judge at a culminating moment of the criminal judicial process." *United States v. Faulks*, 201 F.3d 208, 211 (3rd Cir. 2000).

The presence requirement of Rule 43 has been treated differently by appellate courts on resentencing depending on whether the appellate court's remand was general or limited. If a remand is general, the Sixth Circuit has held that "resentencing upon [general] remand is not an exception to the presence requirement" and as such a Defendant has a "right to be present" for his resentencing. *United States v. Garcia-Robles*, 640 F.3d 159, 165 (6th Cir. 2011). A majority of circuit courts have also held that "[a] defendant has a constitutional right to be present during resentencing, because technically a new sentence is being imposed in place of the vacated sentence." *United States v. DeMott*, 513 F.3d 55,58 (2nd Cir. 2008) (citations omitted); *United States v. Faulks*, 201 F.3d 208, 211-12 (3rd Cir. 2000).

On limited remand, the rights under Rule 43 become less clear. Some courts hold that Rule 43 requires the presence of the defendant only where the sentence is made more onerous, *Mayfield v. United States*, 504 F.2d 888 (10th Cir. 1974); *Caille v. United States*, 487 F.2d 614 (5th Cir. 1973), or where the entire sentence is set aside and the cause remanded for resentencing, *Williamson v. United States*, 265 F.2d 236 (5th Cir. 1959).

In the same vein, 18 U.S.C. § 3553(c), demands that "[t]he court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence." 18 U.S.C. § 3553(c)(2010). The § 3553(c) requirements "are more than mere administrative burdens or meaningless formalities, but rather assure that the court has properly calculated the applicable Guidelines range, and that adequate explanation is provided to allow for meaningful appellate review and the perception of a fair sentence." *United States v. Daniels*, 641 Fed.Appx. 481, 490–91 (6th Cir.2016). Section §3553(c) requirements apply to resentencing. *United States v. Garcia-Robles*, 640 F.3d 159, 167 (6th Cir. 2011). Violations of § 3553(c) constitute "plain error" and "seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Blackie*, 548 F.3d 395, 403 (6th Cir. 2008).

The Second Circuit has held that upon resentencing, it is a violation of § 3553(c) for a district court to submit a "written sentencing explanation" about remand because § 3553(c) "requires the sentencing judge to state the reasons for imposing a particular sentence 'in open court.'" *United States v. DeMott*, 513 F.3d 55, 58 (2nd Cir. 2008). Until its decision in this case, the Sixth Circuit had agreed with the Second Circuit in holding that "after a sentence is vacated on direct appeal, the district court must state the reasons underlying its sentence 'in open court.'" *United States v. Garcia-Robles*, 640 F.3d 159, 167 (6th Cir. 2011). Aside from the

decision in this case, there appears to be no authority regarding whether 18 U.S.C. § 3553(c) is applicable in the cases of limited remand.

Judge Stranch's concurring opinion in this case adds further confusion about a defendant's rights upon limited remand. The Judge's concurrence begins reading almost as a dissent stressing the importance of a defendant's presence at sentencing:

> I write separately to emphasize the principle that underlies the issues we address here—the importance of the pronouncement of sentence in open court in the presence of the defendant. "[T]he notion that the sentencing court must 'eyeball' the defendant at the instant it exercises its most important judicial responsibility . . . is far from a formality." *United States v. Garcia-Robles*, 640 F.3d 159, 164 (6th Cir. 2011) (alteration in original) (quoting *United States v. Faulks*, 201 F.3d 208, 209 (3d Cir. 2000)). "Indeed, this requirement 'is a fundamental procedural guarantee that places the defendant before the judge at a culminating moment of the criminal judicial process.'" *Id.* (quoting *Faulks*, 201 F.3d at 211).

United States v. Woodside, 895 F.3d 894, 903-904 (6th Cir.2018). Then, in a seemingly strange twist, the concurrence indicates that upon limited remand it should be entirely up to the discretion of either the district court or appellate court to allow a defendant to be present at the resentencing hearing:

> Resentencing exists within the arena of judicial discretion. Resentencing "is not a unitary phenomenon." *United States v. Bryant*, 643 F.3d 28, 33 (1st Cir. 2011). "At one extreme, the resentencing ordered may be as unconstrained and open-ended as an initial sentencing; but at the other extreme, a remand may be so focused and limited that it involves merely a technical revision of the sentence dictated by the appeals court and calls for no formal proceeding." *Id.* at 32. As cases move across this continuum from de novo sentencing under a general remand to technical sentence revision, there may be circumstances that require the presence of the defendant, mandate a sentencing hearing, or call for the pronouncement of sentence in open court, even on a limited remand. "The sheer number of issues causing remand can affect" the scope and nature of a remand. *United States v. Campbell*, 168 F.3d 263, 268 (6th Cir. 1999). It is incumbent upon the appellate court "to outline the future intended chain of events. It is the job of the appellate court adequately to articulate instructions to the district court in the remand." *Id.*

> Thus, an appellate court has the discretion to mandate that a district court hold a hearing in the defendant's presence on a limited remand. *** A district court also may exercise its discretion to hold a hearing or to add other procedural protections not mandated by the appellate court but within the scope of its remand. ***
>
> Although our holding recognizes that a defendant is not automatically entitled to the full panoply of procedural rights on a limited remand, our obligation in crafting such a remand requires us to consider the specific nature of the inquiry before the district court and to provide corresponding procedural safeguards in our remand instructions. A district court may then find it necessary to extend other procedural rights, and may do so as long as its actions are consistent with the "letter and the spirit of the mandate." *United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994) (quoting *United States v. Kikumura*, 947 F.2d 72, 76 (3d Cir.1991)).

Id.

Counsel is not suggesting that Petitioner upon limited remand has an unfettered right to reopen or address issues that are not related to the limited remand. However, a defendant certainly should have a right to be present at a resentencing hearing to address matters related to the remand especially under the circumstances of this case.

The district court's decision in this case without Petitioner, counsel or a hearing in open court demonstrates why a hearing with a defendant and counsel present is so vitally important under both Rule 43 and 18 U.S.C. § 3553(c). The appellate court vacated the original sentence because the "absence in the record of the numbers the district court used render[ed] its methodology totally opaque". The appellate court also directed the trial court to determine whether Petitioner should be held accountable for McGregor's drugs. *As the appellate court noted, that issue was not originally argued by either party at the original sentencing hearing.*

Petitioner retained new counsel, different from the attorney that represented him at the initial sentencing hearing. Petitioner's newly retained counsel filed a motion requesting a hearing to present evidence and argument related to the issues before the district court on

remand. Petitioner's newly retained counsel requested an evidentiary hearing because the testimony and evidence presented at the initial sentencing hearing was insufficient in detail and specificity to allow the district court to reach a drug quantity calculation for Petitioner.

As a result of the district court's denial of Petitioner's requests, Petitioner did not have a meaningful opportunity to be heard regarding the issues on remand and the record was not developed in a meaningful way especially where Petitioner's new counsel intended to dispute the drug quantity calculations previously made and since *an issue on remand was not originally argued by either party at the original sentencing hearing.*

Without any meaningful input, after remand, the trial court made several erroneous determinations. The trial court ultimately held Petitioner responsible for McGregor's drugs even though the record supported the fact that the two and both were in fact competitors contrary to embellished case law. *See United States v. Andrews*, 953 F.2d 1312, 1325 (11th Cir. 1992). Relatedly, the trial court failed to make a particularized finding on the "furtherance" criteria of U.S.S.G. § 1B1.3(a)(B), which customarily warrants reversal. *United States v. Jenkins*, 4 F.3d 1338 (6th Cir. 1993); *United States v. Meacham*, 27 F.3d 214; *United States v. Jordan*, 20 Fed.Appx. 319 (6th Cir. 2001). Lastly, at the original sentencing hearing, the trial court stated it was going to err on the side of caution and base Petitioner's the drug quantity calculation on the testimony of witness Breeden. After remand, the court ultimately diverted, ignoring Breeden's testimony and instead relying on witness Stafford's testimony to determine the drug quantity attributed to Petitioner contrary to established precedent. *United States v. Walton*, 908 F.2d 1289, 1302 (6th Cir. 1990).

At sentencing, "it is of the utmost importance not only that justice be done but that it appear to be done." *United States v. Curran*, 926 F.2d 59, 63 (1st Cir. 1991). This Court

should grant certiorari and reverse and remand the matter for a fair sentencing hearing so that not only that justice be done, but that it appear to be done this case, and others coming up for resentencing in federal courts.

CONCLUSION

In light of the undeveloped case law in the area of resentencing after limited remands, the record in this case presents a case worthy of consideration. For the foregoing reasons, Petitioner asks this Court to grant his petition for a writ of certiorari and to order full briefing and oral arguments on the merits.

Respectfully submitted,

Dustin M. Blake (0080560)
ATTORNEY FOR PETITIONER

Dated: October 16, 2018

1a

United States District Court

MIDDLE District of TENNESSEE

UNITED STATES OF AMERICA

V.

RASHAD WOODSIDE

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:13-00097-3

USM Number: 01607-104

Hilton Napoleon, II
Defendant's Attorney

THE DEFENDANT:

__X__ pleaded guilty to Count One of the Indictment

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

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

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § § 841(b)(1)(C) and 846	Conspiracy to Possess with Intent to Distribute and to Distribute Oxycodone, Hydromorphone, Oxymorphone, Schedule II Controlled Substances, and Buprenorphine, a Schedule III Controlled Substance	May 29, 2013	I

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

_____ Counts _____ of the Indictment are dismissed on the motion of the United States.

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

March 12, 2015
Date of Imposition of Judgment

Kevin H. Sharp
Signature of Judge

Kevin H. Sharp, United States District Judge
Name and Title of Judge

March 13, 2015
Date

DEFENDANT: RASHAD WOODSIDE
CASE NUMBER: 3:13-00097-3

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 170 months

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

The Court recommends that Defendant be incarcerated at a federal correctional facility as close as possible to south Florida, subject to his security classification and the availability of space at the institution.

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

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

_____ at _____ _____ a.m. _____ p.m. on _____

_____ as notified by the United States Marshal.

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

X before 2 p.m. on **Monday, April 13, 2015**.

_____ as notified by the United States Marshal.

_____ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: RASHAD WOODSIDE
CASE NUMBER: 3:13-00097-3

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a total term of three years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the Court.

_____ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

__X__ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

__X__ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

_____ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

_____ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

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

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: RASHAD WOODSIDE
CASE NUMBER: 3:13-00097-3

SPECIAL CONDITIONS OF SUPERVISION

1. The Defendant shall participate in a program of drug testing and substance abuse treatment which may include a 30-day inpatient treatment program followed by up to 90 days in a residential reentry center at the direction of the Probation Officer. The Defendant shall pay all or part of the cost for substance abuse treatment if the Probation Officer determines the Defendant has the financial ability to do so or has appropriate insurance coverage to pay for such treatment.

2. The Defendant shall promptly advise the United States Probation Office of any pharmacy that dispenses controlled substances on your behalf of the Defendant and agrees to execute a release of information form so that medical records may be obtained from such pharmacy.

3. The Defendant shall furnish all financial records, including, without limitation, earnings records and tax returns, to the United States Probation Office upon request.

4. The Defendant is prohibited from owning, carrying or possessing firearms, ammunition, destructive devices or other dangerous weapons.

5. The Defendant shall cooperate in the collection of DNA as directed by the Probation Officer

DEFENDANT: RASHAD WOODSIDE
CASE NUMBER: 3:13-00097-3

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on the attached sheet.

	Assessment	Fine	Restitution
TOTALS	**$100**	**$**	**$**

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

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

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

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS $_____ $_____

_____ Restitution amount ordered pursuant to plea agreement $_____

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

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

_____ the interest requirement is waived for the _____ fine _____ restitution, as long as Defendant remains in compliance with the payment schedule..

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

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

DEFENDANT: RASHAD WOODSIDE
CASE NUMBER: 3:13-00097-3

SCHEDULE OF PAYMENTS

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

A __X__ Lump sum payment of $ 100 (Special Assessment) due immediately, balance due

_____ not later than _____, or
_____ in accordance _____ C, _____ D, _____ E, or _____ F below; or

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

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

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

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

F _____ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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

_____ Joint and Several

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

_____ The defendant shall pay the cost of prosecution.

_____ The defendant shall pay the following court cost(s):

_____ The defendant shall forfeit the defendant's interest in the following property to the United States:

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

7a

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 16a0096n.06

No. 15-5346

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 10, 2016
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RASHAD WOODSIDE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESEE

BEFORE: SILER, CLAY, and KETHLEDGE, Circuit Judges.

CLAY, Circuit Judge. Defendant Rashad Woodside appeals from the sentence of the district court sentencing him to 170 months of imprisonment and three years of supervised release for conspiracy to distribute, and to possess with intent to distribute, oxycodone, hydromorphone, oxymorphone, and buprenorphine, in violation of 21 U.S.C. §§ 841(b)(1)(C) and 846. For the reasons set forth below, we **AFFIRM IN PART**, but **VACATE THE SENTENCE**, and **REMAND** for resentencing.

BACKGROUND

Factual Background

Tennessee resident Kenneth Stafford began trafficking prescription pain medications with his girlfriend, Kaycee Breeden, in late 2008 or early 2009. One of their sources for prescription medications, including Lortab (hydrocodone), Roxicodone (oxycodone) and Dilaudid (hydromorphone), was Frederick McGregor, who lived in Florida. McGregor paid various

individuals, including Defendant, to go to doctors' offices to procure prescriptions for pain medication. After McGregor bragged to Defendant about how much pain medication he was selling to Stafford, Defendant acquired Stafford's phone number from McGregor's truck, possibly from McGregor's cell phone, and offered to sell oxycodone to Stafford at a lower price. Stafford and Breeden began buying from Defendant at some point in 2010. Stafford did not tell McGregor that he was buying pills from Defendant because he "didn't want [McGregor] to find out that [he] was doing business" with Defendant and did not want the purchases from Defendant "to end [his] relationship" with McGregor. (R. 1016, Tr. of Sentencing Hr'g 3596–97, 3642.) McGregor did not know about the pill sales until a few years later. For a time, Stafford and Breeden purchased drugs from both Defendant and McGregor, after which they stopped purchasing from McGregor but continued purchasing from Defendant.

Drug Enforcement Agency (DEA) agents intercepted communications from Defendant to Stafford and Breeden between March and June 2013. During the wiretaps, the DEA intercepted two packages from Defendant, each of which contained approximately 360 pills. Defendant was arrested by federal agents at his home in Florida on June 3, 2013. After being given his *Miranda* rights, Defendant spoke at length to a DEA agent about his participation in the prescription drug scheme.

Procedural History

Defendant was indicted along with twenty-three others, including Stafford and Breeden but not McGregor, in the United States District Court for the Middle District of Tennessee for conspiring to possess oxycodone, hydromorphone, oxymorphone, and buprenorphine with intent to distribute. Defendant entered an open guilty plea on July 18, 2014. The Pre-Sentence Investigation Report ("PSR") subsequently prepared recommended that Defendant be held

accountable for 343,000 30-milligram Roxicodone tablets containing 27 milligrams of pure oxycodone, a figure that included McGregor's estimated purchases to Stafford and Breeden. Based on the drug equivalency table contained in U.S.S.G. § 2D1.1, which equates 1 gram of actual oxycodone to 6700 grams of marijuana, the PSR recommended holding him accountable for 62,048.7 kg of marijuana, a figure corresponding to a Base Offense Level of 36.[1] The PSR noted that even if Defendant were held accountable for half that amount, or 31,024.35 kg of marijuana, his Base Offense Level would remain 36. The PSR recommended a four-level leadership role enhancement, and a three-level reduction for acceptance of responsibility, for a final level of 37. The PSR calculated Defendant's Criminal History Category as I, and calculated a Guidelines range of 210–262 months' imprisonment, but reduced that range to 210–240 months because of the 20-year statutory maximum in 21 U.S.C. § 841(b)(1)(C). Defendant filed an objection to the PSR disputing the drug quantity calculation.

The sentencing hearing

The district court held a lengthy sentencing hearing for Defendant on March 12, 2015. The government called three witnesses to testify: DEA agent Dave Lewis, Stafford, and Breeden, who each testified as to their estimates of the number of pills that McGregor and Defendant provided. Defendant did not testify.

Agent Lewis' testimony

Lewis testified about Defendant's post-*Miranda* confession at the time of Defendant's arrest. He stated that Defendant had confessed to having sold hundreds of pills to Stafford and Breeden over two or two and a half years. Based on a combination of wiretaps and interviews with cooperating witnesses, Lewis estimated that he had heard of 10,000-15,000 pills during the

[1] Each 30-milligram tablet containing 27 mg of actual oxycodone is therefore equivalent to .1809 kg of marijuana.

investigation—which he called a "conservative estimate"—and extrapolated to "70-, 80-, 90, hundred thousand" if "you take into consideration the whole conspiracy." (R. 1016, Tr. of Sentencing Hr'g at Page ID 3573.) The intercepts were not always consistent as to quantity; sometimes "Mr. Stafford would say [he] received two or three thousand pills a month, and then there would be intercepts where he would . . . talk to others about the fact that at one time he was getting two and three thousand pills per week." (*Id.* at Page ID 3575.) However, the number of pills decreased over time: Stafford was receiving 1,000 pills per week in 2010 and 2011, and 300-500 per week in 2012 and 2013.

Defendant told Lewis that he had a prescription in his own name for pain medication in the amount of 120-180 pills per 28 days or month. When Lewis asked about where the remainder of the pills that he had sold to Stafford and Breeden had come from, Defendant admitted that he had bought them from other patients or even "sponsored" other patients to get pain medication, whereby he paid the fee for the doctor's visit and/or the prescription in exchange for a large portion of the medicine. Defendant also admitted to paying his girlfriend's brother, Demetrice Armstrong, $200 at a time to receive money via Western Union and packages with payments for the drugs.

Stafford's testimony

Stafford then testified for the government. Before addressing drug quantities, he admitted that he had abused oxycodone, Xanax, hydrocodone, and Lortab, and that Xanax could affect his short-term memory on the day after use. Stafford testified that he had begun selling prescription pills in late 2008 or early 2009.

Stafford testified that when he first started selling prescription drugs, he was buying 1,000 pills per week from McGregor, roughly 70% of which were oxycodone and 30% of which

were Lortabs. About six months later, he began buying pills from Defendant. Stafford testified that initially he purchased 400–500 pills per week from Defendant, with approximately the same 70/30 ratio of oxycodone to Lortab. For about eighteen months, Stafford received approximately 1,000 pills per week from both Defendant and McGregor. Around late 2011 or early 2012 he stopped buying from McGregor. Thereafter, Stafford continued purchasing 1,000 pills per week from Defendant, but by the last six to eight months of the conspiracy, Stafford received only 300-600 pills, about 70% of which were oxycodone. Stafford acknowledged an intercepted communication in which he stated, "I used to get 2,000 -- two, three thousand a week, man. And that's like I had my two connects," meaning both McGregor and Defendant. (*Id.* at Page ID 3611.)

Stafford testified that when he sent packages of money to pay Defendant for pills, Defendant directed him to send the packages to three or four other people whose names Stafford could not recall. When asked whether he had spoken with Defendant about how Defendant procured the pills, Stafford testified that Defendant had told him that "he had various people that he would go pick up, take to the doctor, wait on to get out, and take them to the pharmacy, get them filled, stuff like that. He would do that every day." (*Id.* at Page ID 3602.) Stafford then clarified: "he told me it was like a full-time job . . . . he would do that every day." (*Id.*)

Breeden's testimony

Breeden testified that she used "Lortab, Roxicodone, Opanas, Dilaudid, crack, methamphetamine, [and] cocaine" in the months leading up to her arrest. (*Id.* at Page ID 3635.) She estimated that McGregor supplied about 1,000 Roxicodone pills per week or 4,500 Roxicodone pills per month. On direct examination, Breeden stated that she and Stafford purchased pills from McGregor for "at least six months" or longer prior to purchasing from

Defendant.[2] (*Id.* at Page ID 3640.) On cross-examination, she testified that she and Stafford began purchasing pills from Defendant in 2010. (*Id.* at Page ID 3655.) After Breeden and Stafford began purchasing from Defendant, they received approximately 1,500 pills per week or 6,000 pills per month between McGregor and Defendant, which was "mostly just Roxicodone." (*Id.* at Page ID 3643–44.) Without prompting from counsel, Breeden speculated that the two suppliers were in competition; "the less Mr. McGregor was able to send . . . the more Mr. Woodside was able to send." (*Id.* at Page ID 3643.) Breeden recalled that she and Stafford purchased pills from both McGregor and Defendant for approximately six months. Like Stafford, she testified that they stopped purchasing from McGregor at some point; after that, she testified, Defendant was initially "able to send more, but then over time the numbers decreased." (*Id.* at Page ID 3647.) She estimated receiving approximately 500 pills per week in the last six months before she got arrested, although there were some weeks when she and Stafford did not receive packages.

She also testified that she and Stafford mostly addressed packages containing drug proceeds to Defendant, but also addressed them to two or three other people, at Defendant's direction, to addresses that Defendant would specify. She also stated that she had spoken to Defendant once about sending people to the doctor and paying for their prescriptions.

Drug calculations

The government requested that the district court credit Stafford's testimony, which, by the government attorney's calculations, equaled the equivalent of 31,727 kilograms of marijuana,

[2] On cross-examination, Breeden was asked how long she and Stafford purchased pills from McGregor and then how long she purchased pills from McGregor prior to purchasing from Defendant. In response to both questions, she responded that it was about a year and a half; however, her response to the second question suggests that she may have been restating the total duration of the purchases from McGregor. (*Id.* at Page ID 3662.)

a figure corresponding to a base level of 36. The government then undertook a rough oral calculation of Breeden's estimates, which it calculated as "around 28- or 29,000" kilograms of marijuana.[3] (*Id.* at Page ID 3669.) Defendant argued that the district court should instead extrapolate from the pill quantities contained in the seized packages, which it requested the government average over the seven-month course of the investigation and then extrapolate over two years, for 1,224 oxycodone and 1,080 hydromorphone pills, numbers Defendant claimed corresponded to a base level of 24.

After agreeing with the government that a four-level leadership enhancement was appropriate, the district court proceeded to a drug quantity calculation of its own:

> The numbers do jump around, and I'm sure as I'm listening to the testimony, you'll probably notice me up here with my calculator. And I keep going back and forth in doing these calculations because it does keep moving. And I got some of the testimony up as high as over 36,000 grams [sic] based on what you were going to believe. And I'd get 36,000 and I'm going, oh, wait a minute, now somebody has moved off of that a little bit. It stayed over 30, although Ms. Breeden does come under a little bit when she gets to 28.
>
> . . . A big chunk of it is based on the memory of people who were drug addicts at the time. But it's also supported by the objective data of the agents, and their testimony is internally consistent with each other. They may be off on some details, which when you extrapolate this out, tends to make thousands of grams [sic] worth of marijuana equivalent difference, but the details or the -- most of the details are completely consistent, and then they break a little bit.
>
> I am going to do this because there are numbers, and I calculated them differently. The two calculations come off different depending on whether you're going with a straight Stafford or a straight Breeden or Agent Lewis. A conservative estimate is still 28. It puts them under 30, takes them down to a 34. I think a 34 base.

[3] This calculation was based on the following statement by the government: "I think at the very end she said that they were getting approximately 6,000 a month for about a year and a half. That's around, again, around a hundred thousand pills." (*Id.* at Page ID 3669.) Breeden never actually said this. She testified that she recalled purchasing a total of 6,000 pills per month from both Defendant and McGregor "[f]or about maybe *six* months." (*Id.* at Page ID 3644) (emphasis added).

(*Id.* at Page ID 3679–80.) The district court clarified that it was talking about thousands of kilograms of marijuana equivalent. The district court then added:

> But most of it was over 30. I'm going to give him the benefit of the doubt, and I'll go with Ms. Breeden, even though at times her testimony was not as clear as Mr. Stafford's. I think he most of the time had a better memory, but I'll give Mr. Woodside a break and go with her number. Puts him at a base level of 34 then.

(*Id.* at Page ID 3681.) The district then deducted three levels for acceptance of responsibility, for a final level of 35. After calculating a Guidelines range of 168-210 months, the district court sentenced .Defendant to 170 months' imprisonment, followed by three years of supervised release.

DISCUSSION

Standard of review

We review sentences for abuse of discretion. *Gall v. United States*, 552 U.S. 38, 51 (2007). We must "first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence." *Id.* The determination of a drug quantity by a district court is a factual finding, which we review for clear error. *United States v. Olsen*, 537 F.3d 660, 663 (6th Cir. 2008). "A factual finding is clearly erroneous when a court, on reviewing the evidence, 'is left with the definite and firm conviction that a mistake has been committed.'" *United States v. Gunter*, 551 F.3d 472, 479 (6th Cir. 2009) (quoting *United States v. Navarro–Camacho*, 186 F.3d 701, 705 (6th Cir. 1999)). We apply deferential review to the district court's legal conclusion that a defendant is an organizer or leader pursuant to U.S.S.G. § 3B1.1(a). *United States v. Washington*, 715 F.3d 975, 983 (6th Cir. 2013) (affirming district court's finding that enhancement applied where district court's

analysis was not unreasonable). Unpreserved procedural errors are reviewed for plain error only. *United States v. Vonner*, 516 F.3d 382, 386 (6th Cir. 2008).

Analysis

I. Drug quantity calculations

Defendant makes three arguments in support of his contention that the district court incorrectly and improperly calculated the drug quantity for which he was responsible: the district court inappropriately based its calculation on the testimony of former drug users with impaired memory; made inadequate findings of fact on the record; and attributed to him drug trafficking beyond the scope of his jointly undertaken criminal activity.

Defendant first objects to the district court's reliance on the testimony of Stafford and Breeden, who used prescription pain medication at the time of the transactions in question. This Court "afford[s] the district court's credibility determinations regarding witness testimony great deference." *United States v. Esteppe*, 483 F.3d 447, 452 (6th Cir. 2007). The district court acknowledged that its calculations were "based on the memory of people who were drug addicts at the time." (Tr. of Sentencing Hr'g, R. 1016, at Page ID 3680.) However, the court below credited their testimony because the drug quantity estimates were "also supported by the objective data of the agents, and their testimony is internally consistent with each other." (*Id.*) The record indeed shows Stafford and Breeden corroborated each other's testimony in many respects, which was in turn corroborated by the agents. It was therefore not improper for the district court to have relied Stafford and Breeden's estimates of drug quantities.

Defendant next argues that his sentence must be vacated and remanded because the district court failed to make sufficient findings of fact on the record regarding drug quantity and to explain its calculations adequately. Defendant argues that the district court should have

articulated what quantities of drugs it attributed for which time periods of the conspiracy because a district court "must determine a weekly [drug] quantity and then select a time period over which it is more likely than not that [a defendant was] dealing in that quantity." *United States v. Walton*, 908 F.2d 1289, 1302 (6th Cir. 1990). Without some numeric basis stated by the district court on the record, Defendant asserts, this Court cannot assess whether the district court actually found Defendant to have been responsible for the 28,000 kilograms on the basis of "reliable information and supported by a preponderance of the evidence," or simply invented its numbers. *See United States v. Meacham*, 27 F.3d 214, 216 (6th Cir. 1994). The government counters that the district court described its findings appropriately and proceeded to apply the most conservative of its estimates.

District courts may approximate drug quantities, but "a preponderance of the evidence must support the estimate." *United States v. Jeross*, 521 F.3d 562, 570 (6th Cir. 2008) (quoting *Walton*, 908 F.2d at 1302). Any estimate "must have a minimal level of reliability beyond mere allegation, and the court should err on the side of caution in making its estimate." *United States v. Sandridge*, 385 F.3d 1032, 1037 (6th Cir. 2004) (quoting *United States v. Owusu*, 199 F.3d 329, 338 (6th Cir. 2000)). Although the district court stated that it used a calculator in arriving at its calculation of 28,000 kilograms of marijuana, it never explained how it turned Breeden's testimony into a final figure. We are mindful that district courts sometimes struggle to calculate drug quantities in complex cases. *See Walton*, 908 F.2d at 1302. However, in such cases where evidence is controverted, calculations are complicated, and appeals are likely to follow, it is especially important to create a clear record to facilitate appellate review. The calculation at issue here involved especially many moving parts: the chronology of when Defendant began selling to Stafford and Breeden and when Stafford and Breeden stopped purchasing from

McGregor; how many pills Defendant provided while McGregor was also providing pills; the number of pills sold at the end of the conspiracy; the dosage of the pills; the proportion of oxycodone to other drugs; and the equivalent weight in marijuana, among others. While we are sympathetic to the district court's frustration, the absence in the record of the numbers the district court used renders its methodology totally opaque, and compels us to vacate Defendant's sentence and remand for a better explanation of the district court's calculation, or for recalculation of the quantity of drugs for which Defendant is to be held accountable. *United States v. Webber*, 396 F. App'x 271, 279 (6th Cir. 2010) (holding that remand was required where "the district court's analysis of the drug quantity attributable" to the defendant was "not sufficient" for appellate review).

Defendant argues that the district court should not have counted the drugs McGregor sold to Stafford and Breeden towards the total amount of oxycodone for which he was sentenced. Defendant did not make this argument at sentencing. The district court did not explicitly state whether Defendant was to be held accountable for any of the pills provided by McGregor, although the relatively small difference between the 28,000-kilogram figure and the 31,727-kilogram estimate based on Stafford's testimony that included McGregor's pills suggests that it may have.

The United States Sentencing Guidelines allow a criminal defendant to be held responsible for "all acts and omissions of others that were within the scope of the jointly undertaken criminal activity in furtherance of that criminal activity, and reasonably foreseeable in connection with that criminal activity." U.S.S.G. § 1B1.3(a)(1)(B). Defendant argues that the district court erred because the pills McGregor supplied without his involvement were outside the scope of the jointly undertaken activity. For its part, the government considers *all* drug

trafficking by both Defendant and McGregor to have been jointly undertaken and reasonably foreseeable.

The commentary to the Guidelines states that

> the scope of the 'jointly undertaken criminal activity' is not necessarily the same as the scope of the entire conspiracy. In order to determine the defendant's accountability for the conduct of others under subsection (a)(1)(B), *the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake* (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement) . . . Acts of others that were not within the scope of the defendant's agreement, even if those acts were known or reasonably foreseeable to the defendant, are not relevant conduct under subsection (a)(1)(B).

U.S.S.G. § 1B1.3, cmt. n. 3(B) (emphasis added). The comment further counsels:

> In cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity) may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities.

Id.

A district court must therefore "make *particularized* findings with respect to both the scope of the defendant's agreement *and* the foreseeability of his co-conspirators' conduct before holding the defendant accountable for the scope of the entire conspiracy." *United States v. Campbell*, 279 F.3d 392, 400 (6th Cir. 2002). In *Campbell*, this Court found the attribution of a the entire amount of cocaine involved in a multi-defendant drug ring to a single defendant clearly erroneous where the record did not show that district court had made findings as to the scope of that defendant's agreement to undertake joint criminal activity. *Id.* The "mere fact" that the defendant "was aware of the scope of the overall operation [was] not enough to hold him accountable for the activities of the whole operation." *Id.* at 401. Accordingly, the court vacated the sentence and remanded for further proceedings. *Id.* On remand, the district court should

make these findings of fact in the first instance. *See also United States v. Jenkins*, 4 F.3d 1338, 1347 (6th Cir. 1993) (remanding "to give the district court an opportunity to address the criteria of U.S.S.G. § 1B1.3 and determine the scope of the criminal activity [the defendant] agreed to undertake").

II. Leadership Role Enhancement

Defendant also argues that the district court erred in applying a four-level enhancement for a leadership role. U.S.S.G. § 3B1.1(a) allows a four-level enhancement "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." The commentary to this section of the Guidelines lists factors for a court to consider:

> the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

U.S.S.G. § 3B1.1, cmt. n. 4. We also require control over at least one other individual within a criminal organization to merit an enhancement under U.S.S.G. § 3B1.1(a). *United States v. Walls*, 546 F.3d 728, 735 (6th Cir. 2008) (quoting *United States v. Vandeberg*, 201 F.3d 805, 811 (6th Cir. 2000)). Defendant argues that the government did not meet its burden of showing the requisite number of participants in the conspiracy and Defendant's alleged control over other individuals' actions because none of the sponsored patients testified.

However, the district court reasonably found that Defendant recruited his girlfriend's brother and the unnamed individuals whom he sponsored. Agent Lewis testified that Defendant directed his girlfriend's brother, Demetrice Armstrong, to receive money via Western Union and pick up packages, and that Defendant paid Armstrong for his service. Breeden testified that she and Stafford addressed packages of money to two or three other people besides Defendant;

Stafford testified that it was three or four. Stafford related a conversation in which Defendant apparently complained about driving patients to the doctor and to the pharmacy on a daily basis, which Defendant compared to a "full-time job." (Tr. of Sentencing Hr'g, R. 1016 at Page ID 3602.) Because all three witnesses always spoke of the sponsored patients in the plural, and Stafford and Breeden testified to sending the packages to between two and four other recipients, it was not unreasonable for the district court to have concluded that the conspiracy involved five or more people. Moreover, the government met its burden of showing control of one other individual through Lewis' testimony about Defendant's directing Armstrong to receive money transfers and packages of funds—and paying him for his efforts. Therefore, the district court did not improperly apply a four-level enhancement for a leadership role.

CONCLUSION

For the reasons stated above, we **AFFIRM** the application of the leadership role enhancement, but **VACATE** Defendant's sentence, and **REMAND** to the district court for a recalculation of the drug quantity attributable to Defendant.

22a

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 3:13-00097
	)	CHIEF JUDGE SHARP
RASHAD WOODSIDE	)	

AMENDED JUDGMENT

On March 13, 2015, this Court sentenced Defendant Rashad Woodside to 170 months of imprisonment. (Docket Nos. 954, 955, 1016). In reaching its decision, the Court found that the drug quantity attributable to the Defendant was 28,000 kilograms of marijuana equivalent. (Docket No. 1016, at 135-38). On appeal, the Sixth Circuit held that the Court did not provide a sufficient explanation for its findings, and remanded this case for a recalculation of the drug quantity attributable to the Defendant. (Docket No. 1193). Accordingly, the Court makes the following supplemental findings in support of the sentence.

Co-Defendant Kenneth Stafford testified at the sentencing hearing that he and Co-Defendant Kacee Breeden began purchasing Lortab and oxycodone from Frederick McGregor in late 2008 or early 2009. (Docket No. 1016, at 48). Mr. Stafford testified that the Defendant called him approximately six months after he began buying pills from Mr. McGregor, and suggested that the Defendant would sell him pills for a cheaper price. (Id., at 48-51). The Defendant told Mr. Stafford that Mr. McGregor had paid the Defendant to go to the doctor and obtain prescriptions for the pills Mr. McGregor was selling. (Id., at 51-52). Mr. Stafford testified that after the Defendant's offer, he and Ms. Breeden began purchasing pills from both the Defendant and Mr. McGregor. (Id., at 53-54).

DEA Agent Dave Lewis testified at the sentencing hearing that the Defendant admitted,

during an interview in June, 2013, that he had begun selling pills after he was injured in a car accident and began receiving prescriptions for pain medication, and in order to pay medical expenses after the birth of his child. (Id., at 22-23). Although the Defendant estimated he had begun selling to Mr. Stafford "a couple of years" earlier, other testimony and evidence in this case indicates that the Defendant's involvement with Mr. McGregor began earlier than that. (Id.)[1] Mr. Stafford estimated that during the first 18 months in which he and Ms. Breeden purchased pills from both Mr. McGregor and the Defendant, they were buying approximately 2,000 Lortab and oxycodone pills each week. (Id., at 53-54). Mr. Stafford estimated that approximately 70% of the pills were oxycodone. (Id.)

The Court finds that the Defendant should be held responsible for the oxycodone pills supplied by Mr. McGregor to Mr. Stafford and Ms. Breeden because Mr. McGregor's acts were within the scope of the jointly undertaken criminal activity and were reasonably foreseeable to the Defendant. U.S.S.G. § 1B1.3. The Defendant's statements to Mr. Stafford indicate that he was a supplier of pills to Mr. McGregor and was fully aware the pills were being sold to others. Although there is evidence to support an earlier date, however, in order to err on the side of caution, the Court will not attribute to the Defendant any pills sold by either Mr. McGregor or himself prior to January, 2010.

Thus, the Court finds that approximately 109,200 oxycodone pills are attributable to the Defendant for the time period from January, 2010 through June, 2011. This calculation is based on a quantity of 1,400 pills per week (70% of 2,000) for 78 weeks (18 months). The Court notes

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[1] The Court notes that, according to the Presentence Investigation Report, the Defendant's need for pain medication arose from an injury that occurred in 2009, and that the Defendant's child was born sometime in 2010. (Docket No. 1022, at ¶¶ 49, 51).

that this estimate is more than supported by a wiretap conversation recorded in April, 2013, in which Mr. Stafford estimated that he had previously been receiving 2,000 to 3,000 pills a week from his two sources. (Exhibit 1to Sentencing Hearing).[2]

Mr. Stafford testified that Mr. McGregor stopped supplying pills in late 2011 or early 2012. (Docket No. 1016, at 55). According to Mr. Stafford, the Defendant continued supplying approximately 1,000 pills per week until approximately six to eight months prior to the end of their relationship. (Id., at 54-58). Eight months prior to the Defendant's arrest in June, 2013, which marked the end of the relationship, would have been the beginning of October, 2012. Thus, assuming that 70% of those pills were oxycodone, the Court finds that approximately 42,000 oxycodone pills are attributable to the Defendant for the time period from July 2011 through September, 2012 (700 pills per week for 60 weeks).

For the six to eight months leading up to the Defendant's arrest in June, 2013, Mr. Stafford estimated that he received approximately 300 to 600 pills from the Defendant per week, and that 70% of those pills were oxycodone. (Id., at 57-58). Thus, the Court finds, based on a 300 pills-a-week estimate by Mr. Stafford, that approximately 6,720 oxycodone pills (210 pills per week for 32 weeks) are attributable to the Defendant for the eight-month period prior to his arrest in June, 2013 (October 2012 through May, 2013). The Court notes that this estimate is considerably lower than Agent Lewis' "conservative estimate," based on wiretap conversations, that the Defendant sold 10,000 to 15,000 pills during the six-month period prior to his arrest. (Id., at 29).

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[2] Mr. Stafford's estimates were more specific than those of Ms. Breeden, though at times, somewhat higher. Thus, the Court has generally settled on the low end of Mr. Stafford's estimates.

Based on these findings, the total number of oxycodone pills attributable to the Defendant for purposes of sentencing is approximately 157,920. When converted to a marijuana equivalent, 157,920 oxycodone pills yield a total of approximately 28,568 kilograms of marijuana.[3] The Drug Quantity Table in Sentencing Guideline § 2D1.1(c) of the 2014 Guidelines Manual provides that 10,000 to 30,000 kilograms of marijuana results in a Base Offense Level of 34. With the addition of four levels for the organizer/leader enhancement under Sentencing Guideline § 3B1.1(a), and a three-level reduction for acceptance of responsibility under Sentencing Guideline § 3E1.1, the Defendant's Total Offense Level remains at 35. Combined with a Criminal History Category of I, the Defendant's guideline imprisonment range remains at 168 to 210 months.

With the addition of these findings, in all other respects, the prior Judgment (Docket Nos. 954, 955), remains unchanged. The Defendant is advised that he has 14 days in which to file a notice of appeal.

It is so ORDERED.

Kevin H. Sharp

KEVIN H. SHARP
UNITED STATES DISTRICT JUDGE

[3] The Presentence Investigation Report determined that the typical dose of oxycodone contained 27 milligrams of actual oxcodone, and one gram of actual oxycodone is equivalent to 6,700 grams of marijuana. (Docket No. 1022, at ¶¶ 21, 26). Thus, each oxycodone pill is equivalent to .1809 kilograms of marijuana .

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0146p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RASHAD WOODSIDE,

Defendant-Appellant.

No. 17-5125

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 3:13-cr-00097-3—Kevin H. Sharp, District Judge.

Argued: March 8, 2018

Decided and Filed: July 18, 2018

Before: GILMAN, ROGERS, and STRANCH, Circuit Judges.

COUNSEL

ARGUED: Dustin M. Blake, BLAKE LAW FIRM CO., LLC, Columbus, Ohio, for Appellant. Ahmed A. Safeeullah, UNITED STATES ATTORNEY'S OFFICE, Nashville, Tennessee, for Appellee. **ON BRIEF:** Dustin M. Blake, BLAKE LAW FIRM CO., LLC, Columbus, Ohio, for Appellant. Brent A. Hannafan, UNITED STATES ATTORNEY'S OFFICE, Nashville, Tennessee, for Appellee.

ROGERS, J., delivered the opinion of the court in which GILMAN and STRANCH, JJ., joined. STRANCH, J. (pp. 12–13), delivered a separate concurring opinion.

OPINION

ROGERS, Circuit Judge. Rashad Woodside, a Florida resident, participated in a 24-person conspiracy to distribute pain pills in Middle Tennessee. After pleading guilty, Woodside appealed his sentence, which we vacated so that the district court might better explain the quantity of drugs attributable to him. On remand the district court, without further hearing, imposed the same sentence and explained its reasoning—including the drug quantity on which it based Woodside's sentence—in a written amended judgment. Woodside again appeals, arguing that the district court erred by not affording him a new sentencing hearing, and moreover violated 18 U.S.C. § 3553(c) by not stating the new explanation for his sentence "in open court." These and other procedural arguments do not warrant reversal.

Woodside supplied two of his co-defendants, Kenneth Stafford and Angela Breeden, with prescription pills, which Woodside would ship from Florida to Tennessee. Early in the conspiracy, Fredrick McGregor was a key part of the enterprise. At that time, the scheme worked like this: Woodside and others would go to a doctor and obtain prescription pills for McGregor, who would then sell them to Stafford and Breeden. Woodside eventually decided to go into business for himself and contacted Stafford with an offer to undercut McGregor. For around eighteen months, Stafford and Breeden continued to purchase from both men, but eventually Stafford and McGregor had a falling out, at which point—around "[l]ate 2011, early 2012," according to Stafford—Woodside became the sole supplier of Stafford and Breeden.

The conspiracy's dealings eventually attracted the attention of the Drug Enforcement Administration (DEA). Based on information obtained through wiretapped phone conversations and seizures of shipped drugs, a grand jury returned a single-count indictment charging Woodside and 23 codefendants—including Stafford and Breeden—with conspiracy to possess with intent to distribute oxycodone and other prescription medications, in violation of 21 U.S.C. §§ 841 and 846. Woodside pleaded guilty.

The Probation Office prepared a Presentence Report (PSR), which recommended holding Woodside responsible for 343,000 30-milligram oxycodone pills,[1] each containing 27 milligrams of actual oxycodone. That figure included the drugs that McGregor had sold to Stafford and Breeden. Based on the drug-equivalency table in the United States Sentencing Guidelines, which equates 1 gram of actual oxycodone to 6,700 grams of marijuana, the report recommended holding Woodside accountable for approximately 62,000 kilograms of marijuana equivalent, for a base-offense level of 36. Woodside objected to that drug-quantity calculation.

At Woodside's sentencing hearing, the government put on three witnesses: DEA Agent David Lewis, Stafford, and Breeden. Each testified about the number of pills attributable to Woodside. Agent Lewis testified that "10- to 15,000 pills" was a "conservative estimate" of the pills Woodside sold "[d]uring the six-month period leading up to [his] arrest." Agent Lewis estimated that Woodside sold "closer to 70-, 80-, 90-, hundred thousand" pills throughout the course of the "whole conspiracy." Stafford testified that at first he bought about 1,000 pills per week from McGregor, that he initially bought 400 to 500 pills a week from Woodside, and that he eventually received about 1,000 pills per week from each of Woodside and McGregor, an arrangement that continued for about 18 months. Stafford further testified that he stopped buying from McGregor in late 2011 or early 2012, but continued to purchase about 1,000 pills per week from Woodside, which he continued to do until the last eight months of the conspiracy, during which he received only 300 to 600 pills per week. Stafford also acknowledged an intercepted conversation in which he said, "I used to get 2,000—two, three thousand a week, man. And that's like I had my two connects," referring to Woodside and McGregor. Finally, Breeden testified that McGregor supplied about 1,000 oxycodone pills per week, that she and Stafford purchased from McGregor for "at least six months" or longer before beginning to purchase from Woodside, and that once they began purchasing from both, which they did for about six months, they would receive about 1,500 pills per week. Breeden testified that after they stopped purchasing from McGregor, Woodside initially was "able to send more, but then

[1]The record sometimes refers to these 30-milligram oxycodone pills by the name brand "Roxicodone." For the sake of consistency we use the generic term "oxycodone pill" to refer to the 30-milligram pills, each containing 27 milligrams of actual oxycodone, on which Woodside's sentence was based.

over time the numbers decreased," to the point where they were receiving about 500 pills per week during the last six months before Breeden was arrested.

After hearing that testimony, the district court found that Woodside was responsible for 28,000 kilograms of marijuana equivalent, for a base-offense level of 34, assigned by the guidelines to those responsible for 10,000 to 30,000 kilograms of marijuana equivalent. According to the PSR, each 30-milligram oxycodone pill contains 27 milligrams of actual oxycodone. According to the guidelines, each gram of actual oxycodone is equivalent to 6.7 kilograms of marijuana for sentencing purposes. *See* USSG § 2D1.1 comment. (n.8). Thus, each 30-milligram oxycodone pill is equivalent to .1809 kilograms of marijuana. The district court's estimate of 28,000 kilograms of marijuana equivalent, then, corresponded to roughly 154,781 oxycodone pills.

The transcript did not make clear exactly how the district court calculated the 28,000-kilogram quantity, but the court discussed the testimony of both Stafford and Breeden before apparently relying primarily on Breeden's testimony to estimate the quantity of drugs attributable to Woodside. The district court imposed a four-level enhancement for Woodside's being a leader or organizer of the conspiracy and deducted three levels for his accepting responsibility, resulting in a final offense level of 35. After calculating a guidelines range of 168 to 210 months of imprisonment, the district court sentenced Woodside to 170 months' imprisonment, followed by three years of supervised release.

Woodside appealed his sentence, arguing that the district court's factfinding with respect to the drug quantity attributable to him was inadequate. We agreed and vacated Woodside's sentence, explaining:

> [T]he absence in the record of the numbers the district court used renders its methodology totally opaque, and compels us to vacate Defendant's sentence and remand for a better explanation of the district court's calculation, or for recalculation of the quantity of drugs for which Defendant is to be held accountable.

United States v. Woodside, 642 F. App'x 490, 496 (6th Cir. 2016). We also noted that the district court did not make clear whether it held Woodside responsible for the drugs sold by McGregor, so we instructed the district court to "make . . . findings of fact in the first instance"

regarding both the scope of Woodside's agreement with McGregor and the foreseeability of McGregor's conduct before holding Woodside responsible for drugs sold by McGregor. *Id.* at 497. We thus remanded Woodside's case to the district court "for a recalculation of the drug quantity attributable to [him]." *Id.* at 498.

On remand, the district court estimated that Woodside was responsible for 28,568 kilograms of marijuana equivalent. After recounting witness testimony from the prior sentencing hearing, the district court made findings of fact and explained its drug-quantity calculation as our remand asked. This time around, the court relied primarily on Stafford's testimony to establish drug quantity. After reapplying the four-level leader-or-organizer enhancement and the three-level acceptance-of-responsibility reduction, the district court found that Woodside's final offense level remained at 35, which resulted in the same guidelines range. The court thus reaffirmed its prior judgment and imposed the same 170-month sentence.

Woodside again appeals, and now presses four arguments. He argues that the district court (1) was required by our remand to grant Woodside a new sentencing hearing, and (2) was required by 18 U.S.C. § 3553(c) to state the reasons for his sentence in open court. He also argues that his sentence was procedurally unreasonable because the district court (3) erroneously attributed to him drugs sold by McGregor, and (4) failed to "err on the side of caution" when choosing which of Woodside's coconspirators' testimony to credit as establishing drug quantity. Ultimately none of Woodside's arguments is persuasive.

First, the district court did not commit any procedural error when it denied Woodside's request for a new sentencing hearing and resentenced him through a written amended judgment. Our prior panel had issued a limited remand, the language of which did not entitle Woodside to a new sentencing hearing, and in accordance with that remand, the district court imposed the same sentence based on the same record.

Our remand in Woodside's prior appeal was a limited one. Woodside argues that the remand was general, and that accordingly, under *United States v. Garcia-Robles*, 640 F.3d 159, 166 (6th Cir. 2011), it required an unlimited resentencing procedure. It is true that a remand is presumptively general as opposed to limited, and that to limit the scope of a remand, we "must

convey clearly [our] intent to limit the scope of the district court's review," *United States v. Orlando,* 363 F.3d 596, 601 (6th Cir. 2004) (quoting *United States v. Campbell,* 168 F.3d 263, 267 (6th Cir. 1999)), with language that is "in effect, unmistakable," *Campbell*, 168 F.3d at 268. It is also true that a remand that contains a multiplicity of issues requiring reconsideration renders a limited remand less "desirable or effective." *Id.* But the standard for a limited remand was met here. The prior panel's remand said, "[W]e . . . VACATE Defendant's sentence, and REMAND to the district court for a recalculation of the drug quantity attributable to Defendant." *Woodside*, 642 F. App'x at 498 (emphasis omitted). That mandate unmistakably limited the scope of the remand to the issue of drug quantity.

Not only does this operative final language speak in limited terms, but the whole thrust of our previous opinion was focused on the need for the district court to explain how it reached the conclusions that it did regarding the drug amounts. On remand, district courts are to "implement both the letter and the spirit of the mandate." *United States v. Haynes*, 468 F.3d 422, 425 (6th Cir. 2006) (quoting *United States v. Moore,* 131 F.3d 595, 599 (6th Cir. 1997)). We carefully explained the basis for the remand in this case:

> Although the district court stated that it used a calculator in arriving at its calculation of 28,000 kilograms of marijuana, it never explained how it turned Breeden's testimony into a final figure. We are mindful that district courts sometimes struggle to calculate drug quantities in complex cases. . . . However, in such cases where evidence is controverted, calculations are complicated, and appeals are likely to follow, it is especially important to create a clear record to facilitate appellate review. The calculation at issue here involved especially many moving parts: the chronology of when Defendant began selling to Stafford and Breeden and when Stafford and Breeden stopped purchasing from McGregor; how many pills Defendant provided while McGregor was also providing pills; the number of pills sold at the end of the conspiracy; the dosage of the pills; the proportion of oxycodone to other drugs; and the equivalent weight in marijuana, among others. While we are sympathetic to the district court's frustration, the absence in the record of the numbers the district court used renders its methodology totally opaque, and compels us to vacate Defendant's sentence and remand for a better explanation of the district court's calculation, or for recalculation of the quantity of drugs for which Defendant is to be held accountable.

Woodside, 642 F. App'x at 496. We also explained that it was unclear whether the district court had held Woodside responsible for drugs sold by McGregor. *See id.* at 497. Nothing in this

analysis contemplates the necessity or even advisability of taking any further evidence, or even holding a nonevidentiary hearing. The gist of our mandate was that the district court ought to "show its work." The court did just that when it issued the amended judgment, which included supplemental findings of fact on the drug-quantity issue, based on the evidence presented at Woodside's prior sentencing hearing. Perhaps the district court, in its discretion, could have held a new sentencing hearing consistent with the mandate, but that does not answer the question here, which is whether the district court committed reversible error by not doing so. It did not.

Our precedents support this conclusion. We have held that limiting language need not be in the final sentence of the opinion, but may be found "anywhere in an opinion or order, including a designated paragraph or section, or certain key identifiable language." *Orlando*, 363 F.3d at 601. Limited remands in the sentencing context, moreover, may "explicitly outline the issues to be addressed by the district court and create a narrow framework within which the district court must operate." *Campbell*, 168 F.3d at 265. "[A] limited remand constrains the district court's resentencing authority to the issue or issues remanded." *Garcia-Robles*, 640 F.3d at 166 (quoting *Moore,* 131 F.3d at 597–98).

Second, because no new sentencing *procedure* was required or conducted, as opposed to a new reason or a new explanation of the reason for the sentence, the district court did not violate the procedural guarantee of 18 U.S.C. § 3553(c), particularly given that there was no change in Woodside's sentence. Section 3553(c) provides that the court "at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence." According to Woodside, the district court ran afoul of this requirement when the court explained its drug-quantity calculation and resentenced him through the written amended judgment, rather than in an open court session. But that statute is not implicated here.

Most importantly, the text of § 3553(c) indicates that it does not apply here. Section 3553(c) applies "at the time of sentencing," which, read naturally, refers to a defendant's sentencing hearing. As we said in *Downs v. United States*, 879 F.3d 688 (6th Cir. 2018), albeit in response to a different argument, "the term sentencing in legal as in ordinary language refers to the pronouncing of sentence by the judge in open court." *Id.* at 690. As noted above, the remand from Woodside's prior appeal did not entitle him to a new sentencing hearing nor did the

district court choose to hold one. Section 3553(c), then, by its own terms, applies on remand if and only if that remand requires or entails a new sentencing hearing, and since the remand here did not, reversal is not warranted.

Under the facts of this case, moreover, Woodside's presence at his prior sentencing hearing satisfies § 3553(c). We have held that the procedural right to allocute under Federal Rule of Criminal Procedure 32(i)(4)(A)(ii) does not apply to cases on limited remand. *See United States v. Jeross*, 521 F.3d 562, 585 (6th Cir. 2008). We later explained in *Garcia-Robles* that "[u]pon limited remand, the district court in *Jeross* was not required to 'begin anew,' and thus could rely upon the procedural rights provided to the defendants prior to remand." 640 F.3d at 166. So too here. As explained above, the limited remand from Woodside's first appeal required the district court only to "show its work" with respect to its drug-quantity calculation, which it did in the amended judgment. Here, as in *Jeross*, the remand did not require the district court to start over. Indeed, like the sentencing court in *Jeross*, the district court here relied on the same record and imposed the same sentence as in the first go-around. *See* 521 F.3d at 585–86. It was therefore permissible for the district court to rely on Woodside's presence at his initial sentencing hearing to satisfy the procedural requirement of § 3553(c).

Practical considerations also support this rule. Woodside was not entitled to a new sentencing hearing, *see Garcia-Robles*, 640 F.3d at 166, and it is equally clear that he was not entitled to another allocution, *see Jeross*, 521 F.3d at 585. Woodside's argument thus asks for an open court session, at which he is not entitled to put on evidence, to make argument, or to address the court. Because neither the statute nor our precedents dictate that result, such pageantry is not required.

True, Woodside's brief on appeal at one point appears to suggest that the district court's purported violation of § 3553(c) requires a new sentencing hearing at which he could "present argument." But as noted above, our prior remand did not entitle Woodside to a new hearing.

Third, Woodside argues that his sentence was procedurally unreasonable because the district court erroneously attributed to him drugs that were sold by McGregor and thus were not

part of any criminal activity to which Woodside had agreed.[2] But affirmance is still warranted regardless of whether the district court erroneously attributed to Woodside drugs sold by McGregor, because Woodside would still have been sentenced according to the same base-offense level under any conceivable estimate of the drugs that he himself sold during the period at issue. Any error on this point was therefore harmless.

A few brief calculations are necessary to show why this is so. Woodside's base-offense level was 34, assigned to those responsible for 10,000 to 30,000 kilograms of marijuana equivalent. According to the guidelines, each gram of actual oxycodone is equivalent to 6.7 kilograms of marijuana, *see* USSG § 2D1.1 comment. (n.8), and therefore each pill of oxycodone (which contains 27 milligrams of actual oxycodone) is equivalent to .1809 kilograms of marijuana. Here the district court on remand held Woodside responsible for 157,920 oxycodone pills, equal to a nearly range-topping 28,568 kilograms of marijuana. To reduce Woodside's base-offense level down to 32—the next lowest level, assigned to those responsible for less than 10,000 but more than 3,000 kilograms of marijuana equivalent—the district court would have needed to attribute fewer than 55,279 oxycodone pills to him.

Woodside was responsible for more pills than that under any remotely plausible estimate. In its amended judgment, the district court considered the drugs attributable to Woodside from three different periods of time: January 2010 through June 2011; July 2011 through September 2012; and October 2012 through May 2013. McGregor had nothing to do with the latter two periods, which occurred after Stafford and Breeden had stopped buying from him. During those two periods alone, the district court found Woodside responsible for selling approximately 48,720 pills,[3] and Woodside does not appear to challenge those calculations (apart from his

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[2]Woodside's brief purports to attack his sentence on substantive grounds as well, but the only arguments he presses are procedural in nature. In *Gall v. United States*, 552 U.S. 38, 51 (2007), the Supreme Court listed as examples of procedural errors: "[a district court's] failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence." Woodside's two sentencing arguments—that the district court erroneously attributed to him drugs sold by McGregor and failed to "err on the side of caution" when choosing which drug-quantity testimony to credit—are similarly procedural.

[3]The district court explained that it held Woodside responsible for "approximately 42,000 oxycodone pills . . . for the time period from July 2011 through September, 2012[,]" and "approximately 6,720 oxycodone pills (210 pills per week for 32 weeks) . . . for the eight-month period prior to his arrest in June, 2013 (October 2012 through May, 2013)."

wholesale challenge to the district court's reliance on Stafford's testimony, discussed in footnote four below). During the earliest period—from January 2010 through June 2011, when both McGregor and Woodside were selling to Stafford and Breeden—the district court found "approximately 109,200 oxycodone pills" attributable to Woodside, holding Woodside responsible for all the oxycodone pills McGregor sold during that time. But even if the court were to have held Woodside responsible for only *seven percent* of the drugs distributed during that time—a mere 98 pills per week, for a total of 7,644 pills during the 18-month period—Woodside would still be responsible for 56,364 pills during that period, comfortably qualifying him for the same base-offense level of 34. Woodside nowhere argues that he sold so few pills during that eighteen-month period. In any event, the record would foreclose such a finding: Stafford testified that he received 1,000 pills *per week* from Woodside during the period at issue, and Agent Lewis testified that Woodside admitted to sending "hundreds [of pills] at a time," and that based on his "experience with the investigation," this occurred "at least once a week." For that reason, any error that the district court might have committed by attributing to Woodside drugs sold by McGregor was harmless.

Fourth and finally, Woodside argues that the district court committed procedural error by failing to "err on the side of caution" when choosing between Stafford's and Breeden's testimony regarding drug quantity. But this argument also fails because the choice between the testimony of the two apparently did not matter.[4] Our review is for clear error. *See Jeross*, 521 F.3d at 570 (citing *United States v. Sandridge*, 385 F.3d 1032, 1037 (6th Cir. 2004)). At Woodside's sentencing hearing, the district court relied at least in part on Breeden's testimony to hold Woodside responsible for 28,000 kilograms of marijuana equivalent: "Ms. Breeden does come under a little bit when she gets to 28[-thousand grams of marijuana equivalent]. . . . I'm going to give him the benefit of the doubt, and I'll go with Ms. Breeden." On remand, the district court held Woodside responsible for 28,568 kilograms by relying on Stafford's testimony. That small difference in drug quantity did not affect Woodside's sentence, and Woodside does not explain how relying on Breeden's testimony would result in a lower

[4]To the extent that Woodside means to challenge the district court's reliance on Stafford's and Breeden's testimony because those two were abusing drugs at the time of the relevant events, we have already rejected that argument in Woodside's previous appeal. *See Woodside*, 642 F. App'x at 495.

sentence. Indeed, the panel noted in Woodside's prior appeal that "Stafford and Breeden corroborated each other's testimony in many respects, which was in turn corroborated by the [DEA] agents." *Woodside*, 642 F. App'x at 495. The district court need only have found that Woodside was "more likely actually responsible for a quantity greater than or equal to the amount used in calculating the sentence." *Jeross*, 521 F.3d at 571. There is ample testimonial evidence that Woodside was responsible for more drugs than were used to calculate his sentence, and therefore the district court did err on the side of caution.[5] So regardless of whether the district court arrived at its approximation by relying on the testimony of Stafford or Breeden, or some synthesis of the two, the record supports that approximation, and it therefore was not clearly erroneous.

Woodside's sentence is therefore affirmed.

[5]For example, in the amended judgment, the district court noted that "[a]lthough there is evidence to support an earlier date . . . *in order to err on the side of caution*, the Court will not attribute to the Defendant any pills sold by either Mr. McGregor or himself prior to January, 2010." (Emphasis added.) The district court also "erred on the side of caution" by consistently relying "on the low end of Mr. Stafford's estimates."

CONCURRENCE

JANE B. STRANCH, Circuit Judge, concurring. I concur with the majority opinion. I write separately to emphasize the principle that underlies the issues we address here—the importance of the pronouncement of sentence in open court in the presence of the defendant. "[T]he notion that the sentencing court must 'eyeball' the defendant at the instant it exercises its most important judicial responsibility . . . is far from a formality." *United States v. Garcia-Robles*, 640 F.3d 159, 164 (6th Cir. 2011) (alteration in original) (quoting *United States v. Faulks*, 201 F.3d 208, 209 (3d Cir. 2000)). "Indeed, this requirement 'is a fundamental procedural guarantee that places the defendant before the judge at a culminating moment of the criminal judicial process.'" *Id.* (quoting *Faulks*, 201 F.3d at 211).

Resentencing exists within the arena of judicial discretion. Resentencing "is not a unitary phenomenon." *United States v. Bryant*, 643 F.3d 28, 33 (1st Cir. 2011). "At one extreme, the resentencing ordered may be as unconstrained and open-ended as an initial sentencing; but at the other extreme, a remand may be so focused and limited that it involves merely a technical revision of the sentence dictated by the appeals court and calls for no formal proceeding." *Id.* at 32. As cases move across this continuum from de novo sentencing under a general remand to technical sentence revision, there may be circumstances that require the presence of the defendant, mandate a sentencing hearing, or call for the pronouncement of sentence in open court, even on a limited remand. "The sheer number of issues causing remand can affect" the scope and nature of a remand. *United States v. Campbell*, 168 F.3d 263, 268 (6th Cir. 1999). It is incumbent upon the appellate court "to outline the future intended chain of events. It is the job of the appellate court adequately to articulate instructions to the district court in the remand." *Id.*

Thus, an appellate court has the discretion to mandate that a district court hold a hearing in the defendant's presence on a limited remand. *See, e.g.*, *United States v. Moore*, 76 F.3d 111, 114 (6th Cir. 1996) (*Moore II*) (providing on remand the opportunity for new evidence and argument "to focus on the facts and law relevant to proving" a § 924(c)(1) violation); *United*

States v. Moore, 131 F.3d 595, 599–600 (6th Cir. 1997) (finding the remand in *Moore II* to be a limited remand). A district court also may exercise its discretion to hold a hearing or to add other procedural protections not mandated by the appellate court but within the scope of its remand. Indeed, the precedent on which we rely today did not mandate the right to allocution, but it counseled that "the better practice is for a district court to permit allocution at any sentencing proceeding, regardless of the timing, and the district court below would have been well advised to do so in this case." *United States v. Jeross*, 521 F.3d 562, 586 (6th Cir. 2008).

Although our holding recognizes that a defendant is not automatically entitled to the full panoply of procedural rights on a limited remand, our obligation in crafting such a remand requires us to consider the specific nature of the inquiry before the district court and to provide corresponding procedural safeguards in our remand instructions. A district court may then find it necessary to extend other procedural rights, and may do so as long as its actions are consistent with the "letter and the spirit of the mandate." *United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994) (quoting *United States v. Kikumura*, 947 F.2d 72, 76 (3d Cir.1991)).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-5125

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

RASHAD WOODSIDE,
Defendant - Appellant.

FILED
Jul 18, 2018
DEBORAH S. HUNT, Clerk

Before: GILMAN, ROGERS, and STRANCH, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the sentence imposed by the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk