

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 16-2208, 16-2676 & 16-3975

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TOBY JONES, MARIO WHITFIELD, and
KELSEY JONES,

Defendants-Appellants.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 14 CR 155 — Amy J. St. Eve, Judge.

ARGUED MAY 25, 2017 — DECIDED SEPTEMBER 20, 2017

Before WOOD, Chief Judge, and BAUER and HAMILTON,
Circuit Judges.

BAUER, Circuit Judge. In December 2013, a confidential informant ("CI") informed the Bureau of Alcohol, Tobacco, Firearms, and Explosives about Defendant Toby Jones, the leader of a drug-distribution operation on Chicago's West Side.

The CI introduced Toby and his brother, Defendant Kelsey Jones, to ATF Agent Christopher Labno, who posed as a firearms and drug dealer. During several controlled drug purchases, Toby negotiated a drugs-for-guns transaction with Agent Labno. Eventually, Toby instructed one of his drug workers, Wesley Fields, to complete the transaction; Fields was arrested immediately after the exchange. Thereafter, Toby and Kelsey engaged in a week-long effort to track down and kill the CI who arranged the deal, resulting in two separate shootings. In the later shooting, Kelsey fled the scene in a getaway car driven by Defendant Mario Whitfield, whose counsel filed an *Anders* brief that we consider later on.

Toby and Kelsey were later arrested, charged, and convicted of several crimes based on these events. Now, they both raise challenges to those convictions; Kelsey also challenges his sentence. We affirm.

I. BACKGROUND

A. Facts

Kelsey was tried by jury, and Toby proceeded to a bench trial. At this joint trial, the government established the following facts, which we view in the light most favorable to the prosecution. See *United States v. Resnick*, 823 F.3d 888, 893 (7th Cir. 2016).

1. Kelsey's Role

Kelsey worked for Toby, selling crack cocaine and heroin to customers. He used a cell phone, which Toby provided, to take orders from and make deliveries to customers; he and Fields worked the drug phone in alternating shifts. After

Kelsey completed a drug sale, he brought the money back to Toby. Kelsey also packaged drugs for Toby and provided security to him during drug sales. Particularly, he provided security for Toby and packaged the drugs that were sold to Agent Labno on March 19, 2014. In addition, Kelsey allowed Toby to store drugs in his apartment.

2. Drugs-For-Guns Exchange

Between December 2013 and March 2014, the CI and Agent Labno met with Toby six times to purchase crack cocaine with all purchases taking place near the CI's apartment building located at 464 North Austin Boulevard, Oak Park, Illinois. All these meetings were audio and video recorded. At several of these meetings, Toby discussed the purchase of guns.

On January 15, 2014, Toby told Agent Labno that he wanted to purchase a handgun capable of holding 30 rounds of ammunition in the magazine, but not to discuss guns over the phone. On February 4, 2014, Agent Labno showed Toby pictures of guns that he said he had for sale. When shown the picture, Toby specifically asked Agent Labno about the cost of the Glock with an extended magazine and extended clip ("Glock"). Agent Labno responded that he wanted approximately \$450 or "six jabs" of crack cocaine. (One jab is a package that typically contains 10 to 12 individual use amounts of crack cocaine or heroin.) Toby responded, "Yeah," and told Agent Labno to bring the Glock to him. He also told Agent Labno that he wanted to purchase the Glock for himself and the Beretta pistol for "somebody else."

On February 26, 2014, the CI and Agent Labno met with Toby to conduct another controlled purchase of crack cocaine.

There, Toby confirmed his intention to purchase the Glock in exchange for crack cocaine. Similarly, Toby, who was accompanied by Kelsey, confirmed that same intention to Agent Labno at a controlled purchase of crack cocaine on March 19, 2014.

On March 25, 2014, Agent Labno and the CI placed a recorded call to Toby. The CI asked Toby if he still wanted to purchase guns from Agent Labno. Toby responded, "Hell yeah I want them." Further, Toby stated, "I just want that [Glock], man." Agent Labno confirmed with Toby that the price was six jabs for the Glock.

On March 26, 2014, Toby sent a text message to Agent Labno, explaining that he was sending Fields to conduct the guns-for-drugs exchange. Agent Labno confirmed that the price was six jabs of crack cocaine for the Glock. Toby responded, "Yep."

Around the same time, Toby called Fields to meet him at Kelsey's apartment to pick up the crack cocaine to pay for the Glock. Toby gave Fields six jabs of crack cocaine and approximately \$450 in cash; he instructed Fields to purchase the Glock for him and an additional gun for himself. He further instructed Fields to bring the Glock "straight to him" after purchasing it.

Upon Toby's instruction, Fields then met with Agent Labno and the CI. Agent Labno presented Fields with multiple guns. Fields picked out the Glock for Toby and the Beretta for himself. He was immediately arrested after he gave the crack cocaine and cash to Agent Labno in exchange for the guns.

About an hour after Fields' arrest, the CI called Toby, asking about his payment for arranging the drugs-for-guns transaction. Toby told the CI that Fields had not returned from the drugs-for-guns transaction, and he asked the CI when he had last seen Fields. Toby assured the CI that he would be paid for arranging the deal.

ATF agents placed the CI in a hotel room where he was instructed to stay until Toby was in custody. Despite these instructions, the CI drove back to his apartment. During the drive, the CI received an incoming call from Toby who sounded agitated and repeatedly asked the CI about the CI and Fields' whereabouts. The CI told Toby that he was driving back to his apartment and that he had completed the gun deal with Fields earlier that day, but he did not know Fields' current location. Toby placed a total of 12 outgoing calls to Fields and 15 outgoing calls to the CI in the hours after Fields' arrest. Toby sent Fields a text message, telling him to "Call me let me know you alright."

3. Retaliation Conspiracy

On March 27, 2014, shortly after midnight, Kensha Barlow was shot in his apartment located at 464 North Austin Boulevard, Oak Park, Illinois (the CI lived in the same building, but in the unit on the floor below). Barlow heard someone knock on his door and asked who was there. A male voice responded: "It's me ... You know who it is, open the fucking door." Barlow looked through the door's peephole, but the person in the hallway covered the peephole with a finger. Once the other person removed his finger from the peephole, Barlow saw two males standing in the hallway; he did not know who

either of the individuals were. Shortly after, Barlow heard shots ring out, and he was shot in the leg. (He later identified Toby as one of these two males.)

Around March 30, 2014, Kelsey called Marty Smith, one of his drug customers, and asked Smith to come to his apartment. Smith and the CI knew each other and lived in the same apartment building. When Smith arrived at Kelsey's apartment, Toby and Kelsey were there. Kelsey questioned Smith about the CI's whereabouts and what kind of car he drove. Smith told Kelsey that he had not seen the CI recently.

On April 2, 2014, the CI's brother ("Mark") and sister-in-law ("Christy") came to Chicago to stay with the CI in his hotel room. Mark, Christy, and the CI drove around the CI's neighborhood. Near the CI's apartment building, the CI saw Kelsey wearing a black-hooded sweatshirt. The CI observed that Kelsey "looked right at" him.

Around 7:24 p.m. that evening, Kelsey called Smith and asked him if there were any cameras in the parking lot outside of the CI's (and Smith's) apartment building. At approximately 8:55 p.m., the CI drove back to his apartment with Mark and Christy. Once the CI parked his vehicle, Kelsey exited a red minivan nearby, approached the CI's vehicle, and fired three shots at the CI. Kelsey fired a fourth shot, which struck through the CI's shoulder and grazed Mark's head.

The CI, Mark, and Christy exited the CI's vehicle and ran in different directions. Christy ran towards the red minivan and saw Whitfield in the driver's seat. Whitfield drove into the alleyway behind the apartment building, picked up Kelsey, and fled the scene with him. Before and after this shooting,

there were many phone calls between Kelsey and Toby, and between Toby and Whitfield.

On April 5, 2014, Kelsey was arrested at his residence. During a search of Kelsey's apartment, agents recovered four dark sweatshirts on Kelsey's bedroom floor. Several of the sweatshirts tested positive for the presence of gunshot residue. Toby was arrested on April 20, 2014.

B. Procedural History

On September 17, 2015, Toby and Kelsey were charged in a fifteen-count third superseding indictment. They were both charged with conspiracy to distribute cocaine base, in violation of 21 U.S.C. § 846 (Count 1); distribution of cocaine base, in violation of 21 U.S.C. § 841(a)(1) (Count 7) (based on the March 19, 2014, drug deal); and conspiracy to kill another person with intent to retaliate against an informant, in violation of 18 U.S.C. § 1513(f) (Count 10). Toby was charged with additional counts of distributing cocaine base, in violation of 21 U.S.C. § 841(a)(1) (Counts 2 through 8); possession of a firearm in furtherance of a drug crime, in violation of 18 U.S.C. § 924(c) (Count 9) (based on the March 26, 2014, drugs-for-guns exchange); attempt to kill another person with intent to retaliate against an informant, in violation of 18 U.S.C. § 1513(a)(1)(B) (Count 11) (based on the March 27, 2014, shooting of Barlow); and discharging a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c) (Count 12) (same). Kelsey was also charged with violations of § 1513(a)(1)(B) and § 924(c) (Counts 13 and 14, respectively) (based on the April 2, 2014, attempted murder of the CI).

Prior to trial, Toby moved to suppress Barlow's identification of him. The court denied the motion, finding that the agent's identification procedure was not suggestive. Thereafter, Toby pleaded guilty to Counts 1 through 7 and proceeded to a bench trial; the court found him guilty on Counts 8 through 12. Toby moved for a judgment of acquittal or a new trial; the court denied the motion. At sentencing, Toby was sentenced to a total of 40 years' imprisonment. Toby appealed.

Kelsey moved to suppress evidence found at his apartment. After a suppression hearing, the court denied the motion, finding that Kelsey had given oral consent to the search. At trial, Kelsey requested that a buyer-seller instruction be given to the jury. The court denied this request but, in the alternative, proposed that the jury be instructed that Kelsey had obtained drugs for personal use, and that such evidence could not be used to prove the existence of a conspiracy or to prove that he became a member of a conspiracy. Kelsey accepted the court's proposed alternative instruction, but preserved his objection to the denial of his request.

On January 26, 2016, the jury returned guilty verdicts on all counts against Kelsey. Kelsey moved for judgment of acquittal or a new trial. The court denied the motion.

The Probation Office prepared the Presentence Investigation Report, recommending a two-level sentencing enhancement for obstruction of justice based on perjured testimony at the suppression hearing, *see* U.S.S.G. § 3C1.1, and a two-level sentencing enhancement for causing a serious bodily injury to the CI and Mark, *see* U.S.S.G. § 2A2.1(b)(1)(B). Kelsey filed objections to the PSR, arguing that his testimony did not

amount to an obstruction of justice and that the shooting of the CI and Mark did not constitute a serious bodily injury. At sentencing, the court rejected these two objections and sentenced Kelsey to a total of 35 years' imprisonment. Kelsey appealed.

II. DISCUSSION

A. Toby's Challenges

Toby raises two main arguments on appeal: first, he argues that there was insufficient evidence to support his conviction for possession of a gun in furtherance of a drug trafficking crime;¹ second, he challenges the district court's denial of his motion to suppress Barlow's eyewitness identification of him.

1. Sufficiency of the Evidence

"When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution and ask whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Moshiri*, 858 F.3d 1077, 1081 (7th Cir. 2017) (citation and quotation marks omitted). In conducting this evaluation, we neither assess credibility determinations nor reweigh the evidence. *Id.* A defendant who challenges the sufficiency of the evidence against him "faces a

¹ Toby also argues that there was insufficient evidence to support his convictions based on his involvement in the Barlow shooting. He contends that the evidence of the shooting stems from unreliable testimony. We decline his invitation to second-guess the trier of fact's credibility determinations.

Sanders, 708 F.3d at 989 (collecting cases). We conclude that the identification procedure was not unduly suggestive.

B. Kelsey's Challenges

Kelsey challenges the sufficiency of the evidence to sustain his convictions on several counts. He also argues that the district court erred in its application of two sentencing enhancements.

1. Sufficiency of the Evidence

Kelsey contends that the government presented insufficient evidence to sustain his convictions on Count 10, Count 13, and Count 14. Specifically, he argues that there was insufficient evidence to prove that he shot the CI on April 2, 2014, and that he had the retaliatory intent as required for Count 10 and Count 13.

A defendant is guilty of retaliating against a witness if he attempts to kill a person with intent to retaliate against that person for "providing to a law enforcement officer any information relating to the commission or possible commission of a Federal offense" 18 U.S.C. § 1513(a)(1)(B). Section 1513(f) makes it a crime to conspire to commit the offense of retaliation. Section 924(c)(1)(A)(iii) prescribes an enhanced penalty for anyone who discharges a firearm "during and in relation to" any crime of violence.

Here, the government presented sufficient evidence to establish that Kelsey was the person who shot the CI on April 2, 2014. The CI and Mark testified that they got a clear view of Kelsey's face on the day that they were shot and they both identified him in court as the person who shot them.

Kelsey simply challenges those witnesses' credibility, noting Mark's drug use and inconsistencies with the CI's initial description of the person who shot him. These concerns were addressed at trial, and the jury still determined that Kelsey was the shooter.

The government also provided sufficient evidence to establish Kelsey's intent to retaliate against the CI for providing information to law enforcement. The evidence illustrated that Kelsey and Toby knew the CI before he was shot on April 2, 2014. The CI introduced Agent Labno to Toby to help arrange the drugs-for-guns transaction. Toby made repeated attempts to contact the CI and ultimately blamed the CI for the set up.

Smith, the CI's neighbor, testified that Kelsey inquired about the CI's location and car, and asked him to report back if he saw the CI. Smith also testified that on the evening of April 2, 2014, Kelsey called him to ask whether there were any cameras in the parking lot of the apartment building where the CI lived.

Barlow and the CI resided at the same address; Barlow was shot on March 27, 2014, and the CI was shot on April 2, 2014. The evidence established that Toby mistakenly shot Barlow at his apartment because he thought the CI lived there. After realizing his mistake, Kelsey went back to the building on April 2, 2014, and shot the CI. A jury could have reasonably inferred that Toby and Kelsey wanted to kill the CI in retaliation for the CI's cooperation with law enforcement, which resulted in Fields' arrest and a foiled drugs-for-guns transaction.

Next, Kelsey argues that there was insufficient evidence to support his drug-conspiracy conviction, *see* 21 U.S.C. § 846. We decline his invitation to “second-guess the jury’s credibility determinations.” *United States v. Cardena*, 842 F.3d 959, 994 (7th Cir. 2016). We have already detailed Kelsey’s role in the conspiracy. We conclude that the government’s evidence was sufficient. Relatedly, we note that Kelsey also challenges the court’s denial of his request for a buyer-seller jury instruction. *See United States v. Lomax*, 816 F.3d 468, 476 (7th Cir. 2016). His argument lacks merit, especially in light of all the evidence the government presented and the court’s alternative instruction.

2. Sentencing Enhancements

Kelsey challenges the two-level obstruction of justice enhancement under U.S.S.G. § 3C1.1. We review a district court’s factual findings underlying this enhancement for clear error, and we review *de novo* whether these findings adequately support the enhancement. *United States v. Nichols*, 847 F.3d 851, 858 (7th Cir. 2017).

The Guidelines permit a two-level upward adjustment if a defendant “willfully obstructed or impeded, or attempted to obstruct or impede” the prosecution of the offense of conviction. U.S.S.G. § 3C1.1. In applying this enhancement based on perjury, the district court should indicate it has found the elements of perjury: falsity, materiality, and willfulness. *United States v. Brown*, 843 F.3d 738, 742 (7th Cir. 2016) (citation omitted).

Kelsey argues that the false testimony he provided at the suppression hearing was not willful. He claims that he testified to the best of his ability as to his interactions with law enforce-

court rejected Whitfield's objections to the PSR and sentenced him to 84 months' imprisonment.

Whitfield's attorney filed an *Anders* brief in support of his motion to withdraw as appointed counsel. We agree with counsel that it would be frivolous to challenge the denial of Whitfield's motion for acquittal or a new trial, the district court's evidentiary determinations, or the denial of his request for new appointed counsel.

We also agree with counsel that it would be frivolous to challenge the sentence; the district court stated that it would have imposed the same sentence even if it was incorrect about the sentencing enhancement; the district court departed from the Guidelines based on strong evidence that Whitfield was the getaway driver for the April 2, 2014, shooting of the CI.

Finally, we also note that Whitfield made further arguments in his response to the *Anders* brief that are without merit. We therefore grant counsel's motion to withdraw and dismiss Whitfield's appeal.

III. CONCLUSION

For the reasons mentioned above, we AFFIRM Toby Jones' conviction and Kelsey Jones' conviction and sentence. We GRANT Whitfield's counsel's motion to withdraw and DISMISS Whitfield's appeal.

APPENDIX B

1 Q. When you'd wait, did you have a designated meeting place
2 where you would meet Little Mo when he delivered these drugs?

3 A. Yeah. Usually it would be on Race there. But, you know,
4 there's times they might say go here or you might call them,
5 you could be somewhere else and they'll -- you know, just
6 close-by somewhere. Somewhere.

7 Q. You placed the drugs and Little Mo would deliver them.
8 You said that that happened on three or four occasions?

9 A. Yeah, that -- with -- personally me with him, yeah.

10 Q. And did anyone else ever deliver you drugs from that trap
11 line?

12 A. Yeah.

13 Q. Who else?

14 A. Little Red.

15 Q. Anyone else?

16 A. Big Red a few times.

17 Q. Okay.

18 Someone named Big Red?

19 A. Yep.

20 Q. How many times did Big Red deliver you drugs after you
21 placed an order on the trap line?

22 A. Two or three.

23 Q. Mark, as you sit in court today, do you see the man that
24 you know as Little Mo?

25 A. Yes.

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1 Q. Can you point him out and identify an article of clothing
2 he's wearing?

3 A. White vest. No, wait. Yeah.

4 Q. See they're somewhat --

5 A. Yeah. Yeah. Blue shirt.

6 Can't see.

7 There right in front. Sorry about that.

8 Q. You can stand up.

9 MR. FRANZBLAU: May the record reflect the in-court
10 identification of Kelsey Jones?

11 THE COURT: The record will reflect that.

12 BY MR. FRANZBLAU:

13 Q. And stand up this time so you can see.

14 Do you see Big Red in the courtroom?

15 A. Yes.

16 Q. Will you point him out and identify an article of clothing
17 he's wearing?

18 A. In a light blue shirt.

19 MR. FRANZBLAU: Can the record reflect the in-court
20 identification of Toby Jones?

21 THE COURT: Yes, the record will reflect it.

22 BY MR. FRANZBLAU:

23 Q. Mark, when did you start using -- you can sit down now,
24 sir.

25 When did you first start using drugs?

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1 A. Yes.

2 Q. Who did you identify as the shooter?

3 A. Little Mo.

4 Q. Are those your initials, and is that the date on this
5 picture?

6 A. Yes.

7 Q. Again, that's the same Little Mo in the blue shirt that
8 you identified earlier?

9 A. Yes, sir.

10 Q. Did you testify in the grand jury that day?

11 A. Yes, I did.

12 Q. Did you provide truthful information?

13 A. Yes, I did.

14 Q. What happened after you testified in the grand jury?

15 A. I was taken into custody and taken to -- Agent Labno took
16 me and turned me in to the -- you know, the suburban police
17 department.

18 Q. Did you go to jail?

19 A. Yes, I did.

20 Q. Mark, as you sit here today, how certain are you that
21 Little Mo is the man who shot you and your brother Jamie on
22 April 2nd, 2014?

23 A. Hundred percent.

24 MR. FRANZBLAU: No further questions.

25 THE COURT: Cross-examination.

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1 CROSS-EXAMINATION ON BEHALF OF DEFENDANT KELSEY JONES

2 BY MR. THEIS:

3 Q. Did you say 100 percent?

4 A. Yes.

5 Q. When you were asked to make an identification here in the
6 courtroom less than an hour ago and asked to identify Little
7 Mo, the first person you pointed to was a gentleman you said
8 in the white vest; is that correct?

9 A. Yes.

10 Q. Is that Little Mo?

11 A. No.

12 Q. And, then, upon Mr. Franzblau asking you another question,
13 you then identified another gentleman as Little Mo; is that
14 correct?

15 A. Yes.

16 Q. Mr. Ringswald, I'd like to ask you some questions about
17 the -- what you have told us with regard to your contacts with
18 Little Mo prior to late March and early April of 2014.

19 You told us today that you had had dealings with
20 Little Mo through Joyce and her husband -- Joyce Smith and her
21 husband; is that correct?

22 A. Yes.

23 Q. What's her husband's name?

24 A. Marty.

25 Q. And they lived in the same building as your brother Jamie;

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,) Docket No. 14 C 155-4
)
Plaintiff,)
)
vs.)
)
KELSEY JONES,) Chicago, Illinois
) November 14, 2016
Defendant.) 9:18 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS - SENTENCING
BEFORE THE HONORABLE AMY J. ST. EVE

APPEARANCES:

For the Plaintiff: HON. ZACHARY T. FARDON
United States Attorney
BY: MR. SEAN J.B. FRANZBLAU
MR. BRIAN HAYES
219 S. Dearborn St., Suite 500
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For the Defendant: MR. WILLIAM S. STANTON
53 W. Jackson Blvd., Suite 1062
Chicago, Illinois 60604

Also Present: MS. MELISSA RAY, Probation

Court Reporter: MR. JOSEPH RICKHOFF
Official Court Reporter
219 S. Dearborn St., Suite 1232
Chicago, Illinois 60604
(312) 435-5562

* * * * *

PROCEEDINGS RECORDED BY
MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED BY COMPUTER

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1 THE DEFENDANT: Yes, ma'am.

2 THE COURT: Other than the multiple issues raised in
3 your objections to the PSR and sentencing memo filed on
4 October 7th, do you have any other comments, corrections or
5 objections to the information in this document?

6 MR. STANTON: Other than what I've raised in the
7 written submission, no.

8 THE COURT: Mr. Jones, have you reviewed the
9 Presentence Investigation Report and reviewed it with your
10 lawyer?

11 THE DEFENDANT: Yes, ma'am.

12 THE COURT: Other than the objections he has filed on
13 your behalf, do you have any comments, corrections or
14 objections to any of the information in this document?

15 THE DEFENDANT: No, ma'am.

16 THE COURT: Mr. Franzblau, on behalf of the
17 government, have you reviewed the PSR?

18 MR. FRANZBLAU: Yes, your Honor.

19 THE COURT: Other than what you have raised in your
20 sentencing memo, do you have any other comments, corrections
21 or objections?

22 MR. FRANZBLAU: No.

23 THE COURT: Let's turn to the Guideline calculation,
24 then.

25 On Counts 1 and 7, the probation officer has assessed

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1 a Level 30, given the amount of narcotics attributable to
2 Mr. Jones. 425 grams of cocaine base and 200 grams of heroin
3 have been assessed.

4 You have objected to that, Mr. Stanton. Again, I
5 have read your objections. Do you want to elaborate or add
6 anything with respect to --

7 MR. STANTON: Just very briefly, Judge.

8 Obviously, Mr. Jones was convicted of this
9 conspiracy. We do acknowledge that. In talking to Mr. Jones
10 and his feelings about this, what he believes and what we are
11 arguing was reasonably foreseeable to him was that March 19th
12 transaction, I believe it was, 2014, where there was, I
13 believe, an ounce-and-a-half of crack cocaine delivered to the
14 agents and Mr. Kelsey Jones was present for that.

15 So, it's his position and our position that the 42
16 grams of crack cocaine was reasonably foreseeable to him.
17 That is the amount for which the Base Offense Level should be
18 grounded upon.

19 THE COURT: Mr. Franzblau?

20 MR. FRANZBLAU: Judge, the evidence at trial showed
21 otherwise. This was a jointly-undertaken criminal enterprise
22 between at least three individuals to distribute heroin and
23 crack cocaine on the West Side of Chicago. It began, at the
24 latest, in November of 2013 and continued until at least March
25 19th -- excuse me, March 26th of 2014.

1 The defendant is liable for all of the narcotics
2 distributed through this organization. The evidence at trial
3 showed that this was one single conspiracy; that the sales
4 that Fields testified to that the undercover purchases were
5 made from, that the recorded phone calls were about, were all
6 within the scope of the same conspiracy.

7 There's evidence that Fields' activity, Toby Jones'
8 activity were all reasonably foreseeable to the defendant.

9 You heard testimony at trial that Fields and
10 Mr. Jones worked these same drug shifts, these night and day
11 shifts; that they shared a cellular telephone; that they
12 served the same customers. And, so, that both Mr. Jones would
13 have knowledge of Mr. Fields' sales; Mr. Fields would have
14 knowledge of Mr. Jones' sales.

15 You heard Kelsey -- Mr. Jones -- admitted in his
16 post-arrest statement that he distributed drugs for his
17 brother; that he allowed him to use his apartment to package
18 and store his drugs; that he traveled with his brother to
19 provide security with him. So, he was physically with him.
20 He saw the drugs that his brother was distributing.

21 So, the evidence clearly establishes by a
22 preponderance that under 1B1.3 this defendant is liable for
23 all narcotics distributed in furtherance of this conspiracy.

24 And, your Honor, as I laid out in the sentencing
25 memorandum, the quantities that the government is actually

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1 seeking to hold the defendant accountable for are extremely,
2 extremely conservative. 425 grams of crack and 200 grams of
3 heroin, that are based primarily on Mr. Fields' testimony of
4 his own sales, just Mr. Fields' sales. They are based on his
5 lowest estimates, gone through in the sentencing memorandum in
6 great detail why your Honor can very comfortably rely on these
7 figures.

8 And for that reason, the government agrees with the
9 probation officer.

10 THE COURT: I am overruling your objection and
11 assessing a Base Offense Level of 30. I find that the
12 government has established by a preponderance of the evidence,
13 based on the evidence at trial, that the 425 grams of cocaine
14 base and 200 grams of heroin were reasonably foreseeable to
15 the defendant as sales from the drug conspiracy that he was an
16 active part of.

17 First of all, the defendant's own confession and
18 statements to Agent Labno when he was arrested support this.
19 He admitted to Agent Labno that he sold cocaine and heroin
20 with Toby Jones and Wesley Fields on a regular basis. He
21 admitted that he used a cellular telephone, that Toby Jones
22 had provided to him, to take customers' drug orders and
23 arrange for drug deliveries.

24 He also told Agent Labno that he regularly packed
25 drugs for Toby Jones, including those drugs sold on March

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1 19th; that he allowed Toby Jones to store drugs at his
2 apartment on a regular basis; and, that he provided security
3 for Toby Jones during the course of this drug conspiracy.

4 The testimony of Agent Labno was corroborated by the
5 testimony of Jamie Ringswald and the video recordings of the
6 transactions at issue here.

7 It was also further corroborated by Wesley Fields,
8 who testified that he and the defendant both worked for Toby
9 Jones selling drugs; that they used the cell phone that Toby
10 Jones had provided to them; and, that they shared the cell
11 phone; they took shifts selling drugs; they shared the same
12 customers who would call on that cell phone.

13 Wesley Fields testified that he sold an average of
14 four jabs of crack cocaine and three to four jabs of heroin
15 per day beginning in November of 2013 -- which was, at a
16 minimum, the beginning of the conspiracy -- and that by March
17 of 2014, those sales had increased to an average of five to
18 seven jabs of crack and four to five jabs of heroin per day.
19 He knew that the defendant sold approximately the same amount
20 based on his conversations with the defendant after the fact,
21 as well as on the amount of cell phone activity on this cell
22 phone that they shared.

23 As I indicated before, the defendant admitted to
24 using this cell phone to take customers' drug orders for
25 delivery.

1 I agree with Mr. Franzblau that that is a very
2 conservative amount.

3 Looking at all of the evidence, the government has
4 established those amounts by more than a preponderance of the
5 evidence. So, that objection is overruled.

6 The next objection you have is the probation officer
7 has assessed two levels under 2D1.1(b)(12) for the fact -- or
8 the argument -- that the defendant used his apartment on North
9 Austin Avenue for the purpose of manufacturing or distributing
10 a controlled substance.

11 Go ahead, Mr. Stanton.

12 MR. STANTON: Thank you, Judge.

13 As your Honor heard, this apartment, 653 North
14 Austin, Apartment 3, was Kelsey Jones' full-time residence.
15 The primary and principal use of that residence was not to
16 manufacture or distribute narcotics. The primary and
17 principal use for Mr. Kelsey Jones was as his abode, as his
18 living quarters. As such, and recognizing that a part-time
19 resident of this address, Mr. Toby Jones, did not receive this
20 stash house enhancement, it's our position that Kelsey Jones
21 absolutely should not either.

22 THE COURT: Mr. Franzblau?

23 MR. FRANZBLAU: Judge, as I laid out in the
24 sentencing memorandum, I think it's our position that this
25 does trigger the stash house enhancement. But you've already

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