Misc. No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

TRAMAINE STANDBERRY

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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IN THE

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TRAMAINE STANDBERRY,
Petitioner,

-vs-

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Mr. Tramaine Standberry, who is incarcerated in a federal correctional facility, asks leave to file the attached Petition for a Writ of Certiorari to The Supreme Court of the United States of America without prepayment of costs and to proceed in forma pauperis, pursuant to Rule 39 of this Court.

The Petitioner was previously granted leave to proceed in forma pauperis in the Court of Appeals for the Fourth Circuit. By order of that Court dated May 16, 2016, the undersigned was appointed as CJA counsel for the petitioner, which is why no petitioner affidavit is attached, pursuant to Supreme Court Rule 39(1).

Dated: November 9, 2020

/s/ Mark Diamond
Attorney for Petitioner

Misc. No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

TRAMAINE STANDBERRY,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

November 9, 2020

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QUESTIONS PRESENTED FOR REVIEW

1. Did the jury convict Mr. Standberry for a crime of violence that this Court has held is unconstitutional?

2. Was the district court's upward variance from the Guidelines that doubled Mr. Standberry's sentence inequitable as punishment for acquitted and uncharged conduct?

3. Did the district court incorrectly impose a four-level enhancement for de minimis movement of a victim during a robbery?

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OPINIONS BELOW

The United States Court of Appeals for the Fourth Circuit affirmed judgment in *United States v. Tramaine Standberry,* Slip Copy, 2020 WL 5229400 (4th Cir. 2020).

JURISDICTION

The final Order of the U.S. Court of Appeals, Fourth Circuit, was issued on September 2, 2020. (App. A) A petition for panel and en banc rehearing was denied on September 29, 2020. (App. B) This petition for certiorari was filed within 90 days thereof. Jurisdiction in the trial court was based on 18 USC § 3231, since the appellant was charged with offenses against the laws of the United States of America. The jurisdiction of this Court is invoked under 28 USC § 1254 and Supreme Court Rule 10.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Sixth Amendments, which assures a fair jury trial and that no one shall be deprived of life, liberty, or property, without due process of law. It also involves the constitutionality of 18 USC § 924(c)(3) concerning crimes of violence and the application of 18 USC § 3553(a) concerning sentencing.

STATEMENT OF THE CASE

By affirming his conviction, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. In addition, the Fourth Circuit's ruling contradicts rulings on the same issue rendered by the Supreme Court.

BACKGROUND OF THE CASE

This petition involves a judgment entered in the United States District Court for the Eastern District of Virginia in Richmond, on February 3, 2015. Following a jury trial, Mr. Standberry was convicted of Hobbs Act robbery of a convenience store and brandishing a firearm during a crime of violence. He received an effective sentence of 192 months in prison consisting of 108 months for robbery and 84 consecutive months for firearm possession. Mr. Standberry's judgment was affirmed on September 2, 2020. (*United States v. Standberry*, 2020 WL 5229400 (4th Cir. 2020) A petition for rehearing was denied on September 29, 2020.

REASONS FOR GRANTING THE WRIT

(1) The trial court's definition of "crime of violence" in its final instructions to the jury has been held to be unconstitutional. It deprived Mr. Standberry of the right to be judged upon evidence of guilt beyond a reasonable

doubt. (U.S. Const. 5th Amend.; *In re Winship*, 397 U.S. 358 (1970); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018)

(2) The trial court's excessive doubling of Mr. Standberry's sentence as an upward variance from the Guidelines was inequitable as punishment for acquitted and uncharged. (18 USC § 3553(a); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986); *Kimbrough v. United States*, 128 S.Ct. 558 (2007)

(3) Mr. Standberry's de minimis movement of a victim during a convenience store robbery was not abduction, and his sentence enhancement for movement contravened the Fourth Circuit's own standard as well as that of other Circuits. (USSG § 2B3.1(b)(4)(A); *United States v. Perri*, 487 F. App'x 113 (4th Cir. 2012); *United States v. Whatley*, 719 F.3d 1206 (11th Cir. 2013)

ARGUMENT 1: IT IS IMPOSSIBLE TO SAY THAT THE JURY DID NOT CONVICT MR. STANDBERRY FOR A CRIME OF VIOLENCE HELD AS UNCONSTITUTIONAL.

Mr. Standberry was convicted of Hobbs Act robbery under count 4 and possession of a weapon during a crime of violence under count 5. He was sentenced to 108 months in prison for robbery and 84 consecutive months for brandishing a weapon, pursuant to 18 USC § 924 (c)(i)(A)(ii), respectively.

18 USC § 924(c)(3) defines "crime of violence" as follows:

> For purposes of this subsection the term "crime of violence" means an offense that is a felony and –
>
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Concerning count 5, the district court charged the jury as follows:

> THE COURT: The term "crime of violence" means an offense that is a felony and has as one of its essential elements the use, attempted use, or threatened use of physical force against a person or property of another, or an offense that by its very nature involves a substantial risk that such physical force may be used in committing the crime – committing the offense.
>
> The crimes alleged in Counts One and Four are each crimes of violence. (Transc. 12/9 p. 554, USDC 171)

Thus, the district court included both alternative definitions of "crime of violence" – both subdivisions A and B – in its final charge to the jury for count 5. But the definition of "crime of violence" under subsection B has been held to be unconstitutionally vague, rendering a conviction under this unconstitutional subdivision reversible. [see, *United States v. Davis*, 139 S. Ct. 2319 (2019); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018); *United States v. Simms*, 914 F.3d 229 (4th Cir. 2019)] Conversely, the definition of crime of violence under subsection A, and Standberry's conviction under this subdivision, has been held to be kosher.

Because the court instructed the jury that it could find Mr. Standberry guilty under an unconstitutional statute, and it is impossible to reasonably rule out on hindsight that the jury did not convict him under the unconstitutional subdivision B, his conviction for brandishing a weapon should have been reversed and his sentence vacated. (U.S. Const. 5th Amend.; *In re Winship*, 397 U.S. 358 (1970)

ARGUMENT 2: THE DISTRICT COURT IMPOSED AN EXCESSIVE VARIANCE FROM THE GUIDELINES SENTENCE.

Mr. Standberry was indicted on five counts: Robbery and firearm possession on April 4 (Counts 1 and 2); robbery on April 6 (count 3); and robbery and firearm possession on April 29 (counts 4 and 5). The jury acquitted him on counts 1, 2, and 3 concerning charges for April 4 and 6. It convicted him of counts 4 and 5 concerning charges for April 29 only.

The sentence on count 5 for weapon possession was a mandatory, consecutive 84 months in prison. As for count 4 for robbery, the court held that Mr. Standberry's total offense level was 22 and his criminal history category was I, which resulted in a sentencing range of 41 to 51 months in prison.

Despite Mr. Standberry's acquittal on the April 4 charges, the district court, applying a preponderance-of-the-evidence standard (USDC 166, Transcript of 3/11 pp. 134-135, 149-151, 185) held that he really did commit the crimes charged for April 4, as well as an uncharged robbery on April 19. (USDC 166, Transc. 3/11 pp. 110, 185) Based upon this fact finding, the court increased Mr. Standberry's total offense level on count 4 from 22 to 29, which led to an increase in his sentencing range of from 41 to 51 months in prison (based on level 22) to 87 to 108 months in prison (based on level 29); in other words, a variance that increased his sentence by more than 100 percent. The district court imposed the highest sentence of 108 months for count 4.

The district court failed to give a reason for the variance other than to say that it was "adequate, but not longer than necessary, to serve all the factors of 18, United States Code, Section 3553(a)" and provided "for just punishment." (Transc. 3/11 pp. 152, 185, USDC 166) Mr. Standberry objected repeatedly to the imposition of the upward variance as violating his Fifth and Sixth Amendment rights to due process and jury trial. (Transc. 3/11 pp. 110-112, 165; USDC 166; see also, USDC 121, 123, 125, 128, 134, 135)

The variance levied by the district court resulted in a substantial increase in Mr. Standberry's sentence, so substantial that the court was required to use a reasonable doubt or if not, then at least a clear-and-convincing standard of proof rather than the lesser preponderance-of-evidence standard that it used.

To repeat, the 100 percent upward variance was for allegations for which Mr. Standberry was either acquitted by the jury or never charged. In *McMillan v. Pennsylvania*, 477 U.S. 79, 89-90 (1986) this Court held that the "tail wags the dog," and the potential for inequity rises, as the amount of the variance for acquitted and uncharged conduct rises.

If the government wanted Mr. Standberry to be punished for uncharged criminal acts, then it should have charged him with those acts. "But the United States is not entitled to indict an individual on one charge, and then after conviction seek to punish him for other crimes." (*United States v. Raby*, 2009 WL 5173964, at *8 (S.D.W.Va. 2009)

"(W)here the magnitude of a contemplated departure is sufficiently great ... the factfinding underlying that departure must be established at least by clear and convincing evidence." "Thus, the applicable standard of proof under the Fifth Amendment turns on the differential between the sentence a defendant would have received absent certain findings of fact, and the proposed sentence that will be imposed based on those additional findings. At some point, that differential becomes too disproportionate to the unenhanced sentence to allow the increase to

rest only on a preponderance of the evidence….. If proof by a mere preponderance is sufficient to justify a two-level increase for willfully impeding an investigation ... then proof by that identical standard is also appropriate in order to justify, for example, a four-level increase for organizing an offense ... or a six-level increase for unlawfully receiving explosives that one knows to be stolen ... or probably even a ten-level increase." (*United States v. Kikumura*, 918 F.2d 1084, 1101 (3d Cir. 1990)

"A just system of criminal sentencing cannot fail to distinguish between an allegation of conduct resulting in a conviction and an allegation of conduct resulting in an acquittal." (*United States v. Concepcion*, 983 F.2d 369, 396 (2d Cir. 1992) The district court was correct in *United States v. Pimental*, 367 F.Supp. 2d 143, 150 (D. Mass. 2005) when it put the issue this way:

> It makes absolutely no sense to conclude that the Sixth Amendment is violated whenever facts essential to sentencing have been determined by a judge rather than a jury, *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 2538, 159 L.Ed.2d 403 (2004), and also conclude that the fruits of the jury's efforts can be ignored with impunity by the judge in sentencing.
>
> We cannot have it both ways: We cannot say that facts found by the judge are only advisory, that as a result, few procedural protections are necessary and also say that the Guidelines are critically important. If the Guidelines continue to be important, if facts the Guidelines make significant continue to be extremely relevant, then Due Process requires procedural safeguards and a heightened standard of proof, namely, proof beyond a reasonable doubt.

In short, when a court punishes a defendant for acquitted or uncharged conduct, it expressly considers facts that the jury verdict not only failed to authorize but expressly disapproved. If second-guessing a jury is permitted, the standard to be applied by the district court should at least be the same standard that the jury used when it acquitted Mr. Standberry: That of proof beyond a reasonable doubt or if not, at least a clear-and-convincing standard, but in no event the lesser preponderance of evidence standard that was used by the district court in Standberry's case.

Use of acquitted and uncharged conduct as a basis for a sentence enhancement must have its limits to avoid curtailing a defendant's right to due process and against excessive sentencing. Mr. Standberry's sentence was enhanced by a lot: One hundred percent. This is particularly troubling considering the dearth of reasons the district court gave for the enhancements it imposed. It is the length of Standberry's enhancement that required use of a higher standard of proof than a mere preponderance of the evidence.

The district court's failure to give a clear and rational reason for the length of the sentences and variances imposed, and the length of the variance imposed gives no assurance that the sentence was sufficient but not greater than necessary to achieve 18 USC § 3553(a) sentencing goals. (*Kimbrough v. United States*, 128 S.Ct. 558, 575 (2007) Additionally, due process and the disproportionately high impact that the variance had on Mr. Standberry's sentence called for the use of a

beyond-a-reasonable-doubt or clear-and-convincing evidence standard, which the district court did not use. (U.S. Const. 5th Amend.; *In re Winship*, 397 U.S. 358, 364 (1970); see also, *United States v. Chew*, 804 F. App'x 492, 494 (9th Cir. 2020) Mr. Standberry's sentence on count 4 should have been reversed.

ARGUMENT 3: THE DISTRICT COURT INCORRECTLY IMPOSED A FOUR-LEVEL ENHANCEMENT FOR DE MINIMIS MOVEMENT OF A VICTIM DURING A ROBBERY.

The district court held that Mr. Standberry's total offense level was 22, based upon a base offense level of 20, a 4-level increase for abduction during a robbery, and a 2-level reduction for acceptance of responsibility. (Transc. 3/11 p. 109, USDC 166) The four-level enhancement came under USSG § 2B3.1(b)(4)(A) which states, "If any person was abducted to facilitate commission of the offense" (*of robbery*) "or to facilitate escape, increase by 4 levels."

USSG § 1B1.1 application note (1)(A) defines "abducted as follows:

> "Abducted" means that a victim was forced to accompany an offender to a different location. For example, a bank robber's forcing a bank teller from the bank into a getaway car would constitute an abduction.

At sentencing, the district court said the following:

> THE COURT: Unlike many of the reported cases where the victim has merely been told to lay down on the floor, been told to sit in a chair, or even get inside of a fireplace, this is a situation where they're forced at gunpoint to be

> moved from Point A to Point B. Here, the distance was approximately 15 feet. (Transc. 3/11 p. 164, USDC 166)

In affirming, the Fourth Circuit held, using "a flexible definition of abduction," that moving a store teller from in front of the counter to the back of the counter to open the cash register constituted "forced to accompany an offender to a different location" under *Whitfield v. United States*, 135 S.Ct. 785 (2016) and *United States v. Nale*, 101 F.3d 1000 (4th Cir. 1996).

Whitfield affirmed a sentence under 18 USC § 2113(e) where a victim was killed and another victim forced to accompany the defendant throughout the building. Mr. Standberry's case did not rise to anywhere near this level. *Nale* dealt with the length of an abduction. For purposes of imposing an enhancement under USSG § 2B3.1(b)(4)(A) the Fourth Circuit held that movement of the victim of a carjacking constituted an abduction even if the abduction was temporary.

In *United States v. Whatley*, 719 F.3d 1206 (11th Cir. 2013) the court held that taking an employee to a different office or room within a bank branch without leaving the building does not constitute abduction. For comparison, the Fourth Circuit in *United States v. Osborne*, 514 F.3d 377, 389-390 (4th Cir. 2008) held that moving a store employee from one room in a building to another can constitute an abduction, but that a case-by-case analysis is required where the abduction is *de minimis* in time or distance.

In *Osborne*, the employee of a Walgreens store was taken from a pharmacy located within a large Walgreens store, through a secured door to the pharmacy, and forced to accompany the robber to the front door of the Walgreens. The Fourth Circuit held, "Indeed, it is in ordinary parlance to say that the pharmacy section and the store area are 'different locations' within the Walgreens building. This is especially true in view of the fact that the pharmacy section and the store area are divided by a counter, as well as a secured door intended to be passable only by authorized persons via keypad."

Additionally, in holding that the act in Osborne constituted an abduction, the court cited as determinative that in forcing two victims to "accompany him on his exit path through the Walgreens building, he rendered them potential hostages. In so doing, Osborne engaged in conduct plainly targeted by the abduction enhancement: keeping victims close by as readily accessible hostages."

Again, the facts in Mr. Standberry's case did not rise to near this level.

In *United States v. Perri*, 487 F. App'x 113, 114 (4th Cir. 2012) the defendant forcibly accompanying a victim from one room in a house to another room constituted an abduction. In *United States v. Blackman*, 281 F. App'x 249, 251 (4th Cir. 2008) the defendant forcing his carjacking victim to accompany him to a different location before he returned to the vehicle alone constituted an abduction. And in *United States v. Newell*, 596 F. App'x 203, 205-06 (4th Cir.

2015) the defendant forcing tellers who were outside their banks into their banks at gunpoint, pushing one of them, was abduction.

Taking a case-by-case, fact-specific view of the evidence, Mr. Standberry's case did not rise to a level sufficient to justify a four-point sentence enhancement. During his convenience store robbery, one of the defendants said to one of the clerks, "Don't be scared ma'am, come with me." He then walked with the clerk to the cash register and told her, "I'm not gonna hurt you." The other defendant approached the second clerk and said, "Ma'am, can you please come with me?" He then walked with the second clerk from the front of the counter to the back of the counter to open the cash register. After the defendants took the money and lottery tickets, they exited the store without the clerks and without any further actions or communication with them. (PSR para. 112, USDC 117) Neither clerk was forced into or taken from the convenience store.

The defendant walked with the clerks a very short distance to the cash register, not to abduct him but to complete the robbery. Neither clerk was harmed, dragged, or struck in any manner. They were not used a hostages. Under the facts of this particular case, Mr. Standberry's action was so harmless, de minimis, and transitory that it did not constitute an abduction. The 4-point enhancement was not harmless. It led to an rise in sentence range from 27 to 33 months (at offense level 18) to 41 to 51 months in prison (at offense level 22). His sentence predicated on an unequitable enhancement should have been reversed.

CONCLUSION

FOR THE FOREGOING REASONS, Mr. Standberry respectfully asks this Court to issue a writ of certiorari to review the Court of Appeals for the Fourth Circuit's decision to affirm his judgment, and for such further relief that this Court deems proper.

Respectfully submitted,

/s/ Mark Diamond
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7400 Beaufont Springs Dr., Ste 300
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(917) 660-8758

IN THE SUPREME COURT OF THE UNITED STATES

TRAMAINE STANDBERRY
Petitioner,

-vs-

UNITED STATES OF AMERICA,
Respondent.

PROOF OF SERVICE

Mark Diamond swears that on November 9, 2020, pursuant to Supreme Court Rules 29.3 and 29.4, I served the attached Motion for Leave to Proceed In Forma Pauperis and Petition for a Writ of Certiorari on every person or his counsel who is required to be served by first-class mail through the U.S. Postal Service. The following were served:

(1) Mr. Richard Daniel Cooke, Office of U.S. Attorney, 919 East Main Street, Suite 1900, Richmond, VA 23219

(2) Mr. Tramaine Standberry, 85741-083, FCI Hazelton. Box 5000, Bruceton Mills, WV 26525

(3) Hon. Noel John Francisco, Solicitor General, Department of Justice, 950 Pennsylvania Ave. N.W., Washington, DC 20530

/s/ Mark Diamond
MARK DIAMOND

FILED: September 2, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4166 (L)
(3:15-cr-00102-HEH-2)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JOSHUA N. WRIGHT

Defendant - Appellant

No. 16-4180
(3:15-cr-00102-HEH-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

TRAMAINE STANDBERRY

Defendant - Appellant

APPENDIX A

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4166

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSHUA N. WRIGHT,

Defendant - Appellant.

No. 16-4180

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TRAMAINE STANDBERRY,

Defendant - Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. Henry E. Hudson, Senior District Judge. (3:15-cr-00102-HEH-1; 3:15-cr-00102-HEH-2)

Submitted: September 1, 2020 Decided: September 2, 2020

Before AGEE and QUATTLEBAUM, Circuit Judges, and Thomas S. KLEEH, United States District Judge for the Northern District of West Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

Mark Diamond, Richmond, Virginia; Joseph R. Winston, LAW OFFICES OF JOSEPH R. WINSTON, Richmond, Virginia, for Appellants. Dana J. Boente, United States Attorney, Richard D. Cooke, Stephen E. Anthony, Assistant United States Attorneys, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Joshua Nathaniel Wright and Tramaine Tre'quan Standberry were convicted of interference with commerce by robbery ("Hobbs Act robbery"), in violation of 18 U.S.C. § 1951 (2018), and brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(a)(ii) (2018). On appeal, Wright and Standberry[*] contend (1) that Hobbs Act robbery is not a crime of violence under 18 U.S.C. § 924(c)(3) (2018); (2) that the district court erred by instructing the jury that Hobbs Act robbery is a crime of violence under § 924(c); (3) that the district court abused its discretion by finding by a preponderance of the evidence that they had committed two robberies of which they had not been convicted, and varying upwardly in each of their sentences to reflect that conduct; (4) that the district court clearly erred by finding they had committed an abduction within the meaning of the Sentencing Guidelines; (5) that the district court clearly erred in refusing to grant Wright a sentence reduction for acceptance of responsibility; and (6) that Wright's 276-month upward variant sentence is substantively unreasonable. For the following reasons, we affirm.

Wright and Standberry first argue that Hobbs Act robbery is not a crime of violence under 18 U.S.C. § 924(c)(3) and thus cannot serve as a predicate offense for their 18 U.S.C. § 924(c)(1)(A) convictions. This argument is foreclosed by our decision in *United States v. Mathis*, 932 F.3d 242, 266 (4th Cir. 2019).

[*] We deny Standberry's motion to file a pro se supplemental brief.

Wright and Standberry next argue that the district court erred by instructing the jury that Hobbs Act robbery is a crime of violence under 18 U.S.C. § 924(c)(3). "We review a district court's decision to give a particular jury instruction for abuse of discretion" and "whether a jury instruction incorrectly stated the law de novo." *United States v. Miltier*, 882 F.3d 81, 89 (4th Cir.), *cert. denied*, 139 S. Ct. 130 (2018). We "must determine whether the instructions construed as a whole, and in light of the whole record, adequately informed the jury of the controlling legal principles without misleading or confusing the jury to the prejudice of the objecting party." *Id.* at 89 (internal quotation marks omitted). We have reviewed the record and the relevant legal authorities and conclude the district court did not abuse its discretion in instructing the jury.

Third, both Wright and Standberry argue the district court erred by varying upwardly to account for robberies of which the jury had acquitted them or for which they had not been charged. A sentencing court is free to consider acquitted or uncharged conduct in calculating a defendant's Guidelines range. *See United States v. Lawing*, 703 F.3d 229, 241 (4th Cir. 2012). Acknowledging this fact, Wright and Standberry argue that in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the sentencing court can only consider such conduct under a reasonable doubt standard, rather than under the preponderance standard established in *Lawing*, or must at least use a higher standard of proof when imposing a significant upward variance. However, we have continually held that "a sentencing court may consider uncharged and acquitted conduct in determining a sentence, as long as that conduct is proven by a preponderance of the evidence." *United States v. Grubbs*, 585 F.3d 793, 799 (4th Cir. 2009); *see also United States v. Slager*, 912

F.3d 224, 233 (4th Cir.) ("When sentencing courts engage in fact finding, preponderance of the evidence is the appropriate standard of proof." (internal quotation marks omitted)), *cert. denied*, 139 S. Ct. 2679 (2019). Accordingly, we conclude that "[t]his argument is too creative for the law as it stands." *United States v. Benkahla*, 530 F.3d 300, 312 (4th Cir. 2008).

Fourth, both Wright and Standberry argue that the district court improperly applied a four-level enhancement for abduction under the Sentencing Guidelines. *See* U.S. Sentencing Guidelines Manual § 2B3.1(b)(4)(A) (2018). The Government bears the burden to prove by a preponderance of the evidence that a sentencing enhancement applies. *United States v. Steffen*, 741 F.3d 411, 414 (4th Cir. 2013). "In assessing whether a sentencing court properly applied the Guidelines, we review the court's factual findings for clear error and its legal conclusions de novo." *United States v. Osborne*, 514 F.3d 377, 387 (4th Cir. 2008) (internal quotation marks omitted). Clear error occurs when we are "left with the definite and firm conviction that a mistake has been committed." *United States v. Harvey*, 532 F.3d 326, 337 (4th Cir. 2008) (internal quotation marks omitted).

A victim is "abducted" if he is "forced to accompany an offender to a different location." USSG § 1B1.1 cmt. n.1(A). We have adopted a "flexible, case by case approach to determining when movement to a different location has occurred," *Osborne*, 514 F.3d at 390 (internal quotation marks omitted). In addition, the Supreme Court has held that accompaniment "must constitute movement that would normally be described as from one place to another, even if only from one spot within a room or outdoors to a different one," but does not require movement across "large distances." *Whitfield v. United States*, 574

U.S. 265, 268 (2015); *see also Osborne*, 514 F.3d at 388 (explaining that "movement within the confines of a single building can constitute movement to a different location" (internal quotation marks omitted)). "[E]ven a temporary abduction can constitute an abduction for purposes of the [S]entencing [G]uidelines." *United States v. Nale*, 101 F.3d 1000, 1003 (4th Cir. 1996). We have reviewed the record and relevant legal authorities and conclude the district court did not clearly err in finding that Wright and Standberry abducted the store employees within the meaning of the Sentencing Guidelines.

Fifth, Wright challenges the district court's decision not to grant him a two-level reduction for acceptance of responsibility. "We review a district court's decision concerning an acceptance-of-responsibility adjustment for clear error" and accord "great deference to the district court's decision because the sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility." *United States v. Dugger*, 485 F.3d 236, 239 (4th Cir. 2007) (brackets and internal quotation marks omitted); *see* USSG § 3E1.1 cmt. n.5 (same). To qualify for the two-level acceptance of responsibility reduction, "a defendant must prove to the court by a preponderance of the evidence that he has clearly recognized and affirmatively accepted personal responsibility for his criminal conduct." *United States v. Bolton*, 858 F.3d 905, 914 (4th Cir. 2017) (internal quotation marks omitted). "This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." USSG § 3E1.1, cmt. n.2. However, "[i]n rare situations," including "where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt," such as a "constitutional challenge to

statute," the "defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct." *Id.* We have reviewed the record on this point and conclude that the district court did not clearly err in finding Wright had not clearly accepted responsibility for the robbery for which he was convicted.

Finally, Wright argues his sentence is unreasonable because it is longer than he would have received had the court applied a career offender enhancement under the Guidelines. We review criminal sentences for reasonableness "under a deferential abuse-of-discretion standard." *United States v. Lynn*, 912 F.3d 212, 216 (4th Cir.) (internal quotation marks omitted), *cert. denied*, 140 S. Ct. 86 (2019). In evaluating a sentencing court's calculation of the advisory Guidelines range, "[w]e review the district court's factual findings for clear error and legal conclusions de novo." *United States v. White*, 850 F.3d 667, 674 (4th Cir.), *cert. denied*, 137 S. Ct. 2252 (2017). We have reviewed the record on this point and find that Wright's sentence is procedurally and substantively reasonable.

Accordingly, we affirm the judgments of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: September 29, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4180
(3:15-cr-00102-HEH-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

TRAMAINE STANDBERRY

Defendant - Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Agee, Judge Quattlebaum, and Judge Kleeh.

For the Court

/s/ Patricia S. Connor, Clerk

Appendix B