No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

JOSHUA N. WRIGHT

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTIONS PRESENTED

1. Whether the district court erred in its "crime of violence"instruction to the jury.

2. Whether the district court erred in assessing an enhancement for abduction.

3. Whether the district court's upward variance doubling petitioner's sentence for acquitted conduct was a violation of petitioner's rights.

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PETITION FOR WRIT OF CERTIORARI

Joshua N. Wright respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

CITATION TO OPINIONS BELOW

The judgment of the United States District Court for the Eastern District of Virginia is unreported. (App. B). The opinion of the United States Court of Appeals for the Fourth Circuit, *United States of America v. Joshua N. Wright,* Record No. 16-4166 (4th Cir. September 2, 2020) is unreported. (App. A).

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. § 1254. The judgment of the United States Court of Appeals for the Fourth Circuit was entered on September 2, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(c)(3)

> 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.

18 U.S.C. § 1951

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
> (b) The term "robbery" means the unlawful taking or obtaining of personal property

from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of taking or obtaining.

U.S.S.G. § 1B1.1, Application Note 1(A).

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

U.S.S.G. § 2B3.1(4)

(A) if any person was abducted to facilitate commission of the offense or to facilitate escape, increase by 4 levels; or (B) if any person was physically restrained to facilitated commission of the offense or to facilitate escape, increase by 2 levels.

STATEMENT OF THE CASE

On August 5, 2015, petitioner, Joshua N. Wright and co-defendant Tramaine Standberry were charged in a five count superseding indictment: Counts one, three and four charged Hobbs Act robberies, in violation of 18 U.S.C. § 1951; Counts two and five charged carrying and brandishing a firearm during and in relation to a robbery, in violation of 19 U.S.C. § 924(c). Wright and his co-defendant were convicted in a jury trial of one Hobbs Act robbery count and one carrying and brandishing a firearm during and in relation to a robbery count.

At sentencing, the district court enhanced Wright's offense level four levels, pursuant to U.S.S.G. §2B3.1(b)(4)(A), for abduction to facilitate commission of the offense.

REASONS FOR GRANTING THIS WRIT

I. THE DISTRICT COURT ERRED IN ITS "CRIME OF VIOLENCE" INSTRUCTION TO THE JURY.

Mr. Wright was convicted of Count 4, a Hobbs Act robbery, in violation of 18 U.S.C. §1951, and Count 5, possess a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. §

924(c). The district court combined the definitions of "crime of violence" from both §§ 924(c)(3)(A) and (c)(3)(B) in instructing the jury that:

> 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 involved a substantial risk that such physical force may be used in committing the crime – committing the offense.*** (Emphasis added)
>
> The crimes alleged in Counts One and Four are each crimes of violence.[1]

The "crime of violence" provision in § 924(c)(3)(B) which states, "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" has been held to be unconstitutionally vague. *United States v. Davis*, 139 S. Ct. 2319 (2019); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

The district court's erroneous jury instruction was not harmless and contravened Wright's constitutional right to due process.

> Our doctrine prohibiting the enforcement of vague laws rests on the twin constitutional pillars of due process and separation of powers. Vague laws contravene the "first essential of due process of law" that statutes must give people "of common intelligence" fair notice of what the law demands of them. Vague laws also undermine the Constitution's separation of powers and the democratic self-governance it aims to protect. Only the people's elected representatives in the legislature are authorized to "make an act a crime." Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of laws they are expected to abide. (Citations omitted)

United States v. Davis, 139 S. Ct. at 2325.

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[1]Joint Appendix p. 781; December 9, 2015 transcript p. 554.

Because of the district court's error in giving the jury a constitutionally vague instruction, it is impossible to determine whether the jurors relied on the definition of "crime of violence" in § 924(c)(3)(A) which is constitutional or § 924 (c)(3)(B) which is unconstitutionally vague in judging Wright guilty. Wright's § 924(c) conviction for carrying and brandishing a firearm during and in relation to a robbery must be reversed and vacated and the matter returned to the district court for further proceedings. *Stromberg v. California*, 283 U.S. 359, 368 (1931) ("[I]f any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld.").

II. THE DISTRICT COURT ERRED IN ENHANCING WRIGHT FOUR OFFENSE LEVELS FOR ABDUCTION TO FACILITATE COMMISSION OF THE OFFENSE.

The district court enhanced Wright four offense levels, pursuant to U.S.S.G. § 2B3.1(b)(4)(A), finding that the victims were abducted to facilitate the commission of the offense. Wright and his co-defendant were convicted of robbing a 7-Eleven store and while so doing allegedly abducted[2] the 7-Eleven employees T.D.H and A.W. by brandishing their firearms and ordering them to go to the cash registers and open them.

According to the store employees of the 7-Eleven, two masked individuals entered the store. Robber #1 told employee #1, "Don't be scared ma'am, come with me." Robber #1 and employee #1 proceeded to the cash register where employee #1 was instructed to open the cash register. Robber #1 noted that employee #1 was shaking and told the employee, "I'm not going to hurt you." Employee #1 opened the cash register and robber #1 took money and lottery tickets. Robber #1 then directed employee #1 to turn toward the wall. Robber #2 said to employee #2, "Ma'am can you

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[2]"Abducted" means that a victim was forced to accompany an offender to a different location. For example, a bank robber's forcing a bank tell from the bank into a getaway car would constitute an abduction. U.S.S.G. § 1B1.1, Application Note 1(A).

please come with me?" Employee #2 went to her cash register and opened it while robber #2 came behind the counter and took the money from the cash register. The robbers then left the store. Neither employee was harmed, threatened or restrained. Both the robbers were polite and respectful of the employees.

The district court erred in assessing Wright a four level enhancement for abduction. Both employees were in the 7-Eleven stocking shelves when Wright and his co-defendant entered the store and there was no indication that the 7-Eleven was more than one large room or that the employees were forced to go from one room to another room. The employees would have moved down the aisle to the cash register at the direction of the defendants.

In affirming the district court, the Fourth Circuit relied on *United States v. Osborne*, 514 F.3d 377 (4th Cir. 2008) and *Whitfield v. United States*, 574 U.S. 268 (2015) to affirm the district court's enhancement. But neither case supports the Fourth Circuit's position. *Whitfield* dealt with a bank robber who entered a home and grabbed a 79 year old woman to use as a hostage and forced her down the hall to another room where she died of a heart attack. In *Osborne*, the defendant used the employees as hostages to go from the separate locked pharmacy section of a Walgreens store to the front of the store where the employees refused to leave the store.

In *United States v. Eubanks*, 593 F.3d 645, 654 (7th Cir. 2010), the court held that simply moving victims from one room to another was not enough for abduction finding that, otherwise, any movement of a victim from one room to another without aggravating circumstances would result in an abduction enhancement. The Eleventh Circuit in *United States .v Whatley*, 719 F.3d 1206 1222 (11th Cir. 2013) focused on the guideline definition of "abducted" that the "victim must forced to accompany an offender to a different location" and, in particular, to the term "different location."

In the Eleventh Circuit's view, the ordinary meaning of "different location" would not apply to "each individual office or room in a local bank." Instead the bank would be a single location as noted in the guideline example of taking a bank employee to a getaway car. The court of appeals concluded that Whatley had not forced any employee to leave the bank and did not abduct them.

The public area of the 7-Eleven store where the victims were located was one large room and Wright did not force the 7-Eleven employees to leave the store or go to another room but merely moved down an aisle to the cash register nearby. According to and *Whatley*, Wright's actions would not be considered abduction for guideline purposes. Yet, the Fourth Circuit cited *Osborne*, where the defendants were using the employees as hostages to make their escape, in holding that Wrights actions constituted an abduction. Under the Fourth Circuit's theory, every robbery would include an abduction enhancement if there was any movement by the victims to facilitate the robbery.

That is not what the Sentencing Commission envisioned in the abduction enhancement as stated in the definition of abducted in the Sentencing Guidelines. The Fourth Circuit's interpretation of the abduction enhancement was incorrect and this Court should clarify the definition of abduct in the Sentencing Guidelines. Wright's case should be remanded for further proceedings.

III. THE DISTRICT COURT'S USE OF ACQUITTED CONDUCT TO DOUBLE WRIGHT'S SENTENCE FOR THE ROBBERY WAS A VIOLATION OF HIS RIGHTS.

The government moved for a upward variance for Wright based on his criminal history and the charges the jury acquitted Wright of committing. In granting the government's motion, the district court noted in its Statement of Reasons that it was including by a preponderance of the evidence in its sentencing determination the two armed robberies which the jury acquitted Wright stating:

> The United States filed a Motion for Upward Variance (CM/ECF no. 122) based on the underrepresentation of defendant's criminal history category and also acquitted/uncharged relevant criminal conduct. By a preponderance of the evidence, the Court finds the evidence links the defendant to two armed robberies besides the one contained in Counts 4 and 5; during one of these robberies, two shots were fired inside the store. In addition, criminal history categories IV and V fail to reflect the defendant's 14 prior felony convictions, 11 of which were nighttime residential burglaries. Therefor the Government's motion is granted by the Court.
>
> The offense level is increased from 24 to 30, the criminal history category increased from IV to VI, and the advisory guideline ranged adjusted from 77-96 months to 168-210 months imprisonment on Count 4.

The district court's upward variance increasing Wright's offense level from 24 to 30 and the criminal history category from IV to VI, increased Wright's guideline range from 77-96 months to 168-210 months more than doubled his sentencing exposure.[3] The district court then proceeded to sentence Wright to 276 months imprisonment, 192 months for the Hobbs Act robbery and a consecutive 84 months for the § 924(c) firearm conviction.

So instead of a potential guideline sentence of 96 months at the high end of the guideline range plus 84 months for a total of 180 months, the district court doubled the 96 month high end of the originally computed guideline range to 192 months for the Hobbs Act robbery plus the additional consecutive 84 months for the firearm conviction for a total of 276 months. The district court justified doubling the sentence for the Hobbs Act robbery by relying on the two Hobbs Act robberies for which the government could not prove Wright's guilt. Instead the district court took it upon itself to mete out punishment by finding Wright guilty by a preponderance of the evidence. The district court sentenced Wright as if he were guilty of the two robberies that the jury acquitted him of committing. There is no other way to look at the district court's actions since that is what the court

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[3]Because of the 924(c) conviction of Count 5, Wright was facing a mandatory 84 month sentence consecutive to whatever sentence he received for the Hobbs Act robbery in Count 4.

stated it was doing.

Before the enactment of the Sentencing Guidelines, it was well-settled in the Fourth Circuit that acquitted conduct could be considered by the court in sentencing. *United States v. Isom*, 886 F.2d 736, 738-39 (4th Cir. 1989) citing *United States v. Bernard*, 757 F.2d 1439, 1444 (4th Cir. 1985) and *United States v. Sweig*, 454 F.2d 181, 184 (2nd Cir. 1972). The Sentencing Guidelines have reinforced that in § 1B1.3(a)(2) as "relevant conduct." *United States v. Lawing*, 703 F.3d 229, 241-42 (4th Cir. 2012); *United States v. Jinwright*, 683 F.3d 471, 484-85 (4th Cir. 2012).

The use of acquitted conduct in sentencing should be re-examined by this Court. Several Justices have raised the concerns about the use of acquitted conduct in sentencing to increase terms of imprisonment. In *United States v. Watts*, 519 U.S. 148 (1977) (per curiam), Justice Kennedy in his dissent urged the Court to confront the questionable use of acquitted conduct in sentencing noting "to increase a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal." *Id.* at 170.

Justices Scalia, Thomas and Ginsburg raised concerns in a dissent from a denial of certiorari in *Jones v. United States*, 574 U.S.948, 135 S. Ct. 8 (2014). For Justice Scalia, it was a violation of the defendants' constitutional right under the Sixth Amendment and Fifth Amendment Due Process Clause. "It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable–thereby exposing the defendant to the longer sentence–is an element that must be either admitted by the defendant or found by the jury. It *may not* be found by a judge." *Id.*

While serving on their respective circuit courts, both Justice Gorsuch, in *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014), and Justice Kavanaugh, in *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015), raised similar concerns about judges' reliance on acquitted

or uncharged conduct in imposing higher sentences than would otherwise be imposed. Circuit Judge Millett's concurrence in *Bell* raised deep concerns about constitutionality of using acquitted conduct in sentencing.

The court's use of acquitted conduct intrudes on the jury's sole province in determining guilt or innocence by intruding into the jury room and interpreting the reasoning behind a jury's decision to acquit. In this case, the jury acquitted Wright of two armed robberies where a firearm was discharged and found him guilty of one 7-Eleven robbery. But the district court, attempting to read the jurors' minds, assumed that the jury must have believed Wright guilty by some degree, just not beyond a reasonable doubt, in order to find by a preponderance of the evidence that Wright had committed the two robberies for which he was acquitted. So the court went ahead and doubled Wright's sentence for offenses that a jury said he did not commit.

A court can overturn a jury verdict of guilty but it can not overturn a not guilty verdict no matter how much it believes the evidence supports a finding of guilt beyond a reasonable doubt. But in allowing courts to use acquitted conduct and the lower standard of preponderance of the evidence, the court is permitted, in essence, to override a jury's acquittal and sentence a defendant for acquitted conduct as if the jury had found the defendant guilty.

The use of acquitted conduct as a factor in sentencing determinations by the district court and affirmed by the Fourth Circuit to double the sentence for Hobbs Act robbery denied Wright his right to fundamental due process.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Honorable Court grant his petition.

Respectfully submitted,
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