No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

WILLIE M. HARDY, JR.

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 Virginia Code 18.2-51, malicious wounding, is a a crime of violence.

2. Whether acquitted conduct is a proper sentencing factor.

3. Whether there was sufficient evidence for the jury to find the petitioner guilty of drug trafficking and firearm possession.

4. Whether the failure to give the voluntariness instruction of 18 U.S.C. § 3501 is reversible error.

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PETITION FOR WRIT OF CERTIORARI

Willie M. Hardy, Jr., 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. Willie M. Hardy, Record No. 19-4804 (4th Cir. June 9, 2021) 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 June 9, 2021.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The admissibility of confessions, 18 U.S.C. § 3501, states in pertinent part:

> If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and *shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.* (emphasis added).

Virginia Code § 18.2-51 provides in pertinent part:

> If any person maliciously shoot, stab, cut, or wound any person or *by any means* cause him bodily injury, with the intent to maim, disfigure, disable, or kill, he shall, except where it is otherwise provided, be guilty of a Class 3 felony. If such act be done unlawfully but not maliciously, with the intent aforesaid, the offender shall be guilty of a Class 6 felony. (Emphasis added).

STATEMENT OF THE CASE

Based on information that Willie Hardy was trafficking in drugs from a residence in Newport

News, Virginia, the Newport News police obtained and executed a search warrant. A black bag containing 7-8 ounces of marijuana was found in a black bag in the living room. Also in the bag were found a small bag of heroin inside a bag of rice and a hair cutting kit. A Glock handgun was found in a cabinet below the sink and Hardy's cell phone was found plugged into an outlet on the kitchen counter above the cabinet where the Glock handgun was found. A rifle with a cut-down barrel was found wrapped in a cloth in the living room closet. A handgun and parts of a handgun were found in an upstairs bedroom.

Hardy was arrested and questioned at the scene in a police vehicle and later at the police station. The police officers testified that a body cam worn by one of the police officers was not turned on until after the Miranda warnings were given to Hardy. Hardy did not sign a Miranda waiver and stated he would only sign a consent to search his phone under duress. Hardy told the police that he worked in a barber shop cutting hair. He said that there were 7-8 ounces of marijuana in a black bag and that he was a "two ounce man" breaking the marijuana into dime bags. He said the he did not have any heroin but occasionally might act as a middleman. Hardy told the police that the Glock handgun found in a cabinet under the sink was left in his son's car several months before and that he never carried or fired it. Hardy told the police that the rifle appeared at the house the previous week and that he never held it or cut it down. Neither the Glock nor the cut-down rifle were examined for fingerprints.

Hardy was initially indicted for 1) possession with intent to distribute heroin and marijuana; 2) possession of a firearm in furtherance of drug trafficking crime; and 3) felon in possession of a firearm. A superseding indictment was filed charging 1) possession with intent to distribute heroin; 2) possession with intent to distribute marijuana; 3) possession of a firearm in furtherance of drug

trafficking crime ; 4) felon in possession of a firearm; and 5) possession of an unregistered firearm.

Hardy's statements to the police were introduced at trial and law enforcement testimony consisted of identifying the location where the drugs, firearms and other items were found in the residence during the search.

The jury returned guilty verdicts for possession with intent to distribute marijuana, possession of a firearm in furtherance of a drug trafficking crime and felon in possession of a firearm.[1] The jury returned not guilty verdicts for possession with intent to distribute heroin and possession of an unregistered firearm.

At sentencing the defense objected to the district court's consideration of the acquitted counts in determining the sentence. The district court overruled the defense objection and noted that Hardy qualified as a career offender based on a prior felony drug conviction and state maiming conviction. The court then sentenced Hardy to 120 months on the possession with intent to distribute marijuana count and the felon in possession of a firearm count, to run concurrent with each other and sentenced him to 180 months for the possession of a firearm in furtherance of a drug trafficking crime to run consecutive to the other sentences, for a total sentence of 300 months

The court of appeals upheld the conviction and sentence.

REASONS FOR GRANTING THIS WRIT

I. THE DISTRICT COURT ERRED IN ITS DETERMINATION THAT VIOLATION OF VIRGINIA CODE § 18.2-51 MALICIOUS WOUNDING QUALIFIED AS A "CRIME OF VIOLENCE" FOR CAREER OFFENDER PURPOSES.

In *Johnson v. United States*, __U.S. ___, 15 S. Ct. 2551 (2015), the Court struck down the

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[1]The jury specified that Hardy possessed the Glock handgun and specified that he did not possess the Remington rifle.

residual clause of the Armed Career Criminal Act's (ACCA) definition of "violent felony" in 18 U.S.C. § 924(e), as unconstitutionally vague The Court later retroactively held that *Johnson* would apply retroactively. *Welch v. United States*, ___ U.S.___, 136 S. Ct. 1257 (2016) (*Johnson* announced a substantive rule that applies retroactively to cases on collateral review.) The Career Offender guideline, § 4B1.2 had identical language to the ACCA in its "residual clause and the Sentencing Commission, in response to the Court's decision in *Johnson*, deleted the "residual clause" from the definition of crime of violence in § 4B1.2.

The probation office calculated Hardy's guidelines at offense level at 26, criminal history category IV, guideline range 92-115 months plus 60 months for the § 924(c) conviction. But the probation office counted Hardy's state maiming conviction as a crime of violence and, combined with his prior felony controlled substance conviction, determined that Hardy qualified as a career offender.[2] Once the probation office determined that Hardy was a career offender, his guideline range increased to 360-life. U.S.S.G. § 4B1.1(c)(3).

The district court erred in treating Hardy's Virginia state conviction for maiming as a crime of violence. The Virginia Code § 18.2-51 provides in pertinent part:

> If any person maliciously shoot, stab, cut, or wound any person or *by any means* cause him bodily injury, with the intent to maim, disfigure, disable, or kill, he shall, except where it is otherwise provided, be guilty of a Class 3 felony. If such act be done unlawfully but not maliciously, with the intent aforesaid, the offender shall be guilty of a Class 6 felony. (Emphasis added).

U.S.S.G. § 4B1.2(a) provides:

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[2]To be designated as a career offender, an individual must have at least two prior convictions of either a crime of violence or a controlled substance offense; be at least 18 years old at the time of the offense; and the instant offense must be either a crime of violence or a controlled substance offense. U.S.S.G. § 4B1.1(a).

> The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--
>
> > (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
> >
> > (2) is murder, voluntary manslaughter, kidnaping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841.

Prior to the *Johnson* decision, the Fourth Circuit held that Virginia's unlawful wounding statute, Virginia Code § 18.2-51, was a crime of violence under the residual clause of § 1B1.2(a)(2).[3] *United States v. Lee,* 855 F.3d 244, 246 (4th Cir. 2017). But after the Sentencing Commission, based on the *Johnson* decision, deleted the residual clause from the § 4B1.2, the Fourth Circuit then held that a conviction of Virginia Code § 18.2-51 was a violent felony for purposes of the Armed Career Criminal Act. *United States v. Rumley*, 952 F.3d 538 (4th Cir. 2020). The Fourth Circuit wrongly transferred § 18.2.51 unlawful wounding crimes from the discarded residual clause into the main definition of crime of violence.

A categorical approach is used to determine whether an offense qualifies as a crime of violence for career offender purposes. *Taylor v. United States*, 495 U.S. 575 (1990). The categorical approach requires that courts "look only to the statutory definitions – i.e., the elements – of the defendant's [offense] and not to the particular facts underlying [the offense]" in determining whether the offense qualifies as a crime of violence. *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013) (citations omitted). A prior offense may qualify as a crime of violence under the categorical approach only if all the criminal conduct covered

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[3]The prior version of § 4B1.2(a)(2) contained a residual clause which stated, "otherwise involves conduct that presents a serious potential risk of physical injury to another."

by the statute "including the most innocent conduct" matches or is narrower than the generic crime of violence definition.

In rejecting the government's definition of "physical force" derived from common law battery, the Court defined "physical force" under the Armed Career Criminal Act[4] (ACCA) as "violent force" meaning "force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. at 140-41. The Court noted that the word "physical" "plainly refers to force exerted by and through concrete bodies – distinguishing physical force from [ ] intellectual or emotional force." *Id. at 138.*

The Supreme Court's definition of "physical force" applies equally to crimes of violence in the sentencing guidelines as well as violent felonies under the ACCA. As the Fourth Circuit noted, the court "rel[ies] on precedents evaluating whether an offense constitutes a 'crime of violence' under the guidelines interchangeably with precedents evaluating whether an offense constitutes a 'violent felony' under the ACCA because the two terms have been defined in a manner this is 'substantively identical'" *United States v. Flores-Granados,* 783 F.3d 487, 490 (4th Cir. 2015). While the definitions between the ACCA and § 4B1.2 have diverged with respect to the enumerated offenses clause in § 4B1.2(a)(2), the force clauses remain identical.

Hardy's Virginia conviction does not qualify as a "crime of violence" under the force clause because it can be accomplished without the use or threat of violent physical force. *Johnson v. United States*, 559 U.S. at 140-41. At one time, the Virginia courts required a breaking of the skin to convict but now it requires only de minimis injury and not longer requires that the skin be broken or cut. *English v. Commonwealth*, 715 S.E.2d 391, 395 (Va. Ct. App. 2011). The statute does not

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[4]18 U.S.C. 924(e).

require a "breach" or "disruption" of the skin. A defendant violates the statute even if a victim is not shot, stabbed, cut or wounded as long as the victim suffers bodily injury "by any means." *Id.* at 394.

> Given its disjunctive syntax, the "statute has been more broadly interpreted to include *any* bodily injury" We give the phrase "bodily injury" its "everyday, ordinary meaning, " which needs no technical, anatomical definition. "Bodily injury comprehends, it would seem, *any bodily hurt* whatsoever." It includes any "detriment, hurt, loss, impairment" that could fairly be considered an injury to the human body.
>
> To prove bodily injury, the victim need not experience any observable wounds, cuts, or breaking of the skin. Nor must she offer proof of "broken bones or bruises." Bodily injury "includes soft tissue injuries, at least those which require medical attention and have some residual effect." Thus, internal injuries – no less than external injuries – fall within the scope of Code § 18.2-51.

English v. Commonwealth, 715 S. E.2d at 395. (citations omitted).

The provision "by any means cause him bodily injury." has been interpreted to include "any bodily injury whatsoever." *Id.* Thus, the Virginia statute can be violated with the use of de minimis force which would not be a crime of violence under the force clause because the statute does not require the violent physical force *Johnson* held was necessary to constitute a predicate offense under the force clause. If the most innocent or minimum conduct penalized by a statute does not constitute a crime of violence, then the statute fails categorically to qualify as a crime of violence.

The Fourth Circuit has held that Virginia common law robbery was not a "crime of violence" or "violent felony" because it could be committed with only a slight degree of force necessary that need not harm a victim. *United States v. Winston*, 850 F.3d at 685 (4th Cir. 2017). In *United States v. Torres-Miguel*, 701 F.3d 165, 167 (4th Cir. 2012), the Fourth Circuit recognized that an offense which requires serious bodily injury or death does not necessarily require the use, attempted use, or

threatened use of violent physical force stating, "An offense that *results* in physical injury, but does not involve the use or threatened use of force, simply does not meet the Guidelines definition of a crime of violence." "Of course a crime may *result* in death or serious injury without involving *use* of physical force." *Id.* at 168. The Court went on to point to decisions from other circuits in which physical injury or death could result without the use of violent force. *Id.* at 168-69. While the Supreme Court's decision in *United States v. Castleman*, 134 S. Ct. 1405 (2014) abrogated a portion of *Torres-Miguel*, it did not abrogate the causation aspect of the case that "a crime may result in death or serious injury without involving the use of physical force." *United States v. Middleton*, 883 F.3d 485, 491 (4th Cir. 2018).

Because the Virginia statute fails to qualify as a "crime of violence" under the force clause of § 4B1.2, Hardy does not have two prior convictions of either a crime of violence or a controlled substance offense and would not have qualified as a career offender. Hardy's guideline level would have been level 24, criminal history category IV, guideline range 77-96 months without the obstruction enhancement and would have been 26, criminal history category IV, guideline range 92-115 months with the enhancement.[5] Instead the court sentenced Hardy as a career offender to 120 months for the possession with intent to distribute marijuana count and the felon in possession of a firearm count to run concurrently and 180 months on the possession of a firearm in furtherance of drug trafficking count to run consecutively to the other two sentences for a total sentence of 300 months.

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[5]The filing of the 21 U.S.C. § 851 enhancement, increased the maximum term of imprisonment for possession with intent to distribute marijuana from five (5) years to ten (10) years. In addition, a consecutive sentence was required by § 924(c) which would have increased Hardy's sentence by 60 months.

The Virginia unlawful wounding statute, Virginia Code § § 18.2-51 should be examined by this Court to determine whether it qualifies as a crime of violence.

II. THE DISTRICT COURT'S USE OF ACQUITTED CONDUCT AS A SENTENCING FACTOR WAS A VIOLATION OF HARDY'S RIGHTS.

The use of acquitted conduct to enhance terms of imprisonment has been criticized by Justices of this Court as well as legal scholars and is presently the subject of a bill introduced in Congress to amend 18 U.S.C. 3661 to prohibit the use of acquitted conduct at sentencing.[6] It is time for the Court to re-examine the use of acquitted conduct in sentencing.[7]

Before the enactment of the Sentencing Guidelines, it was well-settled in all circuits, except the Ninth Circuit, that acquitted conduct could be considered by the court at sentencing.[8] The Sentencing Guidelines memorialized the use of acquitted conduct in § 1B1.3(a)(2) as "relevant conduct." The use of relevant conduct was upheld by the Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Court's decision in *United States v. Watts*, 519 U.S. 148 (1997) (per curiam) (J. Stevens, J. Kennedy dissenting), set the table for *Apprendi* which upheld the use of acquitted conduct

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[6]Prohibiting Punishment of Acquitted Conduct Act of 2021, S. 601, 117th Cong. (1st Sess. 2021)

[7]*See* Carissa Byrne Hessick and F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 Cal. L. Rev. 47 (2011) (raising double jeopardy, right to jury trial and Due Process Clause concerns about the use of acquitted conduct.)

[8]*See United States v. Mocciola*, 891 F.2d 13 (1st Cir. 1989); *United States v. Rodriguez-Gonzalez*, 899 F.2d 177 (2nd Cir. 1990); *United States v. Ryan*, 866 F.2d 1095 (3rd Cir. 1989); *United States v. Isom*, 886 F.2d 736 (4th Cir. 1989); *United States v. Juarez-Ortega*, 866 F.2d 747 (5th Cir. 1989); *United States v. McGhee*, 882 F.2d 1095 (6th Cir. 1989); *United States v. Fonner*, 920 F.2d 1330 (7th Cir. 1990); *United States v. Dawn,* 897 F.2d 1444 (8th Cir. 1990); *United States v. Coleman*, 947 F.2d 1424 (10th Cir. 1991); *Unites States v. Rivera-Lopez*, 928 F.2d 372 (11th Cir. 1991); *United States v. Boney*, 977 F.2d 624 (D.C. Cir. 1992). *But see United States v. Brady*, 928 F.2d 844 (9th 1991).

in fashioning a sentence. 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. Justice Scalia concurred in *Watts*, but subsequently, along with Justices Thomas and Ginsburg, raised concerns in a dissent from a denial of certiorari in *Jones v. United States*, 135 S. Ct. 8 (2014). For Justice Scalia, it was a violation of the defendant's 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. A court can overturn a jury verdict of guilty but it should not be able to turn a not guilty verdict into an increased term of imprisonment. In allowing courts to use acquitted conduct and the lower standard of preponderance of the evidence, the Court has permitted, in essence, judges to override a jury's acquittal and sentence a defendant as if the jury had found the defendant guilty.

Unlike subjective background factors which a court may consider as relevant conduct in sentencing, a not guilty verdict by a jury is an absolute under our system of laws that the individual is not guilty of the crime charged and cannot be retried for the same offense no matter how much the court believes in the guilt of the individual. But by allowing acquitted conduct to be considered as a sentencing factor, the court has abrogated that and has given the prosecution "two bites at the apple." As long as the government gets a guilty verdict on any one count of an indictment, it can, and does, at sentencing ask that the defendant be sentenced for the conduct for which the jury had returned a not guilty verdict. So the government gets its increased sentence without a guilty verdict. There is something fundamentally wrong with this concept and it is a violation of Due Process and constitutes Cruel and Unusual Punishment to be sentenced for a crime the jury said the defendant did not commit.

III. THE EVIDENCE WAS INSUFFICIENT FOR THE JURY TO FIND HARDY GUILTY OF POSSESSION WITH INTENT TO DISTRIBUTE DRUGS, POSSESSION OF A FIREARM OR POSSESSION OF A FIREARM IN FURTHERANCE OF DRUG TRAFFICKING.

In assessing the sufficiency of evidence, the Court must determine whether the verdict of the jury is sustained by "substantial evidence, taking the view most favorable to the Government." *Glasser v. United States,* 315 U.S. 60, 80 (1942); *Jackson v. Virginia*, 443 U.S. 307, 309 (1979);

1. Possession with Intent to Distribute Drugs and Use or Carry a Firearm in Relation to Drug Trafficking Offense.

The government must show two elements to prove a violation of § 924(c): (1) the defendant used or carried a firearm, and (2) the defendant did so during and in relation to a drug trafficking offense or crime of violence. *Smith v. United States,* 508 U.S. 223, 227-28 (1993). The purpose of enacting § 924(c) was "an effort to combat the dangerous combination of drugs and guns."

Muscarello v. United States, 524 U.S. 125 (1998).

The government did not prove either actual or construction possession of the firearm by Hardy. The only evidence tying Hardy to the firearm was his statement to the police after his arrest. According to the statement Hardy gave to the police, the Glock was left in his son's car by another individual in October 2017 and he neither fired the Glock nor used it. Hardy told the police about the marijuana in the residence but the fact that Hardy had knowledge of the marijuana does not put him in possession of it, either actual or constructive. The residence was not Hardy's. Hardy was not in possession of either the marijuana or the firearm when he was taken into custody. The government did not produce any evidence or testimony that Hardy distributed drugs or that he used or possessed the Glock firearm during or in furtherance of drug trafficking. There was no surveillance conducted by law enforcement of Hardy distributing drugs or carrying a firearm. The government admitted that its case was based entirely on circumstantial evidence and on the uncorroborated statements made by Hardy during his interrogation that he distributed small amounts of marijuana and that the firearm was left in his son's car several months before. "It is a settled principle of the administration of criminal justice in the federal courts that a conviction must rest upon firmer ground than the uncorroborated admission or confession of the accused." *Wong Sun v. United States,* 371 U.S. 471, 488-89 (1963). "In our country the doubt persists that the zeal of the agencies of prosecution to protect the peace, . . or the aberration or weakness of the accused under the strain of suspicion may tinge or warp the facts of the confession." *Opper v. United States*, 348 U. S. 84, 89-90 (1954). Corroboration "is rooted in 'a long history of judicial experience with confessions and the realization that sound law enforcement requires police investigations which extend beyond the words of the accused.'" *Wong Sun v. United States,* 371 U.S. at 489 (quoting

Smith v. United States, 348 U.S. 147, 153 (1954).

Everyone, including Hardy, were moved out of the residence prior to the police beginning their search. The bag containing the marijuana was found in the living room, while the Glock handgun was found in the kitchen under the sink in a bin in a closed cabinet. There was no fingerprint or DNA evidence tying Hardy to the marijuana or the Glock. The police never questioned Hardy whether he carried the Glock or how it came to be in the residence. Hardy's statements that he never fired or carried the Glock were never controverted by the government. Hardy's cell phone was found plugged into an outlet on the kitchen counter above the cabinet which held the firearm. There was no basis to believe that Hardy knew the Glock was in the cabinet under the sink in the kitchen or that it was there to provide protection for Hardy during any drug transaction.

The government adduced no evidence that Hardy resided at the residence or used the residence from which to deal drugs. The police testified that the leaseholder was Ashahni Wellons who lived there with her daughter. A note found a bedroom upstairs stated that Gregory Wynn was paying Wellons' father, Kenneth Boswell, $146.00 a month rent to reside at the residence. Also found in the bedroom with Wynn's note was a Jimenez Arms .380 caliber handgun as well as parts of a Ruger .22 caliber handgun.

Without substantial independent evidence to support the government's case, the jury's verdict cannot be sustained. *United States v. Opper,* 348 U.S. at 93.

The government played a tape the jury of a phone call between Hardy and his son. The jury was also given a transcript of a phone call between Hardy and his son. The defense never objected that the transcript misstated what Hardy said. The transcript incorrectly quoted Hardy as saying,

"Little Kenny has to take the gun charge **cuz it's a different gun**."(emphasis added). Hardy actually said "Little Kenny has to take the gun charge **cuz its his gun.**" (emphasis added). It is difficult to understand but those were Hardy's words. Little Kenny," Kenneth Boswell, was in the residence at the time the search warrant was executed and was Wellon's brother. It made no sense for Hardy to say it's a different gun." What difference would a different gun have made in the case?

Hardy told the detectives that the Remington rifle appeared a few days after his son was robbed. The government's theory was that Hardy obtained the Remington rifle after his son was robbed to protect his son or to go after those persons who robbed his son. The rifle was inoperable and had two rounds in the magazine. If Hardy possessed a Glock handgun which had a full magazine he did not have any use for an inoperable rifle with two rounds in the magazine.

Even if the evidence was sufficient for the jury to find that Hardy possessed the firearm there was no evidence that he used or carried the firearm during and in relation to drug trafficking. There was not testimony that Hardy distributed drugs in the residence or knew or should have known the firearm was in the cabinet under the sink of someone else's residence.

Thus, the evidence was not sufficient for the jury to find Hardy guilty of using or carrying a firearm during and in relation to drug trafficking.

2. Possession of a Firearm By a Convicted Felon.

To convict for a violation of 18 U.S.C. § 922(g), the government must prove, beyond a reasonable doubt that: (1) the defendant was convicted of an offense punishable by a term of incarceration of greater than one year; (2) the defendant knowingly possessed, transported, shipped, or received the firearm; and (3) the possession was in or affected interstate commerce. *United States v. Langley*, 62 F.3d 602, 606 (4th Cir. 1995).

It was stipulated that Hardy was a convicted felon. There was also no dispute that firearm traveled in interstate commerce having been manufactured in Austria and imported to Georgia in the United States and eventually to Virginia. The question was whether Hardy possessed, transported, shipped or received the Glock. Hardy told the police that the Glock was left in his son's car. He also stated that he never fired or carried the Glock. Hardy did not indicate when he first saw the Glock. There is no evidence that Hardy knowingly transported the Glock. There was no direct or circumstantial evidence that he ever possessed, transported, shipped or received the Glock. A defendant's proximity to a firearm only goes to its accessibility not to dominion or control. *United States v. Ricks*, 573 F.3d 198, 203 (4th Cir. 2009).

Nor is there direct or circumstantial evidence that Hardy had constructive possession of the Glock. Being in the vicinity of the Glock does not place Hardy in possession of the firearm. In order to establish constructive possession, the government must prove "that the defendant intentionally exercised dominion and control over the firearm or had the power *and the intention* to exercise dominion and control over the firearm." *Id.*, citing *United States v. Scott*, 424 F.3d 431, 435-36 (4th Cir. 2005). There was no evidence that other than seeing the Glock in the car, Hardy ever took possession possessed or had the ability to take possession of the firearm or that he transported the firearm anywhere.

While a jury may infer defendant's constructive possession of drugs and firearms found in a defendant's home, there was no evidence that Hardy lived or stayed at the residence. *United States v. Shorter*, 328 F.3d 167, 172 (4th Cir. 2003) (Inference of constructive possession where drugs and firearms found in defendant's home.) A police officer testified that the residence was leased to Ashahni Wellons and her baby daughter not to Hardy. A note found a bedroom upstairs stated that

a Gregory Wynn, who was in the residence when the warrant was executed, was paying Wellons father, Kenneth Boswell, $146.00 a month rent to reside at the residence. Other than Hardy's papers in the kitchen, no articles of Hardy's clothing or personal effects were found in the residence or anything else to indicate that Hardy resided at the residence.

Not living in the residence, Hardy had no reason to store the Glock in the closed cabinet under the sink. If, as the government contended, Hardy was selling drugs out of the residence, Hardy would want the weapon close at hand in case something went wrong with a drug deal or in case someone attempted to rob him of his drugs. He would not, in the middle of a drug deal going bad or a robbery, excuse himself to get the Glock in the kitchen. Nor was the position of the Glock in the cabinet in an easily accessible location and storing it with the grip up placed the Glock in an unwieldy position making it impossible to quickly grab and use. Hardy would have to squat or bend down and twist his hand to properly grip the Glock. Otherwise he grabs the Glock with the barrel down and no finger on the trigger. A better and more logical location for Hardy to have access to the Glock would have been one of the drawers beneath the counter where Hardy was charging his cell phone. It is unlikely that Hardy placed the Glock in the cabinet or even knew it was there.

The evidence, both direct and circumstantial, was insufficient for the jury to find Hardy guilty of knowingly possessing, transporting, shipping or receiving the Glock handgun.

IV. THE DISTRICT COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE LAW GOVERNING THE USE OF A CONFESSION.

The government's case against Hardy was based entirely on the statements Hardy made after his arrest at the scene and at the police station. The audio/video of Hardy's interrogation did not have Miranda warnings being given to Hardy. The police testimony was that Hardy was given the

Miranda warning prior to the audio/video being activated. But there is nothing to confirm the police contention. While it might be understandable that Hardy would not have been given a Miranda waiver form to sign at the scene, once at the police station Hardy given a consent form to allow the police to search his cell phone but not a form waiving his Miranda rights. Hardy signed the consent form to allow police access his phone but stated he was doing so under duress. Without having given Hardy his Miranda warnings, the statements that he made to the police during his interrogation should not have been admitted as they were the "fruit of the poisonous tree." *Wong Sun v. United States*, *supra.*

Of the two hours and twenty minutes in interrogation, the jury was shown 12 audio/video clips totaling approximately 10 minutes of Hardy's interrogation in the minivan and at the police station. A confession instruction was not requested by the defense and the district court committed plain error in failing to instruct the jury to give such weight to Hardy's statements as it deserved under the circumstances.[9] 18 U.S.C. § 3501, *United States v. Inman*, 352 F.2d 954, 956 (4th Cir. 1965);[10] *But see United States v. Sauls*, 520 F.2d 568, 570 (4th Cir. 1975) (In *Sauls*, the Court found it to be plain error to fail to give the instruction but went on to find that the error was "non-prejudicial and harmless.")

The admissibility of confessions, 18 U.S.C. § 3501, states in pertinent part:

> If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and *shall instruct the jury to give such weight*

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[9] FRCrP 52(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

[10] "A per se approach to plain-error review is flawed. *United States v. Young,* 470 U.S. 1, 17 n.14 (1985).

to the confession as the jury feels it deserves under all the circumstances. (emphasis added).

In reviewing plain error, the court must "(1) identify an error, (2) which is plain, (3) which affects substantial rights, and (4) which seriously affects the fairness, integrity or public reputation of judicial proceedings. *United States v. Brewer*, 1 F.3d 1430, 1434-35 (4th Cir. 1993) (internal quotations and citations omitted). *Accord United States v. Olano*, 507 U.S. 725, 732 (1993). Once the court finds plain error, the court must then decide whether "to notice" the error by reviewing the record as a whole and then determine whether the error led to the conviction of a defendant who was innocent or which otherwise seriously affected the fairness, integrity or public reputation of judicial proceedings. *United States v. Vonn,* 535 U.S. 55, 71 (2002)

The district court committed error in failing to give the jury instruction for admissibility of confessions, 18 U.S.C. § 3501. The district court's error in failing to give the jury instruction was plain and affected Hardy's substantial rights as the government's case was entirely circumstantial and relied entirely on the short clips of Hardy's statements during the interrogation to tie him to the marijuana and firearm. Without Hardy's statements, the government had no evidence that Hardy possessed the firearm or the marijuana. The government presented no fingerprint or DNA evidence and no eyewitness testimony placing Hardy in possession of the marijuana or the firearm. Although Hardy's phone was seized, there was no evidence regarding its contents, texts or calls which tied Hardy to drug dealing. The government's only evidence was Hardy's statements about the drugs and the firearm. Without Hardy's statements, the government had no direct or circumstantial evidence that Hardy possessed marijuana with the intent to distribute or that he possessed the firearm.

The district court should have been given the jury the confession instruction so they

understood that they were to give Hardy's statements such weight that it felt the statements deserved. The failure of the district court to give the jury instruction seriously affected the fairness, integrity or public reputation of the judicial proceeding.

CONCLUSION

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

Respectfully submitted,
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