RECORD NO. _____

IN THE
Supreme Court of the United States

CHIKOSI LEGINS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4390

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CHIKOSI LEGINS,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia at Richmond. David J. Novak, District Judge. (3:19-cr-00104-DJN-1)

Argued: September 24, 2021 Decided: May 11, 2022

Before DIAZ and RICHARDSON, Circuit Judges, and FLOYD, Senior Circuit Judge.

Affirmed by published opinion. Judge Richardson wrote the opinion, in which Judge Diaz and Senior Judge Floyd joined.

ARGUED: Charles A. Gavin, CAWTHORN, DESKEVICH & GAVIN, P.C., Richmond, Virginia, for Appellant. Christopher Chen-Hsin Wang, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Gregory B. Friel, Deputy Assistant Attorney General, Tovah R. Calderon, Appellate Section, Civil Rights Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

RICHARDSON, Circuit Judge:

Former federal prison guard Chikosi Legins was indicted for sexually assaulting a prisoner twice and then lying to law enforcement about it. A jury convicted Legins only of making a false statement to law enforcement while acquitting him of the more substantial sex-crime charges. Following that verdict, the district court made two decisions that boosted Legins's sentence. First, it imposed an enhanced statutory maximum that was neither charged nor submitted to the jury. Second, it varied upward to impose the sentence Legins would have faced if he had been convicted of sexually abusing the prisoner.

On appeal, Legins challenges his false-statements conviction. We reject that challenge. Sufficient evidence supported that conviction, and any arguable inconsistency with the jury's acquittal on other counts does not invalidate the false-statement conviction. Legins next argues that the judge improperly imposed an enhanced statutory maximum penalty based on a judicial finding not in the indictment or found by the jury. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). We agree but are constrained to find the error harmless. *See Washington v. Recuenco*, 548 U.S. 212, 219–20 (2006); *Neder v. United States*, 527 U.S. 1, 4 (1999). Finally, we conclude that the court did not impose an unreasonable sentence.

I. Background

A. Alleged Sexual Assaults

In May 2018, B.L., then a prisoner at Petersburg Federal Correctional Institution, was hanging flyers around the prison to inform inmates of upcoming events. Legins, then a prison guard, escorted B.L. as he travelled from unit to unit to distribute the flyers. At

6:10 PM, a surveillance video shows the two men entering a camera-free staff corridor, along which was a similarly camera-free administrative office. At 6:15 PM, the video shows them emerging from the other side of the corridor. They offer wildly different accounts of the intervening 5 minutes.

That evening, B.L. reported to prison lieutenant Steven Arrant that he had been raped. After medical evaluation, B.L. prepared an affidavit describing his assault during those 5 minutes. According to B.L., Legins forced him to perform oral sex on him, and then anally raped him. Legins then ejaculated in his own hand and instructed B.L. to clean up.

And according to B.L., this was not the first time Legins sexually assaulted him. Two months earlier, Legins was similarly escorting B.L. as B.L. hung flyers. While in an elevator alone, Legins allegedly pushed B.L. to his knees and instructed B.L. to perform oral sex on him, and B.L. did so. B.L. did not report this incident until after the May assault. He had, however, placed the sweatshirt he wore at the time, on which Legins had allegedly ejaculated, into a plastic bag.[1]

After completing his affidavit describing the assault, B.L. was taken to a local hospital, where a rape kit test was performed. The results were mixed. No physical indicia of forcible rape were found. But experts for both the prosecution and defense agreed that physical injuries are often not found. The exam did reveal toilet paper on B.L.'s anus, which the defense expert claimed would be unusual if the assault occurred as B.L.

[1] According to B.L., there were also prior incidents of sexual harassment in which Legins masturbated in his presence.

described. But Legins's DNA was found on a swab of B.L.'s anus, on B.L.'s jock strap, and on the sweatshirt B.L. kept from the March assault.

As all of this was going on, Legins began acting suspiciously. Before B.L. was taken to the hospital, Legins called the medical bay seeking medicine (which he had never done and was not authorized to do) and made repeated calls to both the medical bay and the lieutenant's office seeking B.L.'s whereabouts (despite having no official reason to do so). When B.L. was leaving the medical bay, the escorting officer heard someone he believed to be Legins shout "You've got to be kidding me!" A few days later, Legins asked a fellow guard to write a statement saying that Legins was only alone with B.L. for a minute, but the guard refused because he had no personal knowledge of the events of that day.

Legins tells a very different story of what happened during those 5 minutes in May. In June 2018, he was interviewed by the FBI and the Office of Inspector General, placed under oath, and informed that false statements could be prosecuted under 18 U.S.C. § 1001. In the interview, Legins acknowledged taking B.L. into the secretary's office—which was unusual and against protocol—but denied any sexual activity. He claimed that he engaged in "just conversation" with B.L. while he unsuccessfully tried to log onto the computer to print documents.[2] Legins also claimed that he has never had any sexual contact with an inmate at Petersburg. When asked how he would explain the presence of his DNA were it

[2] Petersburg's IT officer testified at trial that based on the prison's data logs, no one tried to access that computer during the time of the May incident.

to be found, Legins recalled that he had masturbated in the restroom located next to the secretary's office the day before the alleged sexual assault. Following the interview, Legins began repeating the masturbation story to his colleagues, adding a new detail: He had seen B.L. and another inmate unattended in that bathroom afterward, but did not report it even though they were in a restricted, guards-only area.

B. District Court Proceedings

Legins was charged with sexual abuse of a ward[3] for the March incident. For the May incident, he was also charged with sexual abuse of a ward, aggravated sexual abuse,[4] and deprivation of civil rights.[5] In a final count, Legins was charged with making false statements[6] during his interview. The language of this false-statement count—the focus of this appeal—is as follows:

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[3] 18 U.S.C. § 2243(b) ("Whoever . . . knowingly engages in a sexual act with another person who is— (1) in official detention; and (2) under the custodial, supervisory, or disciplinary authority of the person so engaging; or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.").

[4] 18 U.S.C. § 2241(a) ("Whoever . . . knowingly causes another person to engage in a sexual act—(1) by using force against that other person; or (2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping; or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.").

[5] 18 U.S.C. § 242 ("Whoever . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined under this title or imprisoned not more than one year, or both."). The indictment alleged that Legins's conduct constituted "cruel and unusual punishment." J.A. 26.

[6] 18 U.S.C. § 1001(a) ("[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . (2) makes any materially false, fictitious, or fraudulent statement or representation . . . shall be fined under this title[and] imprisoned not more than 5 years . . . . (Continued)

> On or about June 5, 2018, in the Eastern District of Virginia, the defendant, CHIKOSI LEGINS, knowingly and willfully made false, fictitious, and fraudulent statements and representations to Special Agents of the Federal Bureau of Investigation (FBI) and the Department of Justice (DOJ) Office of the Inspector General as to material facts in relation [to] a matter within the jurisdiction of the FBI and DOJ, agencies of the United States. Specifically, the defendant, CHIKOSI LEGINS: (1) falsely denied that he engaged in a sexual act with any inmate at any time at Federal Correctional Institution, Petersburg; and (2) falsely stated that on May 10, 2018, he attempted to use a computer and printer while he was engaged in "just conversation" with inmate B.L. when they were alone in an unattended office with no surveillance cameras. Those statements and representations by CHIKOSI LEGINS were false, because as CHIKOSI LEGINS then well knew, he had engaged in a sexual act with an inmate at Federal Correctional Institution, Petersburg; and on May 10, 2018, the defendant used an unattended office with no surveillance cameras to engage in a sexual act with B.L.

During his arraignment, the government stated that the maximum sentence on the false-statement charge was 5 years. Legins pleaded not guilty and went to trial by jury. At trial, the jury was presented with a verdict form that asked whether Legins was guilty "as charged in [the false-statement count] of the Indictment," and asked it to note "which—or both—of [the two alleged false statements] supports [its] guilty verdict." J.A. 820.

The jury convicted Legins on the false-statement count. In finding him guilty of that count, the jury found that both statements presented in the Indictment supported the verdict—that is, both lying about "engag[ing] in a sexual act with any inmate" and lying about using a computer and printer while "engaged in 'just conversation'" with B.L. in the office. J.A. 820. But the jury acquitted Legins on all other counts, even though they involved the commission of the sexual acts that the jury found Legins lied about.

If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.").

After denying Legins's motion for acquittal notwithstanding the verdict, the district court observed that the false-statement count justified an enhanced 8-year maximum sentence—not the standard 5-year maximum—because Legins's statement involved a sexual crime that is an "offense under Chapter 109A" of the criminal code. Legins objected to the increased statutory maximum sentence under *Apprendi*[7] and argued that the "misstatement" of the 5-year maximum sentence during arraignment also prejudiced him. The court disagreed and applied the 8-year statutory maximum. The increased statutory maximum also increased Legins's guideline offense level by 4 levels to 18. *See* U.S.S.G. §2J1.2(b)(1)(A) ("If the (i) defendant was convicted under 18 U.S.C. § 1001; and (ii) statutory maximum term of eight years' imprisonment applies because the matter relates to . . . chapter[] 109A . . . increase by 4 levels."). Having no criminal history, Legins then faced a guidelines range of 27–33 months. *See* U.S.S.G. Ch. 5 Pt. A.[8]

At sentencing, the court adopted the 27–33-month range and granted the prosecution's requested upward variance. The court found that, while the guidelines accounted for the underlying May sexual abuse,[9] they did not reflect that Legins had abused

[7] In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court held that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.* at 476 (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)).

[8] If the 5-year statutory maximum had applied, the guidelines range would have been 15–21 months. U.S.S.G. Ch. 5 Pt. A.

[9] Section 2J1.2(c) provides that a defendant whose lies obstruct a criminal investigation is to be sentenced under § 2X3.1 as an accessory after the fact if doing so results in a higher sentence. The proper range under § 2X3.1 varies based on the severity of the underlying crime. The court found that, based on Legins's conduct in May, the range under § 2X3.1 would be lower than that provided in § 2J1.2, and so it did not apply.

B.L. more than once. The guidelines range did not reflect the "related conduct from the March offense—namely abusive sexual contact in violation of 18 U.S.C. § 2244(a)(4)." J.A. 1057.[10] Thus, as a "starting point" for determining the appropriate size of the variance, the court calculated the guideline range for this sexual offense: 15–21 months. *Id.* The Court then added this range to that for the false-statement count, leading to a total of 42–54 months. The court ultimately varied upwards to 54 months "[t]o account for" the March offense; the extent of Legins's "obstruction"—i.e., his calls to the medical bay and lieutenant's office during the initial investigation; his "premeditation"—i.e., concocting alternative explanations for the presence of his DNA; and a history of similar conduct—i.e., prior reprimands for making lewd comments to female wards and inappropriately entering female-only areas. J.A. 1058.

The court found that a 54-month sentence was appropriate given the "seriousness of the Defendant's conduct" and the need to afford "adequate deterrence to Defendant and other correctional officers," while still accounting for Legins's positive role in his family, country, and religious community. J.A. 1058; *see* 18 U.S.C. § 3553(a). This appeal followed. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

[10] While the jury acquitted Legins of sexual misconduct, the court could still find at sentencing that misconduct occurred. This stems from the different standards of proof required at those two stages. The jury must acquit the defendant unless his guilt is established beyond a reasonable doubt. *See, e.g.*, *In re Winship*, 397 U.S. 358, 361–62 (1970). But at sentencing, the court considers all aggravating and mitigating information based on the preponderance of the evidence—i.e., that it probably happened. *See United States v. Grubbs*, 585 F.3d 793, 798–99 (4th Cir. 2009).

II. Discussion

We consider in turn Legins's arguments that: (1) his conviction is not supported by sufficient evidence; (2) his sentence was for a crime of which he was neither indicted nor convicted; and (3) his sentence is otherwise unreasonable.

A. The Evidence Supports the Conviction

Legins first argues that his false-statement conviction was not supported by sufficient evidence. A § 1001 false-statement conviction requires (1) a false statement in a matter involving a government agency, (2) made knowingly or willfully, that is (3) material to the matter within the agency's jurisdiction. *United States v. Hamilton*, 699 F.3d 356, 362 (4th Cir. 2012). Legins's sufficiency challenge focuses on the first element, a false statement.

The government chose to go beyond reciting the three elements in the indictment. *See Hamling v. United States*, 418 U.S. 87, 117 (1974) (stating that an indictment is sufficient if it (1) "contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend," and (2) "enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense"). The indictment includes two allegedly false statements and gives the reasons why each statement was false. As a result, Legins argues that the government could only convict him if they proved the statements were false *for the reasons* given in the indictment.[11] So under his theory, the

[11] Legins argues that proving that his statements were false for a reason other than that alleged in the indictment would constitute an impermissible constructive amendment of the indictment. *Cf. Stirone v. United States*, 361 U.S. 212, 218–19 (1960). A (Continued)

government had to prove that (1) Legins's denial of having "engaged in a sexual act with any inmate at any time at Federal Correctional Institution, Petersburg" was false because "he had engaged in a sexual act with an inmate at Federal Correctional Institution, Petersburg"; or (2) Legins's statement that "on May 10, 2018, he attempted to use a computer and printer while he was engaged in 'just conversation' with inmate B.L. when they were alone in an unattended office with no surveillance cameras" was false because "on May 10, 2018, the defendant used an unattended office with no surveillance cameras to engage in a sexual act with B.L."[12] Legins argues there was insufficient evidence that he had performed a sexual act on an inmate, so a reasonable jury could not have found that his statements were false for the reasons alleged in the indictment.

"A defendant challenging the sufficiency of the evidence to support his conviction bears a heavy burden." *United States v. Beidler*, 110 F.3d 1064, 1067 (4th Cir. 1997) (cleaned up). That is because it is the jury's role to weigh conflicting evidence and find the truth; once that finding is made, we will not lightly disturb it. So "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a

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constructive amendment occurs when the government or court broadens the possible bases for conviction beyond those presented to the grand jury. *United States v. Cannady*, 924 F.3d 94, 99 (4th Cir. 2019). As explained below, sufficient evidence supports finding that Legins committed a sexual act on an inmate and thus that his statements were indeed false for the reasons alleged in the indictment. We thus need not decide whether his theory—that the government was limited by those reasons for falsity alleged in the indictment—is correct as a legal matter.

[12] Although not express, the structure of the indictment suggests that the two reasons for falsity are each paired with one of Legins's two allegedly false statements.

reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Viewing the evidence in the light most favorable to the prosecution requires drawing all reasonable inferences in favor of the government and assuming the jury resolved any conflicting evidence in the prosecution's favor. *United States v. Jeffers*, 570 F.3d 557, 565 (4th Cir. 2009). Even an uncorroborated account of a single witness may constitute sufficient evidence. *United States v. Clark*, 541 F.2d 1016, 1017–18 (4th Cir. 1976) (per curiam); *United States v. Shipp*, 409 F.2d 33, 35–36 (4th Cir. 1969).[13]

Sufficient evidence supported finding that both of Legins's statements were false for the reason charged—that is, Legins had performed a sexual act on an inmate.[14] B.L. testified under oath that Legins had performed a sexual act on him. Just this account, if found credible by the jury (and we must assume it was), may suffice. *See Shipp*, 409 F.2d at 35–36. But the account is also significantly corroborated. An anal swab performed after

[13] While a single witness's uncorroborated account usually suffices, there are exceptions. Most notably, there is a "deeply rooted" common-law rule that a person cannot be convicted of perjury "solely upon the evidence of a single witness." *Weiler v. United States*, 323 U.S. 606, 608–09 (1945). Although § 1001 bears some similarity to perjury (18 U.S.C. § 1621) as they both penalize material false statements, the Supreme Court has made clear that the two-witness rule derives from the "special considerations" granted to "witnesses compelled to testify in trials at law." *Weiler*, 323 U.S. at 609. Section 1001 does not apply to witness testimony. *Hubbard v. United States*, 514 U.S. 695, 714–15 (1995). Accordingly, as our sister circuits have largely held, perjury's special two-witness rule does not apply to § 1001. *See Fisher v. United States*, 231 F.2d 99, 105–06 (9th Cir. 1956); *United States v. Killian*, 246 F.2d 77, 82 (7th Cir. 1957).

[14] The jury could convict Legins of making a false statement if either of Legins's statements were false, though they ultimately concluded that both were. *See United States v. Dennis*, 19 F.4th 656, 671 (4th Cir. 2021) ("[I]ndictments charge in the conjunctive, but proof in the disjunctive is enough to convict"). Similarly, we may affirm if either of the jury's decisions are supported by sufficient evidence. *See Griffin v. United States*, 502 U.S. 46, 57 (1991). We conclude that both are.

the May incident revealed Legins's DNA, which was also found on B.L.'s clothing (including his jock strap). And Legins's testimony to explain the events was contradicted by the prison's IT manager, who confirmed that Legins did not try to use the computer during that time. Furthermore, the defendant's request for a colleague to falsely attest to personal knowledge that Legins was only with B.L. for a minute also shows he was conscious of his wrongdoing. *See Wilson v. United States*, 162 U.S. 613, 621 (1896) ("The destruction, suppression, or fabrication of evidence undoubtedly gives rise to a presumption of guilt, to be dealt with by the jury."); *United States v. McDougald*, 650 F.2d 532, 533 (4th Cir. 1981). So a rational juror could have concluded beyond a reasonable doubt that Legins performed a sexual act on B.L., making both statements false for the reasons alleged.

Legins responds by pointing to a laundry list of potential alternative sources of the DNA found on B.L.'s anus and clothing and to alleged inconsistencies between B.L.'s testimony and other evidence. Neither helps his cause. While the DNA found on B.L.'s anus and clothing *might* not have come through sexual contact, it is a reasonable inference that it did, given the location at which some of the DNA was found (i.e., B.L.'s anus) and B.L.'s testimony about its source. Legins's alleged inconsistencies fare no better. B.L. testified the rape "lasted like five minutes" after which B.L. cleaned himself up. This could not be, Legins argues, because a 5-minute rape would not have left enough time to clean up during the 5 minutes and 15 seconds the two were alone. But even if B.L.'s testimony could be read to overstate the length of the rape, it does little to undermine his testimony. For someone being coerced into unwanted sexual acts, 1 minute may feel like 5. The same

goes for the Legins's arguments about the lack of physical injury and the presence of toilet paper. The defense's expert only contended that she would not "anticipate" finding a lack of injuries and the presence of toilet paper if the event had occurred as B.L. described, not that B.L.'s description was *impossible*, and even then the jury was not required to believe her. We do not ask whether Legins's position is supported by some evidence, or even most evidence. We may only consider whether, viewing all the evidence in the light least favorable to Legins, *any* rational juror could have found it substantial enough to convict him. And here, even with some contradictory evidence, there was sufficient evidence that Legins committed a sex act against B.L.

Legins counters that the evidence of any sexual act during the March and May incidents must have been unreliable because the jury acquitted Legins on the sexual-assault counts. Though framed as part of his sufficiency challenge, this is essentially an inconsistent-verdict argument—that the jury inconsistently concluded that Legins did not commit the charged sexual acts but did commit a sexual act for the false-statement count. We reject this contention for two reasons.

First, even if the verdict were internally inconsistent, it would not entitle Legins to relief. A defendant "cannot challenge his conviction merely because it is inconsistent with a jury's verdict of acquittal on another count." *United States v. Thomas*, 900 F.2d 37, 40 (4th Cir. 1990) (citing *United States v. Powell*, 469 U.S. 57, 83 (1984)); *accord United States v. Godel*, 361 F.2d 21, 24 (4th Cir. 1966) (upholding a § 1001 conviction despite an inconsistent acquittal on the underlying crime). As we have recognized, "an inconsistent verdict can result from mistake, compromise, or lenity, and a jury could just as likely err

in acquitting as convicting." *United States v. Louthian*, 756 F.3d 295, 305 (4th Cir. 2014). So a reviewing court's "assessment of the reason for the inconsistency would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake." *Powell*, 469 U.S. at 66. The latter is proscribed by the long-standing and near-absolute no-impeachment rule, which upholds the justice system's "strong interest in protecting the finality of jury verdicts, encouraging open deliberations in the jury room, and preventing the harassment of jurors by litigants seeking to overturn the verdict." *Richardson v. Kornegay*, 3 F.4th 687, 702 (4th Cir. 2021). That leaves us with nothing but "pure speculation" into the jury's deliberations. We decline, as we have many times before, to engage in such speculation. *See Thomas*, 900 F.2d at 40; *Louthian*, 756 F.3d at 305–06.

Second, even if inconsistency would entitle Legins to relief, the jury's verdict is not necessarily inconsistent. The sexual-abuse counts each required the jury, as an element of the offense, to determine whether Legins committed a "sexual act," and the court instructed them on the precise legal definition of "sexual act" for each charge: either penetration or contact between a mouth and a penis or anus.[15] But during its discussion of the false-statement count, the court did not instruct the jury on the definition of "sexual act." Nor did it need to: "Sexual act" was used in that count descriptively, as part of the indictment's

[15] For the counts of deprivation of rights under color of law, 18 U.S.C. § 242, and aggravated sexual abuse, 18 U.S.C. § 2241(a), "sexual act" meant only penetrative sex or contact between the mouth and penis. For the two counts of sexual abuse of a ward, 18 U.S.C. § 2243(b), "sexual act" meant penetrative sex, digital penetration, contact between the mouth and penis, or contact between the mouth and anus. So the sexual-abuse counts could not be predicated solely on masturbation.

factual narrative. It was not an element of the offense, so it did not carry any particular legal definition.

In diligently following the jury instructions, the jury could have correctly concluded that "sexual act" as used in false-statement count carried its ordinary, colloquial meaning. That may include acts, such as masturbation, that are excluded under the legal definitions of "sexual act" applicable in the sexual-abuse counts. During his closing argument, *defense counsel* proposed that the jury conclude that B.L. had voluntarily masturbated Legins—which would somewhat explain the presence of Legins's DNA on B.L.'s body and clothing. 4 Trial Transcript at 153:7–158:10, *United States v. Legins*, No. 3:19-cr-00104-DJN-1 (E.D. Va. Feb. 11, 2020), ECF No. 138. So if the jury found—as defense counsel asked them to—that B.L. had masturbated Legins, they could have properly convicted Legins on the false-statement count, despite acquitting him on sexual-abuse counts.

Because we find sufficient evidence to support Legins's conviction, and because the jury's verdict was not necessarily inconsistent—and would not entitle Legins to relief even if it were—we affirm Legins's conviction.

B. The District Court Committed a Harmless *Apprendi* Error

Legins next challenges the district court's conclusion that he was subject to a statutorily enhanced maximum sentence for his false-statement conviction. Section 1001 sets the statutory maximum sentence at "5 years." But if "the matter relates to an offense under chapter 109A . . . then the term of imprisonment imposed under this section shall be not more than 8 years." 18 U.S.C. § 1001(a). Chapter 109A includes aggravated sexual abuse and sexual abuse of a ward, which Legins was being investigated for when he made

the false statements. So the government could have charged and convicted Legins of the aggravated § 1001 offense carrying the 8-year maximum—a point that Legins himself does not appear to contest. *See* Def.'s Position on Statutory Maximum, *United States v. Legins*, No. 3:19-cr-00104-DJN-1 (E.D. Va. Mar. 12, 2020), ECF No. 144 ("Hypothetically, it would be disingenuous of defense counsel to argue that the false statements which are before the court do not relate to offenses under Chapter 109(A)."). But though he could have been charged, he was not. And absent a charge and conviction, Legins was not subject to the 8-year statutory maximum sentence. Even so, we are constrained to find the district court's erroneous use of this enhanced statutory maximum harmless.

1. Existence of *Apprendi* Error

The Fifth and Sixth Amendments guarantee that, in federal courts, "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury," and that guilt must be determined by "an impartial jury." U.S. Const. amends. V, VI. This significant safeguard of individual liberty ensures that the government cannot take away that liberty without the consent of two juries. It is thus necessary that all elements of an offense be included in the grand jury's indictment and submitted to the petit jury for its guilt determination. "[A] fact is by definition an element of the offense . . . if it increases the punishment above what is otherwise legally prescribed." *United States v. Alleyne*, 570 U.S. 99, 107–08 (2013). Thus, the Constitution requires that any fact that increases the statutory maximum, such as the increase in § 1001 from a 5- to

an 8-year maximum, be alleged in the indictment and found by a jury, just like all other offense elements. *Apprendi*, 530 U.S. at 473–74.[16]

The indictment does not allege that the matter within the FBI and DOJ's jurisdiction "relate[d] to" a Chapter 109A sexual-abuse offense. And the jury's verdict mirrors the indictment. Even so, the district court found the relation to a Chapter 109A sexual abuse offense matter was implied by other facts alleged. The indictment charged that Legins "[f]alsely den[ied] that he engaged in a sexual act with any inmate at any time at Federal Correctional Institute, Petersburg." J.A. 28. That statement was false, according to the indictment and the jury's guilty verdict, because Legins had engaged in a sexual act with an inmate. And since sexual acts with an inmate are prohibited by Chapter 109A, the district court applied the enhanced statutory maximum.

But there is a subtle yet significant mismatch between the facts alleged and found by the jury and the aggravating factor in § 1001. The jury found that Legins made statements that were false because he committed a sexual act with an inmate. Section 1001's aggravating factor depends on whether the "matter" within the FBI's jurisdiction when the statements were made "relate[d] to" a Chapter 109A offense. Indeed, the statements need not be false denials of a Chapter 109A charge nor do the statements need to primarily concern a Chapter 109A offense. Put another way, the aggravating factor in

[16] It is inconsequential that whether a matter "relates to an offense under Chapter 109A" contains an inherent legal conclusion. Because it increases the statutory maximum sentence, it is an element of the offense. *See Alleyne*, 570 U.S. at 107–08. And all elements, even those involving a mixed question of law and fact, must be determined by the jury. *See United States v. Gaudin*, 515 U.S. 506, 512 (1995) (holding that a jury must decide whether a false statement under § 1001 is "material").

§ 1001 depends not on a statement's *contents*, but rather the *context* in which it was made. The jury's finding turned on the conduct that rendered the statements false, while the aggravating factor depends on the nature of the investigation.

For example, imagine a situation in which a prison guard is being investigated for taking bribes from a particular prisoner in violation of 18 U.S.C. § 201. In actuality, the guard has also performed sexual acts with that prisoner. During the interview, the guard insists that he has never had a relationship with the prisoner, sexual or otherwise. The statement is a materially[17] false representation under § 1001(a)(2), which concerns an undiscovered Chapter 109A offense and is false because the guard has committed a Chapter 109A offense. But the "matter" within law enforcement's jurisdiction at the time, the bribery investigation, did not relate to a Chapter 109A offense, so an 8-year sentence would be inappropriate.

To be sure, these are not the facts of our case; the FBI informed Legins early in the interview that he was being investigated for sexual abuse. But that fact was never alleged in the indictment, never stipulated to by the defendant, and never found by the jury. So neither the indictment nor the jury verdict contained sufficient facts on which to try or convict Legins on an 8-year aggravated § 1001 offense.

[17] Materiality under § 1001 is a low bar. It merely requires that the statement have "a natural tendency to influence, or is capable influencing, the decision-making body to which it was addressed." *United States v. Hamilton*, 699 F.3d 356, 362 (4th Cir. 2012) (quoting *United States v. Littleton*, 76 F.3d 614, 618 (4th Cir. 1996)). So a false statement about sexual misconduct could be material to (i.e., capable of influencing) an investigation unrelated to sexual misconduct.

2. Harmless Error

Finding this constitutional error does not end our inquiry, however, because not all constitutional errors require automatic reversal; instead, "[m]ost constitutional errors can be harmless." *Neder v. United States*, 527 U.S. 1, 8 (1999) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 306 (1999)).[18] An error is harmless if it does not affect the defendant's "substantial rights." Fed. R. Crim. P. 52(a). For constitutional errors, the government

[18] The government did not expressly argue in its response brief that the *Apprendi* error was harmless, first raising it in response to questioning at oral argument. As a general matter, we do not consider issues raised for the first time at oral argument. *See United States v. Cornell*, 780 F.3d 616, 625 n.2 (4th Cir. 2015). We have not yet addressed "head on" whether the government's failure to argue harmless error in its briefing waives the application of the doctrine. *See United States v. Bizuela*, 962 F.3d 784, 798 n.10 (4th Cir. 2020). On one hand, "[o]ur case law is clear that 'parties cannot waive the proper standard of review by failing to argue it.'" *United States v. Venable*, 943 F.3d 187, 192 (4th Cir. 2019) (quoting *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 286 (4th Cir. 2018)). On the other, we have stated in dicta that harmless error review can be waived. *See United States v. Hall*, 858 F.3d 254, 280 n.8 (4th Cir. 2017). We need not resolve this tension here. Waiver is a discretionary doctrine, and we retain "inherent authority to consider and decide pertinent matters that otherwise may be ignored as abandoned or waived." *United States v. Holness*, 706 F.3d 579, 592 (4th Cir. 2013).

We elect to exercise that authority here, for three reasons. First, Legins's presentment of the *Apprendi* issue in his opening brief was far from clear. Rather than raise it as a distinct issue under its own heading, he included it briefly alongside the Due Process challenge based on comments made during arraignment. The Government then raised harmless error in response to the arraignment issue, but not the *Apprendi* issue. Resp. Br. of Appellee 31. Given the messiness of the briefing, we are inclined to give both parties some leeway; we have been generous in our construction of Legins's arguments, and it seems only fair to afford the government similar grace. Second, the harmless-error issue does not turn on complicated or unclear facts. *See Holness*, 706 F.3d at 592 (noting that looking past waiver is more appropriate where "the facts have been sufficiently developed to readily permit evaluation of an alternative legal theory"). Third, Legins argued in his opening brief that the *Apprendi* issue was not harmless. Op. Br. of Appellant 22–23. So this is not a case in which a party is blindsided by an eleventh-hour argument. *Cf. United States v. Ashford*, 718 F.3d 377, 380–81 (4th Cir. 2013). Legins recognized that harmless error was the applicable standard and took the opportunity to argue under it.

bears the heavy duty of proving "beyond a reasonable doubt that the error complained of did not contribute to the [result] obtained." *Neder*, 527 U.S. at 15 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

But before we can determine whether the error was harmless, we need to determine what exactly that error was. There are two plausible options. First, we may think of it as a trial error: The government failed to include the aggravating factor in its indictment and jury instructions—omitting an essential element of its case. Or we may think of it as a sentencing error: Legins was properly charged and convicted of a baseline § 1001 offense, but the court erroneously sentenced him as if he had been convicted of the aggravated § 1001 offense.

The choice between these two options dictates how we conduct harmless-error analysis. For trial errors—such as the omission of an element from the indictment and jury instructions—we ask whether the jury would have reached the same verdict had the element been included. *See Greer v. United States*, 141 S. Ct. 2090, 2100 (2021); *id.* at 2102 (Sotomayor, J., concurring in part) ("[A] constitutional [trial] error is harmless only if there is no reasonable doubt about whether it affected the jury's actual verdict in the actual trial."); *Neder*, 527 U.S. at 18. In *Neder*, for instance, the defendant was charged with tax fraud—making materially false statements on his tax return. 527 U.S. at 6–7. But the trial court's instructions to the jury omitted the necessary requirement that the misrepresentation be material. *Id.* at 6, 8. Without that element, Neder had not been convicted of any crime. Yet the Supreme Court affirmed Neder's conviction, holding that the constitutional error was harmless. *Id.* at 19–20. This was so, the Court held, because

no rational jury could have found that Neder's statements were immaterial given the "overwhelming" and "uncontroverted" evidence of materiality. *Id.* at 16–18. The Court focused on the trial error because without the omitted element there was no crime on which Neder could be sentenced. Thus, *Neder* made clear that omitting an element is a trial error when the conduct is not a crime without the missing element.

But courts struggled with whether the same held true when the missing element was perceived as a sentencing factor, which affects the statutory sentencing range. In such a case, the defendant would still be guilty of an offense without the omitted element, just one carrying a lower possible sentence. So we might characterize that sort of missing-element error as a "sentencing" error; the court erroneously sentenced the defendant based on the greater crime instead of the lesser crime of which he was convicted. In that case, the error would be harmless if "the result at sentencing would have been the same" without the error. *United States v. Montes-Flores*, 736 F.3d 357, 370 (4th Cir. 2013). In other words, had the defendant been sentenced based on the crime for which he was charged and convicted, would he have received the same sentence?

Our circuit adopted this sentencing-error approach in *United States v. Promise*, 255 F.3d 150, 160 (4th Cir. 2001) (en banc). In *Promise*, as here, the district court imposed a statutory sentence enhancement (for certain drug amounts) that was not in the indictment or jury verdict. *Id.* at 153. Because the defendant did not object below under *Apprendi* (which had not yet been decided), we reviewed for plain error. Like harmless error, plain-error review requires the court to assess whether the error affected the defendant's "substantial rights." *Compare* Fed. R. Crim. P. 52(a), *with* Fed. R. Crim. P. 52(b). To

decide whether the error affected Promise's substantial rights, we began, as we do here, by trying to define the nature of the error.

Chief Judge Wilkinson advocated for the trial-error approach: Although the government and court had failed to include the drug quantities in Promise's indictment and verdict form, the evidence of those drug amounts was overwhelming and uncontroverted. *Promise*, 255 F.3d at 166 (Wilkinson, C.J., concurring in part). So, Chief Judge Wilkinson concluded, the jury would have reached the same verdict even if the missing sentencing factor had been included in the indictment and jury instructions, and there was accordingly no error affecting Promise's substantial rights. *Id.*

But his view did not convince the court, which concluded that "the failure to charge a specific threshold drug quantity in the indictment or to instruct the jury regarding threshold drug quantity was not the error committed by the district court . . . . What was not valid was the sentence imposed, which exceeded the applicable maximum for the facts charged and proven." *Id.* at 160 n.8 (majority opinion). So the court implicitly rejected *Neder*'s trial-focused harmless-error standard, instead looking to whether the error affected Promise's sentence. And because Promise received a higher sentence than he would have had the *Apprendi* error not occurred, the court found that his substantial rights *were* affected. *Id.* at 160.

In the years that followed, our circuit applied *Promise*'s sentencing conception of *Apprendi* errors in harmless-error analyses. *See United States v. Stokes*, 261 F.3d 496, 501 (4th Cir. 2001); *United States v. Chase*, 296 F.3d 247, 250 (4th Cir. 2002). We did so most expressly in *United States v. Mackins*, 315 F.3d 399 (4th Cir. 2003). As in *Promise*, the

three defendants in *Mackins* were convicted of drug crimes, but neither the indictment nor jury form indicated the quantities of drugs involved. *Id.* at 404–05. When the judge determined those quantities at sentencing to increase the defendants' sentences, one of the defendants objected. *Id.* at 407. While conceding that an *Apprendi* error had occurred, the Government argued that it was harmless because the evidence of the drug amounts was "'overwhelming' and 'uncontroverted.'" *Id.* at 409. The court rejected that argument. Relying on *Promise* and cases applying it, the court held that the proper harmless-error inquiry for an "*Apprendi* sentencing error" is whether "it . . . result[ed] in a sentence greater than that which would otherwise have been imposed." *Id.* at 409 (quoting *Chase*, 296 F.3d at 250).

But three years later in *Washington v. Recuenco*, 548 U.S. 212 (2006), the Supreme Court directed that we are to apply the same harmless-error standard from *Neder* to cases involving omitted sentencing factors. Arturo Recuenco threatened his wife with a handgun, for which he was charged in state court with assault with a deadly weapon. *Id.* at 214. The jury found Recuenco guilty of assault and specified that the assault had been committed with a "deadly weapon." But at sentencing, rather than impose a 1-year mandatory sentencing enhancement for assaults involving a "deadly weapon," the judge imposed a 3-year mandatory enhancement for assaults involving a "firearm." *Id.* at 215. The Washington Supreme Court held that this was an *Apprendi* error because the defendant was sentenced on an offense of assault with a firearm even though the firearm element was neither charged nor found by the jury. *Id.* at 216. The state supreme court then held that

this error was "structural"—i.e., can never be "harmless"—and accordingly vacated Recuenco's sentence. *Id.*

The United States Supreme Court reversed, holding that *Apprendi* errors, like most constitutional errors, can be harmless. *Id.* at 220. That top-line holding does not, of course, resolve *how* to perform the harmless-error analysis. But the Court's rationale makes that answer clear. The Court began by describing *Neder*, in which, to reiterate, the Court held that the omission of an element of the offense may be harmless if it is "uncontested and supported by overwhelming evidence." *Neder*, 527 U.S. at 17. *Recuenco* then explained:

> The State and the United States urge that this case is indistinguishable from *Neder*. We agree. Our decision in *Apprendi* makes clear that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding."

548 U.S. at 220 (quoting *Apprendi*, 530 U.S. at 478).

Recuenco argued that *Neder*'s trial-error approach did not apply because he was charged and convicted of one distinct crime (assault with a deadly weapon) but sentenced for another (assault with a firearm); this amounted, he argued, to "a directed verdict of guilt on an offense . . . greater than the one for which the jury convicted him." *Id.* at 221. Justice Ginsburg, writing in dissent, made a similar argument. Unlike in *Neder*, "[n]o error marred the case presented at trial. The prosecutor charged, and the jury found Recuenco guilty of, a complete and clearly delineated offense: 'assault in the second degree, being armed with a deadly weapon.'" *Id.* at 225 (Ginsburg, J., dissenting). In Justice Ginsburg's view, the error occurred post-trial at sentencing. The judge's decision to tack on the uncharged,

unsubmitted firearms enhancement, she insisted, displaced "the jury's entirely complete verdict with, in essence, a conviction on an uncharged greater offense." *Id.* at 228.

But the Court was unpersuaded. Under *Apprendi*, the Court noted, "elements and sentencing factors must be treated the same for Sixth Amendment purposes." *Id.* at 220 (majority opinion). Both Recuenco and Neder were sentenced for a crime which they were almost, but not exactly, charged and found guilty. For Neder, the missing element was materiality. *Id.* at 221. For Recuenco, it was use of a firearm. That Recuenco's crime, without the missing element, was itself a different crime did not, in the Court's view, make any difference. *Id.* Holding otherwise, the Court noted, would produce bizarre results. If Washington, for instance, only criminalized "assault in the second degree while armed with a firearm," then the omission of the "with a firearm" element could be harmless error under the standard in *Neder*. *Id.* at 221–22. To hold that *Neder* applied in that case, but not in Recuenco's would, in the Court's view, defy logic. *Id.* at 222.

The takeaway from *Recuenco* is clear: The Government's failure to include a sentence-enhancing factor in the indictment and jury charge should be treated exactly like its failure to include any other element of an offense. And the proper way to perform harmless-error analysis in both cases is to ask whether proof of the missing element is "overwhelming" and "uncontroverted." *Neder*, 527 U.S. at 17–18. In the years following *Recuenco*, that is how we, along with most of our sister circuits, have analyzed preserved *Apprendi* errors. *United States v. Catone*, 769 F.3d 866, 874 (4th Cir. 2014); *accord United States v. Harakaly*, 734 F.3d 88, 95–97 (1st Cir. 2013); *United States v. Confredo*, 528 F.3d 143, 156 (2d Cir. 2008); *Tarver v. Banks*, 541 F. App'x 434, 438–39 (5th Cir. 2013); *United*

States v. Kuehne, 547 F.3d 667, 681 n.4 (6th Cir. 2008); *United States v. Hollingsworth*, 495 F.3d 795, 806 (7th Cir. 2007); *United States v. Guerrero-Jasso*, 752 F.3d 1186, 1193 (9th Cir. 2014); *United States v. King*, 751 F.3d 1268, 1279–80 (11th Cir. 2014); *United States v. Lopesierra-Gutierrez*, 708 F.3d 193, 208 (D.C. Cir. 2013); *contra United States v. Lewis*, 802 F.3d 449, 456 (3d Cir. 2015) (en banc) (treating *Apprendi* error as a sentencing error and declining to apply *Neder* harmless-error test).

In *Catone*, the defendant was charged and convicted of making false statements relating to federal benefits, violating 18 U.S.C. § 1920. 769 F.3d at 869. Under that statute, if the "benefits falsely obtained" exceed $1,000, the defendant is guilty of a felony punishable by up to a 5-year prison term; otherwise, they are guilty only of a misdemeanor punishable by no more than 1 year of imprisonment. 18 U.S.C. § 1920. Catone argued that, because the jury never found the amount of money he fraudulently obtained, his sixteen-month felony sentence violated *Apprendi*; the government countered that any such error was harmless. *Catone*, 769 F.3d at 872–73. We found *Neder*'s trial-error test applied: An "*Apprendi* error is harmless 'where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error.'" *Id.* at 874 (quoting *Neder*, 527 U.S. at 17).[19]

[19] In *Catone*, we ultimately concluded that the *Apprendi* error was not harmless because there was not "overwhelming evidence" that Catone fraudulently acquired more than $1,000 in benefits. *Id.* at 875.

We therefore apply the harmless-error analysis supplied by *Neder* to the *Apprendi* error before us. To do so, we ask whether there is overwhelming and uncontroverted evidence that the "matter" within law enforcement's jurisdiction when they questioned Legins "related" to a Chapter 109A offense. Chapter 109A is entitled "Sexual Abuse," and includes 18 U.S.C. § 2243, Sexual Abuse of a Minor or Ward, one of the crimes for which Legins was later charged. That section prohibits any sexual act with a person who is in official detention under the defendant's custodial authority. 18 U.S.C. § 2243(b). Early in the June 5 interview, the investigators told Legins the following: "Mr. Legins, we are here today to interview you as a subject to answer questions in an official joint OIG-FBI investigation regarding sexual abuse of an inmate at FCI Petersburg." Digitally Recorded Sworn Statement of Chikosi Legins 3–4, *United States v. Legins*, No. 3:19-cr-00104-DJN-1 (E.D. Va. July 6, 2020), ECF No. 174, Attach. 1. They then reiterated that the investigation "pertains to sexual abuse." *Id.* There is no dispute that the investigators made these statements or that they are true.[20] So the statutory sentencing enhancement is supported by overwhelming evidence.

It is also uncontroverted: During his argument in the district court as to why the sentence enhancement should not apply, Legins conceded that "it would be disingenuous of defense counsel to argue that the false statements which are before the court do not relate to offenses under Chapter 109(A)" because the alleged false statements "were in

[20] The transcript of the interview was not admitted into evidence, though it was used as an aid for the jury as they listened to the audio recording of the interview, which was admitted by stipulation of the parties.

connection with Counts One through Four, three of which are in Chapter 109(A)." Def.'s Position on Statutory Maximum at 2, *United States v. Legins*, No. 3:19-cr-00104-DJN-1 (E.D. Va. Mar. 12, 2020), ECF No. 144. Because the elements of an 8-year aggravated § 1001 offense are supported by overwhelming and uncontroverted evidence, we conclude that the district court's *Apprendi* error is harmless beyond a reasonable doubt.

We acknowledge that there is something deeply unsatisfying about this result. As Justice Scalia observed in his partial dissent in *Neder*, it is bizarre that a deprivation of the jury right, which reflects a distrust of judges to adjudicate criminal guilt, can be set aside as harmless when we judges find the result sufficiently clear. 527 U.S. at 32 (Scalia, J., dissenting in part). It creates an inescapable irony, "in which the remedy for a constitutional violation by a trial judge (making the determination of criminal guilt reserved to the jury) is a repetition of the same constitutional violation by the appellate court (making the determination of guilt reserved to the jury)." *Id.* And, as Justice Ginsburg noted in her *Recuenco* dissent, it is particularly unsettling in this context, when the defendant, "charged with one crime . . . was convicted of another . . . *sans* charge, jury instruction, or jury verdict." 548 U.S. at 229 (Ginsburg, J., dissenting).

Such a practice "diminishes the jury's historic capacity 'to prevent the punishment from getting too far out of line with the crime.'" *Id.* (quoting *United States v. Mayberry*, 274 F.2d 899, 902 (2d Cir. 1960) (Friendly, J.)). But these arguments did not prevail and are not the law. Instead, we are bound by the majority opinions that rejected them, opinions holding that (1) omission of an element is harmless if evidence of the element is

overwhelming and uncontroverted and (2) that the rule applies to all elements, including sentencing factors. And that resolves this case.

We also take some solace in the fact that this rule, properly applied, is a narrow one. It demands the government prove, beyond a reasonable doubt, that the jury would have convicted—also beyond a reasonable doubt—had the aggravating factor been submitted to them. This requires considering both record evidence and possible exculpatory evidence the defendant might have submitted if the crime had been properly charged. And if there is any reasonable possibility that a juror might have chosen not to convict, then the error was not harmless. Here, the aggravating factor is conclusively shown by evidence of unquestioned authenticity, and Legins has conceded—even after learning of the *Apprendi* issue—that it was, as a factual matter, satisfied. So the evidence is truly "overwhelming" and "uncontroverted," and Legins's *Apprendi* challenge is purely formalistic and procedural. We reaffirm that an *Apprendi* error is harmless under these narrow circumstances.[21]

[21] Though not entirely clear, Legins also seems to suggest that the government's statement during arraignment that he was only subject to a 5-year maximum on the false-statement count constitutes a separate reversible error. *See* Op. Br. of Appellant 20. And Rule 11(b)(1)(H) requires that a defendant be informed of the maximum possible sentence before entering a guilty or *nolo contedere* plea, but Legins did not enter such a plea. And even if that rule applied here, the error would be harmless because Legins's sentence is less than the 5-year maximum he was notified of during arraignment. *See Bell v. United States*, 521 F.2d 713, 715 (4th Cir. 1975).

C. The Sentence Imposed was Reasonable

Legins also challenges his sentence as unreasonable. We review the reasonableness of the district court's sentence under "a deferential abuse-of-discretion standard," even if the sentence is within the guidelines range. *Gall v. United States*, 552 U.S. 38, 41 (2007).

First, Legins argues that the district court erred in "departing" upwards from the guidelines sentence. But the district court did not grant an upward *departure*, it granted an upward *variance*. "Departures are enhancements of, or subtractions from, a guidelines calculation 'based on a specific Guidelines departure provision.' . . . Variances, in contrast, are discretionary changes to a guidelines sentencing range based on a judge's review of all the § 3553(a) factors . . . ." *United States v. Brown*, 578 F.3d 221, 225–26 (3d Cir. 2009). Because the district court granted a variance and not a departure, Legins's arguments that U.S.S.G. §§ 2J1.2 and 5K2.7 did not justify a departure are irrelevant.

Next, Legins argues that the district court erred in finding that he had committed certain sexual acts with B.L. in March and May 2018. The district court found that during the March incident, "Defendant at least engaged in consensual sexual contact with B.L., including masturbation, that constitutes a violation of 18 U.S.C. § 2244(a)(4)." Memorandum Order at 13, *United States v. Legins*, No. 3:19-cr-00104-DJN-1 (E.D. Va. June 30, 2020), ECF No. 171. During the May incident, the court found that "Defendant consensually penetrated B.L.'s anus with his penis." *Id.* at 17.

In selecting a sentence, a court may rely on aggravating—or mitigating—facts found by only a preponderance of the evidence. *United States v. Grubbs*, 585 F.3d 793, 798–99 (4th Cir. 2009). We review those factual findings for clear error. *United States v.*

Savage, 885 F.3d 212, 225 (4th Cir. 2018). Clear error exists when "after reviewing all the evidence, we are 'left with the definite and firm conviction that a mistake has been committed.'" *United States v. Steffen*, 741 F.3d 411, 415 (4th Cir. 2013) (quoting *United States v. May*, 359 F.3d 683, 688 (4th Cir. 2004)). "When reviewing factual findings for clear error, '[w]e particularly defer to a district court's credibility determinations, for it is the role of the district court to observe witnesses and weigh their credibility . . . .'" *United States v. Palmer*, 820 F.3d 640, 653 (4th Cir. 2016) (quoting *United States v. Abu Ali*, 528 F.3d 210, 232 (4th Cir. 2008)).

First, there was substantial evidence that some form of sexual contact occurred between Legins and B.L. during the March incident. To begin with, B.L.'s testimony that he was forced to perform oral sex on Legins may be adequate under a preponderance standard even if not corroborated by physical evidence. The district court believed that B.L. was a credible witness, a credibility determination to which we owe great deference. Furthermore, surveillance footage from that day shows B.L. and Legins entering the unmonitored area in which the elevator was located, where they remained for 5 minutes. Finally, the sweatshirt that B.L. was shown to be wearing in that footage tested positive for Legins's DNA. The district concluded, based on this evidence, that it was more likely than not that some form of sexual contact occurred between B.L. and Legins on March 16, 2018. We are not "left with the definite and firm conviction" that this was error.

And, as we have already discussed, there was also substantial evidence that some form of sexual encounter—consensual or otherwise—occurred between Legins and B.L. on May 10, 2018. For the same reasons that the jury possessed sufficient evidence to

conclude beyond a reasonable doubt that such an act occurred, the court did not clearly err in finding so by a preponderance of the evidence.

Finally, Legins argues that "[t]he use of acquitted crimes [i.e., the March and May sexual incidents] to calculate an initial guideline range deprives a defendant of his Sixth Amendment right to a sentence wholly authorized by the jury's verdict." Op. Br. of Appellant 35. Legins's argument is incorrect on both the facts and the law. Factually, Legins is incorrect that the district court used acquitted conduct to calculate his initial guideline range. The district court calculated Legins's initial guidelines range as 27–33 months, based solely on the § 1001 false-statement conviction. He then varied upward based on Legins's sexual misconduct, using the Sentencing Guidelines as a guide to determine how large an upward variance he should grant.[22]

Legally, Legins is incorrect that the district court's consideration of acquitted conduct in calculating his sentence abridges his Sixth Amendment rights. The Supreme Court has expressly held the opposite, as have we. *See United States v. Watts*, 519 U.S. 148, 157 (1997) ("We therefore hold that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proven by a preponderance of the evidence."); *Grubbs*, 585 F.3d at 799 ("[A] sentencing court may consider uncharged and acquitted conduct in determining a

[22] This is an acceptable practice. The Guidelines "reflect the collected wisdom of various institutions," *United States v. Goff*, 501 F.3d 250, 257 (3d Cir. 2007), and "it is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives," *Rita v. United States*, 551 U.S. 338, 350 (2007). Judges, when varying upward based on uncharged or acquitted conduct, may look to that gathered wisdom to guide their discretion.

sentence . . . ."). As the Supreme Court has discussed, district courts have broad discretion to impose sentences fully reflecting the defendant's "background, character, and conduct." *Watts*, 519 U.S. at 151 (quoting 18 U.S.C. § 3661). This discretion includes the ability to examine the defendant's pertinent good conduct, as well as his pertinent bad conduct—which of course includes related criminal activity. Just as a judge may reduce a defendant's sentence upon finding that he has a "history of service to our country" and makes "contributions to his religious community," J.A. 1058, so too may the judge increase the defendant's sentence upon finding that he sexually abused a ward.[23]

We thus conclude that Legins's sentence was reasonable.

* * *

The district court erred in applying the statutory enhancement without an authorizing jury verdict. Doing so violated Legins's constitutional rights under *Apprendi*. But that error does not warrant reversal under *Recuenco* and *Neder*. As Legins's remaining claims for relief lack merit, the district court's judgment is

AFFIRMED.

[23] Legins also appears to generally challenge the district court's weighing of the § 3553(a) sentencing factors given the mitigating arguments Legins made. We find no error.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

UNITED STATES OF AMERICA,

v. Criminal No. 3:19cr104 (DJN)

CHIKOSI LEGINS,
Defendant.

MEMORANDUM OPINION

On July 24, 2019, a grand jury returned an indictment against Defendant Chikosi Legins ("Defendant"), charging Defendant with five offenses, including four counts related to alleged sexual acts between Defendant — a correctional officer — and an inmate at the Federal Correctional Institution, Petersburg ("FCI Petersburg"), and one count of knowingly and willfully making materially false, fictitious or fraudulent statements to agents of the Federal Bureau of Investigation ("FBI") and the Department of Justice, Office of the Inspector General ("OIG") during the investigation of those alleged offenses in violation of 18 U.S.C. § 1001. On February 12, 2020, after considering all of the evidence presented during trial, a jury returned a verdict of not guilty on the first four counts and a verdict of guilty on the § 1001 count, Count Five. (ECF No. 123.) Based on the jury's verdict, the Court found Defendant guilty of the allegations in Count Five and remanded him to the custody of the United States Marshals Service pending his sentencing hearing on June 29, 2020. (ECF No. 125.)

This matter now comes before the Court for sentencing on the First Amended Presentence Investigation Report ("First PSR") (ECF No. 155), the Second Amended Presentence Investigation Report ("Second PSR") (ECF No. 173) and the parties' positions, objections and motions filed in response to both PSRs (ECF Nos. 157, 159-60, 163-67, 174-76,

178). The Court held two sentencing hearings on June 29, 2020, and July 14, 2020, during which the Court heard evidence and arguments from both sides. Based on the parties' arguments and the evidence presented, and for the reasons stated from the bench and set forth below, the Court ADOPTS the guidelines calculation in the Second PSR (ECF No. 173), OVERRULES the Government's and Defendant's Objections (ECF Nos. 174, 176) to the Second PSR, GRANTS IN PART the Government's Motion for an Upward Variance (ECF No. 175), DENIES Defendant's Motions for a Downward Variance (ECF No. 164, 176) and SENTENCES Defendant to 54 months' imprisonment, with credit for time served, three years of supervised release and a $100 special assessment. As a condition of Defendant's supervised release, for the reasons set forth below, Defendant shall participate in a sex offender treatment program, as determined by his probation officer. Defendant shall also be subject to the standard conditions of release in this District, except for mandatory substance abuse testing, though Defendant's probation officer may require him to submit to random substance abuse testing as needed.

I. BACKGROUND

A. Procedural History

On July 24, 2019, a grand jury returned an indictment against Defendant, charging him with five offenses. Specifically, in Count One, the Indictment charged Defendant with depriving the alleged victim, B.L., "of the right, secured and protected by the Constitution and laws of the United States, not to be subjected to cruel and unusual punishment" while acting under color of law in violation of 18 U.S.C. § 242, by subjecting B.L. to aggravated sexual abuse and attempted aggravated sexual abuse that resulted in bodily injury. (Indictment (ECF No. 3) at 2.) Count Two charged Defendant with aggravated sexual abuse and attempted aggravated sexual abuse in

violation of 18 U.S.C. § 2241(a), alleging that Defendant used force and attempted to use force against B.L. to penetrate B.L.'s mouth and anus with his penis. (Indictment at 2.)

In Counts Three and Four, the Indictment charged Defendant with sexual abuse of a ward in violation of 18 U.S.C. § 2243(b) for two separate incidents involving Defendant and B.L., namely: (1) a May 10, 2018 incident in which Defendant allegedly penetrated B.L.'s mouth and anus with his penis; and, (2) a March 16, 2018 incident in which Defendant allegedly penetrated B.L.'s mouth with his penis. (Indictment at 3.) Finally, Count Five charged Defendant with making two materially false, fictitious or fraudulent statements to FBI and OIG investigators in a matter within the jurisdiction of those agencies, specifically: (1) falsely denying that he engaged in sexual acts with any inmate at any time at FCI Petersburg; and, (2) falsely stating that on May 10, 2018, he attempted to use a computer and printer while engaged in "just conversation" with B.L. when they were alone in an unattended office. (Indictment at 4.)

Trial on these charges began with jury selection on February 6, 2020, (ECF No. 109), and continued until closing arguments on February 11, 2020, (ECF Nos. 118-19, 121), when the jury retired for deliberations. The jury returned a verdict on February 12, 2020. (ECF No. 122.)

After considering the evidence presented during trial and the Court's Final Instructions (ECF No. 127-1), the jury returned a verdict of not guilty on Counts One, Two, Three and Four and a verdict of guilty on Count Five of the Indictment. (Verdict Form ("Verdict") (ECF No. 123).) Importantly, in finding Defendant guilty on Count Five, the jury marked that both statements alleged in the Indictment supported its verdict. (Verdict at 3.)

Based on the jury's verdict, the Court found Defendant guilty of the allegations in Count Five. (ECF No. 124.) The Court also revoked Defendant's conditions of release and remanded Defendant to the custody of the United States Marshals Service pending sentencing. (ECF No.

125.) The Court initially scheduled Defendant's sentencing hearing for June 9, 2020, but later rescheduled the hearing to June 29, 2020.

B. The First PSR

Pursuant to the Court's Sentencing Guidelines Order (ECF No. 124), on May 12, 2020, the Probation Officer filed his initial PSR (ECF No. 154), and, after receiving objections from counsel, the Probation Officer filed the First PSR (ECF No. 155) on June 12, 2020. In the First PSR, the Probation Officer outlined his calculation of the appropriate range for Defendant's sentence based on § 2J1.2 of the Guidelines, which the Court directed the Probation Officer to use after finding in its March 20, 2020 Memorandum Order (ECF No. 150) that the eight-year statutory maximum under § 1001 applied to Defendant's conviction. (Presentence Investigation Report ("First PSR") (ECF No. 155) at 4-5.)

The Probation Officer first determined Defendant's offense level under § 2J1.2, which resulted in a base offense level of 14. (First PSR at 4.) The Probation Officer then added a four-level enhancement, because Defendant made the false statements sustaining his conviction in a matter that related to a sex offense under chapter 109A of title 18 of the United States Code. (PSR at 4.) This resulted in a total offense level of 18 under § 2J1.2. (First PSR at 4.)

Because § 2J1.2 includes a cross reference to § 2X3.1 (Accessory After the Fact), with the highest offense level under either provision controlling, the Probation Officer then proceeded to calculate Defendant's offense level under § 2X3.1, using Defendant's aggravated sexual abuse charge in Count Two of the Indictment as the underlying offense. (First PSR at 4-5.) Under § 2X3.1, Defendant's offense level equals the offense level for the underlying offense minus six. (First PSR at 5 (citing USSG § 2X3.1(a)(1)).) Using this guideline, the Probation Officer determined that Defendant's aggravated sexual abuse charge resulted in a base offense level of

30 pursuant to § 2A3.1(a)(2) of the Guidelines. (First PSR at 5.) Because the aggravated sexual abuse charge involved conduct proscribed in 18 U.S.C. § 2241(a) or (b), the Probation Officer included an additional four-level enhancement. (First PSR at 5 (citing § 2A3.1(b)(1)).) And the Probation Officer added a two-level enhancement, because the victim of the abuse, B.L., was in the custody, care or supervisory control of Defendant at the time of the offense. (First PSR at 5 (citing § 2A3.1(b)(3)).) This resulted in an offense level of 36, for a final offense level of 30 under § 2X3.1. (First PSR at 5.)

Because the offense level under § 2X3.1 exceeded the offense level under § 2J1.2, the Probation Officer concluded that Defendant's offense level under § 2X3.1 controlled, which, with no further adjustments, resulted in a total offense level of 30. (First PSR at 5.) The Probation Officer then determined that Defendant has a criminal history category I, which resulted in a guidelines calculation of 97-121 months' imprisonment. (First PSR at 6, 13.) The Probation Officer capped this range at the statutory maximum for Defendant's offense — eight years, or 96 months. (First PSR at 13.)

C. Defendant's Objection to the First PSR and the Court's Preliminary Findings

On June 16, 2020, Defendant filed his Objection (ECF No. 160) to the First PSR. In his Objection, Defendant raised two primary challenges: (1) a challenge to the use of any acquitted conduct to calculate his guidelines range or determine his final sentence; and, (2) a challenge to the use of the aggravated sexual abuse charge in Count Two to calculate his offense level under the § 2X3.1 cross reference. (Objs. to the PSR ("Def. Obj.") (ECF No. 160) at 2-3.) On June 29, 2020, the Court held a hearing on Defendant's Objection, during which the Court heard evidence and offered its preliminary findings on the appropriate guidelines range calculation.

Specifically, for the reasons stated from the bench during the June 29 hearing and set forth in the Court's June 30, 2020 Memorandum Order (the "Preliminary Order") (ECF No. 171), the Court sustained Defendant's Objection (ECF No. 160) insofar as the Probation Officer used the aggravated sexual abuse charge in Count Two to calculate Defendant's offense level under the § 2X3.1 cross reference. (June 30, 2020 Mem. Order ("Prelim. Order") (ECF No. 171).) The Court first rejected Defendant's objection to the use of acquitted and uncharged conduct to calculate his guidelines range, noting that the Supreme Court and Fourth Circuit have both affirmed that sentencing courts may use acquitted and uncharged conduct to determine a sentence, so long as the Government has proven such conduct by a preponderance of the evidence. (Prelim. Order at 7-11 (citing *United States v. Watts*, 519 U.S. 148, 157 (1997) and *United States v. Grubbs*, 585 F.3d 793, 798-99 (4th Cir. 2009)).)

Based on the evidence adduced during trial, the Court then determined that the Government had proven by a preponderance of the evidence that Defendant committed two offenses, namely: (1) abusive sexual contact with B.L. in violation of 18 U.S.C. § 2244(a)(4) on March 16, 2018, in the Fox Unit elevator at FCI Petersburg (the "March offense"); and, (2) sexual abuse of a ward in violation of 18 U.S.C. § 2243(b) on May 10, 2018, in the Fox Unit secretary's office at FCI Petersburg (the "May offense"). (Prelim. Order at 11-18.) Relevant here, the Court found that the Government had not proven that Defendant used force against B.L. during the May offense, as charged in Count Two of the Indictment. (Prelim. Order at 14-15.) Accordingly, the Court found that the aggravated sexual abuse charge in Count Two did not constitute the underlying offense for purposes of the § 2X3.1 cross reference and directed the Probation Officer to instead rely on the sexual abuse of a ward charge in Count Three to determine Defendant's offense level. (Prelim. Order at 18.) The Court also directed the

Probation Officer to address the effect, if any, of Defendant's uncharged abusive sexual contact on the guidelines calculation pursuant to the grouping rules outlined in §§ 3D1.1, *et seq.* (Prelim. Order at 18.)

D. The Second PSR

Following the Court's instructions in the Preliminary Order, on July 1, 2020, the Probation Officer filed the Second PSR (ECF No. 173), which calculated Defendant's guidelines range using the sexual abuse of a ward charge in Count Three as the underlying offense. Specifically, the Probation Officer determined that Defendant's offense level under § 2J1.2, as before, equaled 18. (2d Addendum to the PSR ("Second PSR") (ECF No. 173) at 17.) The Probation Officer then cross-referenced to § 2X3.1, using the sexual abuse of a ward charge as the underlying offense. (Second PSR at 17-18.) Employing § 2A3.4, Defendant's sexual abuse of a ward charge yielded an offense level of 14. (Second PSR at 17-18.)

The Probation Officer then proceeded to calculate the effect, if any, of Defendant's abusive sexual contact on the offense level. (Second PSR at 18.) Using the grouping rules, the Officer increased the offense level for Defendant's underlying offenses from 14 to 16. (Second PSR at 18.) Pursuant to § 2X3.1, the Probation Officer subtracted 6 levels from the combined offense level for both offenses, yielding a total offense level of 10. (Second PSR at 18.) Because the § 2X3.1 cross reference resulted in a lower offense level than the offense level under § 2J1.2, the Officer applied the offense level under § 2J1.2 — 18 — which, together with Defendant's criminal history category I, yielded a guidelines range of 27-33 months, a $10,000-$100,000 fine and 1-3 years of supervised release. (Second PSR at 18.)

E. The Government's Objection to the Second PSR

In response to the Second PSR, on July 6, 2020, the Government filed its Objection and Motion for a Variance. (U.S.' Objs. to Alt. Sentencing Guideline Calculations & Mot. for Upward Variance ("Gov't Obj.") (ECF Nos. 174-75).) In support of its Objection, the Government argues that the proper inquiry when applying the § 2X3.1 cross reference is not whether the Government has proven by a preponderance that the underlying offense occurred, but instead whether the Government has proven by a preponderance that Defendant obstructed the investigation of the underlying offense. (Gov't Obj. at 3-8.) Citing to excerpts from Defendant's interview with FBI and OIG investigators on June 5, 2018, in which Defendant described the allegations against him as "rape," the Government contends that the aggravated sexual abuse charge clearly fell within the scope of the investigation that Defendant obstructed, requiring the Court to use that charge as the underlying offense. (Gov't Obj. at 2-8.)

Alternatively, assuming the Court overrules the Government's Objection, the Government moves for an upward variance to 96 months from the amended guidelines calculation of 27-33 months. (Gov't Obj. at 8-21.) Specifically, the Government argues that the § 3553(a) factors justify an upward variance to reflect the seriousness and nature of Defendant's offense, his past sexual misconduct and the need to protect the public and afford adequate deterrence. (Gov't Obj. at 11-21.)

F. Defendant's Objection to the Second PSR

On July 6, 2020, Defendant filed his own Objection and Motion for a Variance in response the Second PSR. (Resp. Pursuant to Mem. Order ("Def. 2d Obj.") (ECF No. 176).) Specifically, Defendant objects to the Court's finding that the Government has proven by a preponderance of the evidence that Defendant engaged in consensual sex with B.L. during the

May offense in violation of 18 U.S.C. § 2443(b). (Def. 2d Obj. at 1-2.) In support of this contention, Defendant asserts that other evidence adduced during trial tends to demonstrate that, at most, Defendant engaged in inappropriate sexual contact. (Def. 2d Obj. at 2.) Nonetheless, Defendant concedes that this argument would not alter the 27-33 months guidelines calculation. (Def. 2d Obj. at 3.)

Defendant further contends that a downward variance to 15 months' imprisonment proves appropriate, because "all that has been established is that some type of sexual consensual contact occurred," which under the Guidelines provision for abusive sexual contact (§ 2A3.4) results in a total offense level of 14 and a guidelines range of 15-22 months based on Defendant's criminal history category. (Def. 2d Obj. at 4.) And Defendant challenges the Court's consideration of an upward variance based on Defendant's past similar conduct, arguing that the Court should credit neither the secondhand testimony of Special Agent Johnny Lavender that Defendant engaged in a consensual sexual relationship with another transgender inmate at FCI Petersburg, G.L., nor an investigatory report detailing accusations that Defendant behaved inappropriately toward a female inmate while working as a sheriff's deputy in 2008. (Def. 2d Obj. at 5-6.)

On July 14, 2020, the Court conducted a hearing on the Second PSR and the parties' positions, objections and motions filed in response, during which the Court entertained additional arguments and ruled on the parties' objections and motions before imposing Defendant's final sentence. The Court now recites and supplements its reasoning for those rulings below.

II. STANDARD OF REVIEW

In sentencing a defendant, a sentencing court must: (1) "properly calculate the sentence range recommended by the Sentencing Guidelines;" (2) "determine whether a sentence within

that range and within statutory limits serves the factors set forth in § 3553(a) and, if not, select a sentence that does serve those factors;" (3) "implement mandatory statutory limitations;" and, (4) "articulate the reasons for selecting a particular sentence, especially explaining why a sentence outside of the Sentencing Guideline range better serves the relevant sentencing purposes set forth in § 3553(a)." *United States v. Green*, 436 F.3d 449, 456 (4th Cir. 2006). Ultimately, a sentencing court "shall impose a sentence sufficient, but not greater than necessary" to satisfy the factors outlined in 18 U.S.C. § 3553(a).

Whatever the sentence chosen, the sentencing court must explain its reasoning, providing "an individualized assessment of the facts presented," "applying the relevant § 3553(a) factors to the specific circumstances of the case" and "stating in open court the particular reasons supporting its chosen sentence." *United States v. Carter*, 564 F.3d 325, 328 (4th Cir. 2009); *see also United States v. Avila*, 770 F.3d 1100, 1107 (4th Cir. 2014) (noting that the court's explanation "need not be exhaustive"). Moreover, when either "the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence than that set forth in the advisory Guidelines, a [sentencing court] should address the party's arguments and explain why [it] has rejected those arguments." *Id.*

III. ANALYSIS

During the July 14, 2020 sentencing hearing, the Court addressed four outstanding issues: (1) whether the Second PSR properly calculated the guidelines range for Defendant's sentence; (2) whether a basis for a variance from the guidelines range, either upward or downward, exists; (3) if so, the degree of variance the Court should impose; and, (4) the appropriate sentence under the § 3553(a) factors. The Court will address each issue in turn.

A. The Second PSR Properly Calculated Defendant's Guidelines Range as 27-33 Months Based on the Underlying Offense of Sexual Abuse of Ward.

As mentioned, the Government objects to the guidelines calculation in the Second PSR, arguing that the Court need not inquire into the sufficiency of the evidence supporting an underlying offense to use that offense under the § 2X3.1 cross reference. (Gov't Obj. at 3-8.) Instead, the Government contends that the Court need only consider whether the underlying offense fell within the scope of the investigation that Defendant obstructed, which, in this case, the Government asserts includes the aggravated sexual abuse charge. (Gov't Obj. at 3-8.)

Defendant responds that the controlling law in this Circuit — namely, the Fourth Circuit's decision in *United States v. Dickerson*, 114 F.3d 464 (4th Cir. 1997) — does not mandate that the highest offense charged in an investigation always constitutes the underlying offense for an obstruction conviction, but instead requires the Court to consider what offense(s) the evidence of record support. (Resp. Pursuant to Order No. 169 (ECF No. 178) at 1-2.) The Court agrees with Defendant and overrules the Government's objection to the amended guidelines calculation.[1]

The Government's objection relies primarily on the Sixth Circuit's decision in *United States v. Greer*, 872 F.3d 790 (6th Cir. 2017). In *Greer*, the defendant, Willie Greer — an officer accused of forcing a woman to perform oral sex on him incident to a traffic stop of her

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[1] As mentioned, Defendant separately objects to the guidelines calculation in the Second PSR based on his assertion the evidence adduced during trial does not prove, even by a preponderance, that he and B.L. engaged in a consensual sexual act during the May offense. (Def. 2d Obj. 1-3.) However, the evidence cited by Defendant in support of this objection fails to overcome the overwhelming evidence that Defendant penetrated B.L.'s anus with his penis during the May offense, as outlined in the Court's Preliminary Order, including evidence that testing of swabs taken from B.L.'s anus on the evening of the May offense provided "very strong support" for the inclusion Defendant's DNA. (Prelim. Order at 14-18.) Therefore, the Court overrules Defendant's objection to the Second PSR and adopts its findings in the Preliminary Order (ECF No. 171).

vehicle — was charged with a civil rights violation based on aggravated sexual abuse, witness tampering (for lying to investigators) and possession of a gun during a crime of violence. 872 F.3d at 792. Greer pled guilty to witness tampering as part of a plea agreement in which the Government agreed to dismiss the sexual abuse and gun possession charges. *Id.*

As with Defendant's § 1001 conviction here, Greer's witness tampering charge fell under § 2J1.2 of the Guidelines. *Id.* at 793. Based on § 2J1.2, the probation officer cross-referenced to § 2X3.1 using the civil rights violation charge as the underlying offense. *Id.* This yielded a base offense level of 27, which, with a criminal history category I, yielded a guidelines range of 70-87 months' imprisonment. *Id.*

During sentencing, Greer argued that the sentencing court could not cross-reference to § 2X3.1 using the civil rights violation charge as the underlying offense, because insufficient evidence existed to prove that Greer had committed aggravated sexual abuse to sustain that charge. *Id.* Instead, Greer asserted that, at most, the Government had proven "an inappropriate but consensual sexual rendezvous." *Id.* The sentencing court rejected Greer's arguments, finding that the probation officer properly relied on the civil rights violation as the underlying charge, and Greer raised the same objections on appeal. *Id.* at 794.

On appeal, the Sixth Circuit affirmed the sentencing court's decision, rejecting Greer's argument that the Government must prove by a preponderance of the evidence that the underlying offense actually occurred. *Id.* at 794-96. In so holding, the Sixth Circuit distinguished Greer's case from its previous decision in *United States v. Shabazz*, 263 F.3d 603, 610 (6th Cir. 2001), in which the court stated that § 2X3.1 could be applied only using conduct that the Government has sufficiently proven. *Id.* at 796-97. The Sixth Circuit reasoned that *Shabazz* evaluated only the extent to which an accessory after the fact could be punished for the

specific offense characteristics of the principal that he assisted, not whether sentencing courts can rely on uncharged or acquitted conduct within the scope of an investigation to determine the guidelines range for an obstruction charge. *Id.* at 797.

As to the latter, unanswered question, the Sixth Circuit rejected the argument that the commentary supporting § 2X3.1 required the Government to prove that an underlying offense occurred by a preponderance of the evidence. *Id.* at 797-98. Specifically, the Sixth Circuit determined that the United States Sentencing Commission did not intend for a defendant found guilty of obstruction to avoid punishment merely because he successfully prevented his conviction on the underlying offense. *Id.* at 798. Rather, the Sixth Circuit held that "the Guidelines intended that the obstruction of a criminal *investigation* is punishable even if the prosecution is ultimately unsuccessful or even if the investigation ultimately reveals no underlying crime." *Id.* (emphasis supplied).

By way of example, the Sixth Circuit juxtaposed a murder investigation with a trespass investigation, reasoning that obstructing of the former requires "more severe punishment to discourage such obstruction, regardless of whether either investigation results in prosecution or conviction." *Id.* This is because "a murder investigation itself is a very serious thing and its obstruction cannot be tolerated." *Id.* Therefore, the Sixth Circuit found no error in the sentencing court's reliance on the civil rights violation to calculate Greer's offense level. *Id.*

In addition to *Greer*, the Government also relies heavily on the Fourth Circuit's decision in *United States v. Dickerson*, in which the Fourth Circuit similarly held that the Government need not prove that an underlying offense occurred by a preponderance of the evidence for a sentencing court to use that conduct to calculate the guidelines range for a perjury conviction. 114 F.3d at 466-67. However, the Fourth Circuit in *Dickerson* introduced an important caveat to

this general rule by refusing to require that sentencing courts always rely on the highest offense charged as the underlying offense when applying the § 2X3.1 cross reference. *Id.* at 467-68. Instead, the Fourth Circuit held that the "[d]etermination of the proper underlying offense is a factual inquiry for the district court in the first instance." *Id.*

As further guidance, the Fourth Circuit instructed that the § 2X3.1 cross reference for perjury convictions does not require that a defendant be convicted of the underlying offense, because if such were the case, "perjurers would be able to benefit from perjury that successfully persuaded a grand jury not to indict or a petit jury not to convict." *Id.* at 468. At the same time, the Fourth Circuit advised that the highest offense charged does not always constitute the underlying offense either, because prosecutors often use charges to pressure a defendant into pleading guilty and also because "the defendant's actual conduct (*that which the prosecutor can prove in court*) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence." *Id.* at 469 (emphasis supplied) (internal quotations and citation omitted). In other words, to use the highest charged crime to calculate the guidelines in every instance would cede too much power to the charging discretion of the prosecutor.

Ultimately, the Fourth Circuit held that whatever offense constitutes the underlying offense "must be supported by the evidence," with the pertinent question being what criminal offense the defendant obstructed the investigation or prosecution of, as proven by a preponderance of the evidence, with the offense level for the highest such offense controlling the guidelines calculation. *Id.*

Although the Government interprets *Dickerson* as supporting the Sixth Circuit's ruling in *Greer* with only limited exceptions, the Court understands *Dickerson* to require more than a robotic application of the highest offense charged in every case. Instead, *Dickerson* recognizes

that, while in the majority of obstruction cases the underlying offense will be the most serious offense within the scope of the investigation so obstructed, sentencing courts have a duty to inquire into the offenses charged to ensure that a prosecutor's discretion does not result in the undue punishment of a defendant. And although *Dickerson* uses the example of a prosecutor overcharging a defendant to obtain leverage for a plea agreement, which the Court finds did not occur here, *Dickerson* does not limit the circumstances under which a lesser offense might constitute the proper underlying offense to only such an example, thereby recognizing that other outlier cases may exist. Based on its review of the record, the Court finds the instant matter to be one such outlier case, requiring the Court to use the lesser offense of sexual abuse of a ward to determine Defendant's offense level under the § 2X3.1 cross reference.

For one, the policy reasons underlying *Greer* and *Dickerson* do not apply to the same extent to Defendant's conviction. Specifically, *Greer* and *Dickerson* both rely on the principle that someone who obstructs the investigation or prosecution of an offense should not benefit from his obstruction by requiring the Government to prove that the underlying offense occurred. *Dickerson*, 114 F.3d at 468. However, Defendant did not benefit from his obstruction in the same sense. That is, although Defendant clearly made false statements, his statements did not specifically relate to a denial of nonconsensual sex. Rather, the Indictment charged Defendant with, and the jury convicted Defendant of, lying about engaging in "a sexual act with any inmate at any time at [FCI Petersburg]." (Indictment at 4; Verdict at 3.) Therefore, the jury's verdict supports only a finding that Defendant obstructed the investigation into whether he engaged in sexual acts with inmates; sexual acts which, by necessary implication of the jury's verdict, the

Government proved beyond a reasonable doubt to have occurred.[2] In that sense, Defendant did not benefit from his obstruction by avoiding culpability for the act(s) that the Government ultimately proved beyond a reasonable doubt to a jury. And although the Government could have proven beyond a reasonable doubt that Defendant forcefully raped B.L. had Defendant confessed to such a rape, as detailed in the Court's Preliminary Order, the evidence adduced during trial fails to demonstrate that Defendant used force against B.L., even by a preponderance, belying any assertion that Defendant avoided culpability by lying to investigators. (Prelim. Order at 14-15.)

Beyond policy reasons, the factual record also supports the use of the lesser sexual abuse of a ward charge to calculate Defendant's offense level. Indeed, the Fourth Circuit in *Dickerson* emphasized that "the defendant's actual conduct (*that which the prosecutor can prove in court*) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence." 114 F.3d at 469 (emphasis supplied) (internal quotations and citation omitted). Here, as the Court

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[2] Although the jury found Defendant not guilty of committing any sexual acts with B.L., as noted in the Court's Preliminary Order:

> [T]he Court believes that the jury's inconsistent verdict resulted primarily from the Government's failure to argue to the jury and seek a jury instruction that the Government need not prove the use of force by Defendant or the lack of B.L.'s consent to sustain a conviction on Counts Three and Four, the sexual abuse of a ward counts. Because Counts One and Two included an instruction that the Government needed to prove a lack of consent or use of force, (Instr. Nos. 25, 28-31), and because the Government never mentioned the role of consent or force in Counts Three and Four, the jury most likely assumed that Counts Three and Four required proof of a lack of consent. Considering that the Government introduced no evidence that Defendant engaged in sexual acts with an inmate other than B.L., this explains why the jury found Defendant guilty beyond a reasonable doubt of lying about engaging in sexual acts with "any inmate" while finding him not guilty of engaging in even consensual sexual acts with B.L. under Counts Three and Four.

(Prelim. Order at 11 n.3.)

explained in its Preliminary Order, the Government's evidence that Defendant used force against B.L. relied nearly exclusively on B.L.'s testimony and statements to others, (Prelim. Order at 14-15 (detailing relevant testimony from the trial transcript)); otherwise, the only independent corroboration of B.L.'s account came from the testimony of Nurse LaShawn Ruffin that she observed bruising below B.L.'s right eye and on B.L.'s right arm eleven days after the May offense, which proves insufficient to establish the use of force, even by a preponderance, (Tr. Vol. III (ECF No. 137) at 266:2-267:9). Moreover, the jury clearly discredited B.L.'s testimony to the extent that he alleged nonconsensual sex by finding Defendant not guilty of both Counts One and Two, which required the Government to prove that Defendant used force against B.L. (Verdict at 1-2.) Indeed, the Government elicited testimony that Defendant in fact groomed B.L. into consenting by complimenting him and providing him with cigarettes, which directly contradicts any use of force by Defendant during the May offense. (*See, e.g.*, Tr. Vol. II at 199:7-204:15 (testimony of B.L. describing Defendant's grooming behavior, including providing cigarettes to B.L. and complimenting him).) And during the June 29, 2020 sentencing hearing, the Government elicited testimony from Special Agent Johnny Lavender, who testified that another inmate at FCI Petersburg, G.L., engaged in consensual sexual acts with Defendant in exchange for cigarettes, further corroborating the consensual nature of Defendant's conduct with B.L. Considering the Government's own contradictory evidence and the jury's clear rejection of B.L.'s allegations of nonconsensual sex, the record places a "natural limit" on what constitutes the underlying offense in this case.

To be sure, the Court does not find that the Government overcharged Defendant despite what the evidence that it introduced could prove; however, the Government's investigation into nonconsensual sexual acts relied nearly exclusively on B.L.'s allegations of force, which the

jury's verdict and the independent evidence of record do not support. Therefore, although during his interview with federal investigators, Defendant acknowledged that the investigation involved allegations of rape, (*see, e.g.*, Ex. A to Gov't Obj. ("Interview Tr.") (ECF No. 174-1) at 65:2-3 (Defendant: "[H]e [B.L.] wouldn't be the first to say that he was raped and get a rape kit going on."), 67:6-7 (Defendant: "So for the first time in my life, I'm going to try to rape another man?")), that the investigation included such allegations in the first place relied on a victim's account that the jury wholly discredited. Out of principles of lenity and fairness, the Court will not penalize Defendant for obstructing an investigation whose scope relied on a now-discredited account of what occurred.

Moreover, although Defendant described the allegations against him as "rape" allegations, the Government began its interview of Defendant by informing him that the investigation involved only allegations of "sexual abuse" and asked Defendant about the possibility that he engaged in consensual sexual acts with B.L. (*See, e.g.*, Interview Tr. at 3:16-21 (notifying Defendant that he was being investigated for "sexual abuse"), 32:11-25 (questioning Defendant about having consensual sex with B.L.).) Consequently, the Government told Defendant that the interview would be about consensual sex, not rape.

Ultimately, because the policy reasons underlying the general rule that courts should apply the highest offense charged within the scope of an obstructed investigation do not apply with the same rigor to Defendant's conviction, and because the evidence of record places a "natural limit" on the Government's charging discretion in this case, the Court will rely on the lesser offense of sexual abuse of ward, as charged in Count Three, to calculate Defendant's guidelines range. Accordingly, the Court overrules the Government's Objection (ECF No. 174)

and adopts the guidelines calculation in the Second PSR as the proper guidelines range for Defendant's sentence, resulting in a range of 27-33 months.

B. Sufficient Grounds Exist for an Upward Variance

Having determined that the Second PSR properly calculated Defendant's guidelines range as 27-33 months, the Court will proceed to consider whether grounds exist for any variances. To that end, as mentioned, Defendant moves for a downward variance to 15 months, asserting that the Government has in fact proven only that Defendant engaged in abusive sexual contact in violation of 18 U.S.C. § 2244(a)(4), even during the May offense, which results in a guidelines range of 15-22 months. (Def. 2d Obj. at 3-4.) During the July 14, 2020 sentencing hearing, Defendant also argued for a downward variance based on his history and characteristics, including the letters of support submitted on his behalf. The Court rejects both arguments as grounds for a variance. Indeed, the Court finds no reason to alter its previous finding that the Government has proven by a preponderance that Defendant engaged in consensual anal sex with B.L. during the May offense, which constitutes sexual abuse of a ward in violation of § 2243(b). And Defendant's arguments regarding his background and letters of support are most relevant to the degree of any variance that the Court might impose.

Instead, the Court agrees with the Government that grounds exist for an upward variance, though not to the degree requested by the Government. For one, Defendant concedes that the guidelines calculation under the Second PSR accounts only for his obstruction of the investigation of the May offense, without accounting for Defendant's abusive sexual contact with B.L. during the March offense. Indeed, the Second PSR relied only on Defendant's offense level for his obstruction, because his offense level under § 2J1.2 exceeded his offense level under the § 2X3.1 cross reference, even after accounting for the March offense under the grouping

rules. (Second PSR at 18.) Therefore, an upward variance proves necessary to account for Defendant's related conduct.

The Guidelines also fail to capture the extent of Defendant's obstructive conduct. Indeed, the jury's verdict found beyond a reasonable doubt that Defendant made two false statements to federal investigators, namely: (1) denying that he engaged in sexual acts with any inmate at any time at FCI Petersburg; and, (2) stating that on the night of the May offense, he and B.L. engaged in "just conversation" while he attempted to login to a computer in the Fox Unit secretary's office. (Verdict at 3.) The Guidelines consider only one of these false statements.

Further, during trial and sentencing, the Government introduced evidence that Defendant engaged in other obstructive conduct. For example, the Government elicited testimony from Nurse Sarah Ramsey that when B.L. arrived at the prison's medical facility for an examination following the May offense, Defendant called her to ask for medicine despite never having called her before and despite the prison's policy against providing nonemergency medical care to staff. (Tr. Vol. IV (ECF No. 138) at 18:23-21:13.) And Officer Ryan McLaughlin recounted other examples of Defendant's obstructive conduct that same evening. (*See* Tr. Vol. III at 174:1-175:8 (testimony of Officer McLaughlin that on the night of the May offense he heard someone who sounded like Defendant shout "you've got to be kidding me" as he escorted B.L. across the prison complex to the lieutenant's office), 177:24-178:20 (testimony of Officer McLaughlin that once he and B.L. arrived at the lieutenant's office, Defendant called the office twice for suspicious reasons).)

Defendant's obstruction also continued beyond the night of the May offense. Most notably, during his June 5, 2018 interview with federal investigators, Defendant concocted an

elaborate explanation for how his semen ended up on the clothing retrieved from B.L., stating that he had taken erectile dysfunction medication the day before the May offense in hopes of having sex with his wife but ended up not having sex and instead masturbated in the Fox Unit secretary's bathroom to relieve his erection, leaving semen in the bathroom that B.L. must have obtained while working on a cleaning detail. (Interview Tr. at 43:2-44:13.) A few days later, Defendant repeated the same story to a colleague, Officer Harry Parker, adding that he had in fact seen B.L. cleaning the bathroom while unattended — a violation of prison policy that Officer Parker testified would not be allowed under any circumstance. (Tr. Vol. III at 277:7-24.)

As these examples demonstrate, Defendant did not simply obstruct the FBI and OIG investigation through mere denials or offhanded remarks, but instead developed a premeditated plan and continually evolving narrative to escape culpability. When faced with counterevidence, Defendant adapted his story, resulting in an unbelievable explanation that defied both common sense and the clear evidence. The Guidelines do not capture the extent or premeditated nature of Defendant's obstructive conduct, which justifies an upward variance.

Moreover, Defendant's premeditation extended to his sexual misconduct with B.L. Indeed, B.L. testified that, in the months leading up to the March and May offenses, Defendant gave him cigarettes — a valuable commodity in the prison system — complimented B.L. on his appearance and engaged with B.L. in a way that prison guards ordinarily do not engage with inmates. (Tr. Vol. II at 199:7-204:15.) During sentencing, the Government also elicited secondhand testimony from Agent Lavender that Defendant engaged in similar grooming behavior with another transgender inmate at FCI Petersburg, G.L., which corroborates the Government's evidence that Defendant targeted and groomed the transgender inmate

population.[3] And the objective evidence provides further proof that Defendant planned how he would avoid detection during both the March and May offenses by escorting B.L. into an unattended hallway where he knew there would be no surveillance cameras. (*See* Gov't Exs. 1-2 (surveillance footage from the time period of the March and May offenses showing Defendant escorting B.L. into the unattended hallway with no surveillance cameras for approximately five to six minutes).) This evidence establishes that Defendant not only acted with premeditation in obstructing the investigation of his sexual misconduct, but also acted with premeditation in committing the underlying offenses, further justifying an upward variance.

Finally, Defendant's past conduct provides additional grounds for an upward variance. Specifically, Defendant does not dispute that, in 2008, the Richmond Sheriff's Office investigated allegations of Defendant's inappropriate behavior towards female inmates while Defendant served as a sheriff's deputy. In that incident, a female inmate alleged that Defendant made several inappropriate comments, including asking the inmate to show him "something" in a suggestive manner. (Ex. A to Gov't Pos. ("Sheriff's Rep.") (ECF No. 157-1) at 2-3.) Defendant had also been found in areas of the facility where "male deputies generally do not go," including female-only housing. (Sheriff's Rep. at 4.) Based on their investigation, Sheriff's Office investigators reprimanded Defendant for unbecoming conduct, dishonesty and failure to comply with lawful directives. (Sheriff's Rep. at 5.) This investigation provides further support for an

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[3] During the July 14, 2020 sentencing hearing, the Court afforded Agent Lavender's testimony some, but little, weight, because the Government had the opportunity to call G.L. during both trial and sentencing but elected not to. Because the Government did not call G.L. to testify directly, the Court could not adequately assess G.L.'s credibility, nor could Defendant's counsel cross-examine her. Accordingly, the Court credits Agent Lavender's testimony only insofar as G.L.'s statements provide further corroboration to the evidence that Defendant acted methodically in targeting and grooming B.L. to engage in consensual sexual acts.

upward variance, as it demonstrates a pattern of inappropriate sexual conduct by Defendant and, most notably, a history of lying to investigators to avoid culpability for his wrongdoing.

For these reasons, the Court finds that sufficient grounds exist for an upward variance.

C. Variance Calculation and Final Sentence

The question then becomes the extent of the upward variance that the Court should impose. Indeed, "[i]n the event [a] sentencing court decides to impose a variance sentence . . . the sentencing court 'must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.'" *United States v. Pauley*, 511 F.3d 468, 473 (4th Cir. 2007) (quoting *Gall v. United States*, 552 U.S. 38, 50 (2007)). In deciding the degree of a variance to impose, sentencing courts need not adhere to rigid mathematics but must instead consider the "uniqueness of the individual case" together with the § 3553(a) factors. *Gall*, 552 U.S. at 52. That said, the Guidelines represent "the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions" and therefore provide a starting point in deciding the degree of variance to impose. *Id.* at 46.

To that end, because Defendant's guidelines range does not capture his related conduct from the March offense — namely, abusive sexual contact in violation of 18 U.S.C. § 2244(a)(4) — the Court will use the guidelines range for such conduct as a starting point for the degree of variance to impose. Pursuant to § 2A3.4, Defendant's abusive sexual contact results in a base offense level of 12, with a two-level enhancement, because B.L. was under Defendant's supervisory control at the time of the offense, resulting in a total offense level of 14. Together with Defendant's criminal history category I, this yields a guidelines range of 15-21 months for the March offense.

To account for the March offense, as well as the nature and circumstances of Defendant's extensive obstruction, premeditation and past similar conduct, the Court finds that the combined range for Defendant's crime of conviction and the March offense (42-54 months) appropriately captures the degree of variance that should be imposed. Notably, this combined range falls within the ranges for both offense level 22 and offense level 23 under Defendant's criminal history category, but the Court will utilize the range for offense level 23 (46-57 months), as the higher range better accounts for the seriousness of Defendant's offense and related conduct.

Within that range, for the reasons stated from the bench during the July 14, 2020 sentencing hearing, the Court finds that a final sentence of 54 months' imprisonment with three years of supervised release proves sufficient but not greater than necessary to comply with the § 3553(a) factors. Such a sentence captures the seriousness of Defendant's conduct and the manner in which he committed his crime of conviction, while also accounting for the significant role that Defendant has played in his family, his history of service to our country and his contributions to his religious community. The sentence also affords adequate deterrence to Defendant and other correctional officers who commit similar acts in violation of their positions of trust. And a term of three years of supervised release proves necessary to protect the public, as Defendant's repeated incidences of sexual misconduct demonstrate a greater chance of recidivism.

In the same vein, the Court will require Defendant to undergo sex offender treatment while on supervised release, as directed by his probation officer, to ensure that Defendant receives effective correctional treatment, because the evidence presented demonstrates that Defendant has engaged in a pattern of sexual misconduct that likely will continue without treatment. *See United States v. Douglas*, 850 F.3d 660, 666 (4th Cir. 2017) (affirming that

sentencing courts may impose sex offender treatment as a condition of supervised release when the evidence presented "permit[s] the rational inference that [the defendant] present[s] a recidivism risk" (internal quotations and citations omitted).) The Court will also impose the standard conditions of release in this District, except for mandatory substance abuse testing, which the Court waives in light of the absence of any evidence that Defendant has abused drugs or alcohol, though Defendant's probation officer may subject Defendant to random testing as needed. And the Court will impose the $100 special assessment mandated under 18 U.S.C. § 3013(a)(2)(A).

IV. CONCLUSION

Based on the parties' arguments and the evidence presented, and for the reasons stated from the bench and set forth above, the Court ADOPTS the guidelines calculation in the Second PSR (ECF No. 173), OVERRULES the Government's and Defendant's Objections (ECF Nos. 174, 176) to the Second PSR, GRANTS IN PART the Government's Motion for an Upward Variance (ECF No. 175), DENIES Defendant's Motions for a Downward Variance (ECF No. 164, 176) and SENTENCES Defendant to 54 months' imprisonment, with credit for time served, three years of supervised release and a $100 special assessment. As a condition of Defendant's supervised release, for the reasons set forth above, Defendant shall participate in a sex offender treatment program, as determined by his probation officer. Defendant shall also be subject to the standard conditions of release in this District, except for mandatory substance abuse testing, though Defendant's probation officer may require him to submit to random substance abuse testing as needed.

Let the Clerk file a copy of this Memorandum Opinion electronically and notify all counsel of record.

/s/
David J. Novak
United States District Judge

Richmond, Virginia
Date: July 20, 2020