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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the evidence was sufficient to support the conviction under 18 U.S.C. 1001.

II. Whether the defendant was improperly subjected to an enhanced penalty of eight years in violation of Apprendi.

III. Whether the trial court erred in the sentencing of the defendant, both procedurally and substantively by using uncharged and unsupported relevant conduct.

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STATEMENT OF THE OPINIONS BELOW

Former federal prison guard Chikosi Legins was indicted in a five count Indictment for sexually assaulting a prisoner twice (Four Counts) and then lying to law enforcement about it (One Count). A jury convicted Legins only of making a false statement to law enforcement while acquitting him of the all four substantial sex-crime charges. Following that verdict, the district court made two decisions that boosted Legins' 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 actually convicted of sexually abusing the prisoner. Simply put, the trial court inserted its own beliefs about the facts which the jury, by acquitting the defendant on all sexual counts, rejected.

On appeal, Legins challenged his false-statements conviction based on sufficiency which was rejected. The Court of Appeals ruled that sufficient evidence supported the conviction, and that any arguable inconsistency with the jury's acquittal on other sexual counts did not invalidate the false-statement conviction. Legins next argued 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). The Court of Appeals agreed with the defendant that there was a constitutional violation, but then found the error harmless under Recuenco. Washington v. Recuenco, 548 U.S. 212, 219-20 (2006); Neder v. United States, 527 U.S. 1, 4 (1999). Finally, the Court of Appeals concluded that the trial court did not impose an unreasonable sentence, even though

the trial court went beyond the relevant conduct fact pattern to create a new set of facts on which the sentence was, in part, based. The Opinion of the United States Court of Appeals for the Fourth Circuit is attached at Appendix page one (A1).

BASIS FOR APPELLATE JURISDICTION

This is a criminal matter derived from the United States District Court with an automatic right of appeal pursuant to 28 U.S.C. 1291. Appellant timely filed his Petition which is required under Rule 10 of the Supreme Court Rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the

witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On July 24, 2019, a grand jury returned an indictment against defendant Chikosi Legins, charging him with five offenses. J.A. 25 Specifically, in Count One, charged aggravated sexual abuse. Count Two charged Mr. Legins with aggravated sexual abuse. In Counts Three and Four, the Indictment charged Mr. Legins with sexual abusse of a ward in violation of 18 U.S.C. Section 2243(b) for two separate incidents involving Mr. Legins and B.L. namely: (1) a May 10, 2018 incident in which Mr. Legins allegedly penetrated B.L.'s mouth and anus and, (2) a March 16, 2018 incident in which Mr. Legins allegedly penetrated B.L.'s mouth. Finally, Count Five charged Mr. Legins with making two materially false, fictitious or fraudulent statements to FBI and OIG investigators in the investigation of these alleged crimes, specifically: (1) falsely denying that Legins engaged in a sexual act with any inmate at any time at FCI Petersburg; and, (2) falsely stating that on May 10, 2018, Legins attempted to use a computer and printer in an administrative office while engaged in "just conversation" with B.L. when Legins was, in reality, engaged in a sexual act with B.L.

After considering the evidence presented during trial and the court's final instructions, the jury returned a verdict of not guilty on Counts One, Two, Three and Four, and a verdict of guilty solely on Count Five. J.A. 818. In finding Mr. Legins

guilty on Count Five, the jury checked the lines to indicate that the government proved the falsity of both statements. J.A. 818 at 820. Based on the jury's verdict, the court found Legins guilty on Count Five and scheduled the matter for sentencing. Legins filed a Motion to Set Aside Verdict which was denied. J.A. 823.

After trial, the court, sua sponte, reviewed the transcript of the arraignment and confirmed the court's internal records which indicated that the government, during Legin's arraignment, stated on the record that the maximum punishment for the offense was five years. After briefing, the court, over defense objection, directed the Probation Officer to calculate the initial PSR based on an eight-year maximum term under U.S.S.G § 2J1.2, concluding that Apprendi .v. New Jersey, 530 U.S. 466 (2000) was inapplicable.

The court then found that the government had proven by a preponderance of the evidence that Legins had 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 (an incident not charged in the indictment), and (2) sexual abuse of a ward in violation of 18 U.S.C. § 2243(b) on May 10, 2018 (conduct specifically acquitted by the jury under Count Three). J.A. 920-927.

The court instructed the probation officer to calculate the initial sentencing range based on its conclusion that the underlying offense for purposes of the cross-reference was the acquitted conduct under Count Three, which alleged that Legins sexually abused B.L on May 10, 2018. Id. The court then ordered the probation officer to group the alleged conduct (abusive contact from March 16, 2018) as if it had been charged and proven. J.A. 924. That guideline range was 27 to 33

months of imprisonment. J.A. 966. The guideline range without the four level enhancement would have been 15-21 months.

At the final sentencing hearing, the court denied Legins' request for a downward variance, and instead granted the government's motion for an upward variance. The court issued a Memorandum Opinion including its conclusions on sentencing. J.A 1035. The court, to account for its findings that Legins had sexual contact with B.L. on March 16, 2018, and because the grouping rules in the guidelines, in its view, resulted in a sentencing guideline range that did not adequately address uncharged conduct, created an offense level for that uncharged contact as if it had been charged and proven separately (15-21 months). J.A. 993-994. The court then added that created range to the previously-calculated guideline range of 27 to 33 months, resulting in a new range of 42 to 54 months, based on a five-level upward departure. J.A. 995.

The court then sentenced Mr. Legins to the top end of that arbitrary range based on other "related conduct," most of which was not in the nature or obstruction, and not authorized by the jury's verdict. J.A. 1003-1033. The district court sentenced Mr. Legins to serve 54 months in prison. Legins timely appealed. J.A. 1065.1.

B. TRIAL

The government alleged that Chikosi Legins, a guard at Petersburg FCI, Medium Security Facility, sexually abused B.L. on two separate occasions. J.A. 25. The first alleged offense date per B.L. was March 16, 2018. J.A. 227-232. The location of the alleged offense was in an elevator that ran between the first floor

(Echo Unit) and the second floor (Fox Unit). The elevator was in a corridor that connected the Fox South to the Fox North Unit. J.A. 817.2; 817.3; 817.4; 817.5; 817.6; 817.7; 817.8; 817.9. This corridor was not open to inmate travel, and was locked on both ends. J.A. 817,3; J.A. 103-106. There was no camera surveillance in the corridor. J.A. 181. The officers and staff members were the only individuals that had access to the corridor. Also in the corridor, but separate from the corridor, there was an administrative office (the "office") controlled by its own locked door. J.A. 129-130; J.A. 817,4. In the office, there was a bathroom for officers and staff. J.A. 817.9: Id. The office also included a computer and copier utilized by staff and officers. J.A. 129-130; J.A. 817.6. The elevator door was in the corridor. See, J.A. 227-228. B.L. had a work assignment at the facility delivering posters detailing facility activities to the various units. J.A. 221-223. Accordingly, B.L. would walk from one unit to another, floor to floor, putting up posters. Id. To help B.L., as a matter of convenience and efficiency, Legins and/or other officers, would escort B.L. through the corridor from the Fox South Unit to the Fox North Unit. Id. The corridor was approximately 49 feet long. J.A. 692. Cameras from the main pods recorded entry into the corridor from the Fox South side and the exit from the corridor on the Fox North side.

According to B.L., on March 16, 2018, Legins trapped B.L. in the corridor elevator, forced B.L. to engage in oral sex in a violent manner, and ejaculated everywhere, including on a sweatshirt B.L. was wearing. J.A. 226-232. B.L. did not report the incident, but allegedly retained the sweatshirt. J.A. 240-241; J.A. 323-334.

The second alleged offense date per B.L. was May 10, 2018. J.A. 247-257. B.L. alleged that, while being escorted between Fox South and Fox North through the same corridor on May 10, 2018, Legins took B.L. into the office and forced him to perform oral sex for a period of time, then pushed B.L. to the back of the office where Legins allegedly raped B.L. Id. J.A. 817.6- 817.7. The time stamps on May 10, 2018 from the main common area cameras reflect entrance by Legins and B.L. into the Fox South corridor at 18:10:09. J.A. 129. Legins and B.L. exit on the Fox North side at 18:15:24. J.A. 133. The total elapsed time totaled 350+/- seconds. A timeline introduced by defense investigator indicated that the mere opening and closing of doors as alleged by B.L., and the regular walking time from location to location as described by B.L. would have required 70 seconds of the total 315. Accordingly, B.L's version was that B.L. and Legins entered the corridor, entered the locked office where B.L. was forced to perform oral sex on Legins for a period of time, then pushed to the back of the office by Legins, undressed, then raped until Legins ejaculated, after which Legins went to the bathroom, and washed his hands, after which B.L. cleaned up, after which they both exited back out the locked office door into the corridor, and exited on the Fox North side, and all inside of 315 seconds. B.L. executed an Affidavit, under oath, as to his version of both events, on May 10, 2018. J.A. 817.10. B.L.'s statement under oath was the he was raped for five minutes. J.A. 817.10

B.L. was transported to St. Mary's Hospital where he underwent a rape kit examination. J.A. 35; 39. The forensic rape kit at St. Mary's revealed no physical damage or injury to B.L. J.A. 51. No breaks in the skin. J.A. 51. No fibers or

fluids. J. A. 51. The forensic nurse tested B.L.'s anus using a toluidine dye test under a microscope which would have detected the slightest tear of any skin cell. J.A. 51. No cell damage was detected. J.A. 51. The expert could not objectively identify any pain being suffered by B.L. based on her examination. J.A. 67. B.L.'s forensic examination was, based on the government's expert, a normal exam. J.A. 49.

The government's expert (Womble) was also the same forensic nurse that conducted the rape kit examination at St Mary's hospital on May 10. When questioned about possible explanations for the lack of damage or injury, the expert testified that several factors would have been in play. J.A. 52. Lubrication, duration of event, and force. J.A. 52. Sphincter tone was also factor. J.A. 53. On cross-examination, the government's expert agreed, however, that B.L's anus had good muscle tone (tight). J.A. 68. While saliva was the alleged lubricant used by Legins, the expert agreed that saliva was just a lubricant because it was wet. J.A. 64. Saliva had no innate lubrication feature. J. A. 64. The parties stipulated that Legins' penis at full erection was seven inches. J.A. 33.1-33.4.

The government's expert was then asked about the presence of internal injury. J.A. 54-55. Per Womble "If injuries are inside, I can't see them from the outside." J. A. 55. Womble testified that an anoscope could have been used to check for internal injury if she believed it was necessary. J.A. 55. Womble added, however, that based on the lack of damage to the exterior, there was no basis to escalate the examination to an internal examination. J.A. 55.

Oddly, however, the examination did, however, reflect a piece of suspected toilet tissue around the circumference of B.L.'s rectum. J.A. 70. This paper product was never explained by B.L. or the government, despite B.L's statement that B.L. did not have a bowel movement , or take any measures to clean himself between the alleged incident and the forensic exam. J.A. 66. The forensic expert called by Legins (Cheek), essentially, corroborated the government's expert in opining that B.L.'s examination revealed no evidence no injury or damage. Cheek further opined that, based on the analysis of the factors including penis size, force, duration, the affidavit from B.L., and lubrication, if the event happened as alleged, she would have expected to see injury. J. A. 712. Cheek then further elaborated on the toilet paper discovered during the examination which extended around the circumference of B.L.'s anus. Specicifally, in her opinion, there would be no reason for toilet paper to exist in B.L's rectum if the victim has just been raped for five minutes using only saliva. J.A. 712.

In reviewing the FBI"s forensic evidence, the government did not introduce any DNA attributable to Legins from the office. The evidence from the elevator was not tested. J.A. 452 There was DNA found on the sweatshirt allegedly retained by B.L. after the March 16 unreported incident, but the DNA could not be confirmed as semen. J.A. 445. A jock strap B.L. was wearing when he reported the incident on May 10, 2018 contained DNA likely related to Legins. J.A. 418-420; J.A. 817.1. The DNA on the jock strap could not be confirmed as semen. J.A. 418. Coincidentally, a piece of a paper product was collected from B.L. on May 10, 2018, along with the jock strap, lip balm and shorts. All four items were included in the

same evidence bag, but the paper was not tested. J.A. 450-451; J.A. 423-424; J.A. 817.1. An anorectal swab taken as part of the rape kit included DNA likely related to Legins. J.A. 408-410. The exact collection location of the swab was not, however, identified by either government expert. As conceded by the government's DNA expert, none of the findings were conclusive that the samples were semen. JA. 407. The government's expert could not opine on how the DNA got there, just that it was there. J.A. 424. The government's expert agreed that DNA can be transferred by touch alone. J.A. 451. Swabs of the thighs, buttocks, lips, mouth or genitalia did not reveal any DNA attributable to Legins. J.A. 432-436.

On June 5, 2018, Legins was interviewed by Special Agent Johnny Lavendar and OIG Officer Stephen Orloff. During the interview, Agent Lavendar asked Legins if he had sexual activity, whether by force or consensually, with any inmates while at FCI Petersburg. J.A. 488-499. Legins stated that he had not. When questioned about the May 10, 2018 incident, Legins relayed to the officers that the time span between entry into the corridor between the Fox South door and the exit on the Fox North side was caused by the fact that Legins wanted to print additional "cop out" forms. J.A 491-496. These were standard forms used in the unit. Legins said that he tried to insert his staff computer card, which authorized access, into the printer. Id. Legins then stated that, when he tried to punch in his authorization code, the computer would not accept the code because Legins was using the number keys at the top of the keypad. Id. According to Legins, he eventually discovered that the computer number lock had been activated by a former user forcing the user to use the number pad on the right side of the keypad, as opposed to the number keys

at the top. According to Legins, by the time he deciphered the problem, Legins realized that he had spent too much time so he exited the office, abandoned his attempt to get the copies, and escorted B.L. to the Fox North exit door. Id.

Upon completion of the investigation, the United States charged the defendant as outlined herein. The basis for Count Five were the two statements in which (1) Legins denied that he had engaged in sexual activity with any inmate at the facility, and (2) Legins stated that he and B.L. entered the corridor administrative office to print off copies when, in fact, he entered the office with the intent of sexually abusing B.L.

During trial, the defense offered the testimony of two witnesses who provided voluntary statements as part of the government's investigation. Richard Fornash testified that he heard B.L., during a casual group conversation, heard B. L. state that he would use sex with an officer as a way to gain something in return. J.A. 657. Ajibola Erogbogbo, an inmate librarian, testified that he, at B.L's request, assisted B.L. in researching claims on Lexis which involved claims against officers for monetary gain. J.A. 667-670.

C. **SENTENCING**

The sentencing court found that the government had established abuse of a ward through a sexual act which, by definition, required penetration of the mouth or anus. It further found that on a prior occasion, March 16, 2018, the victim had illegal sexual contact with the defendant per below, thereby inserting an entirely different fact pattern not even alleged by the government. The two events were established based on the following:

1. March 16, 2018

For sentencing purposes, the court found by a preponderance of the evidence that the victim, instead of being sexually abused by the defendant, actually masturbated the defendant on March 16, 2018. The court found that conduct, which was not charged or alleged, to be in violation of 18 U.S.C. § 2244(a)(4). J.A. 921. The court relied on two items of evidence to support its finding, the testimony of B.L., and the DNA recovered from the sweatshirt. J.A. 922. The court then added the guideline range for that crime directly on top of the base offense guideline. Masturbation was never alleged by the government or the victim. B.L. never suggested any masturbation. The fact pattern appears to derive from a comment made by defense counsel during closing argument in which defense counsel was attempting to provide hypotheticals for the presence of DNA, and were not admissions of guilt.

2. May 10, 2018

The court then concluded, with respect to the May 10, 2018 incident, that Legins "had sex in Mr. Lemagne's rectal area" based on the preponderance of the evidence. J. A. 922. The court used, as corroboration, 1) B.L's testimony, 2) the anorectal swabs, and 3) the prison tapes reflecting entry and exit into the corridor. J.A. 922**.** The court ignored the testimony of the defense expert which established no penetration, even by dye and microscopic examination.

SUMMARY OF ARGUMENTS

A. The evidence was insufficient to support the conviction under 18 U.S.C. § 1001.

B. The defendant was improperly subjected to an enhanced statutory maximum sentence of eight years.

C. The trial court erred in the sentencing of the defendant, both procedurally and substantively.

ARGUMENT

A. The evidence was insufficient to support the conviction under 18 U.S.C. § 1001

i. Standard of Review

The conviction must be sustained if the evidence, when viewed in the light most favorable to the Government, is sufficient for any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. United States v. Romen, 148 F.3d 359, 364 (4th Cir. 1998). The evidence must be substantial. Substanital evidence is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt. See United States v. Smith, 29 F.3d 914, 917 (4th Cir.), *cert. denied*, 115 S. Ct. 454, 130 L. Ed. 2d 363 (1994).

ii. Discussion of Issues

The government charged Legins with making two false statements in violation of 18 U.S.C. § 1001, when he allegedly lied about the commission of sexual acts, and using a false alibi to cover up his commission of a sexual act on May 10, 2018. The elements of a § 1001 violation are falsity, materiality, knowingly and willfully made, and within federal jurisdiction. United States v. Ritchie, 858 F.3d 201 (4th Cir.

2017). Mr. Legins stipulated the element of jurisdiction. The government was required to prove each element beyond a reasonable doubt.

The fundamental premise of Count Five was that the sexual acts occurred. Without substantiated evidence that they did occur, the government has not met its burden to prove falsity. More specifically, when the government chose to specifically charge the manner in which the defendant's statement was false, the government must have proved that it was untruthful for that reason. Stirone v. United States, 361 U.S. 212, (1960); United States v. Hoover, 467, F.3d 496 (5th Cir. 2006). In this case the Indictment specifically alleged that the false statements were about a sexual act with any inmate at FCI Petersburg. J. A. 25 at 28. The second statement by Legins about the events in the office was also premised on the occurrence of the sexual act within the office. J.A. 28. That being the case, the question is whether there was substantial credible evidence to support the underlying premise beyond a reasonable doubt. That proof must have included anal and oral penetration to satisfy the definition of sexual act. If not, a reasonable finder of fact could not have convicted the defendant of making false statements about an event that was not proven.

Essentially, all of the government's evidence relied on 1) direct evidence in the form of B.L's testimony, 2) the circumstantial forensic evidence collected from a sweatshirt allegedly owned by B.L, a jock strap worn by B.L. on May 10, 2018, a swab from the B.L.'s rectum on May 10, 2018, and 3) the forensic evidence collected from the rape exam. These items were all collected from B.L., based solely on B.L.'s allegations of how Legins' DNA may have made it to each item or location.

There were no other eyewitnesses. The DNA evidence recovered from the elevator on March 18, 2018 was not tested. J.A. 452. There there was no DNA evidence introduced from the administrative office for the May 10, 2018 offense date. There was no camera or other video evidence produced from within the office.

With respect to the May 10, 2018 incident, the time stamps on the video reflected entrance into the corridor at 18:10:09. J.A. 129. Exit on the Fox North side at 18:15:24. J.A. 133. The total elapsed time was 315 +/-seconds. A timeline introduced by defense investigator indicated that the mere opening and closing of doors, and walking to exit location, as alleged by B.L. would have required 70 seconds of the total 315. B.L. alleged that he was forced to perform oral sex on Legins for a period of time just beyond the door(J.A. 817..5), was then pushed to the back of the room by Legins, undressed, then raped for five minutes (J.A. 817.7) until Legins ejaculated, after which Legins went to the bathroom (J.A. 817.9), and washed his hands while B.L. got dressed, after which they both exited back out the locked office door (J.A. 817.5) into the corridor, and exited on the Fox North side (J.A. 817.3), and all inside of 315 seconds. The jury unequivocally rejected B.L.'s version. In addition to the rejection by the jury of that testimony, there was the testimony of Richard Fornash for the defense, who testified that B.L. had stated around the softball field that B.L. would use sex with an officer as a way to take advantage for other means. J.A. 157. Another defense witness, Erigbobo, a librarian, testified that B.L. recruited his help to conduct online Lexis research to find out about fraud and claims against officers for monetary gain. J. A. 667-669. The net result of B.L's direct testimony, based on the jury's verdict on Counts One through Four was

that it failed to support any allegation of sexual abuse. That finding would logically extend to a determination that there was no sexual act as alleged in Counts One through Four.

In turning to the forensic evidence discovered through the rape kit at St. Mary's, the exam revealed no physical damage or injury to B.L at all. J.A. 51. No breaks in the skin. J.A. 51. No fibers or fluids. J. A. 51. Not the slightest tear of any skin cell using toluiene dye and microscope. J.A. 51. It was, based on the government's expert, a normal exam. J.A. 49. B.L's anus had good muscle tone (tight). J.A. 68. The parties stipulated that Legins' penis at full erections was seven inches. J.A.33.1-33.4. Spit was not really a lubricant. J.A. 64. The defendant's affidavit provided at the time of the incident, and as part of the "prompt reporting" argument which was relied upon by the government to corroborate B.L's truthfulness, stated the rape lasted five minutes. J. A. 817.10. The government' expert, however, who was also the forensic nurse who conducted the exam, did not discover objective symptoms that would have justified a conclusion of pain based on her examination. J.A. 67.

No internal exam was attempted based on the fact that there was no basis to escalate the examination to an internal examination. J.A. 55. Per Womble "If injuries are inside, I can't see them from the outside." J. A. 55. In sum, the government's circumstantial evidence through the rape kit, in a light most favorable to the government, failed to prove that there was any penetration of B.L's anus or mouth, at all.

Contrarily, the government's circumstantial evidence tended to establish that B.L. was the individual providing false statements. Specifically, the rape kit examination reflected a piece of toilet tissue around the circumference of B.L.'s rectum. J.A. 70. This paper product was never explained by B.L., or the government, despite B.L.'s statement that B.L. did not have a bowel movement, or take any measures to clean himself between the alleged incident and the forensic exam. J.A. 66. As opined by defense expert, and as common sense would require, it would have been virtually impossible for B.L. to have been raped by a man with a seven-inch penis for five minutes, using saliva, without injury and there still be toilet paper in the victim's anus. While admittedly, there was an anorectal swab taken as part of the rape kit which included DNA likely related to Legins, the exact collection location of the swab was not, however, identified by either government expert. As conceded by the government's DNA expert, none of the findings were conclusive that the samples were semen. JA. 407. Just DNA. The government's expert could not opine on how the DNA got there, just that it was there. J.A. 424. DNA can be transferred by touch alone. J.A. 451.

Lastly, with regard to the evidence from FCI Petersburg, there was DNA found on the sweatshirt allegedly retained by B.L. after the March 16 unreported incident. The origin of the DNA, whether sweat, or skin, or other medium, was not scientifically established. B.L.'s version was rejected. The mere presence of DNA did not establish penetration or either B.L.'s mouth or anus. A jock strap B.L. was wearing when he reported the incident on May 10, 2018 contained DNA likely related to Legins. The original of the DNA was not scientifically established. B.L's version

was rejected. The presence of DNA did not establish penetration. Coincidentally, a piece of a paper product was collected from B.L. along with the jock strap. Both items were included, along with some lip balm, included in the same evidence bag. J.A. 450. The paper was not tested. J.A. 450. Transfer could have occurred within the bag. J.A. 450-451. Arguably, this paper could have been used by B.L. to transfer Legins' DNA to his own rectum area in an attempt to falsely claim rape, or to the sweatshirt.

In sum, although there was evidence to establish that Legins' DNA was in the area of B.L's anus, there was no basis to conclude it was semen, or that it was there as a result of sexual abuse, or, more importantly, that penetration occurred. In the absence other evidence to establish actual penetration, there was no substantial evidence to establish that Legins' statements in the June 5, 2018 interview were false statements, and the conviction and sentence should be vacated. The evidence was insufficient as a matter of law.

B. The trial court erred when after trial it increased the statutory maximum sentence under 18 U.S.C. § 1001 from five years to eight years, in violation of Apprendi.

i. Standard of Review.

This court reviews de novo constitutional due process claims. United States v. Legree, 205 F.3d 724, 729 (4th Cir. 2000).

ii. Discussion of Issues

After the jury returned its verdict, the court noted that the defendant had been arraigned under the general provision of 18 U.S.C. §1001. The court, sua sponte, reviewed the audio of the arraignment to confirm that the maximum penalty for

Count Five stated by the government during the arraigment was five years. J.A. 39. The district court ordered briefing and concluded that Apprendi was inapplicable, that any error was harmless, and then directed the probation officer to calculate the guidelines based on the enhanced penalty paragraph under 18 USC 1001(3). J.A. 919.

The Indictment did not charge Legins with any particular subsecton of 1001. J.A. 25 at 28. Joint Jury Instruction 35 repeated the language in the Indictment. J.A. 747. Joint Jury Instruction 36 defined the Count Five offense as being under 1001(a)(2), but did not make reference to any requirement that the false statement be made pursuant to matter involving crimes under 109(A). J.A. 748-749. Joint Jury Instruction 37 did not include direction that an additional fifth element be proven to establish that the matter involved a crime under Chapter 109A. J.A. 749. Jury Instruction 38 did not contain the definition of sexual act, nor did it refer to the definition of a sexual act in other instructions. J.A. 751-753. The United States, in its closing, did not argue that these offenses would be included within the scope of 109A. J.A. 786-789. There would have been no basis for timely objection by defense counsel to the need for additional instruction to specifically address the defendant's exposure to the enhancment, because the enhanced penalty was not in play based on the terms set forth at arraignment. That being the case, the matter should be reviewed de novo versus for plain error.

Per Alleyne v. United States any fact that increases the penalty for a crime is an element that must be submitted to the jury and found beyond a reasonable doubt. Alleyne v. United States, 570 U.S. 99 (2013); Apprendi v. New Jersey, 530 U.S. 466,

490 (2000). In this case, the regular maximum penalty under 18 U.S.C. § 1001 was five years. In order to seek the enhanced penalty of eight years, the government was required to specifically plead the necessary facts to establish that the "matter" involved facts under 109A, or 109B or 110, or 117, or 1591, and the jury was required to make a specific finding relating the matter to one of those chapters. Because 1) Count Five in the Indictment did not detail the enhanced conduct with specificity, 2) there were no definitions provided in the Instructions with regard to what offenses were sexual acts for purposes of Count Five, 3) the enhancement language was not included as an element in the Instructions for Count Five.

The Court of Appeals **agreed** that the trial court erred, but ruled that the error was harmless. In so doing, the Court of Appeals combined the Neder analysis and the Recuenco analysis to find that the question, whether analyzed from a sentencing perspective or a trial perspective, was to ask "whether proof of the missing element was "overwhelming and "uncontroverted". Washington v. Recuenco, 548 U.S. 212 (2006); Neder v. United States, 527 U.S. 1 (1999). They further held " . . . such that the jury verdict would have been the same absent the error".

Defendant argues, however, that the Court of Appeals focused on the wrong element. The Court of Appeals opined that the Neder inquiry had to be based on whether there was uncontroverted evidence that the general subject matter was within the law enforcement's jurisdiction under a Chapter 109A offense. The Court of Appeals correctly cited that defense counsel conceded the fact that the investigation was a general 109A type inquiry. It was. That, however, was not the issue. The issue was whether the element of **falsity about a sexual act** element

could be established by uncontroverted and overwhelming evidence because the jury had no instruction on the definition of a sexual act for purposes of an enhancement. That question was absolutely contraverted and was very vigourously disputed. The opinion further stated that the offense did not require a "sexual act" to be specifically alleged in the Indictment. For a regular 1001 count, that may have been the case. But when the sentencing court ruled that the enhancement was going to be applied sua sponte, the court essentially created the necessity to prove a 109A offense as an element. The term "sexual act" as otherwise defined in Counts One through Four required penetration of the mouth or anus. In light of the fact that the jury acquitted the defendant of all counts which included the definition of a sexual act, it is entirely possible that if the definition of a sexual act had been made applicable to Count Five.

The opinion further indicates that the jury could have just gone off the reservation and come up with it's own definition of sexual act based on its "colloquial" meaning. That holding, it would seem, would allow a jury to become the grand jury mid-stream during trial. Particularly in light of the standard instruction to the jury which requires the jury, as a duty, to only follow the instructions given. In this case, Instruction 1 did just that. J.A. 719.

C. The court erred in the sentencing of Mr. Legins, both procedurally and substantively.

i. Standard of Review

In a sentencing challenge, the appellate court reviews a sentence for reasonableness, applying a deferential abuse-of-discretion standard. The appellate

court first ensures that the sentence contains no significant procedural error, such as miscalculating the sentencing guidelines range, inadequately considering the 18 U.S.C. § 3553(a) factors, or insufficiently explaining the sentence. If the appellate court finds the sentence procedurally reasonable, the appellate court will consider the substantive reasonableness of the sentence. This Court reviews the district court's factual findings for clear error and its legal conclusions *de novo*.

ii. DISCUSSION

The sentence was procedurally unreasonable because (1) the court's conclusions upon which the guidelines range were calculated were not supported by the evidence, and the court improperly utilized factors to justify an upward variance.

1. **Procedural Defect with Preponderance Findings**.

The district court erred, based on the jury's verdict, in finding that the government established, by a preponderance, that Legins 1) engaged in the uncharged illegal contact under 18 U.S.C. § 2244 on March 16, 2018, and 2) the committed the acquitted conduct on May 10, 2018.

i. March 16, 2018

For sentencing purposes, the court found by a preponderance of the evidence that the victim, instead of being sexually abused by the defendant, actually masturbated the defendant on March 16, 2018. This theory was cut from plain cloth insofar as neither the government nor the victim ever alleged masturbation of any type, by any person. The allegations were either sexual abuse by penetration of the mouth, or anus, or mouth, or nothing. Notably, the court found that conduct, which was not charged, or alleged, to be in violation of 18 U.S.C. § 2244. J.A. 921-922.

The court relied on two items of evidence to support its finding, the testimony of B.L., and the DNA recovered from the sweatshirt. J.A. 922. This finding was error because there was no evidence, even by a preponderance, that the victim masturbated the defendant. Second, while the court characterized the DNA finding on the sweatshirt as "sperm", the government's expert conceded that the DNA found on the sweatshirt could not be conclusively found to be sperm. J.A. 922; J.A.114. Moreover, the manner, time, method, or basis for Legins' DNA to be on the B.L.'s sweatshirt was totally within the control of B.L. The mere presence of Legins' unclassified DNA on B.L.'s sweatshirt did not support any form of penetration, or contact, or masturbation. In sum, because B.L's own testimony failed to refer to any type of masturbation, and because the sweatshirt added no proof that the events on March 16, 2018 transpired as relayed by B. L., there was no evidence to support even a preponderance finding that Legins' statements were false with respect to the March 16, 2018 incident, or related to abusive sexual acts.

ii. May 10, 2018

The court then concluded, with respect to the May 10, 2018 incident, that Legins "had sex in Mr. Lemagne's rectal area". J. A. 922. The court used, as corroboration, 1) B.L's testimony, 2) the anorectal swabs, and 3) the prison tapes reflecting entry and exit into the corridor. J.A. 922**.** As with the finding on the March 16th incident, based on the jury's verdict, there was not substantial credible evidence to determine, even by a preponderance, that Legins penetrated B.L.'s anus with his penis as required by the statute. The prison tapes only reflect an entry into the corridor and an exit from the corridor with a total elapsed time of 315 seconds.

The only person that could have testified to what happened in those 315 seconds was B.L. The fact that B.L. alleged all of this violent conduct, which included one incident of oral sex, then relocation, then another five minutes of being raped, to have happened within 315 seconds, when defense counsel's investigator testified that the time, simply to walk from place to place within the corridor, took 70 of those 315 seconds, actually further undermined the credibility of B.L. Remember that B.L.'s "prompt" affidavit, under penalty of perjury, established the rape time as being five minutes alone. J.A. 817.10.

The only independent evidence upon which the preponderance finding could have been based was the DNA found on B.L's rectum. The court improperly concluded that the mere presence on the outside of B.L's rectum positively established the Legins' penis penetrated the inside B.L., even if slightly. Other than B.L.'s incredible testimony, there was no evidence to support a finding that Legins' penis ever made contact with B.L's rectum. In fact, the evidence was directly to the contrary. Both the government's expert and the defense expert witnesses concluded that there was no evidence of damage to B.L's anus. The examiner used dye and a specific procedure to detect possible damage, even to a single cell of tissue, under a microscope. No damage was detected. The examination revealed that B.L.s' anus was tight. The parties stipulated that Legins had a seven-inch penis at erection. No internal tests were taken. The only lubricant, according to B.L., was spit which had no innate lubricating quality. J.A 64. The lack of evidence of any damage, even the slightest, precluded any finding of actual penetration which the court was

required to find to establish a preponderance. In fact, the defense's expert opined that, based on all of the foregoing factors, she would have expected to see damage.

Additionally, a fact which the court did not address, but was significant, was that B.L. had toilet paper around the circumference of his rectum at the time of examination. J.A. 70. This was never explained by the government. Legins' expert opined that it would have unusual to find toilet paper in that location if the victim had just been forcibly raped by a man for five minutes with a seven-inch penis. J.A. 712. In sum, while there was evidence that Legins' DNA made it somehow, in some way, to B.L's rectum area, there was no credible evidence to support how that DNA got there, or the conclusion by the court that B.L's anus was penetrated, even slightly. The question of penetration was a yes or no question. In this case, there was no physical evidence of penetration. The only credible witnesses, the experts, certified that. At best, the presence of DNA on the exterior of B.L.'s anus would only support a sexual contact case, but it was error to find that Legins sexually abused B.L. by penetrating his anus on May 10, 2018, even by a preponderance.

The court then ordered the probation officer to group the uncharged conduct (abusive contact) as if it had been charged and proven. After the grouping, the probation officer determined that the computation strictly under U.S.S.G § 2J1.2 yielded an offense level of 18 (14+4), which was greater than the result under the cross reference. Accordingly, the court used § 2J1.2 as the guideline range applicable to Mr. Legins. That range was 27 to 33 months. Because the grouping did not result in higher range than the base range, the court then added the range for that uncharged conduct (15 to 21 months), as if the government had independently

charged and proven a sexual "contact" charge under 18 U.S.C. § 2244.

The court then arbitrarily assigned five levels based on the March16, 2018 uncharged conduct based on its conclusion that five levels was the "value" of having an inmate masturbate an officer in a consensual setting. J.A. 995. This guideline calculation method was also procedurally incorrect and resulted in higher adjusted guideline range.. The court essentially created a different fact pattern regarding consensual masturbation by the victim of the defendant, when even the victim did not testify to that event.

2. Procedural Error with Other Acts

The court concluded that based on the "nature and circumstances of Defendant's extensive obstruction, pre-meditation, and past similar conduct," that adjusted range of 42-54 months better reflected the seriousness of the offense and related conduct. J.A. 1015-1022. The court relied upon the additional factors set forth in his memorandum to be addressed infra to sentence Mr. Legins. J.A. 1035.

Based on the Memorandum Opinion, specific additional conduct relied upon to grant an upward departure was as follows (J.A. 1053):

i. Testimony from Nurse Ramsey

1. That when B.L. arrived at the prison's medical facility for an examination following the May 10, 2018 offense, Legins called her to ask for medicine. He had never called her before. J.A. 1054.

Although, perhaps atypical, there is no evidence to suggest that Legins, in any way, attempted to coerce, threaten, or obstruct Nurse Ramsey's efforts. Based on the jury's findings, Legins was simply looking for information about what was being relayed by B.L. to staff. At worst, it should have been a neutral factor.

ii. Officer McLaughlin testified that on the night of the May 10, 2018 offense, he heard someone who sounded like Legins shout "you got to be kidding me" as he escorted B.L. across the prison complex to the Lieutenant's office. J.A. 1024.

The court treated this as aggravating obstructive conduct, even though McLaughlin testified that he did not see Legins make the statement and was not 100% sure it was Legins at all. J.A. 467; J.A. 469. From, the jury's perspective, even if true, this would have been legitimate expression of disbelief on the part of Legins who would have assumed that B.L. was being escorted to report conduct which Legins anticipated to be false. Based on the jury's findings, this should not have been considered as "obstructive conduct" justifying an upward variance.

iii. Legins called Officer McLaughlin in the Lieutenant's office twice for "suspicious reasons". J.A. 1054.

This should have been a neutral factor based on reasons stated above.

iv. Legins provided an explanation on June 5, 2018, attempting to explain away the presence of biological evidence on B.L.'s clothing. J.A. 1054

This version and, frankly, all of Legins' versions, have to be placed in context after reviewing the jury's conclusions. Specifically, there was no evidence to suggest that Legins had any insight into the government's investigation. If B.L. had fabricated all, or even a portion, of events, Legins would not have known what would have been alleged by B.L. Legins went into this June 5, 2018 interview voluntarily, but was then confronted with allegations of sexual abuse, sexual activity, and rape. These statements would not have come from Legins based on his premeditation. These statements arguably came from Legins who was surprised. Because the jury concluded that B.L.'s version was, at least in part, false, it was not fair or reasonable

to increase Legins' sentence based on his illogical statements, when the statements were made to defend himself from false allegations. At worst, his statement should have been a neutral factor for sentencing.

v. Legins stated that he and another colleague, Officer Harry Parker, had seen B.L. cleaning the bathroom while unattended. J.A. 1055.

This should have been a neutral factor based on the foregoing reasons.

vi. Legins used the "premeditation" through the use of grooming. J.A. 1055.

There was no evidence to establish these items of grooming other than the testimony of B.L. which was rejected by the jury. Accordingly, this basis for upward departure did not honor the jury's findings.

vii. Legins planned on how he would avoid detection during both offenses by escorting B.L. into an unattended hallway, where he knew there would be no surveillance camera. J.A. 1056.

Again, that evidence, to be used as a basis for upward departure, is based purely on the court's substitution of its belief in place of the jury's finding. It was not uncommon for Legins, or any officer, to escort B.L. through the corridor. J.A. 221-223. The jury concluded that the acts as alleged in the office or hallway were not proven. If the jury concluded that it did not happen as alleged, the fact that Legins escorted B.L. through the corridor, as typical, should not have served as a basis for upward departure.

viii. In 2008, while Legins was employed by the Richmond Sheriff's Office a female inmate accused him of asking her to "show him something".

In 2008, Legins was reprimanded for unbecoming conduct while working as a guard for the City of Richmond Sheriff's office., suspended from work for five (5) days and was allowed to return to work. Nothing more. The event was **ten** (10) years

prior to the date of the alleged offenses and was not a criminal offense. It should not have been considered under U.S.S.G. § 5H1.5 and would not even be counted for criminal history, yet it was a basis for upward departure.

In sum, none of the factors took the sentencing event to a non-heartland range. To the contrary, the court utilized discouraged factors that were not to a "uncommon degree" that they warranted inclusion in a five level upward departure. It was therefore procedural error to utilize these factors as a basis for an upward departure when they were not based on the nature of the convicted conduct under 1001, but on the nature of the acquitted conduct under Counts One through Four.

CONCLUSION

This government was required to prove beyond a reasonable doubt the sexual act of penetration of Legins penis to B.L.'s mouth or anus to establish the falsity of Legins statements. It did not as a matter of law.

The Apprendi violation was substantive, not harmless. The anchor sentencing range was established incorrectly thereby infecting the balance of the sentencing event.

Lastly, the evidence did not establish conduct that would remove the initial range from the heartland by five additional levels, particularly when the five levels were based on unmentioned or discouraged factors. The defendant requests oral argument.

CHIKOSI LEGINS

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