NO. _____

In The
Supreme Court of the United States

CHRISTIAN M. ALLMENDINGER,

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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Dated: May 28, 2021

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QUESTIONS PRESENTED

1. *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151 (2013), expressly overruled *Harris v. United States*, 536 U.S. 545 (2002), and at least implicitly overturned *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). Did *McMillan*'s rejection also fatally undermine two cases that depend upon it, *Witte v. United States*, 515 U.S. 389 (1995); and *United States v. Watts*, 519 U.S. 148 (1997)? Consequently:

a. does the Fifth Amendment forbid sentencing guidelines from enhancing the *presumed reasonable* punishment for an offense, unless the facts used by those guidelines to enhance the presumed penalty are found by a "beyond a reasonable doubt" standard after indictment?

b. does the Sixth Amendment forbid a judge, instead of a jury, finding the facts that enhance a presumed reasonable punishment?

2. May sentencing courts insert their own suppositions over a party's demonstration; deem statistical and empirical data "too abstract to bear meaningfully on . . . sentence"; and reject its own observation that the defendant before the bar is different from the original defendant sentenced? Or are such deviations factual flaws fatal to procedural and substantive reasonableness?

LIST OF PARTIES TO PROCEEDING BELOW

United States of America

Christian M. Allmendinger

LIST OF DIRECTLY-RELATED PROCEEDINGS

United States District Court for the Eastern District of Virginia, at Richmond. (3:10-cr-00248-REP-1). Robert E. Payne, Senior District Judge.

United States v. Allmendinger, 2012 U.S. Dist. LEXIS 38670 (E.D. Va., Mar. 20, 2012)

United States v. Allmendinger, 2017 U.S. Dist. LEXIS 14312 (E.D. Va., Feb. 1, 2017) (Post-conviction relief denied at, Dismissed by, Motion denied by, As moot, Certificate of appealability denied)

United States Court of Appeals for the Fourth Circuit

United States, Plaintiff-Appellee v. Allmendinger, Defendant-Appellant, No. 11-5162, 706 F.3d 330 (2013 U.S. App. LEXIS 1880) (4th Cir. 2013).

US Supreme Court certiorari denied by *Allmendinger v. United States*, 133 S. Ct. 2747, 186 L. Ed. 2d 194, 2013 U.S. LEXIS 3999 (U.S., 2013)

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OTHER AUTHORITY

Petitioner Christian Allmendinger respectfully petitions for a writ of certiorari, to review the judgment of the United States Court of Appeals for the Fourth Circuit in *United States v. Christian Allmendinger*, No. 19-4406, entered December 29, 2020.

This Petition is timely filed under Supreme Court Rule 30.1.

DECISIONS BELOW

The instant opinion of the United States Court of Appeals for the Fourth Circuit is unpublished and is reprinted at Pet. App. 1a-6a. The instant judgment of the United States Court of Appeals for the Fourth Circuit is unpublished and is reprinted at Pet. App. 7a. The district court's judgment after remand is unpublished and is reprinted at Pet. App. 8a. The district court's order denying downward departure is unpublished and is reprinted at Pet. App. 14a-15a.

JURISDICTIONAL STATEMENT

The district court in the Eastern District of Virginia had jurisdiction over this criminal case under 18 U.S.C. § 3231 (district court jurisdiction) and the criminal statutes of conviction (18 U.S.C. §§ 1341 and 1349; 15 U.S.C. §§ 77q(a) and (x)).

The Court of Appeals for the Fourth Circuit had jurisdiction under 18 U.S.C. § 3742 (reviewing sentences) and 28 U.S.C. § 1291 (courts of appeals jurisdiction). That court issued its opinion and judgment appealed here on December 29, 2021. App. 1a-6a. This Court has jurisdiction under 28 U.S.C. § 1254(1) (certiorari).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be held to answer for a capital, or otherwise infamous crime,

unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation. . . ." U.S. Const. amend. VI.

STATEMENT OF THE CASE

The Sixth Amendment requires indictment before persons may be prosecuted and punished for federal felonies. Absent defendant admissions, it requires a jury to convict defendants of those felonies. Together with the Fifth Amendment's due process clause, the Sixth Amendment also guarantees that jury convictions be had only on peers' (juries') findings beyond a reasonable doubt.

But *United States v. Watts*, 519 U.S. 148 (1997) (per curiam) found "that application of the preponderance standard at sentencing generally satisfies due process." *Watts*, 519 U.S., at 156 (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986)). The *Watts* Court then ***narrowly*** held that the double jeopardy clause does not prohibit the use of acquitted conduct at sentencing. *Watts*, 519 U.S. at 157.

As Justice Stevens noted in dissent, though, regarding a mandatory Guidelines regime:

> the [*McMillan*] holding should not be extended to allow a fact proved by only a preponderance to increase the entire range of penalties within which the sentencing judge may lawfully exercise discretion.

Watts, 519 U.S. at 166, 117 S. Ct. at 642.

Thereafter, this Court expressly struck down *McMillan*'s progeny, *Harris v. United States*, 536 U.S. 545 (2002), and appears to have necessarily overruled *McMillan* as well. *See Alleyne v. United States*, 133 S. Ct. 2151, 2166, 186 L. Ed. 2d 314 (2013) (Sotomayor, J., joined by Ginsberg and Kagan, JJ., concurring) ("The Court overrules *McMillan* and *Harris* because the reasoning of those decisions has been thoroughly undermined by intervening decisions and because no significant reliance interests are at stake that might justify adhering to their result."); *see also Ring v. Arizona*, 536 U.S. 584, 609 (2002) (in death penalty case, "we overrule *Walton* [*v. Arizona*, 497 U.S. 639 (1990), relying in part on *McMillan*] to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance . . .").

Under *Alleyne*, "[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." *Alleyne*, 133 S. Ct. at 2162. Under *Alleyne*'s reasoning, the double jeopardy decision in *Watts* did not survive *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *United States v. Booker*, 543 U.S. 220 (2005), at least as regards the use of acquitted and uncharged conduct in determining presumed reasonable sentencing ranges under the U.S. Sentencing Guidelines.

The statutory minimum and maximum sentences are generally considered the "legally prescribed punishment." *See Alleyne v. United States*, 570 U.S. at 100. But the U.S. Sentencing Guidelines remain a mandatory consideration, and a constriction on the breadth of discretion available in ordinary sentencings. The "legally

prescribed punishment" must be not just within the prescribed statutory range, but also within a "reasonable" variance from the Sentencing Guidelines calculation. *See Rita v. United States*, 551 U.S. 338, 347 (2007).

Because *Watts* and *Witte* substantially stand on overruled case law, *Harris* and *McMillan*, this Court should now also expressly overrule both *Watts* and *Witte*. Thereafter, it should strike the many years and reports of summary deference to *Watts* and *Witte* that now also stand wrongly decided. To the extent it would authorize judicial fact-finding in a mandatory calculation under Sentencing Guidelines, Alleyne was wrongly decided, or at least incompletely examined. *See Alleyne*, 570 U.S. at 30-31 ("We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment.")).

The quandary of using unconvicted conduct in sentencing decisions is exacerbated when district courts reject facts and empirical data, inserting instead its own suppositions. Trial courts may disregard Sentencing Guidelines on policy grounds, of course. *See, e.g., Kimbrough v. United States*, 552 U.S. 85, 110 (2007).

But courts are not constitutionally free to ignore objective data that bears directly on an offense or offender. *See* U.S.S.G. § 6A1.3.

Especially when the sentence rendered by the trial court on remand, with three fewer felonies convicted, is identical to the first sentence based on a "sentencing package" façade hiding result-oriented judgment.

REASONS FOR GRANTING THE WRIT

In *Alleyne*, Justices Ginsberg and Kagan joined Justice Sotomayor in noting:

> "[T]he opinion of the Court . . . persuasively explains why *Harris v. United States,* 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002), and *McMillan v. Pennsylvania,* 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), were wrongly decided. Under the reasoning of our decision in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and the original meaning of the Sixth Amendment, facts that increase the statutory minimum sentence (no less than facts that increase the statutory maximum sentence) are elements of the offense that must be found by a jury and proved beyond a reasonable doubt. *Ante,* at 2156."

Alleyne, 133 S. Ct. at 2164 (Sotomayor, J., joined by Ginsberg and Kagan, JJ., concurring).

This case allows an answer to an important question of federal law, one begged by *Alleyne*: whether facts that enhance mandatory Guidelines *calculations*, which set the presumptively "reasonable" punishments against which district courts ***must*** measure their sentences, must be found by a jury beyond a reasonable doubt. As observed by D.C. Circuit Judge Millett:

> only the Supreme Court can resolve the contradictions in the current state of the law, by either 'put[ting] an end to the unbroken string of cases disregarding the Sixth Amendment' or 'eliminat[ing] the Sixth Amendment difficulty by acknowledging that all sentences below the statutory maximum are substantively reasonable.' *Jones*, 135 S. Ct. at 9 (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari).

United States v. Bell, 420 U.S. App. D.C. 387, 393, 808 F.3d 926, 932 (2015).

A. This case illustrates important but as yet unresolved federal questions.

This case is like any other case where a defendant is sentenced in part for unconvicted conduct. A judge found facts that "guided" the presumptively "reasonable" punishment levels, using a preponderance of the evidence standard. To

date, based on *Watts*, *McMillan*, and *Harris* – two of which cases are now "bad law" – sentencing courts have been allowed to effectively nullify jury findings about which facts merit punishment, and instead substitute their own decisions by a s lessened standard of proof.

"The Constitution permits legislatures to make the distinction between elements and sentencing factors, but it imposes some limitations as well. For if it did not, legislatures could evade the indictment, jury, and proof requirements by labeling almost every relevant fact a sentencing factor." *Harris v. United States*, 536 U.S. at 550, 122 S. Ct. at 2409, *overruled by Alleyne*, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). Thus, "divided opinions of this Court have addressed the constitutional status of a 'sentencing factor.'" *Alleyne*, 133 S. Ct. at 2154.

But even as the Sentencing Guidelines today only advise the ultimate sentence a defendant receives, those Guidelines are still a *mandatory* calculation that frames the "reasonableness" inquiry. *See, e.g., Gall v. United States*, 552 U.S. 38, 49, 128 S. Ct. 586, 596, 169 L. Ed. 2d 445 (2007) ("the Guidelines should be the starting point and the initial benchmark"). Guidelines calculations are presumed reasonable, and deviation from them – a so-called "variance" from the mandatory Guidelines calculation – requires explanation. *See Gall*, 552 U.S. at 50, 128 S. Ct. at 597 (appellate courts "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance").

At issue here is whether facts to be used in a mandatory calculation under the U.S. Sentencing Guidelines are genuine "sentencing factors" during that calculation,

or whether those facts are "elements" of the offense laid out under the mandatory Guidelines arithmetic.

1. *Watts* did not authorize judicial jury nullification through use of unconvicted conduct

The Supreme Court, in *Witte v. United States*, 515 U.S. 389 (1995), narrowly found that the Double Jeopardy Clause does not forbid subsequent prosecution for conduct already used to enhance a prior sentence. Two years later, *Witte* was construed to mean that the Double Jeopardy clause permitted consideration of even acquitted conduct in calculating a defendant's guideline range. *Watts*, 519 U.S. at 154-55.

But *Watts* was not about Sixth Amendment jury trial issues. The Court even expressed *Watt*'s irrelevance to jury trial rights:

> *Watts* . . . presented a very narrow question regarding the interaction of the Guidelines with the double jeopardy clause, and did not even have the benefit of full briefing or oral argument. It is unsurprising that we failed to consider fully the issues presented to us in these cases.

Booker, 543 U.S. at 240 (2005).

Precedent clarifies that juries, not judges, find the facts that control punishment. "The judge's role in sentencing is constrained . . . [by what is] found by the jury." *Apprendi*, 530 U.S. at 483, n.10. *Apprendi* "ensures that the judge's authority to sentence derives wholly from the jury's verdict." *Blakely*, 542 U.S. at 306. Today, even non-petty criminal fines must comport with jury verdicts. *Southern Union Co. v. United States*, -- U.S. --, 132 S. Ct. 2344, 2353-55 (2012).

Simply, the Sixth Amendment is violated by "sentences whose legality is premised on a judge's finding some fact (or combination of facts) by a preponderance of the evidence." *Rita v. United States*, 551 U.S. 338, 371 (2007) (Scalia, J., concurring in part, and in judgment). As a result, "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the statutory maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Booker*, 543 U.S. at 244.

2. Increasing sentence for unconvicted conduct violates Sixth Amendment Right to Jury Trial

"[T]he right to a jury trial had been enshrined since the Magna Carta," because it "stand[s] between the individual and the power of the government." *Booker*, 543 U.S. at 237, 239; *accord* U.S. Const., Amd. VI. Jury trial is both an individual right, and a structural allocation of power to the citizenry. "A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968).

The Founders "understood the threat of 'judicial despotism' that could arise from 'arbitrary punishments upon arbitrary convictions' without the benefit of a jury in criminal cases." *Booker*, 543 U.S. at 238-39 (quoting The Federalist No. 83, p. 499. Rossiter ed. 1961) (A. Hamilton)). They adopted the Sixth Amendment so that juries would "confirm the truth of every accusation" and "draw the ultimate conclusion of guilt or innocence." *United States v. Gaudin*, 515 U.S. 506, 510, 514 (1995).

"The jury could not function as the circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some

point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Blakely*, at 306-07 (emphasis in original).

And yet, this is ***exactly*** what happens when unconvicted conduct yields a presumption of "reasonable" sentences by judicial findings, using a preponderance of evidence standard of proof. The Government may now use jury trial as "a mere preliminary" run to secure a single conviction – however many counts are charged – after which begins the real prosecution: the judicial inquisition we know as a sentencing hearing, founded upon a charging document we call the Presentence Investigation Report.

If this presumed reasonable punishment calculation is not derived from the jury verdict alone, though, then Article III courts engage in jury nullification. Courts nullifying jury verdicts eviscerate a "fundamental reservation of power," and prevent citizens from "exercis[ing] the control that the Framers intended." *Blakely*, 542 U.S. at 306; *see also Apprendi*, 530 U.S. at 479-80 & n.5.

3. Using unconvicted conduct found by Preponderance of Evidence violates Fifth Amendment Rights to Due Process and Indictment

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 363, 364 (1970). The Court characterizes this protection as one of "surpassing importance," one "as equally well-founded" as the right to a jury's verdict. *Apprendi*, 530 U.S. at 476, 478. The Court

has recognized that a reasonable-doubt standard can extend even to facts not found by a jury, but by a judge. *Winship*, 397 U.S. at 359-60 (juvenile proceeding).

The sentencing court here ignored the "[e]qually well founded ...companion right to ... proof beyond a reasonable doubt." *Apprendi*, 530 U.S. at 478. It found uncharged conduct to be criminal in a mandatory punishment calculation, by a mere preponderance of evidence. Like other "inroads upon the sacred bulwark of the nation," this finding that acquitted conduct is punishable with a mere preponderance-of-evidence standard is "fundamentally opposite to the spirit of our constitution." *Booker*, 543 U.S. at 244 (quoting 4 Blackstone 343-44).

Because the penalty calculus here depends on judicial fact-finding reliant on a confidential presentence report, punishment for unconvicted felonies also ignores the Fifth Amendment's mandate that all felony prosecutions require indictment by a grand jury. Federal defendants argue about their culpability – for their liberty – based not on a grand jury's findings, but on the prosecutor's case files as interpreted by the court's Probation Officer into a sealed biography for judicial contemplation, by a preponderance of evidence.

B. This case is a good vehicle for reviewing Watts and Witte.

In his dissent from the *Watts* holding, Justice Kennedy noted that the "*per curiam* opinion shows hesitation in confronting the distinction between uncharged conduct and conduct related to a charge for which the defendant was acquitted. The distinction ought to be confronted by a reasoned course of argument, not by shrugging it off." *Watts*, 519 U.S. at 170, 117 S. Ct. at 644. This case offers that exact

opportunity, to reconsider *Watts* in light of *Alleyne* while expressly distinguishing acquitted conduct rulings from the unconvicted conduct here not found by a jury beyond a reasonable doubt.

Procedurally, this matter is a clean, a clear case of the trial court making findings of fact by a preponderance of evidence. Where mandatory calculations of presumed reasonable Sentencing Guidelines ranges exist, facts found by the judge, by a preponderance of evidence, without any findings from the jury or admissions by Allmendinger, drove the "presumed reasonable" sentence up by years in this case.

This case offers the Court a chance to speak about unconvicted conduct's place under the Fifth and Sixth Amendments and mandatory Guidelines calculations. It also offers the opportunity to distinguish uncharged from acquitted conduct.

C. Watts' effect on sentencing is ripe for reconsideration.

In dissenting from another Petition's denial in October 2014, Justices Scalia, Thomas, and Ginsberg were emphatic about the dissonance between the Sixth Amendment and judges using acquitted (and even unconvicted) conduct to enhance sentences:

> We should grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment—or to eliminate the Sixth Amendment difficulty by acknowledging that all sentences below the statutory maximum are substantively reasonable.

Jones, et al., v. United States, 574 U. S. ____, 135 S. Ct. 8, (2014), *cert. den* 10/14/2014 (Scalia, J. dissenting).

Either there is an upper limit to "reasonableness," based on jury convictions or defendant admissions, or there is no "substantively unreasonable" sentence so long

as it stays under the statutory maximum allowed by any single jury conviction. This Court's composition is now changed, and thinkers once able to only opine about constitutionally calculating misconduct now have fresh eyes on a decades-old problem – mandatory Sentencing Guidelines, whether in full or just ordering a math equation to determine a "reasonable" sentence.

CONCLUSION

Here the sentencing court recognized that the defendant had changed, but then ruled that change was irrelevant to the goals of sentencing or statutory analysis under 18 U.S.C. § 3553(a). Here the sentencing court ignored empirical data supported by that changed defendant, deeming the Sentencing Commission's data "too abstract" to inform Allmendinger's sentencing. Here the sentencing court ignored the defendant's demonstration of prison good conduct – downgraded security despite sentence length – and instead inserted its general supposition that sometimes the Bureau of Prisons elevates security scoring if escape is alleged. The matter is a grave abuse of discretion, and an abuse of due process that merits further examination.

Simultaneously, this Court's long-cloudy philosophizings on "reasonableness" and "sentencing factors" versus "elements of the offense" denied Allmendinger a "reasonableness" determination based on criminal conduct charged by indictment, and either admitted by him or convicted by a jury by a "beyond a reasonable doubt" standard of proof.

For these many violations of the Fifth and Sixth Amendment, this Court should grant Christian Allmendinger's Petition for Writ of Certiorari.

This 28th day of May, 2021.

Respectfully submitted,

/s/ EJ Hurst II
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APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4406

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CHRISTIAN M. ALLMENDINGER,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert E. Payne, Senior District Judge. (3:10-cr-00248-REP-1)

Argued: October 30, 2020 Decided: December 29, 2020

Before GREGORY, Chief Judge, and FLOYD and QUATTLEBAUM, Circuit Judges.

Affirmed by unpublished opinion. Judge Quattlebaum wrote the opinion, in which Chief Judge Gregory and Judge Floyd joined.

ARGUED: EJ Hurst, II, Lexington, Kentucky, for Appellant. Jessica D. Aber, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellee. **ON BRIEF:** G. Zachary Terwilliger, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

QUATTLEBAUM, Circuit Judge:

In 2011, a jury convicted Christian M. Allmendinger of various counts of mail fraud, securities fraud and money laundering. The district court sentenced him to 540 months in prison. We affirmed on direct appeal. *United States v. Allmendinger*, 706 F.3d 330 (4th Cir. 2013). Thereafter, Allmendinger petitioned for writ of habeas corpus pursuant to 28 U.S.C. § 2255, which the district court denied. *See United States v. Allmendinger*, 894 F.3d 121, 125 (4th Cir. 2018). On appeal, we held that Allmendinger's original appellate counsel "failed to raise a significant and obvious issue that, if raised, likely would have resulted in the reversal of [his] money laundering convictions." *Id.* at 124. Accordingly, we vacated Allmendinger's sentence and money laundering convictions and remanded to the district court. *Id.* at 131. At resentencing on the remaining counts of conviction, the district court again sentenced Allmendinger to a total prison term of 540 months. Allmendinger now appeals, arguing that the district court ignored some of his sentencing arguments, failed to properly weigh the relevant sentencing factors and exhibited bias by imposing the same sentence that it imposed at the original sentencing hearing.[1] For the reasons that follow, we affirm.

[1] Additionally, Allmendinger questions whether, at resentencing, the district court improperly relied on the vacated money laundering convictions, though he concedes that controlling precedent forecloses this claim. *See United States v. Watts*, 519 U.S. 148, 157 (1997) (holding that a "sentencing court [may] consider[] conduct underlying [an] acquitted charge, so long as that conduct has been proved by a preponderance of the evidence").

We review Allmendinger's sentence "under a deferential abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 41 (2007). In evaluating the procedural reasonableness of a sentence, we consider, among other things, whether the district court adequately explained the chosen sentence, *see id.* at 51, and whether it addressed all nonfrivolous arguments for a different sentence. *See United States v. Blue*, 877 F.3d 513, 518–19 (4th Cir. 2017). If a sentence is free of "significant procedural error," then we review it for substantive reasonableness, "tak[ing] into account the totality of the circumstances." *Gall*, 552 U.S. at 51. The sentence imposed must be "sufficient, but not greater than necessary," to satisfy the goals of sentencing. 18 U.S.C. § 3553(a) (2018).

Initially, Allmendinger contends that the district court procedurally erred by failing to address his evidence of post-sentencing rehabilitation. But contrary to Allmendinger's contention, the district court acknowledged that post-sentencing rehabilitation bears on the sentencing analysis and addressed Allmendinger's arguments. J.A. 223. The district court concluded that, despite Allmendinger's rehabilitative efforts, the sentence was appropriate under the statutory sentencing factors in light of the extensive, life-altering damage resulting from his crimes. J.A. 223, 227–28, 231–33. The district court did not abuse its discretion in reaching this conclusion. In addition, we discern no abuse of discretion in the district court's determination that certain empirical data, cited by Allmendinger in support of his claim that he was unlikely to recidivate, was too abstract to bear meaningfully on his sentence.

Next, Allmendinger asserts the district court improperly imposed the same 540-month sentence after the vacatur of his money laundering convictions. We addressed this

issue in *United States v. Ventura*, 864 F.3d 301, 309 (4th Cir. 2017). There, in discussing the sentencing package doctrine, we held that, "if some counts [of a multicount criminal judgment] are vacated, 'the judge should be free to review the efficacy of what remains in light of the original [sentencing] plan.'" *Id.* (quoting *United States v. Townsend*, 178 F.3d 558, 567 (D.C. Cir. 1999)). That is what the district court did here. Indeed, during Allmendinger's resentencing, the district court noted that it previously "devised a sentence that [it] thought was appropriate" but that the money laundering charges were not "the driver of the sentencing." J.A. 227–28. Rather, the district court noted that the sentence was dictated by "the egregious conduct in which [Allmendinger] engaged," which "damaged hundreds of people" and "wip[ed] out the life savings" of many. J.A. 227. Therefore, in resentencing Allmendinger, the district court concluded that an analysis of the statutory sentencing factors dictated the same result even though the money laundering convictions had been vacated. J.A. 230–33. We cannot say that in doing so, the court abused its discretion.

Furthermore, nothing in the record supports Allmendinger's suggestion that, in retaliation for Allmendinger's successful appeal in the § 2255 proceeding, the district court vindictively declined to impose a lower sentence. A presumption of vindictiveness applies only when a defendant's new sentence is "actually harsher than that imposed prior to successful appeal." *United States v. Kincaid*, 964 F.2d 325, 328 (4th Cir. 1992) (quoting *United States v. Schoenhoff*, 919 F.2d 936, 939 (5th Cir. 1990)). In the absence of such a presumption, a defendant must prove actual vindictiveness. *Id.* Here, Allmendinger received the same aggregate sentence in his resentencing; therefore, the presumption does

not apply. *See id.* Additionally, Allmendinger has offered no evidence to suggest that the district court retaliated against him for filing a § 2255 petition and appealing the denial of that petition. To the contrary, our review of the record indicates the district court carefully ensured it understood all the evidence presented by Allmendinger and all his arguments about that evidence. It just reached a decision contrary to the one Allmendinger advanced. Accordingly, we reject Allmendinger's assertion that the district court vindictively declined to impose a lower sentence.

Finally, with respect to the substantive reasonableness of his sentence, Allmendinger insists that the district court should have attributed more significance to his rehabilitation evidence. However, as with the other issues raised on appeal, the district court considered Allmendinger's evidence and the totality of the circumstances under the statutory sentencing factors. It just was not persuaded by Allmendinger's arguments. Allmendinger's mere disagreement with the value or weight given to each sentencing factor does not demonstrate an inappropriate exercise of the district court's sentencing discretion. *See United States v. Susi*, 674 F.3d 278, 290 (4th Cir. 2012). Based on our review of the record, Allmendinger failed to rebut the presumption of reasonableness accorded to his sentence, which was below the applicable Sentencing Guidelines range.[2] *See United States v. Louthian*, 756 F.3d 295, 306 (4th Cir. 2014).

[2] We note that the district court determined that the applicable Sentencing Guidelines range was life imprisonment or the applicable statutory maximum sentence. J.A. 195. The statutory maximum here was 780 months. J.A. 195. Therefore, Allmendinger's 540-month sentence was substantially below the applicable Sentencing Guidelines range. Additionally, while in no way binding on us, in a previous opinion, we

Accordingly, for the foregoing reasons, we affirm.

AFFIRMED

noted "that challenging Allmendinger's sentence as substantively unreasonable was a long shot." *Allmendinger*, 894 F.3d at 128.

FILED: December 29, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4406
(3:10-cr-00248-REP-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

CHRISTIAN M. ALLMENDINGER

Defendant - Appellant

J U D G M E N T

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

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

/s/ PATRICIA S. CONNOR, CLERK

UNITED STATES DISTRICT COURT
Eastern District of Virginia
Richmond Division

UNITED STATES OF AMERICA

v.

CHRISTIAN M. ALLMENDINGER,
a/k/a CHRISTIAN MICHAEL ALLMENDINGER

Defendant.

Case Number: 3:10-CR-00248-REP-1

USM Number: 77365-279

Defendant's Attorneys: JOHN ROCKECHARLIE
EJ HURST, III

JUDGMENT IN A CRIMINAL CASE
(On Remand from Fourth Circuit)

The defendant was found guilty on Counts 1, 2, 3, and 15 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of the following counts involving the indicated offenses.

Title and Section	Nature of Offense	Offense Class	Offense Ended	Count
18 U.S.C. § 1349	CONSPIRACY TO COMMIT MAIL FRAUD	Felony	09/07/2010	1
18 U.S.C. §§ 1341 and 2	MAIL FRAUD, AID AND ABET	Felony	06/21/2006	2
18 U.S.C. §§ 1341 and 2	MAIL FRAUD, AID AND ABET	Felony	06/22/2007	3
15 U.S.C. §§ 77q(a) and 77x and 18 U.S.C. § 2	SECURITIES FRAUD, AID AND ABET	Felony	06/22/2007	15

As pronounced on May 23, 2019, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

Date of imposition of judgment this 23rd day of May, 2019.

/s/ REP
Robert E. Payne
Senior United States District Judge

Dated: May 24, 2019

Case Number: 3:10-CR-00248-REP-1
Defendant's Name: ALLMENDINGER, CHRISTIAN M.

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of FIVE-HUNDRED FORTY (540) MONTHS. This term of imprisonment consists of a term of ONE-HUNDRED SIXTY (160) MONTHS on Count 1, ONE-HUNDRED SIXTY (160) MONTHS on Count 2, ONE-HUNDRED SIXTY (160) MONTHS on Count 3, and a term of SIXTY (60) MONTHS on Count 15, all to be served consecutively.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows: _____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

Case Number: 3:10-CR-00248-REP-1
Defendant's Name: ALLMENDINGER, CHRISTIAN M.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS. This term consists of a term of THREE (3) YEARS on Count 1, THREE (3) YEARS on Count 2, THREE (3) YEARS on Count 3, and a term of THREE (3) YEARS on Count 15, all to run concurrently.

The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions of supervised release.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution obligation, it is a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court set forth below:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance or any paraphernalia related to such substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer for a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Case Number: 3:10-CR-00248-REP-1
Defendant's Name: ALLMENDINGER, CHRISTIAN M.

SPECIAL CONDITIONS OF SUPERVISION

While on supervised release pursuant to this Judgment, the defendant shall also comply with the following additional special conditions:

1) As reflected in the presentence report, the defendant presents a low risk of future substance abuse and therefore, the Court hereby suspends the mandatory condition for substance abuse testing as defined by 18 U.S.C. §3563 (a)(5). However, this does not preclude the United States Probation Office from administering drug tests as appropriate.

2) The defendant shall pay the balance owed on any court-ordered financial obligations in monthly installments of not less than $500.00 or 25% of gross monthly income, whichever is greater, starting 60 days after supervision begins until paid in full.

3) The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer.

4) The defendant shall provide the probation officer access to any requested financial information.

5) The defendant shall apply monies received from income tax refunds, lottery winnings, inheritances, judgments, settlements, and any anticipated or unexpected financial gains to the outstanding court-ordered financial obligation.

6) The defendant is prohibited from engaging in any aspect of the banking business, or any similar occupation where the defendant would have access to money of others.

Case Number: 3:10-CR-00248-REP-1
Defendant's Name: ALLMENDINGER, CHRISTIAN M.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Page 6.

	Count	Assessment	Fine	Restitution
	1	$100.00	$0.00	$101,963,048.05
	2	$100.00	$0.00	$0.00
	3	$100.00	$0.00	$0.00
	15	$100.00	$0.00	$0.00
TOTALS:		**$400.00**	**$0.00**	**$101,963,048.05**

FINES

No fines have been imposed in this case.

RESTITUTION

See attached Restitution Order filed on November 9, 2011 (ECF No. 381).

Case Number: **3:10-CR-00248-REP-1**
Defendant's Name: **ALLMENDINGER, CHRISTIAN M.**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

The special assessment and restitution shall be due in full immediately.

Interest on the restitution is waived. On any unpaid balance, the defendant shall pay to the Clerk at least $500.00 per month or 25% of gross monthly income, whichever is greater, beginning 60 days from the inception of supervised release.

The defendant is jointly and severally liable for restitution with the following co-defendants: Adley H. Abdulwahab, docket no. 3:10-CR-248-2, Brent P. Oncale, docket no. 3:10-CR-256, David C. White, docket no. 3:10-CR-248-3, Russell E. Mackert, docket no. 3:10-CR-257, Eric M. Kurz, docket no. 3:10-CR-258 and Tomme Bromseth, docket no. 3:10-CR-246.

The defendant shall forfeit the defendant's interest in the following property to the United States:

SEE Consent Order of Forfeiture entered by the Court on September 27, 2011 (ECF No. 359), April 5, 2012 (ECF No. 430), July 12, 2012 (ECF No. 447), and October 11, 2012 (ECF No. 450).

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed. Payments shall be applied in the following order: (1) assessment (2) restitution principal (3) restitution interest (4) fine principal (5) fine interest (6) community restitution (7) penalties and (8) costs, including cost of prosecution and court costs.

Nothing in the court's order shall prohibit the collection of any judgment, fine, or special assessment by the United States.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA

v. Criminal No. 3:10-cr-248-1

CHRISTIAN M. ALLMENDINGER

ORDER

For the reasons set forth on the record at the sentencing hearing on May 23, 2019, it is hereby ORDERED that:

(1) the Defendant's motion for a downward departure sentence, as set forth orally at the sentencing hearing on May 23, 2019 and in DEFENDANT CHRISTIAN ALLMENDINGER'S POSITION REGARDING SENTENCING FACTORS, DEPARTURE AND STATUTORY SENTENCE MOTIONS, AND MEMORANDUM SUPPORTING SENTENCING (ECF No. 578) is denied; and

(2) the Defendant's motion for a downward variance sentence, to the extent set forth orally at the sentencing hearing on May 23, 2019 and in DEFENDANT CHRISTIAN ALLMENDINGER'S POSITION REGARDING SENTENCING FACTORS, DEPARTURE AND STATUTORY SENTENCE MOTIONS, AND MEMORANDUM SUPPORTING SENTENCING (ECF No. 578) is denied. However, as reflected in the sentence imposed by the Court, the Court imposed a downward variance sentence because such a

sentence was sufficient, but not greater than necessary, to satisfy the purposes of 18 U.S.C. § 3553.

Furthermore, it is hereby ORDERED that the UNOPPOSED MOTION FOR EXTENSION OF TIME FOR CLAIMANT TO FILE THIRD PARTY PETITION (ECF No. 418) is denied as moot.

It is so ORDERED.

/s/ REP
Robert E. Payne
Senior United States District Judge

Richmond, Virginia
Date: May 24, 2019