NO. _____

In The
Supreme Court of the United States

CHRISTOPHER JONELL TYLER,

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: August 20, 2021

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QUESTION PRESENTED

Whether the Fourth Circuit violated the "interests of justice" and this Court's ruling in *Puckett v. United States*, 556 U.S. 129, 143, 129 S. Ct. 1423, 1433, 173 L. Ed. 2d 266, 280 (2009), when they failed to examine the Government's breach of a plea agreement at re-sentencing under plain error analysis?

PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the caption. The Petitioner is Christopher Jonell Tyler, a Defendant. The Respondent is The United States of America.

STATEMENT OF RELATED CASES

None.

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PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER JONELL TYLER respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The *per curium* opinion in Case No. 19-4908 issued by the Fourth Circuit Court of Appeals on March 23, 2021 (App. 2a to 7a) is not published, but is reported at *United States v. Tyler*, 850 F. App'x 175 (4th Cir. 2021). The Judgment of the District Court for the Western District of North Carolina in Case No. 1:06-CR-252 (App. 8a to 14a) is not reported. The Order denying the Defendant's motion to recall the mandate in Case No. 19-4908 issued by the Fourth Circuit Court of Appeals on August 10, 2021 (App. 15a) is not reported.

JURISDICTION

The *per curium* opinion of the Court of Appeals (App. 3a to 8a) was entered on March 23, 2021. By Order of this Honorable Court on March 19, 2020, the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment...." 589 U.S. ____. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 52(b) of the Rules of Criminal Procedure provides, in relevant part:

Plain error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT OF THE CASE

1. Criminal Offense. In April 2006, the Defendant, Mr. Tyler, attempted to rob a gas station in Shelby, North Carolina. Joint Appendix before the 4th Circuit ("JA") 147, 149.

2. Plea in District Court. On December 20, 2006, the Grand Jury in the Western District of North Carolina returned an indictment against Mr. Tyler, for conspiracy to commit Hobbs Act robbery; discharging a firearm during and in relation to a crime of violence; and possessing a firearm as a convicted felon. JA 13-15.

On January 3, 2007, the Defendant, on the advice of his Counsel, entered into a plea agreement. JA 24. According to the terms of the Plea Agreement, both parties agreed that the appropriate sentence was one "within 'the applicable guideline range'" and that neither party would seek a departure from that range. J.A. 25.

3. Initial Sentencing in District Court. The plea was entered and accepted by the District Court. On June 18, 2007, the district court sentenced Tyler to 135 months in prison for the Hobbs Act conspiracy offense, a concurrent term of 120 months in prison for the felon-in-possession offense, and a consecutive term of

120 months in prison for the section 924(c) firearm offense, for an aggregate sentence of 255 months in prison. J.A. 43. Tyler did not appeal.

3. Motion to Vacate and Re-Sentencing. In June of 2016, Tyler filed a motion to vacate his section 924(c) firearm offense, arguing that Hobbs Act conspiracy is not a "crime of violence" and cannot support a conviction for discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). J.A. 48–56. After this Honorable Court decided *United States v. Davis*, 588 U.S. __, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019), the district court granted Tyler's motion to vacate his section 924(c) conviction and ordered that Tyler be resentenced on the remaining counts. J.A. 65.

The Guidelines determination on re-sentencing advised a sentence of between 135 and 168 months in prison for the Hobbs Act conspiracy and felon-in-possession offenses. J.A. 168. A hearing in the resentencing was held on November 26, 2019, before the Honorable Martin K. Reidinger. Supplemental Joint Appendix before the 4th Circuit ("SJA") 44-96. The Defendant requested a sentencing within the Guidelines recommendation. S.J.A. 78. The Government, on the other hand, requested an "upward variance of four levels." S.J.A. 79. The Government stated that it believed a four-level enhancement is appropriate in this case to give the Defendant a sentence above the guidelines, but equivalent to his prior sentence. S.J.A. 85. Ultimately, the Government concluded, "we would ask the Court to vary upward from the current guideline range and oppose the same sentence." S.J.A. 86.

The district court sentenced Tyler to 168 months in prison for the Hobbs Act conspiracy offense and to a consecutive term of 120 months in prison for the felon-in-possession offense, for an aggregate sentence of 236 months in prison. J.A. 133. Tyler filed a timely notice of appeal. J.A. 139–40.

4. **The Court of Appeals Arguments.** On appeal the Defendant argued that (I) the District Court at resentencing placed improper weight on the sentence originally imposed, (II) there was not support in the record and consistent with 18 U.S.C. § 3553 for the District Court to impose the sentence, and (III) there was not support in the record for an enhancement to the guidelines sentence. Document filed in the 4th Circuit ("Doc") #18. The opening brief was silent with regard to the Government's effort to seek a four-level enhancement from the guidelines at re-sentencing, despite the prohibition in the plea agreement.

The Government filed a Motion to Dismiss the Defendant's Appeal based on the terms of the plea agreement prohibiting an appeal. Doc #23. In response to the Government's motion, the Defendant-Appellant argued that the Government violated the terms of the Plea Agreement by failing "to support the computed guidelines range upon re-sentencing in 2019." Doc #30 at 7. This Court denied the Government's Motion to Dismiss. Doc #34.

5. **The Court of Appeals Decision.** On March 23, 2021, the Court of Appeals for the Fourth Circuit affirmed the District Court's re-sentencing in an unpublished *per curium* decision. (App. 2a-7a). The opinion failed to address the allegation that the Government breached the plea agreement at re-sentencing.

6. **Motion to Recall the Mandate.** On June 14, 2021the Defendant filed a Motion to Recall the Mandate of the Court of Appeals for the Fourth Circuit arguing that Government's breach of its plea agreement was clear, and that a miscarriage of justice would result if the Court did not consider the issue of the Government's breach. Doc #53. On June 25, 2021, the Government filed an opposition to the Defendant's Motion to Recall the Mandate. Doc #57.

In an unpublished Order, the Court of Appeals for the Fourth Circuit declined to recall the mandate or address the Government's breach of its plea agreement. Doc #58 (App. 15a)

REASONS FOR GRANTING THE PETITION

While this Court has recently reviewed plain error in the context of miscalculation of a Guidelines sentencing range in *Molina-Martinez v. United States*, 578 U.S., ___, 136 S. Ct. 1338, 194 L. Ed. 2d 444 (2016) and *Rosales-Mireles v. United States*, 585 U.S. ___, 138 S. Ct. 1897, 201 L. Ed. 2d 376 (2018), this Court has never addressed plain error in the context of a Government's breach of the plea agreement at resentencing.

This Court has long emphasized the importance of the Government fulfilling the terms of its plea agreements. "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 499, 30 L. Ed. 2d 427, 433 (1971).

In *Puckett v. United States*, 556 U.S. 129, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009) the Court determined that a breach of the plea agreement by the Government at the initial sentencing is reviewed on appeal under the plain error standard of Rule 52(b) of the Federal Rules of Criminal Procedure if the Defendant fails to object[1] during the proceeding in the District Court.

Rule 52(b) states that "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

As this Court recently explained, "To establish eligibility for plain-error relief, a defendant must satisfy three threshold requirements." *Greer v. United States*, 593 U.S. ___, ___, 141 S. Ct. 2090, 2096, 210 L. Ed. 2d 121, 128 (June 14, 2021). "First, there must be an error that has not been intentionally relinquished or abandoned. Second, the error must be plain—that is to say, clear or obvious. Third, the error must have affected the defendant's substantial rights." *Molina-Martinez*, 578 U.S. at __, 136 S. Ct. at 1343, 194 L. Ed. 2d at 452 (2016) (citations omitted). To satisfy this third condition of the plain error test, the defendant ordinarily must make a showing of "a reasonable probability that, but for the error claimed, the result of the proceeding would have been different." *United States v. Dominguez Benitez*, 542 U.S. 74, 76, 82, 124 S. Ct. 2333, 2339, 159 L. Ed. 2d 157, 167 (2004).

The Court has determined that plain error review by the Court of Appeals is permissive, not mandatory. *United States v. Olano*, 507 U.S. 725, 735, 113 S. Ct.

[1] Under the Rules, "A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection." Federal Rules of Criminal Procedure 51(b).

1770, 1778, 123 L. Ed. 2d 508, 520 (1993). However, this Court has held that "Once those three conditions have been met, the court of appeals should exercise its discretion to correct the forfeited error if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Rosales-Mireles*, 585 U.S. at ___, 138 S. Ct. at 1905, 201 L. Ed. 2d at 383-84, *citing Molina-Martinez*, 578 U.S., at ___, 136 S. Ct. 1338, 194 L. Ed. 2d 444, at 452. *Olano,* 507 U.S. at 736, 113 S. Ct. at 1779, 123 L. Ed. 2d at 521. *United States v. Atkinson*, 297 U.S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed. 555, 557 (1936).

This Court routinely remands cases like Mr. Tyler's back to the Court of Appeals "[a]fter identifying an unpreserved but plain legal error." *Hicks v. United States*, 582 U.S. ___, ___, 137 S. Ct. 2000, 2000, 198 L. Ed. 2d 718, 719 (2017) (Gorsuch, concurring). The remand of a case with an undressed clear error allows the Court of Appeals to "resolve whether the error affected the defendant's substantial rights and implicated the fairness, integrity, or public reputation of judicial proceedings—and so (again) determine if the judgment must be revised, this time under Rule 52(b)." *Id.*

<u>The Government's breach of the plea agreement is plain error and application of this Court's rulings requires correction of the plain error</u>

Applying these standards to Mr. Tyler's case, the court of appeals should have applied plain error review and corrected the Government's breach of its plea agreement.

First, "there must be an error or defect--some sort of deviation from a legal rule--that has not been intentionally relinquished or abandoned, i.e., affirmatively

waived, by the appellant." *Puckett*, 556 U.S. at 129-30, 129 S. Ct. at 1425, 173 L. Ed. 2d at 271 (2009) (internal quotations removed). *Olano*, 507 U.S. at 732-733, 113 S. Ct. at 1777, 123 L. Ed. 2d at 518-19 (1993). A breach of the terms of plea agreement regarding the Government's position at sentencing is undoubtedly a violation of the defendant's rights. *Santobello*, 404 U.S. at 262, 92 S. Ct. at 499, 30 L. Ed. 2d at 433. *Puckett*, 556 U.S. at 136, 129 S. Ct. at 1429, 173 L. Ed. 2d at 275.

There is no allegation in this case that Mr. Tyler waived the provision of the plea agreement requiring that the Government not seek a departure from the applicable guideline range. Further, the Defendant at sentencing argued for a sentence within the applicable guideline range, as required by the plea. *Contrast* S.J.A. 78 with S.J.A. 79, 85, and 86.

As required by the second prong, the Government's breach is "clear or obvious, rather than subject to reasonable dispute." *Puckett*, 556 U.S. at 129-30, 129 S. Ct. at 1425, 173 L. Ed. 2d at 271. In *Puckett,* this court suggested that "Not all breaches will be clear or obvious. Plea agreements are not always models of draftsmanship, so the scope of the Government's commitments will on occasion be open to doubt. Moreover, the Government will often have a colorable (albeit ultimately inadequate) excuse for its nonperformance." 556 U.S. at 143, 129 S. Ct. at 1433. However, in this case, the language of the plea agreement is clearly written, and the breach of that language is unequivocal. ("The defendant and the United States agree that the appropriate sentence is one within 'the applicable guideline range' (U.S.S.G. § 5Cl. I) and that neither party will seek a departure

from that range.") At the resentencing, the Government argued for a four level increase. S.J.A. 86.

To satisfy the third prong of plain error analysis, the Defendant "must demonstrate that it affected the outcome of the district court proceedings." *Puckett*, 556 U.S. at 129-30, 129 S. Ct. at 1425, 173 L. Ed. 2d at 271. This prong is satisfied where the circumstances where the plain error is "reasonably likely to have resulted in a longer prison sentence than necessary" under 18 U.S.C. § 3553(a). *Rosales-Mireles*, 585 U.S. at___, 138 S. Ct. at 1910, 201 L. Ed. 2d at 389. In this case, it is reasonably probable that the Government's breach of its plea agreement negatively affected the Defendant's sentence.

A Defendant whose plea agreement had been broken by the Government cannot show prejudice if he obtained the benefits contemplated by the deal anyway or because he likely would not have obtained those benefits in any event. *Puckett*, 556 U.S. at 141-42, 129 S. Ct. at 1432-33, 173 L. Ed. 2d at 279. In this case, Mr. Tyler did not receive the sentence that the prosecutor promised to request, so prejudice is probable unless the evidence shows that the Government's breach had no effect on the outcome of the sentencing.

In *Puckett*, this Court adopted the finding of the Fifth Circuit that the Government's violation of its obligation to seek a full three-level reduction in offense level was not prejudicial because the District Judge at sentencing had stated that granting the reduction in the circumstances presented was "so rare as to be unknown." Therefore, it was concluded that the Defendant could not show that the

Government's breach had affected his ultimate sentence. 556 U.S. at 133, 129 S. Ct. at 1428, 173 L. Ed. 2d at 273. In this case, there is no similar judicial proclamation absolving the breach.

At Sentencing, the District Court Judge considered this matter a "sentencing package" case as described by *Greenlaw v. United States*, 554 U.S. 237, 253, 128 S. Ct. 2559, 2569, 171 L. Ed. 2d 399, 414 (2008) ("Those cases typically involve multicount indictments and a successful attack by a defendant on some but not all of the counts of conviction. The appeals court, in such instances, may vacate the entire sentence on all counts so that, on remand, the trial court can reconfigure the sentencing plan to assure that it remains adequate to satisfy the sentencing factors in 18 U.S.C. § 3553(a). In remanded cases, the Government relates, trial courts have imposed a sentence on the remaining counts longer than the sentence originally imposed on those particular counts, but yielding an aggregate sentence no longer than the aggregate sentence initially imposed.")

As a "sentencing package" at resentencing, the Court was determined to impose a sentence on the remaining charges longer than the sentence of 135 months imposed by the original court, but less than the aggregate sentence of 255 months, which included the vacated mandatory 10-year sentence under section 924(c) firearm offense.

In every case, the guidelines determination is an essential lodestar for the review of sentencing. *Molina-Martinez*, 578 U.S. at ___, 136 S. Ct. at 1346, 194 L. Ed. 2d at 455 (2016). In this case, the guidelines range was calculated properly.

"Reviewing courts may presume that a sentence within the advisory Guidelines is reasonable." *Rita v. United States*, 551 U.S. 338, 364, 127 S. Ct. 2456, 2472, 168 L. Ed. 2d 203, 222 (2007). However, the error affected the Court's review of the appropriateness of a guidelines sentence. Rather than both the Government and the Defendant arguing for a guidelines sentence, the Government improperly requested that the Defendant receive a sentence that was greater the guidelines range of 135-168 months, arguing for an increase of 4 offense levels. The Court ultimately imposed an upward variance of 4 offense levels[2] at re-sentencing.

This Court has previously recognized that "when a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will be sufficient to show a reasonable probability of a different outcome absent the error." *Rosales-Mireles*, 585 U.S. at___, 138 S. Ct. at 1907, 201 L. Ed. 2d at 386-87. *Molina-Martinez*, 578 U.S. at ___, 136 S. Ct. at 1345, 194 L. Ed. 2d at 454. This is because, an error resulting in a higher range than the proper guidelines range creates a reasonable probability that a defendant will serve a prison sentence that is more than necessary to fulfill the purposes of incarceration under the statute. *Id.*

In the vast majority of cases, Courts either impose a sentence within the Guidelines recommendation or below. 2020 Annual Report of the Sentencing Commission and 2020 Sourcebook of Federal Sentencing Statistics (Table 29), online at https://www.ussc.gov/research/sourcebook-2020 (as last visited Aug. 19,

[2] The Court determined that the Defendant's guideline offense level was 30 and his prior history was IV. A guidelines' sentence of 236 months is within the guideline (210-262 months) of an offense level of 34/IV.

2020). In fact, only two percent of all sentences are imposed with an upward variance or upward departure. *Id (Table 33).* The Government's role is critical in imposing a sentence above the guidelines. More than seventy percent of all upward departures and forty percent of all upward variances are the result of an agreement or a motion by the Government. *Id.*

Similarly, courts rely upon the sentence recommendations and arguments articulated by counsel for the Defendant and the United States Attorney. Rule 32(i)(4)(A) of the Federal Rules of Criminal Procedure specifically requires that "Before imposing sentence, the Court must provide the defendant's attorney an opportunity to speak on the defendant's behalf… and provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney." These procedural protections are meant to ensure "that all relevant matters relating to a sentencing decision have been considered before the final sentencing determination is made." *Irizarry v. United States*, 553 U.S. 708, 716, 128 S. Ct. 2198, 2203-04, 171 L. Ed. 2d 28, 36-37 (2008). When the Government's breach of their agreement short circuits the proper operation of these procedural protections, it creates a reasonable probability that a defendant will serve a prison sentence that is more than necessary to fulfill the purposes of incarceration under the statute.

Where a defendant has satisfied the three prongs of plain error review, "it is well established that courts should correct a forfeited plain error that affects substantial rights if the error seriously affects the fairness, integrity or public

reputation of judicial proceedings." *Rosales-Mireles*, 585 U.S. at___, 138 S. Ct. at 1906, 201 L. Ed. 2d at 385 (internal quotations omitted).

The error need not represent a "miscarriage of justice" to warrant reversal. This Court in *Olano* specifically rejected the "miscarriage of justice" standard for the application of Rule 52(b). 507 U.S. at 736, 113 S. Ct. at 1779, 123 L. Ed. 2d at 521.

The error need not be shocking to warrant reversal. "By focusing instead on principles of fairness, integrity, and public reputation, the Court recognized a broader category of errors that warrant correction on plain-error review." *Rosales-Mireles*, ___ U.S. at___, 138 S. Ct. at 1906, 201 L. Ed. 2d at 385.

The error need not be intentional to warrant reversal. This Court has repeatedly "reversed judgments for plain error on the basis of inadvertent or unintentional errors of the court or the parties below." *Id.*, ___ U.S. at___, 138 S. Ct. at 1906, 201 L. Ed. 2d at 386. An inadvertent breach of a plea agreement "does not lessen its impact." *Santobello*, 404 U.S. at 262, 92 S. Ct. at 499, 30 L. Ed. 2d at 433.

Reversal of plain error is especially warranted where increased incarceration is the consequence of the error. As this Court explained, "The possibility of additional jail time thus warrants serious consideration in a determination whether to exercise discretion under Rule 52(b)." *Rosales-Mireles*, ___ U.S. at___, 138 S. Ct. at 1907, 201 L. Ed. 2d at 386. Any additional amount of incarceration is significant. "To a prisoner, this prospect of additional time behind bars is not some theoretical

or mathematical concept. Any amount of actual jail time is significant and has exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarceration." *Id.* (internal citations and quotations omitted).

The "fairness, integrity or public reputation of judicial proceedings" is an important societal consideration. As this Court explained, "In broad strokes, the public legitimacy of our justice system relies on procedures that are 'neutral, accurate, consistent, trustworthy, and fair,' and that 'provide opportunities for error correction.'" *Rosales-Mireles*, ___ U.S. at___, 138 S. Ct. at 1908, 201 L. Ed. 2d at 387-88, *quoting* Bowers & Robinson, Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility, 47 Wake Forest L. Rev. 211, 215-216 (2012).

As Judge (now Justice) Gorsuch explained in the Tenth Circuit, "And turning to plain error's fourth prong, what reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors… that threaten to require individuals to linger longer in federal prison than the law demands? Especially when the cost of correction is so small? A remand for resentencing, after all, doesn't require that a defendant be released or retried…." *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333-34 (10th Cir. 2014).

In this case, Mr. Tyler entered into a plea agreement with the Government. He relinquished certain rights and protections in expectation of the Government

fulfilling its clear obligations. The Government clearly breached that agreement by moving for a 4-level increase in Mr. Tyler's sentence. Pursuant to plain error analysis, the Court of Appeals should have corrected the plain error and remand the case for resentencing.

CONCLUSION

The petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED THIS the 20th day of August 2021.

/s/ James W. Kilbourne
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APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4908

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CHRISTOPHER JONELL TYLER,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Martin K. Reidinger, Chief District Judge. (1:06-cr-00252-MR-1)

Submitted: March 10, 2021 Decided: March 23, 2021

Before WILKINSON, MOTZ, and HARRIS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

James W. Kilbourne, Jr., ALLEN STAHL & KILBOURNE, PLLC, Asheville, North Carolina, for Appellant. R. Andrew Murray, United States Attorney, Charlotte, North Carolina, Amy E. Ray, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Asheville, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Pursuant to a written plea agreement, Christopher Jonell Tyler pled guilty to conspiracy to commit Hobbs Act robbery, 18 U.S.C. § 1951, possession of a firearm during and in relation to a crime of violence, 18 U.S.C. § 924(c), and possession of a firearm by a felon, 18 U.S.C. § 922(g). The district court imposed an aggregate sentence of 255 months' imprisonment, consisting of 135 months on the Hobbs Act conspiracy, a concurrent 120 months on the § 922(g) offense, and a mandatory consecutive sentence of 120 months on the § 924(c) offense. The district court subsequently granted Tyler's 28 U.S.C. § 2255 motion, vacated his § 924(c) conviction, and ordered that Tyler be resentenced on the remaining counts. Tyler now appeals the 236-month, upward variance sentence imposed upon resentencing. For the reasons that follow, we affirm.

We review a criminal sentence, "whether inside, just outside, or significantly outside the Guidelines range," for reasonableness "under a deferential abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 41 (2007); *see United States v. Provance*, 944 F.3d 213, 217 (4th Cir. 2019). We first must determine whether the district court committed procedural error, such as failing to calculate or improperly calculating the Guidelines range, failing to give the parties an opportunity to argue for an appropriate sentence, insufficiently considering the 18 U.S.C. § 3553(a) sentencing factors, relying on clearly erroneous facts, or inadequately explaining the sentence imposed. *United States v. Lymas*, 781 F.3d 106, 111-12 (4th Cir. 2015). "If we determine that the district court has not committed procedural error, only then do we proceed to assess the substantive reasonableness of the sentence." *United States v. Nance*, 957 F.3d 204, 212 (4th Cir.), *cert.*

denied, 141 S. Ct. 687 (2020). The sentence imposed must be "sufficient, but not greater than necessary," to satisfy the goals of sentencing. 18 U.S.C. § 3553(a).

Tyler first contends that the district court erred by applying the cross reference to the Sentencing Guidelines for assault with intent to commit murder. U.S. Sentencing Guidelines Manual ("USSG") §§ 2A2.1(a)(1), 2K2.1(c)(1)(A), 2X1.1(c)(1) (2018). Although he did not challenge the application of this sentencing enhancement at his initial sentencing, Tyler asserts that the resentencing court was not bound by any rulings made at the original sentencing, but instead may consider anew any rulings made at the initial sentence. *See United States v. Ventura*, 864 F.3d 301, 309 (4th Cir. 2017) (at resentencing, "the [initial] sentence becomes void in its entirety and the district court is free to revisit any rulings it made at the initial sentencing"). Contrary to Tyler's argument, the district court did revisit whether the cross reference was appropriate. Overruling Tyler's objection to the cross reference, the district court emphasized that the offense conduct involved Tyler repeatedly shooting at the intended robbery victim, who had fired a gun at Tyler and his accomplice. The court found that Tyler's conduct supported a reasonable inference that Tyler intended to shoot and kill the victim in order to stop the victim from firing any further shots. We conclude that the district court did not clearly err in overruling Tyler's objection and applying the cross reference to assault with intent to commit murder. *See United States v. Hassan*, 742 F.3d 104, 148 (4th Cir. 2014) (providing standard).

Tyler also contends that the district court failed to properly apply the sentencing package doctrine, and instead placed too much weight on the sentence originally imposed rather than making an independent determination of an appropriate sentence. The

sentencing package doctrine acknowledges that "sentencing on multiple counts is an inherently interrelated, interconnected, and holistic process which requires a court to craft an overall sentence—the sentence package—that reflects the guidelines and the relevant § 3553(a) factors." *United States v. Pearson*, 940 F.3d 1210, 1215 n.10 (11th Cir. 2019) (internal quotations omitted). Thus, upon resentencing a defendant on the remaining convictions after the vacatur of one conviction, the district court may "reconfigure the sentencing plan to ensure that it remains adequate to satisfy the sentencing factors in 18 U.S.C. § 3553(a)." *Greenlaw v. United States*, 554 U.S. 237, 253 (2008). In doing so, the resentencing court is not bound by any rulings made at the original sentencing as to the appropriate aggregate sentence. Rather, the district court may consider anew any rulings made at the initial sentencing. *Ventura*, 864 F.3d at 309; *see Pepper v. United States*, 562 U.S. 476, 490 (2011) (providing that, after remand for resentencing, district court may consider evidence of defendant's rehabilitation since initial sentencing and may vary downward from advisory Guidelines range on that basis).

Our review of the record convinces us that Tyler's claim is without merit. The district court expressly considered the findings at the initial sentencing instructive but not binding, and it assessed the sentencing factors anew when determining an appropriate sentence for Tyler's remaining convictions.

Tyler also contends that the district court erred by imposing an upward variance sentence and that it failed to adequately explain and support the extent of the variance. In reviewing the substantive reasonableness of a sentence, we "examine[] the totality of the circumstances to see whether the sentencing court abused its discretion in concluding that

the sentence it chose satisfied the standards set forth in § 3553(a)." *United States v. Hargrove*, 701 F.3d 156, 160-61 (4th Cir. 2012) (internal quotation marks omitted). "Where, as here, the sentence is outside the advisory Guidelines range, we must consider whether the sentencing court acted reasonably both with respect to its decision to impose such a sentence and with respect to the extent of the divergence from the sentencing range." *Nance*, 957 F.3d at 215 (internal quotation marks omitted). District courts "have extremely broad discretion when determining the weight to be given each of the § 3553(a) factors, and the fact that a variance sentence deviates, even significantly, from the Guidelines range does not alone render it presumptively unreasonable." *Id.* (citations and internal quotation marks omitted). Thus, we "must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Hargrove*, 701 F.3d at 163-64 (brackets and internal quotation marks omitted).

The district court explained that, after reviewing "anew" the sentencing factors, it determined that an upward variant sentence of 236 months' imprisonment was necessary to meet the sentencing goals of § 3553(a), particularly due to the seriousness of the offense—Tyler having repeatedly discharged a firearm during the attempted robbery. The court specifically noted that the Guidelines range did not account for the fact that "violent crimes committed with firearms are more serious than other violent crimes." Given the violent nature of Tyler's offense conduct, the court determined that the advisory Guidelines range—even with the attempted murder cross reference—understated the seriousness of the offense conduct.

The court further explained that it found the prior sentencing decision instructive but not binding, and that it "reduced the sentence somewhat," due to new information presented at the resentencing hearing. In light of the "extremely broad" deference accorded a district court's determination that the § 3553(a) factors, as a whole, justify the extent of a variance, and considering the totality of the circumstances, *United States v. McCain*, 974 F.3d 506, 517 (4th Cir. 2020) (internal quotation marks omitted), we conclude that Tyler's 68-month upward variance sentence is not substantively unreasonable. *See, e.g., Hargrove*, 701 F.3d at 163-65 (affirming variance from 0-to-6-month Guidelines range to 60-month sentence); *United States v. Diosdado-Star*, 630 F.3d 359, 366-67 (4th Cir. 2011) (affirming variance sentence six years greater than Guidelines range because sentence was based on the district court's examination of relevant § 3553(a) factors).

We therefore affirm the criminal judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

AO 245C (WDNC Rev. 02/11) Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
Western District of North Carolina

UNITED STATES OF AMERICA	)	**AMENDED JUDGMENT IN A CRIMINAL CASE**
	)	(For Offenses Committed On or After November 1, 1987)
V.	)	
	)	
CHRISTOPHER JONELL TYLER	)	Case Number: DNCW106CR000252-001
	)	USM Number: 21858-058
	)	
Filed Date of Original Judgment: 6/26/2007 (Or Filed Date of Last Amended Judgment)	)	James W. Kilbourne Jr. Defendant's Attorney

Reason for Amendment:

- ☐ Correction of Sentence on Remand (18 U.S.C. § 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- ☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim . P. 36)
- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☒ Direct Motion to District Court Pursuant ☒ 28 U.S.C. § 2255 Or ☐ 18 U.S.C. § 3559(c)(7)
- ☐ Modification of Restitution Order 18 U.S.C. § 3664

THE DEFENDANT:

- ☒ Pleaded guilty to counts 1s and 4s.
- ☐ Pleaded nolo contendere to count(s) which was accepted by the court.
- ☐ Was found guilty on count(s) after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title and Section	Nature of Offense	Date Offense Concluded	Counts
18 U.S.C. 1951 and 2	Conspiracy to Interfere with Commerce by Threat or Violence	4/12/2006	1s
18 U.S.C. 922(g)(1)	Unlawful Transport of Firearms	4/12/2006	4s

The Defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, United States v. Booker, 125 S.Ct. 738 (2005), and 18 U.S.C. § 3553(a).

- ☐ The defendant has been found not guilty on count(s).
- ☐ Count(s) (is)(are) dismissed on the motion of the United States.
- ☒ The prior conviction on Count 2s has been vacated. See 9/10/2019 Order, Doc. No. 69.

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 monetary penalties, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence: 11/26/2019

Martin Reidinger
United States District Judge

Date: November 26, 2019

Defendant: Christopher Jonell Tyler
Case Number: DNCW106CR000252-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **ONE HUNDRED AND SIXTY-EIGHT (168) MONTHS on Count 1s and ONE HUNDRED AND TWENTY (120) MONTHS on Count 4s. Sixty-Eight (68) months of this term are to run consecutively, with the balance of the term to run concurrently, for a total term of imprisonment of TWO HUNDRED AND THIRTY-SIX (236) MONTHS**.

☒ The Court makes the following recommendations to the Bureau of Prisons:

1. Participation in any available educational and vocational opportunities.
2. Participation in any available substance abuse treatment program and if eligible, receive benefits of 18:3621(e)(2).
3. Defendant shall support all dependents from prison earnings.
4. Placed in a facility as close to Shelby, NC as possible, considering his security classification.
5. Participation in the Federal Inmate Financial Responsibility Program.

☒ The Defendant is remanded to the custody of the United States Marshal.

☐ The Defendant shall surrender to the United States Marshal for this District:

- ☐ As notified by the United States Marshal.
- ☐ At _ on _.

☐ The Defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ As notified by the United States Marshal.
- ☐ Before 2 p.m. on _.
- ☐ As notified by the Probation Office.

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 Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **THREE (3) YEARS**. **This term consists of three (3) years on each of Counts 1s and 4s, to be served concurrently.**

☐ The condition for mandatory drug testing is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

CONDITIONS OF SUPERVISION

The defendant shall comply with the mandatory conditions that have been adopted by this court.

1. The defendant shall not commit another federal, state, or local crime.
2. The defendant shall not unlawfully possess a controlled substance.
3. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court (unless omitted by the Court).
4. ☐ The defendant shall make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. The defendant shall cooperate in the collection of DNA as directed by the probation officer (unless omitted by the Court).

The defendant shall comply with the standard conditions that have been adopted by this court and any additional conditions ordered.

1. The defendant shall report to the probation office in the federal judicial district where he/she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.
2. The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.
3. The defendant shall not leave the federal judicial district where he/she is authorized to reside without first getting permission from the Court or probation officer.
4. The defendant shall answer truthfully the questions asked by the probation officer.
5. The defendant shall live at a place approved by the probation officer. The probation officer shall be notified in advance of any change in living arrangements (such as location and the people with whom the defendant lives).
6. The defendant shall allow the probation officer to visit him/her at any time at his/her home or elsewhere, and shall permit the probation officer to take any items prohibited by the conditions of his/her supervision that the probation officer observes.
7. The defendant shall work full time (at least 30 hours per week) at lawful employment, unless excused by the probation officer. The defendant shall notify the probation officer within 72 hours of any change regarding employment.
8. The defendant shall not communicate or interact with any persons engaged in criminal activity, and shall not communicate or interact with any person convicted of a felony unless granted permission to do so by the probation officer.
9. The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer.
10. The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential informant without the permission of the Court.
12. If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk. The probation officer may contact the person and make such notifications or confirm that the defendant has notified the person about the risk.
13. The defendant shall refrain from excessive use of alcohol and shall not unlawfully purchase, possess, use, distribute or administer any narcotic or controlled substance or any psychoactive substances (including, but not limited to, synthetic marijuana, bath salts) that impair a person's physical or mental functioning, whether or not intended for human consumption, or any paraphernalia related to such substances, except as duly prescribed by a licensed medical practitioner.
14. The defendant shall participate in a program of testing for substance abuse if directed to do so by the probation officer. The defendant shall refrain from obstructing or attempting to obstruct or tamper, in any fashion, with the efficiency and accuracy of the testing. If warranted, the defendant shall participate in a substance abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise the defendant's participation in the program (including, but not limited to, provider, location, modality, duration, intensity) (unless omitted by the Court).
15. The defendant shall not go to, or remain at any place where he/she knows controlled substances are illegally sold, used, distributed, or administered without first obtaining the permission of the probation officer.
16. The defendant shall submit his/her person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), or other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer and such other law enforcement personnel as the probation officer may deem advisable, without a warrant. The defendant shall warn any other occupants that such premises may be subject to searches pursuant to this condition.
17. The defendant shall pay any financial obligation imposed by this judgment remaining unpaid as of the commencement of the sentence of probation or the term of supervised release in accordance with the schedule of payments of this judgment. The defendant shall notify the court of any changes in economic circumstances that might affect the ability to pay this financial obligation.
18. The defendant shall provide access to any financial information as requested by the probation officer and shall authorize the release of any financial information. The probation office may share financial information with the U.S. Attorney's Office.
19. The defendant shall not seek any extension of credit (including, but not limited to, credit card account, bank loan, personal loan) unless authorized to do so in advance by the probation officer.
20. The defendant shall support all dependents including any dependent child, or any person the defendant has been court ordered to support.
21. The defendant shall participate in transitional support services (including cognitive behavioral treatment programs) and follow the rules and regulations of such program. The probation officer will supervise the defendant's participation in the program (including, but not limited to, provider, location, modality, duration, intensity). Such programs may include group sessions led by a counselor or participation in a program administered by the probation officer.
22. The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

Defendant: Christopher Jonell Tyler
Case Number: DNCW106CR000252-001

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments.

ASSESSMENT	FINE	RESTITUTION
$200.00 *****Reduced from $300.00. Paid in full.*****	$0.00	$1,348.00 *****Balance of $698.00 remains outstanding*****

FINE

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☒ The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ The interest requirement is waived.

☐ The interest requirement is modified as follows:

COURT APPOINTED COUNSEL FEES

☐ The defendant shall pay court appointed counsel fees.

☐ The defendant shall pay $0.00 towards court appointed fees.

RESTITUTION PAYEES

The defendant shall make restitution to the following payees in the amounts listed below:

NAME OF PAYEE AMOUNT OF RESTITUTION ORDERED

NAME OF PAYEE	AMOUNT OF RESTITUTION ORDERED
Gary Padgett, Padgett's Amoco	$1,348.00

☒ Joint and Several

☒ Defendant and Co-Defendant Names and Case Numbers *(including defendant number)* if appropriate:
Jacques Robert Jackson, 1:06-CR-252-2

☐ Court gives notice that this case may involve other defendants who may be held jointly and severally liable for payment of all or part of the restitution ordered herein and may order such payment in the future.

☐ The victims' recovery is limited to the amount of their loss and the defendant's liability for restitution ceases if and when the victim(s) receive full restitution.

☐ Any payment not in full shall be divided proportionately among victims.

Defendant: Christopher Jonell Tyler
Case Number: DNCW106CR000252-001

SCHEDULE OF PAYMENTS

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

A ☐ Lump sum payment of $0.00 due immediately, balance due
☐ Not later than_____
☐ In accordance ☐ (C), ☐ (D) below; or

B ☒ Payment to **begin immediately** (may be combined with ☐ (C), ☒ (D) below); or

C ☐ Payment in equal Monthly (E.g. weekly, monthly, quarterly) installments of $50.00 to commence 60 (E.g. 30 or 60) days after the date of this judgment; or

D ☒ Payment in equal **monthly** installments of **$50.00** to commence **60 days** after release from imprisonment to a term of supervision. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. Probation Officer shall pursue collection of the amount due, and may request the court to establish or modify a payment schedule if appropriate 18 U.S.C. § 3572.

Special instructions regarding the payment of criminal monetary penalties:

☐ The defendant shall pay the cost of prosecution.
☐ The defendant shall pay the following court costs:
☐ The defendant shall forfeit the defendant's interest in the following property to the United States

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States District Court Clerk, 401 West Trade Street, Room 210, Charlotte, NC 28202, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. All criminal monetary penalty payments are to be made as directed by 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.

STATEMENT OF ACKNOWLEDGMENT

I understand that my term of supervision is for a period of _____months, commencing on _____.

Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

I understand that revocation of probation and supervised release is mandatory for possession of a controlled substance, possession of a firearm and/or refusal to comply with drug testing.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____ Date: _____
Defendant

(Signed) _____ Date: _____
U.S. Probation Office/Designated Witness

FILED: August 10, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4908
(1:06-cr-00252-MR-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

CHRISTOPHER JONELL TYLER

Defendant - Appellant

O R D E R

Upon consideration of submissions relative to the motion to recall the mandate, the court denies the motion.

Entered at the direction of the panel: Judge Wilkinson, Judge Motz, and Judge Harris.

For the Court

/s/ Patricia S. Connor, Clerk