

APPENDIX A

**UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT**

UNITED STATES OF AMERICA, Plaintiff-Appellant,	
v.	No. 17-2086
MATTHEW DALE SAMPLE, Defendant-Appellee.	

**Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 1:15-CR-04265-JCH-1)**

Fred J. Federici, United States Attorney's Office, Albuquerque, New Mexico (James D. Tierney, United States Attorney's Office, Albuquerque, New Mexico, with him on the briefs), for Plaintiff-Appellant.

Ray Twohig, Albuquerque, New Mexico for Defendant-Appellee.

Before **LUCERO**, **HARTZ**, and **HOLMES**, Circuit Judges.

LUCERO, Circuit Judge

(Filed August 27, 2018)

The United States government appeals the sentence of Matthew Sample, following his guilty plea to one count of frauds and swindles under 18 U.S.C.

§ 1341 and two counts of wire fraud under 18 U.S.C. § 1343. In sentencing Sample to a five-year term of probation on the rationale that such a sentence would allow him to repay his victims, the district court essentially sentenced Sample based on his income. We conclude that this sentence was unreasonable. Exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(b), we reverse and remand for resentencing.

I

Sample began working as a licensed investment advisor and registered broker in 1995. He worked for several large brokerage firms and was recognized as a top advisor. In 2006, Sample began operating the Vega Opportunity Fund (the “Vega Fund”). One year later, in 2007, he closed the fund after it had lost sixty-five percent of its value. Sample had been diverting funds invested in the Vega Fund for his own personal expenses, and had been providing investors with false account statements and quarterly updates on their purported investments.

After closing the Vega Fund, Sample moved from Chicago, Illinois, to Albuquerque, New Mexico. In October of 2009, he began a hedge fund called the Lobo Volatility Fund, LLC (the “Lobo Fund”). He reverted to form. In a scheme similar to that perpetrated on investors in the Vega Fund, Sample provided false monthly statements showing appreciation in value, engaged in misleading email correspondence about market strategies, and provided false tax reports to Lobo Fund investors. All the

while, Sample diverted a total of \$1,086,453.62 from investors for his personal use.

In December of 2015, Sample was charged with one count of defrauding and swindling in violation of 18 U.S.C. § 1341 and two counts of wire fraud, in violation of 18 U.S.C. § 1343. He pled guilty to all charges.

On sentencing, the government requested a sentence at the low end of Sample's Guidelines range, which was 78 to 97 months' imprisonment. It argued that the impact upon Sample's victims had been profound: some lost their entire life savings, others were unable to retire as planned, and many expressed profound emotional distress as a result of Sample's betrayal. Sample's conduct was cast by the government as selfish, callous, and dishonest. The government referenced his attempts to convince investors to testify for him before the Securities and Exchange Commission and in his criminal case as evidence of his selfishness.

The government noted Sample's previous unadjudicated conduct in Illinois, regarding the Vega Fund, now imported to New Mexico, and argued that Sample's betrayal of his fiduciary obligations and the trust placed in him as a financial professional demanded a significant sentence. It reasoned that Sample's sentence should reflect the seriousness of white collar crime and deter other financial professionals from similar conduct. Although the government acknowledged that less prison time would aid in victim restitution, restitution was unlikely to occur because Sample had filed a petition

in bankruptcy. Even were he able to enhance the opportunity for restitution, the government urged Sample should serve the same prison time for his crimes as another defendant with a lower earning capacity would suffer.

To the contrary, Sample argued that he should receive consideration for probation based on his unblemished record in the securities industry before 2008, his charity and volunteer work during that time, and his previous financial support of his family and friends. Sample construed his crimes as an aberration resulting from stress. That stress arose from, in part, the 2008 financial crisis, the collapse of his financial practice, his divorce, acceptance of his gay identity, and his move to New Mexico. He began using alcohol, cocaine, and ecstasy, which he claimed contributed to his reckless behavior. Essentially, Sample rationalized that he swindled his clients in order to provide for his family and entertain his friends. He sought acknowledgement that at the time of sentencing, he was gainfully employed, engaged, and was free of drugs and alcohol. Continued employment with a six-figure annual income, Sample told the court, would allow him to make significant restitution payments to his former investors.

At Sample's sentencing, the district court acknowledged that Sample's crimes were "quite shameful" and indicated that it was ignoring Sample's statements as the usual "right things" most defendants mouthed at sentencing. The court chose instead to focus on the impact that the crimes had upon the victims. Every defrauded investor "wants their money back," said the court. "A prison term

would end the current job that you have, with no guarantee that you would have this job or one like it when you got out of jail,” the court explained, “I want you to keep your job, because I want you to have a good job to pay these victims back.”

In choosing probation, the court noted that society at large had suffered, and accordingly imposed what the court described as strict probation conditions. The court explicitly indicated that if Sample did not have his “current job and [his] ability to make these payments, I might be doing something different” and that “one of the reasons I’m willing to place the defendant on probation was because of this job and his earning capacity.” Sample was sentenced to a five-year term of probation.

Special conditions were imposed. Sample is banned from using or possessing alcohol or drugs and from acting in a fiduciary capacity. He is required to obtain permission from the probation office for personal travel and incurrence of new credit charges. Sample is also required to maintain gainful employment, allow the probation office access to his financial information, participate in a substance abuse treatment program, and undergo regular drug testing. He is ordered to pay restitution to his victims.

The government brings this appeal.

II

We are urged to hold that Sample’s sentence is substantively unreasonable because the district court gave improper weight to Sample’s income and

consequent ability to pay restitution. However, the government asserts that its substantive challenge may also be considered procedural in nature. Our jurisprudence regarding whether such arguments are properly considered procedural or substantive has not been fully developed. See United States v. Sayad, 589 F.3d 1110, 1116-17 (10th Cir. 2009) (summarizing conflicting precedent regarding the proper framing of a challenge based on a sentencing court’s consideration of an impermissible factor). Because the government describes its challenge as addressed to the weight that the district court gave to this factor, rather than whether it is permissible, we will consider it a substantive challenge. United States v. Pinson, 542 F.3d 822, 835-36 (10th Cir. 2008) (“[T]he weight the district court places on certain factors is reviewed for substantive unreasonableness, use of an improper factor is reviewed for procedural unreasonableness.”).

“Review for substantive reasonableness focuses on whether the length of the sentence is reasonable given all the circumstances of the case in light of the factors set forth in 18 U.S.C. § 3553(a).” United States v. Friedman, 554 F.3d 1301, 1307 (10th Cir. 2009) (quotation omitted). We review the substantive reasonableness of a sentence for abuse of discretion. Sayad, 589 F.3d at 1116. This is a deferential standard: “a district court’s sentence is substantively unreasonable only if it is arbitrary, capricious, whimsical, or manifestly unreasonable.” Id. (quotation omitted). Nevertheless, “appellate review continues to have an important role to play and

must not be regarded as a rubber stamp.” Pinson, 542 F.3d at 836.

We do not apply “a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence.” Gall v. United States, 552 U.S. 38, 47 (2007). But in examining a sentence that varies from that suggested by the Sentencing Guidelines, we must determine whether “the justification [for varying from the Guidelines range] is sufficiently compelling to support the degree of variance.” Id. at 50. It is “uncontroversial that a major departure should be supported by a more significant justification than a minor one.” Id.

We are puzzled by the court’s implicit suggestion that if the defendant were poor and unemployed, he might get a prison term. Our court has previously explained in an unpublished decision that courts should not rely on a defendant’s wealth in fashioning a sentence. See United States v. Morgan, 635 F. App’x 423, 446 (10th Cir. 2015) (unpublished) (concluding that focusing on the collateral consequences of a conviction “impermissibly favor[s] criminals . . . with privileged backgrounds”);¹ see also United

¹ In Morgan, as with some of the out-of-circuit cases cited infra, the court analyzed the procedural reasonableness of considering these factors. Id. But see id. at 455-69 (Holmes, J., concurring) (considering the issue as a substantive reasonableness challenge). We conclude that these cases provide persuasive guidance on the related issue of whether a district court imposes

States v. Kuhlman, 711 F.3d 1321, 1329 (11th Cir. 2013) (“The Sentencing Guidelines authorize no special sentencing discounts on account of economic or social status.”); United States v. Prospero, 686 F.3d 32, 47 (1st Cir. 2012) (“[I]t is impermissible for a court to impose a lighter sentence on white-collar defendants than on blue-collar defendants because it reasons that white-collar offenders suffer greater reputational harm or have more to lose by conviction.”); United States v. Stall, 581 F.3d 276, 286 (6th Cir. 2009) (“We do not believe criminals with privileged backgrounds are more entitled to leniency than those who have nothing left to lose.”); United States v. Stefonek, 179 F.3d 1030, 1038 (7th Cir. 1999) (“Business criminals are not to be treated more leniently than members of the ‘criminal class’ just by virtue of being regularly employed or otherwise productively engaged in lawful economic activity.”). Cf. 28 U.S.C. § 994(d)(11) (requiring that the Commission “shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.”)

During its final sentencing determination, the district court repeatedly stressed the importance of restitution in its decision. And it explicitly based its sentencing decision in large measure on Sample’s ability to repay his victims. The court stated that if Sample did not have his “current job and [his] abil-

a substantively unreasonable sentence by granting these factors significant weight.

ity to make these payments, I might be doing something different” and that “one of the reasons I’m willing to place the defendant on probation was because of this job and his earning capacity.” The need to provide restitution to victims is one of the factors district courts must consider in fashioning a sentence. See 18 U.S.C. § 3553(a)(7). However, the district court’s reliance on Sample’s salary as overriding all other sentencing considerations exceeded the bounds of permissible choice.

As the district court noted, Sample’s offense was serious and it inflicted considerable harm upon his victims. See § 3553(a)(2)(A) (requiring that district courts consider “the need for the sentence imposed” to “reflect the seriousness of the offense”). He misappropriated more than a million dollars. That seriousness alone weighs against the lenient nature of the sentence that the trial court imposed. United States v. Walker, 844 F.3d 1253, 1256 (10th Cir. 2017) (“[T]he length of the sentence should reflect the harm done and the gravity of the defendant’s conduct.” (quotations omitted)).

Similarly, the district court failed to adequately balance the need to “promote respect for the law,” “provide just punishment for the offense,” and “afford adequate deterrence to criminal conduct.” § 3553(a)(2)(A), (B). “General deterrence is one of the key purposes of sentencing.” Walker, 844 F.3d at 1257 (quotation omitted). Congress has recognized that general deterrence is particularly important in the context of white collar crime. See United States v. Martin, 455 F.3d 1227, 1240 (11th Cir. 2006) (“[T]he Congress that adopted the § 3553

sentencing factors emphasized the critical deterrent value of imprisoning serious white collar criminals, even where those criminals might themselves be unlikely to commit another offense.”); S. Rep. No. 98-225, at 76 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3259 (“The second purpose of sentencing is to deter others from committing the offense. This is particularly important in the area of white collar crime.”). White collar criminals may be particularly susceptible to general deterrence because “[d]efendants in white-collar crimes often calculate the financial gain and risk of loss, and white-collar crime therefore can be affected and reduced with serious punishment.” Kuhlman, 711 F.3d at 1329 (quotation and alteration omitted)).

In imposing minimal sentences on white-collar criminals, courts “raise concerns of sentencing disparities according to socio-economic” status. United States v. Levinson, 543 F.3d 190, 201 (3d Cir. 2008); see also United States v. Mueffelman, 470 F.3d 33, 40 (1st Cir. 2006) (noting the importance of “minimiz[ing] discrepancies between white- and blue-collar offenses, and limit[ing] the ability of those with money or earning potential to buy their way out of jail”). The district court failed to sufficiently consider “the need to avoid unwarranted sentence disparities.” § 3553(a)(6). The vast majority of fraud offenders convicted in 2016 were imprisoned, and for those with a criminal history level such as Sample’s, Category II, the mean length of imprisonment was 39 months. U.S. Sent’g Comm’n, Sourcebook of Fed. Sent’g Statistics, Table 12, Table 14 (2016). Of course, the Guidelines themselves are designed to

restrain unwarranted disparities. See Gall, 552 U.S. at 54. For an individual with Sample’s particular characteristics, the Guidelines suggest a range of 78 to 97 months’ imprisonment.

We are not permitted to treat probation as if it were no punishment at all. Id. at 47. However, “custodial sentences are qualitatively more severe than probationary sentences of equivalent terms.” Id. Moreover, the particular terms of Sample’s probation provide overly lenient punishment for a crime the Sentencing Commission considers deserving of approximately seven years in federal prison. Sample may travel for work, pay his fiancé’s college tuition, and even contribute to his 401(k) retirement fund. He need not report to the Bureau of Prisons on weekends, engage in community service, or even suffer restriction to his own home. Although the district court indicated that it would not “look favorably” upon his “living the high life,” he is not legally prohibited from any number of leisure activities by any condition of his sentencing.

The record is clear that the district court imposed a lenient probation sentence because Sample’s high income allowed him to make restitution payments to his victims. Our system of justice has no sentencing discount for wealth. Stefonek, 179 F.3d at 1038. Other than Sample’s earning capacity, the district court identified a few factors in mitigation: (1) Sample’s lack of a serious criminal history; (2) his conduct on pretrial release; (3) his acceptance of responsibility; and (4) the likelihood that he would not reoffend. These factors, considered cumulatively, do not justify the extent of the district

court's variance from the Guidelines range. Examining the § 3553(a) sentencing factors without considering Sample's earning capacity, it is not possible to conclude that the probation Sample received, with its lenient conditions, was a reasonable sentence. The seriousness of his crime, the importance of general deterrence, and consistency in sentencing all clearly weigh against such an extreme variance, and Sample's limited criminal history and pretrial compliance with the law cannot sustain a finding to the contrary. Resentencing is required.

III

For the foregoing reasons, we **VACATE** Sample's sentence and **REMAND** for resentencing. The parties' motions to supplement the appendix are **DENIED**.

APPENDIX B**UNITED STATES DISTRICT COURT
District of New Mexico**

UNITED STATES OF AMERICA, v. MATTHEW DALE SAMPLE	Judgment in a Criminal Case Case Number: 1:15CR04265- 001JCH USM Number: 83754-051 Defendant's Attor- ney: Ray Twohig
---	---

THE DEFENDANT:

- pleaded guilty to count(s) **1 and 2 of Information.**
- pleaded nolo contendere to count(s) which was accepted by the court.
- was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<i>Title and Section</i>	<i>Nature of Offense</i>	<i>Offense Ended</i>	<i>Count</i>
18 U.S.C. Sec. 1341	Frauds and Swindles	06/25/2012	1

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984. The Court has considered the United States Sentencing

Guidelines and, in arriving at the sentence for this Defendant, has taken account of the Guidelines and their sentencing goals. Specifically, the Court has considered the sentencing range determined by application of the Guidelines and believes that the sentence imposed fully reflects both the Guidelines and each of the factors embodied in 18 U.S.C. 3553(a). The Court also believes the sentence is reasonable and provides just punishment for the offense.

- The defendant has been found not guilty on count(s).
- Count(s) dismissed on the motion of the United States.

It is ordered that the defendant must 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.

March 23, 2017

Date of Imposition of Judgment

/s/ Judith C. Herrera

Signature of Judge

Honorable Judith C. Herrera
United States District Judge

Name and Title of Judge

May 5, 2017

Date

15a

DEFENDANT: MATTHEW DALE SAMPLE

CASE NUMBER: 1:15CR04265-001JCH

ADDITIONAL COUNTS OF CONVICTION

<i>Title and Section</i>	<i>Nature of Offense</i>	<i>Offense Ended</i>	<i>Count</i>
18 U.S.C. Sec. 1343	Wire Fraud	04/01/2014	2

DEFENDANT: MATTHEW DALE SAMPLE

CASE NUMBER: 1:15CR04265-001JCH

PROBATION

You are hereby sentenced to probation for a term of:
5 years.

As to Counts 1 and 2 of Information, the Defendant is placed on Probation for 5 years; said terms shall run concurrently.

MANDATORY CONDITIONS OF SUPERVISION

1. You must not commit another federal, state, or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must 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.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(Check, if applicable)*
4. You must cooperate in the collection of DNA as directed by statute. *(Check, if applicable)*
5. You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.)

as directed by the probation officer, the Bureau of Prisons, or any state, local, or tribal sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*

6. You must participate in an approved program for domestic violence prevention. *(Check, if applicable)*
7. You must make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664. *(check if applicable)*
8. You must pay the assessment imposed in accordance with 18 U.S.C. § 3013.
9. If this judgment imposes a fine, you must pay in accordance with the Schedule of Payments sheet of this judgment.
10. You must notify the court of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.

STANDARD CONDITIONS OF SUPERVISION

As part of your probation, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court

about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of the time you were sentenced, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must 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. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: MATTHEW DALE SAMPLE

CASE NUMBER: 1:15CR04265-001JCH

SPECIAL CONDITIONS OF SUPERVISION

You must not use or possess alcohol.

You must not knowingly purchase, possess, distribute, administer, or otherwise use any psychoactive substances (e.g., synthetic marijuana, bath salts, etc.) that impair your physical or mental functioning, whether or not intended for human consumption.

You must not incur new credit charges, negotiate or consummate any financial contracts or open additional lines of credit without prior approval of the probation officer.

You must provide the probation officer access to any requested financial information and authorize the release of any financial information. The probation office may share financial information with the U.S. Attorneys Office.

You must not communicate, or otherwise interact, with the victim(s), either directly or through someone else.

You must not engage in an occupation, business, profession, or volunteer activity that would require or enable you to act in a fiduciary capacity.

You must participate in an outpatient substance abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation

in the program (provider, location, modality, duration, intensity, etc.). You may be required to pay all, or a portion, of the costs of the program.

You must submit to substance abuse testing to determine if you have used a prohibited substance. Testing may include urine testing, the wearing of a sweat patch, a remote alcohol testing system, an alcohol monitoring technology program, and/or any form of prohibited substance screening or testing. You must not attempt to obstruct or tamper with the testing methods. You may be required to pay all, or a portion, of the costs of the testing.

Any travel for employment purposes within the United States is permissible; however, any personal travel or even if it is mixed with work travel, must be approved by the United States Probation Officer in advance.

The Defendant must maintain gainful employment, and any change in employment status must be reported to the Court immediately.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: **MATTHEW DALE SAMPLE**

CASE NUMBER: **1:15CR04265-001JCH**

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments.

The Court hereby remits the defendant’s Special Penalty Assessment; the fee is waived and no payment is required.

To- tals:	Assess- ment	JVTA As- sess- ment*	Fine	Restitution
	\$200.00	\$0.00	\$0.00	\$1,086,453.62

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

SCHEDULE OF PAYMENTS

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) JVTA assessment, (8) penalties; and (9) costs, including cost of prosecution and court costs.

Having assessed the defendant’s ability to pay, payment of the total fine and other criminal monetary penalties is due as follows: The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

A In full immediately; or

B \$ due immediately, balance due (see special instructions regarding payment of criminal monetary penalties).

Special instructions regarding the payment of criminal monetary penalties: Criminal monetary penalties are to be made payable by cashier's check, bank or postal money order to the U.S. District Court Clerk, 333 Lomas Blvd. NW, Albuquerque, New Mexico 87102 unless otherwise noted by the court. Payments must include defendant's name, current address, case number and type of payment.

Pursuant to the Mandatory Victim Restitution Act, it is further ordered that the defendant will make restitution to the H's in the amount of \$16,242.00; R.L. in the amount of \$58,091.34; M.R. in the amount of \$118,615.68; The Santa Fe couple in the amount of \$505,956.49; B.R. in the amount of \$47,532.24; and P.C. in the amount of \$340,015.87 for a total of \$1,086,453.62. Restitution shall be submitted to the Clerk of the Court, Attention Intake, 333 Lomas Boulevard N.W. Suite 270, Albuquerque, New Mexico 87102, to then be forwarded to the victims. The Court notes that the Defendant's monthly living expenses range from \$4,500.00 to \$5,000.00, which the Court expects will not increase, and that the Defendant has voluntarily paid a monthly amount of \$5,675.00 towards restitution prior to sentencing. The Court will require the defendant to continue to pay all his remaining amount of earnings, after his monthly living expenses, toward restitution for the victims until the full

amount of restitution is paid. This amount shall be paid in monthly payments. Further, the amount of restitution will increase upon the defendant's increase in pay and if the Defendant experiences any salary reduction, the restitution paid shall be no lower than \$5,675.00 per month. Furthermore, the defendant shall provide proof of his earnings statement to the Probation Officer on monthly basis. The Court will not impose interest.

The payment schedule imposed by the Court is merely a minimum schedule of payments and not the only method, nor a limitation of the methods, available to the United States to enforce the judgment.

The United States Probation Office or the United States Attorney's Office for the District of New Mexico may revise the monthly payment amount depending on the Defendant's financial circumstances.

No later than July 1st of each year after sentencing, until the restitution is paid in full, the Defendant shall provide the Asset Recovery Unit, United States Attorney's Office, PO Box 607, Albuquerque, New Mexico 87103, (1) a completed and signed financial statement provided to the Defendant by the United States Attorney's Office and/or the United States Probation Office, and (2) a copy of the Defendant's most recent tax returns.

26a

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the United States Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of court.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES)
OF AMERICA)
)
vs.) No. 1:15-CR-04265-JCH
)
MATTHEW DALE)
SAMPLE)

EXCERPT OF TRANSCRIPT OF PROCEEDINGS
SENTENCING

March 23, 2017

BEFORE: HON. JUDGE JUDITH HERRERA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:

FRED J. FEDERICI, III
fred@usdoj.gov
Office of the U.S. Attorney
201 Third Street, Northwest #900
Albuquerque, New Mexico 87103
505-346-7274

FOR DEFENDANT:

RAY TWOHIG
ray@twohiglawfirm.com
Ray Twohig PC
8998 Rio Grande Boulevard, NW

28a

Albuquerque, New Mexico 87114
505-898-0400

* * *

THE COURT: Please be seated.

All right. We're back on the record.

Well, I am going to tell you what I am contemplating. And if anybody has any comment, I will be happy to take your comments.

This case is interesting for a number of reasons. It's also a bit unusual for a number of reasons.

First of all, let me just say there is no disagreement from anybody in this room that Mr. Sample committed fraud, stole money from innocent victims, and conducted himself in a way that is quite shameful, frankly.

And I don't think that anybody in this room disagrees that Mr. Sample must be punished for what he has done.

Of course the question is: What is an appropriate punishment? What is sufficient but not greater than necessary to accomplish the sentencing goals that are set out in our statutes?

I have given very, very careful consideration to the various requests.

I have been -- and let me just say that, you know, the label "con man" has been applied to you, Mr. Sample.

And I want to say that I can understand that label. And I think, you know, you did your best to earn that label.

And I think that what I am doing here is, I am evaluating everything that I see, everything I've read.

And you know, I listened to what you said to the Court last time we were here. And you said, basically, all the right things. And just about everybody who appears in my courtroom for sentencing and stands at that podium says the right things.

And basically, people tell me what they think I need to hear in order to go their way or whatever the case may be.

So I have looked at this case not -- you know, I heard what you had to say at the podium. But I try to set aside the things that you were telling me and make decisions and evaluate what to do in this case based more -- even more so, I would say, on your conduct, the good conduct, the bad conduct.

So -- and I'm emphasizing that point because I did hear Mr. Federici talk about how, perhaps, you would be trying to convince me to do something that maybe I wouldn't do, hearing from somebody else who might not have your communication skills or whatever the case may be.

So I have been very -- you know, I've been very moved by the things that the victims had to say.

The victims in this case are real people who had real pain and real loss. And the emotional and financial harm that you caused them has been mentally taxing, financially taxing.

And I'm sure you can understand how they feel, given the fact that it seemed as though you had a little bit more of a personal relationship with them than just, you know, looking at an order on the computer screen.

So I think they felt personally duped and, clearly, emotionally harmed.

So the victims made an impact on me.

And I have to say to you that one of the main things that has affected my thinking is that every single one of them -- because I read the letters that they submitted to the Court as well.

Every single one of them wants their money back.

So I did ask Mr. Federici at the last hearing, Have you prioritized what you're requesting of the Court? Are you requesting -- we know that the government is requesting both a prison term and restitution.

So I asked whether or not there was any prioritizing. Because in my view, both cannot be accomplished.

A prison term would end the current job that you have, with no guarantee that you would have this job or one like it when you got out of jail.

I read, with interest, the letter that one of the victims submitted. And she talked in her letter about

when she was very unhappy with you and had many choice words to describe you.

But she said she wanted you to go to prison and she wanted her money back.

So in her letter she talked about a way to accomplish both. And she said you could go to prison. You could, from prison, work legally to make money to pay the victims back.

She said, in her letter, that you could work at a computer all day long starting in the early morning until late in the evening, with somebody supervising you, and work legally at prison to make money to pay back the investors, the victims in this case. And she suggested that you should stay in prison until everybody is paid back.

And so that if you could pay people back quickly, your -- you would get out of prison quicker.

The point I'm making is, of course, that isn't how it works. And that's not what would happen if you were in prison.

But the thing that was meaningful to me is that she wanted her money back.

So when I asked last time about prioritizing, I understood loudly and clearly that the government wants prison time.

And I understood loudly and clearly last time, as well as today, that the government thinks it is not fair for you to buy your way out of prison or for you to be allowed to carry on with your usual life, despite the fact that you stole a lot of money from these victims.

32a

So I -- I look at everything.

I look at who you are, and I'm not giving you a lot of credit for how you've chosen to treat the victims in this case.

I have looked at how you've conducted yourself since these charges were filed.

Now of course, you know, an argument can be made that, well, you don't -- you don't want to go to prison, so you're going to do what you need to do to convince me that you shouldn't go to prison, and that's certainly one way to look at it.

But what I see is that one of the things that I am looking for, when people do go to prison and get out of prison, is I want to see that they got the message, that they have to live their lives differently. They have to conduct themselves differently.

So I have your conduct for the last couple of years that I can evaluate as well.

You know, long story short, if -- I am seriously considering probation in this case. And the reason that I'm considering it is because I want justice in this case for the victims.

I agree that society at large has suffered, and so you owe a debt to society. And so I would impose strict limitations on you on probation. Because I, frankly, think it's offensive to the victims and to society as a whole to see you on a cruise.

I understand your reasons for that, but I don't like it, and I can't imagine that a victim likes it either.

I don't like seeing you at a baseball park, you know, smiling and having a good time with everybody.

So one of the restrictions that I would impose is that -- you know, I want you to keep your job, because I want you to have a good job to pay these victims back.

But I don't want you out living up -- living the life -- the high life. I don't want you going on vacations, let alone going to the baseball field and, you know, posting it for everybody to see. I just don't think that's right.

I don't think you should even -- I mean there was talk the last time about you doing such a good job at work that you were awarded with a trip to Hawaii.

I would not look favorably on things like that.

If you are entitled to some sort of a reward for good work, I would hope that you would ask your employer to give you money instead, money that can be used to pay your victims back.

So I want society to get the debt from you that society is owed, and that is restrictions on your life.

So I'm going to require that any travel that you do for work should be approved, because it's for work. But any other travel -- personal, even if it's mixed personal and business. If there's any personal travel, that will have to be cleared with probation.

Because I do not -- you know, I don't think you deserve to have fun in life for the next few years. What needs to happen is that you need to work to pay these victims back.

So that is what I'm contemplating.

And I have to say that, you know, not every -- your case was unusual because, yes, I have sentenced bank robbers. I've sentenced people who have committed wire fraud, mail fraud. And I have to tell you that every case is a little bit different, and I do take into account what the defendant's personal history and characteristics are.

I take into account how the victims feel about things.

I take into account the realistic opportunity to pay victims back.

Now -- and I also take into account the fact that you have no criminal history at all.

I mean, did you scheme and did you steal from people? Yes.

But this -- you know, I read your admissions again recently that were submitted in your plea agreement, which I accepted earlier today.

And in your plea agreement you certainly acknowledge -- I mean, it's -- I usually see a paragraph, maybe two paragraphs of admissions from a defendant in a plea agreement.

Yours was pages long. I don't remember how many pages long -- four pages, five pages, at least.

And so I felt that you -- you know, maybe you could have done things differently, whether it was bankruptcy court or whatever.

But I felt that in this case you put everything -- you accepted responsibility for your conduct. And so I -- I believe that you understand that what you did was wrong.

So to the extent that I feel that you might ever commit crimes again -- I mean, I don't have a crystal ball. But based on what I see and how I see that you've conducted yourself while you've been on pretrial release, I feel that -- that society is not in danger of any further crimes from you. At least that's how I see it.

So my inclination is probation.

Now the amounts, though, I have to say I agree with the government's numbers. I feel that the FBI did a really good job tracing things and tracking things. And so I do think that the amount of restitution is going to be higher than you were hoping. For but I think that is what is fair and what is just to these victims.

Now what I've calculated, I've calculated restitution amounts that are slightly different than the government's proposing for restitution, in that I am taking the total investment, but I am deducting from that amount the restitution that has been paid to date. And I'm also reducing investment losses.

Now I understand the victims' argument that had there been no stealing and lying, that perhaps they would have had more control over their investment losses and had less or maybe -- you know, if they had not been lied to, they might have been able to ride it out because they would have had balances that were truly higher than they were.

But I feel that -- that it is fair to reduce the investment losses, because I think anybody who invests in a hedge fund has -- understands the risk. And so to the extent that there were legitimate investment losses, I feel that I'm not going to require restitution in those amounts.

So the total restitution number that I've come up with is \$1,086,453.62.

And I've broken it out with P.C. owed \$304,015.87.

The Santa Fe couple, \$505,956.49.

Now, H. -- I'm including H. in the restitution because you included H. in your plea agreement. I have accepted the plea agreement, and I calculate that H is due \$16,242.

R.L., \$58,091.34.

B.R., \$47,532.24.

M.R., \$118,615.68.

For a total of \$1,086,453.62.

So the last thing I want to say at this point is that if you didn't have your -- your current job and your ability to make these payments, I might be doing something different.

But my -- my feeling is, these people who invested with you -- I mean, I've read their letters. It doesn't sound to me like -- like they -- like this was casual money for them. It doesn't sound to me like this was just fun money that they were playing with in the stock market or the hedge fund.

From reading their letters, I believe that these victims are people who really needed the money.

And as we heard, one of the victims had retired and left retirement, went back to work because of the money that you took from them.

So these victims sound to me like people who really need the money.

And so you know, they're not some corporation that -- you know, this was not a rounding error for them. I mean, this is real money, real people who need their money.

So that's what has really persuaded me, is that these people want their money back.

Now, your current job is going to help them get money back. My hope is they get it all back. That's certainly what I'm sure they want.

And in my restitution order, I'll have to calculate what the percentage is. But I want whatever the percentage has been to be the percentage going forward, so that your -- your living expenses -- and you've chosen to live pretty frugally, and I'm expecting that that's going to continue.

So I will -- I'll look at a monthly restitution amount that is -- whatever the percentage is, I'd have to calculate that -- but the same percentage that you have been paying is what I expect.

So that as your income goes up, I'm expecting that the restitution amount will also go up.

So just so I'm -- we're all understanding each other, I am not saying that the amount of restitution

that you paid last year, the \$70,000, is the annual amount. I'm saying it goes up as your income goes up.

And so those -- those are my thoughts at the moment. And I'm happy to hear anybody who has anything else they want to say.

MR. FEDERICI: Well, Judge, I think we've made clear what our position is in terms of what we think that the Court should do.

But I understand the Court has made its decision.

As part of the probationary terms, will the Court be imposing a specific schedule, such that if he fails to meet that schedule it's going to be a violation of condition of probation?

THE COURT: I want -- I thought about that, about putting in a specific dollar amount, you know, it should be no less than whatever the monthly amount is that we were talking about here.

I wasn't sure, though, that -- I do want to make sure that if the -- if the defendant decides tomorrow that he's on probation now and, you know, maybe he'll find another job or take it easy a little, that's a violation.

So I do need to come up with some language as a condition that is clear that if we don't -- if I don't see a monthly restitution amount along the lines that I just mentioned, the percentage of your current restitution to income, then that would be a violation of the probation conditions.

So I guess the way to do it would be the percentage. You know, it would only be a percentage, though. It wouldn't be a dollar amount.

Do you have any ideas?

MR. FEDERICI: I don't. I mean, I --

THE COURT: I can come up with something, I'm sure.

MR. FEDERICI: I'm also concerned if, for example, the defendant loses his job tomorrow or something -- for whatever reason loses the ability to make any type of repayment, is that a violation of the probationary terms?

THE COURT: You're mentioning things that I was concerned about as well.

I was worried about the defendant losing his job for -- like you said, for any reason.

Clearly, his employer is well aware of this case. And your vigorous cross-examination at the other hearing didn't lead to him losing his job, so I assumed that they're well aware of what is going on here.

MR. FEDERICI: I was actually a little concerned to the opposite. Because it seemed to me that he illustrated sort of a profound lack of understanding and knowledge, and don't know that that carried through to the rest of the employers.

THE COURT: No, I think that he -- that he learned a few things after your cross-examination.

But I see that he's still employed with the same employer, so I -- I've believed that his job, at least

what impact does this case have on his job, I concluded that it would not affect his -- his employability with his current employer.

So I thought his job was safe with respect to how does this case affect his employment.

So then I thought, Well, there could be other issues. There could be, you know, some sort of a market downturn or something that could result in the defendant losing his job.

And I said a while ago that one of the reasons I'm willing to place the defendant on probation was because of this job and his earning capacity.

So I will have to make sure that if there is any change in your employment, that that is something that is going to have to be brought to the Court's attention and could lead to a violation of your probationary conditions.

So I'll have to make sure that the probation department helps -- helps me fashion the condition in a way that is clear, so that everybody understands.

I mean, I'm telling you what I expect, Mr. Sample. I expect you to stay at your current job. If there's any change in your employment, whether it's a different job or a different salary, you know, a salary reduction, I need to know about that. And your probation is, in part, hinging on that. So...

MR. FEDERICI: And, Judge, another thing you mentioned was things like the Hawaii trip.

I would ask that the Court ask Mr. Sample -- it sounded like he might have already gone on the trip.

THE COURT: Well, when we had the hearing in January, it was scheduled for February. So maybe he went.

MR. TWOHIG: Yes, Your Honor. That did happen, and the probation office was aware of it. And there was a substantial business aspect to that trip.

THE COURT: Well, I'm requiring that any -- you'll have to inform probation if you are taking any kind of travel that is not exclusively work related.

If there is a personal component or a reward component or, you know, go a day or two early to have some fun before the work, I'm not giving you permission to do that unless it is cleared with the probation department.

And I'm telling you that I do not want you to take personal travel. I really would rather you didn't.

This is not intended to be a fun five-year probationary period. This is not. You're not free as a bird to do whatever you please. I don't want to ever hear about you going to some nice restaurant. I mean, I really don't.

If I could put you under house arrest so that you couldn't do anything except go to work, I would do it.

So the probation department will be responsible for reviewing your travel.

Again, I don't mind giving you permission to travel for work purposes. We heard, from the testimony last time, that your job requires you to make overnight trips to -- to conduct business. And I understand from your supplemental pleading that you've now received

additional territory that covers quite a bit of the southern states.

I don't mean the south, I mean southern -- the southern United States. So I don't think it would be useful to require you to get permission every time you had to travel for work.

But I'm trying to be as clear as I can be. And you know, I -- I've raised two children, and so I know how kids are when they say, Well, you didn't say that I couldn't do that, you said that I couldn't do this.

You can't do anything. I'm trying to be as clear as I can be. I don't want you traveling anywhere for any kind of personal reasons unless you clear it with the probation department.

I know you had some travel because your mother was ill. If you have to travel to see your mother or to help your mother, you've got to talk to probation about that. That is a personal travel, not work travel.

So I'm trying to be really clear that if you have to travel for your job, I'm willing to give you permission to do that.

But I am not willing to let you even combine business with pleasure unless the probation officer is on board and knows about it and is agreeable to it.

And I -- you know, I know you have a fiance -- or I don't know if you've gotten married. But you know, it's not going to be fun for him either.

But you know, he's your partner now so, you know, one for all and all for one.

And I don't know how to say it any clearer. I do not -- I am looking at you paying your debt to society by living as much in a cage as I can possibly do, and yet see that these victims are compensated.

So anything else, Mr. Federici?

MR. FEDERICI: Your Honor, very briefly.

I have to say I'm not going to enjoy making these phone calls to the victims. We do think it does speak volumes to the defendant's character, that even after our last hearing when that -- that he, nonetheless, went on this Hawaii trip, that trip was described by the witness as a reward.

We don't think it's an acceptance of responsibility to disavow the status of the victim, particularly when we've initially agreed that that person was a victim, as part of your plea agreement.

Whether the government can prove the additional restitution or not, I don't think it's acceptable -- acceptance of responsibility for him to shade the facts in his favor.

I went through that earlier this afternoon, or this morning, in terms of, for example, the whole story about when the fraud and the Lobo fund actually began. I think the records are clear on that.

THE COURT: Well, I think that the plea agreement speaks to that. And I -- you know, I'm just taking the plea agreement at face value.

MR. FEDERICI: Right. And one thing it didn't speak to was, we actually, in this case, filed, in addition to the facts, our own separate facts to support the

plea agreement, because I had told Mr. Twohig at that time I didn't think he was stepping up and taking full responsibility for what he had done, particularly with respect to his story on the BSI website.

Again, we don't think that that demonstrates acceptance of responsibility.

But I guess the most important thing for me to do at this point is -- and just so that the record is clear -- that the government is on record as objecting to any sentence that is not the 78-month guideline sentence. We are objecting to any variance or downward departure.

I just -- I understand it's clear from this record.

THE COURT: Yes.

MR. FEDERICI: But if I don't do that, I'm going to get talked to on the back end. So...

THE COURT: You know, Mr. Federici, that's why I called on you, so you could say anything you need to say for the record. I understand.

MR. FEDERICI: So yes, we do object to a variance. We do object to a downward departure. We think that the appropriate sentence should be as I argued earlier, a 78-month term of imprisonment, as set forth under the guidelines.

THE COURT: All right. Thank you, Mr. Federici.

Do you have any additional comment?

MR. TWOHIG: No, Your Honor. We accept the Court's proposed sentence, and my client has heard you loud and clear.

THE COURT: All right. You know, I -- if I gave you a 78-month sentence, I don't think anybody would disagree that that was an unreasonable sentence.

I just feel -- and I'll say it again -- that this -- these crimes that you committed are not victimless crimes. People were real people. Identifiable people were hurt. And that is a little bit different than society, in general, being wronged.

And I -- and I'm sure Mr. Federici is not going to enjoy his conversations with the victims in this case. But the victims' letters that I read were pretty universal in wanting money, wanting the money back.

And so I'm sure that there are other ways that this case could have been resolved, but I am -- I'm just -- I'm looking for a way to try to get these victims as much money as possible.

And I just feel that putting you in jail for 78 months means that these victims, who have been hurt so badly, end up with next to nothing.

No offense intended when I make this comment, but your employability after a prison term is going to be much -- would be much less. And so I just feel that the reality here is that in this case -- you know, maybe other cases would be different.

But in this case, based on everything I see, this is a case where probation would give you the opportunity to keep working at your current job and get these victims some measure of justice.

And again, I want society's debt to be paid as well. And so this probation that I'm putting you on is not at

all my idea of you getting away with it or you writing a check to get off -- to get off free.

I'm just not seeing it that way. You are going to have five years of somebody supervising your every move. And you know, you have to conduct yourself a certain way. Otherwise, we'll be back here in court and, you know, there will be an argument made, I'm sure, that you should go to prison. So...

Yes.

MR. FEDERICI: Your Honor, two things.

THE COURT: Uh-huh.

MR. FEDERICI: One, the Court mentioned five years. I don't know that that's going to be enough to pay back the victims.

Would the Court consider the fact that he had pled guilty to two crimes -- and I don't know. I need to look at the statute book. But it might be that that could stack in terms of the amount of the supervisory period or probationary period.

And secondarily, it seems to me that if this is the route that's taken in terms of having the case turn on restitution, that the restitution should then include interest, particularly given that this was monies that were given to these folks -- given to Mr. Sample in an investment capacity.

So it seems to me -- I think that's usually a regular part of what happens in restitution cases when we're dealing with third parties; i.e., not the government.

So I would urge the Court to make restitution include an interest component as well.

THE COURT: And I did consider that.

Well, let me hear from the defense.

MR. TWOHIG: I don't know what authority there is for that. I think restitution is to be calculated based on the amount owed, not the amount that might have been earned.

THE COURT: Anything else?

MR. FEDERICI: I think it's 18 USC Section 3612, Subsection (f)(1), which states:

"The defendant shall pay interest on any fine or restitution of more than \$2,500 unless the fine is paid in full before the 15th day after the date of the judgment."

It goes on to talk about how interest is to be computed in 3612(f)(2). It states:

"For example, interest on a fine shall be computed, (a), daily, from the first day on which the defendant is liable for interest under Subparagraph 1."

But -- and then (b):

"At a rate equal to the weekly average of one year constant maturity treasury yield as published by the Board of Governors of the Federal Reserve System."

So there are provisions that talk about interest.

And the other thought that occurred to me was that it seems that if -- if the Court chooses to impose probation as a sentence, then a condition of that probation, it would seem, should be that he has to fully repay all victims the full amount that they are owed

with interest, and that failure to do so would mean that he has violated that condition of probation.

And if we -- and, again, I haven't had an opportunity to fully think through this or research it. To be honest, Judge, I've not been in this position before.

But it strikes me that if that's a condition of probation, a permissible condition of probation, then if he's failed to satisfy that in five years, then the term of probation, I would think, could be extended in order to make sure that he does so.

Because I would hate to see a scenario where he escapes a prison sentence and then pays some fraction of the restitution owed, and after five years he's clear of the criminal justice system.

THE COURT: Well, I can tell you that I'm going to require him to pay -- make monthly restitution payments.

And I -- you know, I paid very careful attention to the information that was provided to us about what his income is and what his monthly expenses are and how much that leaves available to pay restitution.

So I'm -- I'm actually thinking that whatever his monthly expenses are now, I'm assuming that would be about what his monthly expenses are going forward during probation, so that anything above that should go to the -- to the victims.

So if you don't make the monthly restitution payments, as I'm contemplating it, then we have something to talk about, probably a probation violation.

What was the other point you made?

Oh. You also talked about probation -- I mean restitution, at some level at the end of five years.

And I would assume that -- that you-all, the US Attorney's Office, would have the ability to proceed against the defendant for any unpaid restitution. At least that's been my understanding.

MR. FEDERICI: Well, I would still urge the Court, if it's permissible -- and I don't know why it wouldn't be -- to make the full payment of restitution the condition of probation. Because otherwise, we're, in effect, saying that the defendant gets probation, but not like probation based on a promise that he does a partial repayment to them.

And I think, as part of the sentence in this criminal case, it should be part and parcel of what the Judge is thinking -- what the Court is contemplating.

THE COURT: Well, I guess the only thing I'm not clear about is, I mean the -- the ability to repay is dependent upon earnings. And so if his earnings continue to grow, then his ability to pay the entire amount increases.

But I just don't know whether or not that's something that could be accomplished based on his earnings in five years, which is why I was saying I would expect that the US Attorney's Office would go after any unpaid restitution. Because I do want them -- the victims to get their money back.

MR. FEDERICI: Well, it strikes me that it's a much heavier hammer for him to have the potential of a term of imprisonment to be hanging over his head to incentivize him to make those payments.

Because frankly, Your Honor, that's the only thing that's incentivized him to make any payments at all.

THE COURT: Right.

MR. FEDERICI: And if that's where it's going to be, it seems to me that ought to be where it is going forward. Because otherwise, we're essentially in a position of a civil litigant trying to collect on a judgment on the back end without that hammer, despite the fact that it all comes to us as a series of criminal acts over a number of years.

THE COURT: Well, I mean, I -- I completely understand what you're requesting.

I guess my hesitation is, I want him working and paying these victims back. And if I impose, you know, a million dollar restitution award that's got to be paid in five years, and he doesn't make a million dollars in payments in five years, but only makes, you know, 700,000 in payments, I mean that's still a substantial payment toward restitution, substantial progress.

And if I make it tougher, then I'm pretty much guaranteeing a violation, in which case the victims don't get even \$700,000, just to use my example that I -- you know.

MR. FEDERICI: Well, if I'm correct, and it's permissible, I don't think the Court would be making it tougher.

I think what the Court would be doing is to assure that that -- that the Court constantly has the ability to oversee the payments.

THE COURT: Uh-huh.

MR. FEDERICI: So if, after the end of five years there is \$700,000 paid and he fails to pay full restitution, then there would be a violation, at which point the Court, I believe, would be able to extend the term of probation or supervised release in order to assure that he continues to make those payments.

Again --

THE COURT: Well, I am ordering restitution in the full amount. I am ordering that, and I am ordering that pretty significant restitution amounts be paid on a monthly basis, based on the numbers that he has provided us today.

So using his own numbers, I'm saying that any income above his living expenses -- you know, it's roughly \$5,000 -- anything above that goes to restitution.

I don't -- I'm ordering full restitution, but I -- I understand what you're saying about if it's not paid in five years, then what hammer do we have?

I, frankly, don't know the answer to the suggestion that probation could be extended.

I know that he's got two convictions, and five years' probation on each conviction, you suggested perhaps stacking them.

But according to the statute, it has to be concurrent, in 3564.

So I know I can't stack them. I don't know whether I can extend it.

But I mean, I'm -- I just want these victims to get paid. And if there's anything I can do to assure that that happens, you know, I'm happy to do it.

And so I'm going to be working on this judgment. If you have any suggestions in the next few days you can submit them. But I'll probably have this judgment finalized in the next, you know, week or so.

MR. FEDERICI: And it well may be, Your Honor, that based on the fact that the Court is going to order full restitution under the Mandatory Victim Restitution Act, that the concern I'm talking about may already exist. We might have that ability at the end of this term, if he comes up short, to -- to find that he has violated conditions of probation -- namely, paying full restitution -- at which point I would hope it could be extended.

But I'll look into that issue to see whether there's any help.

And I also -- just so the record, again, is clear, merely because I'm sort of taking this position, again, doesn't mean that we're not objecting.

THE COURT: I understand. I think you've made your record.

MR. FEDERICI: Thank you.

THE COURT: All right. Thank you.

Anything else?

MR. TWOHIG: No, Your Honor. Thank you.

MR. FEDERICI: No, Your Honor.

THE COURT: All right. So I will now, then, pronounce sentence.

Now, I indicated that the Court accepts the plea agreement that was in this case.

The Court also adopts the presentence report factual findings.

The Court has considered the sentencing guideline applications as well as the sentencing factors that are set forth in 18 United States Code, Section 3553(a)(1) through (7).

The offense level is 27 and the criminal history category is II.

The guideline imprisonment range is 78 to 97 months.

Pursuant to 18 United States Code, Section 3553(a)(1) through (7), the Court determines that there exists the following sentencing factors that warrant a sentence outside of the applicable guideline range.

That is the nature and the circumstances of the offense and the history and the characteristics of the defendant, pursuant to 18 United States Code, Section 3553(a)(1).

The need to reflect the seriousness of the offense and to promote respect for the law and to provide just punishment for the offense, pursuant to 18 United States Code, Section 3553(a)(2)(A).

And the need to afford adequate deterrence to criminal conduct, pursuant to 18 United States Code, Section 3553(a)(2)(B).

I'm going to stop for just a moment, because this sentencing hearing has been a little bit unusual, and I have forgotten to ask you to step up to the podium, you and your counsel.

So typically, that's where I ask defendants to stand as we -- as I pronounce sentence. And we've done so many other things this morning that I neglected to ask you to come forward.

After evaluating the factors that I just listed, the Court finds that the defendant has a limited criminal history consisting of one misdemeanor conviction for a DUI, in which he received a term of probation that was successfully completed.

The instant offense is the defendant's first felony conviction. The defendant has never been incarcerated for an extended period of time, and the defendant has been on pretrial release.

The defendant has performed well on pretrial release and has not violated any of his pretrial release conditions.

The defendant began making restitution payments to the victims in this case while on pretrial release.

Finally, the defendant's mother was recovering from liver and colon cancer and was in remission. She recently had a recurrence of cancer. She has diabetes, and had a heart attack approximately five years ago.

And so the Court has taken all of these issues into consideration.

I've also taken into consideration the psychological history that was presented to the Court by the defendant.

Based on these findings, the Court has determined that a sentence below the advisory guideline imprisonment range will be reasonable and sufficient but not greater than necessary to accomplish the sentencing goals that are set forth in 18 United States Code, Section 3553(a).

The Court notes the defendant obtained money from multiple investors, a portion of which was converted for the defendant's personal use.

So as to Counts 1 and 2 of Information 1:15-CR-04265-001-JCH, the Defendant Matthew Dale Sample is placed on probation for a term of five years. Said terms will run concurrently.

The defendant must comply with the mandatory and standard conditions of supervision.

And the following special conditions will also be imposed.

I am imposing a travel restriction, as I indicated earlier, so that you will be allowed to travel for work within the United States. And any pleasure travel, even if it is mixed with work travel, must be with the -- you must notify the probation office, and the probation officer must approve the travel.

You must participate in an outpatient substance abuse treatment program and follow the rules and regulations of that program.

56a

The probation officer will supervise your participation in the program by way of which provider, location, modality, duration, intensity is required.

You may be required to pay all or a portion of the cost of the program.

You must submit to substance abuse testing to determine if you have used a prohibited substance.

You must not attempt to obstruct or tamper with the testing methods.

You may be required to pay all or a portion of the cost of the program.

You must not use or possess alcohol.

You must not knowingly purchase, possess, distribute, administer, or otherwise use any psychoactive substances such as synthetic marijuana or bath salts, or anything that impairs your physical or mental functioning, whether or not it is intended for human consumption.

And the Court is imposing these conditions based on the defendant's history of alcohol and substance abuse.

You must not incur new credit charges, negotiate or consummate any financial contracts, or open any additional lines of credit without the prior approval of the probation officer.

You must provide the probation officer access to any requested financial information and authorize the release of any financial information.

57a

The probation officer may share financial information with the US Attorney's Office.

You must not communicate or otherwise interact with any of the victims in this case, either directly or through someone else.

You must not engage in an occupation or business profession or voluntary -- or volunteer activity that would require or enable you to act in a fiduciary capacity.

And the conditions that I just mentioned are imposed based on the nature of the instant offense and to help reduce the risk of reoffending.

Now pursuant to the Mandatory Victim Restitution Act, it is further ordered that the defendant will make restitution to R.L. in the amount of \$58,091.34.

M.R., in the amount of \$118,615.68.

The Santa Fe couple, in the amount of \$505,956.49.

B.R., in the amount of \$47,532.24.

And P.C. -- well, P.C., in the amount of \$340,015.87.

And H., in the amount of \$16,242.

For a total of \$1,086,453.62.

Restitution shall be submitted to the Clerk of the Court, Attention Intake, at 333 Lomas Boulevard, Northwest, Suite 270, Albuquerque, New Mexico 87102, to then be forwarded to the victims.

Now, the restitution will be paid in monthly installments. And I am basing the monthly restitution amount on what the defense has submitted to the Court.

So that currently, the defendant is paying -- is earning -- well, currently, the defendant's living expenses are on the order of 4,500 to \$5,000, and the balance of his current monthly income is provided to the victims as restitution, an amount that currently is over \$7,000.

So the Court will -- the Court is making a restitution monthly amount in reliance on the numbers that were provided by the defendant, so that the defendant will continue with his living expenses as they've been identified. And so the balance would be paid as restitution.

The Court is also -- I should have mentioned I want to also impose a special condition that requires you to continue with gainful employment.

My expectation is that you will continue with your current employer. But if there is any change in your employment situation, that that matter should be brought to the probation officer's attention immediately.

The last thing that I want to mention is that pursuant to the plea agreement, the Court finds that the defendant has waived the right to appeal the final sentence imposed by this Court under 18 United States Code, Section 3742(a).

So let me ask counsel: Is there any reason that sentence should not be imposed as I've stated it?

MR. TWOHIG: No, Your Honor, but I do want to mention one thing.

When you went through the 3553 factors, one you did not mention, which I'm pretty sure you intended to, is restitution.

THE COURT: Yes, I did. You're right.

Thank you.

MR. TWOHIG: So I'm just bringing that to your attention.

THE COURT: Yes. Let me mention that.

Restitution is one of the 3553 factors, and it has been a major motivator in my decision in this case.

I do think that these victims are -- are real people. I mean, you know, society in general of course is real people. But I mean, these are really identifiable victims who have been harmed by the defendant, and the defendant has an opportunity to pay these victims.

I did take -- I paid careful attention to the letters that the victims provided to the Court, and the victims want their money back.

So I am -- I am requiring -- I think restitution is also a factor that supports the Court's variance in this case and the decision to place the defendant on supervision.

I did not -- I also didn't mention interest on the restitution.

I am not going to require interest in this case because I'm really interested in the victims getting their money back.

I understand the government's point that when investments are made that there is some -- I think there was a pretty strong descriptor that was used. I don't know if it was expectation of a return, or words to that effect.

And I don't know that investments such as these are guaranteed. So I want them to be made whole as far as their underlying investment minus, as I said before, the investment losses.

And I didn't order restitution for amounts that have already been paid back. So that's how I would -- will approach it.

So, anything else?

MR. TWOHIG: The only other thing I think I probably should mention is, has the Court made a ruling on a fine?

THE COURT: I have not anticipated imposing any additional fine.

MR. TWOHIG: Well, I was going to ask that, because you've got a lot of financial obligations here.

THE COURT: Yes. I am most interested in the defendant's resources going to the victims.

Anything else?

MR. TWOHIG: Nothing further.

Thank you, Your Honor.

THE COURT: All right. Thank you.

Mr. Federici?

MR. FEDERICI: Your Honor, for the -- to add to our objections, just for the record, we would object to the lack of interest on the restitution.

I know, for example, I can anticipate what P.C.'s reaction will be to me. I think he'll say something along the lines of, Had Mr. Sample told me when he was supposed to, back in 2008, that my money was gone, and I could have gotten back into the market then and earned some sort of reasonable interest on my money and recouped that money.

But because he waited so many years later, he didn't have that opportunity to do that.

And these weren't -- these weren't supposed to be volatile investments. These were investments of retirement income. They're supposed to be safe investments.

So I do think that there's a reasonable expectation of at least some sort of minimal interest that would be earned on that money.

THE COURT: All right. Thank you.

All right. Well, the Court will order sentence imposed as stated.

And I hope that, Mr. Sample, that you -- you approach this with the type of commitment that you had before today.

And you know, I expect that -- that your supervision will be successful. But if it's not, you know, that's what I'm here for. And I will caution you that -- and you know, I have every expectation that these people are going to get paid.

62a

THE DEFENDANT: They will.

THE COURT: And if I see anything that suggests to me that they're not, or that you could be doing better, you know, we're going to have something to talk about.

THE DEFENDANT: Okay.

THE COURT: All right.

So thank you all for your participation today.

We'll be in recess.

(Proceedings concluded at 12:18 p.m.)

63a

APPENDIX D

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

UNITED STATES OF AMERICA, Plaintiff-Appellant,	
v.	No. 17-2086
MATTHEW DALE SAMPLE, Defendant-Appellee.	

ORDER

Before **LUCERO, HARTZ, and HOLMES**, Circuit
Judges.

Appellee's petition for panel rehearing is denied.

Entered for the Court

/s Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

Filed: September 14, 2018

APPENDIX E

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 3553(a):

Factors to be considered in imposing a sentence.

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed--
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for--

65a

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made

66a

to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.