

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of November, two thousand twenty-one.

United States of America,

Appellee,

v.

Thomas Hoey, Jr.,

Defendant - Appellant.

ORDER

Docket No: 19-2353

Appellant, Thomas Hoey, Jr., filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

Catherine O'Hagan Wolfe



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 27th day of August two thousand twenty-one.

Present: ROSEMARY S. POOLER, - 1996-05-5 5/8
REENA RAGGI, - 1980's 88-146 Work of A.A.
DENNY CHIN, - 1980 - . ← " 1 1
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

19-2353

THOMAS HOEY, JR.,

Defendant-Appellant.

Appearing for Appellant: Lawrence D. Gerzog, New York, N.Y.

Appearing for Appellee: Kristy J. Greenberg, Assistant United States Attorney (Anna M. Skotko, Assistant United States Attorney, *on the brief*), for Audrey Strauss, United States Attorney for the Southern District of New York, New York, N.Y.

Appeal from the United States District Court for the Southern District of New York (Engelmayer, J.).

**ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED,
AND DECREED that the judgment of said District Court be and it hereby is AFFIRMED.**

Thomas Hoey, Jr., appeals from the July 25, 2019 amended judgment of conviction in the United States District Court for the Southern District of New York (Engelmayer, J.), arguing that his principal sentence of 78 months' imprisonment was unreasonable. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

A jury convicted Hoey of embezzlement from an employee benefit plan, 18 U.S.C. § 664 (Count One); interstate transportation of stolen money, *id.* §§ 2314, 2 (Count Two); wire fraud, *id.* §§ 1343, 2 (Count Three); and money laundering, *id.* §§ 1957, 2 (Count Four). We affirmed those convictions and the district court's \$650,936.20 restitution order. *United States v. Hoey*, 725 F. App'x 58, 59-62 (2d Cir. 2018). However, with the government's consent, we remanded for resentencing because, after the district court sentenced Hoey, a New York state appeals court reversed Hoey's conviction for assault in the third degree, which reduced the criminal history score and category used to calculate Hoey's original sentence. *Id.* at 62-63, n.2. At resentencing, the district court reduced Hoey's original sentence of 84 months' imprisonment by 6 months to a total of 78 months' imprisonment, 66 of which are to run consecutively to a separate sentence imposed in another federal criminal case. Hoey appeals from this amended sentence.

Our review of a district court's sentencing decision involves "two components: procedural review and substantive review." *United States v. Caveria*, 550 F.3d 180, 189 (2d Cir. 2008). "A district court commits procedural error where it fails to calculate the [Sentencing] Guidelines range . . . , makes a mistake in its Guidelines calculation, or treats the Guidelines as mandatory. It also errs procedurally if it does not consider the [18 U.S.C.] § 3553(a) factors, or rests its sentence on a clearly erroneous finding of fact." *Id.* at 190 (citations omitted). If a defendant does not challenge the procedural reasonableness of the sentence in district court, we review the challenge on appeal for plain error. *United States v. Villafuerte*, 502 F.3d 204, 208-09 (2d Cir. 2007) ("To establish plain error, the defendant must establish (1) error (2) that is plain and (3) affects substantial rights."). Substantive review considers "the length of the sentence imposed in light of the factors enumerated under 18 U.S.C. § 3553(a)." *Id.* at 206. In so doing, we reverse only if "the district court's decision cannot be located within the range of permissible decisions or is based on a legal error or clearly erroneous factual finding." *Id.* (internal quotation marks omitted).

On appeal, Hoey does not argue that the district court incorrectly calculated the Guidelines range, construed the Guidelines as mandatory, or failed to consider the Section 3553(a) factors. Instead, Hoey argues that the district court improperly resentenced him on an incomplete record—specifically, as to the source and circumstances of \$110,000 in recently paid restitution—and used an incorrect legal standard when it considered whether Hoey's rehabilitation efforts were sufficiently "extraordinary" to lessen his sentence. Appellant's Br. at 20. Neither argument prevails.

Because counsel raised no procedural objections before the district court, we use the plain error standard to determine procedural reasonableness. It was not plain error for the district court to deny counsel's purported request for another continuance and sentence Hoey on the record

before it. The court had already granted a seven-week adjournment to afford Hoey's retained counsel time to assist with restitution. Despite the adjournment, at resentencing, counsel was unable to provide details on how Hoey obtained the \$110,000 that he contributed to his restitution obligations. Denying yet another adjournment was not plain error. *See United States v. Carroll*, 510 F.2d 507, 510 (2d Cir. 1975) ("A decision to grant or deny a continuance is a matter within the sound discretion of the trial judge; the sole requirement imposed is that the decision be reasonable."). Moreover, counsel confirmed the district court's understanding that the money was an advance of funds that Hoey anticipated in ongoing civil litigations. Hoey does not argue on appeal that this understanding was inaccurate. Thus, proceeding with resentencing under these circumstances was not error. In any event, the court acknowledged that, regardless of the source of the money, it was "great" that Hoey had taken steps to satisfy the restitution order, App'x at 78, but ultimately was "nothing more than effectively an advance of monies" pursuant to a court order of restitution that had already been affirmed by this Circuit, App'x at 108; *see Hoey*, 725 F. App'x at 62.

The district court also did not commit plain error in evaluating Hoey's rehabilitation efforts. Although the court commended Hoey for using prison time constructively, it found that this did little to outweigh the severity of his theft. In so doing, it did not use the word "extraordinary" as a legal requirement, but rather explained that Hoey's rehabilitation efforts were not so remarkable that they altered the court's original balancing of the Section 3553(a) factors. App'x at 105. Accordingly, there was no procedural error.

The district court's within-Guidelines sentence was also substantively reasonable. Although "we do not presume that a Guidelines-range sentence is reasonable," *Cavera*, 550 F.3d at 190, "[i]n the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable," *United States v. Alcius*, 952 F.3d 83, 88 (2d Cir. 2020) (internal quotation marks omitted). Hoey presents no arguments as to why a 78-month term was unreasonable given the gravity of his crimes. Moreover, the appropriate weight of each factor and their ultimate balance are "matter[s] firmly committed to the discretion of the sentencing judge." *United States v. Broxmeyer*, 699 F.3d 265, 289 (2d Cir. 2012) (citation omitted). Because "the ultimate sentence is reasonable and the sentencing judge did not commit procedural error in imposing that sentence, we will not second guess the weight . . . that the judge accorded to a given factor or to a specific argument made pursuant to that factor." *United States v. Pope*, 554 F.3d 240, 246-47 (2d Cir. 2009) (internal quotation marks omitted).

We have considered the remainder of Hoey's arguments, including those in his pro se supplemental briefs, and find them to be without merit. Accordingly, the judgment of the district court hereby is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA

v.

THOMAS HOEY, JR.

Date of Original Judgment: 7/25/2016

(Or Date of Last Amended Judgment)

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)

) Case Number: 15-CR-229 (PAE)
) USM Number: 92147-054
) Kelley Sharkey
) Defendant's Attorney
)
) Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(c))
) 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 count(s) _____
 pleaded nolo contendere to count(s) _____ which was accepted by the court.
 was found guilty on count(s) 1, 2, 3 and 4 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 664	Embezzlement from an Employee Benefit Plan	12/19/2013	1
18 U.S.C. § 2314	Interstate Transportation of Stolen Money	12/19/2013	2
18 U.S.C. § 1343	Wire Fraud	12/19/2013	3

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 defendant has been found not guilty on count(s) _____
 Count(s) _____ is are 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.

7/17/2019

Date of Imposition of Judgment

Paul A. Engelmayr

Signature of Judge

Paul A. Engelmayr

U.S.D.J.

Name and Title of Judge

7/24/2019

Date

F 1

DEFENDANT: THOMAS HOEY, JR.
CASE NUMBER: 15-CR-229 (PAE)

ADDITIONAL COUNTS OF CONVICTION

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 1957	Money Laundering	12/19/2013	4

F 2

DEFENDANT: THOMAS HOEY, JR.
CASE NUMBER: 15-CR-229 (PAE)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

Seventy-eight (78) months. Twelve (12) months of this total sentence shall be served concurrently with the sentence imposed in 11-CR-337 (PKC), and sixty-six (66) months of this sentence shall be served consecutively to the sentence imposed in 11-CR-337 (PKC).

The court makes the following recommendations to the Bureau of Prisons:

The Court recommends that Bureau of Prisons permit Mr. Hoey's family to visit him in prison, despite their status as victims of the embezzlement in this case.

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

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____

as notified by the United States Marshal.

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

before 2 p.m. on _____

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services 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 UNITED STATES MARSHAL

F 3

DEFENDANT: THOMAS HOEY, JR.
CASE NUMBER: 15-CR-229 (PAE)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

Three (3) years on all counts; these terms of supervised release are to run concurrently. This term of supervised release shall run consecutively to the term of supervised release imposed in case 11-CR-337 (PKC).

MANDATORY CONDITIONS

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 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. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

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DEFENDANT: THOMAS HOEY, JR.
CASE NUMBER: 15-CR-229 (PAE)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, 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 your release from imprisonment, 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, based on your criminal record, personal history or characteristics, that you pose a risk to another person (including an organization), the probation officer, with the prior approval of the Court, 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.

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 _____

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DEFENDANT: THOMAS HOEY, JR.
CASE NUMBER: 15-CR-229 (PAE)

ADDITIONAL SUPERVISED RELEASE TERMS

1. The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the installment payment schedule.
2. The defendant will participate in an outpatient drug treatment program approved by the United States Probation Office, which program may include testing to determine whether the defendant has reverted to using drugs or alcohol. The defendant shall contribute the cost of services rendered based on the defendant's ability to pay and the availability of third-party payments. The Court authorizes the release of available drug treatment evaluations and reports, including the presentence investigation report, to the substance abuse treatment provider.
3. Upon a determination by the Probation Department that the defendant then would benefit from mental-health treatment, the defendant will participate in an outpatient mental-health treatment program approved by the Probation Department.

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DEFENDANT: THOMAS HOEY, JR.
CASE NUMBER: 15-CR-229 (PAE)

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 400.00	\$		\$ 650,936.20

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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See Order of Restitution filed sep

TOTALS	\$ <u>0.00</u>	\$ <u>0.00</u>
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Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

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

the interest requirement is waived for fine restitution.

the interest requirement for the fine restitution is modified as follows:

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

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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DEFENDANT: THOMAS HOEY, JR.
CASE NUMBER: 15-CR-229 (PAE)

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 \$ 400.00 due immediately, balance due
 not later than _____, or
 in accordance with C, D, E, or F below; or

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

C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

See Order of Restitution to be entered on ECF separately.

Unless the court has expressly ordered otherwise, 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 Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.
 The defendant shall pay the following court cost(s):
 The defendant shall forfeit the defendant's interest in the following property to the United States:
The defendant shall forfeit \$763,000 to the United States. See Order of Forfeiture to be entered on ECF separately.

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.

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