

APPENDICES

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUL 28 2023

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN S. ROMERO, AKA John Silva
Romero,

Defendant-Appellant.

No. 21-50004
21-50119

D.C. No.
5:15-cr-00007-VAP-1

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, Chief District Judge, Presiding

Argued and Submitted June 14, 2023
Pasadena, California

Before: BYBEE and CHRISTEN, Circuit Judges, and FITZWATER,** District
Judge.

John S. Romero appeals his convictions and sentence for conspiracy
pursuant to 18 U.S.C. § 371; and health care embezzlement (or causing, aiding, or
abetting the same) pursuant to 18 U.S.C. §§ 669, 2. He does not appeal his

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable Sidney A. Fitzwater, United States District Judge for
the Northern District of Texas, sitting by designation.

conviction or sentence for false statement pursuant to 18 U.S.C. § 1001(a)(3). We have jurisdiction under 28 U.S.C. § 1291, and we affirm. Because the parties are familiar with the factual and procedural history of this case, we do not recount it here.

1. Instructional Objections. Romero argues that the district court erred by failing to instruct the jury on multiple conspiracies, specific unanimity, and *Sears* defense theories.¹ “A criminal defendant has a constitutional right to have the jury instructed according to his theory of the case if it has ‘some foundation in evidence’” *United States v. Johnson*, 459 F.3d 990, 993 (9th Cir. 2006) (quoting *United States v. Morton*, 999 F.2d 435, 437 (9th Cir. 1993)). If “there is evidence upon which the jury could rationally find for the defendant,” he is entitled to the instruction. *Id.* (quoting *Morton*, 999 F.2d at 437). In the district court, Romero requested a multiple conspiracies instruction and a *Sears* instruction, but he did not request a specific unanimity instruction.

“We have not been entirely consistent on whether to apply an abuse of discretion or de novo standard of review in reviewing the district court’s refusal to

¹ A *Sears* instruction informs the jury that “there can be no indictable conspiracy with a government informer who secretly intends to frustrate the conspiracy.” *Sears v. United States*, 343 F.2d 139, 142 (5th Cir. 1965). The instruction is warranted when there is “‘some foundation in the evidence’ to support the defendant’s theory that she conspired only with a government agent.” *United States v. Escobar de Bright*, 742 F.2d 1196, 1201 (9th Cir. 1984).

give a multiple conspiracies instruction when the parties dispute whether there was sufficient evidence to support such an instruction.” *United States v. Job*, 871 F.3d 852, 867 (9th Cir. 2017). But even under a de novo standard, a multiple conspiracies instruction was not warranted because there was no indication in the evidence that “a jury could reasonably conclude that some of the defendants were only involved in separate conspiracies unrelated to the overall conspiracy charged in the indictment.” *United States v. Moe*, 781 F.3d 1120, 1127 (9th Cir. 2015) (internal quotation marks and citation omitted). As such, the district court did not err by denying Romero’s request for a multiple conspiracies instruction.

We similarly need not resolve the standard of review that applies to Romero’s argument for a *Sears* instruction because it would fail even on de novo review. The only support for a *Sears* instruction is Romero’s own uncorroborated assertions—made for the first time in post-trial filings—that Steven Dale began cooperating with the government in November 2012 and that Dale wore a wire to an April 2013 meeting with Romero. No record evidence supports these assertions. But because the government appeared to concede at oral argument that Dale recorded one conversation with Romero at an agent’s request, we consider whether Romero was improperly denied a *Sears* instruction. We conclude he was not. A jury could not reasonably have found that Romero conspired solely with Dale, particularly considering the overwhelming evidence that the Romero family

members conspired and took actions to further the same goals. *See United States v. Barragan*, 871 F.3d 689, 710 (9th Cir. 2017) (“If at least one co-conspirator is not a government agent, a conspiracy conviction is permitted.”). Accordingly, the district court did not err by refusing Romero’s request for a *Sears* instruction.

Finally, because Romero did not request a specific unanimity instruction in the district court, we review the district court’s failure to give one for plain error only. *United States v. Begay*, 33 F.4th 1081, 1088 (9th Cir. 2022) (en banc); *see United States v. Castillo*, 69 F.4th 648, 652 (9th Cir. 2023) (“Federal Rule of Criminal Procedure 52(b) affords appellate courts discretion ‘to correct a forfeited error’ if the appellant shows (1) an error, (2) that is plain, (3) that affects substantial rights, and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings.” (citation omitted)). Regardless of the standard of review, a specific unanimity instruction was not warranted because the evidence did not show “a genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed acts consisting of different legal elements.” *United States v. Luong*, 965 F.3d 973, 985 (9th Cir. 2020) (citation, omission, and internal quotation marks omitted).

2. Evidentiary Objection and Corrective Instruction. Romero submits that government witnesses offered improper opinions regarding the legal definition of assets of a health care benefit plan. He also argues that the district court should

have given a corrective jury instruction as to how plan assets are determined. It is well established that a “witness cannot give an opinion as to her legal conclusion, i.e., an opinion on an ultimate issue of law.” *United States v. Diaz*, 876 F.3d 1194, 1197 (9th Cir. 2017) (emphasis, citation, and internal quotation marks omitted). Assuming the government witnesses’ testimony crossed this line, Romero concedes that he objected to this testimony for the first time in post-trial filings. Any objection raised post-trial was untimely, so we review for plain error. *See Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1066 (9th Cir. 1996). Romero’s evidentiary objection fails because he has not shown why the error he alleges was plain, affected his substantial rights, or seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See Castillo*, 69 F.4th at 652. Romero’s argument that a corrective jury instruction was required also fails because Romero has not shown that the jury was improperly instructed on the statutory definition of that term.

3. Constructive Amendment. Romero argues that the district court constructively amended the indictment when it instructed the jury that “the term ‘two or more persons’ is not limited to the persons charged in this case.” Romero did not raise this objection in the district court, so we review for plain error. Regardless of the standard of review, Romero’s constructive amendment claim

fails because the indictment included “others known and unknown” within its listing of co-conspirators.

4. Sufficiency of the evidence. Romero argues that the evidence was insufficient to support his conviction for conspiracy and for health care embezzlement. In assessing a sufficiency challenge, we “determine whether ‘after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *United States v. Nevils*, 598 F.3d 1158, 1163–64 (9th Cir. 2010) (en banc) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

To prove a conspiracy under 18 U.S.C. § 371, the government must establish three elements: “(1) an agreement to engage in criminal activity, (2) one or more overt acts taken to implement the agreement, and (3) the requisite intent to commit the substantive crime.” *United States v. Kaplan*, 836 F.3d 1199, 1212 (9th Cir. 2016) (internal quotation marks and citations omitted). The testimony of Romero’s family members, financial records, and a recorded telephone call between Romero and his wife supplied overwhelming evidence of Romero’s agreement, multiple overt acts taken in furtherance of the scheme, and his intent to participate in the charged conspiracy.

The elements of health care embezzlement are: (1) knowingly and willfully; (2) embezzling, stealing, or converting; (3) money, funds, or other assets; (4) of a

health care benefit program. 18 U.S.C. § 669; *see also id.* § 24(b) (defining “health care benefit program”). Romero argues that the government did not prove the funds at issue belonged to a health care benefit program—specifically, a union health plan. But the government introduced substantial documentary evidence and adduced expert and lay witness testimony to show that those funds did belong to the health plan. Viewed in the light most favorable to the prosecution, the evidence was more than sufficient to support the jury’s verdict on all the counts of conviction that Romero challenges on appeal.

5. Claim preclusion. Romero first argued that claim preclusion barred his prosecution in his interlocutory appeal. *See United States v. Romero*, 775 F. App’x 347, 348 (9th Cir. 2019). He raises this argument again in this appeal, but he never raised it to the district court. Considering this claim on plain error review and assuming without deciding that civil claim preclusion principles apply to Romero’s criminal case, Romero’s argument fails because there was no error, plain or otherwise. Claim preclusion could not apply to bar Romero’s 2015 prosecution because his 2009 prosecution involved different time periods, unions, transactions, people, and bank accounts. *See Mpoyo v. Litton Electro–Optical Sys.*, 430 F.3d 985, 987 (9th Cir. 2005).

6. Loss Calculation. Romero alleges three errors in the district court’s loss calculation, but none are persuasive. We review this argument for abuse of

discretion. *See United States v. Lonich*, 23 F.4th 881, 910 (9th Cir. 2022). First, the district court's decision not to credit the value of Romero's son's de minimis work against the loss amount is insufficient to create a "definite and firm conviction that the court committed a clear error of judgment." *United States v. BNS, Inc.*, 858 F.2d 456, 464 (9th Cir. 1988) (describing the abuse-of-discretion standard); *but see United States v. Martin*, 796 F.3d 1101, 1110 (9th Cir. 2015) (reversing sentence for abuse of discretion and explaining that "district courts should give credit for any legitimate services rendered to the victims" (internal quotation marks and citation omitted)). Here, any error was harmless because deducting the value of the services performed by Romero's son would have decreased the loss amount by, at most, \$32,475. The challenged sentence enhancement was based on a loss amount of more than \$550,000 and the district court determined a loss amount of \$674,800. Second, the \$193,500 in rent payments to Romero's LLC were properly included in the loss calculation because the jury heard testimony that no health plan work was performed from either of the LLC's properties. Third, we are not persuaded by Romero's argument that the \$25,000 payment for his son's Mustang should not have been included in the loss amount because the payment came from an account that Romero used to collect embezzled funds. The district court did not abuse its discretion in calculating the loss attributable to Romero's crimes.

7. Restitution. Restitution was ordered only in connection with the counts of conviction, so we review the award for abuse of discretion. *See United States v. Anieze-Smith*, 923 F.3d 565, 570 (9th Cir. 2019). Romero contends that the district court erred by ordering that restitution be paid to those who contributed to the plan because the stolen funds belonged to the health plan’s trust, not its contributors. But the relevant statute defines “victim” capaciously, encompassing anyone who is “directly and proximately harmed as a result of” a defendant’s “criminal conduct in the course of . . . [a] conspiracy.” 18 U.S.C. § 3663A(a)(2). The statute provides that if a victim is “deceased” or “incapacitated,” a “representative of the victim’s estate” or “any other person appointed as suitable by the court” may assume the victim’s rights under the statute. *Id.*

By the time Romero was tried and convicted, the trust no longer existed. The trust document provided that in the event of the trust’s termination, “no part of the corpus or income” of the trust fund “shall be used or diverted for purposes other than for the exclusive benefit of” the trust’s beneficiaries, its administrative expenses, or payments in accordance with the document’s provisions or the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 & 29 U.S.C.). Romero does not show that ordering restitution to the trust’s contributors constituted an abuse of discretion.

Romero also contends that the district court improperly calculated the restitution amount using the “defendant’s gain” rather than the “victim’s actual losses.” *See United States v. Anderson*, 741 F.3d 938, 953 (9th Cir. 2013). But *Anderson* did not articulate a general, per se rule that the defendant’s gain can never equal a victim’s loss. The generally applicable rule is more flexible: a district court should not rely solely on its calculation of the loss under the Sentencing Guidelines to determine the amount of restitution because the two measures serve different purposes and different calculation methods apply. *See United States v. Gossi*, 608 F.3d 574, 580–81 (9th Cir. 2010) (“Sentencing, unlike restitution, focuses on the criminal defendant Restitution clearly focuses on the *victim*, not the individual defendant.”).

Here, the district court based its restitution award on the amount the Romero family embezzled from the trust. But for the embezzlement, the trust would have had a reserve for the contributors’ benefit. That the family’s gains happened to equal the trust’s losses does not render the restitution award improper. The district court did not abuse its discretion when it awarded restitution.

AFFIRMED.

**United States District Court
Central District of California**

UNITED STATES OF AMERICA vs.

Docket No.

EDCR 15-00007-VAP-1

Defendant JOHN S. ROMEROSocial Security No. 2 4 8 3akas: John Silva Romero; John Romero, Sr.

(Last 4 digits)

**AMENDED
JUDGMENT AND PROBATION/COMMITMENT ORDER**

The Sentencing was conducted by videoconference, with the express consent of the defendant.

MONTH	DAY	YEAR
01	05	2021

In the presence of the attorney for the government, the defendant appeared in person on this date.

COUNSELRichard W. Raynor, CJA Panel Attorney

(Name of Counsel)

PLEA☐**GUILTY**, and the court being satisfied that there is a factual basis for the plea.☐**NOLO
CONTENDERE**☒**NOT
GUILTY****FINDING**There being a finding/verdict of **GUILTY**, defendant has been convicted as charged of the offense(s) of:

**Conspiracy, in violation of Title 18 U.S.C. § 371 as charged in Count 1 of the Indictment;
Theft in Connection with Health Care, Aiding and Abetting, in violation of Title 18 U.S.C. §§ 669; 2(a) as charged in
Counts 2-5, 9-10, 14, 17, 19-21, 23 of the Indictment; and,
False Statement, Aiding and Abetting, in violation of Title 18 U.S.C. §§ 1001(a)(3); 2(a) as charged in Count 30 of the
Indictment.**

**JUDGMENT
AND PROB/
COMM
ORDER**

The Court asked whether there was any reason why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that::

It is ordered that the defendant shall pay to the United States a special assessment of \$1400, which is due immediately. Any unpaid balance shall be due during the period of imprisonment, at the rate of not less than \$25 per quarter, and pursuant to the Bureau of Prisons' Inmate Financial Responsibility Program.

It is ordered that the defendant shall pay restitution in the total amount of \$674,800.00 pursuant to 18 U.S.C. § 3663(a). The amount of restitution shall be paid as set forth in the separate victim list prepared by the probation office, listed in the Third Addendum to the Presentence Report, which this Court adopts and which reflects the Court's determination of the amount of restitution due to each victim. The victim list, which shall be forwarded to the fiscal section of the clerk's office, shall remain confidential to protect the privacy interests of the victims.

If the defendant makes a partial payment, each payee shall receive approximately proportional payment unless another priority order or percentage payment is specified in the judgment.

Restitution shall be due during the period of imprisonment at the rate of not less than \$25 per quarter pursuant to the Bureau of Prisons Inmate Financial Responsibility Program. If any amount of the restitution remains unpaid after the defendant's release from custody, nominal monthly payments of at least 10% of defendant's gross monthly income but not less than \$800, whichever is greater, shall be made during the period of supervised release and shall begin 30 days after the commencement of supervision. Nominal restitution payments are ordered as the Court finds the defendant's economic circumstances do not allow for either immediate or future payment of the amount ordered.

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The defendant shall be held jointly and severally liable with co-participants and defendants John J. Romero for \$273,250.00, co-defendant Evelyn Romero for \$316,501.98, and Danae Romero for \$ 200,551.98. The victims' recovery is limited to the amount of their loss and the defendant's liability for restitution ceases if and when the victims receive full restitution.

The defendant shall comply with Second Amended General Order No. 20-04.

Pursuant to Guideline § 5E1.2(a), all fines are waived as the Court finds that the defendant has established that he is unable to pay and is not likely to become able to pay any fine.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, John Romero, is hereby committed on Counts 1, 2-5, 9-10, 14, 17, 19-21, 23, and 30 of the Indictment to the custody of the Bureau of Prisons for a term of **144 months**. This term consists of a term of 60 months on each of Counts 1 and 30 of the Indictment, a term of 60 months on each of Counts 2-5, 9-10, 14, 17, 19-21, and 23 of the Indictment, and a term of 24 months based on the statutory sentencing enhancement under 18 U.S.C. § 3147, all such terms to be served consecutively.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three (3) years. This term consists of 3 years on each of Counts 1, 2-5, 9-10, 14, 17, 19-21, 23, and 30, all such terms to run concurrently under the following terms and conditions:

1. The defendant shall comply with the rules and regulations of the United States Probation & Pretrial Services Office and Amended General Order 20-04.
2. During the period of community supervision, the defendant shall pay the special assessment in accordance with this judgment's orders pertaining to such payment.
3. The defendant shall not be employed in any capacity wherein the defendant has custody, control, or management of the defendant's employer's funds.
4. The defendant shall cooperate in the collection of a DNA sample from the defendant.

The drug testing condition mandated by statute is suspended based on the Court's determination that the defendant poses a low risk of future substance abuse.

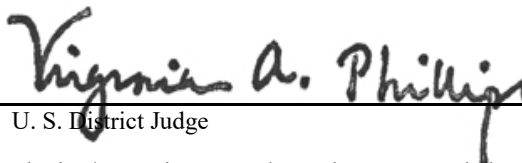
The Court recommends that the defendant be designated to a facility in Southern California.

Defendant is informed of his right to appeal.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release within this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

May 12, 2021

Date


U. S. District Judge

It is ordered that the Clerk deliver a copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Clerk, U.S. District Court

May 12, 2021

Filed Date

By /s/ Christine Chung

Deputy Clerk

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Docket No.: EDCR 15-00007-VAP-1

X The defendant must comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this judgment:

1. The defendant must not commit another federal, state, or local crime;
2. The defendant must report to the probation office in the federal judicial district of residence within 72 hours of imposition of a sentence of probation or release from imprisonment, unless otherwise directed by the probation officer;
3. The defendant must report to the probation office as instructed by the court or probation officer;
4. The defendant must not knowingly leave the judicial district without first receiving the permission of the court or probation officer;
5. The defendant must answer truthfully the inquiries of the probation officer, unless legitimately asserting his or her Fifth Amendment right against self-incrimination as to new criminal conduct;
6. The defendant must reside at a location approved by the probation officer and must notify the probation officer at least 10 days before any anticipated change or within 72 hours of an unanticipated change in residence or persons living in defendant's residence;
7. The defendant must permit the probation officer to contact him or her at any time at home or elsewhere and must permit confiscation of any contraband prohibited by law or the terms of supervision and observed in plain view by the probation officer;
8. The defendant must work at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons and must notify the probation officer at least ten days before any change in employment or within 72 hours of an unanticipated change;
9. The defendant must not knowingly associate with any persons engaged in criminal activity and must not knowingly associate with any person convicted of a felony unless granted permission to do so by the probation officer. This condition will not apply to intimate family members, unless the court has completed an individualized review and has determined that the restriction is necessary for protection of the community or rehabilitation;
10. The defendant must refrain from excessive use of alcohol and must not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
11. The defendant must notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
12. For felony cases, the defendant must not possess a firearm, ammunition, destructive device, or any other dangerous weapon;
13. The defendant must not act or enter into any agreement with a law enforcement agency to act as an informant or source without the permission of the court;
14. As directed by the probation officer, the defendant must notify specific persons and organizations of specific risks posed by the defendant to those persons and organizations and must permit the probation officer to confirm the defendant's compliance with such requirement and to make such notifications;
15. The defendant must follow the instructions of the probation officer to implement the orders of the court, afford adequate deterrence from criminal conduct, protect the public from further crimes of the defendant; and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

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☒ The defendant must also comply with the following special conditions (set forth below).

STATUTORY PROVISIONS PERTAINING TO PAYMENT AND COLLECTION OF FINANCIAL SANCTIONS

The defendant must pay interest on a fine or restitution of more than \$2,500, unless the court waives interest or unless the fine or restitution is paid in full before the fifteenth (15th) day after the date of the judgment under 18 U.S.C. § 3612(f)(1). Payments may be subject to penalties for default and delinquency under 18 U.S.C. § 3612(g). Interest and penalties pertaining to restitution, however, are not applicable for offenses completed before April 24, 1996.

If all or any portion of a fine or restitution ordered remains unpaid after the termination of supervision, the defendant must pay the balance as directed by the United States Attorney's Office. 18 U.S.C. § 3613.

The defendant must notify the United States Attorney within thirty (30) days of any change in the defendant's mailing address or residence address until all fines, restitution, costs, and special assessments are paid in full. 18 U.S.C. § 3612(b)(1)(F).

The defendant must notify the Court (through the Probation Office) and the United States Attorney of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay a fine or restitution, as required by 18 U.S.C. § 3664(k). The Court may also accept such notification from the government or the victim, and may, on its own motion or that of a party or the victim, adjust the manner of payment of a fine or restitution under 18 U.S.C. § 3664(k). See also 18 U.S.C. § 3572(d)(3) and for probation 18 U.S.C. § 3563(a)(7).

Payments will be applied in the following order:

1. Special assessments under 18 U.S.C. § 3013;
2. Restitution, in this sequence (under 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid):
 - Non-federal victims (individual and corporate),
 - Providers of compensation to non-federal victims,
 - The United States as victim;
3. Fine;
4. Community restitution, under 18 U.S.C. § 3663(c); and
5. Other penalties and costs.

CONDITIONS OF PROBATION AND SUPERVISED RELEASE PERTAINING TO FINANCIAL SANCTIONS

As directed by the Probation Officer, the defendant must provide to the Probation Officer: (1) a signed release authorizing credit report inquiries; (2) federal and state income tax returns or a signed release authorizing their disclosure and (3) an accurate financial statement, with supporting documentation as to all assets, income and expenses of the defendant. In addition, the defendant must not apply for any loan or open any line of credit without prior approval of the Probation Officer.

The defendant must maintain one personal checking account. All of defendant's income, "monetary gains," or other pecuniary proceeds must be deposited into this account, which must be used for payment of all personal expenses. Records of all other bank accounts, including any business accounts, must be disclosed to the Probation Officer upon request.

The defendant must not transfer, sell, give away, or otherwise convey any asset with a fair market value in excess of \$500 without approval of the Probation Officer until all financial obligations imposed by the Court have been satisfied in full.

These conditions are in addition to any other conditions imposed by this judgment.

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Docket No.: EDCR 15-00007-VAP-1

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____
Defendant noted on appeal on _____
Defendant released on _____
Mandate issued on _____
Defendant's appeal determined on _____
Defendant delivered on _____ to _____
at _____
the institution designated by the Bureau of Prisons, with a certified copy of the within Judgment and Commitment.

United States Marshal

Date By _____
Deputy Marshal

CERTIFICATE

I hereby attest and certify this date that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

Clerk, U.S. District Court

Filed Date By _____
Deputy Clerk

FOR U.S. PROBATION OFFICE USE ONLY

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

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

(Signed) _____
Defendant Date

U. S. Probation Officer/Designated Witness Date

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 FOR THE CENTRAL DISTRICT OF CALIFORNIA
9 EASTERN DIVISION

10 UNITED STATES OF AMERICA,
11 Plaintiff,
12 v.
13 JOHN S. ROMERO,
14 aka "John Romero, Sr.,"
15 Defendant.
16

No. ED CR 15-00007-VAP-1
ORDER SETTING FORTH FINDINGS
REGARDING RESTITUTION

17 The Court, having considered the trial proceeding in this matter
18 and all the evidence therefrom, the jury verdicts, the United States
19 Probation and Pretrial Services Office's ("USPO") original and
20 amended presentence reports and recommendation letters, the filings
21 regarding sentencing and restitution by both the government and
22 defendant John S. Romero ("defendant"), by and through his counsel of
23 record, Richard Raynor, and the parties' arguments, hereby issues the
24 following findings:

25 1. The Mandatory Victim Restitution Act of 1996 ("MVRA")
26 properly applies to this case because it involves offenses "against
27
28

1 property under this title . . . including any offense committed by
2 fraud or deceit". See 18 U.S.C. § 3663A(c) (1) (A) (ii).

3 2. The government has proven by clear and convincing evidence
4 that there are 706 victims to whom defendant properly owes
5 restitution, as set forth in the Victim List appended to the Amended
6 Presentence Report filed by the USPO on March 3, 2021. (Dkt. No.
7 459). The Court finds that those 706 victims, who paid into the
8 UISWA Health and Welfare Trust during the duration of the conspiracy,
9 were directly and proximately harmed as a result of defendant's
10 offenses, within the meaning of 18 U.S.C. § 3663A(a).

11 3. The government has also proven by clear and convincing
12 evidence that defendant directly and proximately caused actual loss
13 in the amount of \$674,800 to the 706 victims who paid into the UISWA
14 Health and Welfare Trust.

15 4. Both the identification of the 706 victims and the
16 calculation of the actual loss caused by defendant, that is,
17 \$674,800, has been established by sufficient, reliable, and accurate
18 evidence.

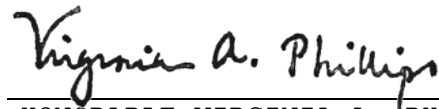
19 5. The methodology employed by the government to determine the
20 specific amount of restitution owed to each of the 706 identified
21 victims, as set forth in the sworn declaration of Financial Analyst
22 Robert Prunty from the Department of Labor (Dkt. No. 489), is
23 reasonable and reliable. The Court also finds that the proposed
24 restitution amount assigned to each victim, as set forth in Exhibit D
25 (Dkt. No. 458) appropriately allocates to each victim a fair and
26 proportional amount of the total loss that is commensurate with each
27 victim's relative contribution to the UISWA Health and Welfare Trust.
28

1 Based on these findings, restitution shall be ordered as set
2 forth in the amended judgment.

3 IT IS SO ORDERED.

4
5 May 3, 2021

6 DATE



HONORABLE VIRGINIA A. PHILLIPS
UNITED STATES DISTRICT JUDGE

18 U.S.C. § 3663A. Mandatory restitution to victims of certain crimes

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term “victim” means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant--

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense--

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to--

(i) the greater of--

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim--

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense--

(A) that is--

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit;

(iii) an offense described in section 3 of the Rodchenkov Anti-Doping Act of 2019;

(iv) an offense described in section 1365 (relating to tampering with consumer products); or

(v) an offense under section 670 (relating to theft of medical products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) or (iii) if the court finds, from facts on the record, that--

(A) the number of identifiable victims is so large as to make restitution impracticable;
or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need

to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

**18 U.S.C. § 3664. Procedure for issuance and
enforcement of order of restitution**

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

(b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(c) The provisions of this chapter, chapter 227, and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.

(d)(1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable--

(A) provide notice to all identified victims of--

(i) the offense or offenses of which the defendant was convicted;

(ii) the amounts subject to restitution submitted to the probation officer;

(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

(iv) the scheduled date, time, and place of the sentencing hearing;

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B);

and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(f)(1)(A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

(B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.

(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of-

-

(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

(B) projected earnings and other income of the defendant; and

(C) any financial obligations of the defendant; including obligations to dependents.

(3)(A) A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.

(B) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(4) An in-kind payment described in paragraph (3) may be in the form of--

(A) return of property;

(B) replacement of property; or

(C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

(g)(1) No victim shall be required to participate in any phase of a restitution order.

(2) A victim may at any time assign the victim's interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.

(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

(i) If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

(j)(1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

(2) Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in-

-

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of the State.

(k) A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

(l) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

(m)(1)(A)(i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or

(ii) by all other available and reasonable means.

(B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

(2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.

(n) If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

(o) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that--

(1) such a sentence can subsequently be--

(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;

(B) appealed and modified under section 3742;

(C) amended under subsection (d)(5); or

(D) adjusted under section 3664(k), 3572, or 3613A; or

(2) the defendant may be resentenced under section 3565 or 3614.

(p) Nothing in this section or sections 2248, 2259, 2264, 2327, 3663, and 3663A and arising out of the application of such sections, shall be construed to create a cause of action not otherwise authorized in favor of any person against the United States or any officer or employee of the United States.