

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL SEAN GRAHAM

Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

APPENDICES TO
PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. BRESNEHAN
Law Offices of Michael J. Bresnehan,
P.C.
1761 East McNair Drive, Suite 101
Tempe, AZ 85283-5002
Telephone: (480) 345-7032
mbresnehan@hotmail.com
Attorney for Petitioner

DATE SENT VIA United States Postal Service: June 19, 2024

APPENDICES TABLE OF CONTENTS

APPENDIX A - District Court's 2021 Amended Judgment and Sentence	A-1-7
APPENDIX B - 2017 Court of Appeals Memorandum Decision	A-8-14
APPENDIX C – Court of Appeals Order Denying Petition for Panel Rehearing/En Banc Hearing	A-15-16

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America

v.

Michael Sean Graham

AMENDED JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

No. CR-16-01300-001-PHX-DLR

Jacob Faussette (CJA)

Attorney for Defendant

THERE WAS A VERDICT OF guilty on April 26, 2021 as to Counts 2, 5, 6, 7, 8, 9, 10, 12, 14, 15, 18, 19, 20, 22, and 24 of the Indictment.

ACCORDINGLY, THE COURT HAS ADJUDICATED THAT THE DEFENDANT IS GUILTY OF THE FOLLOWING OFFENSE(S): violating Title 18, U.S.C. §1343, Wire Fraud, a Class C Felony offense, as charged in Count 2 of the Indictment; Title 18, U.S.C. §1343, Wire Fraud, a Class C Felony offense, as charged in Count 5 of the Indictment; Title 18, U.S.C. §1343, Wire Fraud, a Class C Felony offense, as charged in Count 6 of the Indictment; Title 18, U.S.C. §1343, Wire Fraud, a Class C Felony offense, as charged in Count 7 of the Indictment; Title 18, U.S.C. §1343, Wire Fraud, a Class C Felony offense, as charged in Count 8 of the Indictment; Title 18, U.S.C. §1343, Wire Fraud, a Class C Felony offense, as charged in Count 9 of the Indictment; Title 18, U.S.C. §1343, Wire Fraud, a Class C Felony offense, as charged in Count 10 of the Indictment; Title 18, U.S.C. §1343, Wire Fraud, a Class C Felony offense, as charged in Count 12 of the Indictment; Title 18, U.S.C. §1343, Wire Fraud, a Class C Felony offense, as charged in Count 14 of the Indictment; Title 18, U.S.C. §1343, Wire Fraud, a Class C Felony offense, as charged in Count 15 of the Indictment; Title 18, U.S.C. §1343, Wire Fraud, a Class C Felony offense, as charged in Count 18 of the Indictment; Title 18, U.S.C. §1343, Wire Fraud, a Class C Felony offense, as charged in Count 19 of the Indictment; Title 18, U.S.C. §1343, Wire Fraud, a Class C Felony offense, as charged in Count 20 of the Indictment; Title 18, U.S.C. §1341, Mail Fraud, a Class C Felony offense, as charged in Count 22 of the Indictment; Title 18, U.S.C. §1341, Mail Fraud, a Class C Felony offense, as charged in Count 24 of the Indictment.

IT IS THE JUDGMENT OF THIS COURT THAT the defendant is committed to the custody of the Bureau of Prisons for a term of **SEVENTY-TWO (72) MONTHS**, which consists of **SEVENTY-TWO (72) MONTHS** on Count 2, **SEVENTY-TWO (72) MONTHS** on Count 5, **SEVENTY-TWO (72) MONTHS** on Count 6, **SEVENTY-TWO (72) MONTHS** on Count 7, **SEVENTY-TWO (72) MONTHS** on Count 8, **SEVENTY-TWO (72) MONTHS** on Count 9, **SEVENTY-TWO (72) MONTHS** on Count 10, **SEVENTY-TWO (72) MONTHS** on Count 12, **SEVENTY-TWO (72) MONTHS** on Count 14, **SEVENTY-TWO (72) MONTHS** on Count 15, **SEVENTY-TWO (72) MONTHS** on Count 18, **SEVENTY-TWO (72) MONTHS** on Count 19, **SEVENTY-TWO (72) MONTHS** on Count 20, **SEVENTY-TWO (72) MONTHS** on Count 22, and **SEVENTY-TWO (72) MONTHS** on Count 24, said counts to run concurrently, with credit for time served. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **THIRTY-SIX (36)**

CR-16-01300-001-PHX-DLR
USA vs. Michael Sean Graham

Page 2 of 6

MONTHS, which consists of **THIRTY-SIX (36) MONTHS** on Count 2, **THIRTY-SIX (36) MONTHS** on Count 5, **THIRTY-SIX (36) MONTHS** on Count 6, **THIRTY-SIX (36) MONTHS** on Count 7, **THIRTY-SIX (36) MONTHS** on Count 8, **THIRTY-SIX (36) MONTHS** on Count 9, **THIRTY-SIX (36) MONTHS** on Count 10, **THIRTY-SIX (36) MONTHS** on Count 12, **THIRTY-SIX (36) MONTHS** on Count 14, **THIRTY-SIX (36) MONTHS** on Count 15, **THIRTY-SIX (36) MONTHS** on Count 18, **THIRTY-SIX (36) MONTHS** on Count 19, **THIRTY-SIX (36) MONTHS** on Count 20, **THIRTY-SIX (36) MONTHS** on Count 22, and **THIRTY-SIX (36) MONTHS** on Count 24 and **THIRTY-SIX (36) MONTHS** on Count 24, said counts to run concurrently.

CRIMINAL MONETARY PENALTIES

The defendant shall pay to the Clerk the following total criminal monetary penalties:

SPECIAL ASSESSMENT: \$1,500.00 FINE: WAIVED RESTITUTION: \$1,389,739.00

The Court finds the defendant does not have the ability to pay a fine and orders the fine waived.

The defendant shall pay restitution to the following victim(s) in the following amount(s): Stefan Gschwendtner, in the amount of \$230,000.00; Ian Liu, in the amount of \$100,000.00; Chuck and Gar Cartier, in the amount of \$81,000.00; Guy Iannuzzi, in the amount of \$450,000.00; Sue Irelan, in the amount of \$176,314.00; Christopher York, in the amount of \$50,000.00; Bruce Knutson, in the amount of \$20,000.00; Donald and Alice Schoening, in the amount of \$18,000.00; Dan Sherman, in the amount of \$42,000.00; and Dan Hill, in the amount of \$150,000.00; Michael Clinton (Irving City Employees), in the amount of \$30,000.00; Deborah Kendall, in the amount of \$10,000.00; Donald Muller, in the amount of \$10,000.00; Michael Etzel, in the amount of \$8,000.00; Mark Jacobs (Til Dark Investments), in the amount of \$5,000.00; David Erikson (KP Investments), in the amount of \$5,000.00; Harrison Andrews, in the amount of \$2,900.00; Chris London, in the amount of \$1,500.00; Kenneth & Emily Ward, in the amount of \$25.00.

The defendant shall pay a special assessment of \$1,500.00 which shall be due immediately.

The defendant shall pay a total of \$1,391,239.00 in criminal monetary penalties, due immediately. Having assessed the defendant's ability to pay, payments of the total criminal monetary penalties are due as follows: Balance is due in equal monthly installments of \$500.00 to commence 60 days after the release from imprisonment to a term of supervised release.

If incarcerated, payment of criminal monetary penalties are due during imprisonment at a rate of not less than \$25 per quarter and payment shall be made through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk of U.S. District Court, Attention: Finance, Suite 130, 401 West Washington Street, SPC 1, Phoenix, Arizona 85003-2118. Payments should be credited to the various monetary penalties imposed by the Court in the priority established under 18 U.S.C. § 3612(c). The total special assessment of \$1,500.00 shall be paid pursuant to Title 18, United States Code, Section 3013 for Count 24, 24 of the Indictment.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, (10) costs, including cost of prosecution and court costs.

Any unpaid balance shall become a condition of supervision and shall be paid within 90 days prior to the expiration of supervision. Until all restitutions, fines, special assessments and costs are fully paid, the defendant shall immediately notify the Clerk, U.S. District Court, of any change in name and address. The Court hereby waives the imposition of interest and penalties on any unpaid balances.

SUPERVISED RELEASE

It is ordered that while on supervised release, the defendant must comply with the mandatory and standard conditions of supervision as adopted by this court, in General Order 17-18, which incorporates the requirements of USSG §§ 5B1.3 and 5D1.2. Of particular importance, the defendant must not commit another federal, state, or local crime during the term of supervision. Within 72 hours of sentencing or release from the custody of the Bureau of Prisons the defendant must report in person to the Probation Office in the district to which the defendant is released. The defendant must comply with the following conditions:

MANDATORY CONDITIONS

- 1) You must not commit another federal, state or local crime.
- 2) You must not unlawfully possess a controlled substance. The use or possession of marijuana, even with a physician's certification, is not permitted.
- 3) You must refrain from any unlawful use of a controlled substance. The use or possession of marijuana, even with a physician's certification, is not permitted. Unless suspended by the Court, 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.

STANDARD CONDITIONS

- 1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of sentencing or 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 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.

SPECIAL CONDITIONS

The following special conditions are in addition to the conditions of supervised release or supersede any related standard condition:

- 1) You must cooperate in the collection of DNA as directed by the probation officer.
- 2) You are restricted from engaging in the following occupation, business, or profession: Any profession in which the defendant will act as a financial advisor or investor involving other people's money.
- 3) You must not contact the victims who were identified as investors in Strat X, and the probation officer will verify compliance.

CR-16-01300-001-PHX-DLR
USA vs. Michael Sean Graham

Page 5 of 6

- 4) You are prohibited from making major purchases exceeding \$1,000.00, incurring new financial obligations, or entering into any financial contracts without the prior approval of the probation officer.
- 5) You must provide the probation officer with 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. Attorney's Office.
- 6) You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A, or any other statute authorizing a sentence of restitution.
- 7) The defendant's interest in the following property shall be forfeited to the United States: \$1,488.85 seized from Bank of America account number ending in 8124 and \$181,042.88 seized from Bank of America account number ending in 5756.

THE COURT FINDS that you have been sentenced in accordance with the terms of the plea agreement and that you have waived your right to appeal and to collaterally attack this matter. The waiver has been knowingly and voluntarily made with a factual basis and with an understanding of the consequences of the waiver.

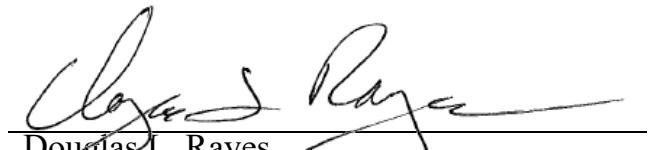
The Court may change the conditions of probation or supervised release or extend the term of supervision, if less than the authorized maximum, at any time during the period of probation or supervised release. The Court may issue a warrant and revoke the original or any subsequent sentence for a violation occurring during the period of probation or supervised release.

The Court orders commitment to the custody of the Bureau of Prisons.

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

Date of Imposition of Sentence: **Tuesday, September 21, 2021**

Dated this 27th day of October, 2021.



Douglas L. Rayes
United States District Judge

CR-16-01300-001-PHX-DLR
USA vs. Michael Sean Graham

Page 6 of 6

RETURN

I have executed this Judgment as follows: _____, the institution
defendant delivered on _____ to _____ at _____
designated by the Bureau of Prisons with a certified copy of this judgment in a Criminal case.

United States Marshal By: _____ Deputy Marshal

CR-16-01300-001-PHX-DLR- Graham 9/21/2021 - 3:35 PM

APPENDIX B

FILED

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEB 26 2024

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL SEAN GRAHAM,

Defendant-Appellant.

No. 21-10277

D.C. No.
2:16-cr-01300-DLR-1

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Douglas L. Rayes, District Judge, Presiding

Argued and Submitted February 7, 2024
Phoenix, Arizona

Before: BERZON, HURWITZ, and JOHNSTONE, Circuit Judges.

Michael Graham appeals his conviction and sentence on 15 counts of wire
and mail fraud involving a foreign-currency investment scheme. We affirm.

1. Graham first argues that the district court violated Federal Rule of
Criminal Procedure 11(c)(1) when it rejected a plea agreement containing a 20-
month sentence cap. Because Graham did not raise the alleged Rule 11 violation

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

before the district court, and because such an objection was not “unlikely or futile,” we review for plain error. *United States v. Kyle*, 734 F.3d 956, 962 (9th Cir. 2013).

The district court did not improperly interject itself into the plea negotiation process. *Id.* at 963. Contrary to Graham’s assertions, the court did not state that it would only accept a plea agreement without a cap or otherwise “comment[] on the hypothetical agreements it would or would not accept.” *Id.* (quoting *United States v. Crowell*, 60 F.3d 199, 203 (5th Cir. 1995)). Instead, it “provide[d] individualized reasons for rejecting the agreement, based on the specific facts and circumstances presented,” *In re Morgan*, 506 F.3d 705, 711 (9th Cir. 2007), and informed Graham that he could either withdraw from the plea agreement, which would have allowed for further plea negotiations, or plead guilty without the cap. Accordingly, the court did not commit plain error in rejecting the agreement.

2. Graham next alleges that the district court violated his confrontation clause and due process rights by requiring witnesses to testify while masked during some, but not all, of their testimony. Because Graham did not object to the masking policy at trial, we review for plain error. *United States v. Olano*, 507 U.S. 725, 732 (1993).

The district court did not plainly err. Considering that the trial took place during the COVID-19 pandemic, the masking requirement was “necessary to further an important state interest,” namely, the health of trial participants. *United*

States v. De Jesus-Casteneda, 705 F.3d 1117, 1120 (9th Cir. 2013). And the “reliability of the [witnesses’] testimony was otherwise assured” because they were present in the courtroom, testified under oath, were subject to cross-examination, unmasked during some of their testimony, and their demeanor and body language were visible. *Id.* at 1121. Nor did the masking requirement infringe upon Graham’s due process rights. *Id.*

3. Graham contends that the district court violated his constitutional rights by reinstating Count 21, a mail fraud count, which the government had mistakenly moved to dismiss before jury empanelment. Because Graham objected to the reinstatement of the count, we review de novo. *United States v. Berry*, 683 F.3d 1015, 1020 (9th Cir. 2012); *United States v. Kimbrew*, 406 F.3d 1149, 1151 (9th Cir. 2005); *United States v. Hartz*, 458 F.3d 1011, 1019 (9th Cir. 2006).

Any error in reinstating Count 21 was harmless. *See United States v. Tuyet Thi-Bach Nguyen*, 565 F.3d 668, 675 (9th Cir. 2009). Graham was eventually acquitted on that count. He has not pointed to any specific impact the introduction of evidence on Count 21 could have had on the counts for which he was convicted.

Nor did the reinstatement of Count 21 constitute double jeopardy. The count was dismissed without prejudice before the jury was empaneled. Graham had therefore not yet been placed in jeopardy on that count when it was reinstated. *United States v. Bernhardt*, 840 F.2d 1441, 1447 (9th Cir. 1988).

Finally, whether or not the reinstatement of Count 21 constituted an improper constructive amendment of the indictment, there was no injury to Graham as a result, as he was not convicted of the charge. *United States v. Ward*, 747 F.3d 1184, 1189 (9th Cir. 2014) (noting that a finding of constructive amendment “typically mandates reversal”).

4. Graham also challenges the sufficiency of the evidence underlying his convictions. Because he did not renew his motion for acquittal at the close of evidence, we review his challenge for plain error or to prevent a miscarriage of justice. *United States v. Barragan*, 263 F.3d 919, 922 (9th Cir. 2001). We conclude that, considering the evidence in the light most favorable to the prosecution, a rational trier of fact could find the essential elements of the crimes were proven beyond a reasonable doubt. *United States v. Nevils*, 598 F.3d 1158, 1163–64 (9th Cir. 2010) (en banc).

Counts 2, 5, 6, 9, 10, 14, 15, 18, 19, and 20 concern the transfer of funds from Graham’s business account to a personal bank account. The government was not required to prove that all the funds in the business account could be “traced back to a particular unlawful activity.” *United States v. Lazarenko*, 564 F.3d 1026, 1036 (9th Cir. 2009). Because at least some of the funds in the business account were deposited by individuals who testified as to false statements by Graham that induced them to invest, and who later received falsified statements misrepresenting

their earnings, a reasonable juror could conclude that transfers out of that account were “in furtherance” of the fraud. *Id.*

Counts 7, 8, 12, 22, and 24 concern funds transferred by two investor-victims to Graham. Although the government did not prove exactly how those funds were used, it did show that the funds were obtained through material misrepresentations and that at least some of the money in Graham’s business account was diverted to personal use. *See United States v. Woods*, 335 F.3d 993, 998–99 (9th Cir. 2003). That evidence is sufficient for a reasonable juror to conclude that the transfers were “incident to the execution of the scheme.” *United States v. Jinian*, 725 F.3d 954, 960 (9th Cir. 2013) (quoting *United States v. Lo*, 231 F.3d 471, 478 (9th Cir. 2000)).

5. Finally, Graham argues that the district court erred in ordering restitution for losses incurred by Sue Irelan, Dan Hill, Christopher York, Bruce and Elaine Knutson, Donald and Alice Schoening, and Dan Sherman. “We review a restitution order for an abuse of discretion, provided that it is within the bounds of the statutory framework. Factual findings supporting an order of restitution are reviewed for clear error. The legality of the order is reviewed *de novo*.” *United States v. Thomsen*, 830 F.3d 1049, 1064 (9th Cir. 2016) (cleaned up).

Because an element of mail and wire fraud is a “scheme,” restitution is not limited to losses caused by the charged or convicted offenses. *Id.* at 1065–66. The

government presented sufficient evidence at sentencing to show by a preponderance of the evidence that each individual was “directly harmed by the defendant’s criminal conduct in the course of the scheme.” 18 U.S.C. § 3663A(a)(2).

Accordingly, the district court did not abuse its discretion in entering the restitution order.

AFFIRMED.

APPENDIX C

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APR 9 2024

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL SEAN GRAHAM,

Defendant-Appellant.

No. 21-10277

D.C. No.
2:16-cr-01300-DLR-1
District of Arizona,
Phoenix

ORDER

Before: BERZON, HURWITZ, and JOHNSTONE, Circuit Judges.

The panel has voted to deny appellant's petition for panel rehearing. Judge Johnstone has voted to deny the petition for rehearing en banc, and Judges Berzon and Hurwitz have so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.