

APPENDIX A

FILED

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee,
v.
MARCUS ORLANDO ARMSTRONG,
Defendant - Appellant.

No. 23-466
D.C. No.
8:19-cr-00195-ODW-2

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Otis D. Wright II, District Judge, Presiding

Submitted March 25, 2024**
Pasadena, California

Before: RAWLINSON, LEE, and BRESS, Circuit Judges.

Marcus Orlando Armstrong appeals his 114-month sentence imposed following his guilty plea on two counts of payment of illegal remunerations in connection with a federal health care program. 42 U.S.C. § 1320a-7b(b)(2)(A).

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

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Armstrong and his co-defendants defrauded Tricare, a taxpayer-funded federal health care program for members of the U.S. military and their families. Armstrong later violated the terms of his pretrial release by selling his residence for \$3.6 million without prior court approval.

The parties and Probation agreed that Armstrong's Guidelines imprisonment range was 57 to 71 months and that he owed \$3,070,091.66 in restitution. At sentencing, Armstrong still owed \$447,932.09 in restitution on a 2003 fraud conviction for which his term of supervised release concluded in 2010. The district court imposed a sentence of 57 months on each count, to run consecutively. Armstrong contends that his sentence is procedurally erroneous and substantively unreasonable. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. The district court did not procedurally err in imposing its 114-month consecutive sentence. Because Armstrong failed to raise any of his four claims of procedural error at sentencing, we review each for plain error. *United States v. Herrera*, 974 F.3d 1040, 1045 (9th Cir. 2020).

First, contrary to Armstrong's contention, the district court did not improperly consider his inability to pay restitution in meting out its sentence. In weighing the 18 U.S.C. § 3553(a) factors, the district court properly considered his recidivism, refusal to abide by his court-ordered restitution obligations and the terms of his supervised release, decision to sell his residence without court

approval, and use of the sale proceeds to pay off personal loans. *See United States v. Rangel*, 697 F.3d 795, 803 (9th Cir. 2012), *as amended* (a “sentencing court is empowered to consider whether the victims will receive restitution from the defendant in varying from the Sentencing Guidelines based on [the] 3553(a) factors”).

Second, Armstrong contends that the district court failed to provide advance notice of its intent to depart from the Guidelines by imposing consecutive sentences in violation of Fed. R. Crim. P. 32(h). This claim fails because the district court’s reliance upon the § 3553(a) factors rendered Armstrong’s above-Guidelines sentence a variance, not a departure requiring advance notice. *See Rangel*, 697 F.3d at 801 (“[The Rule 32(h)] notice requirement does not apply, however, to a ‘variance’ under § 3553(a).”) (citation omitted).¹

Third, the district court did not err in imposing a consecutive sentence beyond the “total punishment” under U.S.S.G. § 5G1.2. Armstrong premises his argument on pre-*United States v. Booker*, 543 U.S. 220 (2005) case law, which is of limited utility in construing the advisory Guidelines provision at issue. *See United States v. Lillard*, 57 F.4th 729, 738 (9th Cir. 2023). Post-*Booker*, this

¹ Armstrong stresses that the government characterized the imposition of consecutive sentences as an upward “departure.” But he has provided no authority indicating that counsel’s nomenclature during a colloquy at sentencing is relevant to ascertaining whether a district court imposed consecutive sentences pursuant to a variance under § 3553(a) or a departure, respectively.

circuit has held that “notwithstanding the Guidelines range, the district court may vary a sentence based on its consideration of the factors set forth in 18 U.S.C. § 3553(a).” *United States v. Wang*, 944 F.3d 1081, 1091 (9th Cir. 2019). And we have long “recognize[d] that ‘the district court retains discretion under 18 U.S.C. § 3584(a) to sentence either concurrently or consecutively despite the guidelines.’” *Id.* (citation omitted).

Fourth, Armstrong argues that his due process rights were violated because the district court mistakenly referenced his failure to pay any restitution in his 2003 case and relied on that error in issuing a 114-month sentence. While the district court at first was under that mistaken belief, the defense counsel later corrected the court, stating that Armstrong paid a portion of it. The district court later said that Armstrong “failed” to make payments, but then added he had failed to “complete” his restitution payments, which could suggest that the court was aware of the partial payment. Any error is not plain because Armstrong has not established that such asserted error affected his substantial rights. *See United States v. Christensen*, 732 F.3d 1094, 1105–06 (9th Cir. 2013). Armstrong has not shown a reasonable probability that he would have received a different sentence absent the alleged error. *See id.*²

² Armstrong has moved for this court to take judicial notice of the docket in his 2003 fraud case. This “court may take judicial notice of its own records in

2. Armstrong's 114-month sentence was not substantively unreasonable.

This court reviews the substantive reasonableness of a sentence for abuse of discretion. *Gall v. United States*, 552 U.S. 38, 51 (2007). In so doing, “we are to consider the totality of the circumstances” and “may not reverse just because we think a different sentence is appropriate.” *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc). The record indicates that the district court rationally and meaningfully considered the § 3553(a) factors in meting out its individualized sentence. The district court was not required to compare Armstrong’s sentence to sentences imposed in unrelated cases. See *United States v. Treadwell*, 593 F.3d 990, 1012 (9th Cir. 2010), *overruled in part on other grounds by United States v. Miller*, 953 F.3d 1095 (9th Cir. 2020). Given the “due deference” we owe the district court’s determination “that the § 3553(a) factors, on a whole, justify the extent of the variance,” *Gall*, 552 U.S. at 51, Armstrong’s 114-month sentence was not substantively unreasonable.

AFFIRMED.

other cases, as well as the records of an inferior court in other cases.” *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980). We grant the unopposed motion, but the outcome of this case remains unchanged.

APPENDIX B

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

UNITED STATES OF AMERICA vs.**Defendant** Marcus Orlando Armstrong

akas: _____

Docket No. **SA CR 19-00195-ODW-2****Social Security No.** N O N E

(Last 4 digits)

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

| | | |
|-------|-----|------|
| MONTH | DAY | YEAR |
| March | 20, | 2023 |

COUNSEL**John Neil McNicholas, panel**

(Name of Counsel)

PLEA

GUILTY, and the court being satisfied that there is a factual basis for the plea. **NOLO**
CONTENDERE **NOT**
GUILTY

FINDINGThere being a finding/verdict of **GUILTY**, defendant has been convicted as charged of the offense(s) of:

Counts 25-26: 42:1320a-7b(b)(2)(A); 18:2(b): Illegal Remunerations in Connection with Federal Health Care Programs
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: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of:

57 months on Count 25 and Count 26 of the Indictment, to run consecutively for a total term of imprisonment of 114 months.

It is ordered that the defendant shall pay to the United States a special assessment of \$200, 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 \$3,070,091.66 pursuant to 18 U.S.C. § 3663A.

The amount of restitution ordered shall be paid as follows:

Victim Amount

TRICARE Recoupemts \$3,070,091.66

A partial payment of \$250,000 shall be paid within 90 days of sentencing. The 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. If any amount of the restitution remains unpaid after release from custody, nominal monthly payments of at least 10% of defendant's gross monthly income but not less than \$500, whichever is greater, shall be made during the period of supervised release. These payments shall begin 90 days after the commencement of supervision. Nominal restitution payments are ordered as the Court finds that the defendant's economic circumstances do not allow for either immediate or future payment of the amount ordered.

The defendant shall be held jointly and severally liable with co-defendant Leslie Andre Ezidore and Sandy Mai Trang Nguyen for the amount of restitution ordered in this judgment. 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.

Pursuant to 18 U.S.C. § 3612(f)(3)(A), interest on the restitution ordered is waived because the defendant does not have the ability to pay interest. Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

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 an inability to pay any fine.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 3 years. This term consists of 3 years on each of Counts 25-26, 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 Second Amended General Order 20-04.
2. The defendant shall cooperate in the collection of a DNA sample from himself.
3. During the period of community supervision, the defendant shall pay the special assessment and restitution in accordance with this judgment's orders pertaining to such payment.
4. The defendant shall apply all monies received from income tax refunds, lottery winnings, inheritance, judgments and any other financial gains to the Court-ordered financial obligation.
5. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from custody and at least two periodic drug tests thereafter, not to exceed eight tests per month, as directed by the Probation Officer.
6. The defendant shall participate in an outpatient substance abuse treatment and counseling program that includes urinalysis, breath or sweat patch testing, as directed by the Probation Officer. The defendant shall abstain from using alcohol and illicit drugs, and from abusing prescription medications during the period of supervision.

7. As directed by the Probation Officer, the defendant shall pay all or part of the costs of the Court-ordered treatment to the aftercare contractors during the period of community supervision. The defendant shall provide payment and proof of payment as directed by the Probation Officer. If the defendant has no ability to pay, no payment shall be required.
8. The defendant shall not be employed in any capacity wherein the defendant has custody, control, or management of the defendant's employer's funds.
9. The defendant shall not be employed in any position that requires licensing or certification by any local, state, or federal agency without the prior written approval of the Probation Officer.
10. The defendant shall not be self-employed nor be employed in a position that does not provide regular pay stubs with the appropriate deductions for taxes, unless approved by the Probation Officer.
11. The defendant shall provide the Probation Officer with access to any and all business records, client lists, and other records pertaining to the operation of any business owned, in whole or in part, by the defendant, as directed by the Probation Officer.
12. The defendant shall submit the defendant's person, property, house, residence, vehicle, papers, or other areas under the defendant's control, to a search conducted by a United States Probation Officer or law enforcement officer. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. Any search pursuant to this condition will be conducted at a reasonable time and in a reasonable manner upon reasonable suspicion that the defendant has violated a condition of his supervision and that the areas to be searched contain evidence of this violation.

The Court authorizes the Probation & Pretrial Services Office to disclose the Presentence Report to the substance abuse treatment provider to facilitate the defendant's treatment for narcotic addiction or drug dependency. Further redisclosure of the Presentence Report by the treatment provider is prohibited without the consent of this Court.

The Court recommends defendant to be housed in a Miami Florida (FCI) facility.

The Court recommends defendant to participate in a 500-hour RDAP.

The Court GRANTS defendant's request to self surrender to the USM in the Miami Florida area.

It is further ordered that the defendant **surrender himself to** the institution designated by the Bureau of Prisons at **or before 12 noon, on March 27, 2023**. In the absence of such designation, the defendant shall report on or before the same date and time, to the United States Marshal located at the First Street U.S. Courthouse 350 W. First Street, Suite 3001, Los Angeles, CA 90012.

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Pursuant to 18 U.S.C. § 3553(a), the Court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The Court, in determining the particular sentence to be imposed, shall consider -

The nature and circumstances of the offense and the history and characteristics of the defendant;

2. The need for the sentence imposed --

- a. To reflect the seriousness of the offense; to promote respect for the law, and to provide just punishment for the offense;
 - b. To afford adequate deterrence to future criminal conduct;
 - c. To protect the public from further crimes of the defendant; and
 - d. To provide the defendant with needed educational correctional treatment in the most effective manner.
3. The kinds of sentences available;
4. The guideline sentencing range;
5. Any pertinent policy statements issued by the Sentencing Commission;
6. The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.
7. The need to provide restitution to any victims of the offense.

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.



March 20, 2023

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

March 20, 2023

Filed Date

By

Sheila English /s/

Deputy Clerk

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. 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.

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. Assessments, restitution, fines, penalties, and costs must be paid by certified check or money order made payable to "Clerk, U.S. District Court." Each certified check or money order must include the case name and number. Payments must be delivered to:

United States District Court, Central District of California
Attn: Fiscal Department
255 East Temple Street, Room 1178
Los Angeles, CA 90012

or such other address as the Court may in future direct.

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.

When supervision begins, and at any time thereafter upon request of the Probation Officer, the defendant must produce to the Probation and Pretrial Services Office records of all bank or investments accounts to which the defendant has access, including any business or trust accounts. Thereafter, for the term of supervision, the defendant must notify and receive approval of the Probation Office in advance of opening a new account or modifying or closing an existing one, including adding or deleting signatories; changing the account number or name, address, or other identifying information affiliated with the account; or any other modification. If the Probation Office approves the new account, modification or closing, the defendant must give the Probation Officer all related account records within 10 days of opening, modifying or closing the account. The defendant must not direct or ask anyone else to open or maintain any account on the defendant's behalf.

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.

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

By _____
Date _____ 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

By _____
Filed Date _____ 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