

United States Court of Appeals
for the Fifth Circuit

No. 20-51054

United States Court of Appeals
Fifth Circuit

FILED

April 7, 2022

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

BRIAN ALFARO,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:18-CR-879-1

Before JOLLY, SMITH, and ENGELHARDT, *Circuit Judges.*

E. GRADY JOLLY, *Circuit Judge:*

Following an eight-day trial, a jury convicted Brian Alfaro on seven counts of mail fraud under 18 U.S.C. § 1341. The district court sentenced Alfaro to 121 months of imprisonment with three years of supervised release and ordered restitution in the amount of \$9,922,428.63. This sentence was within the Guidelines range. Alfaro appeals his sentence and the district court's restitution order. For the reasons specified below, we VACATE and REMAND the sentence and restitution order based solely on the district court's erroneous assessment of total loss amount. In all other respects we AFFIRM.

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I

From 2012 through mid-2015, Alfaro, through his company, Primera Energy (Primera), offered investors the opportunity to own shares—sold as units of “working interest”—in various oil and gas prospects, including the Screaming Eagle 4H Prospect (4H), Screaming Eagle 6H Prospect (6H), and the Black Hawk Horizontal Buda #1 Prospect. Primera created a Confidential Private Placement Memorandum (PPM), which memorialized each investor’s contract. According to the indictment, Alfaro or his employees made material, false representations to investors in order to induce them into buying units and then fraudulently misused the investors’ funds.

In the presentence report (PSR), the probation officer determined that based on a total amount of investment (\$13,781,150.87) minus the calculated tax benefits that the investors could have claimed on their tax returns (\$3,858,722.24), the total amount of loss was \$9,922,428.63. The PSR noted that Alfaro had a criminal history category of I and calculated that the total offense level was 39. The resulting Guidelines range of imprisonment was 262 to 327 months, but the probation officer noted that a sentence in this range could only be achieved if consecutive sentences were imposed because the statutory maximum term of imprisonment was 240 months. The PSR also determined the victims were owed \$9,922,428.63 in restitution.

At sentencing, the Government conceded that the PSR’s total loss amount should be reduced by the \$325,540.35 that Primera paid to 4H investors in royalties and the \$167,288.55 distributed to investors through Primera’s bankruptcy proceedings, resulting in a total loss amount of \$9,429,599.73. The Government correctly noted that, after that reduction in loss, the applicable specific offense characteristic was an 18-level adjustment

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under § 2B1.1(b)(1)(J). Thus, the total offense level would be 37, which would result in a Guidelines range of imprisonment of 210 to 262 months.

Without specifically ruling on the Government's concession, the district court held that the PSR's loss calculations were correct and adopted the PSR's proposed loss finding of \$9,922,428.63 by finding the specific offense characteristics merited a 20-level adjustment. The district court also found that Alfaro's offense resulted in substantial financial hardship to five or more victims, the offense involved sophisticated means, and Alfaro abused a position of public or private trust or used a special skill in a manner that significantly facilitated the commission or concealment of the offense. The district court, however, sustained Alfaro's objection to the organizer-or-leader enhancement and granted Alfaro a three-level reduction for acceptance of responsibility because Alfaro agreed to not appeal the jury's verdict. Thus, Alfaro had a criminal history category of I and a total offense level of 32. The district court then concluded that the correct Guidelines range was 121 months to 151 months, imposed a sentence of 121 months' incarceration, and ordered restitution in the amount of \$9,922,428.63.

On appeal, Alfaro argues that the district court erred in: (1) its loss calculation; (2) its application of the § 2B1.1(b)(2)(B) adjustment for an offense causing substantial financial hardship to five or more persons; (3) its application of the § 2B1.1(b)(10)(C) adjustment for an offense and conduct involving sophisticated means; and (4) its calculation of the restitution award. We first address Alfaro's loss calculation arguments.

II

A

Alfaro argues that the district court's loss calculation was incorrect because: (1) it should have determined his sentence based on gain, rather than on actual loss, which he asserts was not reasonably quantifiable; (2) it did not

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account for the fair market value of the investors' ownership interests in the wells and the fair market value of the services rendered in the completion of most of the wells; (3) the loss amount should not have been based on 425 investors; (4) there is no evidence that Alfaro "knew" or could "reasonably foresee" a loss of investment; (5) the district court erred by failing to consider "other factors" relevant to whether Alfaro intended to cause loss; and (6) the district court erred by failing to accept the Government's concession that the total loss amount was \$9,429,599.73.

We review the district court's loss calculations for clear error, but the district court's method of determining loss, as well as its interpretations of the Guidelines, are reviewed *de novo*. *United States v. Harris*, 821 F.3d 589, 601 (5th Cir. 2016). "There is no clear error if the district court's finding is plausible in light of the record as a whole." *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008) (internal quotation marks and citation omitted). And facts relevant to sentencing must be proven by a preponderance of the evidence. *United States v. Duhon*, 541 F.3d 391, 395 (5th Cir. 2008). A PSR generally "bears sufficient indicia of reliability to be considered . . . by the sentencing judge in making factual determinations." *United States v. Zuniga*, 720 F.3d 587, 591 (5th Cir. 2013) (internal quotation marks and citation omitted). "The district court receives wide latitude to determine the amount of loss and should make a reasonable estimate based on available information." *United States v. Jones*, 475 F.3d 701, 705 (5th Cir. 2007); *see also* U.S.S.G. § 2B1.1 cmt. n.3(C) ("The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence."). As discussed more *infra*, all of Alfaro's loss calculation arguments lack merit except his sixth and final one: that the district court erred by not accepting the Government's concession as to the total loss amount.

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First, Alfaro's argument that the district court should have calculated his sentence under § 2B1.1 based on gain lacks merit because the actual loss amount could be reasonably determined. *See U.S.S.G. § 2B1.1 cmt. n.3(A)-(C).* Accordingly, Alfaro has failed to show that the district court erred by using the actual loss standard for purposes of calculating his sentence under § 2B1.1. *See Harris*, 821 F.3d at 601.

Second, Alfaro argues that the actual loss standard was inappropriate in this case because it cannot account for the fair market value of the investors' ownership interests in the wells and the fair market value of the services rendered in the completion of most of the wells. But, because the investors did not receive any value or benefit from Primera's legitimate business expenditures, there is no reason to credit those amounts against the actual loss amount. *See United States v. Spalding*, 894 F.3d 173, 191-92 (5th Cir. 2018).

Third, Alfaro contends that the district court erred by calculating the loss amount based on 425 investors because the prosecution failed to prove that all those investors were victims of his offense and that all the 420 non-testifying investors considered the "no transaction-based compensation" clause in the PPMs to be material to their decision to invest. Because materiality of falsehood is an element of a mail fraud offense under § 1341, the jury necessarily found that Alfaro used false material representations, pretenses, or promises in his scheme to defraud. *See Neder v. United States*, 527 U.S. 1, 25 (1999). For purposes of calculating financial loss under § 2B1.1, a "victim" is defined as "any person who sustained any part of the actual loss determined under subsection (b)(1)." U.S.S.G. § 2B1.1 cmt. n.1. The record indicates that all the investors in Primera's wells—and specifically those who invested in the 4H and 6H wells—lost their initial investments and ownership interests, although there is some variation among investors as to how much they recouped in dividends and bankruptcy payouts. Alfaro has

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not shown that the district court erred by failing to make a materiality finding as to each specific investor before including that investor as a victim for purposes of the loss calculation. Furthermore, to the extent that Alfaro challenges the district court's use of an extrapolation methodology in the loss calculation, we have affirmed that method to calculate loss amounts in other fraud cases. *See, e.g., United States v. Fairley*, 880 F.3d 198, 215-16 (5th Cir. 2018); *United States v. Johnson*, 841 F.3d 299, 303-05 (5th Cir. 2016).

Fourth, Alfaro's challenge to the district court's use of the actual loss standard is based, in part, on whether it was reasonably foreseeable that the investors would lose their investments and ownership interests as a result of his offense. To the extent that his arguments are based on the implication that he lacked the requisite specific intent, the jury necessarily rejected that argument by finding him guilty because specific intent to defraud is an element of his offense. *See United States v. Strong*, 371 F.3d 225, 227 (5th Cir. 2004). Alfaro's allegations that other factors contributed to Primera's eventual downfall do not obviate his legal liability deriving from his offense. *See United States v. Bazemore*, 839 F.3d 379, 390-91 (5th Cir. 2016); *United States v. Olis*, 429 F.3d 540, 545 (5th Cir. 2005). Based on the evidence at trial, the district court did not commit clear error in finding that the actual losses to the investors were reasonably foreseeable pecuniary harm that resulted from Alfaro's offense.

Fifth, Alfaro argues that a variety of general factors indicate that he did not intend to cause any loss. Specifically, he argues that (1) the prosecution and the investor witnesses erroneously stated that Primera's use of the investors' funds for its own expenses was limited to the Management Fee; (2) he reasonably relied on various financial estimates that the well projects would be profitable; and (3) investors owed as overages the unpaid vendor obligations. But, as discussed *supra*, the jury's verdict necessarily showed that Alfaro had the intent to defraud, and the district court found that

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the investors' loss of their investments, minus certain credits, was reasonably foreseeable. Even if it were true that investors owed the unpaid vendor obligations as overage charges, those amounts did not ultimately confer any value to the investors and are therefore not proper offsets. *See Spalding*, 894 F.3d at 191-92. Therefore, these general factors do not support a conclusion that the district court's loss calculation was clear error.

Sixth, Alfaro contends that the district court erred by failing to accept the Government's concession as to the total actual loss amount. We agree; the district court's failure to accept the Government's concession was error. Specific evidence supported the Government's concession that the total loss amount was \$9,429,599.73 after accounting for proper offsets to the total loss amount, and as such, the district court should have accepted it. *See U.S.S.G. § 2B1.1 cmt. n.3(E)(i); Harris*, 821 F.3d at 605-07; *United States v. Klein*, 543 F.3d 206, 213-15 (5th Cir. 2008). The district court's failure to accept the Government's concession resulted in an erroneous Guidelines range calculation. If the district court had accepted the Government's concession, Alfaro's Guidelines range would have been 97 months to 121 months, not the 121-month to 151-month range adopted by the district court. U.S.S.G. §5A.

The district court's procedural error in calculating the Guidelines range requires a remand unless the Government can establish that the error was harmless. *See Harris*, 821 F.3d at 607. Establishing harmless error is a "heavy burden" that requires proving that the "sentence the district court imposed was not influenced in any way by the erroneous Guidelines calculation." *United States v. Ibarra-Luna*, 628 F.3d 712, 717, 719 (5th Cir. 2010). The Government can establish harmless error if the wrong Guidelines range is employed in two ways. First, the Government can "show that the district court considered both ranges (the one now found incorrect and the one now deemed correct) and explained that it would give the same sentence either way." *United States v. Guzman-Rendon*, 864 F.3d 409, 411 (5th Cir.

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2017). Second, where the district court did not consider the correct Guidelines range, the Government must “convincingly demonstrate[] both (1) that the district court would have imposed the same sentence had it not made the error, and (2) that it would have done so for the same reasons it gave at the prior sentencing.” *United States v. Redmond*, 965 F.3d 416, 420 (5th Cir. 2020) (internal quotation marks omitted) (quoting *Ibarra-Luna*, 628 F.3d at 714), *cert. denied*, 141 S. Ct. 1411 (2021). The Government has not met its heavy burden to establish harmless error in this case.

The record is clear that the district court did not consider both the incorrect Guidelines range and the range now deemed correct. Instead, the district court considered the positions of both the Government and Alfaro on the Sentencing Guidelines but rejected both parties’ calculations in favor of what it deemed to be the correct Guidelines range. The court rejected Alfaro’s proposed Guidelines calculations of 37 months to 46 months and stated that if Alfaro’s proposed Guidelines calculations were correct, the court would nonetheless find that an upward adjustment would be required. The district court also rejected the Government’s Guidelines calculation, which was more than the 240-month statutory maximum, and stated that if the Government’s calculation were correct, it would find that “a downward adjustment/variance would be in order.” The district court concluded that the correct Guidelines range was 121 to 151 months and sentenced Alfaro to 121 months’ incarceration.

Contrary to the Government’s argument, the district court’s rejection of both parties’ proposed Guidelines ranges does not show that it had a particular sentence in mind and would have imposed it notwithstanding the calculation error. Rather, the district court’s reasoning shows that it believed that a now erroneous Guideline sentence of 121 months was appropriate, which supports the inference that the Guidelines calculation influenced the sentence. *See Ibarra-Luna*, 628 F.3d at 719. Moreover, in sentencing him to

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121 months' incarceration, the district court sentenced Alfaro to the bottom of the incorrect Guideline range, which we have previously concluded "indicates that the improper guideline calculation influenced the sentence." *United States v. Martinez-Romero*, 817 F.3d 917, 925-26 (5th Cir. 2016) (per curiam); *see also id.* ("We . . . conclude that the district court's selection of the bottom of the incorrect guideline range indicates that the improper guideline calculation influenced the sentence."); *United States v. Cardenas*, 598 F. App'x 264, 269 (5th Cir. 2015) (unpublished) (holding that an error was not harmless when the district court chose the lowest end of the improper sentencing range after stating that "even if the Court isn't correct, the Court believes it is necessary to sentence at this very high range"). The district court's selection of the bottom of the incorrect Guidelines range is not a mere "coincidence." *Id.* Accordingly, the record does not convincingly demonstrate that the sentence the district court imposed was not influenced in any way by the erroneous Guidelines calculation. A remand for resentencing is therefore appropriate.

As the district court also used the actual loss amount calculation to determine the restitution amount under § 2B1.1(b)(1), the district court's restitution award is vacated and remanded.¹ *See United States v. Beydoun*, 469 F.3d 102, 107-08 (5th Cir. 2006). Thus, we do not consider Alfaro's restitution arguments.

¹ On appeal, the Government concedes that it "may be necessary to remand" the restitution award "to determine the recipients of that value and reduce the amount awarded to those victims" because the loss amount calculated by the district court failed to account for the royalties from the 4H well and the reimbursements from the bankruptcy court.

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B

Alfaro next challenges the district court's application of the § 2B1.1(b)(2)(B) adjustment for causing substantial financial hardship to five or more persons because he asserts that there was insufficient proof showing that the requisite number of investors who submitted victim impact statements were victims and had suffered a substantial financial loss. The district court was entitled to rely on the PSR's findings that there were at least five victims who suffered substantial financial hardship, especially given the PSR's inclusion of the 19 victim impact statements upon which those findings relied. *See United States v. Simpson*, 741 F.3d 539, 557 (5th Cir. 2014); *United States v. Tedder*, 81 F.3d 549, 551 (5th Cir. 1996). Alfaro did not meet his burden of showing that those findings were inaccurate or materially untrue. *See Simpson*, 741 F.3d at 557; *Tedder*, 81 F.3d at 551. Moreover, examination of the victim impact statements shows that well over five of the victims met at least one of the enumerated factors set forth in § 2B1.1's commentary for determining if the offense resulted in substantial financial hardship to a victim. *See U.S.S.G. § 2B1.1 cmt. n.4(F)*. Accordingly, the district court's application of the § 2B1.1(b)(2)(B) adjustment was not error.

C

Finally, Alfaro argues that the district court erred by applying the § 2B1.1(b)(10)(C) adjustment for an offense and conduct involving sophisticated means. He portrays his offense conduct as straightforward and asserts that the stated bases for this adjustment lacked a sufficient evidentiary basis. Our examination of the record shows that the factual findings underlying this adjustment were plausible in light of the record and when Alfaro's scheme is viewed in its entirety. *See United States v. Miller*, 906 F.3d 373, 380 (5th Cir. 2018). We have affirmed application of this adjustment even if the method used to impede discovery of the offense is "not by itself

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particularly sophisticated.” *Id.* Because we are not “left with the definite and firm conviction that a mistake has been committed,” the district court did not commit clear error in this regard. *Id.* (internal quotation marks and citation omitted).

III

In this appeal, we have held that the district court erred in calculating the total loss amount because that court failed to accept the Government’s concession that the total loss amount was \$9,429,599.73. We have rejected Alfaro’s other loss calculation arguments. Additionally, we have vacated and remanded the district court’s restitution award because it was based on the district court’s erroneous assessment of the total loss amount. Finally, we have concluded that the district court’s application of the § 2B1.1(b)(2)(B) adjustment for causing substantial financial hardship to five or more persons was not error, and that the district court did not commit clear error in applying the § 2B1.1(b)(10)(C) adjustment for an offense and conduct involving sophisticated means.

Accordingly, we VACATE the imposed sentence based solely on the district court’s erroneous assessment of total loss amount, and REMAND for resentencing in accordance with this decision. In all other respects, the judgment of the district court is AFFIRMED.

AFFIRMED in part; VACATED; REMANDED.

United States Court of Appeals
for the Fifth Circuit

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United States Court of Appeals
Fifth Circuit

FILED

April 7, 2022

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

BRIAN ALFARO,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:18-CR-879-1

Before JOLLY, SMITH, and ENGELHARDT, *Circuit Judges.*

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED IN PART and VACATED IN PART, and the cause is REMANDED to the District Court for further proceedings in accordance with the opinion of this Court.



Certified as a true copy and issued
as the mandate on Apr 29, 2022

Attest:

Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA

v.

Case Number: 5:18-CR-00879-FB(1)
USM Number: 21287-480

BRIAN ALFARO

Defendant.

RE-SENTENCING
JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
(For Remand from 5th Circuit Court of Appeal Filed April 29, 2022)

The defendant, BRIAN ALFARO, was represented by Michael W. McCrum, Esq.

Upon motion by the United States, the Court dismissed the remaining count as to this defendant.

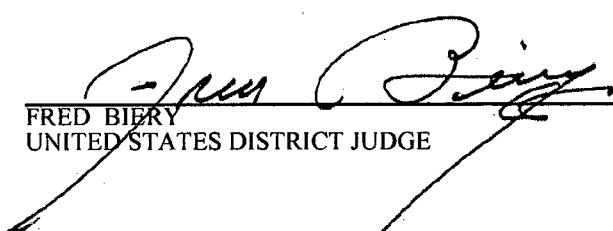
The defendant was found guilty by jury trial to **Count(s) One (1s), Two (2s), Three (3s), Four (4s), Five (5s), Six (6s), and Eight (8s) of the Superseding Indictment** on February 13, 2020. Accordingly, the defendant is adjudged guilty of such Count(s), involving the following offense(s):

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 1341	Mail Fraud	12/04/2013	One (1s)
18 U.S.C. § 1341	Mail Fraud	12/04/2013	Two (2s)
18 U.S.C. § 1341	Mail Fraud	12/13/2013	Three (3s)
18 U.S.C. § 1341	Mail Fraud	12/16/2013	Four (4s)
18 U.S.C. § 1341	Mail Fraud	06/24/2014	Five (5s)
18 U.S.C. § 1341	Mail Fraud	09/05/2014	Six (6s)
18 U.S.C. § 1341	Mail Fraud	12/31/2014	Eight (8s)

As pronounced on June 07, 2022, the defendant is re-sentenced as provided in pages 2 through 9 of this Judgment. The sentence is imposed pursuant to the 5th Circuit Remand dated April 29, 2022, and pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the Court and United States Attorney of material changes in economic circumstances.

SIGNED this 30th day of June, 2022.


FRED BIERY
UNITED STATES DISTRICT JUDGE

DEFENDANT: **BRIAN ALFARO**
CASE NUMBER: **5:18-CR-00879-FB(1)**

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a **total term of ninety-seven (97) months as to count one (1s); ninety-seven (97) months as to count two (2s); ninety-seven (97) months as to count three (3s); ninety-seven (97) months as to count four (4s); ninety-seven (97) months as to count five (5s); ninety-seven (97) months as to count six (6s); and ninety-seven (97) months as to count eight (8s). Terms to run concurrently with credit for time served while in custody for this federal offense pursuant to 18 U.S.C. § 3585(b).**

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

1. The defendant shall serve this sentence at the federal facility in Bastrop, Texas.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **BRIAN ALFARO**
CASE NUMBER: **5:18-CR-00879-FB(1)**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years as to each count one (1s), two (2s), three (3s), four (4s), five (5s), six (6s), and eight (8s). Supervised release terms to run concurrently.

While on probation the defendant shall comply with the mandatory and special conditions that have been adopted by this Court, and shall comply with the following additional conditions:

1. If the judgment imposes a financial penalty, the defendant shall pay the financial penalty in accordance with the Schedule of Payments sheet of this judgment. The defendant shall notify the court of any changes in economic circumstances that might affect the ability to pay this financial penalty.
2. The defendant shall pay any fine, special assessment, costs of prosecution, or restitution that remains unpaid at the commencement of the term of supervised release on a schedule to be approved by the Court.
3. If the defendant is employed in a fiduciary position, the defendant shall inform the employer of his conviction.
4. The defendant shall not be employed in any position that requires him to handle money or authorize funds to be disbursed unless his employer is first notified of his conviction and the circumstances thereof. The U.S. Probation Officer will monitor compliance with this condition.
5. The defendant will comply with all the rules and regulations and sanctions of the Security and Exchange Commission.
6. The defendant shall comply with all IRS reporting and financial obligations and provide proof of meeting all IRS obligations to his U.S. Probation Officer as requested.
7. The defendant shall not, directly or indirectly, offer for sale, sell, or otherwise deal in any securities, as those terms are defined by applicable federal and state securities laws.
8. The defendant shall not associate, directly or indirectly, with any offering of securities or issuer of securities, as those terms are defined by applicable federal and state securities laws.
9. The defendant shall not act as a fiduciary or handle money in connection with any offering of securities, as those terms are defined by applicable federal and state securities laws.

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CONDITIONS OF SUPERVISION

Mandatory Conditions:

- 1) The defendant shall not commit another federal, state, or local crime during the term of supervision.
- 2) The defendant shall not unlawfully possess a controlled substance.
- 3) 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 on probation or supervised release and at least two periodic drug tests thereafter (as determined by the court), but the condition stated in this paragraph may be ameliorated or suspended by the court if the defendant's presentence report or other reliable sentencing information indicates low risk of future substance abuse by the defendant.
- 4) The defendant shall cooperate in the collection of DNA as instructed by the probation officer, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).
- 5) If applicable, the defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et. seq.*) as instructed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which the defendant resides, works, is a student, or was convicted of a qualifying offense.
- 6) If convicted of a domestic violence crime as defined in 18 U.S.C. § 3561(b), the defendant shall participate in an approved program for domestic violence.
- 7) If the judgment imposes restitution, the defendant shall pay the ordered restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664. (*if applicable*)
- 8) The defendant shall pay the assessment imposed in accordance with 18 U.S.C. § 3013.
- 9) If the judgment imposes a fine, it is a condition of supervision that the defendant, pay in accordance with the Schedule of Payments sheet of the judgment.
- 10) The defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines or special assessments.

Standard Conditions:

- 1) The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within seventy-two (72) hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.
- 2) After initially report to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.
- 3) The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.
- 4) The defendant shall answer truthfully the questions asked by the probation officer.
- 5) The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least ten (10) days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within seventy-two (72) hours of becoming aware of a change or expected change.
- 6) The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that are observed in plain view.

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- 7) The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment, he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or job responsibilities), the defendant shall notify the probation officer at least ten (10) days before the change. If notifying the probation officer at least ten (10) days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within seventy-two (72) hours of becoming aware of a change or expected change.
- 8) The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.
- 9) If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within seventy-two (72) hours.
- 10) The defendant shall 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) The defendant shall 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 the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.
- 13) The defendant shall follow the instructions of the probation officer related to the conditions of supervision.
- 14) If the judgment imposes other criminal monetary penalties, it is a condition of supervision that the defendant pays such penalties in accordance with the Schedule of Payments sheet of the judgment.
- 15) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall provide the probation officer access to any requested financial information.
- 16) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall not incur any new credit charges or open additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with the payment schedule.
- 17) If the defendant is excluded, deported, or removed upon release on probation or supervised release, the term of supervision shall be a non-reporting term of probation or supervised release. The defendant shall not illegally re-enter the United States. If the defendant is released from confinement or not deported, or lawfully re-enters the United States during the term of probation or supervised release, the defendant shall immediately report to the nearest U.S. Probation Officer.

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CRIMINAL MONETARY PENALTIES/SCHEDULE

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth. Unless the Court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. Criminal Monetary Penalties, except those payments made through Federal Bureau of Prisons' Inmate Financial Responsibility Program, shall be paid through the Clerk, United States District Court, Attn: Mail Log, 262 West Nueva Street, San Antonio, TX 78207 or online by Debit (credit cards not accepted) or ACH payment (direct from Checking or Savings Account) through Pay.gov (link accessible on the landing page of the U.S. District Court's Website). **Your mail-in or online payment must include your case number in the exact format of DTXW518CR00879-001 to ensure proper application to your criminal monetary penalty.** The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$700.00	\$0.00	\$9,018,525.71

SPECIAL ASSESSMENT

It is ordered that the defendant shall pay to the United States a special assessment of \$700.00. Payment of this sum shall begin immediately.

FINE

The fine is waived because of the defendant's inability to pay.

RESTITUTION

The defendant shall pay restitution in the amount of \$9,018,525.71 through the Clerk, U.S. District Court, for distribution to the payee(s). Payment of this sum shall begin immediately.

The Court directs the United States Probation Office to provide personal identifier information of victims by submitting a "reference list" under seal Pursuant to E-Government Act of 2002" to the District Clerk within ten (10) days after the criminal Judgment has been entered.

The defendant will receive credit for any amount to which he is entitled.

<u>Name of Payee</u>	<u>Amount of Restitution</u>
1. Alan C. Smith	\$17,979.84
2. NuEnergen LLC/ALEXCO ENERGY	\$156,908.16
3. D.J. Allen/Sandy Allen	\$151,495.20
4. Mick Anzaldua	\$17,976.96
5. Ronald H. Apel/Cheri Apel	\$661,276.80
6. Jerald W. Bailey/Dee Bailey	\$18,260.28
7. Marval G. Bailiff	\$35,959.68
8. William T. Bain/Karen M. Bain/Frank L. Bain Jr.	\$156,908.16
9. Bartz Family Living Trust/Robert A. & Betty R. Bartz	\$27,240.12
10. Susan J. Bastian/William J. Bastian	\$18,260.28
11. Wendall C. Bauman Jr./Carsar Holding LP/Happy E. Baumann	\$18,260.28
12. David G. Beadles/Jodee J. Beadles	\$54,780.84
13. Richard N. Berger	\$19,613.52
14. Fred D. Bills	\$56,134.08
15. Black Gold HCJ LLC	\$13,920.12
16. Trophy Club Holdings	\$8,989.92
17. Alpine Appliance Center (Eric Boylan)	\$17,979.84
18. Hugh Wm. Bridgford/Carmen S. Bridgford	\$51,324.12

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19. Garrett J. Burkitt III/Barbara J. Burkitt	\$3,600.00
20. Bruce C. Campbell/Linda M. Campbell	\$18,260.28
21. B.J. Hydraulics Inc.	\$35,959.68
22. Carsar Holdings LP/Wendall C. Bauman Jr.	\$17,979.84
23. L & W Chapman LLC (Walker Chapman)	\$150,373.44
24. Douglas R. Clark/Laurie A. Vargo	\$9,135.75
25. Richard D. Collins/Connie R. Collins/DC Oil Company Inc. DBA Quick Shop	\$252601.61
26. B.E. Conway Energy Inc.	\$73,041.12
27. Liz Cook	\$22,159.80
28. Custom Tool Supply (Helbig)	\$47,867.40
29. Dale C. Anderson/Karene Anderson	\$18,260.28
30. WPD LLC/Pat Daniel	\$73,041.12
31. David Davalos	\$34,907.51
32. John L. Dieterle/Jeune D. Dieterle	\$61,922.16
33. Dr. JS Oil Production Inc.	\$73,049.04
34. Edward Gillette	\$36,679.68
35. Erebor Investments LLC	\$36,520.56
36. Lisa H. Evans/Peter Evans	\$18,280.44
37. Fawcett Descendant Trust (Powell)	\$17,979.84
38. Kent Fear	\$17,979.84
39. Robert Fields/Alice Fields	\$33,063.84
40. Robert L. Fleckenstein / Rea T. Fleckenstein	\$73,041.12
41. Charles P. Forster P.E., P.G./Jennifer J. Dacus	\$73,041.12
42. Arnold C. Fuchs/Shirley K. Fuchs/ W.F. Inc.	\$12,588.48
43. Wayne Gardner/Teresa Gardner	\$55,573.20
44. Al & Patricia Gavegan	\$35,959.68
45. Joshua Geary/Tiffany Geary	\$17,979.84
46. Vincent J. Gillette Jr. /Michele D. Gillette/D & V Investments	\$58,275.51
47. G. Marshall Smith	\$222,292.80
48. Michael Gray	\$18,260.28
49. Arthur Darrell Gregory/Pamela Grove Gregory	\$110,978.28
50. Promar International LC/Sherrie Griffey/Rick Griffey	\$100,399.45
51. Coy A. Griffin	\$35,959.68
52. Robert Leslie Grove Jr.	\$80,643.60
53. Robert E. Gurwitz	\$17,979.84
54. Joseph W. Hart/Nellie M. Hart	\$36,520.56
55. Debbie A. Heintzelman/Mike Heintzelman	\$18,260.28
56. Adele Herdman/Russell Herdman	\$18,469.80
57. Hugh D. Herndon/Joyce G. Herndon/DJ Resources	\$18,260.28
58. Larry A. Hobbs	\$75,747.60
59. G. E. Holladay/S.B. Holladay	\$73,041.12
60. Brian F. Huber/Marilyn M. Huber	\$18,260.28
61. H & H Construction/William Humphreys	\$73,041.12
62. John R. Hunter/Kathryn E. Hunter	\$36,520.56
63. Frank J. Ingersoll/Rebecca A. Ingersoll	\$17,979.84
64. Susan C. Ivins	\$18,260.28
65. Fred W. Jaeckle/Martha Ann Jaeckle	\$18,260.28
66. Peter K. Jenkins	\$36,520.56
67. Craig L. Jennings/Diana R. Jennings	\$35,959.68
68. JG Sales	\$17,979.84
69. F. Schipman Johnston	\$18,260.28
70. The Wendell & Carolyn Jones Trust, Wendell & Carolyn Jones Trustees	\$28,067.04
71. Kaeg Relty LLC	\$63,452.88
72. Roy E. Karnes/Leigh M. Karnes/Karnes Family LP, Charles R. Karnes, Roy Karnes Jr.	\$84,387.96
73. M & L Apartments	\$36,520.56
74. Thomas W. Killion/Carla Matlock Killion	\$36,532.20

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75. Kevin L. Kirst/Jill S. Kirst	\$17,979.84
76. Richard A. Kirsten/Elizabeth Marye Fowler	\$18,260.28
77. Milan Knezovich/Teresa Knezovich	\$18,260.28
78. Sandra Knigge	\$71,919.36
79. K Bar Cattle/Paul E. Kropf	\$19,239.84
80. Chris Kuhn/Candace Kuhn	\$3,600.00
81. Harry L. Leatherwood/Rio Neches Properties LLC	\$146,082.24
82. Tennis & Sun LC/Donal Lewon	\$18,260.28
83. Rong Liang	\$35,959.68
84. Robert H. Loving Jr. D.M.D	\$18,260.28
85. M & V Investments/Marjorie Gillette	\$48,761.28
86. Edgar Madsen/Joelle L. Madsen/TXSE4H LLC	\$30,128.76
87. DIDD Inc./Dean Mantel/Ingrid Mantel	\$156,908.16
88. Nathan W. Masar/Janet E. Masar	\$73,025.28
89. Sean Matus/Lisa Matus/Tim A. Matus	\$117,257.76
90. Lisa Dieterle McBurnett/David S. McBurnett/John L. Dieterle Tr No 1 FBO Lisa Dieterle McBurnett, Lisa Dieterle McBurnett trustee	\$266,762.88
91. Loys Marie McElhone	\$105,769.44
92. David L. McLuckie/Norbert McLuckie	\$36,520.56
93. P & W Sales Inc.	\$71,919.36
94. J.M. McNellis/S.K. McNellis	\$18,260.28
95. Ed McPherson/Jo McPherson	\$73,041.12
96. Rick & Deborah Meritt / Rick Meritt Investments Ltd. DBA Outback Wildlife Feeders	\$80,764.92
97. Frederick L. Mills / Valerie A. Mills	\$17,979.84
98. Sitakanta Mohanty / Sibani Mohanty	\$38,454.84
99. David Moquist/Joann Moquist	\$125,511.12
100. Craig A. Morrow	\$35,959.68
101. Ocean Spring Energy Holdings Inc.	\$52,879.68
102. Robert P. Perkaus Jr. / Barbara R. Perkaus	\$33,063.84
103. James M. Peters	\$73,041.12
104. Enviro Solutions	\$71,919.36
105. Petron Corporation	\$71,919.36
106. Dean A. Pigman/ Janiece K. Pigman	\$9,806.76
107. Ali Aslam Porbankarwala/Mahreen Al Porbandarwala	\$18,260.28
108. William Knox Poyner/Susan Jo Poyner	\$36,520.56
109. Robert L. Poynter	\$18,260.28
110. Promar International LC	\$26,484.92
111. Roman V. Puentes/Anani Puentes	\$53,939.52
112. Quacken Petroleum LLC	\$224,536.32
113. Nancy W. Rathbun Revocable Trust, Nancy W. Rathbun TTEE/ Lee F. Rathbun/Nancy Rathbun	\$35,959.68
114. RDMB Holdings Inc.	\$35,959.68
115. Richard Reade	\$37,873.80
116. Anthony V. Reck	\$17,979.84
117. Jerald J. Redetzke/Sharon A. Redetzke	\$18,260.28
118. Rolling 7s Investments LLC	\$36,520.56
119. RIX-RAX LP	\$13,242.96
120. Philip Leland Rustin	\$18,260.28
121. Walter L. Rye	\$18,260.28
122. Buford Salmon/Jean Salmon	\$802,395.92
123. William E. Sasse/Barbara B. Sasse	\$18,260.28
124. M.R. Senneff	\$73,041.12
125. Wayne W. Sharp/Michele M. Sharp	\$155,989.44
126. Greg Shilts/J.B. Shilts	\$29,474.28
127. Scott E. Silver	\$71,919.36
128. Dr. Scott K. Sitterle/G.F. Sitterle	\$37,593.36

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129.Southwest Livestock and Trucking Co.	\$17,979.84
130.SRI Diversified Capital LLC/Frank Ingersoll	\$17,979.84
131.Bruce A. Stanfill/Marga C. Stanfill	\$17,979.84
132.John Stanley /Sandra S. Stanley	\$18,260.28
133.Stan Steffen/Shelly Steffen	\$18,260.28
134.Matthew P. Streeter/Mimi A. Moras	\$144,960.48
135.Keith C. Strimple	\$17,979.84
136.Thomas J. Gillette / Connie Gillette	\$7,833.21
137.James D. Tauch	\$54,500.40
138.William H. Taylor Sr. / Katherine F. Taylor	\$18,260.28
139.The Entrust Group (Wendell Fink)	\$35,959.68
140.Thesken Family Ltd Ptnrshp 5 (Robert L. Thesken) Robert L. Thesken	\$31,252.32
141.Carl E. Thompson Jr. / Karen Thompson	\$18,260.28
142.TKRS Properties LLC	\$22,726.11
143.R. Thomas Toy/Christine M. Toy	\$71,919.36
144.Veronica Victoria /Felipe Victoria	\$18,134.19
145.Joseph Vogels/ V. Vogels	\$25,079.76
146.Jon A. Vogler/Sherri Vogler/Don E. Vogler	\$34,280.82
147.Sharon Ann Walls/Buddy J. Walls	\$32,098.57
148.George B. Wall Jr. / Martha Bain Wall	\$78,454.08
149.Michael W. Watry / Charlene A. Watry	\$17,979.84
150.Gregg Weston	\$73,041.12
151.Dixie Clamp & Scaffold Inc. (Stee Wietsma)	\$101,413.44
152.Allan Earle Williams	\$5,760.00
153.Martin D. Womack	\$18,260.28
154.Jun X. Li / Yong X. Li	\$71,919.36
155.Cedar Oak Farm/James A. York/Arlene L. York	<u>\$17,979.84</u>
 TOTAL	 \$9,018,525.71

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

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. §3614.

The defendant shall pay interest on any fine or restitution of more than \$2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All payment options may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

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

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