Docket No. 10-1050
(consolidated with Dkt. No. 10-1487)

==========

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

v.

PAUL NEGRONI,
Appellee.

On Appeal by the United States from Judgment filed Dec. 1, 2009,
and entered Dec. 2, 2009, in Crim. No. 2:08-CR-550
in the United States District Court
for the Eastern District of Pennsylvania (Timothy J. Savage, J.)

==========

BRIEF OF APPELLEE NEGRONI

==========

Of Counsel:
STEPHEN ROBERT LaCHEEN
LaCheen Wittels & Greenberg, LLP
1429 Walnut St., 13th Fl.
Philadelphia, PA 19102

PETER GOLDBERGER
PAMELA A. WILK
50 Rittenhouse Place
Ardmore, PA 19003-2276

(610) 649-8200

Attorneys for Appellee Negroni

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Rules:

Miscellaneous:

STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction under 18 U.S.C. § 3231. 2USApp. 36-70.[1] This Court has jurisdiction under 18 U.S.C. § 3742(b) and 28 U.S.C. § 1291. See United States v. Tomko, 562 F.3d 558, 564 n.5 (3d Cir. 2009) (en banc). Mr. Negroni was sentenced on November 23, 2009 (2USApp. 593-656); judgment was entered on December 2, 2009. IUSApp. 5-10; SuppApp. 28 (Dkt. # 175). The government filed a timely notice of appeal on December 24, 2009. IUSApp. 1; SuppApp. 29 (Dkt. # 186); see Fed.R.App.P. 4(b)(1)(B).

COUNTER-STATEMENT OF THE ISSUE WITH STATEMENT OF PLACE RAISED

Under the applicable standard of "highly deferential" review, is defendant-appellee Negroni's sentence – requiring that he serve five years' probation beginning with a nine-month period of home confinement and that he pay substantial restitution and a criminal forfeiture – substantively reasonable, because it reflects an individualized and lawful exercise of the district court's broad discretion?

Where in the Record Raised and Ruled Upon: Appellee Negroni does not dispute that the government adequately raised

[1] "2USApp." and "3USApp." refer to the separately-bound, corrected appendix filed by the appellant United States, and marked "Volume II" and Volume III. "IApp." refers to the government's Volume I Appendix. The appellees have filed a joint, one-volume supplemental appendix.

at sentencing below the issue of the substantive reasonableness of Mr. Negroni's sentence.

STATEMENT OF RELATED CASES AND PROCEEDINGS

All related defendants pleaded guilty. Their sentences varied according to the facts and circumstances of their respective cases. Co-defendant Christian Penta received 60 months' imprisonment, followed by three years' supervised release; he was ordered to pay restitution of $19,571,000 (plus forfeiture in the same amount). Co-defendant and co-appellee James Hall IV was sentenced to 15 months' imprisonment, 3 years' supervised release, and restitution of $572,279.99. Hall also was ordered to pay a forfeiture judgment of $2,500,000. Co-defendant Stephen Porto was sentenced to 3 years' probation, and restitution of $940,523.02 (plus a forfeiture in the same amount). Co-defendant Deborah Rice was sentenced to serve two years' probation, and to pay a fine of $150,000, and no forfeiture. Supp.App. 27 (Dkt. # 171). Kevin Waltzer, the ringleader, was charged in a separate indictment (EDPA Crim. # 2:08-cr-552). After cooperating extensively, he received a sentence of 132 months' imprisonment, with 3 years' supervised release. Waltzer was ordered to pay restitution of $40,675,241.55 (and an equal amount in forfeiture judgment). The government has appealed the judgments of sentence of both Mr. Negroni and co-defendant James Hall, IV, but not of any others.

STATEMENT OF THE CASE

Appellee Paul Negroni was convicted upon his plea of guilty to seven counts of a superseding indictment charging two counts of mail fraud, three of wire fraud, and two counts of money laundering. He received a sentence of five years' probation with the first nine months in home detention, and financial penalties exceeding $1.35 million.

a. The Course of Proceedings

A grand jury sitting in the Eastern District of Pennsylvania returned an indictment on September 11, 2008, charging five codefendants including Mr. Negroni (as defendant # 4) with several counts of mail and wire fraud, and money laundering, in addition to other counts in which Mr. Negroni was not charged. Supp.App. 9-10 (Dkt. # 1). A superseding indictment was issued on April 23, 2009, charging three of the defendants, James Hall, IV, Stephen Porto, and Mr. Negroni. Mr. Negroni was charged with two counts of mail fraud, in violation of 18 U.S.C. §§1341, 1346 and 1349, three of wire fraud in violation of id. §§ 1343, 1346 and 1349, two of money laundering prohibited by id. § 1957, and in each instance with aiding and abetting, contrary to id. § 2. 2USApp. 36-70. He was also named in two forfeiture counts. USApp. 67-70. Pursuant to a plea agreement, 2USApp. 80-89, Mr. Negroni pleaded guilty on

June 30, 2009, to all counts in the superseding indictment in which he was charged. 2USApp. 110-45.[2]

Mr. Negroni was sentenced on November 23, 2009. 2USApp. 593-656. In connection with sentencing, the defense submitted to the district court the psychological assessments of two mental health professionals: Dr. L. Thomas Kucharski, Ph.D., Chair of the Department of Psychology of the John Jay College of Criminal Justice, 2USApp. 289-313, and Mr. Negroni's treating therapist over four months of weekly sessions, Lara Fastman, a Licensed Clinical Social Worker (LCSW), 2App. 286-88. The defense also submitted many additional supportive materials: a summary of Paul Negroni's background written by his brother, Dan Negroni, 2USApp. 277-82, a report of an interview with Paul Negroni's wife, Paige Heller Negroni, 2USApp. 283-84, a written statement by Paul Negroni accepting responsibility, 2USApp. 285, 22 letters from family members, friends and coworkers of Mr. Negroni, 2USApp. 321-58 (along with a summary by defense counsel of the letters' content), 2USApp. 314-20, and a plea for leniency by Mr. Negroni's wife. 2USApp. 359. All of these materials were exhibits to a lengthy defense sentencing memorandum which, inter alia, explained the circumstances of Mr.

[2] Hall pleaded guilty to one count of mail fraud, two of wire fraud, one of tax evasion and aiding and abetting. Porto pleaded guilty to two counts of wire fraud. Supp.App. 20, 23 (Dkt. ## 94, 130).

Negroni's difficult childhood involving abuse and neglect, and resulting psychological disorders. 2USApp. 253-360 (including exhibits). The defense also filed a Response to Government's Sentencing Memorandum. 2USApp. 361-67.

In addition, the defense submitted written objections to the draft PSI, 2USApp. 265-73, and further written objections to the revised PSI, Supp.App. 71-82, which counsel reiterated at the time of sentencing, 2USApp. 603-18, in addition to certain corrections. 2USApp. 596-603. Omitting one withdrawn at sentencing, the defense raised two objections: to a six-level enhancement under USSG § 2B1.1(b)(2)(C) for an offense involving over 250 victims, and to the report's failure to provide a downward adjustment under § 3B1.2 for minor role in the offense. At sentencing, the court rejected both of these objections, 2USApp. 618, determining a total offense level for Mr. Negroni of 27, with a criminal history category of I. This resulted in an advisory guidelines imprisonment range of 70-87 months' imprisonment. 2USApp. 618-19. The parties agreed that, with the defense objections rejected, this was a correct calculation. 2USApp. 618-19.[3]

[3] The government/appellant's brief, at 36-43, explains the government's arguments at sentencing, including its reading in court of certain transcripts of recorded conversations between Mr. Negroni and Mr. Waltzer.

For the reasons fully quoted in subsection (b)(ii) below, the district court on November 23, 2009, sentenced Mr. Negroni to five years' probation beginning with nine months in home confinement, restitution of $677,805.05, a forfeiture money judgment in the same amount, special assessments of $700, and no fine. 2USApp. 644-45.

On December 1, 2009, the district court filed a judgment reflecting the sentence imposed. 1USApp. 5-10 (signed 11/30/09, entered 12/2/09). This judgment was entered on the docket the next day. Supp.App. 28. The government filed its notice of appeal on December 24, 2009. 1USApp. 1. Mr. Negroni did not cross-appeal.

b. Statement of Facts[4]

Paul Negroni, the appellee here, is a (now) 43-year old, non-violent first offender, who is married and the father of twins who were 8 years old at the time of sentencing.

(i) Facts underlying the offense:

Kevin Waltzer was the mastermind of a fraudulent scheme to obtain $40 million from three securities class action settlement funds. Mr. Negroni participated in certain discrete aspects of Mr. Waltzer's scheme. In the main, the various codefendants' participation was not intertwined; each principally interacted

[4] Appellee Negroni adopts and incorporates under Fed.R.App.P. 28(i) the Counter-Statement of the Facts in co-appellee Hall's brief, to the extent applicable.

with Waltzer only. There are two main aspects to Mr. Negroni's involvement. First, on approximately April 10, 2002, at Waltzer's direction, he submitted a fraudulent claim with fake supporting documents in the NASDAQ settlement, in his own name. The claim falsely represented that Mr. Negroni had traded over 17 million NASDAQ shares. This resulted in his being sent a check for $449,009.23 from the settlement fund. App. 131-32.

Second, in the BankAmerica settlement, at Waltzer's direction, Mr. Negroni incorporated "Denver Corporation" in New York in September 2004. Soon after (also in September 2004), Mr. Negroni opened an account at the Bank of New York, and on September 9, 2004, he deposited a check for $228,795.82. The money was the proceeds of a fraudulent claim which Waltzer had made over two years earlier, without Mr. Negroni's involvement, in the identically named Denver Corporation (a Colorado company with which Mr. Negroni was not involved), and which had been paid in July 2004. See USApp 601-02; see also Gov't Br. at 13-15; USApp. 130-34. Mr. Negroni laundered funds involving Denver Corporation-New York by wiring some of the proceeds from the Bank of New York account in New York, to Waltzer's in Pennsylvania, on September 23, 2004. Between July 2007 and November 2008, Negroni and Waltzer (who was at that time cooperating with the government), had discussions about submitting additional fraudulent claims. 2USApp. 130-34.

(ii) Facts Concerning Motion for Downward Departure or Variance.

In the district court, the defense moved for a downward departure under USSG § 5K2.13 (p.s.) or a variance from the sentencing guidelines based upon Mr. Negroni's diminished capacity. The defense further asserted as a basis for downward departure or variance Mr. Negroni's lack of guidance as a youth. 2USApp. 260-61.

In support, the defense presented the reports of Dr. Kucharski and treating LCSW therapist Lara Fastman, 2USApp. 286-88 (Fastman report); 2USApp. 289-313 (Kucharski report), as well as the many other materials noted above. The defense informed the district court that Dr. Kucharski not only conducted a two-hour interview with Mr. Negroni, but also had two lengthy conversations with defense counsel, subjected Mr. Negroni to a battery of psychological tests, and reviewed detailed letters from Mr. Negroni's brother and wife, as well as numerous other letters from friends and family that were also submitted to the court as sentencing exhibit 6. 2USApp. 364; see also 2USApp. 289-90 (Kucharski Rpt.). The letter-report of Mr. Negroni's treating therapist, Ms. Fastman, explains that Mr. Negroni participated in 21 treatment sessions with her over a four-month period. 2USApp. 286-88.

Dr. Kucharski concluded that Mr. Negroni “as a result of substantial abuse and neglect suffers from and has suffered from since childhood serious psychological deficits and liabilities.” 2USApp. 289 (Kucharski Rpt.). These problems, the doctor explained, “led Mr. Negroni to form an intense dependent

attachment to Mr. Waltzer," which "created in Mr. Negroni an unquestioning, naive trust in Mr. Waltzer, a strong need to please, low self esteem and a denigrating self appraisal. This attachment in turn strongly influenced [his] involvement with Mr. Waltzer in the instant offenses." Id. Dr. Kucharski's diagnosis was "dysthymic disorder, adjustment disorder with depressed affect and anxiety," and "personality disorder not otherwise specified with dependent features, depression and anxiety." 2USApp. 292.

LCSW Fastman reported that, based upon her numerous sessions with Mr. Negroni, her "diagnostic impressions" were that Mr. Negroni suffered from "Dependent Personality Disorder." This resulted in Mr. Negroni having an "unhealthy attachment" to Mr. Waltzer, his friend since childhood and now business associate, which "prevented him from realizing Kevin [Waltzer's] lies and deceits. Paul [Negroni's] pathological attachment to Kevin also prevented him from questioning Kevin's business plans." 2USApp. 286-87. Ms. Fastman's opinion was that Mr. Negroni's relationship with Mr. Waltzer "was built on an insecure attachment most likely the result of trauma. Mr. Negroni has been a victim of early multiple childhood traumas beginning with his parents divorce when he was age 8, an absent father through adolescence and most importantly his mother's remarriage to an abusive and violent alcoholic whom she later divorced." 2USApp. 286.

Appellee Paul Negroni's brother Dan explained in detail Paul's difficult childhood. From the age of 8, after his

parents divorced and his mother remarried, he was subject, inter alia, to an abusive stepfather who repeatedly beat the mother and children and sexually abused his sisters, and to an absent father after Paul and his siblings were taken out of the mother and stepfather's home. USApp. 277-82. Mr. Negroni's wife also described the long term abuse Mr. Negroni suffered as a child, and both she and Dan Negroni explained Paul's relationship with Kevin Waltzer since a young age, in which Paul Negroni became dependent on Waltzer and looked up to him for guidance as an older, trusted brother, and to Waltzer's family as the stable and happy family he never had. USApp 283-84. Included also was a written plea for leniency from Paige Negroni, in which she described her desperate fear of losing the family home and her job, and of what would happen to the children if Mr. Negroni were imprisoned. She also assured the court that she would help Mr. Negroni to get back on his feet and make him understand the mistakes he had made, and noted that "he is already not the same person he was when all of this started." US App. 359.

In his own impassioned letter to the court, Mr. Negroni explained that he took full responsibility for his offenses, apologized to his family and "everyone else who is involved" for the "hurt, pain and suffering that [he has] caused," explained that he was "extremely remorseful" and that he had "changed [his] way of life so [he] will never make a mistake like this again." He asked the court for "a chance" and stated that he "will not disappoint you." USApp. 285.

The 22 letters from family, friends and co-workers, in summary, described Negroni as a caring and giving person, and as a loving and involved father and husband. USApp. 321-58.

The government/appellant's brief reiterates at length the same characterizations and criticisms of the conclusions of the defense mental health professionals that it made in the district court. Gov't Br. 35-40; 2App. 232-34 (Gov't Sent. Mem. at 44-46). Contrary to the government's dismissive assessment that both therapists were simply taken in by Mr. Negroni, who was lying to them, the defense showed how the psychological testing conducted by Dr. Kucharski, and the long-term nature of the therapy with Ms. Fastman, corroborated Mr. Negroni's explanations. 2USApp. 364-65.[5]

The government's attitude toward these professionals continues in this Court to be highly dismissive and argumentative, for example referring to Dr. Kucharski's conclusion as a "claim," Gov't Br. at 35, to the doctor's recognition of Mr. Negroni's difficult background as a "supposedly abusive childhood" and of Waltzer as having "somehow tricked [Negroni]" into criminal activity. Gov't Br. 36. See also id. at 38 ([Dr. Kucharski] "simply concluded, based on Negroni's own absurd tale ...."); id. at n. 11 (stating that in district court government

[5] Responding to the government's emphasis of the recorded conversations between Mr. Negroni and Mr. Waltzer in 2007 when Waltzer was cooperating with the government, the defense argued that what Mr. Negroni knew in 2007 does not prove what he knew in 2004; all but two of the offenses were committed before 2005 (and one in mid-2005 and another in January 2008). 2USApp. 365.

argued that Fastman too "started with the fundamental misconception that Negroni was an innocent dupe who simply should have been more careful."). The government fails to recognize that the district court clearly credited these witnesses, accepted their expertise, and embraced their conclusions. The appellant has not argued that the district court's factual findings that Mr. Negroni suffers from the conditions determined by these mental health professionals are clearly erroneous; it would have no basis to do so. Thus, its shallow rhetorical attempt to discredit and minimize the import of these experts' conclusions to the court in sentencing should be disregarded. Nor does the appellant's brief acknowledge that the other components of the defense sentencing package may have had a significant impact on the court as well, in part for their corroboration of the experts' description of Mr. Negroni's difficult childhood, and also for making the court aware of the high esteem in which Mr. Negroni is held by so many friends and others who wrote letters on his behalf.

In imposing sentence, the district court delivered a detailed statement of reasons, replete with findings of fact (which the government, as appellant, fails to honor, although it does not even attempt to show them to be clearly erroneous). For purposes of completeness and ease of reference, it is presented here in its entirety:

> The Court: In determining what sentence to imposed in this case, I consider all of the factors as set forth in 18 [U.S.C. §] 3553(a).

Among those are the nature and circumstances of the offense. And in this particular case we have a massive criminal fraud scheme that resulted in a loss of over $40 million that was orchestrated by Kevin Waltzer.

Mr. Negroni's role, albeit not minor, was limited to only a portion of the scheme and loss. He was involved in not only the fraud itself but also in money laundering. He was lured into this scam by his long-time friend, Waltzer, whom he knew from childhood and trusted as a brother. There was also two separate claims in this particular case, Mr. Negroni's alone and then the Denver Corporation later. He received money from both.

I look at the history and characteristics of the defendant. And what I see is a 42-year old man who is married and the father of twins. That he is actively and intimately involved in the nurturing of his children.

He had a disruptive and unstable childhood punctuated by violence. He has a dependent personality disorder, which makes him a follower rather than a leader. He is a college graduate who has no prior contact with the criminal justice system. He is physically well. He has depression, anxiety, which is really a result of his predicament caused by his involvement here. He certainly does not have a substantially reduced mental capacity as a result of his psychological disorder; nevertheless, it is there. He has been involved in various businesses and jobs over the years, with no real substantial income reported. He seems to be a dreamer, a fantasizer of what he can be when he grows up. He has worked as a stock trader on Wall Street businesses. Until I heard him today I was not so sure that he had accepted his responsibility. But I'm convinced that he has and is truly remorseful, not only because he has gotten himself in this jam, because he recognizes that it was wrong.

I consider the need to impose a sentence that reflects the seriousness of the offenses as I have described it. To afford deterrence, promote respect for the law, and to protect the public from the defendant's further crimes.

Mr. Negroni will never have any further contact with the criminal justice system. The damage to his reputation and what he has to do now to explain to his children what he has done, and what it means to his reputation are substantial in this case.

I consider the need to provide him with needed educational, vocational training and correctional treatment in the most effective manner, the kind of sentences that are recommended, the sentencing ranges recommended, the pertinent policy statements issued by the sentencing commission, the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct and the need to provide the victims with restitution.

Therefore, the defendant shall make restitution in the amount of $677,805.05, less credit for those amounts that he has deposited, payable to Heffler, Radetich & Saitta, LLP. The obligation is joint and several with Kevin Waltzer. Considering the financial resources of the defendant, the projected earnings of the defendant and the financial obligations of the defendant, restitution payments shall be made at the rate of $50 a month subject to adjustment.

I find that based upon the amount of restitution that must be paid and the financial obligations of the defendant, he is unable and unlikely to be able to pay a fine. Accordingly, a fine is waived. The Defendant shall pay a special assessment of $700, which shall be due immediately.

The defendant is sentenced to a period of probation of five years with the first nine months to be served in home detention under electronic monitoring.

Defendant Negroni: Thank you.

The Court: With permission to leave the home for employment, medical or psychological visits and any school affairs or events with his children. He must notify the probation office of any change.

Do you understand the sentence, Mr. Negroni?

Mr. Negroni: Yes. Yes. Thank you.

The Court: Anything from the government?

AUSA: Yes, your Honor. For the record, again, the government would object to the sentence as unreasonable from the guideline range of 70 months to home confinement.

> The Court: I thought you told me it would be somewhere under Mr. Hall.
>
> AUSA: I said that he was less culpable than Mr. Hall, that is true, your Honor, but I also objected to Mr. Hall's sentence as unreasonable.
>
> The Court: Okay.

2USApp. 642-45 (Tr. Sent. (11/23/09), at 50-53).

The district court's findings of fact, most pertinent to the government's appeal, were thus:

> (1) Mr. Negroni's role in the fraud scheme and loss was limited;
>
> (2) Mr. Negroni was lured into participating in the fraud scheme by Mr. Waltzer;
>
> (3) Mr. Negroni received money from both his individual claim and the Denver Corporation's claim;
>
> (4) Mr. Negroni is a 42-year old married father of twins in whose nurturing he is actively and intimately involved;
>
> (5) Mr. Negroni is a college graduate who had no prior contact with the criminal justice system;
>
> (6) Mr. Negroni had a disruptive and unstable childhood involving violence;
>
> (7) Mr. Negroni has a dependent personality disorder (as concluded by both defense mental health professionals), which has not resulted in a substantially reduced mental capacity but which makes him a follower rather than a leader;
>
> (8) Mr. Negroni has accepted responsibility and is truly remorseful because he recognizes that his actions were wrong;
>
> (9) Mr. Negroni will never have contact with the criminal justice system again;
>
> (10) The damage to Mr. Negroni's reputation and what he has to explain to his children are substantial; and
>
> (11) Due to the restitution ordered (which Mr. Negroni has already begun to pay) and Mr. Negroni's financial obligations, he is unable and unlikely to be able to pay a fine.

2USApp. 644 (Sent. Tr. at 52).[6]

In addition to making these findings of fact, the court, as quoted above, noted its consideration of the required § 3553(a) factors, including "the nature and circumstances of the offense," "the history and characteristics of the defendant," "the need to impose a sentence that reflects the seriousness of the offenses as I have described it .... [t]o afford deterrence, promote respect for the law, and to protect the public from the defendant's further crimes," "the need to provide him with needed educational, vocational training and correctional treatment in the most effective manner, the kind of sentences that are recommended, the sentencing ranges recommended, the pertinent policy statements issued by the [S]entencing [C]ommission, [and] the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct and the need to provide the victims with restitution."

[6] By eschewing any claim of procedural unreasonableness, and claiming no "clearly erroneous" factfinding, the government must accept that every one of these facts is true, as should this Court.

SUMMARY OF ARGUMENT

The sentence imposed on appellee Paul Negroni of five years' probation, with a special condition that the first nine months be spent in home confinement, and to pay over $1.35 million in financial penalties, was not substantively unreasonable. The government's argument to the contrary confuses substantive with procedural error, and fails to apply the highly deferential standard of review that applies. Its argument is premised on a failure to accept the district court's findings of fact, which it does not try to show to be clearly erroneous. Instead, the government attempts to reargue its sentencing position, as if *de novo*. Such arguments cannot prevail on appeal.

The district court's imposition of probation is not unreasonable simply because the Guidelines call for imprisonment. Congress viewed probation as a distinct type of criminal punishment with independent value in the overall sentencing scheme, not a gift of "leniency" to be bestowed only in extraordinary cases. Through the Sentencing Reform Act ("SRA"), Congress directed the Sentencing Commission to implement that view by designing guidelines that would insure that probationary sentences would be the "general[ly] appropriate" sentence in certain defined categories of cases, 28 U.S.C. § 994(j), and to design a guideline to assist district judges in deciding when to select probation in cases for which that "kind of sentence" is "available." Since the Commission intentionally failed to establish any such guidelines, a

district judge may properly give little or no deference to the Commission's recommendation for imprisonment in cases that seem, on their facts and circumstances, to call for probation. Although Judge Savage did not expressly reject the applicable guideline on this basis, his judgment can be affirmed on any proper legal ground, of which this is one.

Absent any claim of procedural error, and absent any contention that any of the district court's many findings of fact are clearly erroneous, the government's claim that Mr. Negroni's sentence is substantively unreasonable utterly fails under the applicable standard of review. The facts and circumstances of the case, including Mr. Negroni's relative role in the offense, a comparison with all the co-defendants, and his unique mental health issues in relation to the most culpable participant – who became a government "cooperating witness" against his underlings – all fully support the reasonableness of Judge Savage's selection of a sentence.

Finally, the government's suggests that Mr. Negroni's sentence be vacated and remanded even in the absence of error, so that it might be reconsidered in the event that Mr. Hall's sentence is overturned. Hall's sentence should be affirmed. But even if that sentence is remanded, Negroni's should stand, absent error. Even if this Court had the power to remand without finding error, the relationship between Hall's sentence and Negroni's was only one, relatively minor factor in Judge Savage's decision, and the sentences of most of the co-

defendants, which were also made proportional to everyone else's, have not been appealed and so cannot be altered.

ARGUMENT FOR APPELLEE PAUL NEGRONI

I. THE SENTENCE IMPOSED ON APPELLEE NEGRONI MUST BE AFFIRMED, BECAUSE THE GOVERNMENT HAS NOT SHOWN IT TO BE SUBSTANTIVELY UNREASONABLE.

Standard or Scope of Review: This Court's "review for substantive reasonableness is 'highly deferential.'" United States v. Doe, 2010 WL 3211128, *7 (3d Cir. Aug. 16, 2010), quoting United States v. Bungar, 478 F.3d 540, 543 (3d Cir. 2007). "[I]f the district court's sentence is procedurally sound, we will affirm it unless no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the district court provided." United States v. Tomko, 562 F.3d 558, 568 (3d Cir. 2009) (en banc).[7] "Where, as here, the district court decides to vary from the Guidelines' recommendations, we 'must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance.'" 562 F.3d at 560 (quoting Gall v. United States, 552 U.S at 38, 51 (2007)).

Discussion:

Paul Negroni was sentenced to five years' probation beginning with nine months' home confinement, in addition to

[7] The dissenters in Tomko stated that "we disagree" with this standard as well as the "deferential abuse-of-discretion standard." 562 F.3d at 578. It is important to keep in mind, when considering the dissent, that its analysis of substantive reasonableness thus rested upon the premise of rejecting the most basic principles of appellate substantive reasonableness review of sentences adopted by this Court in that en banc majority opinion.

hefty restitution and forfeiture. His sentencing guidelines range, after the overruling of defense objections, suggested 70-87 months' imprisonment. The government's brief as appellant challenges only the substantive reasonableness of Mr. Negroni's sentence (and only the procedural reasonableness of Mr. Hall's) for one overarching reason: its view that, as a general matter, a sentence to probation with home confinement is "close to a free pass," Gov't Br. 58, and that only a sentence of imprisonment is appropriate for a significant white-collar offender.[8] That argument cannot be reconciled with the Sentencing Reform Act and does not justify reversal under this Court's standard of review.

[8] Mr. Negroni received not only probation and home confinement, of course, but also very substantial restitution and forfeiture penalties. The government baselessly asserts that Mr. Negroni has "not repaid a dime to the thousands of victims of his fraud," Gov't Br. 64, and that "in the view of the district court, a defendant can participate in a massive fraud scheme, walk away with close to $500,000 in proceeds, repay none of it, and suffer a penalty of probation while spending nine months confined to his home." Id. 65. In fact, Mr. Negroni was not only ordered to pay almost $678,000 in restitution, but, as the court noted in its sentencing findings, USApp. 644, Mr. Negroni had already begun paying before sentencing. See USApp. 639 (Mr. Negroni confirms that he has paid); USApp. 641 (defense counsel: Negroni has been contributing to escrow account for victims, counsel has check for $19,450, and asks to whom to make it payable). Undersigned counsel are advised that as of the date of filing of this brief, Mr. Negroni has paid over $22,000 toward restitution, on a schedule substantially more onerous than that which the court originally ordered. The government's hyperbolic assertion that there were "thousands" of victims of "his fraud" is addressed at point I.C. below.

The government could not find a single significant procedural error by the district court to challenge on appeal. Nevertheless, it argues that no reasonable judge would have imposed the same sentence on Mr. Negroni for the reasons the court relied upon, because: (1) such a large variance from the guidelines requires more than "ordinary" mitigating factors to justify it; (2) the district court did not give "meaningful consideration" to the factors calling for a significant prison sentence; and (3) in the government's view, Mr. Negroni's participation in the offense was "extensive." (This last point is advanced even though the district court found as a fact that Mr. Negroni's participation in the overall offense was "limited." USApp 642. The government has not contended that this finding is clearly erroneous, and this Court's precedent holds that role in the offense is a factual issue, reviewed for clear error only. See United States v. Gonzales, 927 F.2d 139, 145 (3d Cir. 1991). Imprisonment is not the only valid punishment; sentencing must be based on the unique circumstances of the particular defendant. See United States v. Olhovsky, 562 F.3d 530, 552 (3d Cir. 2009). For three reasons, the government has failed to meet its burden to demonstrate that Mr. Negroni's sentence is substantively unreasonable.

A. The Appellant's Argument Confuses the Distinction Between Procedural and Substantive Error, and Fails to Adhere to the Highly Deferential Standard of Review Applicable to Claims of Substantive Unreasonableness.

Even while disavowing any claim of procedural unreasonableness as to defendant Negroni's sentencing,[9] the government's complaint against the sentence is primarily of a procedural nature: "The district court did not give meaningful consideration to the factors that called for a significant prison sentence and relied on ordinary mitigating factors in varying downward so dramatically." Gov't Br. 50; see also id. at 64 ("[T]he sentence does not reflect a meaningful consideration of the Guidelines range or the sentencing factors that called for serious punishment."). A district court's failure to give adequate consideration to pertinent sentencing factors is procedural, not substantive error. See United States v. Doe, 2010 WL 3211128, *3 ("Procedurally, the sentencing court must give 'rational and meaningful consideration' to the relevant § 3553(a) factors. United States v. Grier, 475 F.3d 556, 571 (3d Cir. 2007) (en banc)."); United States v. Merced, 603 F.3d 203, 214 (3d Cir. 2010)[10]; Tomko, 562 F.3d at 568 ("The Government makes only one claim of procedural error: it argues

[9] In its consolidated appeal from the sentence imposed on co-defendant/ appellee Hall, on the other hand, the government argues only procedural error, and does not claim substantive unreasonableness.

[10] Merced clarified that an argument of substantive unreasonableness would focus on how much weight the district court gave to a particular factor (relative to other factors) rather than on whether the court adequately considered a factor (which is a procedural matter).

that the District Court failed to meaningfully consider general deterrence."); United States v. Howe, 543 F.3d 128, 136 (3d Cir. 2008).

If the government had wished to challenge the adequacy of the court's consideration of sentencing factors in Mr. Negroni's case, it had to argue procedural error on this appeal, which it has not done. Cf. Merced, 603 F.3d at 217 ("The government cannot circumvent Tomko by repackaging a substantive claim of error as a procedural one"; argument that "choice of sentence did not afford those factors enough weight" is "substantive complaint").

To the extent that the government makes contentions of procedural error under the guise of claiming substantive unreasonableness, these should be rejected. Procedural error is not claimed in the government's Statement of Issues under Fed.R.App.P. 28(a)(5), and issues not articulated there are waived and will not be considered. United States v. Hoffecker, 530 F.3d 137, 159 (3d Cir. 2008); Abdul-Akbar v. McKelvie, 239 F.3d 306, 316 n.2 (3d Cir. 2001) (en banc).

This Court has explained that its "chief" duty in sentencing review "is ensuring that district courts follow proper sentencing procedures. Indeed, the broad substantive discretion afforded district courts under Tomko makes adherence to procedural sentencing requirements all the more important." Merced, 603 F.3d at 214; see also id. at 226. The government's brief pays lip service to the standard of review (noting the district court's "considerable discretion," Gov't Br. 52, though

not the "high" degree of deference required), but actually argues as if from a *de novo* perspective. See Gall, 552 U.S. at 56. It fails in practice to heed Tomko's admonition that the abuse of discretion standard of review "limits the debate and gives district courts broad latitude in sentencing." 562 F.3d at 568, quoting United States v. Levinson, 543 F.3d 190, 195 (3d Cir. 2008).

Since the government's position, expressed at sentencing, see USApp. 645, and even earlier, is that Mr. Hall was more culpable than Mr. Negroni, its failure to argue on appeal that Mr. Hall's sentence was unreasonably lenient, while challenging Mr. Negroni's sentence on that basis is remarkable.[11] Under the government's own theory, Mr. Negroni should have (and did) receive a less severe sentence than Mr. Hall, who received 15 months' imprisonment. By failing to challenge the substantive reasonableness of Hall's sentence, the government now essentially concedes that in Mr. Negroni's case a term of imprisonment of less than 15 months' imprisonment -- in effect, a term of a year's confinement –- would have been reasonable

[11] Since there is nothing to prevent an appellant from arguing both procedural and substantive unreasonableness in a single appeal, the government has waived forever any argument as to the substantive reasonableness of Hall's sentence. See United States v. Pultrone, 241 F.3d 306 (3d Cir. 2001) (issues that could have been raised on a first appeal cannot be raised on a later appeal instead). Compare Gov't Br. 69 n. 12 (mistakenly claiming that because this Court generally prefers not to proceed to examine substantive unreasonableness, if it first finds procedural error, that appellant should not present both procedural and substantive unreasonableness in the same appeal).

notwithstanding guidelines of 70-87 months. In this light, its present position that nine months' home confinement as a condition of probation was not reasonable rings hollow.

B. Probation, Particularly With a Condition of Home Detention, Is Itself a Significant Punishment, Reflecting, Under the Statute, an Entirely Separate and Prior Exercise of Discretion from the Selection of the Length of a Term of Imprisonment.

Judge Savage chose, in his considered discretion, to sentence Mr. Negroni to a term of probation, with restrictive conditions, and to pay onerous financial penalties totaling over $1.35 million. The government, as appellant, repeatedly attacks this sentence for being a "dramatic downward variance" from the recommended Guidelines range, or the like (Gov't Br. 47, 50, 53, 64, 67), a view which is premised (although not expressly) on the mistaken and authoritatively-rejected notion that probation can be equated with a sentence of "zero months' imprisonment." In law, probation is not the absence of imprisonment; it is a different category of punishment entirely. By failing to acknowledge the kind of sentence actually imposed in this case, the government's brief totally fails to show that sentence to be substantively unreasonable. Insofar as the government argues that Mr. Negroni's sentence is unreasonable because of its dissimilarity to a Guidelines sentence, that judgment is supportable on the additional ground that the Guidelines provisions recommending against probation in this kind of case

are contrary to the governing statute and therefore need not be given any significant weight.

1. Due to the Sentencing Commission's Failure to Implement Provisions of the Sentencing Reform Act of 1984 that Established Probation as a Distinct "Kind of Sentence," a Court Acts Reasonably When It Chooses Probation in an Appropriate Case, Notwithstanding the Suggestion in the Guidelines that Imprisonment Be Used for Nearly Every Offense and Offender.

The underlying assumption of the government's argument – that probation amounts to a "reduc[tion]" of some otherwise-presumptive term of imprisonment, Gov't Br. 64 – is wrong as a matter of law. As a result, the argument for appellant not only falls short; it never leaves the starting gate. In the Sentencing Reform Act, Congress explicitly presented probation as a distinct type of sentence with independent value, not as a lenient option to be used only in extraordinarily mitigated cases. Because the Guidelines do not reflect this statutory directive, a judge is entitled to give them little or no weight in making the initial decision whether to impose imprisonment or probation. The criticism of Judge Savage's sentence in this case on the ground that it varies excessively from the recommended Guidelines imprisonment range is therefore totally off the mark.

Congress directed sentencing judges, "in determining *whether* to impose a term of imprisonment," to "consider the factors set forth in § 3553(a) to the extent that they are applicable." 18 U.S.C. § 3582(a). Among those factors, to be

considered prior to choosing in each case the sentence which is "sufficient but not greater than necessary," the court must consider "the kinds of sentences available." *Id.* § 3553(a)(3). Probation is a "kind of sentence" that is "available" so long as the offense of conviction is not a Class A or B felony and no other statute "expressly preclude[s]" the use of probation. 18 U.S.C. § 3561(a)(1), (2).[12] Congress further directed the sentencing judge to "consider," as another factor, the "*kinds of sentences*" as well as "the sentencing range" that are "set forth in the guidelines …issued by the Sentencing Commission *pursuant to section 994(a)(1)* of title 28 …." *Id.* § 3553(a)(4)(A)(i) (emphasis added). In the referenced section 994(a)(1), Congress had directed the Commission to "promulgate . . . guidelines . . . for use of a sentencing court in determining the sentence to be imposed in a criminal case, *including . . . a determination whether* to impose a sentence to probation, a fine, *or* a term of imprisonment." 28 U.S.C. § 994(a)(1)(A) (emphasis added). Nothing in the Act creates a preference for imprisonment over probation generally.

The SRA thus contemplated a system under which the court – consulting a Guideline to be promulgated for this purpose – would determine separately, and necessarily first, *whether* to imprison, not just how long to imprison, in light of the

[12] A Class A felony is one that authorizes the death penalty or life imprisonment; a Class B felony has a maximum term of 25 years or more. 18 U.S.C. § 3559(a)(1),(a)(2). No offense of conviction in Mr. Negroni's case met those criteria.

characteristics of the defendant, the circumstances of the offense, and all of the purposes of sentencing, considering probation as one of the "kinds of sentences available." 18 U.S.C. § 3553(a)(1), (2), (3). If there is no guideline of the kind the statute required to be created –- that is, a guideline for making the probation/imprisonment decision whenever probation is "available" –- then the judge cannot "consider" that guideline and must make the determination independently. See 18 U.S.C. § 3553(b)(1) ("In the absence of an applicable sentencing guideline the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2).").

In the Guidelines, Congress directed, the Commission was to "establish a sentencing range that is consistent with all pertinent provisions of title 18." 28 U.S.C. § 994(b)(1). In designing the Sentencing Guidelines, the Commission violated this provision by failing to provide a mechanism that would guide the decision required by 18 U.S.C. § 3582(a) whenever probation was "available" under § 3561(a). Equally important, the Commission also violated 28 U.S.C. § 994(a)(1)(A) by failing to develop criteria to aid the sentencing judge in choosing first whether to impose probation or imprisonment. In these respects, the Commission did not "exercise . . . its characteristic institutional role" as envisioned by the SRA, Kimbrough, 552 U.S. at 109, since its first *institutional* role was to act in obedience to its governing statute. Thus, Judge Savage correctly followed 18 U.S.C. §§ 3553(a) and 3582(a), and

had no obligation to give weight to the guidelines' recommendation of imprisonment in this case. See Kimbrough, 552 U.S. at 101-2; Gall, 552 U.S. at 47-49.

The Sentencing Reform Act as a whole makes pellucidly clear that Congress expected imprisonment often to be deemed inappropriate and that probation instead would often meet the requirements of 18 U.S.C. § 3553(a)(2). First, it made very few offenses ineligible for probation. Id. § 3651(a). Then, in 28 U.S.C. § 994(j), it charged the Commission with "insur[ing] that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense ...."[13] In the cases described in § 994(j), a probationary sentence is presumptively appropriate. The Commission recognized the need to act on this directive,[14] but actually never did so. Instead, it adopted a circular definition of "serious" that saps all the life out of the directive in § 994(j).

The Commission's misunderstandings of the value of probation and the sentencing goals of Congress produced this statement in its Manual:

---

[13] Congress further directed both the Commission and the courts not to use prison for the purpose of rehabilitation if the other purposes of sentencing did not require incarceration. See 28 U.S.C. § 994(k); 18 U.S.C. § 3582(a); S. REP. 98-225, at 119, 176 (1983).

[14] U.S. Sent. Comm'n, *Recidivism and the First Offender* 1-2 (May 2004), http://www.ussc.gov/publicat/Recidivism_FirstOffender.pdf.

> The statute provides that the guidelines are to "reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . . ." 28 U.S.C. § 994(j). Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission's view are "serious."
>
> The Commission's solution to this problem has been to write guidelines that classify as serious many offenses for which probation previously was frequently given and provide for at least a short period of imprisonment in such cases. The Commission concluded that the definite prospect of prison, even though the term may be short, will serve as a significant deterrent, particularly when compared with pre-guidelines practice where probation, not prison, was the norm.

U.S.S.G., Ch. 1, Pt. A, Subpt. 1 (1987). The Commission thus promulgated an extraordinarily broad and inflexible definition of "serious" offenses ineligible for probation, a definition that defeated rather than implemented what Congress clearly intended in drafting § 994(j). That definitional trick swallowed an entire statutory regime and virtually precluded meaningful consideration of the reasons for probation that the SRA requires courts to consider. Studies show that conviction and probation deter white collar crime as effectively as imprisonment. See David Weisburd, et al., *Specific Deterrence in a Sample of Offenders Convicted of White Collar Crimes*, 33 Criminology 587 (1995). Judge Savage did not act unreasonably in sentencing accordingly.

The Commission failed to identify *any* class of offenders, convicted of any category of offense under any circumstances, for which probation met all of the purposes of sentencing, and for whom imprisonment should be the exception, not the norm. Yet Congress authorized probation, in appropriate cases, even for "serious" crimes below Class B, i.e., for any offense with a statutory maximum below 25 years. See 18 U.S.C. § 3561(a)(1) (citing id. § 3559(a)). Given how high the statutory eligibility for probation reaches, it was patently unreasonable of the Commission – and contrary to its mandate to comply with title 18 – to devise a guideline chart that treats probation as appropriate only in the most trivial or extraordinarily mitigated cases.

The Commission's failure to implement this Congressional directive resulted in a Sentencing Table that completely fails to identify cases where probation, rather than imprisonment, will best achieve the various purposes of sentencing. Indeed, the Sentencing Table provides *no* combination of offense level and criminal history category that excludes the possibility of imprisonment. Every one of the 258 specified ranges, even the range triggered by an offense level of one and a criminal history score of zero, includes imprisonment as a recommended option; by contrast, the Sentencing Table *excludes* probation as an option in most cases, including all cases at level 13 and higher – even though the statutory exclusions of §§ 3559 and 3561 do not kick in until Level 38 or Level 39. Accordingly, the court below was fully justified, whether or not it said so

expressly, in giving little weight or deference to the standard guidelines sentence suggested in this case. Spears v. United States, 555 U.S. ---, 129 S. Ct. 840 (2009) (per curiam); United States v. Arrelucia-Zamudio, 581 F.3d 142, 147-56 (3d Cir. 2009) (courts may freely reject any guidelines which fail to reflect Commission's proper role).

The Commission candidly explained that it designed the Guidelines to recommend sentences within a narrow range tied to average time served under prior law *in which a sentence of imprisonment was imposed*. U.S. Sentencing Commission, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 24 (June 18, 1987) ("Supplementary Report"). The sentencing table, from the very beginning, thus excluded from its recommended "norm" the numerous cases in which judges had believed it appropriate to impose probation. The Commission did so deliberately, implementing a policy decision of its own that was nowhere to be found in the SRA. See Supplementary Report, at 17. Rather than providing courts with a range of prison and non-prison alternatives as Congress had intended and directed, the Commission instead dismissed probation as a "lenient" punishment that rarely would be used.

One of the most noticeable changes in sentencing patterns since the advent of the Guidelines has been the drastic decrease in the use of probation. See Frank O. Bowman III, The Failure of the Federal Sentencing Guidelines: A Structural Analysis, 105 Colum. L. Rev. 1315, 1350 (2005). The percentage of federal defendants sentenced to a purely probationary sentence declined

from approximately 38% in 1984 to 6.2% in 2007.[15] Meanwhile, the length of prison sentences has nearly tripled. Id. at 1328, 1350 n. 65.

That is not what was intended by the Congress that enacted the SRA. The text of the SRA, as well as its legislative history, demonstrate that Congress instead intended that the use of imprisonment not substantially increase, see 28 U.S.C. § 994(g) ("The sentencing guidelines … shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons ...."), and that probation constitute its own sentencing option. When a federal judge sets aside the guidelines in order to implement in a particular case the actual criteria of the Sentencing Reform Act as designed by Congress, that judge acts reasonably, not unreasonably.

For all these reasons, the imposition of a probation sentence on appellee Negroni was reasonable. The district court's imposition in this case of a sentence different from that recommended by the Guidelines was warranted, in part, by the Commission's failure to implement the governing statute with respect to the availability of probation, and thus the Commission's failure, in this regard, to fulfill its designated institutional role.

---

[15] Bureau of Justice Statistics, U.S. Dept. of Justice, *Sourcebook of Criminal Justice Statistics*, table 5.27, at 460-61 (1994) (13,880/36,104 = 38%); U.S. Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics* 27, Fig. D. (2007), available at http://www.ussc.gov/ANNRPT/2007/Table 16.pdf.

2. A Sentencing Judge Is Free to Disagree with and Refuse to Follow the Commission's Flawed Devaluation of Probation, Even in "White Collar" Fraud Cases.

Contrary to the appellant's claims, Gov't Br. 60-64, it is untrue that the Sentencing Reform Act generally disfavored probation in white collar cases or that probation cannot serve the important goals of deterrence and just deserts. That was Sentencing Commission policy, not Congress's. Although courts must consider the guidelines as one of the § 3553(a) factors, they cannot blindly defer to policy decisions of the Sentencing Commission. Gall, 552 U.S. at 46-47; Rita, 155 U.S. at 348, 351, 357. Both the Supreme Court and this Court have approved non-Guidelines sentences as reasonable not only when individual circumstances are compelling, but also when a sentencing judge concludes that the applicable guidelines fail properly to reflect § 3553(a) considerations. See, *e.g.*, Rita, 551 U.S. at 351, 357. Based on the facts of an individual case, judges "may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines," Kimbrough, 552 U.S. at 101 (internal quotation marks omitted), and when they do, the courts of appeals may not "grant greater factfinding leeway to [the Commission] than to [the] district judge." Rita, 551 U.S. at 347. See also Spears v. United

States, 555 U.S. ---, 129 S. Ct. 840 (2009) (per curiam).[16] As long as judges do so for reasons other than mere personal preference, no closer appellate scrutiny can apply to such decisions.[17]

This Circuit affords great deference to a district court's view that the policies supporting the Guidelines are flawed and do not warrant the sentence recommended in a particular case. *See Tomko*, 562 F.3d at 573 (quoting United States v. Levinson, 543 F.3d 190, 195 (3d Cir. 2008)).[18] Although Judge Savage in this case did not articulate a statute-based rejection of the Guidelines' recommendation, his judgment can be affirmed as

[16] The determination that a particular guideline reflects unsound judgment in light of § 3553(a) considerations also provides feedback to the Sentencing Commission – a core function in the constructive evolution of responsible guidelines. See Kimbrough, 552 U.S. at 106; Rita, 551 U.S. at 350, 356-59.

[17] See Kimbrough, 552 U.S. at 109 (dictum: "closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations" – but not when the Guidelines "do not exemplify the Commission's exercise of its characteristic institutional role").

[18] But see United States v. Lychock, 578 F.3d 214 (3d Cir. 2008) (stating that the district court must offer a "reasoned explanation for its . . . disagreement with the policy judgments of Congress regarding the appropriate sentences for child pornography offenses"). Here, by contrast, the sentence comports wit "the policy judgments of Congress," even if not those of the Commission, which Lychock does not address. At most, Lychock endorses "closer scrutiny" only where a judge relies *solely* on a personal policy disagreement with the Guidelines and fails to consider all the § 3553(a) factors. Here, Mr. Negroni's sentence was based upon his own personal facts and circumstances.

reasonable on any legitimate ground, including the one discussed here. See United States v. Miller, 224 F.3d 247, 248 n.1 (3d Cir. 2000) (doctrine of affirmance on alternate grounds applied to sentencing appeal).

The guidelines are less worthy of deferential respect than suggested by the appellant's brief for an additional reason: the Commission has ignored feedback from judges, contrary to the SRA. See 28 U.S.C. § 994(o). As the fifteenth anniversary of the Guidelines' enactment approached, the Commission conducted a survey of federal circuit and district court judges. See U.S. Sentencing Comm'n, Summary Report: U.S. Sentencing Commission's Survey of Article III Judges (Dec. 2002). The judges were asked, among other things, to "identify where you believe that changes in the availability of guideline *sentence types* would better promote the purposes of sentencing." See id., App. B-7 (emphasis in original). Of the responding district court judges, 38.2% said they believed that straight probationary sentences and 46.1% said probation with confinement conditions should be "more available" in fraud cases. Id. Even after Gall removed all legal impediments to imposing probation in appropriate cases, some 22% of the 639 sentencing judges responding to the Commission's 2010 survey commented that probation with home confinement should be more available in fraud cases. U.S. Sentencing Comm'n, "Results of Survey of United States District Judges, January 2010 through March 2010,"

Question 11.[19] Nothing had been done between 2002 and 2010 to amend the Guidelines in response to this consistent judicial feedback. A sentence that reflects the views of 22% or more of the judge's colleagues, and implements that perspective in a particular appropriate case -– Mr. Negroni's –- is not so out of the range of plausible opinions as to be called "substantively unreasonable."

For these reasons as well, the district court's selection of probation as the appropriate sentence was not unreasonable.

3. Consistent With the Statutory Text, the Legislative History of the SRA Reveals the Intent of Congress that Probation Should Be Considered for Sentencing in Cases Such as Appellee's.

In Gall v. United States, 552 U.S. 38 (2007), the Supreme Court specifically endorsed the value of probation as a form of sentence, when thoughtfully selected by the district court in a particular case. "Probation is not granted out of a spirit of leniency ...." Id. 48 n.4 (quoting National Council on Crime and Delinquency). "Offenders on probation are … subject to several standard conditions that substantially restrict their liberty. … Most probationers are also subject to individual 'special conditions' imposed by the court." Id. 48. Gall thus

[19] The appellee is not aware of any differences in survey methodology that might explain the rather marked difference between the 2002 and 2010 responses to what seems to be a similar question. The only apparent difference is that by 2010 many judges had come to realize that probation *was* fully "available" (through variances), so it did not need to be made "more available."

disapproved the Eighth Circuit's characterization of Gall's probationary sentence as a "100% downward variance," in part because that characterization failed to recognize the "substantial[] restrict[ion]" of liberty involved in compliance with probation. *Id.* The Gall Court rejected the position that probation "lies outside the range of choice dictated by the facts of this case" because "§ 3553(a)(3) ['kinds of sentences available'] directs the judge to consider sentences other than imprisonment." Id. at 59 & n.11. Gall not only tracks the intent of Congress to recognize the value of a probationary sentence, as expressed through the SRA and § 3553(a), but also highlights the reasonableness of the district court's discretionary decision in this case, in light of the Commission's statute-defying over-emphasis on incarceration, to the detriment of all other options.

The SRA was not intended to embody a presumption of incarceration. As stated in Senate Report No. 98-225 (the "Senate Report") issued by the Senate Judiciary Committee ("the Committee"), considered the standard source of legislative history, "current law … probably results in too much reliance on terms of imprisonment when other types of sentences would serve the purpose of sentencing equally well ...." S. REP. 98-225, 98th Cong., 1st Sess., at 59 (1983). "[T]he best course is to provide no presumption either for or against probation as opposed to imprisonment." Id. 91, 1984 U.S.C.C.A.N. 3182, 3274 (1983); see also id. at 114, 3297 ("[T]he bill avoids the highly emotional past debate over whether or not there should be

a general sentencing presumption either in favor of incarceration or in favor of probation."). Instead, Congress intended to create a system in which options could be creatively combined to meet all of the purposes of sentencing implicated in the case. See id. at 107, 3290 (fines can provide a "clear form of punishment and deterrence."); id. at 55, 3238 (rejecting the assumption that "a term of imprisonment … is necessarily a more stringent sentence than a term of probation with restrictive conditions and a heavy fine"). Here, Judge Savage imposed not only an obligation to pay $677,805.05 in restitution, but also an equal sum as a criminal forfeiture, totaling over $1.35 million. Together, these heavy financial penalties, in combination with home confinement and probationary supervision, properly reflected Congressional policy, as applied to the circumstances of the individual case as the judge found them to be.

Mr. Negroni's sentence fits well within the range of Congress's suggestions regarding the possible blend of sentencing options. Although the sentence does not impose imprisonment, it includes a lengthy period of home detention and substantial financial penalties. That sentence of home detention constitutes a significant and "equally effective sentence[] involving less restraint on liberty," as contemplated by Congress. S.REP. 98-225, at 77, 3260. Indeed, even under a mandatory, pre-Booker Guideline regime, the district court could have crafted an identical sentence by merely implementing a

three-level departure to level 10. See U.S.S.G. § 5C1.1(c)(3) (Zone B).

The intellectual cornerstone of the SRA is the statement of four principal purposes of sentencing: punishment, deterrence, incapacitation and rehabilitation. 18 U.S.C. § 3553(a)(2). Congress also specifically noted that, because incarceration is not rehabilitative, a reasonable likelihood of rehabilitation should lead a court to impose a sentence of probation, if the other purposes of sentencing do not require imprisonment. S. REP. 98-225, 122, 173 (1983); 1984 U.S.C.C.A.N. 3182, 3305, 3356. The Commission, however, failed in its design of the Guidelines to follow the direction of Congress to consider rehabilitation along with the other three purposes of sentencing. That error contributed to the Commission's twin failures to draft a Guideline assisting in the choice between probation and imprisonment and to generate a guidelines sector that recommends only probation or at least a wider range of options that permit probation. In the absence of any such legislatively mandated Guideline, Judge Savage acted entirely reasonably in choosing probation with home confinement, along with restitution and forfeiture, as the just and lawful sentence for Paul Negroni.

C. The Government/Appellant's Argument That the District Court Could Not Rely Only on What it Refers to as "Ordinary Mitigating Factors" to Vary So Far "Downward" from the Guidelines Range Is Contrary to *Gall* and to this Court's Precedent.

The government contends that the district court was not permitted to impose the variance sentence that it did upon Mr. Negroni based on the factors it relied on, because they are "ordinary mitigating factors." Gov't Br. 50; see also id. 67 ("Negroni did not present any extraordinary circumstances to defeat the considered recommendation of the Sentencing Guidelines regarding the appropriate sentence for a crime of this type."). Under Gall and the other precedent of the Supreme Court and this Court, it is not necessary to "defeat" the Guidelines' recommendation –- which creates no presumptively correct sentence –- nor must the facts and circumstances be "extraordinary" to warrant a district court's reliance upon them in choosing to vary from the guidelines range in a particular defendant's sentencing. Howe, 543 F.3d at 138 (quoting Gall, 552 U.S. at 47, in stating that "We reject ... an appellate rule that requires 'extraordinary circumstances' to justify a sentence outside the Guidelines range.").

Moreover, although it quotes the district court's statement of reasons for selecting the sentence, in which the court noted Mr. Negroni's "disruptive and unstable childhood punctuated by violence," and his "dependent personality disorder, which makes him a follower rather than a leader," the government's brief as appellant minimizes those factors by mischaracterizing them, and

then fails to recognize them as mitigating (or to accord the required deference to the district court's decision that they are mitigating). The government opines that "many white-collar defendants do not originate the schemes in which they participate and choose to become involved, at least in part, because they have weak personalities." Gov't Br. 58. The prosecutors thus inaccurately and insupportably treat "weak personality" as the equivalent of the psychological disorder called "dependent personality" with which Mr. Negroni's mental health professionals diagnosed him, as expressly credited by the district court. The government argues that "many defendants have had difficult childhoods," id., thus brushing off Mr. Negroni's individual situation while growing up, which was not only "disruptive and unstable" but in which he also was compelled to live with a violent step-father.

In any event, since the totality of factors must be reviewed as to their combined effect on each defendant individually in the circumstances of each defendant's life, it is meaningless to describe any factor in a vacuum as merely routine. See Tomko, 562 F.3d at 570 ("To the extent that the typicality or uniqueness of a case is relevant, the Supreme Court has made clear that it does not alter our deferential standard of review when evaluating a district court's sentencing determination"; quoting Gall, 552 U.S at 52, noting that sentencing court must "consider every convicted person as an individual." [source of internal quotation omitted])

Nor is it valid under Gall and its progeny to argue, as the appellant does, that a stronger kind of factor (extraordinary ones) must be present to justify a greater variance from the guidelines range. Gall, as explicated in Tomko, prohibits courts of appeals from conducting a mathematical or proportional analysis to determine the validity of the degree of a variance, because that would in effect permit a more stringent standard of review in the case of larger variances, which is not allowed. Tomko, 562 F.3d at 571, quoting Rita v. United States, 551 U.S. 338, 355 (explaining that "'proportionality test' rests on 'the proposition that the strength of the justification needed to sustain an outside-Guidelines sentence varies in proportion to the degree of the variance.'"); Gall, 552 U.S. at 49 (barring proportionality approach that led some appellate courts to require extraordinary circumstances, which approach "necessarily applies a 'heightened standard of review to sentences outside the Guidelines range ... [which] is 'inconsistent with the rule that the abuse-of-discretion standard of review applies to appellate review of all sentencing decisions -- whether inside or outside the Guidelines range.").

Tomko clarified that, under Gall, it is not the "strength" of the district court's justification, but rather the "significance" of that justification, in the sense of "a more complete explanation," that the court of appeals "may look for" when reviewing a variance, including a "major departure" (or large variance). Tomko, 562 F.3d at 571, quoting Gall, 552 U.S. at 50, and Levinson, 543 F.3d at 197. While the "extent of any

variance" may also be considered, the court of appeals must defer to the district court's determination that the extent of the variance was justified in the defendant's particular circumstances. Tomko, 562 F.3d at 571, quoting Gall, 552 U.S. at 41, 51.

In Tomko, this Court noted that by arguing in that case that the district court had imposed "an overly lenient sentence in a mine-run case," 562 F.3d at 570, the government "[i]n essence" was "asking this Court to apply the already-rejected 'proportionality test' by a different name." Id. at 571. That is exactly the argument the government/appellant is making as to the district court's selection of Mr. Negroni's sentence. See e.g. Gov't Br. 58 ("The court described nothing more than a typical situation for one who played a role such as Negroni's in a major fraud scheme."). Indeed, the government expends several pages of its brief arguing that a sentence of probation is simply unreasonable in white-collar fraud cases in general. Gov't Br. 60-64. Such argument, which fails to take into account the totality of the specific individual circumstances personal to Mr. Negroni's case, flies in the face of Supreme Court's and this Court's precedent.[20] A sentencing court's assessment of the weight to be accorded sentencing factors, and how they should be balanced, must be made in relation to the

[20] Even the dissent in Tomko took pains to clarify that "[w]e do not mean to suggest that white-collar offenses in general ... must be met by a sentence of incarceration." 562 F.3d at 582 n.18.

individual defendant's circumstances as well, and is entitled to great deference. The government/appellant's argument runs contrary to each of these requirements.

1. The Guidelines Range Was Mistakenly Calculated.

Not only is the government's argument misguided, given its inconsistency with binding precedent, but it also starts off from a mistaken premise: that the district court correctly calculated the guideline range. To the contrary, the district court erred in disallowing the defense objection to the six-level enhancement under USSG § 2B1.1(b)(2)(C), for "250 or more victims." The reasons are as follows.

The defense argument on this objection at Mr. Negroni's sentencing hearing, 2USApp. 597-99, 604-09, 614, focused upon the BankAmerica settlement fund and Denver Corporation, in light of the government's concession in the joint sentencing session that took place earlier on the same date as Mr. Negroni's sentencing (11/23/09), USApp. 498, that the claims administrator could not determine [and thus the government could not prove] that there were over 250 victims of the fraud involving the NASDAQ litigation. The defense argued that Mr. Negroni's involvement in the BankAmerica fraud –- consisting of his incorporating Denver Corp. in New York, opening a bank account in New York, receiving a single check, and then depositing the check on September 9, 2004 -- occurred two years after the fraudulent claim was made on behalf of Denver Corporation-

Colorado, and two months after that claim had been paid (on July 14, 2004). USApp. 609.

The government could not dispute that Mr. Negroni did not become involved until that later time. See USApp. 601-02 (Sent. Tr. at 9-10) (prosecutor acknowledging that "It's true that Waltzer filed the fake [BankAmerica] claim without Mr. Negroni" and that Mr. Negroni became involved when "They set up the New York one ... the bank account for the fake company and he helped collect and distribute the proceeds. That is when he [Negroni] became involved."). See also USApp. 229 (Gov't Omnibus Sent. Mem. 41: "Negroni also helped Waltzer collect the proceeds of the Denver Corporation fraud. After the claim was filed, Negroni helped Waltzer incorporate the Denver Corporation and collect and distribute the claim proceeds."); USApp. 468.[21] The government's argument on why the 250-victims enhancement applied to Mr. Negroni was that Mr. Negroni participated with Mr. Waltzer in making up the fake claim in the NASDAQ litigation, and did the research to collect the necessary documents to back that claim up, and that the tape recordings of Mr. Negroni in 2007, talking with the cooperating Mr. Waltzer, showed Mr. Negroni's "knowledge of the fraud and his eagerness to engage in more of these frauds involving class action lawsuits that would clearly involve more than 250 victims." USApp. 605.

The government thus argued at sentencing a relevant conduct theory for why Mr. Negroni should be held responsible for

[21] Mr. Negroni formed Denver Corp. of New York at Waltzer's direction on September 7, 2004. See USApp. 133, 601.

another person's conduct, i.e., the earlier conduct of Waltzer in submitting the false BankAmerica claim. See USSG § 1B1.3(a)(1)(B). Without expressly saying so, the government had to have been arguing for the enhancement's application based upon Waltzer's conduct, on the basis that that conduct constituted, from Mr. Negroni's perspective, "reasonably foreseeable acts ... in furtherance of the jointly undertaken criminal activity" of the fraud scheme. Id. Giving the government the benefit of the doubt that it was even making that argument, however, that theory was defective because "[a] defendant's relevant conduct does not include the conduct of members of a conspiracy [or here, a fraud scheme] prior to the defendant joining the conspiracy [or fraud scheme], even if the defendant knows of that conduct. ..." USSG § 1B1.3 Appl. note 2(ii) (2008 ed.). See also United States v. Collado, 975 F.2d 985, 995 n. 8, 997 (3d Cir. 1992), discussed in United States v. Mannino, 212 F.3d 835, 840-41 (3d Cir. 2000). The government did not claim that Mr. Negroni had any involvement in the BankAmerica fraud scheme before he incorporated Denver Corporation in New York, opened a bank account, deposited a check, and wired money to an account of Waltzer's, all of which occurred in September 2004. See USApp. 132-33 (Plea hrng. At 23-24; US App. 199 (Gov't Omnibus Sent. Mem. 11). This was two and one-half years after the claim had been submitted, and two months after it had been paid. Therefore, the defense objection to the application of the six-level 250-victims enhancement should have been sustained.

Thus, if any comparison between the sentence imposed and the bottom of the properly calculated range is to be made -– and appellee reiterates that for all the other reasons argued in this brief no such comparison is appropriate –- the proper point of reference is at most to Guideline Offense Level 21, not Level 27, and thus to a range with a floor of 37 months, not of 70 months, nearly a 50% difference. Moreover, as discussed previously, the government's acceptance of the substantive reasonableness of appellee Hall's 15-month sentence, and its position that Mr. Negroni's sentence should be less, makes moot its attempt to use a 70-month guideline (or even a 37-month guideline) as a benchmark.

2. The Government's Reliance on Precedent Falls Short.

The government/appellant's brief relies on United States v. Lychock, 578 F.3d 214 (3d Cir. 2009), and United States v. Goff, 501 F.3d 250 (3d Cir. 2007), as having reversed sentences of probation and four months, respectively, on the basis that they were unreasonably lenient, and United States v. Olhovsky, 562 F.3d 530 (3d Cir. 2009), as having reversed on the basis that a sentence was unreasonably harsh. The government's brief fails to recognize that in each of those cases, this Court pointed out that it was procedural error by the district court – failure to consider relevant factors, and/or failure to rule on defense arguments – that had led to a substantively unreasonable sentence. Lychock, 578 F.3d at 218-19 & n.2; Goff, 501 F.3d at

256; Olhovsky, 562 F.3d at 533 (quoting Levinson, 543 F.3d at 195). To reiterate, procedural error has not been claimed here.[22] In light of this recognition of the presence of procedural error, and in light of Tomko and Gall, Lychock cannot be read as having decided across the board that "a sentence of probation is unacceptable for the serious crime of possession of child pornography, where the defendant presents only ordinary mitigating factors," Gov't Br. 53, and it cannot be used to justify such a mechanistic approach in fraud cases. To do so would be contrary to Gall and its progeny in this Court.[23]

[22] The guideline range determined by the district court in Lychock was 30 to 37 months; in Goff it was 37-46 months, and this Court noted that it should have been 33-41 months. 501 F.3d at 255 n. 9. The bottom of those ranges is not so different from what would have been the correct guideline range applicable to Mr. Negroni (37-46 months). Had there not been procedural error in those earlier cases -– as there was not in Mr. Negroni's case -– the court might not have found those sentences substantively unreasonable.

[23] Neither of the two cases from other circuits which the government/appellant relies on as having "reversed unduly lenient sentences in the fraud context as substantively unreasonable," Gov't Br. 59, United States v. Omole, 523 F.3d 691 (7th Cir. 2008), and United States v. Hunt, 521 F.3d 636 (6th Cir. 2008), advances the government's position. In Omole, the Seventh Circuit held that the district court's statement of reasons was contrary to a determination of leniency, as the court made "clearly disparaging comments" about the defendant and "did not highlight [the defendant's] rehabilitative potential or other factors that would support a below-guideline sentence." Id. at 699-700. In addition the district court cited the defendant's lack of substantial criminal history but the record showed otherwise. Id. at 698-99. In Hunt, the Sixth Circuit found that the district court appeared to have relied on an illegitimate factor – that the defendant was innocent of the crime of which the jury had convicted him. Id. at 649-50. Neither case has similarities to Judge Savage's sentencing of Mr. Negroni.

In Olhovsky, this Court reversed because procedural error by the district court -– its failure to consider the reports of defense mental health experts -– led it to impose a substantively unreasonably harsh sentence of six years' imprisonment in a child pornography possession case. This Court found the 72 month prison sentence to be unreasonably harsh despite a much higher guideline range of 135-168 months' imprisonment (deemed to be 120 months due to a statutory maximum 10 year sentence). 562 F.3d at 541.[24] This Court noted that the argument that crimes like this must by necessity be punished by substantial prison terms was belied by the Supreme Court's observation in Gall that in certain circumstances "a sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing." 562 F.3d at 551, quoting Gall, 552 U.S. at 54 (source of internal quotation omitted). Olhovsky does not assist the government in meeting its burden as appellant in Mr. Negroni's case.

[24] Thus, Olhovsky signifies that even a sentence 48 months lower than the bottom of the guidelines range (there, the statutory maximum being the guidelines range) can nonetheless be an unreasonably harsh sentence, showing that it is not the degree of the variance divorced from the particular circumstances of the case which matters. And of course, Gall prohibits a mathematical, proportional test for determining reasonableness.

3. Judge Savage Properly Considered and Balanced the Factors.

The government's brief presents several reasons why, in the government's view, no reasonable court could have imposed the sentence the district court did under the circumstances of Mr. Negroni's case. It argues that the mitigating factors were not strong enough. The government accuses Mr. Negroni of "extensive participation in a $40 million fraud scheme." Gov't Br. at 54. Yet the government ignores the district court's factual finding that Mr. Negroni's participation was "limited to only a portion of the scheme and loss," USApp. 642, which the government has not argued is clearly erroneous.[25] Nor has the government argued that the court's findings were clearly erroneous that though Mr. Negroni does not have a substantially reduced mental capacity, he does suffer from dependent personality disorder (as determined by two mental health professionals), which causes him to be a follower, and was "lured" into participating in the criminal activity by Waltzer. Yet the government, ignoring these findings, refers to "Negroni's position" with respect to his mental issues and Waltzer's effect on him as "not just

[25] The district court's finding that Mr. Negroni's role in the scheme was limited also rejected the government's position that the recorded conversations between Mr. Negroni and the cooperating Mr. Waltzer showed Mr. Negroni's "full knowledge of the scheme ...." Gov't Br. 38. The court made this finding after it agreed with defense counsel's requested corrections to the November 16, 2009 (initially revised) PSI regarding Mr. Negroni's lack of involvement in submitting the BankAmerica claim. See App. 596-602 (defense argument on corrections to PSI and court's rulings).

meritless, but risible." Gov't Br. 56. Disrespectful invective directed at the district court's well-supported findings is no substitute for reasoned argument for an appellate determination of clear factual error; indeed, it is not even acceptable (much less professional) argumentation. The government does not deny that Mr. Negroni has absolutely no criminal history, that he is educated, an involved and dedicated father, respected and loved by many. When the district court's unchallenged factual findings are given their proper respect, and the highly deferential abuse of discretion standard is applied, the district court was entitled to give these factors substantial weight in determining whether and to what extent they called for leniency.

The government/appellant's position that the district court did not give "meaningful consideration" to the non-mitigating factors also rings hollow. The district court engaged in a balancing process. The court noted its consideration of the seriousness of the offenses, which the court noted "was not only the fraud itself but ... money laundering," but balanced that against what it found to be Mr. Negroni's limited role in the fraud scheme and loss, his personal factors, and his sincere remorsefulness. The court noted the need to "afford deterrence, promote respect for the law, and ... protect the public from the defendant's further crimes," balancing that against Mr. Negroni's complete lack of criminal history and the court's finding that he will never have contact with the criminal justice system again, that he is a college graduate, and a

father of twins in whose nurturing he is very involved, and that the damage to his reputation and the explanation he must give to his children are substantial. The court also had before it the entire sentencing package that had been provided by defense counsel, which included the twenty-two supportive letters from family and friends.

Moreover, the district court weighed the totality of the factors in § 3553(a) -– not just those upon which the court stated it was relying as mitigating factors –- thus giving them meaningful consideration in a proper exercise of its broad discretion, despite the government/appellant's contention otherwise. The district court had no duty to "discuss and make findings as to each of the § 3553(a) factors [because] the record makes clear the court took the factors into account in sentencing," Tomko, 562 F.3d at 568, quoting Cooper, 437 F.3d at 329. Nevertheless, the court noted its consideration of the § 3553(a)(2)(A) factors (reflecting seriousness of offense, and promoting respect for the law and just punishment), and imposed in addition to probation and home confinement, very substantial restitution and forfeiture upon Mr. Negroni, who is not a particularly wealthy man. The fact that the court imposed sentences of incarceration upon several codefendants for their greater roles in the offense also promoted respect for the law. See Gall, 552 U.S. at 54.

The court said it considered the factors of deterrence and protection of the public, under § 3553(a)(2)(B) and (C), finding that Mr. Negroni would never have further contact with the

criminal justice system. Its large financial penalty served the goal of general deterrence as well as punishing Mr. Negroni himself, as did the prison sentences of the more culpable defendants, which appropriately offset Mr. Negroni's probationary term for his more limited role. The court considered the § 3553(a)(2)(D) factor of, for example, the most effective correctional treatment, and the (a)(4) and (5) factors of kinds of recommended sentences, the Sentencing Commission's policy statements and the (a)(6) and (7) factors of need to avoid unwarranted disparities among defendants with similar records, and to provide restitution. The disparity between Mr. Negroni's personal factors and his limited role in the offense, on the one hand, and a typical fraud committer and the more seriously involved codefendants in his own case, on the other, justified the disparity in sentencing, in terms of the greater leniency which the district court afforded him. This was warranted disparity. The district court's reasons are "logical and consistent with the factors set forth in [§] 3553(a)." Tomko, 562 F.3d at 571 (quoting United States v. Cooper, 437 F.3d 324, 330 (3d Cir. 2006).

The government essentially argues that Tomko is distinguishable, but its position lacks merit. Gov't Br. at 65-67. In Tomko this Court, sitting en banc,[26] upheld a sentence

[26] The fact that Tomko was not a unanimous opinion, but rather was decided by a 8-5 vote, as the government/appellant argues, Gov't Br. at 65, is of no importance whatsoever: it was the en banc opinion of this Court, and its holding and *ratio decidendi* are binding.

of probation with a period of home confinement imposed on a very wealthy man convicted of tax evasion. The government/ appellant argues that the defendant's offense there involved less money, and that the defendant "presented unique individual characteristics" of "negligible criminal history," "extraordinary charitable acts" and that his incarceration would threaten the jobs of over 300 employees. Id. at 66. Mr. Negroni, as the district court found, has had no prior contact with the criminal justice system at all, had a very difficult childhood, and suffers from a genuine psychological disorder that tends to explain his conduct. The seriousness of Mr. Negroni's offense was duly noted by the district court, but the court also took into consideration his limited involvement in Waltzer's overall scheme; Tomko, on the other hand, was the mastermind of his scheme who also manipulated others into participating – more like Mr. Waltzer than Mr. Negroni. Yet this Court's strict adherence to its limited standard of review led it to affirm a probationary sentence for a more serious offender in Tomko.

The fact that if the government's lawyer "had been sitting as the District Judge, [Mr. Negroni] would have been sentenced to some time in prison," 562 F.3d at 560, "is insufficient to justify reversal of the district court." Id., quoting Gall, 552 U.S. at 51. Because the appellant has failed to meet its burden to show that "no reasonable sentencing court would have imposed the same sentence on that particular defendant [here, Mr. Negroni] for the reasons the district court provided," the sentence must be affirmed.

II. REVERSAL OF APPELLEE NEGRONI'S SENTENCE AND REMAND FOR RESENTENCING MAY NOT BE ORDERED ON THE BASIS OF ANY PROCEDURAL ERROR IN CO-APPELLEE HALL'S SENTENCING, OR, SHOULD THIS COURT DISAGREE, THE SCOPE OF SUCH A REMAND WOULD BE STRICTLY LIMITED.

Standard or Scope of Review: This Court exercises discretion in selecting a remedy on appeal, "as may be just under the circumstances." 28 U.S.C. § 2106.

Discussion:

The Supreme Court has set forth two, and only two, potential errors of district courts at sentencing for which federal courts of appeals may conduct review: procedural unreasonableness, and substantive unreasonableness. Gall, 552 U.S. at 51, 56; Tomko, 562 F.3d at 567-68. Thus, should this Court reject the government/appellant's argument that appellee Negroni's sentence was substantively unreasonable (and in light of the fact that the government has not challenged the procedural reasonableness of Mr. Negroni's sentencing), his judgment of sentence must be affirmed.

Contrary to the appellant's virtually undefended assertion, made only in the part of its brief discussing its appeal against co-appellee Hall, Gov't Br. 83-84, Mr. Negroni's sentence may not be reversed and his case remanded for resentencing solely on the basis of a determination by this Court, should it make such determination, that co-appellee Hall's sentence is procedurally unreasonable. (For all of the reasons argued in co-appellee

Hall's brief, Mr. Hall's sentence is not *procedurally* unreasonable, and the government's failure to raise *substantive* unreasonableness has waived that argument.)

The sole case upon which the government/appellant relies in taking this position, United States v. Stewart, 590 F.3d 93 (2d Cir. 2009) (see Gov't Br. at 84), is inapposite. In that case, the government had cross-appealed with respect to all three co-defendants' sentences. The court of appeals determined that the sentences of these co-defendants were interrelated to the degree that in order to determine a proper sentence for the one defendant whose sentence suffered from procedural error, the district court should have the opportunity to resentence all three if necessary. Id. at 152.[27] In contrast, the government here has not appealed the sentences of any of Mr. Negroni's several co-defendants other than Mr. Hall. Thus, it would not be possible to maintain the intended proportionality and balance among all co-defendants' sentences based on their relative culpability as asserted by the government merely by resentencing Mr. Negroni should Mr. Hall be resentenced. In addition,

[27] Further, contrary to the government's parenthetical description, Gov't Br. 84, the Second Circuit in Stewart did not reverse the sentences of two of the three co-defendants, but rather expressly "affirmed" those sentences and remanded to *permit the district court* to vacate these defendants' sentences *only if* the court deemed it necessary in light of the required resentencing of the principal defendant.

Stewart cited no authority to support its unusual resentencing order, is wrong under the Supreme Court precedent cited above, and in any event is not binding on this Court.

Should this Court disagree with Mr. Negroni's position, and decide that Mr. Hall's sentence is procedurally unreasonable and that Mr. Negroni's sentence will on that basis alone be reversed and remanded, the scope of the permissible remand is narrow. If this Court rejects the government/appellant's argument in this appeal that Mr. Negroni's sentence is substantively unreasonable, the government may not argue that position again in the district court at a resentencing. That would violate the doctrine of law of the case. See United States v. Kikumura, 947 F.2d 72, 77 (3d Cir. 1991) (once this Court decides a case, its decision governs same issue in subsequent stages of same case). (Nor may the government argue the substantive unreasonableness of Mr. Hall's sentence at any resentencing, as that argument has been waived. See Hall Br. 19 n. 7.) The remand would be limited to a determination of Mr. Hall's sentence after correction of any procedural errors determined by this Court and then, at most, a reconsideration of Mr. Negroni's sentence in that light.

For these reasons, the sentence imposed on appellee Negroni should be affirmed, not remanded, regardless of the outcome in the Hall appeal.

CONCLUSION

The government has failed to meet its heavy burden of demonstrating that the court below imposed a substantively unreasonable sentence. Accordingly, the judgment below must be affirmed.

Respectfully submitted,

Dated: October 11, 2010

s/Peter Goldberger

By: PETER GOLDBERGER
PAMELA A. WILK
50 Rittenhouse Place
Ardmore, PA 19003-2276

(610) 649-8200
fax: (610) 649-8362
e-mail: peter.goldberger@verizon.net

Of Counsel:
STEPHEN ROBERT LaCHEEN
LaCheen Wittels & Greenberg, LLP
1429 Walnut Street, 13th Floor
Philadelphia, PA 19102

Attorneys for Appellee Negroni

REQUIRED CERTIFICATIONS

A. Bar Membership. I certify that the attorney whose name and signature appear on this brief is a member of the Bar of this Court.

B. Type-Volume. This brief was prepared in a 12-point Courier New, nonproportional typeface, with no more than 10.5 characters per inch. Pursuant to Fed.R.App.P. 32(a)(7)(C), I certify, based on the word-counting function of my word processing system (Word 2000), that this brief does not comply with the type-volume limitations of Rule 32(a)(7)(B), in that the brief contains 14,438 words. A motion for leave to file will be submitted.

C. Electronic Filing. I certify pursuant to LAR 31.1(c) that the text of the electronically filed version of this brief is identical to the text in the paper copies of the brief as filed with the Clerk. The anti-virus program Avast! vers. 4.8, with current updates, has been run against the electronic (PDF) version of this brief before submitting it to this Court's CM/ECF system, and no virus was detected.

__/Peter Goldberger_____

CERTIFICATE OF SERVICE

On October 11, 2010, I served a copy of the foregoing brief on the attorney for the appellant, and one to counsel for the consolidated appellee, addressed as follows:

Louis D. Lappen, Esq.
Derek A. Cohen, Esq.
Robert A. Zauzmer, Esq.
Ass't U.S. Attorneys
615 Chestnut St., Suite 1250
Philadelphia, PA 19106

Ann C. Flannery, Esq.
Law Offices of Ann C. Flannery
1835 Market Street, Suite 2700
Philadelphia, PA 19103

s/Peter Goldberger