12-3179

To Be Argued By:
SUSAN L. WINES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-3179

UNITED STATES OF AMERICA,
Appellee,

-vs-

ROBIN BRUHJELL BRASS,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The United States District Court for the District of Connecticut (Robert N. Chatigny, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on July 31, 2012. Appendix ("A__") 9. On August 6, 2012, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A9. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Statement of Issues Presented for Review

The district court imposed a sentence above the advisory Guidelines range:

A. Did the district court commit plain error in failing to give the defendant notice of the potential for a sentence above the Guidelines range when the Pre-Sentence Report identified grounds for an above-Guidelines sentence?

B. Did the above-Guidelines sentence impermissibly punish the defendant twice for the same conduct when the district court explained that certain factors were not adequately taken into consideration by the advisory Guidelines range?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-3179

UNITED STATES OF AMERICA,
Appellee,

-vs-

ROBIN BRUHJELL BRASS,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Since at least as early as 2005, the defendant, Robin Brass, ran a Ponzi scheme that resulted in losses of nearly $2 million to her victims. Many of her victims were at or near retirement age, and did not want to put their money at risk. Brass convinced her victims, people who were close to her and trusted her, that investing with her would be safe because she had a record of producing excellent results, because she had

ways to stop trading losses, and because her fund was federally insured and personally guaranteed by her own significant personal assets. None of this was true.

In fact, Brass used her victims' money to fund her own lifestyle, paying for the mortgage on her expansive home, home landscaping, interior design, furniture, clothing and salon visits. She also used certain victims' money to make lulling payments to other victims in order to keep the scheme going.

The impact of Brass's crimes on her victims was extraordinary. Victims lost their entire life savings and faced the possibility of living out their retirement years with no safety net at all. But the impact Brass had on her victims went beyond economic loss. Some of the victims sustained psychological injury, and at least one sustained negative medical consequences as she was left unable to pay for needed medical care and treatments.

On this record, the district court sentenced Brass to an above-Guidelines sentence of 96 months' imprisonment. On appeal, Brass challenges that sentence on two grounds. First, she claims that she had no notice of the potential for an above-Guidelines sentence. As a threshold matter, because the district court imposed a sentence pursuant to § 3553(a), Brass was not entitled to notice of an upward variance from the advisory Guidelines. But Brass received notice

anyhow. The PSR specifically detailed the potential for a departure based on extraordinary victim impact and the issue was extensively briefed by the government. As such, Brass's claim to have lacked notice of the departure is without merit.

Second, Brass claims that the above-Guidelines sentence impermissibly punished her twice for the same conduct. The district court explained, however, that certain characteristics of Brass's offense conduct were not adequately taken into consideration by the advisory Guidelines. On this record, that conclusion was not an abuse of discretion. The district court's judgment should be affirmed.

Statement of the Case

On November 22, 2011, a federal grand jury returned an indictment charging the defendant with four counts of mail fraud in violation of 18 U.S.C. § 1341. A4, A12-14. On April 25, 2012, the defendant pleaded guilty to Count Three of the Indictment. A7. On July 27, 2012, the district court (Robert N. Chatigny, J.) sentenced the defendant principally to 96 months of imprisonment; judgment entered July 31, 2012. A9. On August 6, 3012, the defendant filed a timely notice of appeal. A9.

Brass is currently serving her prison sentence.

Statement of Facts and Proceedings Relevant to this Appeal

A. The scheme to defraud

Starting at least as early as 2005, Brass held herself out to be a successful investment advisor,[1] purporting to do business through a series of different entities including Creative Financial Services, Nibor Investment Fund, and the BBR Group, LLC. PSR ¶7. Brass told investors that she had $19 million in her fund, and guaranteed that they would not lose money because she had a "formula" that put an automatic stop on losses. PSR ¶7. She assured victims that their investments were safe because she was "federally insured," and because she guaranteed their principal with her own personal assets—assets which she claimed to be substantial. PSR ¶7. Her residence was an asset she put on display, entertaining many of her victims at her well-appointed

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[1] As she did in the district court, Brass continues to deny ever claiming that she was an "investment advisor." Appellant's Br. 2. The precise term that Brass used to describe herself to her victims is not material to this appeal. As discussed below, it was relevant to the district court's sentencing analysis only in light of the court's finding that: "You continue to hold yourself out as a person who had a company that engaged in good faith in investing people's money and made errors of judgment that resulted in unintended harm. In truth and in fact, you stole from these people." A115.

home on 15 acres of property. PSR ¶7; Government Supplemental Appendix ("GSA__") 1-8. Brass also claimed to be registered with the Securities and Exchange Commission. PSR ¶7.

Brass continually assured her victims that their money was safe. PSR ¶8. She routinely sent them written account statements purporting to show substantial gains she had earned them on their money, making it seem as if she was delivering on just what she had promised. PSR ¶8. Brass went so far as to engage a third party, Entrust Group, to make victim statements available online so that when victims checked their account balances, they were able to view an account statement provided by a reputable company. PSR ¶8. What Brass's victims did not know, however, was that those account statements were themselves based on false information that Brass provided to Entrust. PSR ¶8.

When Brass had trouble making payments to her victims on time, she lied—telling them that their money was in the mail, that the check was lost, that she had wired the funds, that the bank was holding up payment, or that one of her assistants had made a mistake. PSR ¶9. When victims heard that the State Banking Commission was investigating her, Brass told them that she was being "audited," and that she could not make promised payments because State Banking had "frozen" her accounts. PSR ¶9. Brass

further used the State Banking investigation in an attempt to silence further complaints by her victims, telling them that if they reported her to the State authorities, their money might be frozen indefinitely. PSR ¶9.

Brass's claims were false and her assurances were merely efforts to lull her victims into a false sense of security. PSR ¶10. Brass was not registered with the SEC and was not "federally insured" in any manner whatsoever, despite her representations in numerous emails and on account statements she sent out. PSR ¶10. Nor did Brass invest her victims' money like she said she would. PSR ¶10. Rather, she used it for her own living expenses, personal care, to funnel money to her brother, and other relatives, and to make lulling payments to other victims. PSR ¶10. Brass kept stealing from victims after she knew she was being investigated by State Banking, when she knew her victims were particularly scared of losing more of their retirement savings, and when one victim was struggling with a variety of serious medical conditions that the money Brass stole was supposed to pay for. PSR ¶10.

B. Victim impact

1. Victims K.O. and R.O. (a married couple) and Victim E.W. (K.O.'s mother)

Brass recruited her investors from people who thought they knew her well—people who

she knew trusted her and would not ask many questions. PSR ¶11. For example, K.O. initially met Brass through a quilting group and became very close with Brass, traveling with her, and socializing with Brass and her husband. PSR ¶11.

During the course of their friendship, Brass would routinely discuss how successful she was for her clients. PSR ¶12. K.O. and her husband, R.O., lost a substantial amount of money in the market decline starting in 2008, and in 2009, R.O. lost his job. PSR ¶12. They were very concerned about their financial situation. PSR ¶12. Brass told K.O. that despite the market "tanking," her clients had not lost anything. PSR ¶12. Brass played specifically on K.O. and R.O.'s fears, saying that K.O. and R.O.'s financial advisor had failed to protect their investments and that she could have prevented those losses. PSR ¶12. K.O. was also very concerned about her mother's investment account over which K.O. acted as trustee. PSR ¶12. K.O.'s mother suffered from Alzheimer's and was in a full-time care facility. PSR ¶12.

Around 2009, K.O. discussed with Brass the possibility of investing her and her husband's retirement savings. PSR ¶13. She also spoke with Brass about investing her mother's trust account money, making clear that the money was needed to pay for her mother's on-going care and housing. PSR ¶13. Brass told K.O. that if she invest-

ed their money, Brass would be able to pay K.O. and R.O. monthly interest for their monthly expenses and a monthly interest payment for K.O.'s mother. PSR ¶13.

Brass assured K.O. that she would make them a lot of money, and that by the time the couple retired, they would have "millions." PSR ¶14. Brass represented to K.O. that her principal was guaranteed, and that she followed an investment formula that prevented losses. PSR ¶14. To backup those assurances, Brass gave K.O. and R.O. documentation confirming that guarantee in writing. PSR ¶14. As Brass did with other investors, she provided K.O. and R.O. with an Investment Savings Account agreement in which she stated that "[a]ll monies invested with The BBR Group are guaranteed and insured by the assets of the fund, as well as by Federal SPIC [sic] Insurance." PSR ¶14; GSA9. The SIPC is the Securities Investor Protection Corporation, a non-profit corporation funded by its members that provides insurance coverage for investors in the event a member broker-dealer fails. PSR ¶14. What K.O. and R.O. did not know was that Brass was not a member broker-dealer and therefore was not and could not have been "insured" by SIPC, as she falsely and repeatedly claimed. PSR ¶14. *See, e.g.*, GSA11, GSA12, GSA14, GSA76.

K.O. and R.O. made their first investment with Brass in March 2009, giving Brass a total of

approximately $68,000. PSR ¶16. Between March and July 2009, they invested approximately $344,826.46, a substantial portion of their life savings. PSR ¶16; GSA16-30. In addition, K.O. invested her mother's savings, a total of $210,000. PSR ¶16. Brass told K.O. that based on the investment of her mother's trust account, K.O. would receive $5,000 per month as investment income to use to pay for her mother's care facility. PSR ¶16. Further, Brass told K.O. that based on the investments she and her husband made, they would receive investment income of $4,000 each month. PSR ¶16.

The monthly investment payments Brass promised were often late, or the checks would bounce, causing K.O. and R.O. some amount of concern. PSR ¶17. But Brass always gave some excuse for why the payments were late or less than what was promised, or why the checks did not clear. PSR ¶17. Further, Brass gave K.O. and R.O. written assurances that their investments were doing well in the form of account statements. PSR ¶17. For example, an account statement dated September 15, 2009, indicated that K.O. and R.O.'s initial investment of approximately $85,000 into the "BBR High Yield Fund" in March 2009, had resulted in an account balance of over $107,000. PSR ¶17; GSA31. That statement bore a false advisory at the bottom that "All funds are guaranteed and insured by SIPC." GSA31; *see also* GSA32.

When K.O. and R.O. asked Brass specifically where their money was located and how her company was managed, Brass gave them conflicting (and confusing) information. PSR ¶18. For example, she told them that her "backroom trading operation" was being moved "from MB Trading to Goldman Sachs," in a letter dated July 31, 2009, when in fact, there was no "backroom trading operation." PSR ¶18; GSA33. K.O. and R.O. were sent on a wild goose chase of sorts in that Brass told them at one point that their accounts and funds were being switched from Goldman Sachs to Entrust. PSR ¶19. But then, when R.O. tried to talk to Entrust, he found out that Entrust had no record of receiving funds from Brass. PSR ¶19; GSA37.

By June 2010, K.O. and R.O. had been asking Brass several questions about their investments and Brass's companies. PSR ¶19. In a June 29, 2010 email to them, Brass attempted to reassure them by again stating that "We are registered with the SEC as being compliant under 'Reg D'." PSR ¶19; GSA34. But as Brass well knew, she was not registered with the SEC. PSR ¶19.

In describing the investment with her company, the BBR Group, Brass stated "[w]hile this CAN be viewed as a risky type of investment, as I stated to you in the beginning, I have never had a client loose [sic] money, because as a fund we guarantee you never will." PSR ¶20; GSA34. Brass also reassured K.O. and R.O. by stating

that "[a]lso as I've mentioned, all of our personal funds are invested in these funds, as my philosophy includes 'putting your money where your mouth is.'" PSR ¶20; GSA34-35.

In account statements and emails provided to K.O. and R.O. in May, September and October 2010, Brass represented to K.O. and R.O. that their respective accounts (and the trust account for K.O.'s mother), had grown substantially under her direction. PSR ¶21. In an email dated July 6, 2010, Brass represented that K.O. and R.O.'s $344,000 investment had grown to over $658,000 over several different (and confusing) accounts, and that the trust account for K.O.'s mother (E.W.) had grown from $210,000 to over $262,000. PSR ¶21; GSA38. This was consistent with what Brass falsely represented to K.O. and R.O. in account statements sent to them. PSR ¶21; GSA39, GSA40. These account statements, like others, also falsely claimed that Brass was a "MEMBER" of SIPC. PSR ¶21; GSA39, GSA40.

K.O. and R.O. collectively received $85,300.00 in repayments from Brass. PSR ¶22. When measured against what Brass represented to be their aggregate account balances, namely, $926,305.21, their total loss was $841,005.21. PSR ¶22.

2. Victim J.A. and Victim T.A.

J.A. and T.A., a married couple, met Brass in or around 2005 through a mutual friend. PSR

¶23. Beginning in 2008, J.A. and T.A. faced acute economic and personal challenges. PSR ¶23. T.A. was laid off from his longtime job and although he found new employment, it paid about half of what he made before. PSR ¶23. Further, his retirement account, the couple's primary nest egg, suffered large losses during the 2008 to 2009 market downturn. PSR ¶23. J.A. had been out of work for some time because she had been battling breast cancer, a fact that Brass well knew. PSR ¶23.

In 2009, T.A. talked to Brass about his investment account, expressing his belief that because the account was relatively modest, it had not been given adequate attention. PSR ¶24. Brass assured T.A. that she would be able to keep a "close eye" on his retirement account, keep it safe, and grow his retirement income. PSR ¶24. Brass said that she had an opportunity for J.A. and T.A. to purchase stock, hold it for two years, and make sizeable returns. PSR ¶24. T.A. invested more than $67,000 of his retirement savings with Brass in or around October and November 2009. PSR ¶24; GSA41, GSA43.

In December 2009, J.A. was in a serious car accident that left her with numerous significant injuries. PSR ¶25. She spent over three months at a rehabilitation center and endured multiple surgeries to restore her ability to walk unassisted. PSR ¶25. Brass visited J.A. in the rehabilitation center and spoke with J.A. about her finan-

cial difficulties, her medical costs, and the potential for a sizeable insurance settlement. PSR ¶25.

In May 2010, J.A. received approximately $165,000 as part of an insurance settlement, approximately $60,000 of which was immediately due back to the State to reimburse for medical expenses. PSR ¶26; GSA49. When Brass found out about the settlement, she immediately came over to J.A. and T.A.'s home and advised J.A. to invest the insurance settlement money with her. PSR ¶26. J.A. was reluctant to invest the money, especially the $60,000 that would be immediately due back to the State, but Brass convinced her that she should invest it so that she could at least earn some interest on it. PSR ¶26. Of particular importance to J.A. was Brass's comfort as a friend during her rehabilitation and Brass's assurances that she would personally oversee J.A.'s investments, knowing the economic challenges J.A. faced given her medical condition. PSR ¶26. J.A. called Brass when she received the checks and Brass went immediately to J.A. and T.A.'s home. PSR ¶26. Brass then rushed to have J.A. sign some paperwork, and hurried out of the house, saying that she had to get to the bank. PSR ¶26.

But when J.A. needed the money to repay the State, Brass did not give it back to her. PSR ¶27. When J.A. asked about it in June 2010, Brass told her she would have the money by July 2,

2010. PSR ¶27; GSA52. But that date came and went without payment. PSR ¶27. J.A. had to hound Brass about getting this payment, all while J.A. was dealing with multiple surgeries for ongoing injuries from her car accident, and treatment for cancer. PSR ¶27; GSA55. Brass told J.A. various lies, all of which were intended to stall for more time, even though it meant J.A. had to spend more time, effort and energy while in a vulnerable physical state. PSR ¶27. For example, Brass told J.A. that an "assistant" had brought the check to J.A.'s attorney's office, GSA56; that she had wired the funds to the law firm, GSA60; that the wire had been "frozen," GSA60; that money had been debited from her business account so J.A. would have to confirm her account data, GSA57; and that her accounts were frozen by the State of Connecticut "audit." GSA62.

All the while, Brass kept reassuring J.A. that her money was safe and that, in fact, it had grown substantially. PSR ¶28. Brass repeatedly apologized for not being able to "free" up funds for the medical reimbursement, and assured J.A. that the entire balance was earning interest. PSR ¶28; GSA64. Indeed, in a BBR Group Account Statement for October 2010 that Brass sent to J.A., Brass represented that J.A.'s investment had grown to $176,113.69. PSR ¶28; GSA65.

Brass also arranged for T.A. to receive false account information about his investments. PSR ¶29. Brass certified investor account balances to Entrust Northeast LLC and paid (or had her clients pay) Entrust to send out account statements based on the numbers she provided. PSR ¶29; GSA66. For example, on June 1, 2010, Brass certified that T.A. had $191,956.56 in his account, so when T.A. checked his balance online, he saw that his initial investment had grown substantially. PSR ¶29; GSA66. A printout of the online account statement from October 2010, purported to show that T.A.'s account balance had grown to $224,031.97. PSR ¶29; GSA67.

It was not until January 7, 2011—nearly seven months later—that Brass wired $50,000 to J.A.'s attorneys. PSR ¶30. But that was only a portion of the money J.A. owed to the State, and although Brass made a $1,000 "interest payment" to J.A. and T.A. on March 30, 2011, she never paid back the rest of the medical reimbursement or any of their other investment money. PSR ¶30; GSA72. Based on J.A. and T.A.'s reported account balances, they suffered a net loss of $349,145.66. PSR ¶30; GSA86.

For J.A., the fact that money she counted on to pay for medical treatment and expenses was not available had a negative effect on her medical condition. PSR ¶31; GSA178. She had to forego seeing doctors she wanted to see, and skip

medical tests and recommended physical therapy. PSR ¶31; GSA178. She opted not to have knee replacement surgery on her left knee because she did not have the money and did not want to put her family further into debt. PSR ¶31; GSA178, GSA74. She was undergoing continued chemotherapy and other treatments and was distraught about what the future would hold for herself, her husband and their children. GSA178.

3. Victim J.F.

Victim J.F. met Brass in or around 2005 and was a member of the same quilting group as K.O. PSR ¶32. In 2009, J.F. wanted to consolidate her accounts, and talked to Brass about her business as an investment advisor. PSR ¶32. After hearing how well Brass was doing for her other clients, J.F. decided to invest with Brass, someone she trusted and considered to be a good friend. PSR ¶32.

Just as she had done with K.O. and R.O., Brass gave J.F. an Investment Savings Account agreement to fill out which stated that "[a]ll monies invested with The BBR Group are guaranteed and insured by the assets of the fund, as well as by Federal SPIC [sic] Insurance." PSR ¶33. In her "Subscription Options Page," J.F. selected "a Two year period in the 'High Yield' fund (defined as principal guaranteed with yield flexible)." PSR ¶33; GSA80-81.

From July 2009 to December 2009, J.F. invested approximately $157,000 with Brass. PSR ¶34; GSA82. She specifically told Brass that she did not want her money in any high-risk funds. PSR ¶34. Brass assured J.F. that her money would be safe because she had a formula to stop sales to prevent her from losing any money. PSR ¶34. Brass also told J.F. that J.F. should see a 20 to 25% return on her investment. PSR ¶34.

Periodically, and at least as late as October 2010, Brass sent written account statements to J.F. PSR ¶35; GSA84-85. For example, in October 2010, Brass falsely represented to J.F. that her investment had grown to $204.005.44. PSR ¶35; GSA84. Like the BBR Group statements sent to K.O. and R.O., J.F.'s statement had a false representation on it that Brass was a "member" of SIPC. PSR ¶35; GSA84-85.

On August 16, 2010—three days before Brass sat down for the first day of her deposition taken by the Connecticut State Department of Banking during its investigation—Brass took another $10,000 from J.F. PSR ¶36; GSA82. Based upon her account statements, J.F.'s account had a balance of $204.005.44. PSR ¶36. She never received any repayments on her investments, thus, her total loss was $204,005.44. PSR ¶36; GSA86.

4. Victim P.H.

Victim P.H. was 75 years old at the time of sentencing. A89. Her daughter was friends with

Brass through their mutual association with the Wiccan religion. PSR ¶37. In March 2005, P.H.'s 44-year old daughter died. PSR ¶37. Brass was comforting to P.H. during this time and helped with funeral arrangements. PSR ¶37. Brass also helped to establish a trust account to accept donations for a Wiccan community in Ireland in the daughter's memory. PSR ¶37. Brass was responsible for arranging for the donation payment to be made and in late 2006 or early 2007, Brass told P.H. that the donation had been made via wire transfer. PSR ¶37.

After that, a friend of P.H.'s traveled to the Wiccan community in Ireland and asked the director of the community about the donation. PSR ¶38. The director did not recall ever receiving a donation. PSR ¶38. P.H. repeatedly asked Brass to trace the wire transfer, but never received any response. PSR ¶38.

After her daughter's death, P.H. mentioned to Brass that since she and her daughter had been sharing living expenses, she now needed more income to cover her expenses. PSR ¶39. Brass told P.H she could invest through her company, Nibor Investment Fund. PSR ¶39. In August 2005, P.H. invested approximately $54,000 with Brass from her daughter's estate. PSR ¶39. Brass told P.H. she would earn a 15% return which would be directly deposited into her account in the amount of $675 each month. PSR ¶39; GSA87. Brass told P.H. that she would earn

a "guaranteed return of a minimum of 15%," and [y]our principal and interest are fully guaranteed by the assets of the fund, as well as SPIC [sic] insurance through the supplying wholesaler." GSA87.

Shortly thereafter, P.H. sold the condo she had inherited and invested the proceeds of $80,000 with Brass. PSR ¶40; GSA88. On May 6, 2008, P.H. signed an Investment Savings Account under which she selected "a three year period for an offered 20% per annum return," that was, again, "guaranteed and insured by the assets of the fund, as well as by Federal SPIC [sic] insurance." PSR ¶40; GSA90-91.

P.H. received payments of $2,300 per month throughout 2008 and 2009. PSR ¶41. But in late 2009, she started having difficulties getting payments from Brass. PSR ¶41. Brass told P.H. that the State of Connecticut was conducting an "audit" of her business. PSR ¶41. When monthly payments were still not being made, P.H. asked Brass about it and Brass told her that the State had "frozen" her assets and that was why Brass was unable to pay her. PSR ¶41.

In March 2011, P.H. received a letter from Brass (erroneously dated March 15, 2010), stating (falsely) that the BBR Group has been in an "audit" and trying to quell her investors' "general nervousness" about their investments. PSR ¶42; GSA92. The letter stated "[s]ince the assets of the fund are not currently liquid, I am in the

process of liquidating all of my personal assets in order to give you the option of holding onto your investment and/or having me buy out your position with the firm at it's [sic] current asset value." GSA92. Brass further explained to P.H., and other investors, that if they should "choose to liquidate now," they would only get "the CURRENT value of [their] investment and therefore [they] are NOT eligible for any future earnings on those investments that the company may be yielding." GSA92. Brass sent this letter months after sitting for a deposition with State Banking in September and October 2010. PSR ¶42; GSA112. P.H. believed that she was earning a good return with Brass so she sent a note on April 6, 2011, stating that she was "electing to stay in the fund and to continue to receive any future earnings on the investments." PSR ¶42; GSA93.

After accounting for payments Brass made to P.H. against her $134,000 investment, P.H. was out $39,991.41. PSR ¶44; GSA86.

5. Victim L.W.

Victim L.W. was 93 years old at the time of sentencing and had known Brass for approximately 20 years. PSR ¶45. Victim L.W. considered Brass to be a very close friend. PSR ¶45.

L.W. started investing with Brass in approximately 2004 and appears to have received the same type of guarantees as other investors in

that she was told "[y]our principal and interest are fully secured by the assets of the fund, as well as SPIC [sic] insurance through the supplying wholesaler." PSR ¶46; GSA96. L.W. reported receiving monthly interest payments from Brass regularly until approximately 2010, when Brass started having financial difficulties. PSR ¶46. Brass told L.W. that her financial trouble began when her (Brass's) brother passed away a few years ago and Brass had to be responsible for her brother's finances. PSR ¶46. Brass told L.W. that her brother's wife remarried and the new husband gambled away money that was supposed to provide for the wife. PSR ¶46.

The documentation for L.W.'s investments shows that she gave Brass approximately $670,755.00 from July 2004 through August 11, 2011 and that Brass made repayments to her in the total approximate amount of $199,534.63 for a total loss of $471,220.37. PSR ¶51; GSA105-110.

6. Victim Heritage Concert Society

At the recommendation of L.W., the Heritage Concert Society (HCS), an arts group at the Heritage Village retirement community, invested $50,592.86 with Brass in September 2008. PSR ¶52. HCS took a draw of $10,000 in April 2009 leaving a loss of $40,592.86. PSR ¶52.

7. Other investors not counted as "victims" for purposes of sentencing enhancements

In addition to the nine victims described in the PSR, the district court had before it evidence of other individuals who had given money to Brass. Because these individuals were substantially repaid by the time Brass learned of the investigation, they were not included as "victims" for purposes of sentencing enhancements. But the nature and timing of their repayments show that Brass was running this scheme as far back as 2005. The spreadsheet showing Brass's expenditures of L.W.'s investment money, GSA105-111, shows lulling payments made to H.H. (4/18/05; 7/28/05; 10/12/05); C.S. (4/20/05); R.R. (5/3/05; 8/5/05; 10/5/05; 7/16/08; 7/31/08); and J.L.A. (7/29/05; 1/7/09). Each of these individuals (except for R.R.), along with others, such as P.G., K.B. and T.B., and A.D. were described in a memorandum prepared by State Banking. GSA115-20.

After Brass entered her plea and the parties had stipulated to a loss amount, R.R. submitted a victim impact statement and supporting documentation showing that Brass represented R.R.'s total investment to be worth $1,033,403.78 as of March 31, 2011. GSA128-29. R.R.'s documentation showed that as far back as September 6, 2004, Brass was representing to R.R. that "each investor's 'investment' is guaran-

teed with the assets of the fund, also by SPIC [sic] (similar to FDIC) and then I take additional insurance policies for each investor (should I die) with those investors' as beneficiaries." GSA135. Brass told R.R. that she was at greater risk losing her money deposited at a bank because the FDIC "only covers up to $100,000 per individual account." GSA135. Further, Brass told R.R. "we have to report to the SEC on a quarterly basis, so everything we do is VERY carefully managed and accounted for, thus under good scrutiny." GSA135. As discussed earlier, Brass's "fund" was never "insured" by the SIPC, she was not registered with the SEC, and she did not report information to the SEC.

C. How Brass used victims' money

As shown in spreadsheets submitted by the government at sentencing, Brass deposited victims' funds into her business account and used money from that account to do her personal spending and make lulling payments to other victims. *See* PSR ¶53; GSA16-30 (K.O. and R.O.), GSA78-84 (J.F.), GSA41-48 (J.A. and T.A.), GSA222-25. For example, on the same day J.F.'s first investment of $34,000 was deposited into the BBR bank account on July 20, 2009, Brass made a lulling payment to R.O., and payments on credit card bills. GSA78, GSA222. Within the next two days, she also made significant payments to Jeffrey Bruhjell (her brother) ($4,000), to Indocan Resources ($5,000), a company that

Bruhjell ran, and a lulling payment to R.R. PSR ¶53. Immediately following J.F.'s second investment of $46,623.52 on August 17, 2009, Brass made car payments, withdrew money at the ATM, made credit card payments, and made a payment to a previous investor, A.D. PSR ¶53; GSA79, GSA222.

Brass spent J.A. and T.A.'s investments in a similar way. Immediately after T.A.'s initial investment of $11,805.80 on October 21, 2009, Brass made payments on her credit card, transferred money to her joint checking account with her husband, made a payment to R.O., and paid for personal spending at Costco and Horchow, among other places. PSR ¶54; GSA41, GSA222. Immediately after Brass took J.A.'s insurance settlement money, she paid off an encumbrance to First Financial Title of Minnesota on a house in which one of her relatives was living ($100,000) and made lulling payments to P.H., K.O. and R.O. and to others. PSR ¶54; GSA45-46, GSA223. Over the next week, she simply spent money as she pleased at Costco, CVS, Ross Simons Catalog, Talbot's, iTunes, LJ Edwards (furniture), Petco, Pier 1, landscaping, Thomasville (furniture), and the Apple store. PSR ¶54; GSA46-48, GSA223.

The J.A. and T.A. summary shows a $5,000 expenditure at FXCM Trading on October 28, 2009. PSR ¶55; GSA42. Although the FXCM account was opened in October 2009, that account

only had two trades which took place on November 12, 2010, leaving the account balance at $259.21. PSR ¶555; GSA114, GSA223.[2]

Analyzing the expenditures from Brass's business accounts from the period July 2005 (when the earliest investor for which the government had backup documentation at the time of Brass's plea) through April 2011 shows that Brass spent the following:

- $896,403.58 on bank loans, mortgages, credit cards, car payments and expenses
- $235,487.24 in ATM withdrawals and checks to cash
- $84,441.54 on furniture, interior design services and other home products
- $48,986.61 on home landscaping
- $27,759.68 in other household expenses (*e.g.*, phone, cable, utilities)
- $21,357.75 on clothing

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[2] The other trading account activity that the government pointed out in Brass's bank records was a transfer of $200,000 from the BBR account to Robin Brass's personal account into a trading account at MB Trading. GSA114, GSA224. However, that account was not actively traded until March 31, 2010, long after most of the investors had already put in their money. GSA114, GSA224.

- $17,691.82 on Apple products, iTunes, iStore
- $11,668.35 on a trip to New Zealand and Australia in March 2009.
- $2,906.67 on hair and nail salon costs

PSR ¶ 56; GSA154-58, GSA224.

During that same time period, Brass funneled money that she did not spend on herself to various family members. PSR ¶57. For example, Brass paid $25,000 for her nephew's Boston College tuition. PSR ¶57; GSA225. She also regularly siphoned off money to her brother, Jeffrey Bruhjell, a fraudster in his own right. PSR ¶57. Bruhjell ran a company called Indocan Resources, a penny stock company that solicited investors without being registered, conduct that got him barred by the Pennsylvania Securities Commission in October 2005. PSR ¶57; GSA160.

Brass claimed to have learned of her brother's untrustworthiness "too late," and to have fired him from her company in 2009 for unauthorized trading GSA150-51, GSA247. But this claim was inconsistent with Brass's own bank records which showed that she continued to funnel money to her brother until January 2011—a date well after many investors stopped receiving any payments and more than a year after she purportedly fired him. PSR ¶57; GSA152. In total, Brass paid her brother and his company $300,090.00. PSR ¶ 57; GSA152-53.

D. Brass's obstructionist conduct

Brass repeatedly lied to her victims while she was being investigated by State Banking, telling them that she was only being "audited" and that she was unable to pay them their money because State Banking had "frozen" her accounts. *See, e.g.*, GSA92, GSA161, GSA162, GSA62, GSA163. In fact, Brass was not being audited, she was the subject of an investigation, and State Banking never froze any of her accounts.

Brass used this story as a way to intimidate her victims into silence. She expressly told K.O. and J.A. not to file a complaint with the State because that would result in the "freeze" taking longer, or being indefinite, in which case K.O. might never see her money. *See* GSA161. Brass used the same threat against J.A. *See* GSA171-72, GSA186, GSA187. The message in all of this was clear: "Don't report me or you may never get your money."

Brass's attempts to silence her victims was consistent with her continued misrepresentations to them, well after she knew she was being investigated by State Banking, after she sat for deposition, and even after she knew about the federal investigation. For example, as late as May 2011, Brass was telling victims that she had found a lender for her company which would allow her to pay everyone back, with interest. She went so far as to claim a particular closing date and other details such as that her house

(which was under water at the time), was being used as "collateral," and that there was a "three day rescision [sic] period." *See* GSA188, GSA189.

Like her other promises however, this was false, and Brass strung her victims along like she had before. *See, e.g.,* GSA190 (Brass stating "closing happened on Thursday so unless things change (can't imagine why but I'm gun shy at-bthis [sic] point) funding will be Thursday next week"), GSA191 (K.O. asking "Why did we not receive our funds today as promised?" and Brass stating "The wire has not yet arrived, I've just phoned [attorney's] office and it hasn't been received yet. Due to the size of the wire, I suppose (sigh) that the bank will hold on to it as long as they can."). Brass went so far as to say that a closing had actually occurred and that victims' account statements were being audited as a way to explain the delay in getting money to them. *See, e.g.*, GSA192. When R.O. pressured Brass for documentation to prove that the transaction was in fact real, Brass threatened that she could simply declare bankruptcy, implying that that would leave R.O. nothing. GSA192.

Again, Brass's victims had made financial commitments based upon her promises and were left struggling to make payments they had counted on being able to make. *See e.g.,* GSA194 (K.O. stating "I promised the nursing home I would make payment on may 31st, then the next three days you said the funds would be sent. I

am already a month behind. PLEASE wire me $6000 now so I can pay them. Please.").

After it became clear that no money was forthcoming, Brass told her victims that she had found a "buyer" for her business. *See, e.g.*, GSA195; *see also* GSA196 (Brass stating "[f]unds are STILL on track to be received by Fri, or early next week. . . . Sale of business still on track, though that MAY be a 90 day process. At the end of that time, you all will have funds returned IN FULL, plus the interest rate promised. So not ONE cent will be lost . . . ."), GSA50. In other words, despite knowing of the investigation into her fraud, Brass kept making misrepresentations to her victims.

Summary of Argument

The district court did not commit plain error in imposing a non-Guidelines sentence above the advisory Guidelines range. Although Brass claims—for the first time on appeal—that she received no notice of the potential for an upward variance from the Guidelines range, she was not entitled to notice of the upward variance given that the district court imposed a non-Guidelines sentence under § 3553(a). Further, the PSR notified Brass of the potential reasons for the upward variance and why those factors warranted a variance, the parties had an opportunity to brief the issues before sentencing, and Brass had an opportunity to and did argue against the var-

iance on the specific grounds that Brass advances on appeal.

Nor did the district court, as Brass alleges, punish her twice for the same conduct in imposing an upward variance after applying sentencing enhancements for loss, abuse of trust, vulnerable victim and obstruction of justice. Instead, the district court carefully considered how the sentencing enhancements compared to the factors it believed supported the upward variance and gave a detailed explanation for its conclusion that the Guidelines range, even with enhancements, did not fully account for Brass's conduct.

Argument

I. Brass received more than adequate notice of the potential for an above-Guidelines sentence, and the district court properly imposed that sentence.

A. Relevant facts

1. The guilty plea, the PSR and the parties' sentencing briefs

On April 25, 2012, Brass entered a guilty plea to Count Three of the Indictment charging her with mail fraud in violation of 18 U.S.C. § 1341. A7. The parties agreed that Brass's base offense level was 7, that 16 levels were added under § 2B1.1(b)(1)(I) for loss of more than $1,000,000, and that three levels were subtracted for ac-

ceptance of responsibility. A18. The parties left open their respective rights to argue for or against other sentencing enhancements. A18.

The PSR calculated Brass's advisory guidelines range as follows: Base offense level 7, plus 16 for loss over $1,000,000, plus 2 levels for abuse of trust, plus 2 levels for vulnerable victim, plus 2 levels for obstruction of justice, minus 3 levels for acceptance, resulting in a total offense level of 26 and an advisory guidelines range of 68 to 78 months. PSR ¶¶69-75. The PSR also expressly noted that the guidelines did not appear to have adequately addressed the "extraordinary victim impact suffered in the offense of conviction." PSR ¶140. Specifically, the PSR stated that "Ms. Brass's conduct was egregious and has caused several, if not all of her victims, extreme financial hardship and possibly ruin." PSR ¶140.

On July 16, 2012, the government filed its Memorandum in Aid of Sentencing for the scheduled July 27, 2012 hearing. A8; GSA201. The government devoted a substantial portion of its sentencing brief to describing the devastating impact Brass's conduct had on her victims. GSA208-22. The government also disputed the notion that Brass ran a legitimate investment company by detailing numerous misrepresentations she made to her victims and showing how Brass spent her victims' money. GSA222-25. In particular, the government argued that trading

activity in Brass's accounts was minimal and that while Brass blamed her brother for trading, her bank accounts showed minimal trading activity. The government also offered evidence showing that the activity in a foreign exchange trading account Brass had cited during the investigation had only two trades in it on November 12, 2010. GSA223. Further, the government detailed that the only other investment-related activity from Brass's bank records showed a $200,000 deposit into an MB Trading account, but that account was not actively traded until March 31, 2010. GSA224. The government also submitted evidence, including two spreadsheets tracking Brass's bank activity, that showed Brass spent a $2 million mortgage on personal items, not on her purported business. GSA199-200, GSA241-42.

On July 25, 2012, Brass filed her Memorandum in Aid of Sentencing. A9; GSA245. Brass insisted that she was simply involved in "an investment vehicle that went bad," GSA245-46, that she operated "an investment fund," GSA246, and that the "cause of her wrongdoing stemmed from huge losses in her trading accounts for friends and family, caused by her brother and deceased partner," GSA247. Brass offered no evidence in support of these assertions, nor did she respond to the evidence offered by the government. Brass also continued to insist that she and her husband invested over $2

million into the fund and "mortgaged their home partly for that purpose." GSA246. Again, Brass offered no evidence in support of this claim and offered no response to the government's exhibit detailing how that money was actually spent.

Finally, Brass made clear that she did not have anything to say about victim impact, stating that "[m]uch of the government's sentencing memorandum describes the impact on her victims, with which she has no objection and is genuinely sorry for her conduct." GSA250.

On July 26, 2012, the government submitted a Reply to Defendant's Memorandum in Aid of Sentencing. A9; GSA261. The government directly refuted Brass's claim to have run a legitimate "investment vehicle" and to have sustained "huge losses in her trading accounts" by referencing the portions of its sentencing memorandum (including evidentiary support) that tended to refute those claims. GSA261.

2. The sentencing hearing

On July 27, 2012, the district court held Brass's sentencing hearing. A24. The court confirmed the parties' stipulation that Brass's base offense level was 7, and that 16 levels were added for loss of at least $1,000,000. A28. The court gave defense counsel an opportunity to further argue on the applicability of sentencing enhancements for abuse of trust, vulnerable victim and obstruction. A28-33. It then found that each

of those enhancements applied, for a total offense level of 29. A29-35. The court reduced Brass's offense level by three for acceptance of responsibility. A35.

a. Brass's statements during the sentencing hearing and the district court's colloquy with counsel

Brass addressed the court at sentencing, saying "I was very wrong about many of the investments and human resource decisions that I made which caused everything to fail." A49. Brass also said that she was "deeply sorrowful to everyone for the pain and disruption that was brought to everybody as a result of my poor choices and bad judgments." A50. She addressed some of the individual victims by name, stating that if she had known certain "investments were going to go bad," that she "wouldn't have done them." A50-51. Brass asked the district court if it had any questions and the court stated:

> I have many, actually, but I'm concerned that were I to engage in a colloquy with you, it would be harmful to your interest, and I don't want to take advantage of you.
>
> But I will tell you that I'm stunned by what I see in this case. Looking at the communications that you submitted to your victims, it is a powerful example, in

> my opinion, of behavior that is beyond the pale and conscience shocking, so I'm going to refrain from asking you questions. I don't think it will help you.

A51.

The court did address questions to defense counsel, asking:

> [Defense counsel], the government urges me to conclude that the defendant is, in essence, a predator who groomed her victims and having gained their trust, betrayed them by exploiting them in a way that shows an utter lack of conscience. Why should I not make that finding? What can be said on behalf of his person that makes her criminal conduct less egregious than it is depicted by the government?

A52. Defense counsel responded that initially Brass "was on a good footing in terms of her being an investment—having an investment vehicle for these people." A52. Counsel explained that Brass started lying to her victims when she realized that there were huge losses that could not be paid. A52.

The district court then asked about the inception of Brass's alleged work as an investment counselor. A52. Counsel explained that Brass started working as a trader for family and friends and because of her success, other people joined in. A53. Counsel attributed the offense to

Brass having "made bad decisions about what to do with other people's money that led her here to court today." A53.

The district court then asked defense counsel whether there was any evidence that Brass's "fund" was legitimate and actually made investments that yielded returns paid to investors. A54-55. The court noted that "It's difficult for me to know, of course, since all I have is the record in front of me, but in the absence of any objective evidence demonstrating that in fact there was a legitimate investment fund of the sort you would like me to see, I have great difficulty believing the defendant." A55.

The court explained its difficulty in that regard by citing PSR ¶123 in which Brass reported to Probation that she worked at several colleges as an adjunct college professor. However, the PSR noted that records received from four institutions all stated that there were no records of Brass working at their school. PSR ¶123. The court found that "remarkable, because typically institutions of higher learning are quick to confirm whether somebody has taught there or not, and here we have no evidence to corroborate your client's claim." A56.

The court then asked defense counsel to explain what Brass was referring to during her remarks regarding the "human resources" division of her company and the "errors" she supposedly made. A57. Defense counsel responded that

he believed Brass was talking about having sent money to her brother, which was a "poor choice, given his own track record." A57. The court then directed counsel's attention to a June 29, 2010 letter Brass wrote to victims K.O. and R.O. in which Brass claimed to have traders, accounting staff, part-time staff and network administrators working for her. A58-59; GSA34-35. The court then stated:

> It appears to me that while there was a company name, there really was no company. It appears to me that while the defendant claimed to be in charge of this company with traders all over the world, it was all phony. And I submit to you that in the absence of any evidence to substantiate the defendant's statements, I should conclude that it was all illusory, there were no investments, there were no strategies, there were no traders, there was really nothing to this. It was all one big lie. Why shouldn't I make that finding?

A60. The court then asked defense counsel:

> [Defense counsel], is there any document in this record that reflects the existence of a single investment? An actual investment made on behalf of an investor for the purpose of earning a return? Something that was actually legitimate?

A60-61. Defense counsel responded, "Nothing in the record, Your honor, no." A61.

The court also asked government counsel whether "any of the money defendant took from people, ostensibly for purposes of investment, was in fact actually invested in any way, shape or form." A65. The government summarized the evidence it presented in its sentencing brief showing that there was only minimal evidence of trading, with most of it coming after most of the victims had put the bulk of their money with Brass. A45. Brass did not refute or respond to the government's assertions.

The court also asked government counsel about Brass and her husband being substantial investors in the fund, a claim that Brass maintains on appeal. A68. The government referred back to the summary it submitted in support of its sentencing brief showing that the $2 million mortgage Brass claimed to have invested was actually spent on home renovations, property taxes, lulling payments to other investors. A69; GSA241-42, GSA199. Again, Brass did not refute or respond to the government's argument.

b. Victim statements during the sentencing hearing

Six of Brass's victims addressed the court at sentencing. K.O. confirmed that she and Brass developed a very close friendship and that she trusted Brass "with [her] life." A76, A80. K.O.

explained how she and her husband invested their life savings with Brass and money that K.O. held in trust to care for her mother. A76-81. K.O. expressed the impact that Brass's crimes have had on her family, stating:

> The pain that this has caused us is incalculable. The theft of our money and my mom's money is a tragedy that goes beyond the theft of money. She stole from us our financial security for the rest of our lives. She put my mother on welfare. The meager amount that we had for retirement savings, at least would have been growing over the last three and a half years, but now we have nothing.
>
> The sense of betrayal that I feel is profound. I lost the person that I thought truly was closer to me than a sister could be.
>
> And worse, she stole from me my entire financial security. She stole everything my 90 year old mother with Alzheimer's disease has to support her for the rest of her life.
>
> * * * * *
>
> . . . every day of my life I am frightened about my future, some days near panic, and other days are better, but I'm always afraid. My concentration has suffered. I have insomnia. I fight depression. I have a few years in which to rebuild an entire re-

> tirement plan, and my husband and I can't make ends meet now. Our children are frightened for us."

A82-83.

R.O. told the district court how difficult it was for him to find employment at 63 years old in the social service field. A86. He described having a job recently, but that he and K.O. had been living paycheck to paycheck and that the job had ended. A86. "Now the paycheck is gone and we have no savings to back us up and we have no retirement at all." A86. R.O. described some of the physical effects he attributed to Brass's crimes, stating: "I have depression and severe anxiety. The fear and stress caused me to have a heart attack last year. Every day I am frightened I will have another." A86-87.

Victim P.H., a 75-year old victim who is partially disabled and unable to get a job, A89, also addressed the court. P.H.'s daughter had been a friend of Brass's and when the daughter died at the age of 44, Brass was consoling and supportive. A66. Brass offered to invest the daughter's life insurance policy and to get P.H. a part-time job. A89. P.H. told the district court:

> She told me she could invest the money from my daughter's life insurance so I would be taken care of. You don't think a friend would do this to another friend. I believed her every time she came to visit.

> Every time she took me out to dinner or asked me to crochet something for her. I believed that she was looking out for me because she was a friend of my daughter's, but it was all a lie.

A90.

P.H. was forced to file bankruptcy and to rely on food stamps and housing subsidies in order to survive. A91-92.

Victim L.W. also addressed the court at sentencing, stating that she was 93 years old, and "having lost just about all of my savings, there's no way I can recover that." A92. L.W. described that her health had been failing the past few years and she had a lot of medications and doctor bills to pay. A92-93. She said that she invested "just about everything [she] had" with Brass and that she felt secure in doing so because "it was supposed to be insured by SIPC," and because "I felt secure with Robin always." A93.

L.W. told the court that she did not know how she was going to support herself:

> I think if I'm very, very careful, if I'm very careful, I can survive two years on what I have, and then after that, I don't know what's going to happen to me. I'm 93. There's no way I can earn a living. As I said, my health is not particularly good anymore."

A95.

T.A. addressed the court next. A96. He responded to Robert Brass's statement during the hearing that he and Brass lived frugally and had gone on a cruise recently, but did not have to pay for it. A46-48. T.A. stated:

> Mr. Brass says, he's retired now and he says, oh, I went on vacation, he says, we took a cruise, but I didn't have to pay for it. Number one, I'm never going to be able to retire. My job ended this past Sunday. I have no job. I have no 401K. Nothing. That's all gone. And we don't take trips. We don't take trips to, you know, cruises and stuff. Know where we go? Treatments for her [J.A.] in the hospital every day. We spent Christmas Eve, Christmas Day, New Year's Eve, New Year's Day, Thanksgiving, that whole time we spent in the hospital, and she'll [J.A.] explain everything on that."

A97.

J.A. (T.A.'s wife) was the last victim to address the court. She described how she was diagnosed in April 2009 with Stage 4 breast cancer and how shortly after she began treatment, her husband (T.A.) suffered a 50% pay cut. A99. She stated that they suffered a loss of more than half of their retirement income due to the stock market crash in 2008 and were looking for a finan-

cial planner with a "more personal touch." A99. Brass promised to be that person.

J.A. also described how she got news on December 10, 2009 that her cancer had gone into remission and that on the way home she got into a car accident. A99. She spent 14 weeks in a rehabilitation facility during which time Brass spoke with her and J.A. about investing her insurance settlement and keeping it available because it would be needed to pay for medical expenses. A99-100. When the settlement check came in, J.A. gave it to Brass, stating "at this point I'm in a wheelchair, I'm in a great deal of pain, and I feel like I need to trust somebody . . . ." A100.

J.A. told the court that once she asked for a part of the settlement to pay her medical expenses, Brass began to give her "stall tactics," A100, even telling J.A. that the State of Connecticut had frozen her bank accounts, A101. J.A. told the court how she became so infuriated that she actually called the State Banking Commission and found out that it had never frozen Brass's accounts. A101-102. J.A. described being "just dumbfounded, devastated, overwhelmed with how was I going to pay for my medical expenses? How could I take care of myself? How could I take care of my family? She not only left us broke, but she left us in debt to the tune of a couple of hundred thousand dollars." A102.

J.A. described how "now that my husband is unemployed, it's only intensified the stress." A102. She confirmed that Brass's crime had negatively impacted her medical condition, stating that she "ha[d] not had physical therapy for many of the other prescribed activities and products that my doctors want me to have because they're out of pocket and I can't pay for them . . . ." A103.

J.A. summarized the impact of Brass's crime on her and her family:

> It's outrageous the pain and the suffering and the devastation that it has caused me, my husband and my children who have had to witness their parents being made a fool of for being taken advantage as well as not being able to provide for them the things that they need. As a result, we are on Medicaid Husky, we are on food stamps, and it didn't have to be, it wasn't supposed to be like that, if we had had our money, if it hadn't been stolen."

A103-04.

c. The court's imposition of sentence

Before imposing sentence, the district court asked government counsel about ¶140 of the PSR concerning extraordinary harm to the victims. A107. Government counsel told the court

that the court had discretion to sentence the defendant in accordance with that paragraph, but that the government was recommending the high end of the advisory range. A107, A108, A110. Defense counsel asked for clarification and the court directed counsel to ¶140 and read the paragraph out loud in open court as follows:

> After further consideration of the defendant's conduct, as well as the victims' statements received from the Government, it appears that a sentence above the Guidelines range may be appropriate. Ms. Brass's conduct was egregious and has caused several, if not all, of her victims extreme financial hardship and possible ruin. The Guidelines do not appear to adequately address the extraordinary victim impact suffered in the offense of conviction.

A108.

The district court asked defense counsel for his comments and defense counsel emphasized that Brass would be looking at a less onerous sentence if she had worked for a bank and stolen much more money. A108. Counsel argued that the grounds for any upward departure were "all built into the Guidelines." A109. Counsel stated that "there is no loss enhancement for the victims being particularly more hurt than the person, say, who steals $8 million from a bank. And what concerns me here is that in any sentencing,

if a victim is particularly injured and is not insured, that somehow we're talking about a new enhancement, an additional punishment for the defendant, which I don't think is fair." A109. Counsel concluded by saying "I would ask Your Honor to impose a sentence within the Guidelines. I don't believe a departure above the Guidelines is warranted even with the horrible circumstances here." A110.

At no time did defense counsel object to not having notice of the possibility of an above-Guidelines sentence or ask for more time to respond to such an argument.

B. Governing law and standard of review

1. Sentencing law generally

After *United States v. Booker*, 543 U.S. 220 (2005), at sentencing, a district court must begin by calculating the applicable Guidelines range. *See United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc). After giving both parties an opportunity to be heard, the district court should then consider all of the factors under 18 U.S.C. § 3553(a). The requirement that the district court consider the section 3553(a) factors, however, does not require the judge to precisely identify the factors on the record or address specific arguments about how the factors should be implemented. *See Rita v. United States*, 551 U.S. 338, 356-59 (2007). And although the judge must

state in open court the reasons behind the given sentence, 18 U.S.C. § 3553(c), "robotic incantations" are not required. *Id.*; *see also United States v. Goffi*, 446 F.3d 319, 321 (2d Cir. 2006).

On appeal, a district court's sentencing decision is reviewed for reasonableness. *See Booker*, 543 U.S. at 260-62. This reasonableness review consists of two components: procedural and substantive review. *Cavera*, 550 F.3d at 189.

"A district court commits procedural error where it fails to calculate the Guidelines range (unless omission of the calculation is justified), makes a mistake in its Guidelines calculation, or treats the Guidelines as mandatory." *Cavera*, 550 F.3d at 190 (citations omitted). A district court also commits procedural error "if it does not consider the § 3553(a) factors, or rests its sentence on a clearly erroneous finding of fact." *Id.* Finally, a district court "errs if it fails adequately to explain its chosen sentence," including, "'an explanation for any deviation from the Guidelines range.'" *Id.* (quoting *Gall*, 552 U.S. at 51).

With respect to substantive reasonableness, this Court has recognized that "[r]easonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion. Thus, when we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge 'exceeded the

bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.'" *Fernandez*, 443 F.3d at 27 (citations omitted). A sentence is substantively unreasonable only in the "rare case" where the sentence would "damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009).

2. Notice requirements for sentences above the Guidelines range

Pursuant to Federal Rule of Criminal Procedure 32(h), "before a district court can depart upward on a ground not identified as a ground for departure either in the presentence report or in a prehearing submission by the Government, Rule 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling. *Burns v. United States*, 501 U.S. 129, 138 (1991). As explained by the Court, "[t]his notice must specifically identify the ground on which the district court is contemplating an upward departure." *Id.* at 138-39; *see also United States v. Carter*, 203 F.3d 187, 190 (2d Cir. 2000). The judge need not personally provide the notice to the parties, however. "So long as the defendant is adequately warned that he faces the possibility of an upward departure so that he will not be unfairly surprised and will

have adequate opportunity to argue against it, the concern is satisfied," regardless of the source of the notice. *United States v. Contractor*, 926 F.2d 128, 131-32 (2d Cir. 1991).

In 2008, however, the Supreme Court held that this notice rule did not apply to sentences that were *variances* above the advisory Guidelines range. As the Supreme Court explained, "faced with advisory Guidelines, neither the Government nor the defendant may place the same degree of reliance on the type of 'expectancy' that gave rise to a special need for notice in *Burns*." *Irizarry v. United States*, 553 U.S. 708, 713-14 (2008). Thus, *Burns* and Rule 32(h) do not extend to "variances" (namely, non-Guidelines sentences), as opposed to departures under the Guidelines. *Id.* at 714-15. As a result, a district court is not required to give a defendant advance notice of its intention to impose a non-Guidelines sentence.

3. Standard of review

When, as here, a defendant fails to object to an alleged procedural sentencing error and that sentencing issue is "not particularly novel or complex," this Court reviews for plain error. *United States v. Villafuerte*, 502 F.3d 204, 208 (2d Cir. 2007); *United States v. Wagner-Dano*, 679 F.3d 83, 89 (2d Cir. 2012).

Under plain error review, "an appellate court may, in its discretion, correct an error not raised

at trial only where the appellant demonstrates that (1) there is an 'error'; (2) the error is 'clear or obvious, rather than subject to reasonable dispute'; (3) the error 'affected the appellant's substantial rights, which in the ordinary case means' it 'affected the outcome of the district court proceedings'; and (4) 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)); *Wagner-Dano*, 679 F.3d at 94. "[T]he burden of establishing entitlement to relief for plain error is on the defendant claiming it . . . ." *Wagner-Dano*, 679 F.3d at 94 (quotations omitted).

C. Discussion

1. Brass was not entitled to notice of the possibility of a sentence above the advisory Guidelines range.

Brass's argument that she failed to receive adequate notice of the court's intention to sentence her above her advisory Guidelines range necessarily fails because she was not entitled to such notice in the first place. Brass does not dispute that the district court imposed a non-Guidelines sentence. Appellant's Br. 1 (stating "[a] non-Guidelines sentence of 96 months was imposed by the Court.") Indeed, this fact is set

forth in the Judgment, stating "[t]he Court imposes a non-Guidelines sentence." A126.

Brass cites *Burns v. United States*, 501 U.S. 129, 138 (1991), a pre-*Booker* case requiring a sentencing court to provide reasonable notice before departing upward from the Guidelines sentencing range on a ground not previously identified. Brass simply ignores the later Supreme Court case of *Irizarry* which makes clear that the notice requirement simply does not apply to upward variances imposed under § 3553(a).

Here, the district court based its decision on a careful consideration of the § 3553(a) factors. Although at times it framed its analysis by using the term "departure," there is no dispute that it imposed a non-Guidelines sentence. *See United States v. Keller*, 539 F.3d 97, 100 (2d Cir. 2008) (noting that while the court used both "departure" and "variance" to describe its sentence, it was clear from the record that the sentence was a variance, and stating that "[w]e see no error whatsoever in the District Court's use of the framework and terminology of the Guidelines in the course of exercising its variance discretion"). As such, Brass cannot now complain that she received insufficient notice of the court's intention to sentence above the Guidelines when she was not entitled to notice in the first place.

2. Brass received actual notice of the possibility of a sentence above the advisory Guidelines range and had an opportunity to present evidence and argue against it at sentencing.

Even if Brass was entitled to notice of the district court's intention to impose an above-Guidelines sentence, Brass certainly received it. Brass acknowledges, as she must, that the PSR specifically notified the parties of the possibility of a sentence above the guidelines. PSR ¶140 states:

> After further consideration of the defendant's conduct, as well as the victims' statements received from the Government, it appears that a sentence above the Guidelines range may be appropriate. Ms. Brass's conduct was egregious and has caused several, if not all, of her victims extreme financial hardship and possible ruin. The Guidelines do not appear to adequately address the extraordinary victim impact suffered in the offense of conviction."

See also A108.

Brass does not dispute receiving notice that victim impact would be a possible grounds for an above Guidelines sentence. Instead, she argues that the PSR was "overly broad" in its description of the basis for the departure. Appellant's

Br. 9. She also complains that the court went "beyond victim impact and Ms. Brass' conduct into other matters such as the defendant's allocation [sic] at sentencing and potential future risk to others." *Id.* at 8. The result of all this, Brass says, was that "[h]ad the PSR been more specific, or the Court given notice under Rule 32(h), the defendant would have offered testimony and evidence as to the matters she referred to in her allocation [sic], as pertains to her business." *Id.* at 9.

But the notice Brass received from the PSR alone was more than sufficient to put her on notice that the extreme harm she caused her victims would potentially be the basis for an upward departure. The PSR clearly stated that a departure may be appropriate because of the "egregious" nature of Brass's conduct, and that the "Guidelines do not appear to adequately address the extraordinary victim impact suffered in the offense of conviction." PSR ¶140. The PSR also explained the factual support for the departure namely, that victims suffered "extreme financial hardship" and "possible ruin"—facts that paragraphs 7-65 of the lengthy PSR described in detail. PSR ¶140.

Brass also had notice of the grounds for this departure because the government devoted 14 pages of its opening sentencing brief in a section entitled "Victim Impact," to describing the extraordinary impact Brass's crimes had on her

victims. GSA208-22. This notice was sufficient. *See Contractor*, 926 F.2d at 131-32 (holding that source of the notice is irrelevant).

Instead of responding to those facts before the district court, Brass conceded that she had nothing to say on the matter. Indeed, in her sentencing submission she referenced the victim impact section of the government's brief and acknowledged that she had "no objection" to it. GSA250. Brass well knew that the extraordinary impact her crimes had on her victims was an important issue to be considered at her sentencing, she simply made the strategic decision not to address it.

Brass's other argument, that in imposing an above-Guidelines sentence the district court relied on other facts of which she had insufficient notice is also without merit. The district court repeatedly made clear that the impact Brass's crimes had on her victims was a primary consideration. For example, after describing the factors the court was to consider in sentencing, the first remark the court made about the case was that "[t]he case before the Court today is extraordinary by any measure. It defies description in words that adequately depict the offense conduct on the harm to the victims." A113. The court made clear that "after considering the factors specified in the statute, I conclude that a sentence above the Guideline range is necessary." A113. The court emphasized that "[i]t's im-

portant to look carefully at what you did to these people. You preyed upon these people and took advantage of them in a manner that is conscious shocking, and what is most disturbing of all is that you are continuing to attempt to hold yourself out as something other than the offender you truly are." A113. The court stated:

> I have tried to individualize this sentence in light of all that I know about you, and I see no basis for anything less than a harsh sentence.
>
> You not only knowingly stole from these people, but you did it knowing that the likely consequences for them would be exceedingly severe; you did it at a time when you could not possibly think that you would be able to repay them; you stole even after you knew you were in trouble; you stole after you were caught. You lied to them. You have lied to the authorities. You continue to misrepresent yourself. Along the way, you generated numerous phony documents. You came up with a phony consent decree.

A116-17. In short, the court made clear that the extraordinary impact on Brass's victims was critical to its upward variance.

That the court also referred to "other matters," including Brass's history and characteristics, and the need for deterrence, is a fact that

Brass can hardly complain about since § 3553(a) expressly requires the court to consider those factors.

Moreover, Brass's contention that she did not have adequate notice that the district court would consider the nature of her business is plainly wrong. Whether Brass ran a legitimate investment fund was an important element of the case and was a central issue of dispute in the parties' sentencing memoranda. The government extensively briefed how Brass spent her victims' money, showing with detailed spreadsheets the expenditures on personal items that were entirely inconsistent with any legitimate investment business being done. GSA222-25.

The government also directly refuted the assertion that Brass and her husband took out a $2 million mortgage on their home in order to invest in Brass's business. The government traced money from that mortgage and showed that Brass spent the mortgage loan proceeds to pay down a construction loan on the home, to pay another home equity loan, to pay credit card bills, store charge cards, and tax bills, and to make lulling payments. GSA241. The government pointed out that out of the mortgage proceeds, the only investment Brass appeared to make into any of her business entities was a $20,000 deposit into a Nibor Investment Fund bank account. GSA241. But that money, in turn, was spent just as Brass spent the rest of her vic-

tims' money, on personal bills and lulling payments. GSA241, GSA200.

Rather than respond to this evidence, Brass simply ignored it. In her sentencing brief, for example, she continued to assert that "she and her husband invested over $2 million into [her] fund" by mortgaging their home, and that was why she paid some of her personal expenses out of the business bank account. GSA246. But she offered no evidence to show this purported investment of the mortgage proceeds in fact happened. Nor did Brass address the government's detailed tracing of the mortgage proceeds showing that they were not put into the fund. Brass also continued to maintain that her wrongdoing stemmed from "huge losses in her trading accounts," GSA247, but she failed to respond at all to the government's evidence showing that no such losses occurred. Similarly, she continued to simply assert, without any evidence whatsoever, that she ran a legitimate investment vehicle. GSA245-56.

In its reply memorandum, the government refuted Brass's assertion that she ran a legitimate investment vehicle and had sustained "huge losses in her trading accounts," citing the evidence in its initial sentencing submission. GSA261-62. The government also refuted Brass's continued insistence that she and her husband invested the proceeds from their $2 million mortgage, referring once again to the summary

of how those proceeds were spent set forth in the government's opening sentencing brief. GSA262.

During the sentencing hearing, Brass again refused to engage the evidence presented by the government, and instead repeated the unfounded assertions she advanced in her sentencing brief. She stated, for example, that "I was very wrong about many of the investments and human resource decisions that I made which caused everything to fail," and that "[i]f I had known the investments were going to go bad, I wouldn't have done them." A49, A50-51. She offered no evidence or testimony to support her claim to have run a legitimate investment fund or her claim to have invested proceeds from her $2 million mortgage into her business. Indeed, when the district court asked defense counsel whether there was "any document in this record that reflects the existence of a single investment?" A60, counsel responded that there was nothing in the record, A61.

Brass now claims that "[h]ad the PSR been more specific," she would have "offered testimony and evidence as to the matters she referred to in her allocation [sic], as pertains to her business." Appellant's Br. 9. But Brass repeatedly had that opportunity and failed to offer anything at all. Throughout the sentencing process, from the parties' initial briefing through the sentencing hearing, the nature of Brass's business and the misrepresentations she made to her victims

about that business, was central. Brass well knew about the issue, she just had nothing to say about it. Indeed, even now, she continues this tactic claiming to this Court that the losses were because "an investigation by the Connecticut Banking Commission forced her out of business," Appellant's Br. 2, and that "she and her husband invested in this fund," *id.* But still, she offers no citation to the record evidence. Her failure to do so shows that a lack of notice was not the problem and thus that a remand would serve no useful purpose. *Contractor*, 926 F.2d at 132.

In sum, Brass received notice of the possible grounds for departure or variance and why those grounds warranted such a departure in both the PSR and the parties' sentencing memoranda. Brass had an opportunity to dispute the evidence in the PSR and the government's briefing, and the district court gave Brass an opportunity to respond during the sentencing hearing. This process guarded against the risk of the court relying on any erroneous information and was entirely sufficient. *See* Fed. R. Crim. P. 32(h); *Contractor*, 926 F.2d at 131; *United States v. Sisti*, 91 F.3d 305, 312 (2d Cir. 1986). Accordingly, there was no error, much less plain error in this case.

3. The district court did not punish Brass twice for the same conduct reflected in her sentencing enhancements.

Brass next argues that: (1) the details of her fraudulent conduct were not so extraordinary or novel that the Sentencing Commission would not have already considered them; and (2) that the district court used the enhancements for loss, abuse of trust, vulnerable victim, and obstruction of justice in upwardly departing, effectively "punish[ing] [her] twice for the same conduct." Appellant's Br. 13-14.

This argument is nearly identical to the one made by the defendant in *United States v. Kaye*, 23 F.3d 50, 53 (2d Cir. 1994), a pre-*Booker* case. In *Kaye*, the defendant's great aunt entrusted him with $893,700 to invest on her behalf, but the defendant instead withdrew large sums to bolster his failing grocery business. *Id.* at 51. The defendant repeatedly assured the victim, a woman in her eighties, that her investments were in order. *Id.* Nevertheless, after the fraud was uncovered, the victim recovered only $180,995 from the defendant. *Id.*

In *Kaye*, the district court added 10 levels to the defendant's base offense level for loss, 2 levels for more than minimal planning, 2 levels for abuse of trust, and another 2 levels for vulnerable victim. The court then departed upward 2 levels because the defendant's "fraud had totally

depleted his aunt's liquid assets and left her financially dependent on the goodwill of others." *Id.* at 53.

On appeal, the defendant argued that his offense level under the Guidelines had already been enhanced to account for adjustments for loss, abuse of trust and vulnerable victim. He concluded that, by enhancing the offense level for these factors and then departing upward to account for the particular impact on the victim, the district court had double-counted the harm to the victim. *Id.*

As to the amount of loss enhancement, this Court found that [defendant] may be correct that the fraud guidelines adequately considers the *kind* of harm suffered by [the victim]—namely, the loss of substantial assets by an individual—we do not think that the fraud guideline adequately considers the *degree* of harm she suffered—so great an impact from a loss as to leave her financially dependent on the generosity of others, quite possibly for the rest of her life." *Id.*

As for the abuse of trust enhancement, this Court found that the enhancement is concerned primarily with factors that make a crime easier to commit, not with the consequences of the crime upon individuals, and thus did not fully capture the type of harm inflicted by the defendant. *Id.* at 54.

Finally, as to the vulnerable victim enhancement, this Court found that the enhancement emphasized whether a victim was less likely to thwart the crime rather than more likely to suffer harm. Thus, this Court concluded that while the enhancement does in part consider harm to the victim, the harm present in that case "[was] of a degree not adequately accounted for by the vulnerable victim guideline." *Id.*

As a result, this Court concluded that an upward departure was warranted because the fraud guidelines did not fully consider the degree of harm inflicted upon the victim and affirmed the trial court's decision to upwardly depart. *Id.*

Although the district court here imposed a non-Guidelines sentence above the advisory range rather than a guidelines sentence with a departure, the *Kaye* analysis is instructive. Similar to *Kaye*, the district court here made clear that it believed the case to be "extraordinary by any measure" due to the harm to the victims. A113.

The district court acknowledged that the Guidelines accounted for amount of loss, abuse of trust, vulnerable victim, and obstructing justice, but expressly stated its belief that those enhancements, did not adequately account for the "extraordinary harm that [Brass] did here." A114. The court did not in any sense punish Brass twice for the conduct supporting those enhancements. Rather, the district court gave a de-

tailed explanation as to why it believed a sentence within the Guidelines would not be sufficient even after applying those enhancements. A113-17. In so doing, the court cited factors including: that the loss was at the top of the range, that Brass had stolen from more than 10 victims but had not received an enhancement for having done so, that the victims suffered extraordinary harm, that Brass continued to hold herself out as someone with a legitimate investment company, that Brass stole when she knew the consequences would be exceedingly severe and when she knew she would be unable to repay, and that she stole after she knew she was in trouble with law enforcement. A116-17. In sum, the district court made clear that it was not double counting the conduct supporting Brass's sentencing enhancement. Rather, the court gave specific and detailed facts supporting its decision to sentence her above the advisory Guidelines range.

On this record, and with the court's detailed explanation for its sentence, the district court did not "punish" Brass twice for the same conduct. The court considered the harm inflicted by Brass and sentenced her accordingly.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: March 18, 2013

Respectfully submitted,

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Federal Rule of Appellate Procedure 32(a)(7)(C) Certification

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,954 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

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Addendum

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider --

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed --

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for --

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines --

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation, or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amend-

ments issued under section 994(p) of title 28);

(5) any pertinent policy statement–

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

* * *

(c) Statement of reasons for imposing a sentence. The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence –

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.