

1 **MARK BRNOVICH**  
Attorney General  
2 Firm Bar No. 14000  
3 **KIMBERLY H. ORTIZ**  
Assistant Attorney General  
4 400 West Congress, Suite S-315  
Tucson, Arizona 85701  
5 Telephone No.: (520) 628-6504  
Pima County Computer No.: 65361  
6 State Bar No.: 15102  
[CRMTucson@azag.gov](mailto:CRMTucson@azag.gov)  
7 T002-2013-000106

8 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
9 **IN AND FOR THE COUNTY OF PIMA**

10  
11 **STATE OF ARIZONA,**

12 **Plaintiff,**

13 **vs.**

14 **MICHAEL ALLEN FRICKER (001)**  
15 **dba SALT RIVER SOLAR & WIND,**

16 **Defendant.**

**No. CR 2014-0164-001**

**STATE'S SENTENCING  
MEMORANDUM**

**Hon. Casey McGinley - Division LF**

17 The State of Arizona, by the Attorney General, MARK BRNOVICH, and through his  
18 Assistant Attorney General, KIM ORTIZ, respectfully recommends that Defendant MICHAEL  
19 ALLEN FRICKER be sentenced to the Department of Corrections on Amended Count 3 for the  
20 following reasons: (1) he continued to solicit new customers when he already had failed to pay  
21 rebates to existing customers; (2) his fraudulent conduct was continuous in nature and benefitted  
22 him personally; (3) he caused significant financial harm to many victims, including vulnerable and  
23 elderly adults; and (4) he has two prior felonies for Theft and Forgery, both crimes of moral  
24 turpitude.  
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27 The State further recommends that the Court impose a consecutive term of probation on  
28

1 Amended Count 1 to be served upon release from prison.

2 RESPECTFULLY SUBMITTED this \_\_\_\_\_ day of February, 2015.

3 **MARK BRNOVICH**  
4 Attorney General

5 \_\_\_\_\_  
6 **KIM ORTIZ**  
7 Assistant Attorney General

8 A copy of the foregoing document  
9 delivered this \_\_\_\_\_ day of  
10 February, 2015, to:

11 Hon. Casey McGinley – Div. LF  
12 Pima County Superior Court

13 A copy of the foregoing document  
14 e/mailed this \_\_\_\_\_ day of  
15 February, 2015, to:

16 Joseph P. St. Louis  
17 216 North Main Avenue  
18 Tucson, Arizona 85701  
19 [joestlouis@azdefense.com](mailto:joestlouis@azdefense.com)

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## SENTENCING MEMORANDUM

### **I. Arizona law disfavors rewarding Defendants who commit multiple crimes**

The Defendant’s criminal behavior in this case is blatant in character and unmitigated by any suggestion of necessity or other difficult circumstances. If his business actually was failing, he should have let it failed without continuing to victimize customers. Robbing Peter to pay Paul is not a mitigator.

Public policy strongly disfavors interpreting sentencing statutes to give a defendant “a discount card to commit as many crimes as he might desire without incurring any additional penalty because all the crimes were committed at the same place and within the same time frame.” *State v. Henry*, 152 Ariz. 608 (Ariz. In Banc 1987). In contrast to the single day crime committed in *Henry*, here the Defendant’s volitional fraud spanned a period of multiple years and financially injured numerous victims, one after the other.

### **II. Factual Circumstances**

Defendant Michael Allen Fricker owned and operated an Arizona based company called Salt River Solar & Wind (hereinafter SRSW), which offered solar panel installation, full service roofing, and pre-solar products. SRSW’s business model relied heavily on direct federal grants through the U.S. Treasury 1603 program, and utility company rebates. The rebates enabled SRSW to invest in capital inventory and to market costly solar panel systems to commercial and residential customers by offsetting the expense. The funds at issue in this case were derived from Treasury 1603 grants and Tucson Electric Power (TEP) rebates.

The Treasury 1603 program is a finance mechanism that allows solar and other renewable energy project developers to receive a direct federal grant. The purpose of the 1603 Program is to reimburse eligible applicants for a portion of the cost of installing specified energy products used

1 in a trade or business or for the production of income. The program allows for federal grants  
2 rather than tax credits, and the payment is made after the renewable energy system is placed into  
3 service.

4 TEP's rebate program offered a cash incentive for consumers to install renewable energy –  
5 specifically solar panels. Typically, a solar installer sold (or, in this case, leased) a system to a  
6 residential customer and then applied to TEP to reserve the incentive. Subsequent to installation,  
7 TEP would inspect the system and confirm that it met the necessary requirements and  
8 specifications. Upon approval, TEP would issue a check for a one-time cash rebate. The incentive  
9 varied over time, but at one point covered up to 50% of the total system cost. The TEP program is  
10 now defunct, due largely to fraudulent practices.

11  
12 Defendant Fricker solicited customers with the features and benefits of a solar panel  
13 system. The customer would sign a contract and pay *up front* a partial cost of the system, in  
14 anticipation of the rebate adjustments to be paid by SRSW. The remaining costs—and any  
15 profits—for SRSW were captured via the 1603 Treasury grant and TEP's rebate.

16  
17 The Defendant gradually changed his business model to begin requiring his customers to  
18 pay an amount *equivalent* to the TEP rebate at contract signing, in addition to paying their initial  
19 deposit. Per the contract, when TEP reimbursed the Defendant, the Defendant then was supposed  
20 to refund that amount to the customer. Instead, when TEP paid the rebates to the Defendant, he  
21 deposited the funds into SRSW accounts for his personal use and did *not* reimburse the victims the  
22 money owed to them.

23  
24 In addition to speaking with Ms. Thews from Adult Probation, some victims chose to  
25 recount in this memorandum for the Court about how the Defendant's fraud and intentional  
26 deception affected their lives:  
27

1                   **Paul and Carol Girvan**

2                   In the summer of 2011, Mr. and Mrs. Girvan contacted an Energy Analyst with Salt River  
3 Solar & Wind (SRSW). He came to their home and presented a sales package for the installation  
4 of a solar system, which required the Girvans to provide a 20% prepayment of \$3,567.00 with the  
5 balance of \$14,268.00 being paid when permits were issued. SRSW would handle all the  
6 necessary paperwork, including permits, HOA applications and completion inspections. The  
7 system was to be installed within 90 days. Upon completion and inspection, Mr. and Mrs. Girvan  
8 would receive a TEP rebate of \$15,510.00 reducing their total out of pocket cost to \$2,326.00.  
9 The Girvans signed the contract on August 26, 2011 and paid all required monies.

10                   By mid-November, 2011, the Girvans were still awaiting installation of their system. Mr.  
11 Girvan contacted SRSW and was informed that the company was behind schedule due to “supply  
12 issues which occurred over the summer.” On December 15, 2011, the Girvans received a letter  
13 signed by Defendant Fricker indicating the installation would take place the week of January 23-  
14 27, 2012. He stated that, because the installation date was beyond the contracted 90 day timeline,  
15 SRSW would pay 8.25% APR on the rebate incentive amount from November 2, 2011 to the  
16 installation date. On January 20, 2012, the Girvans received another letter from Defendant  
17 Fricker, indicating further delay and continuation of the 8.25% APR until installation. The unit  
18 was finally installed the last week of February 2012. Thereafter, TEP inspected the installation  
19 and activated the system.

20                   In early March, 2012, Mr. Girvan contacted SRSW to inquire into the status of the rebate.  
21 He was informed that TEP had not issued the rebate check, and that when SRSW received it, the  
22 check would be promptly forwarded. The Girvans then received a letter from TEP, dated April 3,  
23 2012, stating that “your incentive check \$15,510.00 has been issued in accordance with  
24 instructions provided during the application process. Payment will be sent to the appropriate  
25 entity within three weeks of the date of the letter.”

26                   Over the next four months the Girvans contacted SRSW numerous times, reminding  
27 SRSW that the rebate check was to be sent to them, per the contract. SRSW informed the  
28 Girvans that TEP was sending all incentive checks to the entity that filed the  
application. Eventually the Girvans were informed that SRSW was experiencing financial  
difficulties and was applying for grant monies from the U.S. Treasury’s “Recovery Act” under the  
1603 Program (“Payments for Specified Energy Property in Lieu of Tax Credits”). SRSW said  
outstanding rebates would need to be paid in installments and the Girvans were promised weekly  
updates and assured that the 8.25% APR would continue until the rebate was paid. At that point,  
Mr. and Mrs. Girvan realized that SRSW had stolen their TEP incentive check.

                  In July of 2012, SRSW held a conference call with its customers to inform them of the  
status of rebate monies. The customers were told that the U.S. Treasury was withholding  
payment to SRSW based on inconsistencies in SRSW paperwork for the Grant 1603 monies to be  
issued. Mr. and Mrs. Girvan were asked to sign a "validation of project start date letter" stating  
that the installation began before January 1, 2012, when in fact didn't occur until the end of  
February, 2012. On September 14, 2012, SRSW next promised the Girvans would initiate a

1 payment program of 24 equal payments until the rebate was satisfied. In addition, as a result of  
2 the delay they were going to increase the interest rate to 9.5% APR on the unpaid balance.

3 Mr. and Mrs. Girvan exhausted all options at recovering their stolen rebate. They filed for  
4 assistance with the Registrar of Contractors but were advised that the ROC does not assist with  
5 customer rebates. They contacted Channel 4, and reporter ran a televised segment about the  
6 situation, but it did not result in action. They contacted their Congressman. Congressman  
7 Barber's office notified them that, according to the U.S. Treasury web site, a payment of  
8 \$3,930,324.00 was issued to SRSW on September 20, 2012.

9 Mr. and Mrs. Girvan live in a modest, age restricted community. They receive pensions  
10 and social security, but maintain part -time employment. \$15,510.00 is a significant loss to them  
11 in their retirement years. The Girvans paid \$17,836.00 to SRSW and TEP paid a rebate of  
12 \$15,510.00 to SRSW.

### 13 George Massman

14 Mr. Massman's experience with SRSW was nearly identical to that of the Girvans. Their  
15 contract documents stated "TEP rebate goes to customer - \$15,510.00." Having made full  
16 payment up-front, he was guaranteed installation within 90 days. The contract was signed on  
17 August 22, 2011. On September 8, 2011, he and his wife, Veronica (now deceased) we were  
18 notified by SRSW that there had been an amendment to their lease agreement to the effect that  
19 TEP would be sending the rebates to SRSW. They were advised SRSW would forward the rebate  
20 to them.

21 On January 20, 2012, five weeks after the promised installation day, the Massmans  
22 received a letter signed by Defendant Fricker saying that since the installation had been pushed  
23 back "a couple of weeks" and that SRSW would pay them 8.25% interest on the rebate incentive  
24 amount until the installation had been completed. The installation was finally completed on  
25 February 14, 2012. he Massmans waited for their rebate, and promised performance penalty. On  
26 April 11, 2012, the Massmans received a call from SRSW informing them that their rebate check  
27 had been mailed on April 9<sup>th</sup>. The check never arrived. On April 23<sup>rd</sup>, SRSW requested a routing  
28 number so their rebate could be deposited directly into our bank account. The funds were never  
deposited.

On May 10, 2012 the Massmans were added to the SRSW contact list for rebate status  
updates. On May 25, 2012, they were informed that the Treasury Department would begin  
releasing award letters the next week and the money could be anticipated 5 days following the  
release. Between June and September, 2012, the Massmans endured a multitude of excuses as to  
why they still had not received their rebate, including:

- The U.S. Treasury was reviewing the documents
- SRSW customers need to complete a form to validate the 1603 Grant Applications
- Defendant Fricker was "back East, speaking with Senator Arlen Specter, who was going to "make sure the Treasury begins processing the payments."

1 On September 7, 2012 the Massmans received an email notifying them that, due to on-  
2 going delays in Treasury Department payments, SRSW had set up a payment plan. Checks would  
3 be sent out on the 10<sup>th</sup> and 25<sup>th</sup> of the month for the next 12 months. Interest would be 9.5% on  
4 the total debt, including the interest still outstanding for the delinquent system installation of our  
5 system.

6 The Massmans never received any of the funds due to them. Mrs. Massman has since  
7 passed away. Mr. Massman, a widower of limited financial means, feels he was abused and  
8 deceived and that the amount of money stolen from him was no paltry sum. The Massmans paid  
9 SRSW \$17,836.00 and TEP paid a rebate of \$15,510.00 to SRSW.

### 8 **James Millard**

9 On August 20, 2011, Mr. and Mrs. James Millard contracted with SRSW to install a new  
10 solar panel system. The terms required \$4,400.00 down at signing and \$17,600.00 due once  
11 permits were issued. The TEP rebate of \$18,330.00 was to be refunded to them, and installation  
12 was to begin within 90 days. The Millards borrowed from a home-equity line of credit with the  
13 expectation that the funds would be repaid within approximately 4 months.

14 On September 8, 2011, SRSW sent the Millards an amendment which specified that the  
15 rebate money would first be paid to SRSW and then refunded to them within 72 hours. The basis  
16 for this amendment was that "TEP had changed the rules." SRSW did not install the system  
17 within the promised 90 days. The Millards were advised that SRSW would pay 8.25% on the  
18 rebate until paid in full. Ultimately it took 6 months for SRSW to complete the installation and  
19 TEP inspected the system in early March, 2012.

20 After inspection, Mr. and Mrs. Millard were told to expect their rebate within 72 hours.  
21 After several weeks passed, Mr. Millard contacted SRSW. He was told that SRSW had not yet  
22 received the rebate check. Several weeks later he contacted the company again, and was again  
23 told the check had not been received. Finally, after 2 more months had passed, Mr. Millard  
24 telephoned TEP and was told the check was issued to SRSW on April 3 2012.

25 When Mr. Millard confronted SRSW with this information, SRSW claimed it was having  
26 difficulty obtaining federal rebate money. This was the first time the Millards had heard about  
27 federal rebates, as there was no mention of federal monies during contract negotiations. From  
28 that point on, every time Mr. Millard contacted SRSW, he was given a different explanation for  
the rebate's delay. It appeared to Mr. and Mrs. Millard that SRSW had lied about having received  
their rebate check month earlier and was now completely changed the terms of the agreement  
with regard to their rebate funds. It began to dawn on them that they may have been the victims  
of a scam.

On August 6, 2012 – a full year after contracting for the solar panels – Mr. Millard filed a  
complaint with the Arizona Registrar of Contractors. He was told that SRSW's license was  
revoked as a result, but the complaint did nothing to recover the stolen rebate as the Registrar's  
victim recovery fund is designated for incomplete work, not for monetary disputes.

1 On September 7, 2012, SRSW advised the Millards that it would make 24 bi-monthly  
2 payments with the goal of repayment of the rebate in full within 12 months. The Millards were  
3 skeptical. On October 2, 2012, Mr. Millard contacted SRSW to inquire about the status of the  
4 payment that were to begin on September 24, and was told that SRSW had failed to secure the  
5 loan needed in order to make the payments. He was also advised that SRSW had filed a lawsuit  
6 with the U.S. Treasury Department and fully expected to recover the money.

7 Defendant Fricker told the Millards that SW had a buyer/investor who would fund the  
8 rebates and provide capital needed to finish pending installation. He was adamant that all  
9 customers would be repaid. Eventually, the Millards calls to SRSW went unanswered.

10 Mr. Millard runs a small business and understands the difficulties of cash-flow; however,  
11 he does not believe this was a revenue issue, but rather systematic deception spanning nearly two  
12 years. He believes Defendant Fricker fabricated stories to pacify the customers and never made a  
13 good-faith effort to repay the money he stole from his victims. The fact that he stole the money  
14 under the guise of a business makes him no less culpable than the thief who breaks into  
15 someone's home. The Millards paid \$22,000.00 to SRSW and TEP paid a rebate of \$18,330.00  
16 to SRSW.

### 12 **Kathilynn Cheshire**

13 Kathilynn Cheshire was another client who was victimized by SRSW. Suffering from a  
14 terminal illness, Ms. Cheshire was interested in solar energy to provide her children with an  
15 energy efficient home after her death. A coworker had told her that she could obtain a fully  
16 operational solar system at very little or no cost through the TEP rebate program.

17 In late May of 2011, Mrs. Cheshire contacted SRSW to review her options. She chose a  
18 prepaid lease option with the understanding that TEP would offset the cost by approximately  
19 \$12,000.00. She signed a contract on June 11, 2011, and withdrew the money from savings for  
20 the pre-rebate cost. Defendant Fricker was aware of her health related concerns, and gave his  
21 personal assurances that he would follow the project through to completion for the sake of her  
22 children.

23 SRSW also failed to issue the rebate to Mrs. Cheshire. She filed a demand letter on  
24 September 4, 2012, followed by a later complaint with the ROC on March 4, 2014 after the AGO  
25 had obtained an indictment against the Defendant. The poor work quality of the installation  
26 required Mrs. Cheshire's to seek outside repairs. One bid on February 6, 2014, was for  
27 \$9,949.54.

### 24 **James Dunning**

25 Mr. and Mrs. Dunning sold their East Coast home and retired to Tucson, Arizona. They  
26 were able to use the proceeds from the sale of their home to purchase a mortgage-free home.  
27 They, along with the other victims, entered into a contract with SRSW for the installation of solar  
28 panels, relying upon the promised rebate that never materialized. Because of Defendant Fricker's

1 theft, the Dunnings have had to borrow against their home, forego vacation plans, and postpone  
2 Mr. Dunning's enrollment in Pima College. Mr. Dunning paid SRSW \$29,106.00 and TEP paid a  
3 rebate of \$24,960.00 to SRSW.

### 3 **III. Plea Agreement**

4 The Defendant pleaded guilty to: Amended Count 1, Illegal Control of an Enterprise, a  
5 Class 3 Felony, in violation of A.R.S. §§ 13-2312(A) and 13-2301 (D)(4)(b)(v) and (xxvi); and  
6 Amended Count 3, Fraudulent Schemes and Artifices, a Class 2 Felony, in violation of A.R.S. §  
7 13-2310(A). Probation is available for both Counts. He agreed to pay restitution to the victims in  
8 an amount capped at \$1,000,000.00.

### 10 **IV. Aggravating Factors**

11 The length of any sentence must be determined by the presence of aggravating and  
12 mitigating factors. A.R.S. § 13-702(C). The State submits the following aggravating factors  
13 apply in this matter:  
14

- 15 • **A.R.S. § 13-701(D)(6) – The defendant committed the offense as consideration for the  
16 receipt, or in the expectation of the receipt, of anything of pecuniary value.**

17 The Defendant obtained an enormous amount of money as a result of his fraudulent  
18 conduct.

- 19 • **A.R.S. § 13-701(D)(9) – Emotional or financial harm to the victims**

20 Defendant Fricker stole hundreds of thousands of dollars for his own personal use, with no  
21 regard for its impact on his victims. The victims entrusted the Defendant with significant  
22 sums of money which was ultimately stolen from them and, for several of the victims, the  
23 total of their loss represented a substantial amount of their life savings and impacted their  
24 standard of living.

- 25 • **A.R.S. § 13-701(D)(13) – The victim of the offense is at least sixty-five years of age or is  
26 a disabled person as defined in section 38-492, subsection B.**

27 Many of the Defendant's victims are retirees who believed solar energy would help them  
28 reduce their utility bills and stretch their retirement dollars. One such victim was forced to  
return to work because of her financial loss. Another victim, with terminal cancer,  
considered the solar system to be a major component of her estate planning, with the goal

1 of minimizing her children's financial burden when she dies. Defendant Fricker was well  
2 aware of her reason for wanting a solar system, and he took advantage by encouraging her  
and confirming its long-term financial benefit.

- 3 • **A.R.S. § 13-701(D)(24) – Any other factor that the State alleges is relevant to the  
4 Defendant’s character or background or to the nature or circumstances of the crime.**

5 The Defendant was convicted of First Degree Theft on August 21, 2000 and First Degree  
6 Forgery on October 3, 2000. Both felonies were committed in the State of Oregon.

7 Despite his conviction, the Defendant continues to operate in the solar industry with his  
8 former business partner, specifically marketing products and soliciting customers.

## 9 **V. Mitigating Factors**

10 In anticipation of Defendant’s claim for mitigating factors, the State addresses the  
11 following potential mitigators:

- 12 • **A.R.S. § 13-701(E)(6) – Any other factor that is relevant to the defendant's character  
13 or background or to the nature or circumstances of the crime and that the court  
14 finds to be mitigating.**

15 During plea negotiations, the Defendant agreed to release the leases on the solar systems  
he installed for the victims. He did so for the named victims prior to sentencing.

16 Remorse. The Defendant expresses remorse to Ms. Thews, but then denies personal  
17 responsibility in the PSR and further blames “the lawyer” for paying complaining  
18 customers with “other people’s rebate money.” His admission that he “did not strictly  
segregate rebate funds from TEP” defies credulity.

## 19 **VI. Conclusion**

20 The State submits insufficient mitigators are present in this case sufficiently substantial to  
21 justify anything less than a prison term. No evidence exists that the defendant’s capacity to  
22 appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the  
23 law was impaired. A.R.S. § 13-701(E)(2). Furthermore, no evidence exists that the defendant  
24 was under unusual or substantial duress. Legitimate businesses fail in the United States every day  
25 without the business owners stealing customers’ money. A.R.S. § 13-701(E)(3). Last, it would  
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1 be difficult for the court to find a factor relevant to the defendant's character or background or to  
2 the nature or circumstances of the crime sufficiently substantial to justify probation without  
3 prison, especially considering his prior felony convictions. A.R.S. § 13-701(E)(6).

4 In conclusion, while the Defendant has expressed remorse in the PSR from one side of his  
5 mouth, he simultaneously denies responsibility with the other. In fact, the Defendant re-entered  
6 the exact industry and sales scheme with his former SWSR business partner, Tim Precourt.  
7 According to the PSR, he went right back to soliciting customers on behalf of Copper State  
8 Marketing and he did not disclose his partnership in Copper State to Ms. Thews. Additionally,  
9 the owner of ACA Solar had no idea about the Defendant's felony fraud conviction, the plea  
10 conditions requiring him to notify employers and/or clients of the nature of his conviction, or the  
11 upcoming sentencing.  
12

13  
14 The State is recommending prison on Count 3 followed by a consecutive term of probation  
15 on Amended Count 1 to be served upon release from prison, with full restitution to the victims.

16 RESPECTFULLY SUBMITTED this \_\_\_\_\_ day of February, 2015.

17  
18 **MARK BRNOVICH**  
19 Attorney General

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21 \_\_\_\_\_  
22 **KIMBERLY H. ORTIZ**  
23 Assistant Attorney General

24 A copy of the foregoing document  
25 delivered this \_\_\_\_\_ day of  
26 February, 2015, to:

27 Hon. Casey McGinley  
28 Pima County Superior Court

1 A copy of the foregoing document  
2 emailed this \_\_\_\_\_ day of  
3 February, 2015, to:

4 Joseph P. St. Louis  
5 216 North Main Avenue  
6 Tucson, Arizona 85701  
7 [joestlouis@azdefense.com](mailto:joestlouis@azdefense.com)  
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