10-1758

To Be Argued By:
MICHAEL J. GUSTAFSON

==========

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-1758

UNITED STATES OF AMERICA,
Appellee,

-vs-

DONALD R. PERRY, III
Defendant-Appellant,

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

==========

BRIEF FOR THE UNITED STATES OF AMERICA

==========

DAVID B. FEIN
United States Attorney
District of Connecticut

MICHAEL J. GUSTAFSON
Assistant United States Attorney
SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

RULES

Statement of Jurisdiction

This is an appeal from a judgment entered on April 27, 2010 in the District of Connecticut (Vanessa L. Bryant, J.) after the defendant pleaded guilty to altering and fabricating records in a federal investigation. A6, A11-13.[1] The district court had subject matter jurisdiction under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on April 29, 2010, A6 (Docket Entry 33) and A15, and this Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(a).

---

[1] The defendant's appendix will be cited as "A" followed by the page number. The defendant's sealed appendix contains the Pre-Sentence Report ("PSR") and plea agreement. Those documents will be cited by paragraph number and page number, respectively.

Statement of Issues Presented for Review

I. Has the defendant carried his burden under plain error review of showing a reasonable probability that he would not have pleaded guilty if the district court had strictly adhered to Rule 11 notwithstanding that he received notice of all Rule 11 admonitions from other sources, including the prosecutor and the written plea agreement?

II. Did the district court commit procedural error in sentencing the defendant when it (A) identified a related defendant's history of charitable contributions to his community as an explanation for the sentence imposed on that defendant, and (B) mistakenly referred to the defendant by the name of a related defendant at sentencing, where the record reveals that the court fully understood the identity of the person being sentenced?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 10-1758

UNITED STATES OF AMERICA,
Appellee,
-vs-

DONALD R. PERRY, III
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The defendant appeals his conviction and sentence following his guilty plea to a one-count information charging him with altering and fabricating records in a federal investigation in violation of 18 U.S.C. § 1519.

In this appeal, the defendant claims for the first time that the district court did not fully comply with Federal Rule of Criminal Procedure 11. He cannot show a reasonable probability that he would not have entered his

guilty plea had the district court fully complied with Rule 11, however, because the record shows that he was fully aware of all the issues he claims the district court failed to discuss with him.

The defendant also raises two challenges to his sentence, arguing that the court impermissibly compared the defendant's charitable contributions to those of a related defendant and that the sentencing court addressed him by the name of this related defendant during the sentencing. A fair reading of the record, however, reveals that these claims are without merit.

For the reasons that follow, this Court should affirm the conviction and sentence in all respects.

Statement of the Case

On June 17, 2009, the defendant waived indictment and pleaded guilty to a one-count information that charged him with altering and fabricating records in a federal investigation in violation of 18 U.S.C. § 1519. A2 (Docket Entries 1-3); A9-10.

On April 21, 2010, the defendant appeared for sentencing. A16-59. After hearing from the defendant, the defendant's wife and his counsel, the court sentenced the defendant to a six-month term of incarceration to be followed by four months of home confinement with electronic monitoring. The court also imposed a 24-month period of supervised release and fined the defendant

$30,000. A11-12. Judgment entered on April 27, 2010. A6 (Docket Entry 31); A11-14.

The defendant filed a Notice of Appeal on April 29, 2010. A6 (Docket Entry 33); A15.

The defendant is currently serving his split sentence of incarceration and home confinement.

Statement of Facts

A. The Offense Conduct

The criminal conduct that led to the defendant's conviction and subsequent sentence of six month's incarceration, followed by four months of home confinement, is undisputed. The following summary is based on the conduct as described in the Pre-Sentence Report ("PSR").

In March 2007, federal agents were investigating irregularities arising from a highway construction project funded in part by the United States Department of Transportation. PSR ¶¶ 6-8. The agents interviewed the defendant on March 28, 2007. PSR ¶ 8. The defendant was the manager of property located at 160 Sargent Drive, New Haven, Connecticut ("the Sargent Drive property"), which was leased to the Connecticut Department of Transportation. PSR ¶ 7. The defendant also controlled and operated DMP Construction, LLC ("DMP"). PSR ¶ 7.

The agents asked the defendant to provide records relating to the lease of the offices at the Sargent Drive

property, including documents relating to four payments made by Solutions Unlimited, LLC ("Solutions"), a company owned by the co-defendant Gregory Laugeni ("Laugeni"), to DMP. PSR ¶ 8. At the time, Perry and Laugeni were involved in a kick-back scheme concerning the lease of the Sargent Drive property. PSR ¶ 9. To conceal the kick-back scheme, the defendant generated four false invoices that purported to reflect a transaction for construction equipment between Solutions and DMP. PSR ¶¶ 9-12. The defendant gave the false invoices to Laugeni knowing that Laugeni would provide the documents to the federal agents. Plea Agreement at 10.

The agents ultimately discovered that the records produced by Laugeni and Perry were false and fictitious. PSR ¶¶ 13-14. In August 2008, the agents confronted the defendant, who admitted that he had fabricated the items to conceal his improper diversion of money. PSR ¶¶ 13-15.

B. The Change of Plea Hearing

The defendant waived indictment and pleaded guilty on June 17, 2009. A2 (Docket Entries 1-3); A9-10.

At the outset of the plea hearing, Judge Bryant advised the defendant of his right to have a grand jury consider whether probable cause existed to believe he had committed a felony. A63-64. The defendant confirmed that he understood and advised the court that he wished to waive indictment. A64. The government then filed the information. A65.

The court next instructed the prosecutor to explain the charges against the defendant, the elements of the offense, and the statutory and recommended guideline penalties associated with the offense. A65. The defendant was told that the maximum penalty was 20 years' imprisonment, a $250,000 fine, and three years' supervised release, along with a special assessment of $100. A66. In addition, the defendant was advised that a violation of his supervised release could result in an additional period of incarceration of up to two years. A66-67. Continuing, the defendant was apprised of the essential elements of the offense the government would have to prove to obtain the defendant's conviction at trial. A67. The defendant was then advised that in addition to the maximum penalties previously mentioned, interest on any unpaid fine greater than $2,500 would begin to accrue after 15 days of the judgment. A68.

The prosecutor next advised the defendant that there was no issue of forfeiture or restitution in the case. A68. The defendant was also told that the Sentencing Guidelines were advisory, and that the court would consider them – in addition to the factors set forth in 18 U.S.C. § 3553(a) – when determining an appropriate sentence. A68.

Continuing, the prosecutor told the defendant that the parties had agreed to an advisory sentencing range of 10 to 16 months of imprisonment and a fine range of between $3,000 and $30,000. A66, A68-69. In this regard, the defendant was cautioned that the parties' agreement on the guidelines range was not binding on the court. A69. The prosecutor also noted that the defendant had agreed to

waive any appeal of his conviction and sentence if the court imposed a sentence not greater than 16 months of imprisonment, a three year term of supervised release, and a fine of $30,000. A69. The prosecutor then advised the defendant that by pleading guilty the defendant would be waiving certain trial rights. A70. The prosecutor also explained that the defendant acknowledged in his plea letter that the plea was made freely and voluntarily and was not the product of duress or coercion. A70.

The court then asked the government to articulate a factual basis to sustain the defendant's conviction. A71. Tracking the language in the defendant's Stipulation of Offense Conduct, *see* Plea Agreement at 10-11, the government outlined the defendant's kick-back scheme and his attempt to conceal the same from federal investigators. A71-73.

Addressing the defendant directly, Judge Bryant then confirmed that he understood his rights: (1) against self-incrimination; (2) to counsel at all stages of the proceedings; (3) to the presumption of innocence; and (4) to a trial at which the government would have to prove its allegations beyond a reasonable doubt and at which he could confront the government's witnesses, cross-examine witnesses, and compel witnesses to appear in court to produce documents or testify on his behalf. A73-75. Judge Bryant next confirmed the defendant understood that by pleading guilty he was waiving all of these rights. A75-76. The court also told the defendant that by virtue of being a convicted felon, he could be subject to stiffer penalties if convicted of a subsequent offense and that he would lose

the right to serve on a jury, vote and hold public office. A76. Continuing, the court ensured the defendant knew that by pleading guilty he would be required to submit a DNA sample that would be analyzed, indexed and maintained in the public records and that the government would be entitled to notify any employer or subsequent licensor of the defendant's felony conviction. A76-77. The defendant assured Judge Bryant that he understood. The defendant and his attorney then signed the plea agreement, which was filed. A77.

The defendant's guilty plea was entered pursuant to a written plea agreement. *See* Plea Agreement. The plea agreement advised the defendant: (1) of the nature of the charge and the elements the government would have to prove beyond a reasonable doubt to sustain a conviction; (2) the maximum penalties that could be imposed; (3) that neither forfeiture nor restitution were an issue in the case; (4) that the sentencing guidelines were advisory as opposed to mandatory; (5) that although the parties had stipulated to an advisory sentencing range, the judge retained sole authority to impose a sentence; and (6) of the various rights the defendant was waiving by virtue of his guilty plea, including the right to be indicted, the right to plead not guilty and to persist in that plea, the right to be tried by a jury with the assistance of counsel, the right to confront and cross-examine the witnesses against him, the right not to be compelled to incriminate himself, and the right to compulsory process for the attendance of witnesses to testify in his defense. Plea Agreement at 1-6.

The plea agreement also memorialized that the defendant would be "deprived of certain rights, such as the right to vote, to hold public office, to serve on a jury, or to possess firearms." Plea Agreement at 7. When the defendant signed the plea agreement in court, he explicitly acknowledged that he had

> read this plea agreement letter . . . that he has had ample time to discuss this agreement . . . with counsel and that he fully understands and accepts its terms.

Plea Agreement at 9. The defendant's counsel also certified that he had "thoroughly read, reviewed and explained this plea agreement . . . to my client who advises me that he understands and accepts its terms." Plea Agreement at 9.

Consistent with these certifications, during the plea colloquy, the defendant told the court that he had an adequate opportunity to review the information and plea agreement, to consult with his attorney regarding these documents, and that he understood the documents and had no questions. A78. Defense counsel also told the court that he had reviewed the information and plea agreement with his client and believed the defendant understood the documents. A79. The court then confirmed that the defendant was satisfied with the legal representation he had received. A79.

Next, Judge Bryant confirmed that the defendant was not under the influence of any drugs, alcohol or substances

that would impair his ability to understand the proceedings. A79. The defendant assured the court that his guilty plea was a free and voluntary act, and that he had not been promised anything or, conversely, threatened in any manner to induce his guilty plea. A79.

Following this colloquy the defendant entered his plea of guilty and the court accepted it as being given knowingly, voluntarily and intelligently, with the effective assistance of counsel. A80.

C. The Sentencing Proceedings

The United States Probation Officer filed a PSR dated August 5, 2009 and an addendum on December 11, 2009. The Probation Officer concurred with the parties' stipulation that the advisory sentencing range was 10 to 16 months of imprisonment with a fine range of $3,000 to $30,000. PSR ¶¶ 4, 63, 69. The Probation Officer also noted that the defendant faced a maximum term of incarceration of 20 years, PSR ¶ 62; a term of supervised release of not more than three years, PSR ¶ 64; and a maximum fine of $250,000, PSR ¶ 68. The Probation Officer also reported that restitution was not applicable, PSR ¶ 71, and provided a detailed description of the offense conduct, PSR ¶¶ 5-19.

The court convened a sentencing hearing on April 21, 2010.[2] A16. After reciting the procedural history of the

---

[2] Previously, on November 17, 2009, the court sentenced (continued...)

case and the factual basis underlying the defendant's conviction, A17-21, Judge Bryant referred to the defendant as "Mr. Laugeni" when she described the defendant's objection to the PSR. A21. When the mistake was called to her attention, Judge Bryant immediately apologized to the defendant, and corrected her misstatement. A21. The defendant then told the court that he had no objections to the PSR. A22.

After the court entertained defense counsel's arguments for leniency and a sentence of no incarceration, A24-29, the defendant addressed the court and answered questions about his financial status. A29-43. The defendant's wife also addressed the court. A43-49.

Before imposing sentence, Judge Bryant noted that because the advisory Guidelines range fell within Zone C, she had discretion to impose all or some of the sentence in the form of community or home confinement. A49-50.

At the outset, the court focused on the factors set forth in 18 U.S.C. § 3553(a). A51. After listing the various considerations that may inform a court's sentencing decision, Judge Bryant noted the inherent tension between the defendant's crime and his otherwise law-abiding life:

---

[2] (...continued)
Laugeni to a sentence of five months' incarceration and three years of supervised release, the first five months of which were to be served in home confinement; the defendant was also fined $30,000. A84-85.

> Mr. Perry is a man of substantial means and a man of considerable fortune, not just financially but personally. His greed prompted him to engage in a kick-back scheme and to fabricate documents, wasting well over a year of federal resources in order to conceal his unethical, if not illegal, conduct.
>
> On the other hand, before the Court is an individual nearly 40 years old who has no prior criminal history.

A52. The court then underscored the need for general deterrence, opining that:

> Undue leniency would engender disrespect for the law and would undermine the purpose of sentencing.
>
> The crime in which Mr. Perry engaged is one which is very difficult to detect, but has a crushing impact upon the cost of government and the taxation of its citizens. It is a crime for which punishment must be imposed, if for no other reason than to deter the thousands of others who are engaging in the same kind of criminal conduct as I speak, from engaging in that conduct.

A53.

In addition to general deterrence, Judge Bryant placed emphasis on "the nature and circumstances of this

offense[, which] are significant." A52. Specifically, the court stated:

> The need to punish the offender is also clear because the cost of kick-back schemes impair the government financially, as well as public confidence in its government. It undermines the very foundation of our society.
>
> * * *
>
> The theft and the waste of government money is the theft from your neighbor, from your fellow citizen, from your fellow taxpayer. It's a very serious offense which has very serious consequences.

A53.

The court also addressed the defendant's primary sentencing argument that he was substantially less culpable than Laugeni. *See* A50-51. In rejecting this claim, the court explained that "[t]he two men conspired to fabricate the documents in order to conceal their joint kick-back scheme, and that Mr. Perry was aware that Mr. Laugeni was going to give the documents to federal officials who were engaged in a [sic] investigation." A51. A few moments later, the court determined that:

> The significance and the impact of [the] offense does not seem to this Court[] to be clearly recognized by the Defendant. In particular, the notion that he and Mr. Laugeni are significantly

> different people is one that I simply can't wrap my mind around. They certainly may have different personalities, but they engaged collusively together, voluntarily and knowingly, in the same illegal conduct.

A54. Having discarded the defendant's claim that he was significantly less culpable than Laugeni, and that she was troubled by the defendant's lack of introspection in making the argument, Judge Bryant determined that "[t]his lack of recognition speaks volumes to the need for rehabilitation, for a period of reflection and the recognition of the true aspects of his character that led him to engage in the kick-back scheme and the fabrication of documents for the provision to federal investigators, in frustration of their investigation." A54.

Next, the court discussed "the need to avoid unwanted sentencing disparities." A54. And on this point, the court identified at least one difference between the two participants in the kick-back scheme:

> Here, there is a difference between Mr. Laugeni and Mr. Perry. Mr. Laugeni demonstrated a substantial contribution to his community over a sustained period of time, both in terms of his own time and in terms of his money, which warranted a period of community confinement. That mitigating factor is not present here. That is a distinction with a difference between Mr. Laugeni and Mr. Perry, and in the avoidance of unwarranted sentencing

disparities, is one which the Court must take into consideration.

A54-55.

The court then sentenced the defendant, referring to him as "Mr. Laugeni," to six months of incarceration, followed by four months of home confinement. A55-56. A moment later, the court granted the defendant's application for voluntary surrender, specifically addressing him as "Mr. Perry" to ask how long he needed to prepare for his incarceration, and then again, addressing him as "Mr. Perry" to set the surrender date. A56-5. The court then advised the defendant of his right to appeal. A58.

Summary of Argument

I. The defendant claims, for the first time on appeal, that his Rule 11 colloquy was deficient in multiple respects. To reverse his conviction after pleading guilty, however, the defendant must do more than simply identify instances where the district court failed to adhere strictly to the dictates of Fed. R. Crim. P. 11. Instead, to establish plain error, the defendant must show there exists a reasonable probability that he would not have entered his guilty plea if he had been warned by the court that: (1) he faced a maximum penalty of 20 years' imprisonment; (2) the court had the authority to order restitution if it was requested; (3) his sentence would be calculated and informed by the Sentencing Guidelines and the factors enumerated in 18 U.S.C. § 3553(a); (4) he was waiving his appeal; or (5) he could no longer possess a firearm.

The defendant makes no real attempt to meet this standard, and indeed does not even allege in this Court that any failing in the Rule 11 colloquy impacted his decision to plead guilty. The defendant makes no allegations because he cannot. It is undisputed that he was on notice of these sundry Rule 11 admonishments given the prosecutor's statements at the plea hearing, the plea agreement the defendant reviewed with his attorney and confirmed he understood, and the PSR, which the defendant reviewed with the assistance of counsel prior to sentencing.

II. The district court committed no procedural errors at sentencing. *First*, the district court did not penalize the defendant for a lack of charitable contributions vis-a-vis Mr. Laugeni. Rather the court properly identified Mr. Laugeni's substantial contributions to the community as a factor that properly supported his sentence and distinguished him from Mr. Perry.

Second, the district court did not err in confusing the defendant with Mr. Laugeni. Rather, the record reveals that the court simply misspoke. The transcript reveals that the court fully understood the identity of the defendant being sentenced, and any references to Mr. Laugeni were mere mis-statements.

Argument

I. The district court's failure to comply with Rule 11 was not plain error because the defendant has not shown that it would not have affected his decision to plead guilty.

A. Relevant facts

The relevant facts are set forth above in the Statement of Facts.

B. Governing law and standard of review

1. Rule 11

Federal Rule of Criminal Procedure 11(b) dictates that before a district court may accept a guilty plea, the court must address the defendant in open court and inform the defendant of, and determine that the defendant understands, the following:

> (A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;
>
> (B) the right to plead not guilty, or having already so pleaded, to persist in that plea;
>
> (C) the right to a jury trial;

(D) the right to be represented by counsel – and if necessary have the court appoint counsel – at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and

other sentencing factors under 18 U.S.C. § 3553(a); and

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

See Fed. R. Crim. P. 11(b)(1)(A)-(N).

2. Plain error standard of review

A defendant may – by inaction or omission – forfeit a legal claim, for example, by simply failing to lodge an objection at the appropriate time in the district court. Where a defendant has forfeited a legal claim, this Court engages in "plain error" review pursuant to Fed. R. Crim. P. 52(b). Applying this standard, "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*, 129 S. Ct. 1423, 1429 (2009)); *see also Johnson v. United States*, 520 U.S. 461, 467 (1997); *United States v. Cotton*, 535 U.S. 625, 631-32 (2002); *United States v. Deandrade*, 600 F.3d 115, 119 (2d Cir.), *cert. denied*, 130 S. Ct. 2394 (2010).

To "affect substantial rights," an error must have been prejudicial and affected the outcome of the district court proceedings. *United States v. Olano*, 507 U.S. 725, 734 (1993). This language used in plain error review is the same as that used for harmless error review of preserved claims, with one important distinction: In plain error review, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id.*

This Court has made clear that "plain error" review "is a very stringent standard requiring a serious injustice or a conviction in a manner inconsistent with fairness and integrity of judicial proceedings." *United States v. Walsh*, 194 F.3d 37, 53 (2d Cir. 1999) (internal quotation marks omitted). Indeed, "[t]he error must be so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." *United States v. Plitman*, 194 F.3d 59, 63 (2d Cir. 1999) (internal quotation marks omitted).

3. Plain error in the context of Rule 11 challenges

In *United States v. Vonn*, 535 U.S. 55 (2002), the Supreme Court held that a defendant who does not lodge a timely objection to Rule 11 error in the district court must satisfy the plain error standard in Federal Rule of Criminal Procedure 52(b). *Id*. at 58-59. The Court explained that "a silent defendant has the burden to satisfy the plain-error rule" and further held "that a reviewing

court may consult the whole record when considering the effect of any error on substantial rights." *Id*. at 59.

In *United States v. Dominguez Benitez*, 542 U.S. 74, (2004), the Supreme Court held that a defendant attempting to obtain relief for an unpreserved claim of Rule 11 error under the substantial rights prong of the plain error test,"must show a reasonable probability that, but for the error, he would not have entered the plea." *Id*. at 83. Simply put, aggrieved defendants must "satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is 'sufficient to undermine confidence in the outcome' of the proceeding." *Id*. (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

C. Discussion

The defendant claims that the district court breached Rule 11 when it failed to specifically advise him that: (1) he faced a maximum penalty of twenty years of imprisonment; (2) the court had the authority to order restitution; (3) his sentence would be calculated and considered pursuant to the Sentencing Guidelines and factors identified in 18 U.S.C. § 3553(a); (4) he was waiving his right to appeal; and (5) he would not be permitted to own a firearm or ammunition as a result of his felony conviction. Defendant's Brief at 5-6. After cataloging the district court's missteps, however, the defendant does nothing more; he certainly does not attempt to demonstrate "a reasonable probability that, but

for the error, he would not have entered the plea." *Dominguez Benitez*, 542 U.S. at 83.

The defendant's claims, along with an explanation as to why they do not "undermine confidence in the outcome" of his guilty plea, *id*., are addressed below. In short, the defendant can show no prejudice because the record reveals he was fully aware of all of the warnings omitted by the district court.

Rule 11(b)(1)(H) requires the district court to advise a defendant of the maximum penalties associated with the offense to which he is pleading guilty. The defendant is technically correct that the court failed to expressly address him on this matter. However, it is equally clear that the defendant was given notice of the maximum penalties both prior to the entry of his guilty plea and prior to his sentencing. To wit, the prosecutor – at Judge Bryant's behest – told the defendant of the maximum term of incarceration, the maximum fine and the maximum term of supervised release he faced. A66-67. In addition, the plea agreement thoroughly outlined the maximum penalties. Plea Agreement at 2. And the defendant unequivocally told the court that he had read the plea agreement and, having reviewed it with his attorney, understood its contents and had no questions. A78. Defense counsel also told the court that he had reviewed the information and plea agreement with his client and believed the defendant understood the documents. A78-79. In short, the record demonstrates that the defendant was wholly aware of the maximum penalties he faced even though Judge Bryant did not literally say the words herself.

Moreover, the Probation Officer notified the defendant prior to the date of sentencing of the maximum penalties in this case, PSR ¶¶ 62, 64 and 68, and at his sentencing the defendant stated that he had no objections to the PSR. A22. The defendant's knowledge of the maximum penalties before sentencing, and his failure to attempt to withdraw his plea, demonstrates that the district court's technical omission during the Rule 11 colloquy did not affect his substantial rights. As this Court stated in *United States v. Vaval*:

> Where a defendant, before sentencing, learns of information erroneously omitted in violation of Rule 11 but fails to attempt to withdraw his plea based on that violation, there can be no reasonable probability that, but for the [Rule 11 violation], he would not have entered the plea, and the plain error standard is not met.

404 F.3d 144, 152 (2d Cir. 2005) (internal quotations omitted). Therefore, as a matter of law, the defendant has failed to sustain his burden.

The defendant has similarly failed to sustain his burden with respect to the court's failure to advise him of its authority to order restitution as required by Rule 11(b)(1)(K). While it is clear that Judge Bryant did not personally advise the defendant of the court's authority to order restitution during the plea proceeding, it is equally clear that restitution was not an issue in this case and that the defendant was repeatedly informed of the same. For instance, the plea letter specifically noted that "[t]here is

no issue of restitution in this case." Plea Agreement at 2. In addition, the government advised the defendant prior to the entry of the guilty plea that "there is no issue of restitution in this case." A68. The PSR also notified the defendant that restitution was "[n]ot applicable." PSR ¶ 71. And finally – and most significantly – the district court did not impose an order of restitution. A12 (Judgment). Given that the defendant was notified several times that restitution was not an issue, and, that ultimately, he was not required to pay restitution, he should not now be permitted to undo his guilty plea on this ground. Simply put, the probability of a different result is non-existent.

The defendant's argument on Rule 11(b)(1)(M) fares no better. That rule requires a district court judge to advise a defendant that in determining a sentence, the court's obligation is to calculate an advisory guidelines range, consider that range, and entertain possible grounds for departure from that range based on both the guidelines and the factors outlined in 18 U.S.C. § 3553(a). In this case, Judge Bryant did not specifically advise the defendant of the court's obligation on this score. Notwithstanding the court's silence, it is undisputed that the defendant was apprised of the role the guidelines and section 3553(a) play in federal sentencing. For instance, the plea agreement noted that the guidelines – while no longer mandatory – were certainly advisory and something the sentencing court would be required to consider prior to imposing a sentence. Plea Agreement at 3. And as described above, both the defendant and his attorney confirmed that they had read and understood the plea agreement. A78-79. In addition, prior to the defendant's

guilty plea the prosecutor informed the defendant of the role the guidelines and section 3553(a) play in federal sentencings. A68. Because the record shows that the defendant was fully aware of the role of the sentencing guidelines in the sentencing process, he cannot show that but for the Rule 11 error, there is a reasonable probability that he would not have pleaded guilty. Once again, based on the record before this Court, the defendant's claim of error rings hollow.

The defendant's fourth claim of error is similarly misplaced. The defendant notes that the court did not discuss his appellate waiver prior to his guilty plea in violation of Rule 11(b)(1)(N). The government does not contest this claim but notes the following. First, the prosecutor's comments during the plea hearing, coupled with the plea agreement that the defendant signed, put the defendant on notice of his agreement to forego taking an appeal under certain circumstances. Plea Agreement at 5; A69. *See also* A78-79 (defendant confirming that he had read plea agreement, had discussed it with his attorney, and understood its provisions). Second, given that the government is not attempting to enforce the defendant's appellate waiver, the district court's failure to comply with Rule 11 has not affected the defendant's substantial rights.

Finally, without reference to any specific portion of either Rule 11 or case law, the defendant asserts that the district court erred when it told him that as a convicted felon he could lose the right to serve on a jury, vote or hold public office, but failed to tell him he would not be able to lawfully possess a firearm. A76.

Aside from the defendant's failure to cite any law on this point, the defendant has failed to even allege – much less show – a reasonable probability that he would not have pleaded guilty but for this omission from his plea colloquy. Indeed such a showing would be difficult. The plea agreement specifically alerted the defendant to this consequence, *see* Plea Agreement at 7, and he confirmed to the court that he had read and understood the plea agreement, *see* A78-79. In addition, at sentencing, the defendant discussed several different collateral consequences to his plea that were troubling to him, *see, e.g.*, A30 (discussing the impact of his plea on his ability to obtain employment); A31 (discussing possibility that he would not be allowed to chaperone field trips for his children's school), but never once discussed the fact that he would not be allowed to own a firearm. In other words, there is nothing in the record to suggest that this omission from the colloquy had any impact on his decision to plead guilty.

In summary, at no point in this appeal has the defendant even attempted to show why he would not have pleaded guilty if the court had stated aloud what the government stated during the Rule 11 hearing and what was contained in the plea agreement that the defendant and his attorney told the court they had reviewed and understood. The defendant has not come close to showing a reasonable probability that, but for the district court's failure to specifically address certain items at his change of plea, he would not have entered the plea. *Dominguez Benitez*, 542 U.S. at 83. Accordingly his conviction should be affirmed.

II. The district court committed no procedural errors in sentencing.

A. Relevant facts

The relevant facts are set forth above in the Statement of Facts.

B. Governing law and standard of review

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the United States Sentencing Guidelines, as written, violate the Sixth Amendment principles articulated in *Blakely v. Washington*, 542 U.S. 296 (2004). *See Booker*, 543 U.S. at 243. The Court determined that a mandatory system in which a sentence is increased based on factual findings by a judge violates the right to trial by jury. *See id*. at 245. As a remedy, the Court severed and excised the statutory provision making the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), thus declaring the Guidelines "effectively advisory." *Booker*, 543 U.S. at 245.

After *Booker*, 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), *cert. denied*, 129 S. Ct. 2735 (2009). "The Guidelines provide the 'starting point and the initial benchmark' for sentencing, and district courts must 'remain cognizant of them throughout the sentencing process.'" *Id.* (internal citations omitted) (quoting *Gall v. United States*, 552 U.S. 38, 49, 50 & n.6 (2007)). 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). *See Gall*, 552 U.S. at 49-50. This Court "presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the [§ 3553(a)] factors." *United States v. Fernandez*, 443 F.3d 19, 30 (2d Cir. 2006).

Because the Guidelines are only advisory, district courts are "generally free to impose sentences outside the recommended range." *Cavera*, 550 F.3d at 189. "When they do so, however, they 'must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.'" *Id.* (quoting *Gall*, 552 U.S. at 50).

On appeal, a district court's sentencing decision is reviewed for reasonableness. *See Booker*, 543 U.S. at 260-62. In this context, reasonableness has both procedural and substantive dimensions. *See United States v. Avello-Alvarez*, 430 F.3d 543, 545 (2d Cir. 2005) (citing *United States v. Crosby*, 397 F.3d 103, 114-15 (2d Cir. 2005)). "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, and must include 'an explanation for any deviation from the Guidelines range.'" *Id.* (quoting *Gall*, 552 U.S. at 51).

After reviewing for procedural error, this Court reviews the sentence for substantive reasonableness under a "deferential abuse-of-discretion standard." *Cavera*, 550 F.3d at 189. The Court "will not substitute [its] own judgment for the district court's"; rather, a district court's sentence may be set aside "only in exceptional cases where [its] decision cannot be located within the range of permissible decisions." *Id.* (internal quotation marks omitted); *see also United States v. Verkhoglyad*, 516 F.3d 122, 134 (2d Cir. 2008) ("Our review of sentences for reasonableness thus exhibits restraint, not micromanagement.") (internal quotation marks 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), *cert. denied*, ___ S. Ct. ___, No. 09-1456, 2010 WL 2191203 (Oct. 4, 2010). While the Court does not presume that a Guidelines sentence is reasonable, "in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *Fernandez*, 443 F.3d at 27. Finally, no one fact or statutory factor may dictate a particular sentence; rather "a district judge must

contemplate the interplay among the many facts in the record and the statutory guideposts." *Id.* at 29.

When, as here, a defendant fails to preserve an objection to the procedural reasonableness of a sentence, this Court reviews for plain error. *See Verkhoglyad*, 516 F.3d at 128; *United States v. Villafuerte*, 502 F.3d 204, 208 (2d Cir. 2007). To show plain error, a defendant must demonstrate "(1) error (2) that is plain and (3) affects substantial rights." *Villafuerte*, 502 F.3d at 209. Even then, the Court will exercise its discretion to correct the error "only if the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id.* (internal quotation marks omitted). Reversal for plain error should "'be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" *Villafuerte*, 502 F.3d at 209 (quoting *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982)).

C. Discussion

The defendant challenges his sentence on two grounds. First, he argues that the district court erred by comparing his charitable contributions to those of a related defendant, and second, that the court erred when it mistakenly referred to him by the related defendant's name at sentencing. The defendant failed to object on either ground at sentencing and thus these arguments are reviewed for plain error. And on the record here, there was no error, much less plain error.

1. The district court did not improperly compare the defendant to a co-defendant and penalize him for lack of charitable contributions.

The defendant argues that the sentencing court penalized him because his history of charitable contributions were not as impressive as those of the related defendant, Laugeni. Defendant's Brief at 7. This claim is factually wrong on two grounds.

First, as a practical matter, the defendant was not sentenced more harshly than Laugeni. The difference in the sentences between the two defendants is negligible at best. While both men received 10 month sentences (the low end of their respective Guidelines ranges) and $30,000 fines, the defendant was sentenced to six months of incarceration whereas the court sentenced Laugeni to five months of incarceration. However, Laugeni was sentenced to 36 months of supervised release whereas the defendant must serve only 24 months. A11; A84. The government respectfully submits that these sentences are not meaningfully different and, given that Laugeni must serve an additional year of supervised release, arguably the defendant received the more lenient of the two sentences.

Second, in imposing sentence, the court did not – as the defendant claims – penalize him for allegedly not being as charitable as Laugeni. Rather, a closer examination of the sentencing transcript shows that Judge Bryant merely elected to credit Laugeni for an impressive history of contributions to his community (in both money and time),

which she was entitled to do given the dictates of 18 U.S.C. § 3553(a)(1), which mandates that sentencing courts must consider, among other things, "the history and characteristics of the defendant[.]" To wit, the court explained:

> Mr. Laugeni demonstrated a substantial contribution to his community over a sustained period of time, both in terms of his own time and in terms of his money, which warranted a period of community confinement. That mitigating factor is not present here. That is a distinction with a difference between Mr. Laugeni and Mr. Perry, and in the avoidance of unwarranted sentencing disparities, is one which the Court must take into consideration.

A54-55. In short, the court did not penalize the defendant, it simply gave him a very similar sentence to that of the related defendant and, in doing so, explained that the history and characteristics of the defendant did not warrant imposition of the same sentence meted out in the case of a similarly situated defendant.

At bottom, Judge Bryant fully complied with this Court's sentencing protocol. The court correctly calculated the relevant Guidelines range, considered the § 3553(a) factors, and imposed a reasonable sentence. *See Fernandez*, 443 F.3d at 26. And as this Court has explained, sentencing courts are not required to precisely identify the factors on the record or address specific arguments about how the factors should be implemented.

Id. at 29; *Rita*, 551 U.S. at 356-59. Against this backdrop, the sentence should stand.

2. The district court properly identified and addressed the defendant at sentencing.

The defendant identifies three instances during the sentencing hearing where the court incorrectly referred to him by the name of the related defendant, Mr. Laugeni. Although his brief does not say much beyond identifying these mis-statements, he appears to suggest that the court was confused about which defendant it was sentencing.

A review of the transcript, however, demonstrates no error by the sentencing court. At best, the defendant has identified mere mis-statements by the district court, but has not identified any prejudice from the mistakes. After the first mis-statement, Judge Bryant apologized to the defendant and corrected herself as soon as it was brought to her attention. A21. The defendant did not alert the court to the other two mis-statements, A55, but those instances appeared to be mistakes as well.

In any event, it is clear that notwithstanding these slips-of-the-tongue, the court understood that Donald Perry was being sentenced. For example, the judge responded directly to the defendant's argument for a lower sentence based on his allegedly lower culpability as compared to Mr. Laugeni. The district court's response clearly demonstrates that she understood the difference between Mr. Laugeni and Mr. Perry and understood that Mr. Perry was the defendant before her. *See, e.g.*, A50-51 (rejecting

the defendant's argument, made through defense counsel, that he "was substantially less culpable than Mr. Laugeni"); A51 (describing Laugeni and Perry as conspiring to conceal their joint kick-back scheme and stating that "Mr. Perry was aware that Mr. Laugeni was going to give the documents to federal officials who were engaged in a [sic] investigation"). Similarly, at the end of the hearing, very shortly after the court mistakenly referred to the defendant as Mr. Laugeni when imposing its sentence, the court granted the defendant's application for voluntary surrender and specifically addressed him as "Mr. Perry[.]" A57. In addition, the Judgment correctly identifies the defendant as Donald R. Perry, III. A11.

On the basis of a record that demonstrates that the district judge fully understood the identity of the defendant before her, the defendant cannot show any prejudice to his substantial rights from the judge's mis-statements. And in the absence of any impact on his substantial rights, he has not met his burden of showing reversible plain error.

Accordingly, this final claim can be rejected as well. The district court committed no error, much less plain error, at sentencing and the judgment should be affirmed.

Conclusion

For the foregoing reasons, the defendant's conviction via guilty plea and his sentence should be affirmed.

Dated: November 23, 2010

Respectfully submitted,

DAVID B. FEIN
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

MICHAEL J. GUSTAFSON
ASSISTANT U.S. ATTORNEY

SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 7,701 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

MICHAEL J. GUSTAFSON
ASSISTANT U.S. ATTORNEY