

09-1174-cr

To Be Argued By:
SARAH P. KARWAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-1174-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

JEAN AINE,

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 district court (Vanessa L. Bryant, United States District Judge) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231.

Judgment entered on March 16, 2009. JA 8. On March 23, 2009, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). JA 8.

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**

- I. Did the district court commit plain error in accepting the defendant's guilty plea the day trial was to begin after the district court canvassed the defendant concerning whether the plea was knowingly and voluntarily made and after hearing summaries of the offense conduct?

- II. Should this Court remand the case for re-sentencing before a new judge in light of the district court's comments at sentencing that could be understood to suggest that the defendant's nationality played some role in the determination of his sentence?

United States Court of Appeals

FOR THE SECOND CIRCUIT

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Appellee,

-vs-

JEAN AINE,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The defendant was charged in an indictment with bank fraud in connection with a scheme involving stolen United States Treasury checks. The defendant obtained those checks in Brooklyn, New York, and brought the checks to Groton, Connecticut, where he enlisted other individuals to cash the checks for him at the Navy Federal Credit Union. The defendant explained that the checks belonged to friends and family who did not have their own bank accounts because of immigration problems. When the

checks were ultimately reported stolen, and reclaimed by the United States Treasury, the Navy Federal Credit Union and the individuals who had helped the defendant lost tens of thousands of dollars.

On the day scheduled for the defendant's trial to begin, the defendant decided to plead guilty to one of the counts in the indictment. The district court thereafter sentenced the defendant to an 18-month term of imprisonment and a 5-year term of supervised release. The district court also ordered the defendant to make restitution to the Navy Federal Credit Union and the individuals who had unwittingly cashed the Treasury checks for him.

This appeal concerns the defendant's challenge to his guilty plea, which the defendant argues was not knowing and voluntary, nor supported by a sufficient factual basis. This appeal also concerns the defendant's argument that he is entitled to a remand to be re-sentenced by a different district judge because of certain remarks concerning the Haitian community made by the district court at sentencing.

For the reasons set forth below, this Court should affirm the defendant's conviction, but remand the case for re-sentencing before a different district judge.

Statement of the Case

On May 28, 2008, a federal grand jury sitting in Hartford, Connecticut, returned a 17-count indictment charging the defendant, Jean Aine, with bank fraud, in violation of 18 U.S.C. § 1344. JA 4, JA 10-13.

On December 8, 2008, the defendant pleaded guilty to Count 17 of the Indictment, JA 6-7, pursuant to a written plea agreement with the government, JA 72-80.

On March 11, 2009, the district court (Vanessa L. Bryant, United States District Judge) sentenced the defendant to a term of 18 months of imprisonment and 5 years of supervised release. The district court also ordered that the defendant make restitution in the amount of \$53,392.96. JA 8, JA 204-206. On March 16, 2009, judgement entered. JA 8. On March 23, 2009, the defendant filed a timely notice of appeal. JA 8, JA 207.

On September 4, 2009, the defendant was released from the custody of the Federal Bureau of Prisons.¹

¹ The defendant is facing deportation but is currently out on bond.

**Statement of Facts and Proceedings
Relevant to this Appeal**

A. The offense conduct

From October of 2006 through May of 2008, the defendant obtained over 20 stolen United States Treasury checks in the name of third parties, most of which were tax refund checks. JA 79, JA 151. Those checks had been mailed by the Treasury to addresses in New York, *id.*, mainly in and around the defendant's neighborhood in Brooklyn, New York. JA 153-54.

The defendant brought the Treasury checks to Groton, Connecticut, where he arranged to have others negotiate the checks through their accounts at the Navy Federal Credit Union. JA 149. These other individuals included the defendant's friend, Rudy Damas, and Damas's wife, Shanda Easley, as well as Easley's friends, Heather Hickman, Vanessa Calixte, and Denise Rollison. JA 148-49. The defendant approached these individuals through Damas, explaining that the Treasury checks belonged to friends and family in Brooklyn who could not cash the checks because of immigration problems. JA 149.

When several of the checks were ultimately reported stolen by their intended recipients, the Treasury reclaimed the checks from the Navy Federal Credit Union, which, in turn, debited the amount of the reclaimed checks from their customers' accounts. JA 160. This action resulted in Damas, Easley, Hickman, Calixte and Rollison owing thousands of dollars to the Navy Federal Credit Union. *Id.*

On May 15, 2008, members of the Secret Service and the Groton Town Police Department arrested the defendant as he was attempting to have five, \$500 counterfeit traveler's checks negotiated at the Navy Federal Credit Union. JA 149-50, JA 159. The defendant waived his *Miranda* rights and agreed to speak with the agents. JA 151. As reported by the agents, he stated that he had "stolen U.S. Treasury checks in the Brooklyn area, that he would bring them up to the Groton, Connecticut area, and have various individuals cash those treasury checks through their own accounts, and that he would bring the proceeds back to Brooklyn with him." *Id.* The defendant further stated that he had been involved in the fraudulent negotiation of "20 or more" checks. *Id.* Finally, the defendant stated that he had been involved in the scheme with another individual, "Natzari," but did not implicate Damas or any of the other Navy Federal Credit Union account holders in the scheme. JA 154-55.

On May 28, 2008, a grand jury charged the defendant with 17 counts of bank fraud, one count for each stolen Treasury check. JA 10-13. Following the indictment, the Secret Service identified an additional five Treasury checks that had been reported stolen and reclaimed by the Treasury. JA 157. The 22 checks totaled \$90,741.11, which, together with the five counterfeit traveler's checks found in the defendant's possession, totaled \$93,241.11. JA 159.²

² Some checks that the defendant caused to be negotiated have not yet been reported stolen, and thus not reclaimed by the
(continued...)

B. The guilty plea hearing

On December 2, 2008, the district court held jury selection, for which the defendant was present. JA 6, JA 21-22. A jury was selected and impaneled and trial was set for December 8, 2008. JA 6.

On December 5, 2008, the defendant filed a motion with the district court, asking to continue the trial and for the appointment of new counsel. JA 6, JA 14.

On the morning scheduled for the defendant's trial to begin, the district court noted that it had received the defendant's motion for new counsel, and recessed for approximately 15 minutes to allow the defendant to speak with his attorney, with the assistance of a Haitian-Creole interpreter.³ JA 17-18. After that recess, the defendant informed the district court that he needed an additional 20 minutes to speak to his attorney, which request the district court granted. JA 18.

² (...continued)

Treasury. The Secret Service was not able to track down the payees of these checks, who may, in fact, not be aware that they were supposed to receive a refund check from the government. JA 157-58.

³ During the district court proceedings, the defendant was assisted by a Haitian-Creole translator. The district court did note, however, that the defendant's English was "quite good," JA 42, and, at sentencing, the defendant addressed the district court in English. JA 122.

Following a 30 minute recess, the district court reconvened. The defendant stated to the district court that he still wanted new counsel. JA 18-19. The district court noted that the defendant had been present at and participated in the lengthy jury selection the week before and “did not express any dissatisfaction with [his] attorney[.]” JA 21-22. In addition, the district court explained to the defendant the consequences of appointing new counsel after the jury had been impaneled, including the declaration of a mistrial and the delay in setting the matter down for a new trial date. JA 23-24. The district court then identified for the defendant two stand-by attorneys present in the courtroom, a private attorney and a member of the Federal Public Defender’s office, whom the district court had arranged to be present to assist the defendant in connection with his request for new counsel, if necessary. JA 24; *see also* JA 69-70 (district court thanking the attorneys for responding to the court’s “emergency request” to assist the defendant). The district court then asked these two attorneys to meet with the defendant and explain the possible implications of his request for new counsel. JA 24-25.

Following an additional 30 minute recess, the defendant again stated to the district court that he desired new counsel. JA 27. The district court then expressed its intention to discuss with the defendant the reasons why he wanted new counsel. *Id.* In light of the possible attorney-client issues that might arise in such a colloquy, counsel for the government left the courtroom and the district court ordered that portion of the transcript sealed. JA 28-30.

The transcript, now unsealed at the defendant's request, *see* Br. 5, reveals that the defendant, his attorney, and stand-by counsel discussed with the district court the reasons why the defendant was dissatisfied with his defense counsel. JA 30-50. Stand-by counsel suggested, and the district court agreed, that an additional recess might be helpful in further discussing the issues with the defendant, as well as in discussing a possible resolution of the case with the government. JA 50-51. The district court then recessed for an additional two and one-half hours. JA 52.

Following the court's recess, the defendant informed the district court that after considering the matters before the court, he wished to plead guilty to Count 17 of the Indictment. JA 52. Counsel for the government then highlighted the terms of the written plea agreement for the district court. JA 52-60. With respect to the factual basis for the plea, counsel for the government noted that the parties had agreed to a stipulation of offense conduct, JA 54, and added:

[T]he Government, if put to its burden of proof at trial, would call various witnesses including law enforcement witnesses and lay witnesses to testify basically that the Defendant received or stole checks, United States treasury checks, from the mail in New York, caused those checks to be brought here to the District of Connecticut, and caused those checks to be negotiated at the [N]avy Federal Credit Union's branch in Groton, Connecticut by a number of individuals, and at the

time that these checks were negotiated the payees of the checks had not authorized the Defendant or anyone else to negotiate the checks, and at the time that the checks were negotiated, the [N]avy Federal Credit Union was a federally insured credit union.

JA 54. Government's counsel also set forth the specifics as to the treasury check identified in Count 17 of the Indictment, noting the payee's initials, the amount of the check, and the date the defendant caused the check to be fraudulently negotiated at the credit union. JA 54-55.

The prosecutor also noted that the plea agreement provided that "at sentencing, the Court may order restitution, and that [the defendant] would agree to make restitution to all victims or substitute victims of his criminal conduct, and not merely those victims included in Count 17." JA 55; *see also* JA 73 (plea agreement). Finally, government's counsel noted that "[t]he parties have specifically not agreed to a loss amount[.]" JA 57; *see also* JA 74 (plea agreement).

The district court then addressed the defendant concerning the plea agreement:

THE COURT: Has anyone promised you anything or threatened you in any way in order to induce you to plead guilty other than the provisions of the plea agreement which have been summarized here?

THE DEFENDANT: No.

THE COURT: Has the Government accurately described the offense to which you intend to plead guilty?

THE DEFENDANT: Yes.

THE COURT: Has the Government correctly recited the terms of the plea agreement as you understand them?

THE DEFENDANT: Yes.

THE COURT: And do you understand the minimum and maximum penalty for the offense, including the potential term of incarceration, supervised release, deportation, restitution, and assessment?

THE DEFENDANT: Yes.

THE COURT: Have you understood all of the proceedings here in court today?

THE DEFENDANT: Yes.

THE COURT: Have you had an adequate opportunity to discuss all of the matters, including the question of substitute counsel, the charge against you, the plea agreement, the potential penalty and your motion for release from detention with your counsel?

THE DEFENDANT: Yes.

THE COURT: Have your attorneys answered every question you have asked?

THE DEFENDANT: Yes.

THE COURT: Are there any additional questions you would like to ask them or you would like to ask me?

THE DEFENDANT: At this very second I'm speaking now, no, I do not have any question.

THE COURT: Do you need an opportunity to consider the question further?

THE DEFENDANT: On all these questions that you have asked me, no.

THE COURT: What I'm asking you is, do you believe you fully understand the proceedings so that you can go forward, or would you like more time to consult with your attorneys?

THE DEFENDANT: No, we can continue,

THE COURT: Are you satisfied with the legal representation you've received?

THE DEFENDANT: For today, yes.

JA 61-63. The defendant's attorney, together with the two stand-by counsel, then informed the district court that they saw no reason why the court could not accept the plea. JA 64-65.

The district court accepted the defendant's guilty plea, finding that it was voluntarily and intelligently made and that there was a factual basis for the plea. JA 67.

C. The sentencing hearing

On March 11, 2009, the district court held a sentencing hearing. JA 8, JA 113-202. At issue in the hearing was the total amount of loss attributable to the defendant under the United States Sentencing Guidelines, and the amount of restitution owed by the defendant to the victims of the scheme. JA 116-17.

The defendant first addressed the district court, admitting that he had stolen some Treasury checks, but that he had "no idea" how many checks he had been involved with. JA 126, JA 133-34. The defendant implicated Rudy Damas and another individual, "Gaspar," who the defendant stated were primarily responsible for the check scheme. JA 122-34.

Following the defendant's testimony, the government presented the testimony of Secret Service Special Agent Jeffrey Sengle, who testified about the check scheme. JA 147-69. Special Agent Sengle also testified that the defendant had admitted to him the details of the check scheme and that he was involved in "20 or more" Treasury

checks. JA 148-51. Special Agent Sengle further testified that the defendant told him that he was involved in the scheme with another individual, "Natzari," but that the defendant did not implicate Damas or others in the scheme. JA 154-55. Finally, Special Agent Sengle testified that the total amount of the fraudulently negotiated Treasury checks was \$90,741.11. JA 159.

After hearing from the defendant's sister, two victims of the scheme, and counsel for both parties, JA 170-92, the district court identified the factors that it considered in selecting an appropriate sentence, JA 193-98. The district court then sentenced the defendant to a term of imprisonment of 18 months, followed by a period of supervised release of five years and restitution in the amount of the reclaimed checks, \$53,392.96. JA 198.

This appeal followed.

Summary of Argument

I. The district court did not commit plain error when it concluded that the defendant's guilty plea was knowingly and voluntarily made. There was no error because the defendant, who consulted with three attorneys on the date of his plea, stated under oath that he understood the plea agreement, understood the court proceedings, had an adequate opportunity to consult with his counsel, and was satisfied with his legal representation. Further, the district court properly advised the defendant about the consequences of his plea and concluded that there was a sufficient factual basis for the plea based upon a record that included the plea agreement, the parties' stipulation of offense conduct, and the comments by the prosecutor and the defendant.

Moreover, the defendant has not shown that there was a reasonable probability that, but for the alleged errors, he would not have pleaded guilty. That is, the defendant has not shown how any of the alleged errors induced him to enter into the plea. In contrast, the benefits received by the defendant pursuant to the plea agreement, along with the defendant's failure to move to withdraw his plea once he learned facts that he now claims made his plea involuntary, demonstrate that the alleged errors did not cause the defendant to plead guilty. And finally, even if the district court committed any error, the defendant has not shown that such error affected the fairness, integrity or public reputation of the judicial proceedings.

II. This Court should remand this case for re-sentencing before a different district judge because one of the district judge's comments at sentencing could be read to suggest that the judge improperly considered the defendant's nationality in selecting an appropriate sentence. Although the government does not believe that the district judge harbored any *actual* bias against the defendant, under *United States v. Leung*, 40 F.3d 577 (2d Cir. 1994), the case should be remanded to a different judge for re-sentencing to avoid the *appearance* that the defendant's nationality played a role in his sentencing.

Argument

I. The district court did not commit plain error in accepting the defendant's guilty plea.

The defendant seeks to have his guilty plea vacated as a matter of plain error or, in the alternative, asks this Court to remand to a new district court judge “to allow that judge to consider whether to vacate the plea on a motion to withdraw.” Br. 33. Specifically, the defendant argues that his plea was not knowing and voluntary given his relationship with his attorney, that the district court failed to properly advise him of the consequences of his plea, and that there was an insufficient factual basis for the district court to accept his plea. Br. 33-42.

A. Relevant facts

The relevant facts surrounding the defendant's guilty plea are set forth above in the “Statement of the Case” and “Statement of Facts.”

B. Governing law and standard of review

Federal Rule of Criminal Procedure 11(b) requires the district court to determine that a defendant who seeks to plead guilty understands his various rights, including the nature of the charge to which he is pleading guilty, and the penalties for that charge. The rule's requirements are “designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary.” *United States v. Torrellas*,

455 F.3d 96, 102 (2d Cir. 2006) (quoting *United States v. Maher*, 108 F.3d 1513, 1520 (2d Cir. 1997)). “[W]ith regard to voluntariness, a guilty plea ‘must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor’s business (e.g. bribes).’” *United States v. Doe*, 537 F.3d 204, 211 (2d Cir. 2008) (quoting *Brady v. United States*, 937 U.S. 742, 755 (1970)).

Rule 11(b)(3) also requires the district court to “determine that there is a factual basis for the plea.” That is, the district court “must assure itself simply that the conduct to which the defendant admits is in fact an offense under the statutory provision under which he is pleading guilty.” *United States v. Maher*, 108 F.3d 1513, 1524 (2d Cir. 1997). In making this determination, the district court may rely upon “any facts at its disposal” as “long as the facts relied on are placed on the record at the time of the plea[.]” *Id.* at 1524-25 (internal citation omitted). The district court “may look to answers provided by counsel for the defense and government, the presentence report, or whatever means is appropriate in a specific case[.]” *United States v. Smith*, 160 F.3d 117, 121 (2d Cir. 1998) (internal quotations and alterations omitted).

“[W]here a defendant raises on appeal a claim of Rule 11 error that he did not raise in the district court, that claim is reviewable only for plain error.” *Torrellas*, 455 F.3d at 103. That is, the defendant must show: “that (1) there was error, (2) the error was plain, and (3) the error prejudicially

affected his substantial rights.” *Id.* (internal quotations omitted). In addition, the defendant must show that such error (4) “‘seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings.’” *United States v. Garcia*, 587 F.3d 509, 519 (2d Cir. 2009) (quoting *Johnson v. United States*, 520 U.S. 461, 467 (1997)).

With respect to the requirement that a defendant show that the Rule 11 error affected his substantial rights, the defendant must show “‘a reasonable probability that, but for the error, [he] would not have entered the plea.’” *Id.* (quoting *United States v. Vaval*, 404 F.3d 144, 151 (2d Cir. 2005)); *see also United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004). In making this determination, the Court may look beyond the plea colloquy because “the record as a whole becomes relevant.” *Garcia*, 587 F.3d at 520.

C. Discussion

The defendant argues that several “errors and irregularities” surrounding the plea demonstrate that the plea should be vacated. Br. 35. However, an examination of the record below demonstrates that the defendant’s plea was knowing and voluntary and supported by an ample factual basis. Moreover, the defendant has not shown that there is a reasonable probability that he would not have entered the plea but for any alleged error, or that such error affected the fairness, integrity, or public reputation of the judicial proceedings.

1. There was no Rule 11 error, plain or otherwise, in connection with the defendant's guilty plea.

a. The defendant's plea was knowing and voluntary.

The defendant claims that his plea was not voluntary because the defendant had “several problems” in the context of the attorney-client relationship. Br. 35-38. For example, the defendant asserts that the plea was rushed, that there were communication problems between him and his attorney, and that his attorney had not adequately prepared him to go to trial.⁴

The flaw in the defendant's argument is that it requires this Court to ignore the defendant's answers to the district court during the plea colloquy – answers which demonstrate that the defendant's plea was informed, deliberate, and voluntary. During the colloquy, the defendant stated under oath that he understood the plea agreement, that he understood the court proceedings, that he had an adequate opportunity to consult with his counsel (which at that point, consisted of three attorneys), that his counsel had answered every question that he had asked, and that he was satisfied with his legal representation. JA 61-63. While the defendant dismisses the district court's questions and his answers as “boilerplate,” Br. 38, this

⁴ The defendant explicitly states that he is not advancing an ineffective assistance of counsel claim at this time. Br. 38, n.2.

Court has made clear that “a straightforward and simple ‘Yes, your Honor,’” in response to the district court’s questions “is sufficient to bind a defendant to its consequences.” *Torrellas*, 455 F.3d at 103 (quoting *United States v. Gardner*, 417 F.3d 541, 544 (6th Cir. 2005)); *see also Doe*, 537 F.3d at 211 (“A defendant’s bald statements that simply contradict what he said at his plea allocution are not sufficient grounds to withdraw the guilty plea.”) (citation omitted); *id.* at 213 (noting that “statements at a plea colloquy carry a strong presumption of veracity”).

The defendant’s argument that the plea was “rushed” is not supported by the record, which demonstrates that the district court granted several lengthy recesses to the defendant to confer with three different attorneys. JA 17-19, JA 24-25, JA 27, JA 52. During the plea colloquy, the district court specifically asked the defendant whether he was ready to move forward with the proceeding or whether he “would . . . like more time to consult with [his] attorneys,” to which the defendant responded “No, we can continue.” JA 62. Thus, the record as a whole, including the defendant’s statements on the record, indicates that the defendant had sufficient time to discuss legal strategy with the attorneys and to make the informed decision to plead guilty.

To the extent that the defendant suggests that his plea was not voluntary because he had “little choice” between going to trial or pleading guilty, Br. 37-38, this, too, is an insufficient basis to attack his plea. In *Doe*, this Court rejected a similar claim, where the defendant argued that he had pleaded guilty in a “panic” and against his will. The

Court explained: “The question is not whether his ‘decision reflected a wholly unrestrained will, but rather whether it constituted a deliberate, intelligent choice between available alternatives.’” *Doe*, 537 F.3d at 212 (quoting *Rosado v. Civiletti*, 624 F.2d 1149, 1191 (2d Cir. 1980)). While the defendant obviously would have preferred no conviction at all, it does not follow that his decision to plead guilty instead of taking his case to trial was not an intelligent and knowing decision.⁵

b. The defendant was fully advised of the consequences of his guilty plea.

Next, the defendant argues that his plea was invalid because the district court failed to properly advise him of the consequences of pleading guilty. Br. 39-41. Specifically, the defendant asserts that “the significance of the Guidelines was not made clear,” and, in particular, that the district court did not explain how the issue of relevant conduct would apply in the computation of the loss amount. Br. 39. This argument fails because the law does not require the district court to make a detailed explanation concerning the Guidelines’ application.

The district court sufficiently apprised the defendant that it would consider the advisory Sentencing Guidelines as well as the material contained in the pre-sentence report

⁵ There is simply nothing in the record to support the defendant’s assertion that “he reasonably perceived the plea as being far more advantageous to him than it actually was.” Br. 38.

in fashioning a sentence in the case. JA 63; *see also* JA 73 (plea agreement) (“[T]he defendant understands that although application of the United States Sentencing Guidelines is not mandatory, they are advisory and the Court is required to consider any applicable Sentencing Guidelines as well as other factors enumerated in 18 U.S.C. § 3553(a) to tailor an appropriate sentence in this case.”). The defendant acknowledged that he understood this procedure, JA 63, and nothing more was required.

The district court had no further obligation to discuss in detail any specific Guideline calculation, including relevant conduct for purposes of determining loss amount. *See United States v. Andrades*, 169 F.3d 131, 134 (2d Cir. 1999) (“[T]here is no requirement in Rule 11 itself that defendants be advised of their potential punishments pursuant to the Sentencing Guidelines rather than the criminal statute, and we decline to create the requirement.”). This Court does not require a detailed discussion of the Sentencing Guidelines during a plea colloquy in part because any such discussion at that time would be impractical. In the absence of a presentence report with information about the details of the crime, the defendant’s criminal history, and potential grounds for departure, “the district court at the time of the plea allocution frequently has too little information available to provide defendant with an accurate sentencing range.” *Id.*

In sum, the district court properly and sufficiently advised the defendant about the applicability of the Sentencing Guidelines in this case.

c. The district court properly concluded that there was an adequate factual basis for the plea.

Finally, the defendant questions whether there was an adequate factual basis for his guilty plea because the district court failed to ask the defendant himself to describe what he did. Br. 42. Rule 11, however, does not require that the district court rely solely upon the defendant in evaluating the factual basis for the plea. *See Maher*, 108 F.3d at 1524-25. Instead, the district court may rely upon “any facts at its disposal[.]” *Id.* Here, there were ample facts at the district court’s disposal to demonstrate that a factual basis existed for the defendant’s plea.

First, the plea agreement itself spelled out the essential elements of the crime of bank fraud under 18 U.S.C. § 1344(1). JA 72. It continued with a stipulation of offense conduct, signed by the defendant, his counsel, and the prosecutor, which outlined the facts demonstrating that the defendant had, in fact, committed bank fraud. JA 79.

Also, during the plea colloquy, counsel for the government offered a recitation of the government’s evidence, were the case to proceed to trial:

[T]he Government if put to its burden of proof at trial would call various witnesses including law enforcement witnesses and lay witnesses to testify basically that the Defendant received or stole checks, United States treasury checks, from the mail in New York, caused those checks to be

brought here to the District of Connecticut, and caused those checks to be negotiated at the [N]avy Federal Credit Union's branch in Groton, Connecticut by a number of individuals, and at the time that these checks were negotiated the payees of the checks had not authorized the Defendant or anyone else to negotiate the checks, and at the time that the checks were negotiated, the [N]avy Federal Credit Union was a federally insured credit union.

JA 54. The prosecutor continued with a description of the facts specific to Count 17:

With respect specifically to the count that the Defendant is pleading guilty to, Count 17, the Government at trial would show that on or about December 7, 2006, the Defendant caused a specific United States treasury check payable to an individual who had the initials J.L. in the amount of \$4,272 and bearing the date of November 24, 2006, and at the time the Defendant caused that check to be negotiated he knew he did not have the authority to negotiate the check or to obtain the proceeds of that check.

JA 54-55. After this recitation, the court asked the defendant whether the government had "accurately described the offense to which you intend to plead guilty." JA 61. The defendant answered, "Yes." JA 61.

On this record, there was more than a sufficient factual basis for the plea. The facts as set forth in the plea

agreement and by the prosecutor during the plea colloquy provided a more than sufficient foundation to allow the district court to conclude, as it did, JA 67, that “the conduct to which the defendant admits is in fact an offense under the statutory provision under which he is pleading guilty.” *Garcia*, 587 F.3d at 514 (internal quotations omitted). The defendant does not seriously contend otherwise.

2. Even if there were plain error, the defendant cannot show that there is a reasonable probability that but for the error, he would not have entered the plea.

To establish plain error based on an alleged Rule 11 violation, the defendant must show “a reasonable probability that, but for the error, [he] would not have entered the plea.” *Garcia*, 587 F.3d at 519 (quoting *Vaval*, 404 F.3d at 151). The defendant makes no attempt to explain how he meets this standard (aside from a conclusory statement that he would not have pleaded guilty, Br. 33), and accordingly, he has waived any argument that any alleged errors prejudiced his substantial rights. *See Hicks v. Baines*, 593 F.3d 159, 166 n.5 (2d Cir. 2010) (holding that conclusory allegations, with no explanation, analysis, or developed argument, are forfeited on appeal); *Tolbert v. Queens College*, 242 F.3d 58, 75 (2d Cir. 2001) (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)) (“It is a ‘settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.’”).

In any event, an examination of the record as a whole shows that there is no basis for concluding that but for the alleged errors, the defendant would not have pleaded guilty. *See Garcia*, 587 F.3d at 520 (when assessing whether error affects substantial rights, “the record as a whole becomes relevant”). First, the case against the defendant was strong, and included evidence that the defendant confessed to being involved in the stolen check scheme. JA 151. It also included evidence that the individuals who cashed the stolen Treasury checks received the checks from the defendant or in the defendant’s presence. JA 155. Moreover, by pleading guilty pursuant to the plea agreement, the defendant received the benefit of a two-level reduction in his adjusted offense level that he would not have received if he had gone to trial. JA 74.

In addition, the plea agreement – which the defendant signed – demonstrates that the alleged errors the defendant now raises did not induce him to enter into a plea that he would have otherwise avoided. For example, although the defendant now argues that he was dissatisfied with his legal representation, the plea agreement explicitly states that the defendant “acknowledges his complete satisfaction with the representation and advice received from his undersigned attorney.” JA 76. The agreement also records the defendant’s agreement that he was “entering into this agreement and is pleading guilty freely and voluntarily.” JA 76.

Similarly, while the defendant complains that the district court failed to notify him that it could consider

checks beyond the single stolen check identified in Count 17 at sentencing, the plea agreement and plea colloquy demonstrate that this alleged error had no impact on his substantial rights. In the plea agreement's stipulation of offense conduct, the defendant specifically admitted that during a 19 month period he obtained Treasury *checks*, "a number of which had been stolen." JA 79 (emphasis added). And while the factual stipulation provided details about the check identified in Count 17, it also stated that the government could "present additional relevant offense conduct to the attention of the Court in connection with sentencing." JA 79. Further, the plea agreement specifically noted that the parties had reached no agreement on the loss amount, JA 74, thereby alerting the defendant that the loss amount would not be limited to the \$4,272 check at issue in Count 17. Counsel for the government highlighted this very term during the plea colloquy, noting that the "parties have specifically not agreed to a loss amount." JA 57. In sum, on this record where the plea proceedings notified the defendant that the sentencing court could consider loss amounts beyond the check in Count 17, the defendant cannot show that he would not have pleaded guilty if only the district court itself had relayed the same information.

The defendant's failure to object to several of the factual statements in the Pre-Sentence Report also undermines his assertion that he would not have pleaded guilty but for the alleged errors. While the defendant objected to the PSR's ultimate loss calculations, JA 99, he did not challenge the PSR's statements that the defendant "obtained stolen United States Treasury checks" and

“caused these checks to be fraudulently cashed without the payee’s authorization.” PSR ¶ 6.

Finally, the defendant’s failure to withdraw his guilty plea before the district court also forecloses his argument that the alleged errors at the plea colloquy caused him to enter into the plea. At a minimum, the mere fact that he did not move to withdraw his guilty plea in the district court undermines his argument that he pleaded guilty involuntarily. *See Doe*, 537 F.3d at 213 (“Whereas a swift change of heart may indicate a plea made in haste or confusion, the fact that the defendant waited five months to file his motion strongly supports the district court’s finding that his plea was entered voluntarily.”) (citation omitted).

Moreover, the defendant learned additional information after the plea colloquy and yet still made no effort to withdraw his plea. Specifically, the PSR calculated the defendant’s base offense level based upon a loss amount between \$70,000 and \$120,000. PSR ¶ 42. While the defendant objected that the loss amount “is less than the amount calculated by the Probation Officer and the Government[,]” JA 99, the defendant did not seek to withdraw his guilty plea before sentencing on the basis that the issues of relevant conduct and loss amount were inadequately relayed to him at his plea. Accordingly, he cannot show that the alleged errors in the plea colloquy prejudiced his substantial rights. “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.” *Vaval*, 404 F.3d at 152 (quoting *Dominguez Benitez*, 542 U.S. at 74.)

In sum, the defendant has not shown that but for the alleged errors in his plea colloquy, he would not have pleaded guilty. He has not shown, in other words, that any error prejudiced his substantial rights.

3. Any alleged error did not affect the fairness, integrity, or public reputation of the judicial proceedings.

Finally, the defendant has not alleged, nor does a review of the record reveal, that the alleged errors in the Rule 11 colloquy affected the fairness, integrity, or public reputation of the judicial proceedings.

For example, there is no evidence to suggest that the defendant was convicted of a crime for which he is not guilty. To the contrary, the defendant repeatedly acknowledged his guilt to the court. *See, e.g.*, JA 122 (“I’m not trying to say that I am not guilty of anything. I come before the Court to say my involvement in this case is less than the prosecutor tries to put it.”); JA 132-34 (admitting that he was involved in passing stolen checks a “few times” but could not say with certainty how many checks he was involved with); JA 136 (“I’m not trying to explain to the Court I am an innocent man. That’s not the case.”); PSR ¶ 36 (“Mr. Aine stated he was involved in the

theft [of the checks], but that he was taken advantage of by others.”).

Thus, the facts surrounding the defendant’s conviction are far from the facts of a case like *Garcia* where the Court found and corrected a plain error in the factual basis for a guilty plea. In *Garcia*, the Court explained that the defendant “has been convicted of and is serving a 108-month sentence for an offense of which there is a substantial possibility he is not guilty.” 587 F.3d at 521. Here, the defendant’s own statements concerning his guilt, and his failure to withdraw his plea below, demonstrate that there is no basis to conclude that, even if an error occurred, it affected the integrity of the judicial process.⁶

In conclusion, the defendant’s guilty plea was knowing and voluntary, and supported by an adequate factual basis. In addition, the defendant cannot show that but for the alleged errors, he would not have pleaded guilty. Accordingly, it was not plain error for the district court to accept the defendant’s plea. The defendant’s conviction should be affirmed.

⁶ The defendant argues in the alternative that he should be allowed to withdraw his guilty plea on remand. Br. 42-43. Although the government does not believe that there is any basis for a motion to withdraw the plea in this case, there is no reason for this Court to reach that issue here. As set forth below, the government agrees that this case should be remanded for re-sentencing. *See* Part II, *infra*. On remand, the Federal Rules of Criminal Procedure provide a mechanism for the defendant to withdraw his plea in appropriate circumstances. *See* Fed. R. Crim. P. 11(d)(2)(B).

II. This Court should remand for re-sentencing by a different district judge.

The defendant requests a remand for re-sentencing by a different district judge in light of certain remarks made by the district court at sentencing. The government agrees that a remand is warranted.

A. Relevant facts

Prior to sentencing, the Probation Department prepared a PSR. The PSR calculated the defendant's Guidelines range with a base offense level of 7, and an 8-level increase for a loss amount exceeding \$70,000. PSR ¶¶41-42; *see also* U.S.S.G. § 2B1.1(b)(1)(E). With a two-level reduction for acceptance of responsibility, PSR ¶ 47, and a Criminal History Category of I, PSR ¶ 50, the defendant's Guidelines range was 12 to 18 months of imprisonment. PSR ¶ 63.

The defendant objected to the loss amount as set forth in the PSR (and advocated by the government), arguing that the loss amount "should be calculated to be a sum less" than the \$70,000 threshold, but did not advocate a specific loss amount. JA 99. The defendant also moved for a downward departure, citing his "extraordinary" strides towards rehabilitation and his lack of previous criminal convictions. JA 103-106. The defendant asked for a sentence of time served, which, due to his pretrial detention, would have effectively been 10 months at the time of sentencing. JA 109.

At sentencing on March 11, 2009, the key issue in dispute was the loss amount. JA 116-17. The defendant addressed the court regarding his responsibility for various checks and his belief that other individuals were primarily responsible for the scheme. JA 122-34. The government presented the testimony of Special Agent Sengle, who testified that the total amount of fraudulently negotiated Treasury checks associated with the scheme was \$90,741.11. JA 159. After hearing this testimony, the district court found that the loss attributable to the defendant exceeded \$70,000. JA 193.

With this dispute resolved, the district court described the factors it was required to consider in selecting an appropriate sentence. For example, the court discussed the offense conduct, the impact on the victims, the defendant's characteristics and history, the various goals of sentencing, and the need to avoid sentencing disparities. JA 193-97. In the course of this discussion, the district court made the following comments:

The Court must also consider a sentence which deters others, and clearly, there are others in the Haitian community who, by the content of the docket in this case, and the presentations here today, are still engaging in illegal activity with impunity and without any appreciation for the illegality of that conduct, and the adverse effect that it has on the legitimate individuals around the world, seeking entry in the United States, in the right and legal way.

JA 195. The defendant did not object to the district court's statements.

After explaining the factors that guided its decision, the court sentenced the defendant to 18 months' imprisonment and 5 years' supervised release. The court ordered the defendant to pay restitution in the amount of \$53,392.96 and a \$100 special assessment, but did not impose a fine. JA 198.

B. Governing law and standard of review

This Court's precedents make clear that when a district judge's comments suggest the possibility that a defendant's national origin or ethnicity played an adverse role in sentencing, the case must be remanded for re-sentencing by a different district judge. In *United States v. Leung*, 40 F.3d 577, 586 (2d Cir. 1994), for example, this Court "reject[ed] the view that a defendant's ethnicity or nationality may legitimately be taken into account in selecting a particular sentence to achieve the general goal of deterrence." In particular, this Court held that "[a] defendant's race or nationality may play no adverse role in the administration of justice, including at sentencing." *Id.* at 586.

In that case, the sentencing judge had remarked that the sentence imposed was to punish the defendant "and to generally deter others, particularly others in the Asiatic community because this case received a certain amount of publicity in the Asiatic community, and I want the word to go out from this courtroom that we don't permit dealing in

heroin” *Id.* at 585 (quoting district court). While this Court was “confident” that the trial judge harbored no actual bias, it nonetheless remanded for re-sentencing before a different judge because “justice must satisfy the appearance of justice,” and there was “a sufficient risk that a reasonable observer, hearing or reading the quoted remarks, might infer, however incorrectly, that [the defendant’s] ethnicity and alien status played a role in determining her sentence.” *Id.* at 586-87 (citation and quotation omitted).

More recently in *United States v. Kaba*, 480 F.3d 152 (2d Cir. 2007), the Court reached a similar conclusion. In that case, which involved a defendant from Guinea, the district court made the following comments at sentencing relating to the defendant’s national origin:

[I]t is entirely reasonable to assume that people from the Guinea community are going to say gee, do you hear what happened to [the defendant]? I don’t want that to happen to me.

I hope that that has some effect here that will deter other people from that background from doing what you’ve done here[.]

Id. at 155-56. This Court, again, had “no doubt” that the district court “harbored no bias” against the defendant, but nonetheless remanded for re-sentencing by a different judge. *Id.* at 158 (quoting *Leung*, 40 F.3d at 586). A remand was necessary because the district court’s

comments created “at least the appearance of unfairness.”
Id.

In contrast, in *United States v. Carreto*, 583 F.3d 152 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 813 (2009), and *cert. denied*, __ S. Ct. __, 2010 WL 86011 (No. 09-8482) (Feb. 22, 2010), this Court rejected a claim that the district court improperly considered the defendants’ national origin at sentencing on sex trafficking charges. In that case, defense counsel argued that his Mexican client’s national origin should be considered in sentencing because prostitution was more widespread in Mexico than in the United States. *Id.* at 159. The district court rejected this argument by remarking as follows: “And it’s, I think, terribly important in particular in this case to send a message loud and clear that people – I don’t care where they come from, whether they come from the United States, Mexico, any place. If they commit these crimes in the United States, they’re going to be treated harshly by the law.” *Id.* On appeal, the defendants argued that these comments were improper, but this Court rejected that claim. According to the Court, a remand was not warranted because the district court only remarked about the defendant’s country of origin in response to remarks by defense counsel and because “the court explicitly stated that defendants’ national origin was not being considered[.]” *Id.* at 160.

This Court reviews *de novo* whether a sentencing court impermissibly considered a defendant’s national origin. *Id.* at 159. Moreover, a defendant’s failure to object to the district court’s comments at the time of sentencing does

not foreclose the defendant's ability to raise this issue on appeal because a party "could not reasonably have been expected to raise a contemporaneous objection" in response to such a statement. *Leung*, 40 F.3d at 586.

C. Discussion

The government has "no doubt" that the district judge here "harbored no bias" toward the defendant on account of his national origin. *Kaba*, 480 F.3d at 158 (quoting *Leung*, 40 F.3d at 586). Although the judge indicated that she intended her sentence to deter "others in the Haitian community," JA 195, the government understood that comment to be directed not to the Haitian community in general, but rather to the other individuals involved in the defendant's bank fraud scheme, many of whom happened to be Haitian. Indeed, the defendant himself had identified other individuals from Haiti who were involved in the scheme, and who he believed to be more culpable. *See* JA 122-25; *see also* PSR ¶ 36 (recording defendant's description of others from the Haitian community who were involved in the scheme). On this record, the district judge's comments could be understood to be referring to the need to deter other individuals who were possibly still involved in the very same scheme.

Nevertheless, the government also agrees that there is an appearance of bias in this case. Specifically, the government acknowledges that there is a risk that a reasonable observer might conclude that the defendant's national origin played an adverse role in his sentence. The government notes that the district court's comment that it

must impose a sentence “which deters others, and clearly, there are others in the Haitian community who . . . are still engaging in illegal activity,” JA 195, is similar to the comments found objectionable in *Leung*, where the district court stated the sentence was “to generally deter others, particularly others in the Asiatic community.” 40 F.3d at 585. The district court’s statement was also reminiscent of the objectionable statement at issue in *Kaba*, where the district court remarked that “deterrence is a major factor . . . [and] it is entirely reasonable to assume that people from the Guinea community are going to say gee, did you hear what happened to [the defendant]? I don’t want that to happen to me.” 480 F.3d at 155-56.

In short, while the record as a whole provides a reasonable interpretation of the district judge’s comments, a “reasonable observer, hearing or reading the quoted remarks, might infer, however incorrectly, that [the defendant’s] ethnicity . . . played a role in determining [his] sentence.” *Leung*, 40 F.3d. at 586-87. Accordingly, the government agrees that, in light of *Leung* and *Kaba*, a remand for re-sentencing by a different judge is warranted, even absent an objection by the defendant at the time of sentencing.⁷ *Leung*, 40 F.3d at 586-87; *Kaba*, 480 F.3d at 158-59.

⁷ Because the government agrees that a remand for re-sentencing is appropriate under *Leung*, the government has not addressed the defendant’s other challenges to the sentence imposed by the district court. Br. Pt. I.C and I.D.

Finally, although the defendant requests a remand for a limited re-sentencing on the questions of supervised release and restitution only, Br. 32-33, there is no basis for such a limited remand. This Court has never parsed a district court's objectionable comments to determine whether they applied to only a portion of the sentence. Indeed, it has been the practice of this Court to remand for re-sentencing, with no limitations, when faced with the appearance of biased comments by a district judge at sentencing. *See, e.g., Kaba*, 480 F.3d at 159 (noting risk to defendant of potentially higher sentence on remand). In any event, any attempt to parse the judge's comments here would be futile. The objectionable portions of the district court's comments went to the court's reasoning for the sentence as a whole, and were not limited to any particular part of the sentence. Because the appearance of bias arose during the defendant's sentencing hearing, the case should be remanded for full re-sentencing by a different judge.

Conclusion

For the foregoing reasons, the defendant's conviction should be affirmed, and his sentence vacated and remanded for re-sentencing before a different district court judge.

Dated: April 9, 2010

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Sarah P. Karwan", written in a cursive style.

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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 8,700 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

A handwritten signature in black ink, appearing to read "Sarah P. Karwan". The signature is fluid and cursive, with a long horizontal stroke at the end.

SARAH P. KARWAN
ASSISTANT U.S. ATTORNEY

ADDENDUM

Rule 11. Pleas

(a) Entering a Plea.

(1) In General. A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

* * *

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must 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.

Rule 52. Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.