**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

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No. 93-4632

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

HECKMAT MIKHAEL,

Defendant-Appellant.

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Appeal from the United States District Court
for the Western District of Louisiana
(92-CR-60028-01)

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(August 3, 1994)

Before REYNALDO G. GARZA, SMITH, and PARKER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Hekmat Mikhael appeals the order of restitution imposed upon him at sentencing after pleading guilty to conspiracy to commit wire fraud. Finding only harmless error, we affirm.

I.

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Mikhael was indicted on May 14, 1992, in a nine-count indictment charging one count of conspiracy to commit wire fraud in violation of 18 U.S.C. § 371, six counts of wire fraud in violation of 18 U.S.C. § 1343, and two counts of use of a false social security number in violation of 42 U.S.C. § 408(7)(B). On January 25, 1993, Mikhael pled guilty to the conspiracy charge pursuant to a written plea agreement in exchange for dismissing the remaining counts. At that time, Mikhael executed an affidavit of understanding of maximum penalty and constitutional rights. In both the plea agreement and the affidavit, the maximum penalty was described as a fine of not more than $250,000, imprisonment of not more than five years, and a minimum of three years of supervised release. No mention of restitution appeared in either document.

A presentence investigation report ("PSR") was prepared and stated that the district court could order restitution as a condition of supervision. The PSR noted, however, that Mikhael had a negative net worth, a negative monthly cash flow, and had insufficient resources to pay a fine or restitution.

The district court sentenced Mikhael to twelve months' imprisonment to be followed by thirty-six months' supervised release. In addition, the district court ordered restitution in the amount of $5000. The court found that Mikhael was employed and that "[f]ollowing his incarceration, he should be able to get a job and pay restitution." The court imposed no fine, however.

II.

A.

Mikhael argues on appeal that the district court erred in imposing restitution on him without explaining at the time of the guilty plea that restitution was a possibility. The legality of a restitution order is reviewed de novo, and, if the sentence is legal, the award is reviewed for an abuse of discretion. United States v. Reese, 998 F.2d 1275, 1280 (5th Cir. 1993) (citation omitted). Moreover, the district court is not required to assign specific reasons for the restitution order unless the record contains insufficient data for appellate review. United States v. Patterson, 837 F.2d 182, 183-84 (5th Cir. 1988).

Mikhael relies upon United States v. Corn, 836 F.2d 889, 895 (5th Cir. 1988), in which this court stated that an imposition of restitution "without explicit prior notice of the possibility of restitution, could scarcely be deemed either harmless or not to affect the defendant's substantial rights." In Corn, the district court imposed $6 million in restitution without prior notice at the plea colloquy.

The government argues that Corn is no longer valid after United States v. Johnson, 1 F.3d 296 (5th Cir. 1993) (en banc). Before accepting a plea of guilty, the court must address the defendant personally in open court and, when applicable, inform him that the court may order restitution to any victim. FED. R. CRIM. P. 11(c)(1). We no longer examine whether the plea colloquy can be categorized as a failure to comply with one or more of the three

"core concerns" of rule 11 or whether such failure was total or partial. Johnson, 1 F.3d at 301-02. Instead, a "harmless error" standard is applied, id. at 302, and Corn must be read in this light.

A failure in a plea colloquy mandates reversal only when it affects substantial rights, i.e., when the defendant's "knowledge and comprehension of the full and correct information would have been likely to affect the defendant's willingness to plead guilty." Id. The issue "`must be resolved solely on the basis of the Rule 11 transcript' and the other portions (e.g., sentencing hearing) of the limited record made in such cases." Id. (citing FED. R. CRIM. P. 11 (advisory committee notes to 1983 amendment) (quoting United States v. Coronado, 554 F.2d 166, 170 n.5 (5th Cir.), cert. denied, 434 U.S. 870 (1977))).

Applying this standard to the instant case, we conclude that the district court's failure to mention restitution during the plea colloquy was harmless error. Mikhael knew that he could be fined up to $250,000. Three other circuits have found the failure to address the possibility of restitution during the plea colloquy harmless error where the defendant was advised of possible fines. See United States v. Padin-Torres, 988 F.2d 280 (1st Cir. 1993) (order of restitution without prior notice at plea colloquy deemed harmless where restitution did not exceed maximum fine amount of which defendant was advised); United States v. Fox, 941 F.2d 480 (7th Cir. 1991) (same), cert. denied, 112 S. Ct. 1190 (1992); United States v. Miller, 900 F.2d 919 (6th Cir. 1990) (same).

Furthermore, Mikhael knew from the PSR that he had caused a loss amounting to $188,770 and that the court could order restitution. He failed to object to any part of the PSR or to object to the restitution order at sentencing. It cannot therefore be said that the court's failure to warn him about possible restitution would have affected his decision to plead guilty.[1] As the error did not affect his substantial rights, it was harmless.

We note, however, that this inquiry is somewhat case-specific. Here, the error is harmless because the defendant's total economic exposure (fine plus restitution) was not increased by the sentence as compared with the affidavit of understanding and the plea agreement. Accordingly, his decision to plead guilty was not affected by the inaccurate information provided.

B.

Mikhael also challenges that amount of the restitution order. The defendant bears the burden to produce evidence concerning his inability to pay restitution. 18 U.S.C. § 3664(d).[2] A defendant's indigence at the time of sentencing is generally not considered a bar to the requirement of restitution. United States v. Ryan, 874 F.2d 1052, 1054 (5th Cir. 1989). It is not only the defendant's present ability to pay that is considered, but his future ability as well. See United States v. Matovsky, 935 F.2d 719 (5th Cir.

[1] Nor, for the same reasons, can it be said that the failure rendered his plea involuntary.

[2] The government bears the burden of proving the amount of the loss, but Mikhael does not contest that figure.

1991) (basing a restitution order upon defendant's ability to gain future employment based upon education and background, despite present unemployment).

The record reflects that Mikhael has a high school education and some college experience. The restitution order was only $5000, and Mikhael failed to adduce evidence of his inability to pay or the possibility of deportation. Therefore, the order was not an abuse of discretion.

AFFIRMED.