

**United States Court of Appeals  
FOR THE SECOND CIRCUIT**

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August Term, 2017

(Argued: January 31, 2018 Decided: March 13, 2018)

Docket No. 16-4318-cr

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UNITED STATES OF AMERICA,

*Appellee,*

–v.–

WINIFREDO GONZALES, AKA FRED, AKA CHIN,

*Defendant-Appellant.*

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B e f o r e :

SACK, PARKER, and CARNEY, *Circuit Judges.*

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3 Defendant-Appellant Winifredo Gonzales appeals from a judgment of conviction  
4 in the United States District Court for the Western District of New York (Geraci, *C.J.*),  
5 arguing that his guilty plea was not knowingly entered. During the colloquy in which  
6 the District Court accepted his plea, the court did not inform Gonzales, a lawful  
7 permanent resident of the United States, of the serious potential immigration  
8 consequences of his plea. These consequences included likely removal from the United  
9 States. The plea agreement, too, did not mention those consequences. In its omission at  
10 the colloquy, the District Court violated Fed. R. Crim. P. 11(b)(1)(O). Months later, at  
11 sentencing, having learned through the Presentence Report that he would likely be

1 removed after serving his sentence, Gonzales himself addressed the court and  
2 complained that he had not known about those consequences when he entered his plea.  
3 The District Court acknowledged Gonzales's concern but took no action to remedy the  
4 earlier oversight or to inquire further. Because the court's failure to inform Gonzales of  
5 the immigration consequences of his plea before accepting his plea violated Gonzales's  
6 substantial rights, we VACATE the judgment of the District Court and REMAND the  
7 cause for further proceedings consistent with this opinion.  
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VACATED AND REMANDED.

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9  
10 BRENDAN WHITE, White & White, New York, NY, *for*  
11 *Defendant-Appellant.*

12  
13 ROBERT MARANGOLA (Monica Richards, *on the brief*),  
14 Assistant United States Attorneys, *for* James P.  
15 Kennedy, Jr., Acting United States Attorney for the  
16 Western District of New York, Buffalo, NY, *for*  
17 *Appellee.*

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PER CURIAM:

18 Defendant-Appellant Winifredo Gonzales appeals from a judgment of conviction  
19 in the United States District Court for the Western District of New York (Geraci, C.J.),  
20 arguing that his guilty plea was not knowingly entered. During the colloquy in which  
21 the District Court accepted his plea, the court did not inform Gonzales, a lawful  
22 permanent resident of the United States, of the serious potential immigration  
23 consequences of his plea. These consequences included likely removal from the United  
24 States. The plea agreement, too, did not mention those consequences. In its omission at  
25 the colloquy, the District Court violated Federal Rule of Criminal Procedure 11(b)(1)(O),

1 which provides in relevant part that “before the court accepts a plea of guilty . . . the  
2 court must address the defendant personally . . . [and] inform the defendant of, and  
3 determine that the defendant understands . . . that, if convicted, [and if] not a United  
4 States citizen [he] may be removed from the United States, denied citizenship, and  
5 denied admission to the United States in the future.”

6 Months later, at sentencing, having learned through the Presentence Report  
7 (PSR) that he would likely be removed after serving his sentence, Gonzales himself  
8 addressed the court and complained that he had not known about those consequences  
9 when he entered his plea. The District Court acknowledged Gonzales’s concern but  
10 took no action to remedy the earlier oversight or to inquire further. Because the court’s  
11 failure to inform Gonzales of the immigration consequences of his plea before accepting  
12 his plea violated Gonzales’s substantial rights, we VACATE the judgment of the District  
13 Court and REMAND the cause for further proceedings consistent with this opinion.

#### 14 **BACKGROUND**

15 On June 22, 2015, Defendant-Appellant Winifredo Gonzales was charged by  
16 information in Rochester, New York, with one count of conspiracy to manufacture,  
17 possess with intent to distribute, and distribute, five kilograms or more of cocaine and  
18 280 grams or more of cocaine base, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A),  
19 and one count of possessing a firearm in furtherance of a drug trafficking offense, in  
20 violation of 18 U.S.C. § 924(c)(1)(A)(i). The following day, he entered into a plea  
21 agreement with the government under Fed. R. Crim. P. 11(c)(1)(C) that contemplated  
22 primarily a sentence of 228 months and appeared with counsel before the District Court

1 for the Western District of New York to enter his plea of guilty to the charged offenses.  
2 In the plea colloquy that day, the District Court failed, in violation of Fed. R. Crim. P.  
3 11(b)(1)(O), to “inform [Gonzales] of, and determine that [he] understands, . . . that, if  
4 convicted, [if he] is not a United States citizen[, he] may be removed from the United  
5 States, denied citizenship, and denied admission to the United States in the future.”  
6 Fed. R. Crim. P. 11(b)(1)(O). Gonzales was not informed of the dire potential  
7 immigration consequences of his plea by his attorney, the prosecutors, or the plea  
8 agreement itself. Gonzales is a lawful permanent resident (LPR), not a citizen, of the  
9 United States.

10 On December 15, 2016, almost eighteen months after the District Court accepted  
11 his plea, Gonzales appeared with counsel before the District Court, for sentencing. By  
12 that point, he had had access to the PSR, dated June 10, 2016. In its paragraph 86, the  
13 PSR recited Gonzales’s status as an LPR and advised, “[B]ased on the nature of the  
14 offenses to which Gonzales pled guilty to, it appears that he may be amenable to  
15 removal after sentencing.” PSR ¶ 86. During sentencing, the court asked whether he  
16 had a “chance to review the [PSR] with your attorney as well and discuss it with him.”  
17 Gonzales responded, “Did he? Yes. But I have some disagreement with the presentence  
18 report.” App. 81. After a brief discussion of an offense-level concern, the defendant  
19 further addressed the court as follows: “There’s another [concern] . . . . I asked [my  
20 counsel] about my—they’re saying me getting deported after my sentencing. You said I  
21 have to—don’t worry about that, I was here since I was five years old. Is that true? He  
22 told me I don’t have to worry about that.” *Id.* at 82-83. After confirming that Gonzales is  
23 an LPR, the District Court responded, “Mr. Gonzales is raising whether or not he was

1 advised that the plea in this case would have consequences on his status in the United  
2 States, and I don't recall that being part of the plea agreement in here. The sentence here  
3 is involving [sic] almost 20 years, that may be why it wasn't part of the agreement. Is  
4 there anything else?" *Id.* Gonzales responded, "No, Your Honor." *Id.* That was the end  
5 of the discussion of the immigration consequences of Gonzales's plea.

6 At the close of the sentencing hearing, the District Court asked Gonzales if there  
7 was "anything [he] want[ed] to say." Gonzales responded, "No, I got nothing to say.  
8 I'm not satisfied with [my counsel's] defense. That's all I got to say." App. 84. The  
9 District Court then sentenced Gonzales to a total of 228 months of imprisonment  
10 followed by five years of supervised release and ordered that, at the end of his term of  
11 incarceration, Gonzales "be delivered to immigration authorities at the appropriate time  
12 to determine his status in the United States." Represented by new counsel, Gonzales  
13 timely appealed.

## 14 DISCUSSION

15 On appeal, Gonzales seeks vacatur of the judgment of conviction and his  
16 associated plea. He argues that his plea was not knowing and voluntary because he was  
17 unaware of the grave potential immigration consequences of the convictions when the  
18 plea agreement was reached and the plea was entered.

19 Entry of a guilty plea must be "a knowing and intelligent act done with  
20 'sufficient awareness of the relevant circumstances and likely consequences.'" *United*  
21 *States v. Rossillo*, 853 F.2d 1062, 1064 (2d Cir. 1988) (quoting *Brady v. United States*, 397  
22 U.S. 742, 748 (1970)). To help ensure that a guilty plea is "a knowing and intelligent act,"

1 Fed. R. Crim. P. 11 governs many aspects of a district court's interaction with a  
2 defendant who is entering a guilty plea. *Rossillo*, 853 F.2d at 1065. As noted above, Rule  
3 11 requires in particular that, before accepting a guilty plea, the District Court "inform  
4 the defendant of, and determine that the defendant understands," that "if convicted, a  
5 defendant who is not a United States citizen may be removed from the United States,  
6 denied citizenship, and denied admission to the United States in the future." Fed. R.  
7 Crim. P. 11(b)(1)(O). Our Court requires "strict adherence" to Rule 11. *United States v.*  
8 *Pattee*, 820 F.3d 496, 503 (2d Cir. 2016). Because of its importance, we must "examine  
9 critically even slight procedural deficiencies to ensure that the defendant's guilty plea  
10 was a voluntary and intelligent choice, and that none of the defendant's substantial  
11 rights has been compromised." *Id.*

12 The government concedes that the plea colloquy engaged in by the District Court  
13 here "plain[ly]" violated Rule 11. Appellee's Br. 6. Because Gonzales himself personally  
14 raised the error in the District Court, albeit at sentencing (having apparently been  
15 alerted to the issue by the PSR), we review the record to determine whether the  
16 government has demonstrated that the District Court's failure to inform Gonzales of the  
17 potential immigration consequences of his plea is harmless error, as the government  
18 contends. *Pattee*, 820 F.3d at 503, 505; *see also United States v. Davila*, 569 U.S. 597, 606-07  
19 (2013). A Rule 11 violation is harmless only if it does not affect the defendant's  
20 "substantial rights." Fed. R. Crim. P. 11(h). A "substantial right" is affected if there is "a  
21 reasonable probability that, but for the error, [the defendant] would not have entered  
22 the plea." *Pattee*, 820 F.3d at 505. When applying harmless error review, "the  
23 prosecution bears the burden of showing harmlessness," *Davila*, 569 U.S. at 607, and the

1 government must demonstrate that “the misinformation in all likelihood would not  
2 have affected [Gonzales’s] decision-making calculus,” *United States v. Harrington*, 354  
3 F.3d 178, 184 (2d Cir. 2004).

4 In presenting his plea, Gonzales came before the court as a lawful permanent  
5 resident of the United States, a status he had held for over forty years, having come to  
6 this country from the Philippines with his parents in the late 1970s as a child. He has  
7 lived in New York City, near his two children and their mothers, for most of his life. His  
8 grandmother and his father (his only living parent) live in the New York City area, and  
9 his siblings are residents serving in the military of the United States. Here, the  
10 government points to no evidence contradicting Gonzales’s assertion at his sentencing  
11 that, when entering his plea, he did not understand that he would likely be deported for  
12 his offense. It has given no persuasive reason to conclude that the likely grave  
13 immigration consequences of his plea were not of great importance to Gonzales, *see*  
14 *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (deportation is “a particularly severe  
15 penalty”); *see also Lee v. United States*, 137 S. Ct. 1958, 1967 (2017) (finding “deportation  
16 was the determinative issue in [defendant’s] decision whether to accept the plea deal”).  
17 The crimes with which Gonzales was charged are serious, and it appears that he may  
18 have derived a benefit from entering into the plea agreement at issue, but that alone is  
19 not enough for us to conclude, as the government would have us do, that the prospect  
20 of removal was not an important and even essential factor for Gonzales to consider in  
21 determining his course of action.

22 It is true that Gonzales did not formally move to withdraw his plea immediately  
23 after learning from the PSR that he “may be amenable” to removal. PSR ¶ 86. But

1 Gonzales’s actions at sentencing spoke loudly, and both the District Court and counsel  
2 then present inexplicably failed to take up the burden, rightly theirs, to raise with him  
3 his wishes regarding his earlier-entered plea. As we have previously noted,  
4 “compliance with Rule 11 is not a difficult task,” and district courts can easily use “a  
5 standard script for accepting guilty pleas, which covers all of the required information”  
6 to ensure their conformity with the Rule. *Pattee*, 820 F.3d at 503.<sup>1</sup> Moreover, while the  
7 mandates of Rule 11 are addressed primarily to the District Court, and the obligation  
8 should be meticulously carried out, “[p]rosecutors and defense attorneys also have an  
9 obligation to make sure that the Rule is followed.” *Id.* at 504.

10 The Supreme Court has recognized that “deportation is an integral part—indeed,  
11 sometimes the most important part—of the penalty that may be imposed on noncitizen  
12 defendants who plead guilty to specified crimes.” *Padilla*, 559 U.S. at 364 (footnote  
13 omitted); *see also I.N.S. v. St. Cyr*, 533 U.S. 289, 322 (2001) (“There can be little doubt that,  
14 as a general matter, alien defendants considering whether to enter into a plea agreement  
15 are acutely aware of the immigration consequences of their convictions.”). It is a district  
16 court’s responsibility, ultimately, to ensure that no defendant, when entering a guilty  
17 plea, is blindsided by this aspect of his penalty. The District Court did not do so here.

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<sup>1</sup> By detailing the court’s obligations before accepting a guilty plea, Rule 11 safeguards vital rights of criminal defendants at a crucial moment. *Pattee*, 820 F.3d at 504. And yet, as we have noted with concern elsewhere, failures to comply with Rule 11 have been a “recurring issue” within this Circuit. *Id.* at 503. Such failures are unacceptable. We see no legitimate excuse for noncompliance with Rule 11 absent special circumstances.



