

1 UNITED STATES COURT OF APPEALS

2
3 FOR THE SECOND CIRCUIT

4
5 August Term, 2006

6
7 (Argued: January 11, 2007 Decided: October 23, 2007)

8
9 Docket No. 05-6662-pr

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11 SEAN ZHANG,

12 Petitioner-Appellee,

13
14 v.

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16 UNITED STATES OF AMERICA,

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18 Respondent-Appellant.

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21 B e f o r e: WINTER, CABRANES, Circuit Judges, and KORMAN,
22 District Judge.*

23
24 Appeal from an order of the United States District Court for
25 the Eastern District of New York (Arthur D. Spatt, Judge)
26 granting a petition for habeas corpus relief under 28 U.S.C. §
27 2255. Petitioner-appellee, a legal permanent resident of the
28 United States, pled guilty to one count of mail fraud under 18
29 U.S.C. § 1341. The district court found that statements of the
30 magistrate judge and prosecutor about the immigration
31 consequences of the conviction affirmatively misled the
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*The Honorable Edward R. Korman, of the United States District Court for the Eastern District of New York, sitting by designation.

1 petitioner-appellee, thus rendering his guilty plea involuntary.
2 We find that the statements of the magistrate judge and
3 prosecutor -- while not full explanations -- were not
4 sufficiently misleading to render the guilty plea involuntary.
5 Accordingly, we vacate and remand for consideration of
6 petitioner-appellee's other constitutional arguments.

7 GARY SCHOER, Syosset, New York, for
8 Petitioner-Appellee.

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10 CARRIE CAPWELL, Assistant United
11 States Attorney (Roslynn R.
12 Mauskopf, United States Attorney
13 for the Eastern District of New
14 York, on the brief, and Peter A.
15 Norling, Assistant United States
16 Attorney, of counsel), United
17 States Attorney's Office for the
18 Eastern District of New York,
19 Brooklyn, New York, for Respondent-
20 Appellant.

21
22 WINTER, Circuit Judge:

23 The government appeals Judge Spatt's order granting Sean
24 Zhang's 28 U.S.C. § 2255 petition for habeas corpus and vacating
25 his plea of guilty to mail fraud and resultant sentence of 60
26 months' imprisonment. Judge Spatt found that Zhang's guilty plea
27 was involuntary because the magistrate judge and the prosecutor
28 had affirmatively misled Zhang during the plea colloquy with
29 respect to the likelihood of his being deported as a result of
30 his conviction. Zhang v. United States, 401 F.Supp.2d 233, 243-
31 44 (E.D.N.Y. 2005) ("Zhang I"). On appeal, the government
32 principally argues that the representations of the magistrate

1 judge and prosecutor -- that Zhang faced possible, rather than
2 certain, deportation -- were not affirmatively misleading or
3 prejudicial, and that the court had no greater obligation to
4 spell out the possible collateral effects of Zhang's guilty plea.

5 We conclude that the statements made during the colloquy
6 were not affirmatively misleading, and that they did not render
7 Zhang's guilty plea involuntary. We therefore vacate the order
8 below. Zhang has also raised a claim of ineffective assistance
9 of counsel, which we remand to the district court for further
10 proceedings.

11 BACKGROUND

12 Sean Zhang came to the United States from China in 1985, at
13 the age of seven. Zhang I, 401 F.Supp.2d at 235. Zhang's family
14 was granted asylum on the basis of his father's public criticism
15 of Communism and the Chinese government. Id. Zhang attended
16 Cornell University and graduated with a Bachelor of Science
17 degree in "Food Science." Id. Although Zhang has spent the bulk
18 of his life in the United States, does not speak Chinese
19 proficiently, is married to an American citizen, and has long
20 been a legal permanent resident, he has never become an American
21 citizen. Id.

22 _____In 2001, while working as a chemist, Zhang began mixing and
23 selling capsules of the chemical 2,4 Dinitrophenol ("DNP"). Id.
24 In addition to its many industrial and research uses, DNP, when

1 ingested by humans, acts as a metabolic stimulant and can reduce
2 body fat. Id. Because of the effect of DNP, the drug is banned
3 for human use by the Food and Drug Administration. Id.
4 Nonetheless, DNP is sometimes used by bodybuilders seeking to
5 quickly reduce their body fat. Id. Using the screen name "DNP
6 Guru," Zhang used a bodybuilding website to promote and sell DNP.
7 Id. One of Zhang's customers, Eric Perrin, died as a result of
8 ingesting DNP purchased from Zhang. Id. Another customer, James
9 Shull, lapsed into a 10-day coma caused by DNP prepared and sold
10 by Zhang. Id.

11 Zhang was indicted on ten counts of introducing a misbranded
12 drug into interstate commerce, in violation of 21 U.S.C. §
13 331(a), and ten counts of mail fraud, in violation of 18 U.S.C. §
14 1341. Zhang entered into a plea agreement in which he agreed to
15 plead guilty to a single count of mail fraud with a maximum
16 penalty of 60 months and waive his right to appeal if sentenced
17 to 60 months or less. The plea agreement stated that the
18 government would seek an upward departure based upon Perrin's
19 death and Shull's injuries, and included the statement, "Other
20 penalties: Removal." The plea agreement also contained the
21 government's loss estimate of between \$70,000 and \$120,000.

22 According to Zhang, in discussing a guilty plea, his
23 attorney told him that any resulting deportation proceeding would
24 be discretionary, and that deportation was unlikely given his

1 personal history and family circumstances. On June 25, 2002,
2 Zhang entered his guilty plea before a magistrate judge. During
3 the plea allocution, the prosecutor stated that Zhang "agrees he
4 [is] subject to possible post sentence deportation." Plea Tr. at
5 14. The magistrate judge further stated that "it's not indicated
6 as a consequence of your plea and the plea agreement but the
7 government indicated that this felony conviction because of your
8 immigration status could result in your deportation. Do you
9 understand that?" Zhang answered "Yes, I understand." Id. at
10 15. Elsewhere in the allocution, the prosecutor noted that
11 Zhang's counsel had reserved the right to move for a downward
12 departure, and to challenge any loss calculation.

13 A year later, following a hearing pursuant to United States
14 v. Fatico, 579 F.2d 707 (2d Cir. 1978), Zhang was sentenced to 60
15 months' imprisonment plus three years' supervised release, and
16 ordered to pay \$113,414.53 in restitution. At the sentencing
17 hearing, the prosecutor noted that "there is another condition of
18 supervised release. He may be deported. If he does, if you can
19 put on the judgment that he should not reenter without the
20 permission of the Attorney General." Sentencing Tr. at 410. The
21 sentencing judge agreed, and stated that "if the defendant is
22 deported, he's not to reenter the United States illegally without
23 the consent of the government." Id.

24 Pursuant to his plea agreement, Zhang did not appeal his

1 conviction or sentence. After the time for filing a direct
2 appeal had passed, Zhang received a Notice to Appear from the
3 Bureau of Immigration and Customs Enforcement ("ICE"). Zhang
4 claims at this time that he first became aware that he faced
5 mandatory deportation as a result of having been convicted of an
6 "aggravated felony" -- defined in relevant part for deportation
7 purposes as "an offense that involves fraud or deceit in which
8 the loss to the victim or victims exceeds \$10,000." 8 U.S.C. §
9 1101(a)(43)(M)(i). On June 17, 2004, Zhang filed a habeas corpus
10 petition in the district court pursuant to 28 U.S.C. § 2255,
11 seeking to vacate his conviction on two grounds: (i) that the
12 statements of the prosecutor and the court regarding possible
13 deportation were affirmatively misleading and violated Fed. R.
14 Crim. P. 11; and (ii) that he received ineffective assistance of
15 counsel regarding deportation. Zhang I, 401 F.Supp.2d at 236.
16 The government argued that the statements during the course of
17 sentencing were accurate because Zhang could potentially avoid
18 deportation by applying for asylum or relief under the Convention
19 Against Torture ("CAT").

20 On July 29, 2005, the district court held a hearing on
21 whether Zhang's guilty plea was involuntary because of the
22 characterization of the chances of deportation as less than
23 certain. Consideration of the ineffective assistance claim was
24 deferred.

1 On November 18, 2005, the district court issued its decision
2 vacating Zhang's conviction. Zhang I, 401 F.Supp.2d 233. The
3 court first held that Zhang's claim was not procedurally barred
4 by his failure to raise it on direct appeal or by his plea
5 agreement's waiver of collateral attack. Id. at 237. The court
6 then found that while Second Circuit law does not require a judge
7 to alert a defendant to the immigration consequences of a guilty
8 plea, affirmative misinformation about those consequences can
9 render a plea involuntary under Rule 11. Id. at 237-38.
10 Finally, the district court determined that it was, in fact,
11 materially misleading to inform Zhang that deportation was
12 "merely possible, not probably or certain," and that "the
13 misrepresentation was sufficient to render Zhang's plea
14 constitutionally involuntary." Id. at 244.

15 The government appealed.

16 DISCUSSION

17 In appeals under 28 U.S.C. § 2255, "this Court reviews
18 factual findings for clear error and questions of law de novo."
19 Harris v. United States, 367 F.3d 74, 79 (2d Cir. 2004) (internal
20 quotation marks omitted).

21 As a threshold issue, the government argues that Zhang
22 procedurally defaulted by failing to bring his claims on direct
23 appeal. "A motion under § 2255 is not a substitute for an
24 appeal." United States v. Munoz, 143 F.3d 632, 637 (2d Cir.

1 1998). In general, a claim may not be presented in a habeas
2 petition where the petitioner failed to properly raise the claim
3 on direct review. Reed v. Farley, 512 U.S. 339, 354 (1994). The
4 rule does not generally apply to claims of ineffective assistance
5 of counsel. Massaro v. United States, 538 U.S. 500, 505-06
6 (2003). The claim ruled on in the district court and before us
7 now, however, is not Zhang's ineffective assistance of counsel
8 claim, but rather the claim that Zhang's guilty plea was
9 involuntary. If such a claim has not been presented on direct
10 review, the procedural default bar may be overcome only where the
11 petitioner establishes either (1) "cause" for the failure to
12 bring a direct appeal and "actual prejudice" from the alleged
13 violations; or (2) "actual innocence." Bousley v. United States,
14 523 U.S. 614, 622 (1998). "To satisfy the 'cause' requirement,
15 the petitioner must show circumstances 'external to the
16 petitioner, something that cannot be fairly attributed to him.'" Rosario-Dominguez v. United States, 353 F.Supp.2d 500, 508
17 (S.D.N.Y. 2005) (quoting Marone v. United States, 10 F.3d 65, 67
18 (2d Cir. 1993) and Coleman v. Thompson, 501 U.S. 722, 753
19 (1991)).

21 Zhang argues that because of the (mis)representations by the
22 court, his counsel, and the government about the deportation
23 consequences of his plea, he was unaware of those consequences
24 until he received a letter from the ICE, and that this serves as

1 "cause" justifying his failure to bring the claim on direct
2 appeal. However, we cannot determine whether the allegedly
3 misleading statements prejudiced Zhang and excuse his failure to
4 bring his claims on direct appeal without first determining
5 whether they were, in fact, affirmatively misleading. If the
6 statements were affirmatively misleading and prejudicial,
7 procedural default would be waived and Zhang would prevail on the
8 merits. If the statements were not affirmatively misleading and
9 prejudicial, procedural default would not be waived, and Zhang
10 would lose on the merits. Either way, we must address the
11 merits.

12 Prior to accepting a guilty plea, a court must advise the
13 defendant of his right to plead not guilty and of the rights
14 waived by pleading guilty. Fed. R. Crim. P. 11(b)(1). Rule 11
15 also requires a court to tell the defendant of the possible
16 direct consequences of a guilty plea, such as the maximum prison
17 term, the maximum fine, and the effect of possible supervised
18 release. Id. A court need not, however, inform a defendant
19 about the "collateral" consequences of a guilty plea. See Michel
20 v. United States, 507 F.2d 461, 465 (2d Cir. 1974); Bye v. United
21 States, 435 F.2d 177, 179 (2d Cir. 1970) ("[A]n accused need not
22 be informed prior to the acceptance of his guilty plea about
23 every conceivable collateral effect the conviction entered on the
24 plea might have.").

1 The possibility of discretionary deportation after a guilty
2 plea is a "collateral" consequence that need not be addressed at
3 the plea hearing. Michel, 507 F.2d at 465-66. The passage of
4 the Illegal Immigration Reform and Immigrant Responsibility Act
5 of 1996 ("IIRIRA") and the Antiterrorism and Effective Death
6 Penalty Act of 1996 ("AEDPA"), however, has altered the landscape
7 of immigration law, and deportation of aggravated felons is now
8 automatic and non-discretionary. 8 U.S.C. § 1227(a)(2)(A)(iii);
9 see also INS v. St. Cyr, 533 U.S. 289, 325 (2001) (referring to
10 deportation of aggravated felons as "certain"). Nonetheless,
11 several circuits have held that "automatic" deportation under
12 IIRIRA is still a collateral consequence that need not be
13 addressed prior to a court's accepting a guilty plea. See El-
14 Nobani v. United States, 287 F.3d 417, 421 (6th Cir. 2002) ("[I]t
15 is clear that deportation is not within the control and
16 responsibility of the district court, and hence, deportation is
17 collateral to a conviction."); United States v. Amador-Leal, 276
18 F.3d 511, 516-17 (9th Cir. 2002) ("[W]hether an alien will be
19 removed is still up to the INS. There is a process to go
20 through, and it is wholly independent of the court imposing
21 sentence Removal is not part of the sentence."); and
22 United States v. Gonzalez, 202 F.3d 20, 27 (1st Cir. 2000)
23 ("However 'automatically' [the defendant's] deportation . . .
24 might follow from his conviction, it remains beyond the control

1 and responsibility of the district court in which that conviction
2 was entered and it thus remains a collateral consequence
3 thereof.”).

4 Although we have acknowledged the existence of the issue,
5 United States v. Cuoto, 311 F.3d 179, 190 (2d Cir. 2002), we have
6 not decided whether “automatic” deportation is a collateral
7 consequence of a guilty plea that need not be mentioned or a
8 direct consequence that required discussion during the plea
9 proceeding. Once again, the issue is not before us. As the
10 district court noted, “[w]hether automatic deportation is a
11 direct or collateral consequence is of no matter in this case
12 because the court did address deportation at the plea hearing.”
13 Zhang I, 401 F.Supp.2d at 239. We agree.

14 “Rule 11 sets forth requirements for a plea allocution and
15 is designed to ensure that a defendant’s plea of guilty is a
16 voluntary and intelligent choice among the alternative courses of
17 action open to the defendant.” United States v. Andrades, 169
18 F.3d 131, 133 (2d Cir. 1999) (internal quotation marks and
19 citation omitted). To successfully challenge a guilty plea
20 conviction based on a Rule 11 violation, a petitioner must
21 establish that the violation constituted a “constitutional or
22 jurisdictional” error, or establish that the error resulted in a
23 “complete miscarriage of justice,” or in a proceeding
24 “inconsistent with the rudimentary demands of fair procedure.”

1 United States v. Timmreck, 441 U.S. 780, 783 (1979) (internal
2 quotation marks omitted). In addition, the petitioner must
3 demonstrate that the violation was prejudicial -- where the error
4 was not preserved, this requires the petitioner to show that "the
5 violation affected substantial rights and that there is a
6 reasonable probability that, but for the error, he would not have
7 entered the plea." United States v. Vaval, 404 F.3d 144, 151 (2d
8 Cir. 2005) (internal quotation marks and citation omitted).

9 Given this legal background, the principal issue in the
10 present matter is whether the statements that Zhang was subject
11 to "possible post sentence deportation," Plea Tr. at 14, that his
12 conviction "could result" in deportation, id. at 15, and that he
13 "may be deported," Sentencing Tr. at 410, were, in fact,
14 accurate. If the statements were accurate at the time they were
15 made, then they could not reasonably be said to be misleading and
16 could not have rendered Zhang's guilty plea involuntary.

17 The district court assumed that Zhang's conviction was for
18 an aggravated felony subjecting him to automatic deportation,
19 noting that it was "undisputed in this case that Zhang's mail
20 fraud conviction constitutes an aggravated felony under the
21 statute." Zhang I, 401 F.Supp.2d at 241. As a result, the
22 district court's analysis focused on whether Zhang could
23 realistically apply for relief from automatic deportation, such
24 as asylum or protection under the CAT. Id. at 242. The district

1 court determined that Zhang, as an aggravated felon, would be
2 "ineligible for discretionary relief from removal such as asylum,
3 8 U.S.C. § 1158(b)(2)(B)(I); restriction on removal, 8 U.S.C. §
4 1231(b)(3)(B); cancellation of removal, 8 U.S.C. § [1229b]; and
5 voluntary departure, 8 U.S.C. § [1229c]." Id. at 241. Likewise,
6 even if entitled to protection under CAT, an aggravated felon who
7 had been sentenced to at least 5 years' imprisonment is entitled
8 only to have his removal deferred to a country where he is less
9 likely to be tortured. 8 C.F.R. § 208.17(a). Under such
10 circumstances, and assuming Zhang's conviction was indisputably
11 for an aggravated felony, Judge Spatt found that "possible,"
12 "could," and "may" were misleading, given that Zhang's
13 deportation was virtually certain. Zhang I, 401 F.Supp.2d at
14 242.

15 At the time the allegedly misleading statements were made,
16 however, it was far from clear that Zhang's conviction would
17 ultimately constitute an aggravated felony. Indeed, the question
18 of whether Zhang pled guilty to an aggravated felony is still in
19 dispute. For deportation purposes, the term "aggravated felony"
20 is defined, in relevant part, as "an offense that involves fraud
21 or deceit in which the loss to the victim or victims exceeds
22 \$10,000." 8 U.S.C. § 1101(a)(43)(M)(i). Thus, mail fraud does
23 not constitute an aggravated felony unless the loss exceeds
24 \$10,000. Zhang pled guilty to Count One of the superseding

1 indictment -- a single count of mail fraud involving the sale of
2 DNP to an individual in New York who was not James Shull or Eric
3 Perrin. At the time of the plea proceeding, it was not known
4 with certainty whether the loss amount for the single count to
5 which Zhang was pleading guilty would exceed \$10,000. While the
6 plea agreement contained a loss estimate of \$70,000 to \$120,000,
7 Zhang explicitly reserved the right to challenge the loss
8 calculation at sentencing, and the parties struck the line in the
9 plea agreement stating that "[t]he defendant agrees with this
10 guidelines calculation." Indeed, Zhang -- in pressing his claim
11 of ineffective assistance of counsel -- argues in his brief
12 before this court that the count to which he pled guilty did not
13 involve a loss of \$10,000, and that his "[c]ounsel could have
14 easily insured that [Zhang] would not face deportation by
15 specifying the exact amount of money that was involved in the
16 single transaction for which [Zhang] pleaded guilty" Br.
17 for Petitioner-Appellee at 25. Thus, at the time of the plea
18 proceeding, neither the court nor the government could know that
19 Zhang's conviction would qualify as an aggravated felony,
20 subjecting him to "automatic" deportation.¹ In such
21 circumstances, the statement that Zhang faced "possible"
22 deportation was, in fact, completely accurate.

23 The statements thus served to put Zhang on notice that his
24 guilty plea had potential immigration consequences, and provided

1 an opportunity to pursue those consequences more fully with his
2 attorney or with an immigration specialist. That is all that is
3 required. To be sure, the statements were not a full elaboration
4 of the immigration consequences of a guilty plea, but they were
5 not misleading or prejudicial in any way. To hold a sentencing
6 court that has decided to address the topic to a higher standard
7 of detail in explaining possible immigration ramifications -- a
8 notoriously complex and constantly shifting area of law -- would
9 likely have the perverse effect of encouraging sentencing courts
10 simply to avoid the issue entirely, lest a reviewing court find a
11 statement to be, in retrospect, misleading. That Zhang's counsel
12 allegedly failed to apprise Zhang more fully of the immigration
13 consequences of his plea, and allegedly failed to take actions
14 which would have shielded Zhang from mandatory deportation,
15 serves as the basis for Zhang's claim of ineffective assistance
16 of counsel, which we now remand to the district court for
17 consideration.

18 CONCLUSION

19 For the foregoing reasons, we vacate the order of the
20 district court and remand for further consideration consistent
21 with this opinion.

1
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FOOTNOTES

1. Zhang suggests that the government's contention that he was not convicted of an aggravated felony contradicts the government's position below, where it assumed that Zhang's conviction constituted an aggravated felony. As noted, however, Zhang himself seeks to preserve the claim that the count to which he pled guilty did not constitute an aggravated felony at the time of the plea colloquy and that it was only the incompetence of his attorney that prevented the record from clearly showing that his crime was not an aggravated felony.