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2 **FOR PUBLICATION**

3
4 **IN THE SUPERIOR COURT**
5 **OF THE**
6 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

7 **COMMONWEALTH OF THE**)
8 **NORTHERN MARIANA ISLANDS,**)

9 Plaintiff,)

10 v.)

11 **TANG, YONG**)

12 Defendant.)
13

CRIMINAL CASE NO. 01-0236(C)

**ORDER DENYING DEFENDANT'S
MOTION TO SET ASIDE GUILTY
PLEA**

14 **I. INTRODUCTION**

15 THIS MATTER came before the court on November 6, 2002, in Courtroom 205A at 9:00 a.m. on
16 Defendant's *Motion to Set Aside Defendant's Guilty Plea* pursuant to Com. R. Crim. P. 32(d).¹
17 Assistant Attorneys General Kevin Lynch and Justin Wolosz appeared on behalf of the Commonwealth
18 of the Northern Mariana Islands [hereinafter Government]. G. Anthony Long, appeared on behalf of Yong
19 Tang [hereinafter Defendant].

20 **II. BACKGROUND**

21 On April 24, 2001, the court was advised that the parties had reached a pretrial disposition. The
22 parties asked the court to accept, pursuant to Com. R. Crim. P. 11(e)(3), a plea agreement the parties had
23 entered into regarding the Information charging Defendant with one count of Promoting Prostitution in the
24 Second Degree in violation of 6 CMC § 1344(d), made punishable by 6 CMC § 1346(c), e(2) and (f).
25 The court accepted the parties' plea agreement, whereby Defendant pled guilty to the charge. The court
26 accepted Defendant's non-trial disposition only after finding that (1) Defendant's decision to plead guilty
27 to Promoting Prostitution in the Second Degree was freely, voluntarily and intelligently made; (2) that she
28 had the advice of a competent counsel with whom she said she was satisfied; (3) that she understood the

¹ The case was originally heard by Associate Judge Sablan-Onerheim.

1 consequences of her plea; and (4) that there was a factual basis for the plea. The court, pursuant to the
2 parties' stipulation, sentenced Defendant to five years imprisonment, all suspended except for three days
3 with credit for time already served. The court further accepted the condition of Defendant's suspended
4 sentence.

5 On September 26, 2002, Defendant, through newly retained counsel G. Anthony Long, moved
6 pursuant to Com. R. Crim. P. 32(d)² to set aside Defendant's guilty plea of April 24, 2001, on the basis
7 that it would be manifestly unjust to Defendant, because she was not advised her plea would result in her
8 deportation. *See* Def.'s Mem. Supp. Withdrawal of Plea [hereinafter Def.'s Withdrawal of Plea] at 2.

9 III. ANALYSIS

10 In the case at bar, Defendant submits that the court's failure to advise her of the deportation
11 consequence to her guilty plea violates Due Process concerns. *See* Def.'s Withdrawal of Plea at 4-5.
12 Defendant also contends that the Government breached their contract agreement because the deportation
13 charge was not part of the agreement. *Id.* at 5-6. Defendant argues that she did not voluntarily, knowingly
14 and intelligently enter into the guilty plea. At the outset, the Court finds both Defendant's arguments to be
15 meritless.³ Defendant at all times received adequate representation during the course of the proceedings
16 and plea negotiations. Defendant, therefore, was apprised of the plea.⁴

17 The only remaining issue that warrants attention is Defendant's contention that the court failed to
18 inform her, pursuant to Commonwealth Rule of Criminal Procedure 11(c)(1), of the deportation
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21 ² Commonwealth Rule of Criminal Procedure 32(d) provides:

22 [a] motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is
23 imposed or imposition of sentence is suspended; but to correct manifest injustice the court after
24 sentence may set aside the judgment of conviction and permit the defendant to withdraw his/her plea.

25 ³ *See United States v. Amador-Leal*, 276 F.3d 511, 517 (9th Cir. 2002) (holding that the general rule remains that
26 there is no Rule 11 or Due Process requirement for defendants to be informed of immigration consequences because
27 immigration consequences are collateral). The collateral consequence rule is addressed *infra* p.4.

28 ⁴ In this case, the court accepted Defendant's plea and imposed the sentence the parties agreed to, after finding
that: 1) Defendant's decision to plead guilty to Promoting Prostitution in the Second Degree was freely, voluntarily and
intelligently made; 2) she had the advice of competent counsel with whom she stated she was satisfied; 3) she
understood the consequences of her plea; and 4) there was a factual basis for the plea. The Court, therefore, finds that
Defendant voluntarily, knowingly, and intelligently entered into a guilty plea agreement with the Government.

1 consequences of her guilty plea. *Id.* at 2-6. In support of this proposition, Defendant asserts that
2 deportation in the CNMI is a direct, rather than collateral consequence of a guilty plea. Therefore, the
3 court was required to inform Defendant of the deportation consequence. *Id.*

4 Defendant concedes that deportation in the federal system is collateral. However, in the CNMI,
5 deportation is handled by the Office of the Attorney General and heard by the Superior Court, the same
6 parties who handled Defendant's criminal case. *Id.* at 3-4. The Government asserts that deportation in the
7 CNMI is collateral to a criminal sentence because a deportation is imposed, not by the sentencing judge,
8 but by a Commonwealth judge in a different proceeding, brought about by the filing of a separate civil
9 action. Specifically, a proceeding that is wholly separate from the criminal action resulting in the guilty plea.
10 *See Government's Opp'n to Withdrawal of Guilty Plea* at 3-6.

11 Commonwealth Rule of Criminal Procedure 11(c)(1) obligates a court, before accepting a guilty plea,
12 to inform a defendant of "the nature of the charge to which the plea is offered, the mandatory minimum
13 penalty provided by law, if any, and the maximum possible penalty provided by law." Com. R. Crim. P.
14 11(c)(1). A guilty plea is an admission that defendants committed the crime charged against him.
15 *Commonwealth v. Camacho*, Crim. No. 88-0136 (N.M.I. Super. Ct. March 15, 1993) (Opinion and
16 Order at 6) (*citing United States v. Broce*, 488 U.S. 563, 570, 109 S. Ct. 757, 762-63, 102 L. Ed. 2d
17 927, 936 (1989)). Guilty pleas must be knowing and voluntary. *United States v. Amador-Leal*, 276 F.3d
18 511, 514 (9th Cir. 2002). A plea is voluntary only if it is entered by one fully aware of the direct
19 consequences of his guilty plea. *Id.* at 514 (*citing Torrey v. Estelle*, 842 F.2d 234, 235 (9th Cir. 1988)).
20 In accepting a defendant's guilty plea, a trial court must advise the defendant of the direct consequences
21 of the plea. *Id.*

22 The trial court, however, is under no constitutional obligation to inform the defendant of all possible
23 collateral consequences of the plea. *El-Nobani v. United States*, 287 F.3d 417, 421 (6th Cir. 2002).
24 "The distinction between a direct and collateral consequence of a plea turns on whether the result
25 represents a definite, immediate and largely automatic effect on the range of the defendant's punishment."
26 *Amador-Leal*, 276 F.3d at 514 (*citing Torrey v. Estelle*, 842 F.2d 234, 236 (9th Cir. 1988)). Direct
27 consequences are consequences that have "a definite, immediate and largely automatic effect on the range
28 of the defendant's punishment,' with collateral consequences that 'have included the possibility of a felony

1 prosecution for reentry following deportation; . . . and the potential of deportation, where a separate agency
2 has authority over such deportation.” *Id.* at 515 (citing *United States v. Littlejohn*, 224 F.3d 960, 965
3 (9th Cir. 2000) (holding that a direct consequence arises when defendant’s conviction automatically
4 rendered him ineligible for certain food stamp and social security benefits because the ineligibility itself is
5 an automatic product of defendant’s conviction, not a result of another governmental agency’s actions)).
6 A collateral consequence, on the other hand, is one that “remains beyond the control and responsibility of
7 the district court in which that conviction was entered.” *United States v. Gonzalez*, 202 F.3d 20, 27 (1st
8 Cir. 2000).

9 Generally, collateral consequences include deportation consequences. *Amador-Leal*, 276 F.3d at
10 515.⁵ The Sixth Circuit recently held that deportation consequences are collateral consequences of pleas
11 because deportation is not within the control and responsibility of the district court. *El-Nobani*, 287 F.3d
12 at 421; *see also United States v. Romero-Vilca*, 850 F.2d 177, 179 (3rd Cir. 1988) (“[W]e hold that
13 potential deportation is a collateral consequence of a guilty plea.”); *United States v. Quin*, 836 F.2d 654,
14 655 (1st Cir. 1988) (“[D]eportation in this context is generally regarded as a collateral consequence.”);
15 *United States v. Campbell*, 778 F.2d 764, 767 (11th Cir. 1985) (“[D]eportation is a collateral
16 consequence of a guilty plea.”).

17 What renders the plea’s immigration effects “collateral” is not that they arise “virtually by
18 operation of law,” but the fact that deportation is “not the sentence of the court which
19 accepts the plea but of another agency over which the trial judge has no control and for
20 which he has no responsibility.”

21 *Gonzalez*, 202 F.3d at 27 (citing *Fruchtman v. Kenton*, 531 F.2d 946, 949 (9th Cir. 1976)). Because
22 deportation is a collateral consequence of a guilty plea, courts are not obliged to grant plea withdrawal
23 motions filed by defendants who realize, post-plea, the immigration implications of their conviction. *Id.* at
24 28.

25 In *Amador-Leal*, the defendant was an illegal alien convicted and sentenced pursuant to a guilty plea,
26 of one count of possession with intent to distribute cocaine base. 276 F.3d at 511. Defendant appealed

27 ⁵ *See Mafnas v. Commonwealth*, 2 N.M.I. 248, 264 n.12 (1991), stating that “it is appropriate to consult
28 interpretation of counterpart federal rules when interpreting commonwealth procedural rules; interpretation of such rules
can be highly persuasive.”

1 his guilty plea upon discovering that his felony plea would possibly result in his removal or deportation.
2 Defendant contended that his plea did not meet Due Process requirements, because the Magistrate did not
3 inform him of the potential immigration consequences of his conviction when the plea was taken. The Ninth
4 Circuit held that although it was virtually certain that an aggravated felon would be removed, whether an
5 alien would be removed was still up to the Immigration and Naturalization Service. *Id.* at 516. The court
6 ruled that:

7 There is a process to go through, and it is wholly independent of the court imposing
8 sentence. The Supreme Court has made this clear by describing deportation as a “purely
9 civil action” separate and distinct from a criminal proceeding. Removal is not part of the
sentence; future immigration consequences do not bear on the “range of the defendant’s
punishment” imposed by the court.

10 *Id.* (citation omitted). The court concluded that immigration consequences continued to be a collateral
11 consequence of a plea and the resulting conviction. *Id.* at 517. Thus the district court was not
12 constitutionally required to warn a defendant about potential deportation in order to assure voluntariness
13 of his plea, and as such, Due Process concerns were not violated. *Id.*⁶

14 Applying the principles above to the case at bar, the Court finds that deportation in the CNMI is a
15 collateral instead of a direct consequence of a criminal conviction. Section 4340 of Title 3 of the
16 Commonwealth Code establishes the grounds for deportation of an alien in the Commonwealth.⁷ When
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18 ⁶ In *El-Nobani v. United States*, 287 F.3d 417(6th Cir. 2002), the court accepted petitioner’s guilty plea to
19 conspiracy to traffic food stamps and alien-harboring, but did not inform him of any possible deportation consequences.
20 Petitioner was sentenced to two years probation with four months of home confinement and electronic monitoring. The
21 INS later initiated deportation proceedings against petitioner. The petitioner filed a petition to withdraw his guilty plea
22 arguing that his lack of awareness of the deportation consequences, the misrepresentations by the government as to
23 his deportation consequences, and the court’s failure to inform him of the deportation consequences, made his plea
24 involuntary and unknowing. The lower court granted the petition to withdraw his guilty plea. On appeal, the Sixth
25 Circuit held that deportation is collateral because it is not within the control and responsibility of the district court, and
26 the court was not obligated to inform defendant of the possible deportation. *Id.* at 421. The court further held that the
27 fact that petitioner was unaware of the deportation consequences of his plea does not make his plea unknowing or
28 involuntary. *Id.*

25 ⁷ Section 4340 provides, in pertinent part:

The following are grounds for deportation of an alien from the Commonwealth:

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(d) The alien is convicted in the Commonwealth of a felony, or two or more misdemeanors,
or any crime of moral turpitude, or any firearms control offense;

3 CMC § 4340.

1 an alien meets any of these grounds for deportation, as Defendant did in this case, the Attorney General
2 has the ultimate discretion as to when, and whether, to bring a deportation action. 3 CMC § 4312(d)(4).
3 The Attorney General has the ultimate discretion to decide whether filing a deportation action is warranted,
4 independent of any previous criminal action.⁸ Under these statutes, although the Attorney General is the
5 same government agent party to the criminal and deportation cases, the deportation proceeding is wholly
6 a separate civil action.

7 In this case, Defendant and the Government presented their plea agreement to the court. The court,
8 after finding that Defendant voluntarily, knowingly, and intelligently entered into the plea, accepted the
9 agreement without informing Defendant of the deportation consequence.⁹ This procedure concluded the
10 criminal case, because Defendant did not appeal the court's decision. Subsequently, the Government and
11 the Division of Immigration Services filed an entirely separate civil action to deport Defendant, pursuant to
12 3 CMC §§ 4340 and 4341.

13 With respect to Defendant's claim that the Government breached the plea agreement, the Court finds
14 that the Government did not breach any portion of the plea agreement. Accordingly, the court's failure to
15 inform Defendant of the possible deportation consequence did not violate Defendant's due process right
16 or Commonwealth Rule of Criminal Procedure 11(c)(1). *See Amador-Leal*, 276 F.3d at 517 (holding that
17 the general rule remains, that there is no Rule 11 or due process requirement for defendants to be informed
18 of immigration consequences because immigration consequences are collateral).

19 **IV. CONCLUSION**

20 For the foregoing reasons, this Court finds that deportation in the CNMI is a collateral consequence
21 to a guilty plea, and therefore, the court is not obligated to inform a defendant of the potential deportation
22 consequences stemming from a criminal guilty plea. The Court further finds that neither Commonwealth
23 Rule of Criminal Procedure 11(c)(1) nor Defendant's due process rights were violated. For the reasons
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25 ⁸ If the Attorney General decides to seek deportation, the Attorney General must file a totally separate civil
26 proceeding, a petition to show cause, in the trial court. 3 CMC § 4341.

27 ⁹ *See El-Nobani*, 287 F.3d at 421 (“[D]efendant need only be aware of the direct consequences of the plea,
28 however; the trial court is under no constitutional obligation to inform the defendant of all the possible collateral
consequences of the plea.”).

1 stated above, Defendant's *Motion to Set Aside Guilty Plea* pursuant to Commonwealth Rule of Criminal
2 Procedure 32(d) is hereby **DENIED**.

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4 SO ORDERED this 17th day of June 2003.

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/s/ _____
David A. Wiseman
Associate Judge

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