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FOR PUBLICATION

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS,

Plaintiff,

v.

CAI HUA FEI

Defendant.

CRIMINAL CASE NO. 02-0076(E)

ORDER DENYING DEFENDANT'S
MOTION TO SET ASIDE GUILTY PLEA

I. INTRODUCTION

THIS MATTER came before the Court on June 17, 2003, to hear Defendant's *Motion to Set Aside Defendant's Guilty Plea* pursuant to Commonwealth Rule of Criminal Procedure 32(d). Assistant Attorney General Justin Wolosz appeared on behalf of the Commonwealth of the Northern Mariana Islands [hereinafter Government]. Stephen Woodruff appeared on behalf of CAI HUA FEI [hereinafter Defendant].

II. FACTS

This Court entered a Judgment and Commitment Order, pursuant to the parties stipulated plea agreement, finding Defendant guilty of Promoting Prostitution - Second Degree under 6 CMC § 1344(d). In the plea agreement dated June 3, 2002 [hereinafter Agreement], the Defendant stated that she voluntarily, knowingly and intelligently enter into the Agreement. See Agreement at ¶7. Further, no promises other than those set forth in the Agreement were made. *Id.* On June 5, 2002, this Court accepted the Agreement only after a finding that: (1) Defendant's decision to plead guilty was freely,

1 voluntarily and intelligently made; (2) the Defendant had advice of competent counsel with whose
2 representation she was satisfied, and also had a translator performing translating services to her; (3) the
3 Defendant understood the consequences of her plea; and (4) there was a factual basis for the plea. *See*
4 Judgment and Commitment Order at 1-2. On November 8, 2002, the Attorney General's Office filed a
5 Petition for an Order to Show Cause requiring Defendant to show cause why she should not be deported.

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7 Subsequently, Defendant moved to have her guilty plea withdrawn or enforced. Defendant's view
8 of enforcement of the five-year probation sentence would entitle her to remain in the Commonwealth during
9 that time. On June 17, 2003, Defendant moved, pursuant to Com. R. Crim. P. 32(d),¹ to set aside her
10 guilty plea of June 3, 2002, on the basis that it would be manifestly unjust to Defendant, because she was
11 not advised her plea would result in her deportation.

12 III. ANALYSIS

13 In the case at bar, Defendant submits that the court's failure to advise Defendant of the deportation
14 consequence to her guilty plea violates Due Process concerns. *See Motion to Withdraw Guilty Plea* at
15 6-7. Defendant also contends that the Government breached its contract Agreement because the
16 deportation charge was not part of the Agreement. *Id.* at 3-4. The Defendant bases her argument on the
17 claim that she did not voluntarily, knowingly and intelligently enter into the guilty plea. At the outset, the
18 Court finds both of Defendant's arguments to be inadequate to warrant the requested motion.² Defendant
19 at all times received adequate representation and language assistance during the course of the proceedings
20 and plea negotiations. Defendant, therefore, was apprised of the plea.³

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22 ¹ Commonwealth Rule of Criminal Procedure 32(d) provides:

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

25 ² *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
immigration consequences are collateral). The collateral consequence rule is addressed *infra* p.4.

27 ³ In this case, the court accepted Defendant's plea and imposed the sentence the parties agreed to, after finding
28 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

1 The only remaining issue that warrants attention is Defendant’s contention that the court failed to
2 inform her of the deportation consequences of the guilty plea pursuant to Commonwealth Rule of Criminal
3 Procedure 11(c)(1). *Id.* at 5-7. In support of this proposition, Defendant asserts that deportation in the
4 CNMI is a direct, rather than collateral, consequence of a guilty plea. Therefore, the court was required
5 to inform Defendant of the deportation consequence. *Id.*

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

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

24 The trial court, however, is under no constitutional obligation to inform the defendant of all possible
25 collateral consequences of the plea. *El-Nobani v. United States*, 287 F.3d 417, 421 (6th Cir. 2002).
26 “The distinction between a direct and collateral consequence of a plea turns on whether the result

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28 Defendant voluntarily, knowingly, and intelligently entered into a guilty plea agreement with the Government.

1 represents a definite, immediate and largely automatic effect on the range of the defendant's punishment.”
2 *Amador-Leal*, 276 F.3d at 514 (citing *Torrey v. Estelle*, 842 F.2d 234, 236 (9th Cir. 1988)). Direct
3 consequences are consequences that have “a definite, immediate and largely automatic effect on the range
4 of the defendant's punishment,’ with collateral consequences that ‘have included the possibility of a felony
5 prosecution for reentry following deportation; . . . and the potential of deportation, where a separate agency
6 has authority over such deportation.” *Id.* at 515 (citing *United States v. Littlejohn*, 224 F.3d 960, 965
7 (9th Cir. 2000) (holding that a direct consequence arises when defendant’s conviction automatically
8 rendered him ineligible for certain food stamp and social security benefits because the ineligibility itself is
9 an automatic product of defendant’s conviction, not a result of another governmental agency’s actions)).
10 A collateral consequence, on the other hand, is one that “remains beyond the control and responsibility of
11 the district court in which that conviction was entered.” *United States v. Gonzalez*, 202 F.3d 20, 27 (1st
12 Cir. 2000).

13 Generally, collateral consequences include deportation consequences. *Amador-Leal*, 276 F.3d
14 at 515.⁴ The Sixth Circuit recently held that deportation consequences are collateral consequences of pleas
15 because deportation is not within the control and responsibility of the district court. *El-Nobani*, 287 F.3d
16 at 421; *see also United States v. Romero-Vilca*, 850 F.2d 177, 179 (3rd Cir. 1988) (“[W]e hold that
17 potential deportation is a collateral consequence of a guilty plea.”); *United States v. Quin*, 836 F.2d 654,
18 655 (1st Cir. 1988) (“[D]eportation in this context is generally regarded as a collateral consequence.”);
19 *United States v. Campbell*, 778 F.2d 764, 767 (11th Cir. 1985) (“[D]eportation is a collateral
20 consequence of a guilty plea.”).

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

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

28 ⁴ *See Mafnas v. Commonwealth*, 2 N.M.I. 248, 264 n.12 (1991) stating that “it is appropriate to consult
interpretation of counterpart federal rules when interpreting commonwealth procedural rules; interpretation of such rules
can be highly persuasive.”

1 22.

2 In *Amador-Leal*, the defendant was an illegal alien convicted and sentenced pursuant to a guilty
3 plea, of one count of possession with intent to distribute cocaine base. 276 F.3d at 511. Defendant
4 appealed his guilty plea upon discovering that his felony plea would possibly result in his deportation.
5 Defendant contended that his plea did not meet Due Process requirements, because the Magistrate did not
6 inform him of the potential immigration consequences of his conviction when the plea was taken. The Ninth
7 Circuit held that although it was virtually certain that an aggravated felon would be deported, whether an
8 alien would be deported was still up to the Immigration and Naturalization Service. *Id.* at 516. The court
9 ruled that:

10 There is a process to go through, and it is wholly independent of the court imposing
11 sentence. The Supreme Court has made this clear by describing deportation as a “purely
12 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.

13 *Id.* (citation omitted). The court concluded that immigration consequences continued to be a collateral
14 consequence of a plea and the resulting conviction. *Id.* at 517. Thus the district court was not
15 constitutionally required to warn defendant about potential deportation in order to assure voluntariness of
16 his plea, and as such, Due Process concerns were not violated. *Id.*⁵

17 Applying the principles above to the case at bar, the Court finds that deportation in the CNMI is
18 a collateral instead of a direct consequence of a criminal conviction. Section 4340 of Title 3 of the
19 Commonwealth Code establishes the grounds for deportation of an alien in the Commonwealth.⁶ When

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21 ⁵ In *El-Nobani v. United States*, 287 F.3d 417(6th Cir. 2002), the court accepted petitioner’s guilty plea to
22 conspiracy to traffic food stamps and alien-harboring, but did not inform him of any possible deportation consequences.
23 Petitioner was sentenced to two years probation with four months of home confinement and electronic monitoring. The
24 INS later initiated deportation proceedings against petitioner. The petitioner filed a petition to withdraw his guilty plea
25 arguing that his lack of awareness of the deportation consequences, the misrepresentations by the government as to
26 his deportation consequences, and the court’s failure to inform him of the deportation consequences, make his pleas
involuntary and unknowing. The lower court granted the petition to withdraw his guilty plea. On appeal, the Sixth
Circuit held that deportation is collateral because it’s not within the control and responsibility of the district court, and
the court is not obligated to inform defendant of the possibility of deportation. *Id.* at 421. The court further held that
the fact that petitioner was unaware of the deportation consequences of his plea does not make his plea unknowing or
involuntary. *Id.*

27 ⁶ Section 4340 provides, in pertinent part:
28 The following are grounds for deportation of an alien from the Commonwealth:
....

1 an alien meets any of these grounds, as Defendant did in this case, the Attorney General has the ultimate
2 discretion as to when, and whether, to bring a deportation action. 3 CMC § 4312 (d)(4). The Attorney
3 General has the ultimate discretion to decide whether filing a deportation action is warranted, independent
4 of any previous criminal action.⁷ Under these statutes, although the Attorney General is the same
5 government agent party to the criminal and deportation cases, the deportation proceeding is wholly a
6 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.⁸ 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
14 finds that the Government did not breach any portion of the Agreement. Defendant received her benefit
15 of the bargain under the Agreement, because she will avoid incarceration if she continues to abide by the
16 terms of the Agreement. That was the basis of the Agreement. The Agreement made no representation
17 regarding any consequences aside from those imposed per the criminal conviction. Accordingly, the court's
18 failure to inform Defendant of the possible deportation consequence did not violate Defendant's due
19 process right or Commonwealth Rule of Criminal Procedure 11(c)(1). *See Amador-Leal*, 276 F.3d at
20 517 (holding that the general rule remains, that there is no Rule 11 or due process requirement for
21 defendants to be informed of immigration consequences because immigration consequences are collateral).

22 IV. CONCLUSION

23
24 (d) The alien is convicted in the Commonwealth of a felony, or two or more misdemeanors,
25 or any crime of moral turpitude, or any firearms control offense;
26 3 CMC § 4340

27 ⁷ If the Attorney General decides to seek deportation charge, the Attorney General must file a totally separate
28 civil proceeding, a petition to show cause, in the trial court. 3 CMC § 4341.

⁸ *See El-Nobani*, 287 F.3d at 421 (“[D]efendant need only be aware of the direct consequences of the plea,
however; the trial court is under no constitutional obligation to inform the defendant of all the possible collateral
consequences of the plea.”).

1 For the foregoing reasons, this Court finds that deportation in the CNMI is a collateral consequence
2 to a guilty plea, and therefore, the court is not obligated to inform a defendant of the potential deportation
3 consequences stemming from the criminal guilty plea. The Court further finds that neither Commonwealth
4 Rule of Criminal Procedure 11(c)(1) nor Defendant's due process rights were violated. For the reasons
5 stated above, Defendant's *Motion to Set Aside Guilty Plea* pursuant to Com. R. Crim. P. 32(d) is hereby
6 **DENIED.**

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8 SO ORDERED this 25th day of June 2003.

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/s/ _____
David A. Wiseman
Associate Judge

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