FOR PUBLICATION

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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, **Plaintiff and Respondent,** **vs.** **MELODY SHIMABUKURO aka ESTERLITA SHIMABUKURO,** **Defendant and Petitioner.**	**Criminal Action No. 02-0254** **ORDER DISMISSING SHIMABUKURO'S PETITION FOR WRIT OF ERROR CORAM NOBIS AND DENYING SHIMABUKURO'S MOTION TO VACATE**

I. INTRODUCTION

THIS MATTER came for hearing on October 6, 2005. Esterlita Shimabukuro appeared telephonically and was represented in the matter by counsel Robert Tenorio Torres. The Commonwealth appeared by and through Assistant Attorney General Ian Catlett.

II. FACTS

Esterlita Shimabukuro is a citizen of the Republic of the Philippines and was a lawful permanent resident (hereinafter "LPR") of the United States. On August 15, 2002, Esterlita Shimabukuro and her husband Wayne Shimabukuro were arrested following the execution of a search warrant of their residence, which yielded certain amounts of methamphetamine. The Commonwealth filed an Information against Wayne Shimabukuro and Esterlita Shimabukuro charging Ms. Shimabukuro with Trafficking of a Controlled Substance in violation of 6 CMC § 2141(b), Illegal Possession of a Controlled Substance in violation of 6 CMC § 2142(a) and Conspiracy in violation of 6 CMC § 303(a). Ms. Shimabukuro faced a maximum sentence of life imprisonment and a fine of not more than $18,000 if convicted.

Prior to trial, Ms. Shimabukuro exhibited indications of mental illness and persistently interrupted pretrial proceedings. As a result, the Court ordered that Ms. Shimabukuro be evaluated to determine whether she was competent to stand trial. Initially, a Dr. Bottone found that Ms. Shimabukuro was temporally mentally unable to understand the charges against her and to assist her attorney in her own defense and she was consequently found incompetent to stand trial. Following a second evaluation with Dr. Bottone--about four months later--the Court found Ms. Shimabukuro mentally competent to stand trial.

On December 4, 2003, co-defendant Wayne Shimabukuro filed a motion to suppress a tape recording of a telephone conversation which occurred on or about August 15, 2002. Although Ms. Shimabukuro claims that her counsel at that time, Vicente Salas, failed to advise her of her husband's motion to suppress or the ability to join in the motion. However, Mr. Salas claimed that he indeed informed Ms. Shimabukuro of the suppression motion and "discussed the ramifications of such motion, if granted, at a meeting with her" on November 25, 2003.

Ms. Shimabukuro did not join in her husband's motion to suppress, but rather entered into a plea agreement with the Commonwealth on November 28, 2003. The plea agreement provided that Ms. Shimabukuro would plead guilty to Illegal Possession of a Controlled Substance under 6 CMC § 2142(a) and would be sentenced to eighteen months in prison, with credit for time served. Pursuant to the plea agreement, Ms. Shimabukuro agreed to be interviewed and provide testimony against her husband and co-defendant Wayne Shimabukuro

The Plea Agreement document, eventually executed by Ms. Shimabukuro, contained all typical recitations and waivers required by the Constitution and Rule 11. The Plea Agreement contained additional language representing that Ms. Shimabukuro had read and fully understood the nature, contents, and legal consequences of the Plea agreement. While the Plea Agreement advised of possible consequences under the Commonwealth Entry and Deportation Act, 3 CMC § 4301, it was silent as to the consequences such a conviction may have on her U.S. immigration status under the Immigration and Nationality Act (INA). Under U.S. immigration law, a legal permanent resident who is convicted of a violation of any law relating to a controlled substance, as defined in section 102 of the Controlled Substances Act, 21 U.S.C. § 802, is subject to removal proceedings by the

United States. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 8 U.S.C. § 1227(a)(2)(B)(i) and (ii). Thus, by pleading guilty to one count of Illegal Possession of a Controlled Substance under CNMI law, Ms. Shimabukuro, as an LPR, would become subject to removal proceedings under IIRIRA.

On December 9, 2003, the Court held a Change of Plea hearing, during which Ms. Shimabukuro formally pleaded guilty to one count of Illegal Possession of a Controlled Substance. During the plea colloquy, neither the court nor the defense attorney advised Ms. Shimabukuro of the federal immigration consequences of pleading guilty to an offense involving controlled substances. Furthermore, Ms. Shimabukuro alleges that her attorney, Mr. Salas, failed to advise her of the immigration consequences of a guilty plea, and moreover, affirmatively represented to Ms. Shimabukuro that she would not lose her LPR status because a conviction in a Saipan court was not sufficient to warrant removal under IIRIRA--an allegation which Mr. Salas has flatly denied under oath.

On December 10, 2003, the Court issued an order granting Wayne Shimabukuro's motion to suppress the warrantless tape-recorded telephone conversation between a government informant and the defendants. After the Commonwealth's motion to stay the trial pending an interlocutory appeal of the Court's ruling was denied, the Commonwealth moved to dismiss its case against Wayne Shimabukuro without prejudice. Ms. Shimabukuro was sentenced in a later hearing to an eighteen month jail term and was credited with time served. The Commonwealth has failed to renew its prosecution of Wayne Shimabukuro despite its representations to the Court and Ms. Shimabukuro that it would.

On or about July 29, 2004, after Ms. Shimabukuro had accompanied her husband to Hawaii via Guam, Immigration and Naturalization Service (INS) issued Ms. Shimabukuro a Notice to Appear, stating that she was subject to removal proceedings because she had been convicted of or admitted to a violation of law related to a controlled substance. On March 16, 2005, the Immigration Judge (IJ) ruled that Ms. Shimabukuro failed to show good cause for relief from removal and ordered her removed from the United States to the Philippines. Ms. Shimabukuro now seeks to vacate her underlying conviction and guilty plea by writ of error coram nobis, or

alternatively under Commonwealth Rules of Criminal Procedure, Rule 32(d).

III. DISCUSSION

A. Writ of Error Coram Nobis

Ms. Shimabukuro (hereinafter "Petitioner") seeks primary relief from her guilty plea and conviction under the writ of error coram nobis. The Commonwealth has opposed her petition, citing its contention that coram nobis relief is an exclusively federal remedy, and thus inapplicable to the CNMI. Therefore, as a threshold matter, this Court must consider whether the use of a writ of error coram nobis is applicable to CNMI courts in criminal matters, and whether coram nobis relief is available to Petitoner when such writ is codified only by federal statute under the All Writs Act, 28 U.S.C. § 1651(a).

In its opposition to Petitioner's request for a writ of error coram nobis the Commonwealth claims that CNMI courts cannot borrow the writ because *Telink* suggests that the common law basis for the writ was superseded by the all writs act, a purely federal rule.

> The writ of error coram nobis affords a remedy to attack an unconstitutional or unlawful conviction in cases when the petitioner already has fully served a sentence. The petition fills a very precise gap in federal criminal procedure. A convicted defendant in federal custody may petition to have a sentence vacated, set aside or corrected under the federal habeas corpus statute, 28 U.S.C. § 2255. However, if the sentence has been served, there is no statutory basis to remedy the "lingering collateral consequences" of the unlawful conviction. Recognizing this statutory gap, the Supreme Court has held that the *common law* petition for writ of error coram nobis is available in such situations, even through the procedure authorizing the issuance of the writ was abolished for civil cases by Fed. R. Civ. P. 60(b). District courts are authorized to issue the writ pursuant to the All Writs Act, 28 U.S.C. § 1651(a).

Telink, Inc. v. United States, 24 F.3d 42, 45 (9th Cir. 1994) (*emphasis added*) (citations omitted).

A writ of error coram nobis, as shown above, is available in federal criminal practice by virtue of the All Writs Act, however, the origin of coram nobis relief is rooted in the common law of the states. Although many states have enacted statutes or rules providing essentially the same relief from judgment where the petitioner is no longer in the custody of the state and may not seek relief through a habeas corpus petition, thereby eliminating the need for an extraordinary writ, the writ of error coram nobis has not been completely eliminated from the common law landscape. *See State v. Poierier*, 212 Or. 369, 320 P.2d 255 (1958) (overruled in part on other grounds by, *State v. Endsley*,

214 Or. 537, 331 P.2d 338 (1958)); *see also Janiec v. McCorkle*, 52 N.J. Super. 1, 144 A.2d 561 (Appl Div. 1958); *Lyons v. Goldstein*, 290 N.Y. 19, 47 N.E.2d 425, 146 A.L.R. 1422 (1943).

Contrary to the Commonwealth's assertions, the writ of error coram nobis is not an exclusively federal remedy, and although it is federally codified under the All Writs Act, its application to non-federal jurisdictions was not abrogated unless abolished by statute. *See generally People v. Gersewitz*, 294 N.Y. 163, 61 N.E.2d 427 (1945), cert dismissed, 326 U.S. 687, 66 S.Ct. 89, 90 L. Ed. 404 (1945). Although the CNMI has expressly abolished the writ of error coram nobis for the purpose of civil cases under Commonwealth Rules of Civil Procedure, Rule 60(b), no CNMI statute or rule has abrogated the common law writ's application to criminal cases. Furthermore, in the absence of written law or local customary law to the contrary, the Common Law "as expressed in the restatements of the law... and, to the extent not so expressed as generally understood in the United States, shall be the rules of decision in the courts of the Commonwealth." 7 CMC s. 3401.[1] Accordingly, as a preliminary matter, a petitioner's request for writ of error coram nobis is not automatically legally defective under CNMI law.

Although the writ's general availability is not absolutely foreclosed, the writ of error coram nobis is an exceedingly narrow remedy. States, which have not completely abolished the writ, have traditionally limited use of the writ to address errors of fact, not of law. *See Ex Parte Welles*, 53 So. 2d 708 (Fla. 1951); *State v. Miller*, 161 Kan. 210, 166 P.2d 680 (1946); *Madison v. State*, 205 Md. 425, 109 A.2d 96 (1954); *Lopez v. Shulsen*, 716 P.2d 787 (Utah 1986). Here, Petitioner cites only errors on the part of the judge presiding over the plea hearing for not advising her of the potential federal immigration consequences collateral to a plea of guilty to felony possession, her lawyer for not advising her of the same and not joining in her husband's motion to suppress, and the disparity between her husband's outcome, i.e. dismissal without prejudice, and her own. Each of the errors alleged above involve legal questions, regarding what is incumbent upon a judge

---

[1] Although 7 CMC 3401 is found under Title 7, Civil Procedure, its prefatory language "in all proceedings" draws no distinction in its applicability in either civil or criminal cases in the absence of a CNMI statute, rule or mandatory case authority. *See generally Commonwealth v. Palacios*, 4 N.M.I. 330-333 (1996) (applying in a criminal case a common law analysis to determine whether field sobriety testing should be considered "scientific, technical or other specialized knowledge," admissible as a basis of expert opinion under the standards of Com. R. Evid. 702.).

accepting a plea under Com. R. Crim. P. Rule 11 and the requirements of an attorney representing a client entering in a plea agreement with potential immigration consequences, and consequently are inappropriate grounds for the narrowly applied common law writ of error coram nobis.

Also, federal coram nobis relief requires that the petitioner meet a series of gateway elements in order to consider the writ on the merits:

> To qualify for coram nobis relief, four requirements must be satisfied. Those requirements are: (1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and (4) the error is of the most fundamental character.

United States v. Kwan, 407 F.3d 1005, 1011.

Here, the Court must venture only so far as the first element to determine that coram nobis relief is unseasonable because a more usual remedy is available within the Commonwealth Rules of Criminal Procedure. Petitioner also filed for relief under Commonwealth Rule of Criminal Procedure 32(d), which provides for the withdrawal of a guilty plea after the imposition of sentence to correct "manifest injustice". This patently standard avenue of relief is readily available to the petitioner and consequently forecloses the availability of a writ of error coram nobis under federal standards. Further, denying the writ to those where a more usual remedy is available comports with the underlying policy of the writ--that it fills a remedial gap by allowing a person who was convicted of a crime and having already served sentence to attack his/her conviction despite the unavailability of the great writ of habeas relief. *See Telink* 24 F.3d at 45. A 32(d) motion in petitioner's case sufficiently closes that gap, for it makes no requirement that the movant remain in government custody. Accordingly the Court must dismiss the petition and examine petitioner's alternative 32(d) motion to withdraw her guilty plea after sentence has been imposed.

B. Withdrawal of Guilty Plea Under 32(d)

Petitioner also requests relief under Commonwealth Rules of Criminal Procedure 32(d). As a general matter, Rule 32(d) provides in pertinent part that "[a] motion to withdraw a plea of guilty... may be made only before a sentence is 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 guilty plea." Com. R. Crim. P. 32(d) (*emphasis added*).

In her request petitioner cites the same grounds as made under her request for coram nobis relief, that (1) the presiding judge over Petitioner's plea colloquy failed to apprise her of the potential federal immigration consequences that would have likely resulted from a conviction for possession of a controlled substance, a felony; (2) Petitioner's attorney not only failed to advise Petitioner of the potential immigration consequences attendant to her plea but also affirmatively mislead Petitioner into believing that her status as a legal permanent resident of the United States would be unaffected by her guilty plea; (3) Petitioner's attorney failed to join in Petitioner's husband's successful motion to suppress; and that (4) the disparity between the result of Petitioner's guilty plea and the dismissal of her husband's case warranted a vacation of her conviction and leave to change her guilty plea. The court will examine each claim for the existence of *manifest injustice*.

Manifest injustice, although a colorful term, does little to identify the types of error or failures which warrant drastic action such as allowing a convict to withdraw her guilty plea after conviction and sentencing. However, the Ninth Circuit has mildly elucidated this general term by requiring the movant to show "a complete miscarriage of justice" or a proceeding "inconsistent with the rudimentary demands of fair procedure" to permit the withdrawal of a guilty plea after sentencing. *CNMI v. Cabrera*, 979 F.2d 854 (9th Cir. 1992) *citing United States v. Timmreck*, 441 U.S. 780, 784 (1979). Here, because none of Petitioner's above-referenced claims amount to a complete miscarriage of justice nor do they indicate a proceeding inconsistent with the rudimentary demands of fair procedure, the Court must deny Petitioner's alternative motion to vacate her conviction and change her guilty plea after sentencing.

Petitioner first claims to have suffered manifest injustice when the Court failed to advise her of the possible U.S. federal immigration consequences of a guilty plea. However, no such requirement is provided under CNMI Rules or statute, nor is any found within Federal law. *See* Com. R. Crim. P. 11 (governing pleas); *see also Fruchtman v. Kenton*, 531 F.2d 946, 949 (9th Cir. 1976) (holding that Rule 11 imposes no duty on the trial court accepting a guilty plea to advise a defendant of collateral consequences, including deportation, that flow from a conviction: "The collateral consequences flowing from a plea of guilty are so manifold that any rule requiring a district judge to advise a defendant of such a consequence as that here involved would impose an

unmanageable burden on the trial judge and only sow the seeds for later collateral attack.").

To be sure, the CNMI Superior Courts have adopted the Ninth Circuit's position regarding the collateral consequences of a criminal conviction on two occasions by holding that a judge presiding over a change of plea hearing has no affirmative duty to advise a defendant of the collateral immigration consequences of a criminal conviction. *CNMI v. Cai Hua Fei*, CR 02-0076E (N.M.I. Super. Ct. 2003) (Order Denying Defendant's Motion to Set Aside Guilty Plea); *CNMI v. Tang Yong*, CR 01-0236C (N.M.I. Super. Ct. 2003) (Order Denying Defendant's Motion to Set Aside Guilty Plea); *cf CNMI v. Chen*, CR 01-0277 (N.M.I. Super. Ct. 2003).[2] Though it is evident that the Superior Court cases are distinguishable because they address CNMI immigration consequences of guilty pleas, the policy which supports relieving the trial judge of the affirmative duty to warn against collateral consequences, i.e. preventing an unmanageable burden, applies with equal if not greater force to immigration consequences beyond the jurisdiction of the CNMI.

Because a judge is not required to advise a defendant of the collateral federal immigration consequences flowing from her guilty plea and conviction, the Court which accepted Petitioner's guilty plea did not cause Petitioner to suffer manifest injustice, and consequently such omission is insufficient to support Petitioner's 32(d) motion.

Next, Petitioner claims that certain acts and omissions by her attorney Vicente Salas constituted ineffective assistance of counsel which rose to the level of manifest injustice. Specifically, Petitioner claims that Mr. Salas failed to inform her of the collateral federal immigration consequences associated with a guilty plea, that Salas affirmatively misled her into believing that a guilty plea would not affect her status as an LPR, and finally that Mr. Salas's failure to join in co-defendant Wayne Shimabukuro's successful motion to suppress was tantamount to

---

[2]The Superior Court has not been unanimously consistent in holding that a failure to advise a defendant of the possible immigration consequences associated with a conviction, however, this Court has consistently held such and in any event is not obligated to follow other Superior Court decisions, for they have no mandatory precedential value. In addition, although not alone dispositive, *Chen* may be distinguished from the instant case because it dealt with CNMI immigration consequences rather than federal immigration consequences. Therefore, it may be assumed that the Court in *Chen*, certainly did not envision burdening a judge accepting a plea with the duty of foreseeing and warning of federal immigration consequences, which, in this case, are triggered by conviction for a violation related to controlled substances.

manifest injustice.

To determine whether an attorney's acts or omissions amounted to ineffective assistance of counsel and thereby causing Petitioner to suffer manifest injustice. The proper test for determining whether Petitioner's attorney delivered ineffective assistance in the defense of Petitioner is whether (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that but for those errors the outcome would be different. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

Petitioner, through her brief claims that her attorney Mr. Salas never advised her of the immigration consequences of a conviction before she entered her guilty plea. Mr. Salas, however, has disputed Petitioner's assertion and claimed that he advised Petitioner on the possible immigration ramifications of entering a guilty plea. Furthermore, Petitioner's recitations at her plea colloquy, in which she affirmed that counsel had advised her on the consequences and waivers attendant upon entering a plea of guilty, belie her claim that Mr. Salas omitted such consultation. However, assuming *arguendo* that Petitioner's disputed claims are not fabricated merely for the sole benefit of supporting her motion, the failure of a defense counsel to advise his client of potential immigration consequences of conviction does not violate Petitioner's Sixth Amendment right to effective assistance of counsel. *Resendiz v. Kovensky*, 416 F.3d 952, 957 (9th Cir. 2005); *United States v. Fry*, 322 F.3d 1198, 1200-01 (9th Cir. 2003). As a result, Mr. Salals's alleged failure to advise his client of the immigration consequences of her plea do not rise to the level of ineffective assistance of counsel and thus did not precipitate manifest injustice.

Petitioner also claims that her attorney's failure to fully inform her of the ability to join co-defendant Wayne Shimabukuro's eventually successful motion to suppress a recorded telephone conversation between the Commonwealth's informant and the defendants amounted to ineffective assistance of counsel. Again, Petitioner's assertions are flatly contradicted by the sworn statements of Mr. Salas, who claimed that he informed Petitioner of the potential ramifications of the motions shortly before it was submitted by her husband.

Although it is not completely obvious why Petitioner, through Mr. Salas, refrained from joining in her husband's motion to suppress, it is not the duty of the Court to second guess what may

have been a tactically sound decision or use the power of hindsight to correct what may be considered a tactical error unless the error was patently unreasonable. Perhaps the consequences of joining in such a motion would have cost Petitioner the bargain of a plea deal which drastically reduced her potential sentence from life in prison to eighteen months in prison with credit for time served. Nevertheless, such speculation is unnecessary to find that Mr. Salas's actions did not fall below an objective standard of reasonableness, even though it appears that had he joined in the motion to suppress, the charges against Petitioner would also have been dismissed without prejudice.

Next, Petitioner claims that Mr. Salas affirmatively misrepresented the law when he allegedly informed Petitioner that her LPR status would not be affected by her guilty plea and conviction of one count of Illegal Possession of a Controlled Substance, and under *Kwan* warrants a grant of Petitioner's Rule 32(d) motion to vacate the conviction and withdraw her guilty plea. As a preliminary matter, *Kwan* dealt only with a federal writ of error coram nobis, which this ruling has already dismissed because of the existence of a more usual remedy under Commonwealth Rules of Criminal Procedure 32(d), and therefore would appear inapplicable. *See supra*, pp. 6-7. However, the Court's analysis does not end here. Petitioner's claims were again flatly disputed by Mr. Salas in his declaration. It is therefore difficult for this Court to attach significant weight to the veracity of Petitioner's claims especially when they are presented in such bare form, lacking any circumstantial or direct corroboration, and when Petitioner bears the burden of convincing the Court that such facts, as she asserts, are true. Petitioner has not met her burden of convincing the Court that her assertions are true and the self-serving and uncorroborated nature of her statements add to the incredulity of this Court with regard to her claims.

Lastly, Petitioner maintains that each claimed defect in the administration of her criminal proceedings which led to her guilty plea and her husband's dismissal without prejudice created a disparity in results amounting to manifest injustice. This Court recognizes the obvious variance in the husband's result as compared to the Petitioner. The husband remains free, and without conviction on his record. While in contrast, Petitioner has been convicted of one count of Illegal Possession of a Controlled Substance and has been subjected to U.S. removal proceedings as a

result. However, as shown above, each of the acts or omissions complained of, although perhaps incrementally contributing to Petitioner's current situation, did not amount to manifest injustice. The existence of plea agreements often leads to disparity in outcomes of similarly situated cases, however, that alone cannot support a finding of manifest injustice, and a plea does not guarantee one person a better outcome than another who selects to be tried by jury. Here, Petitioner's plea was voluntarily made, and she was awarded the benefit of her bargain. Although this Court finds it questionable that the Attorney General never renewed its criminal pursuit of Wayne Shimabukuro, it refuses to support a finding of manifest injustice on such a slender reed.

IV. CONCLUSION

For the foregoing reasons, Petitioner's petition for a writ of error coram nobis is dismissed with prejudice. It is further ordered that Petitioner's alternative motion to set aside her conviction and withdraw her plea of guilty is DENIED.

So ORDERED this 24th day of January 2006.

/s/

David A. Wiseman, Associate Judge