FOR PUBLICATION

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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Plaintiff, vs. CRIZALDO M. VALDEZ, Defendant.	CRIMINAL CASE NO: 01-0167A ORDER DENYING DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA AND SET ASIDE JUDGMENT AND CONVICTION

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I. INTRODUCTION

This matter came before the Court on March 10, 2011 on Defendant's Motion to Withdraw Guilty Plea and Set Aside Judgment of Conviction pursuant to Commonwealth Rule of Criminal Procedure 32(d). Defendant Crizaldo M. Valdez ("Defendant" or "Valdez") was represented by Reynaldo O. Yana, Esq. The Commonwealth of the Northern Mariana Islands ("CNMI," hereafter, the "Commonwealth" or the "Government") was represented by Assistant Attorney General Benjamin K. Petersburg.

Based on the papers submitted and oral arguments of counsel, the Court DENIES Defendant's motion.

II. BACKGROUND

Defendant Crizaldo Valdez, a contract worker, is a citizen of the Republic of the Philippines. Defendant has been married to Barbara Ada, a CNMI resident and U.S. citizen, for

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Defendant Crizaldo Valdez, a contract worker, is a citizen of the Republic of the Philippines. Defendant has been married to Barbara Ada, a CNMI resident and U.S. citizen, for over 20 years. In 2002, Defendant, represented by his counsel of record, Jeffrey Moots, entered into a plea agreement with the Government. Under the terms of the agreement Defendant agreed to plead guilty to Count I, Attempted Rape, in exchange for the Government's dismissal of Counts II, Burglary, and III, Assault and Battery. The plea was silent as to whether trial counsel advised Valdez of the immigration consequences of his plea. The Government made no sentencing recommendation. On March 19, 2002, the agreement was filed and accepted by the Court.

On June 4, 2002, a sentencing hearing was held and Defendant was sentenced to five years of imprisonment, all suspended except for six months. Defendant has since completed his sentence.

In late 2010, the Department of Homeland Security ("DHS") filed a removal case against Defendant based on the above conviction.

On January 24, 2011, Defendant filed a Motion to Withdraw Guilty Plea Pursuant to Commonwealth Rule of Criminal Procedure 32(d). Valdez alleges that his counsel failed to advise him of the deportation consequences prior to his entering the guilty plea.

III. STANDARDS

Rule 32(d) of the Rules of Criminal Procedure authorizes the Court to set aside the judgment of conviction and permit the defendant to withdraw his guilty plea in order "to correct manifest injustice." In order to withdraw a guilty plea before sentence is imposed, a defendant must offer "fair and just" reasons to do so. The "manifest injustice" standard, however, is much higher. *See Kerchival v. United States,* 274 U.S. 220, 224 (1927). It requires 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).

IV. DISCUSSION

Defendant claims that he should be allowed to withdraw his guilty plea to correct the manifest injustice stemming from ineffective assistance of counsel.[1] Defendant makes a claim for ineffective assistance of counsel under the decision announced by the U.S. Supreme Court in *Padilla v. Kentucky,* 130 S. Ct. 1473 (2010). In *Padilla,* the Supreme Court held that an attorney provides ineffective assistance of counsel by failing to inform a client that a guilty plea carries a risk of deportation. *Id.*

Under CNMI Supreme Court Rules, a notice of appeal in a criminal case must be filed within 30 days of the entry of judgment. NMI Sup. Ct. R. 4(b). Here, the Court accepted Valdez's plea agreement in March of 2001 and a sentence was imposed on June 4, 2002. No appeal was filed and Defendant's conviction became final on July 4, 2002. The rule in *Padilla* was announced in 2010, long after Defendant his conviction became final. Thus, the issue now is whether *Padilla* should be applied retroactively to Defendant's case.

A. RETROACTIVITY

Retroactivity is determined based on the framework announced in *Teague v. Lane*, 489, U.S. 288 (1989). In that case, the Supreme Court held that a "new" constitutional rule of criminal law does not apply on collateral review to convictions that were final before the new rule was announced. *Id.* at 301. "Under the *Teague* framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review." *Whorton v. Bockting,* 549 U.S. 406, 416 (2007). The Court in *Teague* explained that most newly recognized rules of criminal procedure apply only prospectively so as to ensure that a conviction remains final. *Teague,* 489 U.S. at 310.

A holding constitutes a "new rule" within the meaning of Teague if it "breaks new ground," "imposes a new obligation on the States or the Federal Government," or was not "dictated by precedent existing at the time the defendant's conviction became final." *Id.* at 301.

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[1] The CNMI Supreme Court has firmly established that the "Sixth Amendment of the United States Constitution is applicable in the Commonwealth via the Covenant." *CNMI v. Shimabukuro*, 2008 MP 10 n.4. The Sixth Amendment to the United States Constitution provides the right to counsel in all criminal matters, and the Supreme Court has consistently interpreted that to mean "effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759 (1970).

Conversely, a rule is old if a "court considering the defendant's claim at the time of his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution." *O'Dell v. Netherland,*, 521 U.S. 151, 156 (1997). The Supreme Court, since *Teague,* has given broad articulation to the meaning of when a rule is "new," thus limiting review in collateral challenges, and "validat[ing] reasonable, good-faith interpretations of existing precedents made by state courts" even though they are "contrary to later decisions." *Butler v. McKeller,* 494 U.S. 407, 414 (1990).

Here, the question is whether *Padilla* represent a new rule or an application of the *Strickland* standard to new facts.[2] The central holding of *Padilla* is that defense counsel "must inform her client whether his plea carries a risk of deportation." *Padilla*, 130 S. Ct. at 1486. There is no question that the holding in Padilla is an application of the rule in *Strickland.*

Before *Padilla,* most state and federal courts that had previously addressed the issue considered failure to advise a client of potential collateral consequences of a conviction to be outside the Sixth Amendment requirements. *See Padilla,* 130 S. Ct. 1481 n.9. Indeed, in making its ruling, the Supreme Court effectively changed the law in nine circuit courts of the United States Court of Appeals. *See Brromes v. Ashcroft,* 358 F.3d 1251 (10th Cir. 2004); *U.S. v. Fry,* 322 F.3d 1198 (9th Cir. 2003); *U.S. v. Gonzalez,* 202 F.3d 20 (1st Cir. 2000); *U.S. v. Banda,* 1 F.3d 354 (5th Cir. 1993); *U.S. v. Del Rosario,* 902 F.2d 55, 284 U.S. app. D.C. 90 (D.C. Cir. 1990); *U.S. v. George,* 898 F.2d 333 (7th Cir. 1989); *U.S. v. Yearwood,* 863 F.2d 6 (4th Cir. 1988); *U.S. v. Campbell,* 778 F.2d 764 (11th Cir. 1985); *U.S. v. Santelises,* 476 F.2d 787 (2nd Cir. 1973).

In the CNMI, our Supreme Court held that "an alien defendant's ignorance of the immigration consequences of a guilty plea [does] not constitute manifest injustice sufficient to withdraw a guilty plea" under Rule 32(d). *Commonwealth v. Taivero,* 2009 MP 10 ¶ 26, 28. *See also Commonwealth v. Shimabukuro.* 2008 MP 10, ¶ 25. The Court held that neither trial courts nor counsel had a "duty to inform alien defendants of the potential immigration

[2] In *Strickland v. Washington,* 466 U.S. 668, the Supreme Court articulated the two steps required for establishing ineffective assistance of counsel: "First the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the *Sixth Amendment.* Second, the defendant must show that the deficient performance prejudiced the defense."

consequences of their guilty pleas. *Shimabukuro*, 2008 MP 10 ¶ 15 (citing *Commonwealth v. Chen*, 2007 MP ¶ 15).

Furthermore, there has been a longstanding legal distinction between direct and collateral consequences of a conviction. The Supreme Court has never applied *Strickland* to collateral consequences of a conviction and *Padilla* represents a significant departure from that precedent.

Thus, the rule in *Padilla* did not exist nor was it "dictated by precedent existing at the time defendant's conviction became final." Accordingly, *Padilla* is a new rule of criminal procedure and will not be retroactive unless an exception applies.

B. EXCEPTIONS TO RETROACTIVITY

There are two exceptions to the rule in *Teague*. First, a newly recognized rule of criminal procedure may apply retroactively if the rule is substantive and places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague*, 489 U.S. at 307 (internal quotations omitted). The second exception applies if a rule establishes a procedure "implicit in the concept of ordered liberty." *Id.* (internal quotations omitted). That is, "the rule is a 'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Whorton v. Bockting*, 549 U.S. 406, 416 (2007). The Supreme Court has interpreted both exceptions narrowly. *See Beard v. Banks*, 542 U.S. 406, 417 (2004).

Here, the first exception does not apply because the decision concerns counsel's duty to inform a client about immigration consequences and does not place any conduct outside the realm of criminal behavior. *See Teague,* 489 U.S. at 311.

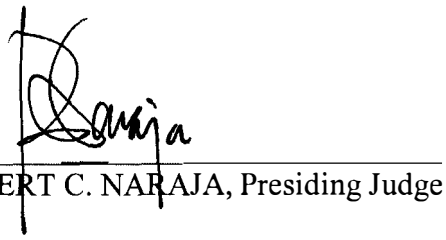
The Supreme Court has repeatedly emphasized that the second exception outlined in *Teague* is very limited in scope, meant to apply only to a limited number of "watershed" rules of criminal procedure. *Beard v. Banks*, 542 U.S. 406, 417 (2004) (internal quotations omitted). The Court has "yet to find a new rule that falls under the second Teague exception," and points to the Constitutional right to counsel, first found in *Gideon v. Wainwright*, as the only rule that would apply. *Beard*, 542 U.S. at 417 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)). Thus, the second exception is inapplicable here.

Accordingly, the rule in *Padilla* is a new rule of criminal procedure that does not fall within either of *Teague's* exceptions. Because *Padilla* will not apply retroactively in this case, the Court need not address whether Defendant has shown ineffective assistance of counsel.

V. CONCLUSION

For the reasons set forth above, the Court hereby DENIES Defendant's Motion to Withdraw Guilty Plea and Set Aside Judgment of Conviction pursuant to Commonwealth Rule of Criminal Procedure 32(d).

IT IS SO ORDERED this 22nd day of November, 2011.



ROBERT C. NARAJA, Presiding Judge