FOR PUBLICATION

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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, **Plaintiff,** **vs.** **MOHAMMAD A. BASHAR** d/o/b 04/29/65, **Defendant.**	**CRIMINAL CASE NO. 09-0036A** **AGIU CASE NO. 09-004** **ORDER DENYING DEFENDANT'S REQUEST TO SET ASIDE PLEA AND VACATE CONVICTION AND SENTENCE**

I. INTRODUCTION

THIS MATTER came before the Court on Thursday, August 22, 2013 at 1:30 p.m. in Courtroom 202 on Defendant's motion to set aside plea and vacate conviction and sentence. The Commonwealth of the Northern Mariana Islands ("Commonwealth") was represented by Assistant Attorney General James B. McAllister. Defendant Mohammad A. Bashar ("Bashar") was represented by Janet H. King, Esq.

II. BACKGROUND

Bashar is a Bangladeshi national, who has lived in Saipan since 1997. He married Jayna Lynn Taitano ("Jayna") in Saipan on March 13, 2009. Both Bashar and Jayna were charged with Conspiracy to Commit Marriage Fraud and Marriage Fraud on March 30, 2009. *CNMI v. Bashar and Taitano*, Crim. No. 09-0036A (CNMI Super. Ct. March 30, 2009) (Information). Jayna pled guilty to marriage fraud on July 6, 2009, and a Judgment of Conviction and Order was entered against her on July 7, 2009.

Commonwealth v. Taitano, Crim. No. 09-0036A (NMI Super. Ct. July 7, 2009) (Judgment of Conviction and Order). One of the conditions of Jayna's plea agreement was that she would cooperate with law enforcement officials in the prosecution of Bashar. *Id.* at 3. On or about November 17, 2009, Jayna filed for divorce, claiming that the parties were married and separated on same day and requesting that the divorce be granted on the basis of fraud. *Taitano v. Bashar*, FCD No. 09-0655 (NMI Super. Ct. Nov. 17, 2009) (Complaint for Divorce at 1, 3).

Bashar's criminal trial began on February 3, 2011. Before the trial's conclusion, Bashar entered a plea of *nolo contendere* on February 10, 2011, for which he received a one year suspended prison sentence, probation, and a $2,000 fine. As part of this plea agreement, the Commonwealth agreed that it would not pursue any deportation action against him. According to Bashar, he entered into the plea agreement because his attorney at the time, Edward C. Arriola ("Arriola"), advised him that there were no immigration consequences associated with this agreement. Arriola disputes that claim. Decl. of Arriola ¶¶ 15-19. During the change of plea hearing, the undersigned Presiding Judge Naraja advised Bashar that a deportation action may be initiated against him by the United States.

On February 22, 2011, Bashar was served with a Notice to Appear in removal proceedings scheduled for March 15, 2011 by the Department of Homeland Security. He was provided with a paper copy of this Notice in English, and a Bengali interpreter orally informed him of the date and place of the hearing and the consequences of his failure to appear. Def. Ex. 4-4. The Notice to Appear specifically states that the removal proceeding was based upon Bashar's conviction for marriage fraud. *Id.* Bashar, however, claims that he did not learn the reason for this action until the immigration hearing took place. Decl. of Bashar ¶ 14.

On January 12, 2012, the United States Immigration Court issued an order of removal. Def. Ex. 4-5. That Order allowed Bashar to file an appeal by February 13, 2012. *Id.* at 5. His immigration

attorney, Stephen C. Woodruff, filed a Notice of Appeal on January 20, 2012, indicating that he would also submit a brief. Def. Ex. 4-6; Decl. of Bashar ¶¶ 16-17. However, the brief was not filed, and the Immigration Court dismissed Bashar's appeal. Def. Ex. 4-7; Decl. of Bashar ¶ 17.

Bashar now asks this Court to allow him to withdraw his guilty plea, claiming that he would have insisted on taking the trial to completion if he had known that his plea would subject him to deportation.

III. LEGAL STANDARD

The Court may set aside a judgment of conviction and permit a criminal defendant to withdraw his guilty plea in order to "correct manifest injustice". NMI R. Crim. P. 32(d). The decision to do so is within the court's discretion. See, for example, *Katz v. United States*, 161 F.2d 869 (6th Cir. 1947); *United States v. Rodriguez-DeMaya*, 674 F.2d 1122, 1123 (5th Cir., 1982). In order for the court to permit a post-sentencing withdrawal of a plea, the defendant must show that either (1) "a complete miscarriage of justice" exists or (2) the proceeding was "inconsistent with the rudimentary demands of fair procedure". *CNMI v. Valdez*, Crim. No. 01-0167A (NMI Super. Ct. Nov. 22, 2001) (Order Denying Defendant's Motion to Withdraw Guilty Plea and Set Aside Judgment and Conviction at 2), citing *CNMI v. Cabrera*, 979 F.2d 854 (9th Cir. 1992) and *United States v. Timmreck*, 441 U.S. 780, 784 (1979).

IV. DISCUSSION

Bashar moves this Court, pursuant to NMI R. Crim. P. 32(d), to withdraw his plea of *nolo contendere* entered on February 10, 2011 based on a theory of ineffective assistance of counsel. Specifically, Bashar argues that Arriola incorrectly informed him that a plea of *nolo contendere* to marriage fraud would not result in his deportation. He states that he would have continued with the trial already in progress if he had been properly advised that the federal government could pursue a removal

action against him based upon this plea. He also states that he did not fully understand the proceedings because he has limited understanding of the English language and was not provided with a Bengali interpreter. In response, the Commonwealth contends that (1) Bashar's motion is untimely, (2) Bashar failed to show that Arriola was ineffective, and (3) Bashar failed to show that Arriola's performance caused prejudice.

A. Ineffective Assistance of Counsel

In order to prevail on a claim of ineffective assistance of counsel involving a plea agreement, a defendant must prove that (1) "his counsel's performance was deficient" and (2) "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Commonwealth v. Shimabukuro*, 2008 MP 10 ¶ 11, citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984) and *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Shimaburkuro*, 2008 MP at ¶ 12 respectively. The Court examines each prong of the *Strickland* test in turn.

1. Bashar has not proved that Arriola's performance was deficient

The first prong of the *Strickland* test requires that the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed [to] the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Thus, Bashar must demonstrate that Arriola's performance fell below that of a "reasonably competent attorney", and the advice he gave to Bashar was not "within the range of competence demanded of attorneys in criminal cases". *Id.*, citing *Cuyler v. Sullivan*, 466, U.S. 335, 344 (1980).

Deportation proceedings are inextricably linked to criminal actions, with deportation being viewed as a "particularly severe 'penalty'". *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 1481 (2010), citing *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893). Because of the severity of this penalty, the United States Supreme Court has stated that an attorney must advise his client regarding the

risk of deportation associated with a plea agreement. *Id.* at 1482. Thus, the failure to provide such advice amounts to deficient performance under the first prong of the *Strickland* test. *Id.* at 1480.

In *Padilla*, the US Supreme Court accepted Padilla's allegations as true; namely, that Padilla's counsel provided him with inaccurate advice regarding the immigration consequences of his plea. *Id.* at 1483. On remand, the Government conceded this point, and Padilla's former attorney admitted as much. *Padilla v. Commonwealth*, 381 S.W.3d 322, 327 (2012). This case, however, differs significantly, and the Court is not obligated to take Bashar at his word. *Shimabukuro*, 2008 MP at ¶ 18.

Here, Arriola denies Bashar's claim of ineffective assistance of counsel. Arriola has signed a sworn declaration stating that on multiple occasions he informed Bashar that he would be subject to deportation by accepting the plea agreement. Decl. of Arriola ¶¶ 15-19. In support of these assertions, Arriola describes conversations he had with Bashar, during which Bashar asked how he could prolong the deportation process and stated that he did not want to go back to prison. *Id. at* ¶¶ 15-18. Two of Arriola's employees have also provided sworn statements that they witnessed Arriola advising Bashar of the possible immigration consequences of the plea agreement. Decl. of Demapan ¶ 2; Decl. of Ada ¶ 2.

Although Bashar claims that Arriola misrepresented the immigration consequences of his plea, he has not provided any direct or circumstantial evidence to support his claim. *Shimabukuro*, 2008 MP at ¶ 18. Arriola, on the other hand, has stated the exact opposite and has supported his claim with both details of conversations he had with Bashar and eyewitness statements. The Court is not persuaded that Bashar was given ineffective assistance of counsel.

2. Bashar has failed to prove prejudice

Because Bashar has failed to prove the first prong of the *Strickland* test, the Court need not address the second prong. *Shimabukuro*, 2008 MP at ¶ 18; *Strickland*, 466 U.S. at 697. However, since this is the first time the *Padilla* decision has been addressed in the Commonwealth, it will do so briefly.

A criminal defendant claiming ineffective assistance of counsel in relation to a plea agreement must prove that there is a reasonable probability that but for his attorney's errors, the defendant would have insisted on going to trial instead of pleading guilty. *Padilla v. Commonwealth*, 381 S.W.3d at 328, citing *Hill*, 474 U.S. at 59. A reasonable probability is one sufficient to undermine confidence in a case's outcome. *Shimabukuro*, 2008 MP at ¶ 11, citing *Strickland*, 466 U.S. at 694. This test is objective and requires the defendant to convince the court that rejecting the plea bargain "would have been rational under the circumstances." *Padilla v. Kentucky*, 130 S.Ct. at 1485. "This standard of proof is 'somewhat lower' than the common 'preponderance of the evidence' standard." *Padilla v. Commonwealth*, 381 S.W.3d at 328, citing *Strickland*, 466 U.S. at 694.

i. Bashar failed to prove that his plea was unreasonable

While this Court agrees with Bashar that a decision to enter into a plea agreement based upon incorrect advice of immigration consequences *could* lead to a claim of ineffective assistance of counsel, the Court does not agree that such misconduct occurred in this case. First, as addressed above, Bashar has failed prove that Arriola provided ineffective assistance of counsel. Next, the evidence against Bashar was overwhelming: (1) Jayna had already testified at Bashar's trial that Bashar paid her to marry him so that he could avoid deportation; (2) Jayna's complaint for divorce alleged fraud and further alleged that the couple married and separated on the same day; (3) Jayna's boyfriend, Nestor Daikichy ("Daikichy") made a statement that he and Jayna continued to cohabitate even after she married Bashar; (4) Jayna gave birth to a child that was not Bashar's during her marriage to Bashar and named that child Nestor, after his father; (5) Bashar and Jayna were not living together as man and wife; (6) Bashar was living with another woman, Xiangping Wang, who was subpoenaed by the Commonwealth to testify at his trial. Finally, if convicted as a result of the uncompleted trial, Bashar faced a prison term of up to ten

years followed by deportation. Thus, he has failed to demonstrate that rejecting the plea agreement would have been rational under the circumstances.

ii. Other Forms of Knowledge

Bashar was on notice that entering into the plea agreement could result in his deportation. First, the plea agreement specifically states that he was aware of the "legal consequences of the Agreement, including any potential immigration consequences that may or may not occur as a result of entering into this Agreement." *CNMI v. Bashar*, Crim. No. 09-036A (NMI. Super. Ct.) (Plea Agreement at 3). The agreement goes on to state that "counsel for Defendant, represents and warrants that he has fully informed the advised [*sic*] Defendant of the nature, contents, and legal consequences of the Agreement including any potential immigration consequences". *Id.* Both Bashar and Arriola signed this agreement. Since the Commonwealth no longer handled deportations actions at the time of Bashar's plea, these statements could only have referred to immigration consequences existing within the federal system. *In re Office of the Attorney General and Division of Immigration* (NMI Super. Ct. Nov. 27, 2009) (Amended General Order Dismissing All Pending Immigration Cases).

Next, the undersigned oversaw the change of plea hearing and went over the terms of the plea agreement with Bashar. The Court specifically advised Bashar that the United States could pursue removal actions against him. At no time did he express that he wanted to reconsider or withdraw his plea.

Therefore, even if Arriola provided ineffective assistance of counsel by misinforming Bashar, Bashar was placed on notice of the possible immigration consequences of his plea.

iii. Understanding of the English Language

Bashar claims prejudice existed because he has limited understanding of the English language. Dec. of Bashar ¶ 4. He claims that all of his conversations with Arriola were conducted in English

without the assistance of an interpreter. *Id.* ¶ 6. However, Bashar does not claim that he ever requested an interpreter or that he ever indicated in any way that he was unable to understand or communicate with his attorneys. Bashar does not claim that he needed an interpreter to communicate with his immigration attorney or his current attorney. Finally, he did not request the services of an interpreter during the criminal trial or change of plea hearing.

On the contrary, Arriola asserts that Bashar never gave him the impression that he had difficulty understanding their conversations. Rather, Bashar interacted in way that indicated that he did, in fact, understood what was transpiring. For instance, Bashar asked about ways to prolong deportation. Decl. of Arriola, pp. 5-8. Bashar also communicated with Arriola's staff in English. Decl. of Ada; *see* also Pl. Ex. Z. Bashar has lived in Saipan for approximately seventeen years and runs his own business. Moreover, this Court observed Bashar during the instant motion hearing. While an interpreter appeared with him, the interpreter seemed disinterested in the proceedings, often looking up at the ceiling or using his mobile telephone. The interpreter even left the proceeding for a short time. The interpreter did not seem any more interested during the Government's argument. Instead, Bashar and the interpreter had only a handful of exchanges during the entire proceeding, which lasted over an hour. All of these exchanges were exceedingly brief, and some involved what appeared to be jokes or conversations about things other than the matter at hand, as the parties were observed smiling and laughing. Given the gravity of the issue at bar and consequences for Bashar, he would have asked his interpreter to describe the proceedings if he was truly unable to understand what was taking place.

Finally, it seems incongruous that on one hand Bashar claims that Arriola misinformed him and on the other that Bashar does not understand English. If he truly did not understand Arriola, he could not be certain that he was misinformed. Most importantly, he would have requested the assistance of an interpreter when facing a criminal action that carried with it a prison term of up to ten years.

The Court believes that Bashar understood his attorney, the plea agreement, the proceedings before this Court, and the consequences of his actions.

B. Timing

NMI R. Crim. P. 32(d) does not set a time limit for filing a post-sentence motion to withdraw a plea. However, undue delay between the occurrence of the alleged cause of action and the filing of the motion may adversely affect the defendant's credibility. 9 A.L.R. Fed 309; see also, *Lipscomb v. United States*, 226, F.2d 812, 815 (8th Cir. 1955) (the court held that filing a motion to withdraw plea three and one-half years after it was entered was "too late"); *United States v. Leland*, 370 F. Supp. 2d 337 (U.S.D.C., 2005) (motion to withdraw plea filed almost one year after the plea was accepted was not timely); *Hood v. United States*, 152 F.2d 431, 436 (8th Cir. 1946) (motion to vacate filed approximately one year and eight months after sentencing following a guilty plea was too late). The bar for granting motions to withdraw pleas is set much lower at the pre-sentencing stage. Yet, courts routinely find such motions untimely. See, for instance, *United States v. Dukagjini*, 198 F. Supp. 2d 299 (U.S.D.C. 2002) (a "two-year delay between the plea date…and [defendant's] first motion seeking to vacate…is so extraordinary as to warrant denial of the motion on that basis alone. Courts consistently consider the amount of time which has elapsed between the plea and the motion to vacate. Prompt requests are more often favorably considered, but the longer it takes a defendant to seek withdrawal, the less likely his reasons will justify permitting [a] withdrawal of the plea").

In this case, Bashar pled *nolo contendere* to Marriage Fraud on February 10, 2011. Twelve days later, on February 22, 2011, he was served with a Notice to Appear in removal proceedings. The Notice to Appear clearly indicates that the removal action was based upon his conviction for marriage fraud, and a Bengali interpreter orally provided him with details pertaining to the hearing. Thus, it was at that

time that Bashar should have addressed this matter. Yet he did not motion the Court to withdraw his plea at that time.

Bashar claims that he first became aware that the deportation action was based on this plea at an immigration hearing. The removal hearing was scheduled for March 15, 2011. Bashar did not attempt to withdraw his plea following that hearing. The Immigration Court issued a removal order on January 12, 2012. Again, Bashar did not attempt to withdraw his plea. Inexplicably, Bashar waited over two and one-half years after entering his plea to bring this claim of ineffective assistance of counsel; the Court does not look favorably on the lapse of time. Accordingly, the Court finds that the instant motion is untimely.

V. CONCLUSION

Based on the foregoing, the Court **DENIES** Bashar's motion to set aside plea and vacate conviction and sentence.

SO ORDERED this 4th day of September, 2013.

ROBERTO C. NARAJA, Presiding Judge