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

CHEROLEEN RAY, **Petitioner,** **v.** **URSULA LIFOIFOI ALDAN, in her official capacity as Chief Probation Officer, Office of Adult Probation,** **Respondent.**	**CIVIL CASE No. 14-0110-CV** **ORDER DENYING PETITIONER'S APPLICATION FOR WRIT OF HABEUS CORPUS**

I. INTRODUCTION

THIS MATTER came before the Court on September 4, 2014, at 1:30 p.m. in Courtroom 223A. Attorney Joseph E. Horey appeared for the Petitioner, Cheroleen Ray. Assistant Attorney General James B. McAllister appeared for the Respondent, Commonwealth of the Northern Mariana Islands.

Based on review of the filings, oral arguments, and applicable law, the Court hereby **DENIES** Petitioner's application for writ of habeus corpus.

II. BACKGROUND

On October 19, 2011, Petitioner was charged with two felonies and two misdemeanors with a cumulative imprisonment potential of more than eleven years. Pet'r's Appl. for Writ, Ex. A. Pursuant to a plea agreement, Petitioner was convicted of one felony for a five-year imprisonment sentence (all suspended except for two years) and one misdemeanor for a one-year imprisonment sentence. Pet'r's Ray Decl., Ex. B 2 (May 16, 2014). The misdemeanor sentence was to run concurrently with the felony sentence for a total imprisonment term of five years. Pet'r's Ray Decl., Ex. B 2 (May 16, 2014). Petitioner served two years in

confinement, and now serves a term of probation under Respondent's supervision. Pet'r's Appl. for Writ ¶ 5.

Petitioner is not a citizen or national of the United States. Pet'r's Appl. for Writ, Ex. C. Because of this, the United States seeks to deport Petitioner under the automatic removal provisions of 8 U.S.C. § 1182(a)(2)(B):

> An alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years of more is inadmissible.

8 U.S.C. § 1182(a)(2)(B); Pet'r's Appl. for Writ ¶ 6.

In response, Petitioner filed an application for writ of habeus corpus, requesting that this Court vacate Petitioner's conviction and sentence in *Commonwealth v. Ray*, Crim. No. 11-0251E (NMI Super. Ct. Apr. 16, 2012), under the Sixth Amendment of the United States Constitution, as construed in *Padilla v. Kentucky*, 559 U.S. 356 (2010). Pet'r's Appl. for Writ 1, ¶¶ 8, 9. Petitioner claims that her lawyer did not advise Petitioner that her particular plea agreement would automatically subject her to deportation. Pet'r's Appl. for Writ. ¶ 7; Pet'r's Ray Decl. ¶ 5. Petitioner claims that she "would have agreed only to a plea that did not make [Petitioner] automatically removable, such as a plea to only one offense rather than two, or to a sentence of four years (or four and a half years, etc.) rather than five." Pet'r's Ray Decl. ¶ 5.

Petitioner's former lawyer claims that " . . . [he] advised [Petitioner] that her conviction of the offenses she was pleading to would make her deportable, but that [he] could not guarantee that [Petitioner] would actually be deported." Pet'r's Meyer Decl. ¶ 2 (July 25, 2014). Petitioner's former lawyer also claims that "[he] advised [Petitioner] that, if she decided to go to trial in that case, she would probably be convicted and end up being sentenced to a longer jail term than the two years offered by the Government in her plea agreement." Pet'r's Meyer Decl. ¶ 2 (July 25, 2014).

III. BASIS OF RELIEF

Petitioner brings an application for writ of habeus corpus under 6 CMC § 7101 ("Every person

unlawfully imprisoned or restrained of his or her liberty under any pretense whatsoever, or any person on behalf of an unlawfully imprisoned individual, may apply for a writ of habeas corpus to inquire into the cause of the imprisonment or restraint."). Petitioner is not in a lock-up situation, but she argues that a writ of habeus corpus is the appropriate basis for relief because Petitioner is under probation, restrained of her liberty. Pet'r's Opening Br. 2 (citing *Beckway v. DeShong*, 717 F. Supp. 2d 908, 925 (N.D. Cal. 2010) ("An individual on probation can generally petition for a writ of habeus corpus under both state and federal law.")).

Respondent does not address this issue in its Opposition papers[1], and the Court deems Respondent's lack of opposition as a concession to its merits. Accordingly, the Court finds that Petitioner brings a proper application for writ of habeus corpus under 6 CMC §§ 7101 *et seq*.

IV. THE LEGAL STANDARD FOR A WRIT OF HABEUS CORPUS FOR INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT

As a general rule, the petitioner has the burden to show illegal restraint by the respondent. *Eagles v. United States*, 329 US 304, 314 (1946). And, in order to show ineffective assistance of counsel under the Sixth Amendment, the petitioner must show that (1) the trial counsel's performance was deficient, or "fell below an objective standard of reasonableness"; and that (2) the defendant was prejudiced, or "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Commonwealth v. Shimabukuro*, 2008 MP 10, ¶¶ 11-12, citing *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

1. The Legal Standard for *Strickland*'s Deficient Performance Prong.

The "judicial scrutiny of a defense counsel's performance under *Strickland* is highly deferential." *Commonwealth v. Taivero*, 2009 MP 10 ¶ 21. There is "a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance . . . ." *Id.* (quoting *Strickland*, 466 U.S. at 690). And prior to 2010, the Commonwealth held that "a trial counsel's failure to advise a non-citizen criminal

[1] Respondent cites to NMI R. Crim. P. 32(d) as Petitioner's basis for relief. Resp't's Opp'n. 2. However, Respondent does not argue that this Court should decline to address the merits of Petitioner's Writ for procedural deficiencies.

defendant of the immigration consequences of his or her plea is not objectively unreasonable under *Strickland*'s performance prong." *Id.* ¶ 18.

But in 2010, the U.S. Supreme Court held that defense counsel "must inform a client whether his plea carries a risk of deportation." *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010). There, the defendant faced automatic deportation after pleading guilty to drug-distribution charges. *Id.* at 359. Defense counsel "not only failed to advise [defendant] of [facing automatic deportation] prior to entering the plea, but also told him that [defendant] 'did not have to worry about immigration status since he had been in the country so long.'" *Id.* The defendant alleged that "he would have insisted going on trial if he had not received incorrect advice from his attorney." *Id.*

The Court found that the "weight of prevailing professional norms supports the view that counsel must advise the client regarding the risk of deportation." *Id.* at 368 (citations omitted). Under 8 U.S.C. § 1227(a)(2)(B)(i), the deportation statute at issue:

> Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

8 U.S.C. § 1227(a)(2)(B)(i).

But some deportation statutes require that defense counsel does more than just advising the client regarding the risk of deportation. The Court found that the terms of 8 U.S.C. § 1227(a)(2)(B)(i) were "succinct, clear, and explicit", and that the text of the statute "addresses not some broad classification of crimes[2] but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses." *Id.* So while, normally, defense counsel "need do no more than

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[2] Justice Alito, in his concurring opinion, raises examples where defense counsel might have difficulty ascertaining the deportation consequences where "aggravated felonies" and "crimes of moral turpitude" are concerned. *Padilla*, 559 U.S. at 377 (Alito, S., concurring). Respondent's persuasive authority of *Clarke v. U.S.*, 703 F.3d 1098, 1099 (7th Cir. 2013) deals with an "aggravated felony" deportation statute and, for the purpose of evaluating *Strickland*'s deficient performance prong, is inapplicable.

advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences . . . when a deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear." *Id.* at 369.

Therefore, the Court found that the defendant satisfied his burden to show that his defense counsel's deficient performance fell below the objective standard of reasonableness. *Id.* Accordingly, this Court must answer two questions in evaluating the deficient-performance prong of the *Strickland* analysis: (1) Was the automatic deportation statute in this case "succinct, clear, and explicit" so as to create a duty in defense counsel to do more than just advise Petitioner of the risk of deportation? (2) If so, did defense counsel fulfill that duty and give the correct advice?

Here, the Court finds that the deportation statute in this case was "succinct, clear, and explicit." However, the Court also finds that defense counsel failed to give the correct advice.

2. Defense counsel's advice fell below the professional standards set in *Padilla v. Kentucky* because defense counsel did not give correct advice.

This Court finds that the language of 8 U.S.C. § 1182(a)(2)(B) is "succinct, clear, and explicit." Therefore, defense counsel had a duty to advise Petitioner in detail that a guilty plea for two offenses with an aggregate sentence of five years or more would trigger automatic deportation.

8 U.S.C. § 1182(a)(2)(B) is simple: If a Court convicts a non-citizen for two non-political crimes with an aggregate imprisonment sentence of five years or more, the non-citizen is subject to deportation. 8 U.S.C. § 1182(a)(2)(B). This statute is not unlike *Padilla*'s 8 U.S.C. § 1227(a)(2)(B)(i) where: If a Court convicts a non-citizen for a drug-related crime, and the drugs are not for limited personal use, then the non-citizen is subject to deportation. 8 U.S.C. § 1227(a)(2)(B)(i).

Therefore, when proposing the plea agreement to Petitioner, defense counsel must have done more than just advise her that she faced possible deportation. *Padilla*'s holding mandates higher performance standards for criminal defense attorneys. Here, defense counsel had a duty to inform Petitioner that, while she would spend less time in confinement, the proposed plea agreement would subject her to automatic

deportation.

Accordingly, this Court finds that defense counsel failed to fulfill his duty. Petitioner met her burden to show that defense counsel's deficient performance fell below objective standards of reasonableness.

3. The Legal Standard for *Strickland*'s Prejudice Prong.

In addition to *Strickland*'s deficient-performance prong, Petitioner must also show that she was prejudiced – and prior to 2012 – that "there is a reasonable probability that but for counsel's errors, [Petitioner] would not have pleaded guilty and would have insisted on going to trial." *Shimabukuro*, 2008 MP 10 ¶ 12 (citing *Hill v. Lockhart*, 474 U.S. 52, 57-58 (1985)).

Petitioner argues that this Court (instead of applying the 2008 *Shimabukuro*'s holding) should adopt an expanded holding from the 2012 U.S. Supreme Court case of *Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012) (plurality opinion). In *Frye*, the Court held that "[t]o show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." *Id.* at 1409.

Petitioner argues that this Court should expand the holding in *Frye* to include situations where a better plea bargain deal "could have happened" during the plea negotiations process itself. Pet'r's Opening Br. 8. Petitioner proposes that this Court adopt a derivative *Frye* standard where "[t]he pertinent question . . . is whether there was a reasonable probability that a better plea agreement could have been negotiated." Pet'r's Opening Br. 9. According to Petitioner, expanding the *Frye* holding is appropriate because *Frye* expanded the *Hill* holding's requirement that Petitioners show that they would have elected to try their case by trial. Pet'r's Opening Br. 7 (citing *Frye*, 132 S. Ct. at 1403 ("*Hill* correctly applies in the context in which it arose, but it does not provide the sole means for demonstrating prejudice arising from counsel's deficient performance during plea negotiations.")).

Petitioner points to the Massachusetts case of *Commonwealth v. Gordon* as an example. There, the court held that a defendant "may show prejudice by demonstrating 'a reasonable probability that a different

plea bargain (absent [the dire immigration] consequences) could have been negotiated at the time.'" *Commonwealth v. Gordon*, 974 Mass. App. Ct. 389, 400 (2012) (quoting *Commonwealth v. Clarke*, 470 Mass. 30, 47 (2011) (overturned in part by *Chaidez v. United States*, ___ U.S. ___, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013)) (relying in part on *Padilla*, 559 U.S. at 1485)).

In *Gordon*, like the Petitioner in this case, the defendant also faced deportation after pleading guilty based on inadequate advice from his counsel. *Id.* at 389-90. The court found that the defendant raised a substantial issue as to prejudice where "[t]o avoid the consequence of which the defendant complains . . . it would not have been necessary for him to plead guilty to different or lesser charges, or even to serve less time. Rather, what was necessary was to convince the judge to sentence him to at least one day less on the [assault and battery on a police officer] charge." *Id.* at 400-01.

The Court is persuaded by Petitioner's arguments, and adopts Petitioner's proposed *Frye* derivative standard in ruling on the *Strickland* prejudice prong. However, the Court does not find in favor of Petitioner.

4. Petitioner was not prejudiced by defense counsel's deficient performance because Petitioner's aggregate sentence is six years, and not five.

The Court finds that Petitioner failed to meet her burden. Petitioner asserts that a plea agreement for a sentence "even one day shorter" would have prevented her automatic deportation. Pet'r's Opening Br. 6; Pet'r's Reply Br. 6 ("Like [Petitioner], in other words, he had unwittingly pleaded himself into a situation where he was removable by the margin of a single day."). But for Petitioner to have avoided automatic deportation, she must have entered into a plea agreement for a sentence that is <u>one year and one day</u> shorter – a margin of time far greater than the facts in *Commonwealth v. Gordon*.

Petitioner's aggregate imprisonment sentence is six years – not five, as Petitioner asserts. Pet'r's Opening Br. 5 ("Cheroleen's counsel advised her to enter into a plea agreement whereby she would be . . . sentenced [sic] to exactly five years' imprisonment – precisely the minimum sentence required to make her removable."). The "aggregate sentences to confinement" calculation under 8 U.S.C. § 1182(a)(2)(B) does not make a distinction as to whether Petitioner's imprisonment sentences run concurrently or

consecutively. *See* Pet'r's Ray Decl. Ex. C 3 (May 16, 2014) ("5. Your aggregate sentence was six (6) years imprisonment."); *see also* 8 U.S.C. § 1182(a)(2)(B) (" . . . regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct . . . for which the aggregate sentences to confinement were 5 years or more is inadmissible."); *see also* 8 U.S.C. § 1101(a)(48)(B) ("Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part."); *see also, e.g.*, *State v. Clemens*, 168 Conn. 395, 409 (1975) ("The imposition of a concurrent sentence . . . allows the court the flexibility of setting definite periods of imprisonment that fit the particular defendant's situation, despite the number of offenses to which the sentences apply; they remain, however, separate terms of imprisonment which the legislature has permitted to be served at one time.").

This Court finds this fact fatal to Petitioner's application for a writ of habeus corpus. Petitioner would have been subject to automatic deportation even if she were to have been able to negotiate an "even a day shorter" sentence.

Accordingly, the Court has enough reason to doubt whether Petitioner could have reached a better plea agreement that avoids automatic deportation under 8 U.S.C. § 1182(a)(2)(B). Petitioner has not offered authorities to suggest that the Court should think otherwise. Therefore, the Court finds that Petitioner failed meet her burden to show that she was prejudiced – that there was a reasonable probability that a better plea agreement could have been negotiated.

V. CONCLUSION

Based on the foregoing, the Court **DENIES** Petitioner's application for writ of habeus corpus.

SO ORDERED this 23rd day of December, 2014.

/ s /
David A. Wiseman, Associate Judge