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2 IN THE SUPERIOR COURT
3 FOR THE
4 COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

5 COMMONWEALTH OF THE
6 NORTHERN MARIANA ISLANDS,

) CRIMINAL CASE NO. 01-0062

)

)

Plaintiff,

) ORDER DENYING PETITION FOR

v.

) WRIT OF ERROR CORAM NOBIS AS

) DEFENSE COUNSEL DID NOT

) PROVIDE INEFFECTIVE ASSISTANCE

7 SEREMA ISSY NOWELL.

) OF COUNSEL; THE CNMI SUPERIOR

) COURT IS DUTY BOUND TO FOLLOW

Defendant.

) FEDERAL IMMIGRATION LAW

) DESPITE THE DEFENDANT'S HEALTH

) CONCERNS

)

11 This matter came before the Court on September 16, 2015 at 1:30 p.m. in Courtroom 220.¹

12 The Defendant, Serema Issy Nowell, was represented by Attorney Pamela Brown Blackburn. The
13 Commonwealth was represented by then-Chief Prosecutor Leonardo Rapadas.

14 The Defendant is asking that the Court vacate his conviction for attempted rape under 6
15 CMC § 1301(a) and 6 CMC § 301, which he pleaded guilty to on May 22, 2002, arguing that he
16 received ineffective assistance of counsel when his then-counsel failed to advise him of the
17 immigration consequences of a guilty plea. Def.'s Pet. at 2-6, 8.

18 Based on a review of the filings, oral arguments, and applicable law, the Court **DENIES**
19 Defendant's Emergency Petition for Writ of Error Coram Nobis.²

23 ¹ This matter had previously come before the Court on July 14, 2015; however, the hearing was continued, as the
Defendant had not served the Commonwealth with his petition.

24 ² A writ of error coram nobis "provides a remedy for those suffering from 'lingering collateral consequences of an
unconstitutional or unlawful conviction based on errors of fact' and 'egregious legal errors.'" *United States v. Walgren*,
885 F.2d 1417, 1420 (9th Cir. 1989) (quoting *Yasui v. United States*, 772 F.2d 1496, 1498, 1499 n. 2 (9th Cir. 1985)).

II. BACKGROUND

On May 22, 2002, the Defendant pleaded guilty to attempted rape under 6 CMC § 1301(a) and 6 CMC § 301, and the Honorable Judge Virginia Sablan-Onerheim accepted this guilty plea. In the Defendant's Emergency Petition for Writ of Error Coram Nobis and its attached declaration, the Defendant states that his attorney, then-Assistant Public Defender Jeffrey A. Moots, did not advise the Defendant of any potential immigration consequences of his plea. Def.'s Pet. at 2-3. The Defendant also stated that he was "never told by any government official that [he] could face immigration problems." Decl. of Serema Issy Nowell at 1. The Defendant was subsequently sentenced to five (5) years of imprisonment, of which he served two (2) years.

At the time of the Defendant's conviction, the Commonwealth of the Northern Mariana Islands ("CNMI") handled its own immigration. On November 28, 2009, federal immigration laws took effect in the CNMI.³

13 The Defendant is a citizen of the Federated States of Micronesia (“FSM”),⁴ currently
14 residing on Saipan. At the time of his plea, the Defendant was a lawful permanent resident (“LPR”)
15 of the United States. The Defendant has a United States citizen stepson. On January 13, 2015, the
16 Immigration Judge (“IJ”) issued an oral decision ordering that the Defendant be removed from the
17 United States to FSM. The IJ made this decision despite the Defendant’s medical concerns related
18 to his advanced diabetes and hypertension, including challenges in obtaining medical treatment on
19 his home island in FSM.

On May 21, 2015, the Defendant filed his Emergency Petition for Writ of Error Coram Nobis to Vacate Judgment, To Set An Expedited Hearing and Memorandum in Support Thereof.

²³ ³ *The Commonwealth of the Northern Mariana Islands Transition to U.S. Immigration Law: Overview.* <http://www.dhs.gov/commonwealth-northern-mariana-islands-transition-us-immigration-law>.

²⁴ The Defendant is originally from the State of Chuuk in FSM. His home island is Mama, which is a week-long boat ride from the main island of Weno. Def.'s Pet. at 2.

1 The Defendant argued that the Court should vacate the Defendant's conviction and reset the matter
2 for a jury trial, because he received ineffective assistance of counsel when his attorney failed to
3 advise him of potential immigration consequences to his guilty plea.⁵ Def.'s Pet. at 2-3. The
4 Commonwealth filed its opposition on September 9, 2015.

5 On July 14, 2015, the Court issued Orders allowing the Defendant's then-counsel, Jeffrey
6 Moots, and the U.S. Department of Homeland Security – Immigration and Customs Enforcement
7 ("USDHS-ICE") to file amicus curiae briefs. On August 28, 2015, Mr. Moots filed his amicus
8 curiae brief as well as a declaration related to his representation in the Defendant's case. USDHS-
9 ICE did not file any briefs.

10 III. DISCUSSION

11 A writ of error coram nobis "provides a remedy for those suffering from 'lingering collateral
12 consequences of an unconstitutional or unlawful conviction based on errors of fact' and 'egregious
13 legal errors.'" *United States v. Walgren*, 885 F.2d 1417, 1420 (9th Cir. 1989) (quoting *Yasui v.*
14 *United States*, 772 F.2d 1496, 1498, 1499 n. 2 (9th Cir. 1985)). Coram nobis relief requires the
15 following four factors: "(1) a more usual remedy is not available; (2) valid reasons exist for not
16 attacking the conviction earlier; (3) adverse consequences exist from the conviction to satisfy the
17 case or controversy requirement of Article III; and (4) the error is of the most fundamental
18 character." *United States v. McClelland*, 941 F.2d 999, 1002 (9th Cir. 1991) (quoting *Hirabayashi*
19 *v. United States*, 828 F.2d 591, 604 (9th Cir. 1987)). Both the Defendant and the Commonwealth
20 focused their arguments on the fourth factor, specifically on whether the Defendant received
21 ineffective assistance of counsel when he was not advised of the immigration consequences of a
22 guilty plea.

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24 ⁵ The Defendant also mentions in passing that Mr. Moots failed to "negotiate a reasonably available plea to false imprisonment;" however, as the petition discusses Mr. Moots's failure to advise the Defendant of immigration consequences, the Court will focus on that analysis. Def.'s Pet. at 3-6.

1 Under the Sixth Amendment of the United States Constitution, “the accused shall enjoy the
2 right to...the assistance of counsel for his defense.” U.S. CONST. amend. VI. Although this
3 assistance need not be “perfect or free from error,” it must still be “*effective* assistance of counsel.”
4 *Commonwealth v. Taivero*, 2009 MP 10 ¶ 8 (citing *McMann v. Richardson*, 397 U.S. 759, 771 n.14,
5 774 (1970)) (emphasis in original).

6 Courts apply a two-prong test in determining whether a defendant received ineffective
7 assistance of counsel, outlined in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*,
8 “[T]he defendant must [first] show that counsel’s performance was deficient. This requires showing
9 that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed by
10 the Sixth Amendment.” *Id.* at 687. Under this first prong, the Defendant must show that “counsel’s
11 representation fell below an objective standard of reasonableness.” *Id.* at 688.

12 Under *Strickland*’s second prong, “the defendant must show that the deficient performance
13 prejudiced the defense.” *Id.* at 687. *Strickland* applies not only to trial itself, but also to the plea
14 bargaining process. *Commonwealth v. Taivero*, 2009 MP 10 ¶ 11 (citing *Hill v. Lockhart*, 474 U.S.
15 52, 58 (1985)). To satisfy the second prong of prejudice when challenging a guilty plea, a defendant
16 must show “a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty
17 and would have insisted on going to trial.” *Id.* (citation omitted).

18 The Defendant argues that he received ineffective assistance of counsel when Mr. Moots
19 failed to advise him of the potential immigration consequences of his guilty plea, or in the
20 alternative when Mr. Moots failed to negotiate a plea deal that had no immigration consequences.
21 In other words, that Mr. Moots’s “representation fell below an objective standard of
22 reasonableness” under *Strickland*’s first prong. *Strickland*, 466 U.S. at 688.

23 Under *Padilla v. Kentucky*, defense counsel “must advise a client about the risk of
24 deportation as a consequence of entering a criminal plea.” *Commonwealth v. Bashar*, 2015 MP 04 ¶

1 14 (citing *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010)). *Padilla* was decided in 2010, eight years
2 after the Defendant pleaded guilty—thus, if *Padilla* were to apply retroactively, then Mr. Moots
3 would have provided ineffective assistance of counsel. If, on the other hand, *Padilla* applies only
4 prospectively, then Mr. Moots had no obligation to advise the Defendant of potential immigration
5 consequences back in 2002.

6 In the Commonwealth, “*Padilla* applies prospectively.” *Commonwealth v. Bashar*, 2015 MP
7 4 ¶ 17 n.6 (citing *Chaidez v. United States*, __ U.S. __, 133 S. Ct. 1103, 1107-11 (2013)).⁶ Thus,
8 although Mr. Moots did not advise the Defendant of the immigration consequences of a guilty plea,
9 there was no obligation to do so in 2002, especially since at the time the CNMI was not subject to
10 federal immigration law. Since *Padilla* is not retroactive, the Defendant has failed to show that Mr.
11 Moots’s “representation fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at
12 688. As the Defendant has failed to show that Mr. Moots’s provided ineffective representation, the
13 Court need not reach the second *Strickland* prong requiring prejudice to the Defendant.

14 Mr. Moots’s legal representation met the level that he was legally obligated to provide at the
15 time, given the information available to him. The Court declines to find that there had been
16 ineffective assistance of counsel in this case, and thus declines to vacate the Defendant’s
17 conviction.

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⁶ The Defendant argues that the Court should decline to follow the United States Supreme Court’s holding in *Chaidez v. United States*, which held that *Padilla* is not retroactive. Def.’s Pet. at 6-7. This Court is duty bound to follow the rulings of the United States Supreme Court and the CNMI Supreme Court.

IV. CONCLUSION

Based on the foregoing reasons, the Defendant's emergency petition for writ of error coram nobis is **DENIED**. *[Signature]*

IT IS SO ORDERED this 1 day of December, 2015.

JOSEPH N. CAMACHO
Associate Judge