

CLERK OF COURT  
SUPERIOR COURT  
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1 **FOR PUBLICATION**

2 **IN THE SUPERIOR COURT** 2015 DEC -7 PM 4: 39  
3 **FOR THE**

4 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

5 **COMMONWEALTH OF THE**  
6 **NORTHERN MARIANA ISLANDS,**

7 **Plaintiff,**

8 **v.**

9 **SUSAN SULA PASCUAL.**

10 **Defendant.**

CRIMINAL CASE NO. 08-0069

ORDER DENYING PETITION FOR  
WRIT OF ERROR CORAM NOBIS AS  
DEFENSE COUNSEL DID NOT  
PROVIDE INEFFECTIVE ASSISTANCE  
OF COUNSEL; THE CNMI SUPERIOR  
COURT IS DUTY BOUND TO FOLLOW  
FEDERAL IMMIGRATION LAW  
DESPITE DEFENDANT'S CONVICTION  
BEING VACATED PER PLEA  
AGREEMENT

11  
12 This matter came before the Court on September 30, 2015 at 1:30 p.m. in Courtroom 220.  
13 The Defendant, Susan Sula Pascual, was represented by Attorney Pamela Brown Blackburn. The  
14 Commonwealth was represented by Acting Chief Prosecutor Chester Hinds.<sup>1</sup>

15 In 2008, the Defendant pleaded guilty to Theft by Failure to Make Required Disposition of  
16 Funds Received under 6 CMC § 1608. The Defendant is asking that the Court find her guilty plea  
17 invalid, arguing that she received ineffective assistance of counsel when her then-counsel failed to  
18 advise her of the immigration consequences of a guilty plea. Def.'s Pet. at 2-4.

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

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22  
23 <sup>1</sup> The Commonwealth's opposition was filed by then-Chief Prosecutor Leonardo Rapadas on September 9, 2015. Mr.  
Hinds represented the Commonwealth at the motion hearing.

24 <sup>2</sup> 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)).

1 **II. BACKGROUND**

2 On December 3, 2008,<sup>3</sup> the Defendant pleaded guilty to Theft by Failure to Make Required  
3 Disposition of Funds Received under 6 CMC § 1608. The Defendant was initially represented by  
4 then-Assistant Public Defender Janet King, and was later represented by then-Assistant Public  
5 Defender Douglas Hartig.<sup>4</sup> In the Defendant’s Emergency Petition for Writ of Error Coram Nobis  
6 and its attached declaration, the Defendant states that neither Ms. King nor Mr. Hartig advised her  
7 of the potential immigration consequences of a guilty plea. Def.’s Pet. at 2-4. In her declaration, the  
8 Defendant states that when she entered her plea, neither Mr. Hartig nor the Honorable Judge David  
9 Wiseman, who accepted the guilty plea, advised her of any immigration consequences to her guilty  
10 plea. Decl. of Susan Sula Pascual at 2.

11 The Defendant was convicted under 6 CMC § 4113, which allows the Court to vacate a  
12 conviction if “the probationer has successfully completed his probation period.” 6 CMC § 4113(k).  
13 The Defendant subsequently fulfilled the terms of her deferred sentence and Judge Wiseman  
14 vacated her conviction on March 29, 2010. Def.’s Pet. at 3.

15 At the time of the Defendant’s guilty plea, the Commonwealth of the Northern Mariana  
16 Islands (“CNMI”) handled its own immigration. On November 28, 2009, federal immigration laws  
17 took effect in the CNMI.<sup>5</sup>

18 At the time of her guilty plea, the Defendant was a citizen of the Philippines, who was  
19 lawfully in the CNMI with CW-1 status. Def.’s Pet. at 3. The Defendant has resided in the CNMI  
20 since 1991, and she has an adult United States citizen daughter. *Id.* In April 2013, the Defendant’s  
21 daughter petitioned to have her mother’s legal status in the United States adjusted to that of legal

22 \_\_\_\_\_  
23 <sup>3</sup> Although the Defendant states that she pleaded guilty on November 8, 2008, the Judgment and Commitment Order  
states that the Defendant came before the Court on December 3, 2008.

24 <sup>4</sup> Ms. King is currently in private practice in the CNMI. Mr. Hartig is the current CNMI Chief Public Defender.

<sup>5</sup> *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>.

1 permanent resident (“LPR”). *Id.* On June 25, 2013, the Defendant was informed by United States  
2 Citizenship and Immigration Services (“USCIS”) that she would be ineligible to adjust her status to  
3 LPR status, as a result of her conviction for a crime of moral turpitude, despite the fact that Judge  
4 Wiseman had already vacated her conviction. The Defendant attempted to have this decision  
5 reconsidered or overturned, but was informed that vacating a conviction under 6 CMC § 4113 is  
6 insufficient for removing the conviction from the Defendant’s record for immigration purposes;  
7 however, a writ of error coram nobis would suffice. Decl. of Pamela Brown Blackburn at 3.

8 On July 8, 2015, the Defendant filed her Emergency Petition for Writ of Error Coram Nobis  
9 to Vacate Judgment, To Set An Expedited Hearing and Memorandum in Support Thereof. The  
10 Defendant argues that the Court should find her guilty plea invalid and set the matter for trial, as  
11 she received ineffective assistance of counsel when her attorneys failed to advise her of the  
12 potential immigration consequences to her guilty plea. Def.’s Pet. at 4, 14. The Commonwealth  
13 filed its Opposition on September 9, 2015.

14 On July 15, 2015, the Court issued Orders allowing the Defendant’s then-counsels, Janet  
15 King and Douglas Hartig, to file amicus curiae briefs and/or sworn declarations. The Court also  
16 issued an Order inviting an amicus brief from the U.S. Department of Homeland Security –  
17 Immigration and Customs Enforcement (“USDHS-ICE”). On September 17, 2015, Mr. Hartig filed  
18 a Response to Court’s Order Allowing Submission of Amicus Curie And / Or Sworn Declaration as  
19 to Douglas Hartig. Ms. King and USDHS-ICE did not file any briefs. Both Ms. King and Mr.  
20 Hartig were present at the motion hearing.

### 21 III. DISCUSSION

22 A writ of error coram nobis “provides a remedy for those suffering from ‘lingering collateral  
23 consequences of an unconstitutional or unlawful conviction based on errors of fact’ and ‘egregious  
24 legal errors.’” *United States v. Walgren*, 885 F.2d 1417, 1420 (9th Cir. 1989) (quoting *Yasui v.*

1 *United States*, 772 F.2d 1496, 1498, 1499 n. 2 (9th Cir. 1985)). Coram nobis relief requires the  
2 following four factors: “(1) a more usual remedy is not available; (2) valid reasons exist for not  
3 attacking the conviction earlier; (3) adverse consequences exist from the conviction to satisfy the  
4 case or controversy requirement of Article III; and (4) the error is of the most fundamental  
5 character.” *United States v. McClelland*, 941 F.2d 999, 1002 (9th Cir. 1991) (quoting *Hirabayashi*  
6 *v. United States*, 828 F.2d 591, 604 (9th Cir. 1987)). Both the Defendant and the Commonwealth  
7 focused their arguments on the fourth factor, specifically on whether the Defendant received  
8 ineffective assistance of counsel when she was not advised of the immigration consequences of a  
9 guilty plea.

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

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

21 Under *Strickland’s* second prong, “the defendant must show that the deficient performance  
22 prejudiced the defense.” *Id.* at 687. *Strickland* applies not only to trial itself, but also to the plea  
23 bargaining process. *Commonwealth v. Taivero*, 2009 MP 10 ¶ 11 (citing *Hill v. Lockhart*, 474 U.S.  
24 52, 58 (1985)). To satisfy the second prong of prejudice when challenging a guilty plea, a defendant

1 must show “a reasonable probability that, but for counsel’s errors, she would not have pleaded  
2 guilty and would have insisted on going to trial.” *Id.* (citation omitted).

3 The Defendant argues that she received ineffective assistance of counsel when Ms. King and  
4 Mr. Hartig failed to advise her of the potential immigration consequences of her guilty plea. In  
5 other words, that their “representation fell below an objective standard of reasonableness” under  
6 *Strickland*’s first prong. *Strickland*, 466 U.S. at 688.

7 Under *Padilla v. Kentucky*, defense counsel “must advise a client about the risk of  
8 deportation as a consequence of entering a criminal plea.” *Commonwealth v. Bashar*, 2015 MP 04 ¶  
9 14 (citing *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010)). *Padilla* was decided in 2010, two years  
10 after the Defendant pleaded guilty—thus, if *Padilla* were to apply retroactively, then Ms. King and  
11 Mr. Hartig would have provided ineffective assistance of counsel. If, on the other hand, *Padilla*  
12 applies only prospectively, then Ms. King and Mr. Hartig had no obligation to advise the Defendant  
13 of potential immigration consequences back in 2008.

14 In the Commonwealth, “*Padilla* applies prospectively.” *Commonwealth v. Bashar*, 2015 MP  
15 4 ¶ 17 n.6 (citing *Chaidez v. United States*, \_\_ U.S. \_\_, 133 S. Ct. 1103, 1107-11 (2013)). Thus,  
16 although Ms. King and Mr. Hartig did not advise the Defendant of the immigration consequences of  
17 a guilty plea, there was no obligation to do so in 2008, especially since at the time the CNMI was  
18 not subject to federal immigration law. Since *Padilla* is not retroactive, the Defendant has failed to  
19 show that Ms. King and Mr. Hartig’s “representation fell below an objective standard of  
20 reasonableness.” *Strickland*, 466 U.S. at 688. As the Defendant has failed to show that Ms. King  
21 and Mr. Hartig provided ineffective representation, the Court need not reach the second *Strickland*  
22 prong requiring prejudice to the Defendant.

23 The Defendant argues that the Court should decline to follow the United States Supreme  
24 Court’s holding in *Chaidez v. United States*, which held that *Padilla* is not retroactive. Def.’s Pet. at

1 8-14. The Defendant urges the Court to apply *Padilla* retroactively, citing jurisdictions that have  
2 done so. *Commonwealth v. Sylvain*, 995 N.E. 2d 760 (Mass. 2013) (holding that *Padilla* is  
3 retroactive in Massachusetts); *State v. Ramirez*, 333 P.3d 240 (N.M. 2014) (holding that *Padilla* is  
4 retroactive in New Mexico). Notwithstanding the Defendant's argument that *Padilla* should be  
5 applied retroactively, this Court is duty bound to follow the Commonwealth Supreme Court, which  
6 stated that "*Padilla* applies prospectively." *Commonwealth v. Bashar*, 2015 MP 4 ¶ 17 n.6. This  
7 Court must follow the precedent set by the Commonwealth Supreme Court, and thus will only  
8 apply *Padilla* prospectively.

9 Ms. King and Mr. Hartig's legal representation met the level that they were legally obligated  
10 to provide at the time, given the information available to them. The Court declines to find that there  
11 had been ineffective assistance of counsel in this case, and thus declines to find the Defendant's  
12 guilty plea invalid.

#### 13 IV. CONCLUSION

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

16  
17 **IT IS SO ORDERED** this 7<sup>th</sup> day of December, 2015.

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20 \_\_\_\_\_  
21 JOSEPH N. CAMACHO  
22 Associate Judge  
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