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1 FOR PUBLICATION

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

5 COMMONWEALTH OF THE)
6 NORTHERN MARIANA ISLANDS,)

CRIMINAL CASE NO. 09-0036

7 Plaintiff,)

8 ORDER DENYING DEFENDANT'S
9 SECOND REQUEST TO SET ASIDE HIS
PLEA AND VACATE HIS CONVICTION
AND SENTENCE

v.)

10 MOHAMMAD ABUL BASHAR,)

11 Defendant.)

12 I. INTRODUCTION

13 THIS MATTER came before the Court on January 19, 2017 at 1:30 p.m. in Courtroom
14 202A for a hearing on Defendant's NMI R. CRIM. P. 32(d) motion. Assistant Attorney General
15 Matthew C. Baisley represented the Commonwealth of the Northern Mariana Islands
16 ("Commonwealth"). Attorney Janet H. King represented Defendant Mohammad Abul Bashar
17 ("Defendant"). After reviewing the facts of this case as well as the relevant law the Court **DENIES**
18 Defendant's motion to withdraw his plea and set aside the judgment and conviction against him
19 pursuant to NMI R. CRIM. P. 32(d).

20 II. BACKGROUND

21 The events underlying the present criminal case against Defendant began on March 13, 2009
22 when Defendant married Jayna Lynn Taitano ("Ms. Taitano"). On March 30, 2009, both Defendant
23 and Ms. Taitano were charged with Conspiracy to Commit Marriage Fraud and Marriage Fraud, 3
24 CMC § 4366. On February 3, 2011, Defendant's criminal trial on the aforementioned offenses

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1 commenced.¹ Before the conclusion of trial, on February 10, 2011, Defendant entered a *nolo*
2 *contendere* plea, for which he received a one year suspended prison sentence, probation, and a
3 \$2,000 fine. Further, as part of the plea agreement, the Commonwealth agreed that it would not
4 pursue any deportation action against him.

5 In between the time of the original offense and charging, March 2009, and Defendant's
6 guilty plea, February 2011, two relevant events occurred: (1) on November 28, 2009, the
7 Consolidated Natural Resources Act of 2008 ("CNRA"), Pub. L. No. 110-229, 122 Stat. 754,
8 became effective and (2) on March 22, 2010, Public Law 17-1 ("PL 17-1") was enacted.
9 Defendant's motion centers on whether the passage and implementation of the CNRA and/or PL
10 17-1 made it so that he should never have entered a plea because the statute underlying his
11 conviction had been preempted or repealed. Additionally, Defendant argues that the Court should
12 allow him to withdraw his plea in this case because his conviction is currently being used against
13 him in a pending Federal immigration proceeding seeking his removal from the Commonwealth.

14 III. LEGAL STANDARD

15 In the Commonwealth:

16 A motion to withdraw a plea of guilty or *nolo contendere* may be made only before
17 sentence is imposed or imposition of sentence is suspended; *but to correct manifest*
18 *injustice the court after sentence may set aside the judgment of conviction and*
permit the defendant to withdraw his/her plea.

19 NMI R. CRIM. P. 32(d). The decision whether to allow withdrawal is soundly within a court's
20 discretion. *See Commonwealth v. Bashar*, Crim. No. 09-0036 (NMI Super. Ct. Sept. 4, 2013)
21 (Order Denying Defendant's Request to Set Aside Plea and Vacate Conviction and Sentence at 3)

22 ¹ In July 2009, Ms. Taitano pled guilty to a count of marriage fraud pursuant to a plea agreement that provided that she
23 would cooperate with the Commonwealth in the prosecution of Defendant.

1 (citing *Katz v. United States*, 161 F.2d 869 (6th Cir. 1947); *United States v. Rodriguez-DeMaya*,
2 674 F.2d 1122, 1123 (5th Cir. 1982)). Further, “[i]n order for the court to permit a post sentencing
3 withdrawal of a plea, the defendant must show that either (1) a complete miscarriage of justice
4 exists or (2) the proceeding was inconsistent with the rudimentary demands of fair procedure.” *Id.*
5 (citing *Commonwealth v. Valdez*, Crim. No. 01–0167 (NMI Super. Ct. Nov. 22, 2001) (Order
6 Denying Defendant’s Motion to Withdraw Guilty Plea and Set Aside Judgment and Conviction at
7 2) (citing in turn *Commonwealth v. Cabrera*, 979 F.2d 854 (9th Cir. 1992); *United States v.*
8 *Timmreck*, 441 U.S. 780, 784 (1979))) (internal quotation marks omitted).

9 IV. DISCUSSION

10 The present motion presents the Court with two distinct lines of inquiry: (A) whether the
11 CNRA, which applies federal immigration laws to the Commonwealth, preempted 3 CMC § 4366
12 in such a way as to make the conviction of Defendant improper and (B) whether the timing of the
13 passage of PL 17–1, which repealed 3 CMC § 4366, support’s Defendant’s motion. Both of these
14 issues go to the broader question of whether it would be a manifest injustice to allow Defendant’s
15 guilty plea to stand.

16 A. Preemption.

17 Generally speaking, “the first rule of construction is that legislation must be considered as
18 addressed to the future, not the past” *Commonwealth v. Minto*, 2011 MP 14 ¶ 19 (quoting
19 *Greene v. United States*, 376 U.S. 149, 160 (1963) (additional citations omitted)). If the United
20 States Congress does not manifest an intention to make a statute, such as the CNRA, retroactive
21 then a court presumes the statute is to be applied prospectively. *See Minto*, 2011 MP at ¶ 19 (citing
22 *Union Pac. R.R. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913)).

1 In *Minto*, the NMI Supreme Court examined the contours of the CNRA and 3 CMC § 4366
2 and opined:

3 CNRA did not grant new federal rights to Minto or any other participant in the
4 marriage fraud. Federal immigration law prohibits marriage fraud through a
5 provision that is analogous to section 4366. For that reason, it would be absurd to
infer Congress intended to abate prosecution under Commonwealth immigration law
for marriage fraud that occurred before CNRA passed.

6 2011 MP at ¶ 20. Essentially, the NMI Supreme Court ruled that a prosecution under 3 CMC §
7 4366 is not preempted in any case where the underlying criminal conduct, marriage fraud, took
8 place before the effective date of the CNRA, November 28, 2009. *Id.*

9 In this case, Defendant pled guilty to one count of marriage fraud under 3 CMC § 4366 for
10 conduct, which took place before the CNRA was effective. As such, pursuant to the NMI Supreme
11 Court's reasoning in *Minto*, it was not a manifest injustice for Defendant to have pled *nolo*
12 *contendere* to the offense because the CNRA did not preempt 3 CMC § 4366 as of the time of the
13 offense charged, March 2009.

14 **B. Impact of PL 17-1.**

15 Defendant also advances the argument that even if his preemption arguments fails it was
16 still improper for him to have entered his plea because the date of his plea occurred after PL 17-1
17 passage and effective date, February 10, 2011. PL 17-1 was enacted on March 22, 2010 and had a
18 retroactive effective date of November 28, 2009.² Defendant contends that the date of his plea is the
19 key guidepost for determining when liability accrued. The crux of Defendant's argument is that
20 since PL 17-1 was enacted almost a year before his guilty plea, i.e. when liability accrued, it is a
21 manifest injustice to let his plea stand.

22 _____
23 ² The law had a retroactive effective date so as to coincide with the effective date of the CNRA.

1 Generally, under the common law, when a criminal statute is repealed it has the effect of
2 terminating any criminal prosecutions then pending. *See, e.g., Bell v. Maryland*, 378 U.S. 226, 230
3 (1964). However, common law abatement gives way when the legislature incorporates a savings
4 clause into a piece of legislation. *See, e.g., Bradley v. United States*, 410 U.S. 605, 607–08 (1973);
5 *see also Dorsey v. United States*, 567 U.S. 260, 272–273 (2012) (discussing the federal
6 government’s general savings statute, 1 U.S.C. § 109,³ which has the effect of modifying the
7 common law).

8 Here, the question of whether Defendant should have pled *nolo contendere* even though PL
9 17–1 was enacted before his plea hinges on whether the Commonwealth Legislature included a
10 savings clause in PL 17–1, which it did. Section 11 of PL 17–1 provides in full:

11 **Savings clause.** This Act and any repealer contained herein shall not be construed as
12 affecting any existing right acquired under contract or acquired under statutes
13 repealed or under any rule, regulation or order adopted under the statutes. *Repealers*
14 *contained in this Act shall not affect any proceeding instituted under or pursuant to*
prior law. The enactment of the Act shall not have the effect of terminating, or in any
way modifying, any liability, civil or criminal, which shall already be in existence on
the date this Act becomes effective.

15 PL 17–1’s savings clause is substantially similar to the federal government’s general clause which
16 has been interpreted by courts to displace the common law rule that prosecutions pending are
17 abated when a criminal statute is repealed. *See* 1 U.S.C. § 109; *United States v. Brown*, 429 F.2d
18 566, 568 (5th Cir. 1970); *United States v. Mayfield*, 999 F.2d 1497, 1501 (11th Cir. 1993); *United*
19 *States v. Van Den Berg*, 5 F.3d 439, 441 (9th Cir. 1993).

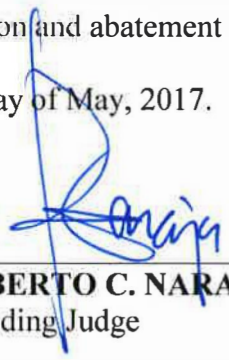
21 ³ “The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred
22 under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still
23 remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty,
24 forfeiture, or liability”

1 In this case, PL 17-1's savings clause expressly preserved any liability that was already in
2 existence at the time of the acts effective date. Case law "makes clear that penalties are 'incurred'
3 under the older statute when an offender becomes subject to them, *i.e.*, commits the underlying
4 conduct that makes the offender liable." *See Dorsey*, 567 U.S. at 272-273. Moreover, when liability
5 accrues is measured not from the date of a plea, but instead from the date of the alleged criminal
6 conduct. Here, the offense underlying Defendant's guilty plea took place on March, 13, 2009,
7 which is before the effective date of PL 17-1, November 28, 2009. Defendant's reliance on the date
8 of his plea, February 10, 2011, is in error because the date of the underlying conduct is the key to
9 the analysis. Based on the foregoing, it is not a miscarriage of justice to allow Defendant's plea to
10 stand because the Commonwealth Legislature expressly provided a savings clause in PL 17-1,
11 which covers Defendant's conduct.

12 V. CONCLUSION

13 In sum, Defendant's motion to set aside his February 10, 2011 plea pursuant to NMI R.
14 CRIM. P. 32(d) is **DENIED** because the CNRA did not preempt 3 CMC § 4366 and the savings
15 clause contained in PL 17-1 displaces the common law abatement rule. Further, since Defendant's
16 plea was not improper his ineffective assistance of counsel argument also fails because it is
17 inextricably linked to the flawed preemption and abatement arguments.

18 **IT IS SO ORDERED** this 10th day of May, 2017.

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22 **ROBERTO C. NARAJA**
23 Presiding Judge
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