

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

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COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,  
Plaintiff-Appellee,

v.

**ESTERLITA SHIMABUKURO,**  
**aka Melody Shimabukuro,**  
Defendant-Appellant.

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**SUPREME COURT NO. CR-06-0008-GA**  
SUPERIOR COURT NO. 02-254

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**Cite as: 2008 MP 10**

Decided April 28, 2008

Robert T. Torres, Saipan, Northern Mariana Islands, for Appellant.  
Melissa Simms and Kevin A. Lynch, Assistant Attorneys General, Commonwealth Attorney  
General's Office, for Appellee.

BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice; and JOHN A. MANGLONA, Associate Justice

CASTRO, J.:

¶ 1 Defendant Esterlita Shimabukuro appeals the denial of her motion to withdraw her guilty plea for illegal possession of a controlled substance based on alleged ineffective assistance of counsel and abuse of discretion by the trial court. We hold that trial counsel’s representation did not fall below an objective standard of reasonableness. We further hold that the trial court did not abuse its discretion in denying Shimabukuro’s motion because her ignorance of the federal immigration consequences of her guilty plea did not constitute manifest injustice. Accordingly, the trial court’s decision is AFFIRMED.

## I

¶ 2 Shimabukuro is a citizen of the Republic of the Philippines and a lawful permanent resident of the United States. In August 2002, drug enforcement officers arrested Shimabukuro and her husband after searching their home pursuant to a search warrant and finding a large cache of methamphetamine. The Commonwealth charged Shimabukuro with trafficking a controlled substance in violation of 6 CMC § 2141(b), illegal possession of a controlled substance in violation of 6 CMC § 2142(a), and conspiracy in violation of 6 CMC § 303(a). Shimabukuro faced a maximum possible sentence of life imprisonment and a fine of up to \$18,000.

¶ 3 In December 2003, Shimabukuro’s husband,<sup>1</sup> who was facing similar drug-related charges, filed a motion to suppress a recorded telephone conversation between himself, Shimabukuro, and a government informant. The recorded conversation, which took place shortly before drug enforcement officers discovered the methamphetamine at Shimabukuro’s home, allegedly linked Shimabukuro and her husband to the drugs. Shimabukuro’s trial counsel, Vicente T. Salas (“trial counsel”), asserts that he and Shimabukuro discussed the potential ramifications of the suppression motion along with the option of joining her husband’s motion in a meeting on November 25, 2003. Shimabukuro, however, claims that trial counsel did not advise her of her husband’s motion to suppress or the possibility of joining the motion.

¶ 4 Shimabukuro did not join her husband’s motion to suppress. Instead, she entered into a plea agreement with the Commonwealth wherein she agreed to plead guilty to illegal possession of a controlled substance, and serve an eighteen month prison term with credit for time served. She also agreed to be interviewed and provide truthful testimony against her husband. The plea agreement contained the standard recitations and waivers required by Rule 11 of the Commonwealth Rules of Criminal Procedure. It also contained additional language stating that

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<sup>1</sup> The record does not indicate the charges levied against Shimabukuro’s husband.

Shimabukuro understood the nature, content, and legal consequences of her guilty plea. Although the plea agreement stated that Shimabukuro knew of the potential impact her guilty plea might have on her immigration status under Commonwealth law,<sup>2</sup> it did not state whether she was aware of the potential immigration consequences under federal immigration law. On December 9, 2003, the trial court accepted Shimabukuro's guilty plea and convicted her of illegal possession of a controlled substance. During the plea colloquy, neither the trial judge nor Shimabukuro's trial counsel advised her of the federal immigration consequences associated with her guilty plea.

¶ 5 A day after convicting Shimabukuro of illegal possession of a controlled substance, the trial court granted her husband's motion to suppress the recorded telephone conversation. Thereafter, the Commonwealth dismissed its case against Shimabukuro's husband without prejudice.

¶ 6 In July 2004, after Shimabukuro traveled to Hawaii, the Immigration and Naturalization Service ("INS") informed Shimabukuro that it was initiating deportation proceedings because of her drug-related conviction.<sup>3</sup> In March 2005, the immigration judge determined that Shimabukuro failed to show good cause for relief from removal. He therefore ordered her deportation to the Philippines. Following her removal proceeding, Shimabukuro, citing ineffective assistance of counsel, sought to vacate her conviction for illegal possession of a controlled substance by filing a writ of error *coram nobis*. Alternatively, Shimabukuro sought to withdraw her guilty plea under Rule 32(d) of the Commonwealth Rules of Criminal Procedure. In January 2006, the trial court denied both her petition for a writ of error *coram nobis*, as well as her motion to withdraw her guilty plea.

## II

### *Ineffective Assistance of Counsel*

¶ 7 Shimabukuro claims that her trial counsel's representation amounted to ineffective assistance of counsel. Shimabukuro asserts ineffectiveness in several respects. First, she argues that trial counsel failed to accurately advise her of the federal immigration consequences associated with her guilty plea. Additionally, Shimabukuro argues that trial counsel should have moved to suppress the recorded telephone conversation prior to negotiating her plea agreement. She also argues that her trial counsel should have withdrawn her guilty plea and filed a post-conviction suppression motion after her husband successfully suppressed the recorded telephone

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<sup>2</sup> The plea agreement stated that Shimabukuro was informed of the possible immigration consequences of her guilty plea under the Commonwealth Entry and Deportation Act, 3 CMC § 4301.

<sup>3</sup> The INS stated that Shimabukuro was subject to removal proceedings because she was convicted of or admitted to a violation of law related to a controlled substance in violation of the Illegal Immigration Reform and Immigrant Responsibility Act, 8 U.S.C. § 1227(a)(2)(B)(i)-(ii).

conversation in his trial. A claim of ineffective assistance of counsel is reviewed de novo. *Commonwealth v. Diaz*, 2003 MP 14 ¶ 6.

¶ 8 As a threshold matter, a claim of ineffective assistance of counsel at trial is ordinarily raised by collateral attack upon the conviction and not on direct appeal. *Commonwealth v. Esteves*, 3 NMI 447 at 460 (1993); *United States v. Birges*, 723 F.2d 666, 670 (1984) (“This is so because usually such a claim cannot be advanced without the development of facts outside the original record.”). “We may, however, review the issue on direct appeal, but only where ‘the record is sufficiently complete to decide the issue.’” *Id.* (citing *United States v. O’Neal*, 937 F.2d 1369, 1376 (9th Cir.1990)). Here, we find that the record is sufficiently complete to determine whether Shimabukuro was denied effective assistance of counsel at trial.

¶ 9 The Sixth Amendment of the United States Constitution<sup>4</sup> states that “in all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.” U.S. Const. amend. VI. However, assistance of counsel does not have to be perfect or free from error. *McMann v. Richardson*, 397 U.S. 759, 774 (1970). Rather, “the right to counsel is the right to the *effective* assistance of counsel.” *Id.* at 771 n.14 (emphasis added). Conversely, ineffective assistance of counsel occurs when a trial counsel’s performance falls below that of a “reasonably competent attorney.” *Id.* at 770-71.

¶ 10 The United States Supreme Court elaborated on the meaning and scope of effective assistance of counsel in *Strickland v. Washington*. 466 U.S. 668 (1984). The Court determined that the purpose of the Sixth Amendment right to counsel is to ensure a fair trial. *Id.* at 684-85 (“The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results.”). Based on this purpose, the Court stated that “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.* at 686.

¶ 11 In determining whether a criminal defendant has been deprived of effective assistance of counsel, the Court adopted a two-pronged test. *Id.* at 687. First, the defendant must “show that the counsel’s *performance* was deficient.” *Id.* (emphasis added). Second, the defendant must “show that the deficient performance *prejudiced* the defense.” *Id.* (emphasis added). Under the first prong, or the “performance prong,” a defendant must show that the defense counsel’s

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<sup>4</sup> The Sixth Amendment of the United States Constitution is applicable in the Commonwealth via the Covenant. COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA, 48 U.S.C. § 1801 note, *reprinted in CMC* at 1xxxix, § 501(a); *see, e.g., Commonwealth v. Perez*, 2006 MP 24 ¶ 11 (stating that the Covenant provides that the “Sixth Amendment to the United States Constitution applies in the Commonwealth”).

performance “fell below an objective standard of reasonableness.” *Id.* at 688. In determining whether a defense counsel’s advice is reasonable, a court must determine whether it is “within the range of competence demanded of attorneys in criminal cases.” *Id.* (quoting *McMann*, 397 U.S. at 770-71). Furthermore, the reasonableness of counsel’s conduct must be assessed according to “the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690. Under the second prong, or the “prejudice prong,” the defendant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. Therefore, the defendant must show with reasonable probability that the attorney’s error caused the defendant to lose the case. *Id.* at 695.

¶ 12 Applying the standard adopted by *Strickland*, the United States Supreme Court in *Hill v. Lockhart* determined that *Strickland*’s two-prong test applies to ineffective assistance claims arising out of the plea process. 474 U.S. 52, 57-58 (1985). However, for claims arising out of the plea process, *Strickland*’s prejudice prong is slightly modified. *Id.* at 58-59. In determining whether an attorney’s conduct in negotiating a plea agreement amounts to ineffective assistance, the defendant satisfies the prejudice prong by showing that “there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Id.* at 59. Therefore, after pleading guilty, a defendant must show that the counsel’s error was the sole reason the defendant waived the trial and pled guilty. *Id.*

¶ 13 In the present case, Shimabukuro argues that trial counsel’s representation amounted to ineffective assistance of counsel because he never informed her that her guilty plea may result in deportation. Under federal immigration law, a lawful permanent resident convicted of a violation of any law relating to a controlled substance, as defined in Section 102 of the Controlled Substances Act, 21 U.S.C. § 802, is subject to removal proceedings. Thus, when Shimabukuro pled guilty to one count of illegal possession of a controlled substance under Commonwealth law, she became subject to removal proceedings under federal immigration law. *See* 8 U.S.C. § 1227(a)(2)(B)(i)-(ii).

¶ 14 In applying *Strickland*’s two-pronged test, we must determine whether the performance of Shimabukuro’s trial counsel was deficient, and, if so, whether the deficient performance prejudiced her. To determine whether trial counsel’s performance was deficient, we must first establish whether trial counsel was required to inform Shimabukuro of the potential immigration consequences of her guilty plea.

¶ 15 This Court has never definitively stated whether trial counsel must inform a criminal defendant of the potential immigration consequences of a guilty plea. We have, however, held that a trial judge has no duty to inform alien defendants of the potential immigration

consequences of their guilty pleas. *Commonwealth v. Chen*, 2006 MP 14 ¶ 15. In *Chen*, we determined that under the Due Process Clauses of the United States and Commonwealth Constitutions, a trial judge must apprise criminal defendants of the direct consequences of their guilty pleas, but need not inform them of the collateral consequences of their pleas. 2006 MP 14 ¶ 5; *see also Commonwealth v. Jindawong*, 2008 MP 3 ¶ 7. Direct consequences have “a definite, immediate and largely automatic effect on the range of the defendant’s punishment.” *Id.* Conversely, collateral consequences are not automatic, but are “contingent on action taken by an individual or individuals other than the sentencing court . . . .” *Id.* (quoting *United States v. Kihuyama*, 109 F.3d 536, 537 (9th Cir. 1997)). In *Chen*, we held that deportation is a collateral consequence of a criminal conviction based on two crucial determinations. *Id.* ¶ 15. First, the decision to initiate deportation proceedings against an alien defendant in the Commonwealth is not left to the sentencing court, but to the Attorney General’s Office. *Id.* ¶ 14. Second, deportation is a civil matter, wholly separate from a criminal proceeding. *Id.* ¶ 15. Therefore, this Court concluded that a trial judge need not inform criminal defendants of the potential immigration consequences of their guilty pleas.

¶ 16 Federal courts of appeal take our *Chen* decision one step further and hold that defense counsel, like a trial judge, has no duty to inform criminal defendants of the potential immigration consequences of their guilty pleas because deportation is a collateral consequence.<sup>5</sup> In light of our decision in *Chen*, along with the precedent set forth in all federal courts of appeal, we

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<sup>5</sup> *See United States v. Gonzalez*, 202 F.3d 20, 25 (1st Cir. 2000) (stating that “deportation is only a collateral concomitant to criminal conviction”); *United States v. Santelises*, 509 F.2d 703, 704 (2d Cir. 1975) (stating that defense counsel’s failure to inform a defendant of the immigration consequences of his guilty plea did not amount to ineffective assistance of counsel); *United States v. Romero-Vilca*, 850 F.2d 177, 179 (3d Cir. 1988) (“[W]e hold that potential deportation is a collateral consequence of a guilty plea.”); *United States v. DeFreitas*, 865 F.2d 80, 82 (4th Cir. 1989) (holding that “[a]lthough, ideally, counsel will inform the client of the possible consequences, failure to do so does not rise here to a level of unreasonableness”); *United States v. Banda*, 1 F.3d 354, 355 (5th Cir. 1993) (“We hold that an attorney’s failure to advise a client that deportation is a possible consequence of a guilty plea does not constitute ineffective assistance of counsel.”); *United States v. El-Nobani*, 287 F.3d 417, 421 (6th Cir. 2002) (“[I]t is clear that deportation is not within the control and responsibility of the district court, and hence, deportation is collateral to a conviction.”); *United States v. George*, 869 F.2d 333, 338 (7th Cir. 1989) (“[W]e decline to hold as a matter of law that counsel’s failure to inform a client as to the immigration consequences which may result from a guilty plea, without more, is ‘outside the wide range of professionally competent assistance.’” (quoting *Strickland*, 466 U.S. at 691)); *Kandiel v. United States*, 964 F.2d 794, 796 (8th Cir. 1992) (“[D]eportation proceedings are merely a collateral consequence of a conviction.”); *United States v. Amador-Leal*, 276 F.3d 511 (9th Cir. 2002) (stating that Rule 11 of the Federal Rules of Criminal Procedure does not require the courts to inform defendants of immigration consequences because they are collateral to the conviction); *Varela v. Kaiser*, 976 F.2d 1357, 1357 (10th Cir. 1992) (stating that failure to advise a client that deportation may result from a guilty plea does not constitute ineffective assistance of counsel); *United States v. Campbell*, 778 F.2d 764, 768 (11th Cir. 1985) (“[D]eportation is a collateral consequence of a guilty plea.”); *United States v. Russell*, 686 F.2d 35, 39 (D.C. Cir. 1982) (“It [is] well settled . . . that Rule 11 of the Federal Rules of Criminal Procedure does not require informing a defendant of the possibility of deportation.”).

reiterate that deportation is a collateral consequence of a guilty plea in the Commonwealth. We therefore join with the majority of jurisdictions and hold that defense counsel has no duty to inform defendants of the collateral consequences of their guilty pleas. As such, failure to advise a defendant of a collateral penalty is not objectively unreasonable under *Strickland's* performance prong and therefore does not amount to ineffective assistance of counsel.

¶ 17 Shimabukuro attempts to distinguish the instant case by claiming that trial counsel not only failed to convey the potential immigration consequences of her guilty plea, but he also affirmatively misrepresented federal immigration law. Specifically, Shimabukuro claims that trial counsel misrepresented the law when he allegedly informed her that her status as a lawful permanent resident of the United States would not be affected by her guilty plea and conviction of illegal possession of a controlled substance. In essence, Shimabukuro requests that we adopt an exception to the collateral consequence rule. In support of her argument, Shimabukuro relies on *State v. Roja-Martinez*, which states that although attorneys have no affirmative duty to investigate and advise clients of potential immigration consequences, they must not misinform clients of immigration consequences. 125 P.3d 930, 935 (Ut. 2005) (“We . . . embrace the exception to the collateral consequence rule when attorneys affirmatively misrepresent the deportation consequences of a guilty plea.”); *see also United States v. Couto*, 311 F.3d 179, 187-88 (2d Cir. 2002) (holding that an affirmative misrepresentation regarding immigration consequences amounts to deficient performance under *Strickland*).

¶ 18 Although an exception to the collateral consequence rule may be warranted when an attorney misrepresents the immigration consequences of a guilty plea, we find such an exception inapplicable to the present case. Commonwealth law mandates that this Court give due deference to the trial court’s interpretation of the evidence, particularly as it relates to witness credibility. 1 CMC § 3103 (“[D]ue regard shall be given to the opportunity of the trier of fact to judge the credibility of witnesses.”); *Commonwealth v. Kaipat*, 2 NMI 322, 329 (1991) (“[W]here the evidence consists largely of oral testimony contradictory in nature, due regard is given by this Court to the opportunity of the trial court to judge the credibility of the witnesses.”). Although Shimabukuro claims trial counsel misrepresented the consequences of her guilty plea under federal immigration law, she provides no direct or circumstantial corroboration to support her claim. To the contrary, trial counsel categorically denied her claim under oath, testifying that he gave her accurate information regarding both the Commonwealth and federal immigration consequences of her guilty plea. The trial court considered the evidence and concluded that trial counsel did not misrepresent the immigration consequences of Shimabukuro’s guilty plea. We have no reason to disregard the trial court’s assessment of the evidence. We therefore hold that

trial counsel's performance was not deficient, and did not amount to ineffective assistance of counsel under *Strickland*. Thus, we have no need to address *Strickland's* prejudice prong as it relates to the immigration consequences of Shimabukuro's guilty plea.

¶ 19 Shimabukuro also argues that prior to negotiating her plea agreement, trial counsel should have moved to suppress the recorded telephone conversation that allegedly linked her to the methamphetamine that police seized from her home. Furthermore, Shimabukuro claims that trial counsel should have withdrawn her guilty plea and filed a post-conviction suppression motion after her husband successfully suppressed the recorded telephone conversation in his trial. Having failed to do so, Shimabukuro asserts that her trial counsel's performance under *Strickland* fell below an objective standard of reasonableness.

¶ 20 Judicial scrutiny of a defense counsel's performance under *Strickland* is highly deferential. 466 U.S. at 690. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.* A fair assessment of trial counsel's performance requires this Court to "eliminate the distorting effects of hindsight." *Id.* We also "must indulge a *strong presumption* that counsel's conduct falls within the wide range of reasonable professional assistance . . ." *Id.* (emphasis added). In so doing, we recognize that there are "countless ways to provide effective assistance in any given case." *Id.*

¶ 21 In light of the presumption set forth in *Strickland*, we find that Shimabukuro fails to overcome her burden and demonstrate that trial counsel's performance fell outside the wide range of acceptable assistance. Trial counsel testified that he advised Shimabukuro of the motion to suppress and its potential ramifications shortly before it was filed by her husband. Although it is not clear why Shimabukuro refrained from joining in her husband's motion to suppress, it is not the duty of this Court to second-guess trial counsel's strategic decisions through the distorting lens of hindsight. Rather, the "court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* Trial counsel may have refrained from joining the motion to suppress for any number of reasons. As the trial court stated, "[p]erhaps the consequences of joining in such a motion would have cost [S]himabukuro the bargain of a plea deal which drastically reduced her potential sentence from life in prison to eighteen months of prison with credit for time served." *Commonwealth v. Shimabukuro*, Crim. No. 02-0254 (NMI Super. Ct. Jan. 24, 2006) (Order Dismissing Shimabukuro's Petition for Writ of Error Coram Nobis and Denying Shimabukuro's Motion to Vacate at 12). Regardless, Shimabukuro proffers no credible



evidence sufficient to overcome her substantial burden. We therefore must presume that trial counsel's failure to join the motion to suppress, withdraw Shimabukuro's guilty plea, and file a post-conviction suppression motion were strategic choices "made after thorough investigation of law and facts." *Strickland*, 466 U.S. at 690. Thus, having determined that Shimabukuro fails to satisfy *Strickland*'s performance prong, we have no need to address whether trial counsel's failure to file a motion to suppress prejudiced her.

#### *Motion to Withdraw Guilty Plea*

¶ 22 Shimabukuro argues that the trial court erred in refusing to allow her to withdraw her guilty plea after she was convicted of illegal possession of a controlled substance and sentenced to eighteen months in prison with credit for time served. We review a trial court's denial of a post-conviction motion to withdraw a guilty plea for abuse of discretion. *Chen*, 2006 MP 14 ¶ 6.

¶ 23 The trial court abuses its discretion when it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. *Commonwealth v. Campbell*, 4 NMI 11, 17 (1993); *Chen*, 2006 MP 14 ¶ 6. Commonwealth Rule of Criminal Procedure 32(d) provides that a guilty plea may be withdrawn after imposition of a sentence only "to correct manifest injustice." This standard is significantly higher than the "fair and just" standard for withdrawing guilty pleas prior to sentencing. *See Kerchival v. United States*, 274 U.S. 220, 224 (1927). In *Chen*, we determined that an alien defendant's ignorance of the immigration consequences of a guilty plea did not constitute manifest injustice sufficient to withdraw a guilty plea under Com. R. Crim. P. 32(d). 2006 MP 14 ¶ 6, 19.

¶ 24 In the present case, the trial court did not abuse its discretion in denying Shimabukuro's motion to withdraw her guilty plea. The trial court applied *Strickland*'s two-pronged test and correctly determined that trial counsel's performance did not amount to ineffective assistance of counsel. Additionally, the trial court's denial of Shimabukuro's motion properly followed the precedent set in *Chen*. *See id.* ¶ 6 ("A lawyer's failure to inform his client of the consequences of a guilty plea does not amount to 'manifest injustice.>"). Furthermore, we have no evidence suggesting that the trial court based its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence. Therefore, the trial court did not abuse its discretion.<sup>6</sup>

### III

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<sup>6</sup> Finally, Shimabukuro argues that the errors in the case cumulatively require reversal. *See, e.g., Commonwealth v. Camacho*, 2002 MP 6 ¶ 120 (stating that "[i]n some cases, although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant"). As we find no merit in any of Shimabukuro's individual arguments, we similarly find no merit in them cumulatively.

¶ 25

For the foregoing reasons, we reject Shimabukuro's claim of ineffective assistance of counsel, as trial counsel's performance did not fall below an objective standard of reasonableness. Furthermore, we hold that the trial court did not abuse its discretion in denying Shimabukuro's motion to withdraw her guilty plea because her ignorance of the federal immigration consequences of her plea did not constitute a manifest injustice. Accordingly, the trial court's decision is AFFIRMED.

Concurring:  
Demapan, C.J., Manglona, J.