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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

MOHAMMAD A. BASHAR,
Defendant-Appellant.

Supreme Court No. 2017-SCC-0014-CRM
Superior Court No. 09-0036

SLIP OPINION

Cite as: 2018 MP 11

Decided December 5, 2018

Michele Harris, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Appellee.

Janet King, Saipan, MP, for Appellant.

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLONA, Associate Justice; PERRY B. INOS, Associate Justice.

MANGLONA, J.:

¶ 1 Defendant-Appellant Mohammad A. Bashar ("Bashar") appeals the trial court's orders denying his motion to set aside his post-conviction plea and denying his motion for reconsideration. Bashar asserts the court erred by: (1) interpreting the local savings clause to apply to Bashar's prosecution; (2) finding federal law did not preempt Commonwealth law at the time of Bashar's marriage; and (3) failing to find Bashar was provided with ineffective assistance of counsel. For the following reasons, we AFFIRM Bashar's conviction.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 Bashar, a citizen of Bangladesh, originally entered the Commonwealth of the Northern Mariana Islands ("Commonwealth") in 1997. On March 13, 2009, Bashar wed Jayna Lynn Taitano ("Taitano").[1] Later that month, the Commonwealth charged Bashar with Marriage Fraud pursuant to 3 CMC § 4366(a).[2] As Bashar's trial proceeded, he agreed to enter a plea of nolo contendere to the marriage fraud charge; the trial court accepted Bashar's plea on February 10, 2011. The plea indicated, in relevant part, that Bashar understood and had been advised by then-counsel Edward A. Arriola ("Arriola") of the "nature, content, and legal consequences of the agreement, including 'any potential immigration consequences that may or may not occur as a result of entering into the agreement.'" *Commonwealth v. Bashar*, 2015 MP 4 ¶ 2 ("*Bashar I*") (citation omitted). Based on Bashar's plea, the United States Immigration Court found him removable. He currently faces removal.

¶ 3 Meanwhile, in May 2008, the federal government enacted the Consolidated Natural Resources Act ("CNRA" or "the Act"), fundamentally altering the Commonwealth's immigration functions. In particular, the CNRA enabled the federal government to apply federal immigration law to the Commonwealth, overtaking local immigration laws. The CNRA became effective in the Commonwealth on November 28, 2009.

¶ 4 On March 22, 2010, the Commonwealth enacted Public Law 17-1, seeking to "amend the Commonwealth Code to reflect the assumption of

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[1] Taitano filed for divorce in November 2009, alleging she and Bashar had married and separated on the same day.

[2] 3 CMC § 4366(a) provided that "[a]ny individual who knowingly enters into a marriage for the sole purpose of obtaining a labor or immigration benefit, or for the purpose of evading any provision of Chapter 3, Chapter 4 or Chapter 6 of this Title, or any United States immigration law, shall be guilty of marriage fraud." Bashar was also charged with Conspiracy to Commit Marriage Fraud in violation of 6 CMC § 303(a) and 3 CMC §§ 4366(a) and 4371.

immigration responsibilities by the federal government." PL 17-1, § 2. Created in response to the CNRA's removal of Commonwealth control over the administration and promulgation of immigration laws, the public law took effect immediately and applied retroactively to November 28, 2009. Public Law 17-1 repealed many of the Commonwealth's statutes dealing with immigration functions, including 3 CMC § 4366, the marriage fraud statute under which Bashar had entered his plea. Amongst its provisions was a savings clause governing, in part, proceedings instituted under prior law.

¶ 5 Bashar has challenged the plea's propriety on multiple occasions. He first moved to set aside his plea and vacate his conviction and sentence pursuant to NMI Rule of Criminal Procedure 32(d) ("Rule 32(d)") in July 2013, alleging Arriola provided ineffective assistance by failing to inform him of the plea's removal consequences.[3] Following the motion's denial in the trial court was an unsuccessful appeal in *Bashar I* and petition for certiorari in the United States Supreme Court. In November 2016 Bashar again moved to set aside his plea pursuant to Rule 32(d). Premised on his attorney's 'discovery' that 3 CMC § 4366 was repealed prior to Bashar's plea, he asserted arguments based on the statute's preemption and repeal. The court denied Bashar's Rule 32(d) motion as well as his subsequently filed motion for reconsideration.[4]

¶ 6 Bashar challenges the trial court's orders denying his motions to set aside his plea and vacate his conviction and sentence and for reconsideration.

II. JURISDICTION

¶ 7 We have jurisdiction over final judgments and orders of the Commonwealth Superior Court. NMI CONST. art. IV, § 3.

III. STANDARDS OF REVIEW

¶ 8 We first consider whether we are precluded from reviewing the merits of Bashar's appeal by either the waiver or law of the case doctrine. Because whether the application of either doctrine is proper are questions of law, we review de novo. *Commonwealth v. Minto*, 2011 MP 14 ¶ 11 (waiver doctrine);

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[3] The 2013 motion solely discussed the immigration consequences of pleading to 3 CMC § 4366(a), with no mention of the CNRA or Public Law 17-1.

[4] The trial court refuted each of Bashar's arguments. As to the statute's preemption, the court cited our statement in *Minto* that "it would be absurd to infer Congress intended to abate prosecution under Commonwealth immigration law for marriage fraud that occurred before CNRA passed," to conclude that "a prosecution under 3 CMC § 4366 is not preempted in any case where the underlying criminal conduct . . . [takes] place before the effective date of the CNRA . . . ." *Commonwealth v. Bashar*, Crim. Case No. 09-0036 (NMI Super. Ct. May 10, 2017) (Order Denying Defendant's Second Request to Set Aside His Plea and Vacate His Conviction and Sentence at 4) (quoting *Minto*, 2011 MP 14 ¶ 20). As to the repeal of 3 CMC § 4366, the court interpreted Public Law 17-1's savings clause to find that prosecutions pending and penalties incurred when the statute was repealed would not abate.

Commonwealth v. Taitano, 2017 MP 19 ¶ 17 (law of the case doctrine). Second, we determine whether the trial court properly denied Bashar's motion to withdraw his plea and vacate his conviction and sentence. We review the denial of a motion to withdraw a plea for abuse of discretion. *Bashar*, 2015 MP 4 ¶ 7. We, however, review the court's legal conclusions underlying its decision de novo. *United States v. Brown*, 250 F.3d 811, 815 (9th Cir. 2001). These legal conclusions include whether the savings clause in Public Law 17-1 authorizes Bashar's plea, *Ada v. Calvo*, 2012 MP 11 ¶ 16, as well as whether the retroactivity or preemption doctrines allow Bashar's continued prosecution. *Minto*, 2011 MP 14 ¶ 16 (preemption); *Gallegos-Vasquez v. Holder*, 636 F.3d 1181, 1184 (9th Cir. 2011) (retroactivity). Third, we determine whether Bashar was provided with ineffective assistance of counsel. We review claims of ineffective assistance de novo. *Bashar*, 2015 MP 4 ¶ 7.

IV. DISCUSSION

A. Consideration of Merits

1. Waiver

¶ 9 We first consider our ability to reach the merits of Bashar's appeal under two procedural doctrines, reviewing each in turn.[5] First, the Commonwealth encourages us to adopt the waiver doctrine as applied to a second appeal, arguing Bashar waived his right to have his preemption and repeal arguments considered. It notes the facts necessary to consider the repeal of 3 CMC § 4366 and preemptive effect of the CNRA were already present when Bashar filed his initial 2013 motion—the present appeal is solely due to counsel's failure to 'discover' the relevant facts sooner. The Commonwealth asserts our application of the waiver rule to Bashar's second appeal will further the doctrine's purpose of encouraging finality and discouraging piecemeal litigation.

¶ 10 We have enforced that an appellant generally waives issues raised for the first time on appeal, *Sablan v. Elameto*, 2013 MP 7 ¶ 29, as well as issues not raised in an opening brief. *Commonwealth v. Arriola*, 2002 MP 8 ¶ 4. The waiver doctrine as applied to a second appeal, however, instructs that "where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal . . . ." *Northwestern Indiana Tel. Co. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989). "The doctrine promotes procedural efficiency and 'prevents the bizarre result that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost.'" *Lindquist v. City of Pasadena*, 669 F.3d 225, 239–40 (5th Cir. 2012) (citation omitted). Notably, the reviewing court has discretion as to whether to entertain the waiver claim, normally reserving such exercise for "exceptional circumstances, where injustice might otherwise result." *United States v. Henry*, 472 F.3d 910, 913 (D.C. Cir. 2007) (citation and internal quotation marks omitted); *see, e.g., United States v. McKinley*, 227

[5] Because Bashar's counsel neglected to file a reply brief, the Commonwealth's arguments as to each doctrine are unopposed.

F.3d 716, 718 (6th Cir. 2000) (applying waiver where a "firearms enhancement argument was just as available to the [party] during the first appeal as it is in the current proceeding").

¶ 11 Although we have applied waiver with respect to two circumstances, we have not had occasion to adopt the doctrine as it applies to a second appeal. We do so now. Notwithstanding the doctrine's force in our jurisdiction, we decline to apply it to Bashar's appeal. First, because we had not spoken on the doctrine's manifestation as it applies to a second appeal, Bashar arguably lacked notice as to its potential application. More importantly, our failure to review Bashar's repeal and preemption arguments may result in injustice—particularly, his potentially improper conviction and receipt of the serious consequences that would follow as a result.[6] We therefore reserve the doctrine's application to future cases and proceed to consider the law of the case doctrine.

2. Law of the Case

¶ 12 The Commonwealth also asserts that the law of the case doctrine precludes our review of Bashar's ineffective assistance of counsel claim. It argues that Arriola's alleged failure to advise Bashar that 3 CMC § 4366 was repealed is encompassed by his earlier, rejected claim that Arriola failed to advise Bashar of the immigration consequences of the nolo contendere plea. The Commonwealth contends the doctrine prevents Bashar from relitigating the claim absent a showing that the prior ruling was clearly erroneous.

¶ 13 The law of the case doctrine specifies that "courts are generally required to follow legal decisions of the same or a higher court in the same case." *Wabol v. Villacrusis*, 4 NMI 314, 318 (1995). "While the doctrine is not a limit on a court's power, it is our practice to generally refuse to reopen what has been decided . . . ." *In re Estate of Roberto*, 2010 MP 7 ¶ 18 (citation and internal quotation marks omitted). Importantly, the law of the case doctrine "posits that a prior decision should govern the *same* issue later in the case," *Rockwood v. SKF USA Inc.*, 687 F.3d 1, 12 (1st Cir. 2012), and is inapplicable to "issues neither presented nor decided in a former proceeding . . . ." *Halpern v. Principi*, 384 F.3d 1297, 1301 (Fed. Cir. 2004); *see, e.g.*, *Los Angeles Police Protective League v. Gates*, 995 F.2d 1469, 1477 (9th Cir. 1993) ("Assuming that it is the law of the case that the $ 2.9 million verdict was excessive as a matter of law, that would not be controlling on the determination of whether a different and much lower verdict of $ 626,000 is also excessive.").

¶ 14 We find the law of the case doctrine inapplicable. Although in *Bashar I* we considered a claim of ineffective assistance, the specific grounds Bashar asserts now were not presented or decided there. Rather, in *Bashar I* the claim concerned whether Arriola's alleged failure to inform Bashar of the potential immigration consequences of his plea, under Commonwealth law, rendered him

[6] By the same reasoning, barring our consideration of Bashar's ineffective assistance of counsel claim has equal potential for injustice.

ineffective as counsel. Here, our analysis focuses on whether Arriola's failure to inform Bashar of the repeal of 3 CMC § 4366—and the consequences of the repeal—made Arriola ineffective. The claim is distinguishable since, should the statute's repeal result in the Commonwealth's loss of jurisdiction and subsequent dismissal of charges as Bashar suggests, there would *not be any* immigration consequences pursuant to the local statute. This, instead of potential removal consequences, is why Bashar now alleges that he would not have entered a plea had counsel properly informed him of the statute's repeal and preemption. Because these two arguments present patently different issues, the law of the case doctrine does not prevent our review. We now turn to the merits of Bashar's appeal.

B. Withdrawal of Marriage Fraud Plea

¶ 15 Rule 32(d) governs the withdrawal of pleas, stating: "[a] motion to withdraw a plea of guilty or nolo contendere may be made only before [a] sentence is imposed . . . *but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his/her plea*." (emphasis added). Because whether to allow the withdrawal of a plea is within the trial court's sound discretion, we review whether the court abused its discretion in denying Bashar's motion to withdraw his plea. *Bashar*, 2015 MP 4 ¶ 7. We consider the requisite legal doctrines in light of these standards.

1. Repeal & Savings Clause

¶ 16 Bashar first asserts that the repeal of 3 CMC § 4366 required the dismissal of his charges pursuant to the statute. As a result, he argues his plea following the statute's repeal was improper. Moreover, Bashar claims that even though the repealing law contained a savings cause, its applicability should be defined narrowly so as to not encompass Bashar's prosecution.

¶ 17 A statute's enactment will result in the repeal of an earlier-enacted statute "where the two are in irreconcilable conflict and an intent to repeal is clear and manifest." *Faisao v. Tenorio*, 4 NMI 260, 265 (1995) (internal quotation marks omitted). In turn, "the repeal of a criminal statute abate[s] all prosecutions which ha[ve] not reached final disposition in the highest court authorized to review them." *Bradley v. United States*, 410 U.S. 605, 607 (1973); *United States v. Schumann*, 861 F.2d 1234, 1239 (11th Cir. 1988) (describing the abatement doctrine as "provid[ing] a 'haven from prosecution' for those who violate a statute repealed after committing their offenses but prior to their convictions and sentences"). To avoid abatement, legislatures often include a specific savings clause in the repealing statute. *See Bradley*, 410 U.S. at 608; *Mortera-Cruz v. Gonzales*, 409 F.3d 246, 252 (5th Cir. 2005) (defining a savings clause as a "statutory provision exempting from coverage something that would otherwise be included") (citation and internal quotation marks omitted). The savings clause's language dictates its scope, requiring courts to construe the statute and determine its effect on pending prosecutions. *See, e.g.*, *Commonwealth v. Anglo*, 1999 MP 6 ¶ 11 (construing clause stating "[r]epealers contained in this Act shall not affect any proceeding instituted

under or pursuant to prior law" to require application of previously effective law) (citation and internal quotation marks omitted).

¶ 18 Here, Public Law 17-1 expressly sought to "repeal certain sections of the Commonwealth Code dealing with immigration functions," including 3 CMC § 4366. PL 17-1; *Minto*, 2011 MP 14 ¶ 9. Because the Act applied retroactively to the CNRA's effective date, its provisions went into effect on November 28, 2009, prior to Bashar's plea. Thus, had Public Law 17-1 simply repealed the Commonwealth's laws related to immigration without any further provisions, dismissal of Bashar's charges would be proper. However, Public Law 17-1 contained a savings clause. We thus review whether Public Law 17-1's savings clause had the effect of allowing Bashar's continued prosecution.

¶ 19 In construing the savings clause, we adhere to our established principles of statutory interpretation. These principles instruct that we begin with the statute's text, interpreting it "according to its plain meaning, so long as that meaning is clear, unambiguous, and will not lead to a result that is absurd or defies common sense." *Commonwealth v. Guerrero*, 2014 MP 15 ¶ 21 (citation and internal quotation marks omitted). If the text does not provide a clear answer, we turn to legislative history and purpose. *Id.* The text of the savings clause provides:

> This Act and any repealer contained herein shall not be construed as affecting any existing right acquired under contract or acquired under statutes repealed or under any rule, regulation or order adopted under the statutes. *Repealers 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.

PL 17-1, § 11 (emphasis added). We need not go beyond the text. Notably, the clause's second sentence protects "proceeding[s] instituted under or pursuant to prior law." *Id.* Black's Law Dictionary defines a "proceeding" as "the regular and orderly progression of a lawsuit, including *all acts and events between* the time of commencement and the entry of judgment." *Miller-El v. Cockrell*, 537 U.S. 322, 355 (2003) (Thomas, J., dissenting) (quoting Black's Law Dictionary 1221 (7th ed. 1999)). It follows that the savings clause's second sentence may unambiguously be interpreted as protecting lawsuits commenced under the prior law. Because Bashar's prosecution was commenced in March of 2009—prior to the November 2009 repeal—the savings clause plainly protects his lawsuit from abatement.

¶ 20 As such, so long as Commonwealth law remained applicable to Bashar's prosecution, Public Law 17-1's savings clause would operate to preserve his plea notwithstanding the repeal of 3 CMC § 4366. Such a result, however, would require local law to remain valid in the Commonwealth despite the

CNRA's enactment. We thus turn to the applicability of the CNRA and its effect on local law.

2. Preemption & Retroactivity

¶ 21 Bashar next contends his plea, conviction, and sentence are unauthorized under the federal preemption doctrine. He claims that in federalizing control over immigration matters, the Commonwealth lost jurisdiction over prosecution of his charges. Bashar further notes that reliance on *Minto* is misplaced. Specifically, he claims that *Minto* is factually distinguishable in that because the judgment against the defendant was entered over a year *before* the CNRA's effective date, applying the CNRA to the defendant in *Minto* required determining that the Act applies retroactively. Because Bashar's had not been convicted when the CNRA took effect, he posits that for the Act to apply to his prosecution we need only find that the CNRA became law on its effective date, rather than applying retroactively.

¶ 22 In general, the power to preempt state law is established through the Supremacy Clause. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ."). In the Commonwealth, however, only federal laws applicable through the Covenant have effect. *See In re Pangelinan*, 2008 MP 12 ¶ 51 ("Federal laws are supreme, but only 'applicable' federal laws have any affect in the NMI and the Covenant is co-equal with them."). Section 503 of the Covenant identifies federal laws that will apply to the Commonwealth "in the manner and to the extent made applicable to them by the Congress by law," and includes "the immigration and naturalization laws of the United States."[7] Therefore, although the Supremacy Clause is not applicable to the Commonwealth as it is to the several states, "the imposition of the federal immigration laws [on the Commonwealth] is expressly within Congress's power under the Covenant." *Commonwealth v. United States*, 670 F. Supp. 2d 65, 82 (D.D.C. 2009) (citation and internal quotation marks omitted).

¶ 23 In passing the CNRA, Congress exercised this power, expressing its intent to prescribe federal immigration law to the Commonwealth. *See* Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, 122 Stat. 754, 755 (2008) (describing the CNRA as an Act "to implement further the Act approving the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America"). For example, in its Statement of Congressional Intent, Congress stated: "it is the intention of the Congress . . . to ensure that . . . national security and homeland security issues

[7] The Covenant defines the political relationship between the Commonwealth and the United States. 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.

are properly addressed, by extending the immigration laws . . . to apply to the [Commonwealth]." *Id*. § 701(a), 122 Stat. at 853. And as to the CNRA's effect on other laws, Congress indicated that "[t]he provisions of this section and of the immigration laws . . . shall, on the transition program effective date, supersede and replace all laws, provisions, or programs of the Commonwealth relating to the admission of aliens and the removal of aliens from the Commonwealth." *Id*. § 702(f), 122 Stat. at 860.

¶ 24 "Express preemption occurs when Congress has manifested its intent to preempt state law explicitly in the language of the statute." *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1122 (11th Cir. 2004); *see, e.g., Bruesewitz v. Wyeth Inc.*, 561 F.3d 233, 242 (3d Cir. 2009) (categorizing "[n]o State may establish or enforce a law which prohibits an individual from bringing a civil action against a vaccine manufacturer for damages for a vaccine-related injury or death if such civil action is not barred by this part," as an express preemption provision); *Chae v. SLM Corp.*, 593 F.3d 936, 942 (9th Cir. 2010) (categorizing "[l]oans made, insured, or guaranteed pursuant to a program authorized by Title IV of the Higher Education Act . . . shall not be subject to any disclosure requirements of any State law," as an express preemption provision). Following such reasoning, various courts have recognized the CNRA's preemption of Commonwealth immigration law. *See, e.g.*, *Minto*, 2011 MP 14 ¶ 16 (acknowledging that "Commonwealth immigration law was preempted by CNRA"); *Commonwealth*, 670 F. Supp. 2d at 78 (citation omitted) ("There is no dispute that the CNRA takes away from the CNMI control over immigration matters and federalizes control over such matters, and thereby effectively preempts the CNMI's local immigration laws."); *cf. Mtoched v. Lynch*, 786 F.3d 1210, 1214 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 837 (2016) (citation omitted) ("Congress was authorized to enact the challenged provisions of the CNRA by the plain and unambiguous terms of Section 503 of the Covenant."). In reviewing the aforementioned provisions, we agree.

¶ 25 Albeit not stemming from the Supremacy Clause, Congress' language within the CNRA expressly indicated its intent to preempt the Commonwealth's immigration laws. As a result of the CNRA's express preemption of local law, the Act acted to repeal both 3 CMC § 4366 and Public Law 17-1. Because the CNRA repealed Public Law 17-1, its savings clause had no effect on whether the Commonwealth continued to have jurisdiction over Bashar's prosecution. It follows that although Bashar is correct regarding the CNRA's preemption of Commonwealth immigration law, the proper determination as to which law applied to Bashar's prosecution after November 28, 2009 does not involve Public Law 17-1's savings clause. Rather, our determination requires an examination of whether Congress intended the CNRA to apply retroactively.

¶ 26 A retroactive law is a "legislative act that looks backward or contemplates the past, affecting acts or facts that existed before the law came into effect." Black's Law Dictionary 1343 (8th ed. 2004). "[T]he first rule of

[statutory] construction is that legislation must be considered as addressed to the future, not to the past." *Minto*, 2011 MP 14 ¶ 19 (citation omitted). Stated differently, there is a longstanding presumption in American law against retroactive legislation. *Vartelas v. Holder*, 566 U.S. 257, 266 (2012). The presumption against retroactive legislation arises in a case that "implicates a federal statute enacted after the events in suit . . . ." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). In *Landgraf v. USI Film Products*, the United States Supreme Court established a two-step test for determining whether a statute has an impermissible retroactive effect. *Id*.

¶ 27 In *Landraf*, the Supreme Court was tasked with deciding whether Section 102 of the Civil Rights Act of 1991, which created a "right to recover compensatory and punitive damages for certain violations of Title VII of the Civil Rights Act of 1964," should apply to a case pending on appeal. *Id.* at 241. The Court reviewed whether Section 102 "applies to cases pending when it became law"—whether the court "should have applied the law in effect at the time the discriminatory conduct occurred," or the law in effect at the time of its 1992 decision. *Id.* at 250. It instructed that a "court's first task is to determine whether Congress has expressly prescribed the statute's proper reach." *Id.* at 280. If Congress has spoken, the inquiry ends. *Id.* If, however, "the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties . . . ." *Id.* If so, the presumption against retroactive application applies and the statute does not govern absent clear congressional intent. *Id.* Applying such an analysis, the Court found the statute's language itself unhelpful. *Id.* at 257 ("A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date."). Turning to whether the Act would have retroactive effect, it found that the right to recover certain compensatory and punitive damages imposed a new disability, or legal burden, on the defendant. *Id.* at 282–83. Unable to find clear congressional intent as to retroactive application, the Supreme Court found it proper to apply the law in effect when the discriminatory conduct occurred. *Id.* at 286.

¶ 28 Applying *Landgraf's* imperative to the CNRA's application to Bashar, we first review whether the CNRA's temporal reach was expressly prescribed. Such a question was determined by the Ninth Circuit in *Mtoched*, finding the CNRA "did not express a clear intent to make the legislation retroactive." 786 F.3d at 1215; *see also Minto*, 2011 MP 14 ¶ 19 ("Minto points to no 'unequivocal and inflexible import of the terms [of CNRA] and the manifest intention of the [United States Congress], to suggest CNRA had retroactive effect. . . . CNRA was not retroactive."). Our own review warrants the same result; no language as to the CNRA's proper reach was included in the Act. We thus turn to *Landgraf's* second, more nuanced, consideration.

¶ 29 Determining whether the CNRA increased Bashar's liability for his past

conduct or imposed new duties on him "demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *INS v. St. Cyr*, 533 U.S. 289, 321 (2001) (citation omitted). Courts have found the enforcement of various statutes to attach new legal consequences, subsequently instructing against those statutes' retroactive application. *See, e.g.*, *Vartelas v. Holder*, 566 U.S. 257, 260 (2012) (finding application of prohibition from entering United States for permanent residents with felonies enacted after defendant's plea impermissibly retroactive); *Ventura v. Sessions*, 2018 U.S. App. LEXIS 29543, *14 (5th Cir. 2018) (finding federal inadmissibility proceeding after addition of drug to federal schedule defendant previously charged with possessing impermissibly retroactive). But where a defendant claimed less discretion under federal law as to pursuing removal than what was previously provided under state law constituted a new legal consequence, the argument was rejected. *See Mtoched*, 786 F.3d at 1215.

¶ 30 Pursuant to the CNRA, Bashar would be subject to 8 USCS § 1325(c), the federal statute prohibiting marriage fraud. It provides: "[a]ny individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than 5 years, or fined not more than $ 250,000, or both." 8 USCS § 1325(c). In contrast, Commonwealth law made marriage fraud "punishable by not more than five (5) years imprisonment or fined not more than $2,000.00, or both . . . ." 3 CMC § 4366(b) (repealed). Plainly, subjecting Bashar to federal prosecution would increase his liability for past conduct, subjecting him to a new disability. Like the potential for increase in compensatory and punitive damages in *Landgraf*, application of the CNRA to Bashar would subject him to liability of up to $250,000 for his conduct—far above the $2,000 fine prescribed by Commonwealth law. Application of the CNRA to Bashar would therefore have an impermissible retroactive effect. And, given that we find no clear congressional intent as to the retroactive application of the federal immigration laws, use of Commonwealth law in Bashar's prosecution was proper.

¶ 31 Furthermore, even though we do not agree with the trial court's reasoning underlying its denial of Bashar's Rule 32(d) motion to withdraw his plea—in fact, we explicitly disclaim its propriety—the decision to uphold the application of local law to Bashar's prosecution was proper. Because we conclude the application of Commonwealth immigration law was proper, Bashar failed to demonstrate manifest injustice. We thus conclude the court did not abuse its discretion in denying Bashar's motion to withdraw his plea.

C. Ineffective Assistance

¶ 32 Finally, we consider Bashar's claim that he was provided with ineffective assistance of counsel based on Arriola's failure to inform him of the repeal of 3 CMC § 4366. "To prevail on an ineffective assistance claim, Bashar must establish two prongs: (1) deficient representation by counsel, and (2) prejudice resulting from counsel's deficient performance." *Bashar*, 2015 MP 4

¶ 12. In evaluating whether representation was deficient, we review whether counsel's performance was reasonable, or within the range of competence demanded of a criminal defense attorney "according to the facts of the particular case . . . ." *Commonwealth v. Taivero*, 2009 MP 10 ¶ 10 (internal quotation marks omitted). Counsel has no duty to make or inform their client of a frivolous argument. *See United States v. Rezin*, 322 F.3d 443, 446 (7th Cir. 2003). Given that application of the CNRA to Bashar would be impermissibly retroactive, the repeal of 3 CMC § 4366 is inconsequential to Bashar's case. Arriola's failure to inform the court or Bashar of such events is therefore also inconsequential, as it is reasonable not to assert an inaccurate argument. Because Bashar fails to show deficient representation by Arriola, we reject his ineffective assistance claim.[8]

V. CONCLUSION

¶ 33 For the foregoing reasons, we AFFIRM Bashar's conviction.

SO ORDERED this 5th day of December, 2018.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

/s/
PERRY B. INOS
Associate Justice

[8] We reject Bashar's claim as to Arriola's ineffective assistance but write further as to Bashar's current counsel. Bashar's counsel argued Arriola "was ineffective because he failed to advise Bashar that [3 CMC § 4366] had been repealed before Bashar entered his plea . . . [Arriola] should have known that the statute in question had been repealed and should have motioned for a dismissal." App. Br. 9. Despite counsel's argument, her appeal in *Bashar I* was similarly void of a discussion of the repeal of 3 CMC § 4366 and enactment of the CNRA. Both counsels failed to 'discover' the change despite its occurrence well before either assumed representation of Bashar.