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DIVISION TWO

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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

*Respondent,*

v.

ALAA HASSAN,

*Appellant.*

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. Appellant assigns error to the denial of his motion for withdrawal of his guilty plea and vacation of his judgment and sentence. RP II, 59.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Was the appellant's guilty plea involuntary and unknowing, and therefore a due process violation, because he was not informed that if he plead guilty, the immigration consequence of deportation would be automatic and unavoidable?
2. Is deportation still properly considered a "collateral" consequence of a guilty plea, even though since 1996 a guilty plea to an aggravated felony or to a domestic violence crime (and in this case the crime was both of these things) triggers the automatic and unavoidable consequence of deportation?
3. Assuming, arguendo, that deportation remains a collateral consequence because it is a consequence carried out by a different governmental agency, are the immediate and permanent consequences of ineligibility for readmission to the United States, and permanent ineligibility for naturalized citizenship, direct consequences of a guilty plea to an aggravated felony which is a domestic violence crime, of which a defendant must be informed prior to pleading guilty in order to satisfy due process?
4. Were the appellant's statutory rights under RCW 10.40.100 violated because the written plea form failed to advise the defendant that the consequences of deportation, permanent exclusion from admission to the United States, and permanent ineligibility for naturalized citizenship, were not merely possible consequences, but were instead mandatory and absolutely certain consequences of a conviction?
5. Did the appellant's attorney fail to provide him with effective assistance of counsel when she advised him that if he plead guilty there was (a) a probability, or (b) a possibility, that he would be deported if he pled guilty to the charged offense?

**C. STATEMENT OF THE CASE**

**1. PROCEDURAL HISTORY**

On June 28, 2004 Alaa Hassan, a citizen of Egypt, was charged in Pierce County Superior Court with Assault 2, Interfering with the Reporting of Domestic Violence, and Unlawful Possession of a Controlled Substance (under 40 grams of marijuana). CP 1-3. Ms. Dixie Krieg, an attorney from the Department of Assigned Counsel, was assigned to represent him. On August 17, 2004 an amended information was filed, charging only one count of Assault 2 and specifying that the assault was “a domestic violence incident as defined in RCW 10.99.020.” CP 6. Hassan plead guilty to that one charge before the Honorable Beverly Grant. CP 7-14. He was sentenced that same day. The prosecution recommended that Hassan be sentenced to six months in jail, which was the midpoint of the standard range. RP I, 7.<sup>1</sup> Defense counsel Dixie Krieg recommended that the Court impose a low end standard range sentence of three months in jail. RP I, 14. Judge Grant followed the prosecution’s recommendation and imposed a six month jail sentence. RP I, 14; CP 15-25. Hassan served that time and was released. However, at the time of his release he was taken into custody by the Immigration and Naturalization Service which began deportation proceedings against him.

On August 10, 2005, Hassan, represented by new counsel, Michael Schwartz, Hassan filed a CrR 7.8 motion seeking leave to withdraw his plea of guilty. CP 32-51. On October 28, 2005, a hearing was held before Judge Grant. The Court heard testimony from Hassan, from his wife Nancy Phelps, and from Hassan's first lawyer Dixie Krieg. At the end of the hearing Judge Grant orally denied the motion. RP II, 59.

Hassan filed timely notice of appeal on November 23, 2005. CP 93. This Court pointed out the absence of any final written order, and on December 9, 2005 Judge Grant entered a written order denying the motion for leave to withdraw the plea. CP 94.

## **2. FACTS PERTAINING TO THE PLEA AND SENTENCING HEARING OF AUGUST 17, 2004**

At the August 17, 2004 plea hearing, no one advised Judge Grant that Hassan was not a citizen of the United States. However, the prosecutor advised the Court that there was an Arabic language interpreter present at the very outset of the proceedings, and Mr. Kamal Abou-Zaki introduced himself to the Court. RP I, 3.<sup>2</sup> Thus it is likely that the Court

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<sup>1</sup> Volume I of the Report of Proceedings refers to the plea hearing of August 17, 2004. Volume II of the Report of Proceedings refers to the motion hearing of October 28, 2005.

<sup>2</sup> The Court asked Abou-Zaki, "Are you certified?" He replied, "There's no certification for the Arabic language, but I'm a qualified interpreter." RP I, 3. The transcript does not directly indicate that Abou-Zaki then translated the proceedings from English into Arabic for the defendant, although it appears that he did. The Court never administered any oath to Abou-Zaki, even though that is required by statute, and defense counsel never objected to the failure to place the interpreter under oath.

inferred that Mr. Hassan was not a U.S. citizen.

Attorney Krieg told the Court, “I believe [Mr. Hassan] understands the plea of guilty and the conditions and the rights he is waiving.” RP I, 3. Before she asked him how he wished to plead to the amended charge, Judge Grant asked Mr. Hassan twelve questions. RP I, 4-6.<sup>3</sup> However, the Court never asked him anything about his citizenship, his immigration status, or his knowledge regarding the effect that a guilty plea would have upon his immigration status.

Paragraph No. 6 of the written Statement of Defendant Upon Plea of Guilty began with the following language: IN CONSIDERING THE CONSEQUENCES OF MY GUILTY PLEA, I UNDERSTAND THAT: . . .” CP 8. This statement was then followed by 27 separately lettered subparagraphs. The ninth subparagraph, labeled ¶ 6(i), read as follows:

If I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

CP 10, ¶ 6(i) at p. 4. The plea judge never discussed this subparagraph with Hassan, never pointed it out to him, and never asked attorney Krieg

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<sup>3</sup> He answered six questions with the single word “yes,” two questions with the single word “no,” and one question with the reply, “I understand.” RP I, 4-6. The Court asked him if he understood the maximum possible sentence and the standard range; that the charge was a “violent offense”; that he was giving up certain constitutional rights by pleading guilty; that she was not bound by any party’s sentencing recommendation; that

anything about whether she had discussed it with him.

The written plea form also contained a statement of what the prosecutor would recommend as a sentence. This included a notation that the prosecutor would recommend “no contact with N.P.” CP 10. “N.P.” referred to Nancy Phelps, the defendant’s wife.

Immediately after accepting his guilty plea, Judge Grant took up the question of what sentence to impose. The prosecution recommended a six month sentence, and also asked for a no-contact order barring any contact between Hassan and his wife Nancy Phelps. RP I, 7-8.

The prosecutor introduced Phelps to the Court, and she addressed the Court. She told the Court about her concern that her husband might harm her if he was released from jail. RP I, 10-11. She also told the Court of her concern that he might harm himself, and of her belief that he was depressed, bipolar and suicidal:

*There’s a couple of other things I want to say, but I don’t know how this is handled. I just wanted to say that **I’m very concerned about my husband’s emotional and mental health and was hoping that there’s some way that he could be seen by a mental health professional and at least be put on antidepressants or something.***

***I consider that he’s bipolar. He has extreme mood swings – you know, manic, depressive, and then obviously, violent.*** From before the assault happened, for several months, I’ve been enduring increasingly terrible verbal

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a conviction would count as a strike, and that he would be required to have a DNA analysis. RP I, 4-6.

abuse from him. You know, one minute, madly in love, the next minute, everything I did was wrong. Just textbook case of domestic violence offenders.

And now, we haven't had any contact since he's been arrested, but he's been visited by friends and relatives and talked to them on the phone and corresponded through an interpreter, and *he has been threatening suicide, now saying things like he cannot live without me, he's going to die without me, things like that that are very scary, and I think he really needs help.*

RP I, 11-12 (bold italics added).

Defense counsel then addressed the Court, and stated that the marriage between Hassan and Phelps "is not going to go forward." RP I, 13. She also told the Court that once released from jail, "it is his intention to go straight back to Egypt. He has no desire to remain here." RP I, 13. She noted that Hassan had been in jail since June 28, 2004 (for the past 50 days) and argued that it would be wrong to prolong his incarceration for that purpose. RP I, 13.

Judge Grant then imposed a six month sentence. RP I, 14-15. The Court also entered a no contact order that prohibited Mr. Hassan from having any contact with his wife for 10 years. CP 18, 26.

### **3. THE MODIFICATION, AND THE SUBSEQUENT TERMINATION, OF THE NO CONTACT ORDER**

On February 4, 2005, at Phelps' request, Judge Grant modified the no-contact order and allowed Hassan to meet his wife "for two hours one

time per month in the company of a third party to discuss financial of [sic] family matters.” CP 29. On July 8, 2005, at Phelps’ request, Judge Grant terminated the no contact order, allowing Hassan to have completely unrestricted contact with his wife. CP 31.

**4. FACTS PERTAINING TO THE HEARING ON  
THE MOTION TO WITHDRAW THE PLEA**

On October 28, 2005 Judge Grant heard Mr. Hassan’s motion for an order allowing withdrawal of his guilty plea. At the start of the hearing Judge Grant stated that she didn’t want attorney Krieg to be “taking the rap for something that the Court neglected to do and I will take full responsibility.” RP II, 6. She noted that she did not engage in any colloquy with the defendant on the subject of whether he knew that there would be some immigration consequences if he plead guilty. RP I, 6.

The defendant presented the testimony of his wife. Phelps testified that after her husband was arrested, and before he plead guilty, she talked with attorney Krieg about potential immigration consequences. RP II, 10. “I expressed concern that there might be a problem with immigration because of the offense and I asked her if she knew anything about that and she told me that she didn’t know but she would try and find out.” RP II, 10. Phelps said that in a later conversation Krieg “led me to believe that there would be no immigration consequences, that it didn’t have anything

to do with it.” RP II, 11.

I asked her – she said she didn’t know. Then when I asked her about it again, she told me that she was going to encourage him to plead guilty because he would get a lesser sentence and not have to stay in jail and go to trial and she didn’t mention anything about immigration.

RP II, 11. “She told me she didn’t know of any immigration consequences.” RP II, 12.

Hassan also testified at the motion hearing.<sup>4</sup> His new attorney asked him about his meetings with attorney Krieg while he was incarcerated after his arrest and prior to the entry of his guilty plea. Hassan said that interpreter Abou-Zaki was present at these meetings and that he interpreted the conversations between attorney and client. RP II, 15. Hassan was asked whether Krieg ever told him anything about the immigration consequences of a guilty plea:

Q. Okay, Now during these conversations about pleading guilty, did the subject of immigration consequences come up?”

A. I remember last time she see me, before it was Court time, *she asking me is immigration visiting you? I said no. She said that’s good. That’s the only thing she said from immigration.*

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<sup>4</sup> Abou-Zaki, the same interpreter who had been present at the plea hearing more than one year earlier, was also at the motion hearing. But Abou-Zaki told the Court at the start of the hearing that Hassan “wants to answer straight in English so I will standby.” RP II, 13. Apparently, then, Abou-Zaki never translated anything that was said at this second hearing (the transcript never indicates that Hassan asked for translation assistance). However, the transcript makes it painfully clear that there were communication problems, and Hassan’s testimony was difficult to understand.

- Q. *What did that lead you to believe?*
- A. *I don't have any idea for this.*
- Q. *Okay. You didn't have any idea about what the immigration consequences were or you didn't know what was going to happen?*
- A. *No.*
- Q. *Which one?*
- A. *I didn't have any idea what this.*
- Q. I didn't hear you.
- A. *I didn't have any idea for immigration.*
- Q. *Okay. And was that the only conversation you had with her regarding immigration?*
- A. *Yes.*
- Q. Okay. On the date of your plea when you entered your plea in front of the judge, do you remember that day?
- A. Yes. I remember this day.
- Q. And would that have been August 17<sup>th</sup>, 2004?
- A. Yes.
- Q. Okay. Do you remember reading through an eight page document with your attorney and the interpreter?
- A. *Yes, he never said something from immigration. Whole deal is I sign guilty because I need to get out of jail the same day is what I know.*

Q. Okay. When the plea form was read to you, did you listen carefully to what was being read to you?

A. For this time I think I have because I'm all day, all night because *I don't think somebody said something from immigration*, sure, I'm crying. I understand what people see for me so I never have somebody tell me this is sign guilty, it helps with immigration whole deal. *I need to get out in this day from jail.*

Q. *When you went to enter your plea of guilty, what was your understanding of what would happen with regard to the immigration, with regard to immigration?*

A. *I don't have any idea with this. I don't have any idea for something from immigration. I don't say from immigration.*

RP II, 16-18 (bold italics added).

The prosecutor asked Hassan if, at the time he plead guilty, it had been his intention to return to Egypt, his native country. Hassan denied this had been his intent, and denied ever saying this to Krieg.

Q. *Did you and your attorney talk about going back to Egypt?*

A. *No.*

Q. *That never came up in your conversations?*

A. *No.*

Q. Did you listen to your attorney talk when you entered the guilty plea?

A. This is what I sign before. Again – sorry.

THE INTERPRETER: Can you repeat the question?

Q. Did you listen to your attorney talk when you entered the guilty plea?

A. Yes, yes, I listened because I can't understand everything from this time.

Q. You had an interpreter, didn't you?

A. Because I – *sorry this time I am crying. I am thinking how I can get my life back. I don't think everything right from my head.*

Q. And the Court gave you a chance – the judge gave you a chance to speak, didn't she?

A. No, I think at the beginning somebody asked me every time I come to court somebody said don't talk, listen. *This is the only time a judge ask me if you want to talk. I said no, because I am hesitant. I am crying. I can't say nothing. This day I am crying. I can't talk, right.*

Q. What were your plans after are you plead guilty, what were you going to do?

A. I have idea that I need to get out of jail and I fix everything. I have this – I thought if I am going to get out of jail and fix my life and start all over.

Q. *Isn't it true that you planned on going back to Egypt.*

A. *No, because my dream I come to this country before. I love to stay here because I go make it – I go visiting and I need to stay here with my wife because I start my life here.*

- Q. When you signed the statement of defendant on plea of guilty, the interpreter went over all that language with you, didn't he?
- A. He translate for me everything. *He never said if you do this and you go, nobody tell me this.*
- Q. Was he the same interpreter who was present in court?
- A. Yes, yes.
- Q. Did you have any questions of the interpreter in understanding what he was reading to you?
- A. He showed me something for this. He translate for me. *He never said something for deport or anything from immigration. The whole idea I was thinking for this day I need to get out of jail is what I think.*
- Q. Can you say that again? I didn't understand.
- A. This whole – my thing for this day is I need to get out of jail. The whole idea was just I want to get out. I don't want to stay in jail. I want to go out from jail.

RP II, 18-20 (bold italics added).

The prosecutor called Krieg as a witness. She testified that initially she was not sure what the immigration consequences of a guilty plea might be in Hassan's case, that she told Hassan that deportation was both "probable" and "possible," and that eventually the interpreter, Abou-Zaki told her that immigration was deporting everyone, so she made that clear to Hassan:

Q. Did the subject of immigration or deportation ever come up in any of your conversations?

A. Yes it did.

Q. What specifically was talked about with regard to those issues?

A. Well, essentially I felt Mr. Hassan had some good issues to go to trial and he was absolutely adamant that he was going to plea and so, of course, I discussed with him the consequences of a plea.

Q. Do you know why he wanted to plea?

A. He was depressed. He didn't want to say bad things about his wife, that he loved her. He had – he just wanted to get it over with.

Q. And when you say you talked about the consequences of the plea, what kind of things did you talk about with regard to immigration issues?

A. Well the reason I remember it so distinctly is because the interpreter was with me and I was going over – the time I remember so clearly is going over the plea form and as I always have done it, said that, explained to him the consequences of pleading guilty and deportation. *And I probably used the words that that's a probable or possible consequence and the interpreter told me that they are deporting them all and it wasn't probably, it was likely to occur.*

*And this was with Mr. Hassan present and so I said, well, I don't know that much about it but the interpreter did and so he was advised at that time and his response was I just want to go back to Egypt.*

And my concern was – I didn't – I can say I didn't

know enough about what happens once he was detained to be able to tell him how long that would be. So what I had done is I went back to my office and asked my colleagues and they agreed that he would definitely be deported because of the current lovely laws we have now and that's what I recall.

Q. And when you went back and spoke with your colleagues about this, was that after the plea was entered or before?

A. Before.

Q. Okay.

A. No, I take that back. It could have been after but it confirmed what had been told to him.

Q. And you said that was told to him by the interpreter?

A. The interpreter and I were discussing it.

Q. *And after you discussed it with the interpreter, did the interpreter advise the defendant about that?*

A. *No, but I did. I would tell him what I was learning.* There was a concern that he didn't have money to get back to Egypt.

Q. *And so when all is cut and dried in this case, what was the advice that you gave him with regard to deportation?*

A. *He would be deported.* I recall because his mother died and his wife wouldn't let me tell him, even though I told him I'll set it up with the pastor and the other people in the jail and we had thought we were going to get the low end but she indicated she wanted him to have more jail so that she could go to Egypt and get her things and get back before he got

there. I was very angry. That's why I remember it so well.

RP II, 23-26 (bold italics added).

Krieg acknowledged that Hassan was hard to talk to, and that he wanted to plead guilty, get it over with, and get back to his wife:

Q. Did the defendant ever express any confusion over deportation or immigration consequences?

A. Not to my – I don't recall that he did. He, as I said, *it was hard to talk to him because it was I just want to do this; I just want to do this; I want it over with; I want to go home.* Of course, *he wanted to be back with his wife* but it was clear that wasn't going to happen at that time. I can say that he did understand fully the plea. I read every single paragraph to him. And I know that he understood what that was. He wasn't confused.

RP II, 26-27 (bold italics added).

Krieg acknowledged that she never visited Hassan at the jail and only spoke to him before court hearings. RP II, 30. She also said she never spoke to him on the phone because "he didn't speak very good English." RP II, 30.

She confirmed Hassan's testimony that at one point she asked him if he had been contacted in the jail by anyone from the immigration service. RP II, 30. She said she did that because very often Spanish speaking clients of hers had been contacted by INS officials while in the jail, and thus they already knew what their

immigration consequences were going to be. RP II, 30. Krieg said that as far as immigration consequences were concerned, she learned what she knew on this subject from the interpreter:

Q. Okay. You testified on direct, and correct me if I'm wrong, that ***the question of immigration came up during that discussion; is that right?***

A. ***Yes.***

Q. And that ***your initial response to him was that it was probable or possible that he could be deported as a result of his guilty plea, correct?***

A. ***That's likely what I said.*** I don't remember my exact words.

Q. Okay. After you told him this, you and the interpreter according to you had a discussion; is that right?

A. Correct.

Q. And you say that ***the interpreter told you they are deporting all of them now, right?***

A. ***Something to that effect.*** He was certainly more articulate than that.

Q. And you said that you then related the information to Mr. Hassan, correct?

A. Yes.

RP II, 33 (bold italics added). Krieg said that "during this conversation he was still depressed and sad," and "[i]n fact he was crying." RP II, 34.

Judge Grant asked attorney Krieg why it was that she was sure that

she fully disclosed the ramifications of deportation to Hassan. RP II, 43.

She replied that she remembered things clearly because Hassan said he wanted to go back to Egypt:

*And the reason I remember this simply is because he wanted to go back to Egypt* and I was more concerned with whether he would be held for a long time, what the – what would happen. But I feel that it was discussed very fully. It certainly was discussed at great length.

RP II, 43-44 (bold italics added).

After hearing argument from counsel, RP II, 47-58, Judge Grant orally denied the motion and made these remarks:

THE COURT: All right. I'm going to proceed to the hearing on this case and not allow him to withdraw his plea. I think that the colloquy in the record is clear, that *not only did he want to go back to Egypt but he understood regardless that he would be going back to Egypt.*

Now with regards to the ambiguity [in the language printed on the written plea statement], you can take that up on appeal and then they can clean it up from there.

RP II, 59 (bold italics added).

#### **D. INTRODUCTION TO ARGUMENT**

##### **1. Distinguishing Between Due Process, Sixth Amendment, and Statutory Claims.**

There are many cases involving a defendant's contention that he should have been allowed to withdraw his guilty plea on the grounds that he was unaware of the possible immigration consequences of a conviction at the

time he plead. All of these cases share the common factual assertion that the defendant did not know about the immigration consequences. But the cases discuss several different legal grounds for the contention that the defendant is entitled to withdraw his guilty plea.

First, there is the constitutional argument that the Due Process Clause of the Fourteenth Amendment was violated because the Court failed to advise the defendant of the immigration consequences, thereby rendering the plea invalid because it was not made voluntarily and intelligently. Second, in some cases defendants have argued that there was a violation of their *statutory* right pursuant to RCW 10.40.200, to be advised of the potential immigration consequences. Third, many cases involve the separate constitutional claim that even if *the Court* had no responsibility to advise the defendant of the potential immigration consequences, the failure of *the defendant's attorney* to inform the defendant about them constituted a denial of the Sixth Amendment right to effective representation of counsel. Fourth, many cases involve the related Sixth Amendment claim that the defendant's attorney *incorrectly* advised the defendant about the immigration consequences of a conviction, and that such "misadvice" constituted a denial of the right to effective representation of counsel. Fifth, some cases have addressed the related claim that the attorney's failure to attempt to negotiate for a plea bargain in which the defendant would have plead guilty to some

other criminal offense -- one that would not have triggered an adverse immigration consequence -- constituted ineffective assistance of counsel.

In the present case, appellant Hassan raises *all* of these arguments in this direct appeal. In addition, he is raising several factually related but legally distinct due process claims in his personal restraint petition.

**2. STATUTORY CHANGES IN FEDERAL LAWS MAKING DEPORTATION FOR AN AGGRAVATED FELONY SUCH AS ASSAULT 2 AUTOMATIC AND MANDATORY.**

The immigration laws in this country have undergone considerable change in the last 10 years. Washington case law dealing with the immigration consequences of a conviction begins in 1984 with State v. Malik, 37 Wn. App. 414, 680 P.2d 770, *review denied*, 102 Wn.2d 1023 (1984). Malik plead guilty to a felony drug offense on September 1, 1982 and was sentenced on October 22. Id. at 415. After discovering that INS planned to start deportation proceedings based upon his conviction, he moved to withdraw his guilty plea, and this motion was denied on January 27, 1983. Id. Division One affirmed denial of the motion.

This Court has analyzed the history of the statute enacted after Malik plead guilty, which took effect on September 1, 1983 one year after entry of Malik's plea. State v. Littlefair, 112 Wn. App. 749, 766, 51 P.3d 116 (2002). That statute declares that as a matter of fairness to non-citizen defendants

pleading guilty, an “appropriate warning of the special consequences” must be given to them before they plead guilty. RCW 10.40.200. At this time in 1983, federal law afforded the United States Attorney a great deal of prosecutorial discretion as to whether or not to commence deportation proceedings against an alien who was potentially deportable. Prior to passage of the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) in 1996, the INS had discretion to decide *not* to remove aliens from the United States, even though by virtue of their illegal actions the aliens were removable. Reno v. Arab-American Committee, 525 U.S. 471, 483-84 (1999). Prior to the IIRIRA INS officials had been “exercising that discretion for humanitarian reasons or simply for its own convenience.” Id. By enacting the IIRIRA, Congress eliminated that discretion and expanded the range of offenses for which deportation was mandatory.

First, Congress greatly enlarged the definition of “aggravated felony” to include offenses some of which are neither aggravated nor felonies. *See* 8 U.S.C. § 1101(a)(43), amended by 110 Stat. 3009-627 (1996). Second, Congress eliminated all discretion to refrain from deporting alien residents convicted of an “aggravated felony.” *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (stating that aliens “shall” be deported for conviction of aggravated felony); and 8 U.S.C. § 1229b(a)(3) (stating the alien is not eligible for cancellation of removal if he is convicted of an aggravated felony).

Thus, at the time RCW 10.40.200 was enacted, while a conviction for an aggravated felony was grounds for which an alien *could* be deported, deportation was not *required* in all such cases, and thus it could not be said that if convicted for such an offense the defendant necessarily *would* be deported. Accordingly, when the Supreme Court of Washington fashioned new language to be placed on the written plea form for defendants pleading guilty to felony offenses, it couched the “appropriate warning” required by RCW 10.40.200 in language stating that a guilty plea “is grounds for” deportation, exclusion, or denial of naturalized citizenship. CrR 4.2. This was certainly true at the time this language was adopted. After 1996, however, such language is misleading insofar as it fails to warn pleading defendants that not only is a conviction “grounds for” such immigration consequences, such a conviction will *absolutely require* deportation and exclusion in all “aggravated felony” and domestic violence cases.

E. **ARGUMENT**

1. **BECAUSE THE PLEA JUDGE FAILED TO INFORM THE DEFENDANT THAT A GUILTY PLEA WOULD HAVE THE AUTOMATIC CONSEQUENCE OF DEPORTATION, HIS PLEA WAS NOT VOLUNTARY, AND IT VIOLATED THE DUE PROCESS CLAUSE.**

a. **A Defendant Must Be Made Aware of All the Likely Consequences of a Guilty Plea**

“Due process requires that a defendant’s guilty plea be knowing,

voluntary, and intelligent.” In re Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004). Boykin v. Alabama, 395 U.S. 238, 242 (1969). When a defendant pleads guilty, courts are constitutionally required to exercise the utmost solicitude “to make sure he has a full understanding of what the plea connotes *and of its consequence.*” Id. at 243-244 (italics added). Boykin seemingly required that the defendant be made aware of every consequence of his plea. Boykin placed no restriction on the type of “consequence” that courts must make sure the defendant understands, and did not refer to or distinguish between “direct” and “collateral” consequences.

Shortly after Boykin, however, in Brady v. United States, 397 U.S. 742, 748 (1970) the Court held that in order to constitute a voluntary and intelligent plea, the defendant must be shown to have acted “with sufficient awareness of the relevant circumstances and *likely consequences.*” Again there was no distinction drawn between direct versus collateral consequences, but there was this new limitation that to be of constitutional significance, a plea consequence had to be “likely.”

More recently, the Supreme Court reaffirmed the “likely consequences” standard of Brady, holding that “the Constitution insists” that in order to be voluntary a defendant pleading guilty must do so “with sufficient awareness of the . . . likely consequences.” United States v. Ruiz,

536 U.S. 622, 629 (2002).

**b. Lower Court Development of the Distinction Between Collateral and Direct Consequences.**

Despite the fact that the Supreme Court has adhered to the Brady standard of “likely consequences,” until quite recently the lower federal courts have long employed a different standard, and have observed a distinction between “direct” and “collateral.” In State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980), the Washington Supreme Court endorsed this distinction and adopted the test used by the Fourth Circuit.

In Barton the issue was whether the failure to inform the defendant of the possibility that the prosecution might seek a life sentence under the habitual criminal statute rendered his guilty plea invalid. The Barton Court held that habitual criminal status was a “collateral” consequence and thus it was not necessary to inform the defendant of it. Id. Adopting the test employed by the Fourth Circuit, the Court distinguished between “direct” and “collateral” consequences by inquiring whether the consequence was one that was “definite, immediate, and largely automatic”:

The distinction between direct and collateral consequences of a plea “turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant’s punishment.”

Barton, 93 Wn.2d at 305, *quoting* Cuthrell v. Director, 475 F.2d 1364, 1366 (4<sup>th</sup> Cir. 1973). Since habitual criminal status was not sought in every case

where the defendant was eligible for it, it was not a “direct” consequence. Consequently the Barton Court held that it was not constitutionally necessary that a defendant pleading guilty to a felony be informed of it.

We hold that an habitual criminal proceeding is a collateral consequence of a guilty plea. An habitual proceeding is *not automatically imposed* after a defendant has entered a plea of guilty even if the defendant has two or more prior felonies. Rather, *the prosecuting attorney has discretion on whether to file* habitual criminal proceedings conditioned on the requirement that prosecutorial discretion “must be tempered by procedural due process.”

Barton, 93 Wn.2d at 305-06 (bold italics added).

The Barton “definite, immediate, and largely automatic” test, has continued to be the test employed by the Washington Supreme Court since 1980. In State v. Ross, 129 Wn.2d 279, 916 P.2d 405 (1996) the Court adhered to this definition of a “direct consequence” and held that because a term of community placement was mandatory, it was a direct consequence of a guilty plea of which a defendant must be advised. Because a term of community placement was “a definite, immediate and largely automatic effect” flowing from his guilty plea, the Ross Court held that a defendant who had not been advised that it would be imposed was constitutionally entitled to withdraw his guilty plea.<sup>5</sup>

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<sup>5</sup> The State argued “that community placement is not immediate because the term begins upon the completion of confinement,” but the Court rejected this argument, holding that the “effect” on the defendant’s sentence was immediate, even though the defendant would not experience the community placement term until several years later. Ross, 129 Wn.2d at 285.

Since Ross the Washington Supreme Court has consistently adhered to the rule that if a consequence is largely automatic, it is a consequence of which the defendant must be advised. In those unusual circumstances where something makes a consequence unlikely, it will not be a direct consequence, even though in the cast majority of cases it is a direct consequence. See State v. Oseguera-Acevedo, 137 Wn.2d 179, 970 P.2d 299 (1999) (although normally a term of community placement automatically follows release from prison and thus is a direct consequence, it was not likely that this particular defendant would ever serve a term of community placement because there was a very high probability that he would be deported)<sup>6</sup>; State v. Turley, 149 Wn.2d 395, 399-401, 69 P.3d 338 (2003) (where defendant plead guilty to two charges, and was not advised that one of the charges required imposition of a term of community placement, he was constitutionally entitled to withdraw his guilty plea to *both* of the two charges).

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“A defendant will definitely serve a full 12 months of mandatory community placement.” Id. Moreover, the Ross Court recognized that “community placement imposes significant restrictions on a defendant’s constitutional freedoms.” Id. at 286.

<sup>6</sup> “In this case, Respondent Oseguera is an undocumented alien from Mexico who has once been deported, returned to this country illegally, and will most likely be deported again upon his release from prison. He will not likely ever be available to serve a term of community placement. The reference to community placement in Ross that produces a “definite, immediate and automatic effect on a defendant’s range of punishment” simply does not apply. One cannot logically conclude that Respondent Oseguera’s mandatory term of community placement is a “direct consequence” of his plea of guilty.” Osegeura, 137 Wn.2d at 307.

**2. SINCE THE 1996 AMENDMENTS, DEPORTATION HAS BECOME A DIRECT CONSEQUENCE SINCE IT IS NOW AUTOMATIC IN ALL AGGRAVATED FELONY AND DOMESTIC VIOLENCE CASES.**

Up until 1996, deportation was a possible consequence of a guilty plea to most felonies, but it was not a “definite” or “largely automatic” consequence because the INS had unfettered discretion as to whether or not to seek to deport convicted criminals. With the elimination of such discretion, however, alien defendants who were surprised to learn that their guilty pleas had made them subject to automatic deportation, began seeking to withdraw their guilty pleas, arguing that while prior to 1996 deportation was a “collateral” consequence (just something that was possible), after 1996 it was virtually certain and therefore had become a “direct” consequence. See *Deportation is Different*, 89 Cal. L. Rev. 741, 762 (2001) (collateral consequence characterization “is no longer appropriate”).

So far two divisions of the Washington Court of Appeals have rejected this argument. At the same time, one federal circuit court has begun to recognize that the entire concept of a distinction between “direct” and “collateral” consequences seems to be breaking down, and may no longer be valid. Appellant Hassan respectfully submits that the concept *never* was valid, and that under the Brady/Ruiz formulation of the appropriate due process inquiry the only pertinent question is whether the

adverse consequence is “likely.” Deportation is now not only “likely,” in cases such as Hassan’s, it is a virtual certainty. Therefore Hassan should have been informed by the Court that it was an automatic consequence.

In United States v. Couto, 311 F.3d 179 (2<sup>nd</sup> Cir. 2002), the Second Circuit discussed at some length the defendant’s argument that deportation had become a “direct” consequence of a guilty plea due to changes in federal immigration law, and that consequently the Court was required to advise him of this automatic consequence. Ultimately the Second Circuit found it unnecessary to decide “this difficult question,” because it resolved the case before it by holding that misadvice given by the defendant’s attorney had deprived him of effective assistance of counsel in violation of the Sixth Amendment. Id. at 191. But in a lengthy dictum the Second Circuit stated that “on its face *the Defendant’s argument*” that deportation is now a direct consequence as a result of statutory changes “*is persuasive*, and we believe that it deserves careful consideration even though three other circuits . . . have declined to reconsider their prior holdings on this point.” Id. at 190.

The Second Circuit found the argument persuasive precisely because earlier cases holding deportation to be a collateral consequence had rested on the fact that deportation was discretionary consequence. Couto, 311 F.3d at

189.<sup>7</sup> But given the 1996 amendments to the immigration laws, this was no longer true because deportation had become an automatic and unavoidable result of a conviction for an aggravated felony:

Given these amendments, an alien convicted of an aggravated felony is automatically subject to removal and no one – not the judge, the INS, not even the United States Attorney General – has any discretion to stop the deportation. Therefore, Defendant argues, the rationale behind the [earlier Second Circuit] decisions . . . -- that deportation is not a direct consequence *because it is not automatic* -- no longer reflects the state of the law. Instead, deportation today is an essentially certain, automatic, and unavoidable consequence of an alien's conviction for an aggravated felony.

Couto, 311 F.3d at 189-190 (italics in original). These changes led the Second Circuit to conclude in dictum that deportation is now a direct consequence of a guilty plea to an aggravated felony.

Prior to the 1996 Congressional changes to the immigration laws, Washington courts had also held that the possibility of deportation was a collateral consequence of which the defendant did not have to be advised, because it was not a “definite, immediate and largely automatic” consequence. State v. Malik, 37 Wn. App. 414, 416, 680 P.2d 770, *review denied*, 102 Wn.2d 1023 (1984); State v. Holley, 75 Wn. App. 191, 196,

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<sup>7</sup> “Years ago, we concluded that the possibility of deportation based on a conviction was a ‘collateral consequence’ of a guilty plea, and that the court was not required to inform the defendant of such a possible consequence. [Citations]. Defendant points out, however, that at the time those cases were decided, decisions about deportation were within the broad discretion of the Immigration and Naturalization Service. . . [An earlier Second Circuit decision] relied on the non-automatic nature of the deportation laws then in effect.”

876 P.2d 973 (1994); State v. Ward, 123 Wn.2d 488, 513, 869 P.2d 1062 (1994); In re Yim, 139 Wn.2d 581, 989 P.2d 512 (1999).<sup>8</sup>

More recently, both Divisions One and Three have addressed and rejected the argument that the 1996 changes to the deportation laws have altered the landscape such that deportation is now a direct consequence of a guilty plea. State v. Martinez-Lazo, 100 Wn. App. 869, 999 P.2d 1275 (2000) (Div. III); State v. Jamison, 105 Wn. App. 572, 20 P.3d 1010 (2001). Appellant Hassan urges this Court to decline to follow Division One and Three because their analysis is clearly flawed.

First, in Martinez-Lazo, a citizen of Mexico moved for permission to withdraw his guilty plea to third degree child molestation. He argued that his attorney's failure to advise him that the resulting conviction would cause his deportation constituted ineffective assistance of counsel. Division Three affirmed the denial of the motion.

It is not clear whether it was the appellant or the Court of Appeals which first made the analytical mistake of believing that the distinction between "direct" and "collateral" consequences was relevant to the

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<sup>8</sup> Although Yim was decided in 1999, it involved guilty pleas entered in 1996 before the effective date of the changes in the federal immigration laws, and no arguments were made in that case that the recent change in deportation laws changed the analysis of the due process issue.

appellant's Sixth Amendment claim.<sup>9</sup> Even though the distinction was not relevant to the claim before it, Division Three proceeded to consider whether deportation was still a collateral consequence.

Mr. Martinez-Lazo acknowledges the general rule in Washington that deportation is a collateral consequence, but argues that deportation is no longer a collateral consequence due to changes to the Immigration and Naturalization Act (INA) ushered in by the Anti-Terrorism and Effective Death Penalty Act [citation] and the Illegal Immigration Reform and Immigrant Responsibility Act [citation]. In view of these changes, Mr. Martinez-Lazo contends his deportation is certain, and therefore no longer a collateral consequence.

Martinez-Lazo, 100 Wn. App. at 876-877.

Division III accepted the appellant's premise that deportation was now a virtually automatic and certain consequence of the appellant's guilty plea. Id. at 877, n.3. Nevertheless, even though deportation was now a definite and automatic consequence, Division III held that it *still* was not a direct consequence because deportation is carried out by an independent agency of government, and is not something done by sentencing court:

A deportation proceeding is a collateral civil action because it is "not the sentence of the court which accepted the plea but of another agency over which the trial judge has no control and for which he has no responsibility."

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<sup>9</sup> In fact, it is completely immaterial. For Sixth Amendment purposes a defendant must show that his attorney's conduct was deficient because it was objectively unreasonable. An attorney's objectively unreasonable conduct does not become reasonable simply because the effect it has on his client is "collateral" rather than "direct." For example, if an attorney failed to inform his attorney client that a guilty plea could possibly result in his disbarment, such a failure could easily be found to be deficient conduct, even though disbarment is a collateral consequence because it is not virtually automatic, and is merely a possible future consequence.

Martinez-Lazo, at 877, quoting Michel v. United States, 507 F.2d 461, 465 (2d Cir. 1974).

The Martinez-Lazo Court's reliance upon the Second Circuit's decision in Michel is on shaky ground, however, since the Second Circuit itself recently assailed this aspect of Michel in its Couto decision rendered three years after the Martinez-Lazo decision. In Couto the Second Circuit suggested that either: (1) Michel *didn't* really hold that directness hinged upon whether it was the court or another institution that brought about the consequence; or (2) that if Michel really did make such a holding, the Michel decision was internally inconsistent, and should no longer be followed:

Michel seemed to say that what mattered was not the likelihood of an event occurring as a result of a guilty plea, but whether it was the court accepting the plea or another institution that made the decision that would bring about the event in question. [Citation.] Still, although the Michel panel expressed disapproval of determining "directness" of a consequence based on the likelihood of its occurrence, "virtual certainty" is another matter. Thus, *when an event is a certain consequence of a decision of a court, it is meaningless to say that the court did not ordain that event; any action by other institutions are purely ministerial. As a result, Michel's rationale might itself not survive the changes to the immigration law.*

In this respect, *the Michel panel's reliance on Bye [v. United States], 435 F.2d 177 (2d Cir. 1970) is a further indication that a truly certain consequence might be "direct" even if the entity nominally responsible for the consequence is not the court itself.* In Bye, the panel held that a guilty plea is not "voluntary" when it is given by an accused who does not

know that he will be ineligible for parole from the sentence he receives. 435 F.2d at 178. The panel reasoned, in language the Michel panel quoted approvingly, that “the unavailability of parole directly affects the length of time the accused will have to serve in prison,” and that “such a major effect on the length of possible incarceration would have great importance to an accused in considering whether to plead guilty.” Bye, 435 F.2d at 180 (quoted in Michel, 507 F.2d at 463). ***And the Bye panel rejected a distinction based on the origin of the consequence . . .***

Couto, 311 F.3d at 190, n.10 (bold italics added).

In Jamison, without engaging in any significant analysis, Division One simply followed Division Three and stated that it agreed with the Martinez-Lazo decision. Like Martinez-Lazo, Jamison argued that since deportation is now absolutely mandatory and cannot be avoided, deportation should now be considered a “direct” consequence. Division One simply noted that “Division Three of this court rejected the same argument” in Martinez-Lazo. Accepting the contention that deportation was no longer just a possibility, but was now a certainty, Division One quoted the same passage from the Michel case which Division Three had quoted in Martinez-Lazo:

***Deportation*** with no possibility of re-entry into the United States, ***even if an absolute certainty*** following conviction of an aggravated felony as defined by federal law, ***remains collateral*** to the criminal prosecution ***because it is “not the sentence of the court which accepted the plea*** but of another agency over which the trial judge has no control and for which he had no responsibility.”

Jamison, 105 Wn. App. at 593, quoting Martinez-Lazo, 100 Wn. App. at

877, quoting Michel, 507 F.2d at 465 (bold italics added).

Two years after Jamison was decided, the Second Circuit issued its Couto decision, thereby undercutting the vitality of Michel, the case upon which both Martinez-Lazo and Jamison rest. Appellant Hassan urges this Court to follow the suggestion of the Second Circuit in Couto, and to recognize that simply because it is some other agency that carries out a deportation, that does not change the reality of the fact that deportation is a direct consequence of a guilty plea to an aggravated felony as defined by federal law. The failure of the Superior Court plea judge to advise the defendant that he would *definitely* be deported if he plead guilty to Assault 2 rendered Hassan's guilty plea involuntary, and that in turn entitled Hassan to the remedy of withdrawal of his plea. "A showing that [a guilty] plea was involuntary independently establishes manifest injustice requiring the trial court to permit a defendant to withdraw the guilty plea." Turley, 149 Wn.2d at 398. Accordingly, appellant asks this Court to reverse the Superior Court and to enter an order directing that his guilty plea be withdrawn.

**3. MANDATORY AND PERMANENT INELIGIBILITY FOR CITIZENSHIP AND FOR RE-ENTRY ARE DIRECT CONSEQUENCES OF THE PLEA, AND THE FAILURE TO INFORM HASSAN OF THESE CONSEQUENCES RENDERS THE PLEA INVOLUNTARY**

As the recent case of United States v. Littlejohn, 224 F.3d 960 (9<sup>th</sup>

Cir. 2000) illustrates, a consequence which has an immediate disqualifying effect is a “direct” consequence, because it takes place immediately and does not require any independent action by any other government agency. In Littlejohn the defendant’s guilty plea rendered him ineligible to receive food stamps. The Ninth Circuit held that this immediate disqualifying effect flowed directly from acceptance of the guilty plea. A deportation requires that a Government agency take action to initiate it. But a convicted defendant’s immediate ineligibility for a benefit such as food stamps does not require any government action to start the ineligibility. Consequently, such a disqualification is properly classified as a “direct” consequence of a defendant’s guilty plea.

Littlejohn plead guilty to one count of cocaine base distribution pursuant to a plea bargain in which the prosecution agreed to recommend 240 months imprisonment. Pursuant to both 21 U.S.C. § 862(a) and 21 U.S.C. § 862a,<sup>10</sup> Littlejohn’s conviction rendered him ineligible for food stamps and other federal benefits. Id. at 966. The Ninth Circuit recognized that because these statutes automatically affected the range of Littlejohn’s punishment, “they are ‘direct’ consequences” of his plea. Id.

The Government argued that the benefit stripping effect of the two

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<sup>10</sup> As the Ninth Circuit pointed out, 21 U.S.C. § 862a and 21 U.S.C. § 862(a) are two different statutes, both of which have automatic benefit-stripping effects. The two

statutes was collateral because their effects were dependent upon the future actions of independent agencies who actually deny the benefits when they are applied for. But the Ninth Circuit rejected this argument, noting that it was the ineligibility itself – not the later denial of benefits – which was the direct and automatic consequence of the defendant’s guilty plea:

***The government misses the point. It is the ineligibility itself that is an automatic product of subsection 862(a)’s application, not a later actual denial of benefits, suspension of ineligibility, or the entirely irrelevant question of whether a defendant is eligible or ineligible for the benefits at the time that subsection 862(a) is triggered. [Citation]. The ineligibility itself is not a result of other governmental agencies’ actions, and it is not dependent upon Littlejohn’s own future conduct.*** It is an automatic product of Littlejohn’s conviction. In other words, it is a “direct” consequence of his conviction.

Littlejohn, 224 F.3d at 967 (bold italics added).

In the present case, deportation is only one of **three** automatic consequences of appellant Hassan’s entry of a guilty plea to one count of second degree assault with a domestic violence designation.<sup>11</sup> The other two automatic consequences are immediate and permanent ineligibility for naturalized citizenship,<sup>12</sup> and ineligibility for admission to the United

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statutes have the same identifying numbers, but the latter has a parentheses and the former does not. Id. at 966.

<sup>11</sup> See 8 U.S.C. § 1227(a)(2)(A)(iii) (stating alien shall be deported for conviction of “aggravated felony”) and 8 U.S.C. § 1101(a)(43) (defining “aggravated felony”).

<sup>12</sup> See 8 U.S.C. § 1427(a) (requiring good moral character as condition for naturalized citizenship) and 8 U.S.C. § 1227(a)(2)(i) (excluding persons convicted of crimes of moral turpitude).

States.<sup>13</sup> Thus not only does Hassan's conviction trigger federal statutory provisions that dictate that he must be deported and thus thrown out of this country, they also trigger immediate disqualifications which insure that he may never come back to this country, and may never qualify for citizenship.

Nor are these permanent disqualifications dependent upon a deportation. If Mr. Hassan were to voluntarily depart the United States today, he could never return to this country. If he went to Vancouver, British Columbia for the weekend and then tried to return, he would forever be turned away at the border because he would be subject to permanent disqualification for admission to the United States. And if he left voluntarily for Egypt, lived thirty or forty or fifty more years as law abiding citizen in Egypt, he still would be forever disqualified from either returning to this country physically, or from obtaining naturalized citizenship.

These immediate disqualifying effects do not require any further action by any other governmental agency. Like the immediate disqualifying effect of the food stamp eligibility bar found to be a direct consequence in Littlejohn, the permanent bars to naturalized citizenship and admission to the United States are also direct consequences of Hassan's conviction. Therefore, even if this Court is not prepared to hold that deportation is a direct consequence of a guilty plea, these other two eligibility bars are direct

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<sup>13</sup> See 8 U.S.C. § 1182(a)(2) making persons convicted of crimes of moral turpitude

consequences. Therefore Hassan's guilty plea was not made knowingly and voluntarily because he was never told that he would be forever ineligible for admission to the U.S., or for naturalized citizenship.

**4. THE COURT FAILED TO GIVE APPELLANT AN "APPROPRIATE WARNING" REGARDING THE CONSEQUENCES OF A GUILTY PLEA TO ASSAULT 2, AND THEREBY VIOLATED RCW 10.40.200.**

Wholly aside from whether or not his guilty plea violated constitutional standards, Hassan submits that it violated the *statutory* requirements of RCW 10.40.200. A similar argument was raised in State v. Littlefair, 112 Wn. App. 749, 51 P.3d 116 (2002).

Littlefair was a Canadian citizen and a resident alien in the United States. He plead guilty to growing marijuana plants. Although his written plea statement contained a sentence stating that a guilty plea was grounds for deportation, exclusion from admission to the United States and denial of naturalization, this sentence was stricken by having large capital X's typed through the paragraph designation of ¶ 6(n). Littlefair's attorney mistakenly assumed that Littlefair was a U.S. citizen and therefore never advised him of the immigration consequences of his plea. Two years after his plea and sentence INS notified Littlefair that it intended to deport him. Littlefair then moved to withdraw his guilty plea, and the Superior Court

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ineligible for admission to the United States.

denied his motion. This Court reversed, holding that he was statutorily entitled to withdraw his plea.

Like appellant Hassan, Littlefair raised due process and ineffective assistance of counsel claims. But this Court found it unnecessary to decide the first two claims, because Littlefair's statutory claim based upon RCW 10.41.200 was dispositive. *Id.* at 763. RCW 10.41.200(1) provides:

The legislature finds and declares that in many instances involving an individual who is not a citizen of the United States charged with an offense punishable as a crime under state law, a plea of guilty is entered without the defendant knowing that a conviction of such offense is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. Therefore, ***it is the intent of the legislature in enacting this section to promote fairness to such accused individuals by requiring in such cases that acceptance of a guilty plea be preceded by an appropriate warning of the special consequences for such a defendant which may result from the plea.*** It is further the intent of the legislature that at the time of the plea no defendant be required to disclose his or her status to the court.

RCW 10.41.200(1) (bold italics added).

Despite the fact that his written plea statement contained language informing him that a guilty plea was grounds for his deportation, this Court held that Littlefair was misled by the X's that were typed over the paragraph number, indicating incorrectly that this paragraph did not apply. *Id.* at 765. This Court found a *statutory* violation of the command that the defendant must receive "an appropriate warning." This statutory violation

existed wholly independent of any constitutional violation which might have occurred.

Our conclusion is not affected by whether Littlefair had or lacked a constitutional right to be advised of the deportation consequences of his plea. The Legislature can create statutory rights not found in the constitution, and it did that when it enacted RCW 10.40.200.

Littlefair, 112 Wn. App. at 766 (footnotes omitted).

Moreover, in deciding that a statutory violation had occurred, this Court noted that it was completely unnecessary to determine whether deportation was still properly classified as a collateral consequence, or had instead become a direct consequence. For RCW 10.41.200 purposes, it simply does not matter: “In making this statement, we do not consider the current viability of the somewhat arbitrary distinction between a plea’s ‘direct’ and ‘collateral’ consequences.” Id. at 766, n.46.

In the present case, while Hassan’s written plea statement did contain an advisement – written in English – that a guilty plea is “grounds” for deportation, exclusion or denial of naturalization, it failed to advise Hassan that these consequences were mandatory, absolute, and utterly unavoidable. Thus, even assuming, *arguendo*, (1) that the written advisement was properly translated into Arabic for him, and (2) that Mr. Hassan understood it, this warning was still incomplete and misleading. Coupled with Krieg’s acknowledgment that she told Hassan that

deportation was “probable” or “possible,” the information she gave him was misleading. Her advice incorrectly implied that it was possible to avoid deportation, exclusion and denial of naturalization after pleading guilty to the charged offense, when in fact it was not possible.

The Legislature dictated that a defendant must receive an “appropriate warning.” At the time the statute was enacted, an advisement that deportation, exclusion and denial of naturalization were all possible consequences, was an appropriate warning, because that was an accurate statement at that time. But after 1996 that was no longer an appropriate warning because what formerly was merely possible, was henceforth virtually certain and unavoidable. An advisement that is no longer an accurate statement of the law cannot be deemed an “appropriate warning.”

There is no Washington case law which discusses the meaning of the phrase “an appropriate warning” for purposes of RCW 10.40.200. And the Superior Court judge below specifically declined to rule on Hassan’s argument that the advisement stated on the written plea form was statutorily inadequate. RP I, 59. However, the case of State v. Rawson, 94 Wn. App. 293, 971 P.2d 578 (1999), presented an analogous situation. In that case the defendant was informed there was a possibility that the sentencing judge *might* impose a term of community placement, but he was *not* told that in fact it was a certainty that such a term *would* definitely be

imposed because it was mandatory. Rawson's plea form stated: "In addition to confinement, the Judge *may* sentence me to community placement for at least one year." Id. at 295 (bold italics added). This Court, applying the Ross test, held that telling the defendant that he "may" receive such a consequence was not sufficient to render the plea valid:

***Neither the trial court nor the plea forms explicitly warned Rawson that, as a consequence of his pleas, he would definitely receive twelve months community placement after his term of incarceration.*** The plea form states that the judge "may" sentence the defendant to community placement. CrR 4.2(g) suggests a form containing a warning that the judge "will" sentence the defendant to community placement (unless the paragraph is stricken as inapplicable). ***This plea form is inadequate to inform a defendant that community placement is mandatory and will definitely be imposed if the defendant pleads guilty.*** If the trial court fails to explicitly warn the defendant that community placement will be imposed as a consequence of the guilty plea, and such an inadequate form is used, ***the warning to the defendant is unacceptable under Ross.***

Rawson, 94 Wn. App. at 198 (bold italics added). Accordingly, this Court held that Rawson was entitled to withdraw his guilty plea, and the trial court should have granted his motion for such relief.

A term of community placement is a direct consequence of a guilty plea, and therefore a failure to correctly advise a defendant that imposition of a term of community placement is mandatory violates due process. For purposes of RCW 10.40.200, the legislature has dictated that a defendant receive an "appropriate warning" regarding the immigration consequences

of his plea. Thus, RCW 10.40.200 treats immigration consequences as analogous to the “direct consequences” of a guilty plea. In Rawson this Court found that a misleading advisement that community placement “may” be imposed constituted a due process constitutional violation. Similarly, a misleading advisement that immigration consequences “may” be imposed should be deemed to be a statutory violation of the “appropriate warning” requirement of RCW 10.40.200.

The Oregon Court of Appeals reached a similar conclusion in Gonzalez v. Oregon, 191 Or. App. 587, 83 P.3d 921, *review allowed*, 337 Or. 247, 95 P.3d 728 (2004), although in that case relief was granted upon ineffective assistance of counsel grounds. The rationale, however, was much the same. The prosecution argued that a defense attorney who simply advised his client that a plea to a specific crime “may” lead to deportation had rendered adequate legal advice. But the Oregon appellate court disagreed, noting the misleading nature of such advice:

In the state’s view, an attorney fulfills the duty to assist an alien client by informing the client that a guilty plea to an aggravated felony “may” be subject to deportation *implies that there is a chance, potentially a good chance, that the person will not be deported. That is an incomplete and therefore inaccurate statement* if made to an alien considering whether to plead guilty to an aggravated felony.

Gonzalez, 83 P.3d at 924-25 (bold italics added).

Whenever an “appropriate warning” is not given, RCW 10.40.200 *requires*<sup>14</sup> that the defendant’s motion to withdraw his guilty plea must be granted. Since appellant Hassan did not receive an “appropriate warning” of the true, automatic and unavoidable immigration consequences of his guilty plea, under RCW 10.40.200 he is statutorily entitled to withdrawal of his guilty plea.

**5. ATTORNEY KRIEG’S ERRONEOUS ADVICE REGARDING THE IMMIGRATION CONSEQUENCES OF A CONVICTION FOR ASSAULT 2 DEPRIVED HASSAN OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.**

**a. Standard of Appellate Review**

To prevail on a claim of ineffective assistance of counsel a defendant must prove that his counsel’s performance fell below an objective standard of reasonableness and that this deficiency in his counsel’s performance prejudiced him. Strickland v. Washington, 466 U.S. 668 (1984). Accord State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

In the present case, the Superior Court did not specifically rule on

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<sup>14</sup> “If, after September 1, 1983, the defendant has not been advised as required by this section, and the defendant shows that conviction of the offense to which the defendant pleaded guilty may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant’s motion, *shall vacate the judgment and permit the defendant to withdraw the plea of guilty and enter a plea of not guilty.*” RCW 10.40.200(2) (bold italics added).

either of these prongs of the Strickland test. Reading between the lines, however, it would appear that the Superior Court based its ruling on a determination that Mr. Hassan failed to establish the prejudice prong of the Strickland test. In her oral ruling, Judge Grant stated that “not only did [Hassan] want to go back to Egypt but he understood regardless that he would be going back to Egypt.” Thus it appears that Judge Grant concluded that it was unnecessary to address the deficiency prong. She appears to have concluded that even assuming that attorney Krieg’s performance was deficient, that deficiency did not prejudice the defendant because he would have plead guilty anyway even if he had been properly advised that deportation was absolutely required for anyone, like Hassan, who plead guilty to a felony offense such as Assault 3.

Regardless of exactly what her reasoning was, Judge Grant’s ruling denying Mr. Hassan’s ineffective assistance of counsel (“IAC”) claim is reviewable on appeal under a *de novo* standard of review. Ineffective assistance of counsel is a mixed question of law and fact, Strickland, 466 U.S. at 698, and therefore such claims are reviewed on appeal under a *de novo* review standard. In re Personal Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). Accord In re Personal Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); State v. S.M., 100 Wn. App. 401, 409,

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996 P.2d 1111 (2000).

b. **For Sixth Amendment Purposes, It is Irrelevant Whether Immigration Consequences are Deemed Direct of Collateral.**

As this Court noted in State v. Stowe, 71 Wn. App. 182, 187, 858 P.2d 267 (1993), for Sixth Amendment purposes, “the question here is not whether counsel failed to inform defendant of collateral consequences, but rather whether counsel’s performance fell below the objective standard of the guilty plea.” In Stowe this Court treated discharge from the Army as a “collateral” consequence of the defendant’s guilty plea to Assault 2. Nevertheless this Court found defense counsel’s failure to accurately advise the defendant that a conviction would lead to an Army discharge constituted deficient conduct and was a basis for finding a denial of the right to effective assistance of counsel. Id. at 189.

More recently the U.S. Supreme Court strongly suggested that failure to inform a defendant of the likely immigration consequences of a guilty plea would amount to incompetent representation:

Even if the defendant were not initially aware of [possible waiver of deportation under the Immigration and Nationality Act’s prior] § 212(c), *competent defense counsel*, following the advice of numerous practice guides, would have advised him concerning the provision’s importance.

INS v. St. Cyr, 533 U.S. 289, 323 n.50 (2001) (italics added).

[T]he American Bar Association’s Standards for Criminal

Justice provide that, if a defendant will face deportation as a result of a conviction, defense counsel should fully advise the defendant of these consequences.

Id. at 323, n.48.

c. **Where Defense Counsel Misinforms the Defendant, and Gives Inaccurate or Incomplete Advice, Such as Failing to Explain That Deportation is Now Mandatory, Courts Have Found Ineffective Assistance of Counsel.**

Recently, both the Ninth and Second Circuits have found ineffective assistance of counsel where the defendant's attorney failed to accurately explain that deportation was a mandatory and unavoidable consequence of a guilty plea. In Couto the Court held that it "need not reconsider whether the standards of attorney competence have evolved to the point that a failure to inform a defendant of the deportation consequences of a plea would by itself now be objectively unreasonable," because the record showed that the attorney in that case had misled the defendant about the likely consequences of a guilty plea. In that case defense counsel assured the defendant "that they could deal with her immigration problems after the guilty plea, and said there were many things that could be done to prevent her from being deported, including asking the judge for a letter recommending against deportation." Couto, 311 F.3d at 183. This advice was incorrect, because once a guilty plea had been entered deportation was automatic, and there was nothing that could be done to stop it. Therefore, the Second Circuit held that

there was ineffective assistance, and remanded the case with an order that the defendant be allowed to withdraw her guilty plea.

A similar result was reached in United States v. Kwan, 407 F.3d 1005 (9<sup>th</sup> Cir. 2004), where the Circuit Court granted relief in a proceeding on a petition for a writ of coram nobis. In that case counsel told the defendant that “at his plea colloquy the judge would tell him that he might suffer immigration consequences” but “that there was no serious possibility that his conviction would cause him to be deported.” Id. at 1008. Counsel was unaware of the changes made by the IIRIRA in 1996, and thus the defendant was induced to enter a plea of guilty to a crime that made it virtually certain that he would be deported. Id. at 1009. The Ninth Circuit found that defense counsel’s erroneous advice to the defendant was objectively unreasonable deficient conduct, and that such deficient conduct prejudiced the defendant. Id. at 1017-1018.

Whereas the 9th and 2nd Circuits have found ineffective assistance where the facts show incomplete or misleading advice, the Supreme Court of New Mexico has gone further. Recently that Court held “that an attorney’s nonadvice to an alien defendant on the immigration consequences of a guilty plea would also be deficient performance.” State v. Paredes, 136 N.M. 533, 538, 101 P.3d 799 (2004). The New Mexico Court refused to draw any distinction between misadvice and non-advice for three reasons:

First, in many cases, there will be only a tenuous distinction between the two. Whether an attorney provides no advice regarding immigration consequences or general advice that a guilty plea “could,” “may,” or “might” have an effect on immigration status, the consequence is the same: the defendant did not receive information sufficient to make an informed decision to plead guilty. Second, distinguishing between misadvice and non-advice would “naturally create a chilling effect on the attorney’s decision to offer advice,” because of the attorney’s advice regarding immigration consequences is incorrect, the attorney’s representation may be deemed “ineffective.” John Francis, *Failure to Advise Non-Citizens of Immigration Consequences of Criminal Convictions: Should This be Grounds to Withdraw a Guilty Plea?*, 36 U. Mich. J. L. Reform 691, 726 (2003). Third, not requiring the attorney to specifically advise the defendant of the immigration consequences of pleading guilty would “place[] an affirmative duty to discern complex legal issues on a class of clients least able to handle that duty.” [Citation].

Paredes, 136 N.M. at 538-39.

In the present case, the Superior Court never directly addressed the deficient conduct prong of the Strickland test, and seemingly held instead that Hassan had failed to establish the prejudice prong of the test. “A defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226. The Supreme Court recently reaffirmed this point in Woodford v. Visciotti, 537 U.S. 19, 22 (2002):

Strickland held that to prove prejudice the defendant must establish a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different,” *id.*, at 694, 80

L.Ed.2d 674, 104 S.Ct. 2052 (emphasis added); *it specifically rejected* the proposition that the defendant had to prove it more likely than not that the outcome would have been altered, *id.*, at 693, 80 L.Ed.2d 674, 104 S.Ct. 2052.

(Bold italics added).

In the present case the Superior Court's assessment of the showing of prejudice was made without awareness of the defendant's severe medical problems, and without consideration of the fact that attorney Krieg appears to have misunderstood the interpreter. These problems are discussed in the personal restraint petition which accompanies this direct appeal.<sup>15</sup>

Moreover, as documented in the affidavits accompanying his personal restraint petition, Hassan's medical problems left him in a state where he was not competent to understand anything that his attorney was telling him. Hassan did not understand that he would be deported, or that he would be forever ineligible for citizenship or for admission to the United States. The new facts outlined in the PRP, together with those in the record of the direct appeal, do establish that there is a reasonable likelihood that Hassan would not have plead guilty to Assault 2 DV had he understood the immigration consequences of such a plea.

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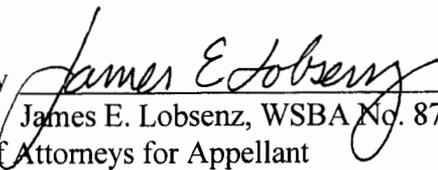
<sup>15</sup> See Declaration of Abou-Zaki.

**E. CONCLUSION**

For the reasons stated above, appellant asks this Court to reverse the Superior Court's decision, and to remand with directions that Hassan be permitted to withdraw his guilty plea and to enter a plea of not guilty.

DATED this 23rd day of March, 2006.

CARNEY BADLEY SPELLMAN, P.S.

By  \_\_\_\_\_  
James E. Lobsenz, WSBA No. 8787  
Of Attorneys for Appellant

NO. 34072-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

ALAA FEKRY AHMED HASSAN,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
06 MAR 24 AM 10:55  
STATE OF WASHINGTON  
BY 

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CERTIFICATE OF SERVICE

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The undersigned, under penalty of perjury, hereby declares as follows:

1. I am a lawful permanent resident of the United States and over the age of 18 years and am not a party to the within cause.
2. I am employed by the law firm of Carney Badley Smith & Spellman, P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600, Seattle WA 98104.
3. On March 24, 2006, I caused to be served via legal messenger, one copy of the following documents on:

Mr. Sven Karl Nelsen  
Pierce County Prosecuting Attorneys Office  
930 Tacoma Ave. S. Room # 946  
Tacoma, WA 98402-2171

ORIGINAL

Entitled exactly:

**BRIEF OF APPELLANT**

DATED: March 24, 2006 .



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Lily T. Laemmle