

NO. 34072-1-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ALAA HASSAN,

Appellant.

CONSOLIDATED REPLY BRIEF OF APPELLANT/PETITIONER
HASSAN

FILED
COURT OF APPEALS
06 AUG 31 PM 2:18
STATE OF WASHINGTON
BY [Signature]

James E. Lobsenz
Attorney for Appellant

Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	v
A. <u>ARGUMENT IN REPLY</u>	1
1. DEPORTATION, EXCLUSION FROM ENTRY, AND INELIGIBILITY FOR CITIZENSHIP, ARE ALL AUTOMATIC CONSEQUENCES OF A PLEA TO AN AGGRAVATED FELONY. THEREFORE DUE PROCESS REQUIRES THAT THE COURT INFORM A PLEADING DEFENDANT OF THEM.....	1
a. Divisions I and III Have Relied Upon the Fact That Deportation Proceedings are Initiated by “Another Agency” of Government Not Controlled by the Court.....	1
b. <u>Martinez-Lazo</u> and <u>Jamison</u> Are In Conflict With Both Washington Supreme Court and U.S. Supreme Court Precedent.....	3
c. Even Assuming That Deportation is Still a Collateral Consequence Because It Is Initiated By Another Agency, The Automatic Ineligibility for Citizenship and The Automatic Ineligibility to Enter the Country Are Not Consequences That Require Initiating Action by Another Agency. Therefore They Are Direct Consequences.....	4

2. THE STATE (1) MISREPRESENTS THE RECORD AS TO THE DEFENDANT’S UNDERSTANDING OF THE IMMIGRATION CONSEQUENCE WARNING ON THE WRITTEN PLEA FORM; AND (2) IGNORES THE CENTRAL QUESTION OF WHETHER ADVICE THAT A PLEA MAY HAVE IMMIGRATION CONSEQUENCES REMAINS AN “APPROPRIATE WARNING” WHEN CHANGES IN FEDERAL LAW DICTATE THAT THE PLEA DEFINITELY AND AUTOMATICALLY WILL HAVE SUCH CONSEQUENCES.

a. Misrepresenting the Record on Appeal.....6

b. The State Ignores The Central Question of Whether Advice That a Plea May Have Immigration Consequences Remains an “Appropriate Warning” When Changes in Federal Law Dictate That The Plea Definitely Will Have Such Consequences.....9

3. THE SUPERIOR COURT NEVER RESOLVED THE DISPUTED FACTUAL ISSUE AS TO WHAT ATTORNEY KRIEG ACTUALLY TOLD MR. HASSAN ABOUT THE PROBABILITY, POSSIBILITY, OR CERTAINTY, OF DEPORTATION. THE STATE MISREPRESENTS THE RECORD WHEN IT IMPLIES THAT THE SUPERIOR COURT RESOLVED THIS ISSUE IN FAVOR OF ATTORNEY KRIEG BY DECIDING THAT SHE ULTIMATELY TOLD HASSAN HE “WOULD” DEFINITELY BE DEPORTED.....12

4. THE SUPERIOR COURT’S RULING WAS BASED ON A FALSE ASSUMPTION REGARDING THE MEANING OF THE WORD “HOME” WHEN USED BY HASSAN. AT THE VERY LEAST HASSAN IS ENTITLED TO A REFERENCE HEARING SO THAT HE CAN ESTABLISH THAT HE NEVER SAID HE WANTED TO GO BACK TO EGYPT..... 14

5. THE STATE NEVER EVEN ADDRESSES THE IAC CLAIM BASED ON FAILURE TO ADVISE HASSAN THAT HE WOULD AUTOMATICALLY AND FOREVER BE INELIGIBLE FOR CITIZENSHIP OR RE-ENTRY INTO THE USA. 15

6. HASSAN’S DEPORTATION ORDER IS A DISABILITY THAT RESULTED FROM THE STATE COURT CONVICTION THAT HE IS CHALLENGING. WHETHER OR NOT DEPORTATION IS A COLLATERAL CONSEQUENCE OF A PLEA IS IRRELEVANT TO THE ISSUE OF WHETHER HASSAN IS UNDER A RESTRAINT FOR PRP PURPOSES..... 17

7. THE FAILURE OF ATTORNEY KRIEG TO REQUEST A COMPETENCY EVALUATION, OR EVEN TO INVESTIGATE THE ISSUE OF COMPETENCY, AMOUNTED TO INEFFECTIVE ASSISTANCE. 19

8. AT THE VERY LEAST, PETITIONER HAS SUFFICIENTLY REBUTTED THE PRESUMPTION OF VOLUNTARINESS TO BE ENTITLED TO A REFERENCE HEARING ON THAT ISSUE, SO THAT A JUDGE CAN MAKE FINDINGS OF FACT AS TO PETITIONER’S MENTAL CONDITION. 26

9. THE STATE IGNORES BOTH THE FACT THAT THE FACTUAL BASIS OF A PLEA MUST BE PRESENTED ON THE RECORD AT THE TIME THE PLEA IS ENTERED, AND THE FACT THAT THIS RULE APPLIES TO FACTUAL BASIS CHALLENGES MADE IN PRP'S AS WELL AS TO CHALLENGES RAISED ON DIRECT APPEAL.....29

B. CONCLUSION.....30

TABLE OF AUTHORITIES

Page

STATE CASES

<i>Born v. Thompson</i> , 154 Wn.2d 749, 117 P.3d 1098 (2005)	18
<i>Department of Ecology v. Campbell</i> , 146 Wn.2d 1, 43 P.3d 4 (2002)	10
<i>Diaz v. State</i> , 444 N.E.2d 340 (Ind. App. 1983).....	20
<i>Hernandez v. State</i> , 978 S.W.2d 137 (Tex. App. 1998)	20
<i>In re Restraint of Keene</i> , 95 Wn.2d 203, 622 P.2d 360 (1981)	29, 30
<i>In re Restraint of Powell</i> , 92 Wn.2d 882, 602 P.2d 711 (1979)	18
<i>In re Restraint of Evans</i> , 31 Wn. App. 330, 641 P.2d 722 (1982)	29
<i>In re Restraint of Rice</i> , 118 Wn.2d 876, 828 P.2d 1086 (1992)	28, 29
<i>In re Restraint of Taylor</i> , 31 Wn. App. 254, 640 P.2d 737 (1982)	29
<i>State v. Aquino-Cervantes</i> , 88 Wn. App. 699, 945 P.2d 767 (1997)	21
<i>State v. Barton</i> , 93 Wn.2d 301, 609 P.2d 1353 (1980)	2, 3
<i>State v. Constantine</i> , 48 Wash. 218, 93 P. 317 (1908).....	20

	<u>Page</u>
<i>State v. Crenshaw</i> , 27 Wn. App. 326, 617 P.2d 1041 (1980), <i>affirmed</i> 98 Wn.2d 789, 659 Wn.2d 488 (1983).....	20
<i>State v. Jamison</i> , 105 Wn. App. 572, 20 P.3d 1010 (2001)	2
<i>State v. Lopez</i> , 74 Wn. App. 264, 872 P.2d 1131 (1994)	20
<i>State v. Martinez-Lazo</i> , 100 Wn. App. 869, 999 P.2d 1275 (2000)	2
<i>State v. Mlo</i> , 335 N.C. 353, 440 S.E.2d 98 (1994).....	20
<i>State v. Paredes</i> , 136 N.M.533, 101 P.3d 799 (2004).....	11
<i>State v. Rawson</i> , 94 Wn. App. 293, 971 P.2d 578 (1999)	12
<i>State v. Wilbur</i> , 110 Wn.2d 16, 749 P.2d 1295 (1988)	10

FEDERAL CASES

<i>Brady v. United States</i> , 397 U.S. 742 (1970)	1
<i>United States v. Amador-Leal</i> , 276 F.3d 511 (9th Cir. 2002).....	4, 5
<i>United States v. Couto</i> , 311 F.3d 179 (2d Cir. 2002).....	2
<i>United States v. Littlejohn</i> , 224 F.3d 960 (9th Cir. 2000).....	4, 5

	<u>Page</u>
<i>United States v. Ruiz</i> , 536 U.S. 622 (2002)	1

STATE STATUTES

RAP 16.4(b).....	17, 18
RAP 16.11(a).....	28
RAP 16.11(b).....	15
RAP 16.12	28
RCW 7.36.010	18
RCW 10.40.200(1)	9, 12

A. ARGUMENT IN REPLY

Appellant/petitioner Alaa Hassan submits the following consolidated brief in reply to the two response briefs submitted by the State of Washington in response to Hassan's opening brief of appellant and his personal restraint petition.¹

- 1. DEPORTATION, EXCLUSION FROM ENTRY, AND INELIGIBILITY FOR CITIZENSHIP, ARE ALL AUTOMATIC CONSEQUENCES OF A PLEA TO AN AGGRAVATED FELONY. THEREFORE DUE PROCESS REQUIRES THAT THE COURT INFORM A PLEADING DEFENDANT OF THEM.**
 - a. Divisions I and III Have Relied Upon the Fact That Deportation Proceedings are Initiated by "Another Agency" of Government Not Controlled by the Court.**

The prosecution correctly notes that Divisions I and III have rejected the contention that deportation is now a direct consequence of a felony conviction. This Court, however, is bound by decisions of the U.S. Supreme Court and the Washington Supreme Court. The former has consistently held that pleading defendants must be told of the "likely consequences" of their plea. Brady v. United States, 397 U.S. 742, 748 (1970); United States v. Ruiz, 536 U.S. 622, 629 (2002). The latter has

¹ The State's two response briefs taken together comprise 58 pages. Appellant/petitioner Hassan's consolidated reply brief in support of both his direct appeal contentions and his PRP contentions is 30 pages long. Although Hassan believes that in this situation he is entitled to 50 pages of briefing, and is not limited to 25 pages, in case he is mistaken in this respect he has submitted a motion for leave to file this 30 page brief which is slightly over the limit of 25 pages for a normal reply brief in a direct appeal.

consistently held that defendants must be informed of the “direct” consequences of their plea, which it defined as a consequence that was “definite, immediate, and largely automatic.” State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980).

After the 1996 amendments to federal immigration laws it was obvious that deportation, exclusion, and ineligibility are now not only likely consequences, they are also automatic consequences. Nevertheless, Divisions I and III have concluded that even though deportation is now an automatic consequence, it still is not a “direct” consequence because the consequence is not imposed by the Court, but rather by a different agency of government. State v. Martinez-Lazo, 100 Wn. App. 869, 877, 999 P.2d 1275 (2000). Division I reached the same conclusion in State v. Jamison, 105 Wn. App. 572, 593, 20 P.3d 1010 (2001).

Neither Division One nor Division Three explained why it was material to the issue of voluntariness that the consequence was imposed by a different branch of government. The Second Circuit has recognized that this fact is immaterial, because “when an event is a certain consequence of a court decision, it is meaningless to say that the court did not ordain that event; any action taken by other institutions are purely ministerial.” United States v. Couto, 311 F.3d 179, 190, n.10 (2d Cir. 2002). Moreover, the constitutional requirement of voluntariness requires a demonstration

that the defendant understands what will happen to him as a result of his plea. The fact that a defendant does not understand what will definitely happen to him once he pleads is not altered by the fact that it is an executive agency of government rather than the court which will ultimately impose the automatic consequence.

b. Martinez-Lazo and Jamison Are In Conflict With Both Washington Supreme Court and U.S. Supreme Court Precedent.

Divisions I and III have thus imposed an additional requirement on plea consequence analysis – the consequence must be one carried out by the judicial branch, and cannot be one imposed by a different agency, even if the consequence is an automatic result of a court’s acceptance of the plea. Neither the U.S. Supreme Court nor the Washington Supreme Court has ever imposed such a requirement. By engrafting a new requirement onto plea-voluntariness analysis, Divisions I and III have modified the controlling state and federal supreme court decisions. This they have no power to do. This Court should follow Barton, and its progeny. These immigration consequences are now automatic and definite, and thus under Barton a court must inform a defendant of them or else any plea entered is not voluntary. The U.S. Supreme Court has never suggested that there be any distinction between direct or collateral consequences, and has simply commanded that a defendant be informed of all likely consequences, and

thus under that court's precedent, the failure of the Court to inform him of the virtually certain immigration consequences also causes the plea to be constitutionally invalid.

c. Even Assuming That Deportation is Still a Collateral Consequence Because It Is Initiated By Another Agency, The Automatic Ineligibility for Citizenship and The Automatic Ineligibility to Enter the Country Are Not Consequences That Require Initiating Action by Another Agency. Therefore They Are Direct Consequences.

As noted in appellant's opening brief, the Ninth Circuit has ruled that ineligibility for food stamps is a direct consequence of a guilty plea because it does follow automatically, because it is self-executing. United States v. Littlejohn, 224 F.3d 960 (9th Cir. 2000). No further action is required by any other agency; as soon as the plea is entered and accepted, the federal statute in question has an immediate benefit-stripping effect. Thus the Littlejohn Court rejected the Government's contention that food stamp ineligibility was not a direct consequence of the guilty plea.

In the present case the State argues that this Court should follow the approach taken in United States v. Amador-Leal, 276 F.3d 511 (9th Cir. 2002). There the Ninth Circuit *distinguished Littlejohn*, and held that because deportation is not a self-executing consequence of a plea, it remains a collateral consequence even though it is virtually automatic that the executive agency responsible for enforcement of immigration laws

will eventually commence a deportation proceeding. This non self-executing feature of deportation distinguished it from the self-executing feature of food stamp ineligibility, which remains, in the Ninth Circuit's view, a direct consequence of a plea.

In his opening brief, Hassan argued that even if it is correct to continue to treat deportation as a collateral consequence of his plea, the other consequences of immediate ineligibility for naturalized citizenship and immediate ineligibility for entry into the United States were direct consequences because they are both automatic and self-executing. *The State of Washington has not responded to this argument.*

The State offers no explanation as to why these two consequences are not direct consequences of a plea, and why his plea should not be deemed involuntary because he was not informed and did not understand them. Even assuming that he was told and understood that he would be deported from the U.S., no one claims that he understood that once deported he could never come back to the U.S. and could never apply for citizenship to the U.S. Thus, under the analytical approach employed by the Ninth Circuit in Littlejohn, a case which Amador-Leal did not overrule, Hassan's guilty plea was not made voluntarily because he was not informed of these two automatic, self-executing "direct" consequences.

2. **THE STATE (1) MISREPRESENTS THE RECORD AS TO THE DEFENDANT’S UNDERSTANDING OF THE IMMIGRATION CONSEQUENCE WARNING ON THE WRITTEN PLEA FORM; AND (2) IGNORES THE CENTRAL QUESTION OF WHETHER ADVICE THAT A PLEA MAY HAVE IMMIGRATION CONSEQUENCES REMAINS AN “APPROPRIATE WARNING” WHEN CHANGES IN FEDERAL LAW DICTATE THAT THE PLEA DEFINITELY AND AUTOMATICALLY WILL HAVE SUCH CONSEQUENCES.**

- a. **Misrepresenting the Record on Appeal**

Without citation to any place in the transcripts of the hearings, the State asserts: “The defendant testified that his interpreter translated the entire plea form to him and that he had no trouble understanding Ms. Krieg or his interpreter.” *Brief of Respondent*, at 26. This representation that Hassan admits that the interpreter translated “the entire plea form to him” is not borne out by the record, however, since Hassan explicitly testified that the interpreter never told him anything about deportation or immigration laws. Hassan testified: “He showed me something for this. He translate for me. He never said something for deport or anything from immigration.” RP II, 20.² Hassan answered: “He translate for me

² The prosecutor never asked Hassan a question phrased in terms of whether the interpreter translated “the entire plea form.” Instead he asked a fairly ambiguous question regarding “all that language”: “When you signed the statement of defendant on plea of guilty, the interpreter went over all *that* language with you, didn’t he?” RP II, 19. It is not clear what “all *that* language” referred to. Because the question is limited to the moment “when you signed,” it appears to refer only to the language immediately prior to the defendant’s signature which provides: “My lawyer has explained to me, and we have fully discussed, all of the above paragraphs. I understand them all. I have been given

everything. He never said if you do this and you go, nobody tell me this.”

RP II, 20.

Hassan’s demonstrated inability to fully understand the prosecutor’s questions was matched by the prosecutor’s inability to understand his answers, thus demonstrating the language barrier problem. For example, Hassan’s answer to the prosecutor’s question “Did you have any questions of the interpreter in understanding what he was reading to you?” was so grammatically convoluted that the prosecutor said: “I didn’t understand,” and asked him to answer again. RP II, 20. Indeed, Hassan’s answer was not precisely responsive, for when asked if he had any questions about what the interpreter “was reading to you,” Hassan’s response did not acknowledge that anything was actually read to him; he responded instead that the translator “showed me something for this.” RP II, 20.

Although the prosecutor misrepresents Hassan’s hearing testimony as an admission that the entire plea form was translated into Arabic for him, this fact is explicitly denied in Hassan’s PRP declaration:

Mr. Abou-Zaki did read some parts of the document to me

copy of this “Statement of Defendant on Plea of Guilty.” I have no further questions to ask the judge.” It should be borne in mind that Mr. Hassan “cannot read or write English,” Decl. Hassan, ¶ 29, so providing him with a copy of the plea form is a thoroughly meaningless gesture. In addition, it is doubtful that Hassan could understand that the colloquial phrase “went over” meant that he was being asked if the interpreter read out loud in Arabic what it said on the plea form. To Hassan, it may have seemed that he was being asked simply if he had been given a copy of the form.

in Arabic, but he did not translate the whole thing. He only read some parts of it to me. He did not read me the part of the document labeled paragraph 6(j) which talks about deportation and other related things. Dixie Krieg did not read me this part of the document either.

Decl. Hassan, ¶ 34.

The interpreter himself does not recall whether attorney Krieg ever said anything to Hassan about immigration matters or consequences.

Decl. Abou-Zaki, ¶ 9. But the interpreter does state that Hassan's "understanding and his command of English is rather poor." *Id.*, ¶ 4.

The prosecution's assertion that Hassan admitted having no trouble understanding attorney Krieg is also not borne out by the record. When asked what his understanding was about immigration consequences of a guilty plea Hassan replied "I don't have any idea with this." RP II, 17. When asked if he listened to his attorney talk when he entered his plea he replied, "Yes, yes, I listened because I can't understand everything from this time." RP II, 18.

It is undisputed that Hassan cannot read or write English, had only a primary school education in Egypt, and left school to work as a carpenter at age 14. *Decl. Hassan*, ¶¶ 29, 3-4. At the time he plead guilty his English was so poor that he could not even write his last name in English, as evidenced by his first-name-only signature on the plea form. And his understanding of legal terms was very poor. For example, Mr. Hassan

states: "I do remember hearing people talk about a 'no-contact' order, but I did not understand the word 'contact.'" *Decl. Hassan*, ¶ 46. Moreover, even when English words were translated for him into Arabic, he could not always hear them: "Mr. Abou-Zaki was there and he was translating what people were saying into Arabic. He was translating while they were talking, so it was difficult to hear what he was saying in Arabic." *Decl. Hassan*, ¶ 40. In his declaration Hassan states, "There was a great deal I did not understand when I was in Court." *Id.*, ¶ 42.

Ultimately, the best evidence of what Mr. Hassan understood comes from the translator. As the only person who is fluent in both Arabic and English, and who was situated so as to be able to evaluate Mr. Hassan's comprehension of what his attorney told him, Mr. Abou-Zaki is in the best position to know what Hassan was, and was not, understanding. He concludes: "I am 100% certain that he did not understand a single word she said." *Decl. Abou-Zaki*, ¶ 8.

b. The State Ignores The Central Question of Whether Advice That A Plea May Have Immigration Consequences Remains An "Appropriate Warning" When Changes in Federal Law Dictate That The Plea Definitely Will have Such Consequences.

Even assuming that the translator did translate paragraph 6(j) of the plea form, the question remains whether that statement is sufficient to comply with the command of RCW 10.40.200(1) that the defendant be

given an “appropriate warning.” The prosecution essentially ignores this question, arguing that since the warning given is consistent with the language set forth in subsection (2) of the statute, such language must be deemed legally sufficient to constitute an “appropriate warning” for purposes of the preceding subsection. But this begs the question: Would the Legislature consider a warning consistent with subsection (2) to be an “appropriate warning” even after Congress amended the immigration laws so as to change the “potential consequences” identified in subsection (2) into automatic consequences that inevitably would result in every case?

Ultimately, this is an issue of statutory construction: How should a court construe the term “appropriate warning” under these circumstances? The cardinal rule of statutory construction is to interpret a statute so as to carry out the intent of the legislature. Dept. of Ecology v. Campbell, 146 Wn.2d 1, 9, 43 P.3d 4 (2002); State v. Wilbur, 110 Wn.2d 16, 18, 749 P.2d 1295 (1988). In this case the legislature expressly declared its intent, stating: “[I]t is the intent of the legislature in enacting this section to ***promote fairness*** to such accused individuals [noncitizens] 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.” (Bold italics added).

At the time this statute was enacted, the immigration consequences

of a plea to an aggravated felony were merely potential consequences, since the courts and executive officials retained the discretion to prevent such consequences. Accordingly the legislature directed that accused noncitizens must be told of the immigration consequences which “*may* result from the plea.” (Italics added). In light of the 1996 amendments to the federal immigration laws, Congress made these potential consequences, mandatory consequences. So the question for this Court is, if the Washington Legislature required courts to warn noncitizen defendants of potential immigration consequences, what would the Legislature intend with respect to mandatory consequences? Or to put it another way: How could anyone suppose that although the legislature thought that it would “promote fairness” to ignorant noncitizen accused criminal defendants to require that they be told of immigration consequences that they *might* face, but that it would not “promote fairness” to tell them more accurately that they would definitely and automatically be subjected to those immigration consequences? Cf. State v. Paredez, 136 N.M.533, 101 P.3d 799 (2004) (Holding that “general advice” that a guilty plea “could,” “may,” or “might” result in an immigration consequence was not meaningfully different from giving no advice at all, because the truth was that a guilty plea definitely would have such a consequence). The holding of State v. Rawson, 94 Wn. App. 293,

971 P.2d 578 (1999) supports the view that the more accurate advice is required. Rawson, at 198 (plea form that said defendant “may” receive community placement, but which did not “definitely” inform defendant that he would receive 12 months of community placement, was “inadequate”).

Obviously the legislative goal was to promote fairness by providing accurate knowledge of the immigration consequences of a guilty plea. Therefore, a court must construe an “appropriate warning” as one which advises a pleading noncitizen defendant that these consequences are mandatory and automatic. Since no one provided such a warning to Mr. Hassan, the acceptance of his plea violated the command of RCW 10.40.200(1), and accordingly he is entitled to have his plea set aside.

3. **THE SUPERIOR COURT NEVER RESOLVED THE DISPUTED FACTUAL ISSUE AS TO WHAT ATTORNEY KRIEG ACTUALLY TOLD MR. HASSAN ABOUT THE PROBABILITY, POSSIBILITY, OR CERTAINTY, OF DEPORTATION. THE STATE MISREPRESENTS THE RECORD WHEN IT IMPLIES THAT THE SUPERIOR COURT RESOLVED THIS ISSUE IN FAVOR OF ATTORNEY KRIEG BY DECIDING THAT SHE ULTIMATELY TOLD HASSAN HE “WOULD” DEFINITELY BE DEPORTED.**

The prosecution asserts in its brief that after providing initial advice that deportation was simply a possibility, that attorney Krieg ultimately told Hassan that in fact deportation would necessarily occur if

he plead guilty.³ It is true that attorney Krieg testified that she did say these things to Mr. Hassan. However, the prosecution ignores the salient fact that Mr. Hassan testified that she never told him any of these things, and that the interpreter could not recall Krieg speaking to Hassan about immigration consequences. More importantly, the prosecution ignores the fact that the Superior Court judge never resolved the conflict between their testimony. The Superior Court never entered any findings of fact and conclusions of law, and never resolved this conflict.⁴ To simply assert, therefore, that attorney Krieg did, in the end, tell Hassan he “would” be deported, is to simply assume, without any basis, that the Superior Court made a factual determination on this point and resolved the matter in favor of attorney Krieg.

In fact, it appears far more likely that the Superior Court said nothing on this disputed point because she decided that it was unnecessary to resolve this dispute. For even assuming that Krieg never did advise

³ Without citation to the record the prosecution’s brief asserts: “In the present case, defendant’s counsel initially advised defendant that he potentially would be deported. Ms. Krieg then told defendant that deportation was a probable consequence of defendant’s plea. After defendant’s interpreter explained that it was his experience that deportation was happening to all similarly situated inmates as defendant, Ms. Krieg told the defendant deportation would occur.” *Brief of Respondent*, at 31.

⁴ Similarly the prosecution simply asserts that attorney Krieg read the plea statement to Hassan, including the portion containing the immigration consequence advisement. *Brief of Respondent*, at 30. The State also asserts that Krieg “went through each line of the plea form with defendant . . .,” *Brief of Respondent*, at 31, ignoring the fact that Hassan testified that she did not do this, and the fact that the Superior Court never resolved this factual dispute either.

Hassan that he would be deported, the Court decided that Hassan was not prejudiced by any such failure to advise him accurately “because he want[ed] to go back to Egypt [and] he understood regardless that he would be going back to Egypt.” RP II, 59.⁵ Thus the Court ruled that Hassan would have pleaded guilty anyway, even if attorney Krieg had accurately advised him that deportation was a virtual certainty.

4. THE SUPERIOR COURT’S RULING WAS BASED ON A FALSE ASSUMPTION REGARDING THE MEANING OF THE WORD “HOME” WHEN USED BY HASSAN. AT THE VERY LEAST HASSAN IS ENTITLED TO A REFERENCE HEARING SO THAT HE CAN ESTABLISH THAT HE NEVER SAID HE WANTED TO GO BACK TO EGYPT.

As noted in Hassan’s PRP and the supporting declarations of Hassan and the translator Mr. Abou-Zaki, the Egyptian word that Mr. Hassan used -- *beit* – means home; it does not mean country or Egypt. *Decl. Abou-Zaki*, ¶¶ 10. The translator does not think that Hassan ever said he wanted to go back to Egypt, and notes that Hassan’s use of word “home” was very consistent with Hassan’s repeated statement that he wanted to get back together with his wife (then a Tacoma, Washington resident) and his statement that he wanted to go back to work. *Id.* at ¶ 11-

⁵ At the hearing on his motion to withdraw the plea Hassan was not afforded the opportunity to present any rebuttal evidence to rebut Krieg’s testimony that he said he wanted to go back to Egypt. Moreover, even if rebuttal testimony had been allowed, it would have been difficult to present the testimony of the interpreter Mr. Abou-Zaki,

12. The Superior Court judge was unaware of this issue of linguistic ambiguity in the word “beit.” Under RAP 16.11(b), at the very least, this Court should order a reference hearing so that a factual determination may be made as to what Arabic word he actually used; what he meant when he used that word; and whether attorney Krieg misconstrued the meaning of Hassan’s statement that he wanted to go “beit” when it was translated into an English word.⁶

5. THE STATE NEVER EVEN ADDRESSES THE IAC CLAIM BASED ON FAILURE TO ADVISE HASSAN THAT HE WOULD AUTOMATICALLY AND FOREVER BE INELIGIBLE FOR CITIZENSHIP OR RE-ENTRY INTO THE USA.

Even assuming, for the sake of argument, that attorney Krieg did competently and accurately advise Hassan regarding the automatic consequence of deportation, the State completely ignores the other two automatic immigration consequences. To be told that one will definitely be deported is to be informed that one will be leaving the United States. But such advice does inform a defendant that he may never come back again. Without the additional automatic consequence of excludability,

because Mr. Abou-Zaki was actively translating the entire proceeding for Mr. Hassan. He could not have acted as both a witness and a translator at the same time.

⁶ The prosecution suggests that it is obvious that no such translation misunderstanding occurred, because attorney Krieg testified that Hassan spoke with her about his concern about the cost of a trip back to Egypt and the time it would take to be deported. *State’s Response to PRP*, at 12. But once again the State ignores the fact that Hassan denies ever making any such statements and the Superior Court did not resolve this conflict.

even a deported individual would still be able to return to the United States at some later point, even if just for a visit. But Mr. Hassan was told absolutely nothing about the excludability consequence. Moreover, even assuming that Mr. Hassan was told and understood that he would be deported, no one told him that once he got to Egypt, he would never be able to apply for U.S. citizenship. No one told him that he would be *forever* banished from the United States – the home country of his wife. Anyone in this position would logically assume that he could return after some specified period of demonstrated good behavior, perhaps 5 years, perhaps 10 or maybe even longer. But absent any warning, what alien married to a U.S. citizen would assume that after being deported he would be eternally banned from ever setting foot in this country again?

Citizenship ineligibility and excludability were two additional totally automatic consequences of a guilty plea in this case. Hassan testified that attorney Krieg never discussed any immigration consequences with him, and while attorney Krieg disputes this as to deportation, she made no claim that she ever discussed excludability or citizenship ineligibility with him. The prosecution simply ignores her failure to advise Mr. Hassan of these consequences, and thus seeks to avoid the inevitable conclusion that these failures constituted ineffective assistance of counsel.

6. HASSAN'S DEPORTATION ORDER IS A DISABILITY THAT RESULTED FROM THE STATE COURT CONVICTION THAT HE IS CHALLENGING. WHETHER OR NOT DEPORTATION IS A COLLATERAL CONSEQUENCE OF A PLEA IS IRRELEVANT TO THE ISSUE OF WHETHER HASSAN IS UNDER A RESTRAINT FOR PRP PURPOSES.

The prosecution contends that Hassan's PRP must be dismissed because he is not under "restraint" for purposes of RAP 16.4(b). That rule expressly provides that a person is under restraint if he "has limited freedom because of a court decision in a . . . criminal proceeding." The State does not dispute attorney Morales' declaration that Hassan is presently under a stayed (pending the outcome of these state court proceedings) deportation order that compels him to leave this country.

RAP 16.4(b) also provides that a person is under restraint if he "is under some other disability resulting from a judgment or sentence in a criminal case." It is also undisputed that as a result of his criminal conviction, Hassan is forever ineligible for naturalized U.S. citizenship and barred from entering the United States. These are obviously disabilities resulting from the challenged conviction.

The State argues that because deportation is a "collateral" consequence of his conviction, it does not qualify as either a disability or as a limitation on his freedom that results from his conviction. *State's*

Response to PRP, at 4. But the State has confused constitutional analysis of the due process claim raised on direct appeal with the procedural issue of “restraint” in a PRP case. RAP 16.4(b) contains no requirement that the petitioner’s disability or freedom limitation be a direct consequence of his conviction. On the contrary, it is well established that RAP 16.4(b) expressly permits petitioners to challenge the validity of their convictions even though they have completed serving their sentences and even though the only remaining negative consequences that they are suffering are “collateral.” The Supreme Court has expressly held that “an unlawful conviction can serve as a restraint on liberty *due to collateral consequences*” such as its “potential effect on future minimum sentences” and by “creating difficulties for a former prisoner attempting to reestablish himself or herself with society upon release from prison.” In re Restraint of Powell, 92 Wn.2d 882, 887-88, 602 P.2d 711 (1979) (italics added). Cf. Born v. Thompson, 154 Wn.2d 749, 117 P.3d 1098 (2005) (even though civil commitment proceeding had been dismissed and all confinement ended, fact that defendant had been found to have committed a violent act “ha[d] potential collateral consequences sufficient to constitute restraint under RCW 7.36.010.”[habeas corpus petition])

7. THE FAILURE OF ATTORNEY KRIEG TO REQUEST A COMPETENCY EVALUATION, OR EVEN TO INVESTIGATE THE ISSUE OF COMPETENCY, AMOUNTED TO INEFFECTIVE ASSISTANCE.

The prosecution argues that attorney Krieg's failure to raise the issue of competency did not amount to deficient attorney conduct, even though the presence of the following obvious indicators of incompetency are not disputed: (1) the interpreter told counsel that Hassan was not fit to go to trial and should see a psychiatrist; (2) Hassan cut his own wrists while in jail; (3) the jail put him on suicide watch and dressed him in a suicide smock; (4) when people tried to converse with Hassan they reported he was in an hysterical condition; (5) the interpreter told the attorney that Hassan was incapable of listening to her; and (6) Hassan's wife expressed concern that her husband was bipolar, suicidal, and said that "he really needs help." *Decl. Abou-Zaki*, ¶¶ 5-8; *Decl. Hammou*, ¶ 8; *Decl. Hassan*, ¶ 23; RP I, 11-12.

Focusing on the interpreter, the prosecution dismisses his opinions and observations on the grounds that he is neither a mental health professional nor an attorney. *State's Response*, at 9. But one need not be an attorney or a mental health professional to make observations as to whether a person is listening to his attorney, or whether he is understanding what his attorney is saying.

Moreover, “it is well-established in Washington that a lay witness may testify concerning the sanity or mental responsibility of others, so long as the witness’ opinion is based upon facts he personally observed.” State v. Crenshaw, 27 Wn. App. 326, 332, 617 P.2d 1041 (1980), *affirmed* 98 Wn.2d 789, 659 Wn.2d 488 (1983). See, e.g., State v. Constantine, 48 Wash. 218, 225, 93 P. 317 (1908) (“A nonexpert witness may give his opinion as to the mental condition of a defendant whose mental condition is the subject of inquiry in his own language.”).

Similarly, courts routinely accept lay opinion testimony from both interpreters and police officers as to whether a defendant understood what was being said to him. See, e.g., State v. Lopez, 74 Wn. App. 264, 266, 872 P.2d 1131 (1994) (“He [Officer Larson] testified that he believed from his responses that Lopez understood the conversation” they had in the police car.).⁷ And in this State, this Court has explicitly held that it is permissible and proper for a trial judge to ask a court appointed interpreter to give her opinion as to whether the defendant was comprehending the

⁷ See also State v. Mlo, 335 N.C. 353, 365, 440 S.E.2d 98 (1994) (“In the opinion of both Officer Roseman and the interpreter, both while being advised of his constitutional rights and during the entire interview that followed, the defendant appeared to understand the conversation and made logical, coherent and responsive answers to the questions propounded.”); Diaz v. State, 444 N.E.2d 340, 342 (Ind. App. 1983) (“the court asked the interpreter’s present opinion as to Diaz’s ability in English, and the interpreter responded that Diaz could understand English.”); Hernandez v. State, 978 S.W.2d 137, 139 (Tex. App. 1998) (“In [the officer’s] opinion appellant understood everything that was read to him in English and in Spanish”).

ongoing translation of the court's proceedings, noting that "the court had no other way to be sure" that the defendant understood what was being said. State v. Aquino-Cervantes, 88 Wn. App. 699, 706-7, 945 P.2d 767 (1997).

In the present case, when attorney Krieg spoke to Mr. Hassan, the only person present who was capable of observing whether Hassan was understanding what his attorney was saying was Mr. Abou-Zaki, because he was the only person who spoke Mr. Hassan's language – Arabic. It defies reason to suggest that attorney Krieg is in a position to know whether Mr. Hassan understood what Mr. Abou-Zaki related to him in Arabic.

Even assuming that the observations of Mr. Abou-Zaki were not sufficient to raise grave doubts about Hassan's competency, his observations should not be viewed in isolation. Presumably the person who best knew Mr. Hassan was his wife. She had known him since 2000 and had been married to him for roughly three years. She spoke both Arabic and English and was in a very good position to judge what he was, and was not understanding.

The prosecution dismisses affidavit testimony from Mr. Abou-Zaki on the grounds that he "should not speculate on matters to which he lacks personal knowledge." *State's Response to PRP*, at 10. But the interpreter

does have personal knowledge as to whether a person for whom he is translating exhibits an understanding of what is being said to him. He also has personal knowledge of the fact that Hassan acted hysterically and cried whenever his attorney visited and spoke to him before court hearings because the interpreter was present and *saw* the hysterical crying himself. Moreover, the observations that the interpreter made are conformed by identical observations made by Mr. Hassan's wife, who reports that she was "shaken by Alaa's appearance and demeanor at the arraignment. He was sobbing the entire time . . ." *Decl. Phelps*, ¶ 11. This also is consistent with the observations made by the jail guard: "He was very distressed and upset all the time," *Decl. Hammou*, ¶ 6; and by jail nurse Chandler: Hassan "quite tearful and shaking." *Decl. Lobsenz, Appendix A*.

The prosecution contends that since Abou-Zaki is not a mental health professional, his observations as to what Mr. Hassan could understand are not "sufficient" to provide a reason to doubt Hassan's competency. But the entries made in Hassan's jail medical records were made by health professionals, and they also confirm that Hassan's ability to understand the legal system was very poor. See, e.g., entry of 6/30/04 ("states he doesn't understand what is happening to him or why he is incarcerated"). *Decl. Lobsenz, Appendix A*. The State dismisses the fact that the translator told attorney Krieg that he thought Hassan should see a

psychiatrist because the translator is not a health professional. But Nurse Chandler, who is a health professional, *also* thought Hassan “may need to see Psychiatrist.” *Id.*

As a result of Nurse Chandler’s observations, Mr. Hassan *did* in fact see a psychiatrist while he was in the county jail. As the jail medical records attest, he was seen at least twice by Dr. Halarnakar, a psychiatrist in the Mental Health Clinic, who also noted the same hysterical behavior that the translator, the nurse, and the defendant’s wife had all observed (“He immediately began to cry when he was placed in a medical interview room.”) *Id.*, entry for 7/21/04.

Similarly, the State wholly ignores the undisputed evidence that Mr. Hassan was placed on psychiatric medications, Trazodone and Doxepin. *Id.* When seen again by a staff psychiatrist his medication dosage was increased. *Id.*, entry for 7/26/04.

The State suggests that Mr. Hassan’s own declaration is “self-serving” and thus not entitled to much weight, particularly when it comes to Mr. Hassan’s assertions that (1) he did not understand that by pleading guilty he would be subjecting himself to automatic deportation, and (2) he did not want to go back to Egypt, but wanted to return to living with his wife in Tacoma. If Mr. Hassan’s own declaration was the only support that he had for making these assertions, the State’s argument would be

more persuasive. But the State ignores the fact that Mr. Hassan's assertions are corroborated by the observations of the county jail medical health clinic, which reports that when Mr. Hassan was visited by INS officials and informed that deportation proceedings were being started, he was "very tearful and upset," because he wanted to "remain in the US." *Decl. Lobsenz, Appendix A*, entry for 9/23/04. Nor can the State argue that Hassan changed his mind about deportation after he plead guilty on August 17, 2004, since this fails to account for the other indications in the jail medical records that document the fact that Hassan was expressing his desire *not* to be deported long before he plead guilty. *Id.*, entry for 7/2/04 ("he is concerned about possible deportation").

The bottom line is that attorney Krieg did *nothing* to investigate the possibility that Mr. Hassan was not competent to enter a plea, even though she was *expressly told* by both the translator and the wife that it appeared that Hassan was in need of mental health treatment. While the State has obtained and filed an affidavit from attorney Krieg, the most salient aspect of that affidavit is what attorney Krieg does not dispute. Her affidavit contains no denial of the fact that the interpreter told her that he "did not think he [Hassan] was fit to go to trial and that maybe he should see a psychiatrist." *Decl. Hassan*, ¶ 6-7. Nor does she dispute Mr. Abou Zaki's statement: "I told her attorney Krieg that he was not listening to

what she was saying to him.” *Id.* In sum, while attorney Krieg has advanced her own personal opinion that she saw no reason that Hassan could not assist her, she has essentially not responded to the allegation that Hassan could not and did not understand what she was telling him. She *admits* that she understood that Hassan had made a suicide attempt. The transcript of the plea hearing unambiguously discloses that she did *not* tell the plea judge anything about this suicide attempt, nor did she tell the plea judge that the interpreter thought the defendant was not fit to go to trial and was not understanding what she was saying. She is silent about whether she knew that the defendant was receiving medications in jail and does not indicate whether she knew that a jail health services psychiatrist was seeing the defendant. She is similarly silent as to whether she knew that the defendant had an unresolved infection from a poorly healed appendectomy. Thus, she is in the position of admitting that she had several reasons to doubt Mr. Hassan’s competency and yet she told the plea judge nothing about any of them.

Ultimately, it is the responsibility of the plea judge to decide whether these many factors were sufficient to warrant a court ordered competency evaluation. But because attorney Krieg never informed the Court of these factors, the Court never knew of them. Had the Court been informed, there is a reasonable probability that a competency evaluation

would have been ordered, that it would have been discovered that Hassan did not understand that if he plead guilty he would be deported, and that accordingly Hassan would never have plead guilty. For these reasons, this Court should find ineffective assistance of counsel.

8. AT THE VERY LEAST, PETITIONER HAS SUFFICIENTLY REBUTTED THE PRESUMPTION OF VOLUNTARINESS TO BE ENTITLED TO A REFERENCE HEARING ON THAT ISSUE, SO THAT A JUDGE CAN MAKE FINDINGS OF FACT AS TO PETITIONER'S MENTAL CONDITION.

Even assuming that attorney Krieg rendered effective representation of counsel, there remains simply the question of whether Hassan was competent at the time he entered his guilty plea. The State argues that since he signed a plea form which does contain mention of the possible immigration consequences of a guilty plea, there arises a strong presumption that his plea was voluntarily entered. But the State concedes this presumption is rebuttable.

Under the circumstances of this case, where everyone agrees that the defendant's ability to understand English is poor, and that he cannot read English at all, the strength of this presumption is remarkably weak. The presumption must survive, if at all, solely on the strength of two additional assumptions: (1) that the document was completely translated for him into Arabic, his native language, and (2) that the defendant did in

fact listen to this translation, and he understood it.

Both of these additional assumptions are sharply in dispute. The defendant has presented specific, concrete testimony from several individuals that unequivocally establishes that he was (1) seriously ill with an infection, (2) suffering from both serious depression and anxiety; and (3) receiving several medications prescribed by a jail psychiatrist. In addition, the defendant's "self-serving" affidavit testimony that he never wanted to go to Egypt, and didn't understand that he would be deported there, is objectively confirmed and supported by at least *four* different sources: (1) the interpreter; (2) his wife; (3) medical staff in the Pierce County Jail who specifically recorded their comments that Hassan repeatedly, both before and after his plea, voiced his fear that he might be deported, and his desire to avoid deportation; and (4) his employer who also confirmed that Hassan did not want to be deported, and sought his advice on what to do to avoid that result.

Assuming, for the sake of argument, that this Court is not persuaded that at this point petitioner Hassan has not yet made a showing sufficient to justify the granting of his petition and the vacation of his conviction, at the very least petitioner should be granted a reference hearing. "If a petitioner makes at least a prima facie showing of actual prejudice, but the merits of the contentions cannot be determined solely on

the record, the court should remand the petition for a full hearing on the merits or for a reference hearing pursuant to RAP 16.11(a) and RAP 16.12.” In re Restraint of Rice, 118 Wn.2d 876, 885, 828 P.2d 1086 (1992). The purpose of a reference hearing is to resolve genuine factual disputes. Id. at 886. “The State’s response must answer the allegations of the petition and identify all material disputed questions of fact.” Id. The State has not done that in this case.

The petitioner has supported his petition with declarations from persons with personal knowledge attesting to facts with great particularity. In response, the State has submitted affidavits that are simply conclusory (i.e., the defendant didn’t show any signs of incompetency or lack of understanding to me), and which do not address *factual* questions (i.e., Did the interpreter in fact tell the attorney that he thought Hassan was not fit to go forward and needed to see a psychiatrist?; Did the attorney know that Hassan was under the influence of several psychiatrically prescribed medications?). In sum, petitioner submits that the State has not presented enough to warrant withholding the requested relief from petitioner. But assuming, *arguendo*, that the Court disagrees, then at the very least a reference hearing should be ordered. For as stated in Rice, at 886-87: “If the parties’ materials establish the existence of material disputed issues of fact, then the superior *887 court will be directed to hold a reference

hearing in order to resolve the factual questions.”

9. THE STATE IGNORES BOTH THE FACT THAT THE FACTUAL BASIS OF A PLEA MUST BE PRESENTED ON THE RECORD AT THE TIME THE PLEA IS ENTERED, AND THE FACT THAT THIS RULE APPLIES TO FACTUAL BASIS CHALLENGES MADE IN PRP’S AS WELL AS TO CHALLENGES RAISED ON DIRECT APPEAL.

There is no factual basis for the petitioner’s guilty plea in the record. The State ignores the well established proposition that the factual basis must be placed in the record at the time of the plea, and cannot be supplied later. Contrary to the State’s implication, this rule does not apply only to direct appeals. Washington courts have applied the same rule in collateral attack proceedings. See, e.g., In re Restraint of Keene, 95 Wn.2d 203, 210 622 P.2d 360 (1981) (The factual basis “must be developed on the record at the time the plea is taken and may not be deferred . . .”); In re Restraint of Taylor, 31 Wn. App. 254, 257, 640 P.2d 737 (1982) (“[B]ecause of the failure of the record at the time of the plea hearing to provide any factual basis indicating an awareness of the nature of the charge, the plea was not voluntary. Therefore we grant the petition . . .”); In re Restraint of Evans, 31 Wn. App. 330, 332, 641 P.2d 722 (1982) (“there is merit to this petition because there does not appear on the record at the time the plea was taken a sufficient factual basis for finding Mr. Evans guilty of escape.”)

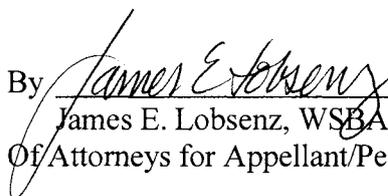
Petitioner has asserted the constitutional claim that he did not know what the term "assault" implied, did not understand that his conduct did not fit the definition of the crime of assault, and that accordingly his plea was not made voluntarily. This is a constitutional claim. It can and has been raised in a PRP. Here, as in In re Keene, supra, the State's failed to place evidence in the record at the time of the plea to establish that the defendant did understand the relationship and the fit between what he did and what constitutes the crime. Here, as in Keene, the defendant is entitled to vacation of his plea due to this constitutional defect, because he has established that he would not have plead guilty had he understood.

B. CONCLUSION

For the reasons stated above, appellant/petitioner asks this Court to set aside his guilty plea, and remand for further proceedings. In the alternative, he asks this Court to remand for a reference hearing to decide whatever disputed factual questions this Court believes must be resolved before this Court can rule on petitioner's legal claims.

DATED this 30th day of August, 2006.

CARNEY BADLEY SPELLMAN, P.S.

By  _____
James E. Lobsenz, WSBA No. 8787
Of Attorneys for Appellant/Petitioner

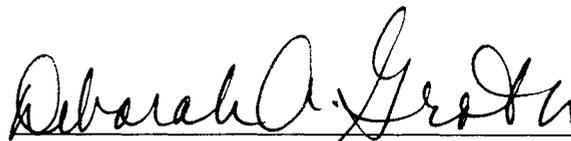
Alaa Hassan
PO Box 8873
Lacey WA 98509
(Via US Mail)

Entitled exactly:

APPELLANT'S MOTION FOR PERMISSION TO FILE 30 PAGE CONSOLIDATED
REPLY BRIEF

CONSOLIDATED REPLY BRIEF OF APPELLANT/PETITIONER HASSAN

DATED: August 30, 2006

A handwritten signature in cursive script, reading "Deborah A. Groth", written over a horizontal line.

DEBORAH A. GROTH