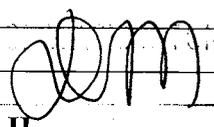


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NO. 34072-1-II



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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ALAA FEKRY AHMED HASSAN, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Beverly Grant

No. 04-1-03172-1

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court exercise proper discretion when it denied defendant's motion to withdraw his guilty plea, where defendant's guilty plea was knowing and voluntary, where counsel informed defendant that he would be deported, and where he signed his plea statement, which properly advised defendant that his plea was grounds for deportation? (Appellant's Assignment of Error No. 1.)

2. Under Washington law, does deportation remain a "collateral" consequence of a guilty plea even though Congress has expanded the class of "aggravated felonies" that will result in deportation and has narrowed the exceptions previously available to persons subject to deportation? (Appellant's Assignment of Error Nos. 2 and 3.)

3. Were defendant's statutory rights under RCW 10.40.200 violated where defense counsel advised defendant that he would be deported and read defendant the relevant statutory language in his plea form even though the court failed to verbally advise defendant of his immigration consequences at the plea hearing? (Appellant's Assignment of Error No. 4.)

4. Has defendant established constitutionally deficient counsel where counsel ultimately informed defendant he would be deported as a result of his guilty plea and read him the immigration advisement contained in his plea form and where defendant has not demonstrated resulting prejudice?

(Appellant's Assignment of Error No. 5.)

B. STATEMENT OF THE CASE.

1. Procedure

On June 28, 2004, the State charged appellant ALAA FEKRY AHMED HASSAN, hereinafter, "defendant", with second degree assault (domestic violence related),<sup>1</sup> interfering with domestic violence reporting,<sup>2</sup> and unlawful possession of marijuana under forty grams.<sup>3</sup> CP 1-3. On August 17, 2004, the State amended the charges to one count of second degree assault (domestic violence related). CP 6. That same day, defendant pleaded guilty to this offense. CP 7-14, IRP 7.<sup>4</sup> The court sentenced the defendant to six months incarceration, with credit for 51 days served and twelve months of community custody. CP 15-27, IRP

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<sup>1</sup> RCW 9A.36.021(1)(a) and RCW 10.99.020.

<sup>2</sup> RCW 9A.36.150(1) and RCW 9A.36.150(3).

<sup>3</sup> RCW 69.50.101(q) and RCW 69.50.401(e).

<sup>4</sup> IRP refers to the Verbatim Report of Proceedings dated August 17, 2004 (Plea hearing).

15.<sup>5</sup> The term of community custody included domestic violence counseling and no contact with Mrs. Nancy Phelps, the victim and wife of the defendant. CP 15-27.

On October 1, 2004, defendant obtained new counsel, Mr. Michael Schwartz. CP 28. On February 4, 2005, Mr. Schwartz obtained a modification to defendant's no contact order permitting limited contact between defendant and his wife. CP 29-30. That same day, the parties briefly addressed defendant's motion to withdraw his guilty plea before the Honorable Beverly Grant. CP \_\_\_\_.<sup>6</sup> It is unclear from the clerk's minutes of the proceedings what transpired regarding defendant's motion. CP \_\_\_\_.<sup>7</sup>

On July 12, 2005, the court terminated the no contact between the defendant and Ms. Phelps that it had issued on February 4, 2005. On August 10, 2005, defendant filed his motion to withdraw his guilty plea pursuant to CrR 7.8. CP 32-51.

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<sup>5</sup> IIRP refers to the Verbatim Report of Proceedings dated October 28, 2005 (Defendant's hearing on his motion to withdraw his guilty plea).

<sup>6</sup> The State's Designation of Clerk's Papers containing this Memorandum of Journal Entry, dated 02/04/05 will be filed contemporaneously with its Reply Brief. Therefore, the page number has not yet been assigned.

<sup>7</sup> The defendant did not provide a record of these proceedings.

On October 28, 2005, the parties came before Judge Grant on defendant's motion to withdraw his guilty plea. IIRP 5. The court heard testimony from defendant's former counsel, Dixie Krieg, his wife, and the defendant himself. IIRP 8-47. The court denied the defendant's motion to withdraw his guilty plea. CP 94. IIRP 59. The court concluded that the colloquy at the plea hearing was clear, that not only did defendant want to return to Egypt but he understood regardless that he would be going back to Egypt. IIRP 59. The court did not enter findings or conclusions. This timely appeal followed.

2. Facts

a. Plea Hearing.

On August 17, 2004, defendant pleaded guilty to second degree assault. CP 7-14. Mr. Kamal Abou-Zaki interpreted the proceedings for the defendant in defendant's native Arabic language. IRP 3. Defendant's attorney, Dixie Krieg, represented to the court that she had filled out the plea paperwork and had gone over these documents with the defendant and his interpreter. IRP 3. During the court's colloquy with the defendant, defendant acknowledged that Ms. Krieg had explained the implications of his violent offense classification and that he understood that he was waiving certain constitutional rights set forth in paragraph five of the plea statement. CP 8, IRP 5. Defendant further indicated that no

one threatened him to enter his plea or made promises to him in exchange for his plea. IRP 6. When asked whether defendant was entering his plea freely and voluntarily, the defendant responded, "Yes." IRP 6.

Defendant initialed the following statement, adopting it as his own:

On June 27<sup>th</sup>, '04, in Pierce County, Washington, I assaulted N.P. and she had significant injuries. CP 7.

After the court accepted the defendant's plea, Ms. Krieg advised the court that defendant had not adjusted well in the United States, that he had no support here, that he did not desire to remain here, that he was very close to his family in Egypt, and that defendant's intention was to "go straight back to Egypt." IRP 13, 14. During allocution, defendant addressed the court with one statement: "I would never do anything bad again. You will never see me again here, but you need to be fair with me, too." IRP 14.

b. Motion to Withdraw Guilty Plea Hearing.

On October 1, 2004, defendant obtained new counsel, Mr. Michael Schwartz. CP 28. On August 10, 2005, defendant brought a motion to withdraw his guilty plea under CrR 7.8 on two grounds. CP 32-51. First, defendant claimed that Ms. Krieg incorrectly advised defendant of the immigration consequences to his guilty plea. CP 34, IIRP 7. Second, defendant claimed that the language regarding these consequences contained in his plea statement was an incorrect statement of the law. CP

38, IIRP 7. On October 28, 2005, the Honorable Beverly Grant heard defendant's motion to withdraw his guilty plea. IRP 4.

Ms. Krieg testified that she met with defendant many times and had spent a great deal of time with him. IIRP 23. Ms. Krieg indicated that an interpreter was always present during her meetings with defendant. IIRP 23. According to Ms. Krieg, defendant was adamant that he was going to plead guilty even though Ms. Krieg explained to him that his case presented good issues for his trial. IIRP 23. In explaining the immigration consequences to defendant, Ms. Krieg initially told defendant that deportation was a "probable" or "possible" consequence of his guilty plea. IIRP 24. During this discussion, the interpreter advised Ms. Krieg that it was his experience that "they were deporting them all and it was not a probability but was likely to occur." IIRP 24. Defendant responded that he did not care because he wanted to return to Egypt. IIRP 24. When defendant expressed concern about his costs to return to Egypt, Ms. Krieg advised the defendant she was still learning about defendant's immigration consequences. IIRP 25.

Ultimately, Ms. Krieg advised defendant that he would be deported. IIRP 25. She recalled this fact because she was angry with Ms. Phelps for not permitting Ms. Krieg to advise defendant of his mother's death while he was incarcerated and because Ms. Phelps wanted defendant to stay in jail long enough for her to return to Egypt, get her property, and

return to the States. IIRP 26. Defendant did not express any confusion over the deportation or immigration consequences. IIRP 26.

Ms. Krieg explained that she went through every paragraph on defendant's plea statement with him. IIRP 27. She explained that the defendant is a very smart man who understood these paragraphs on the plea form and was not confused. IIRP 27. She specifically recalled going through the paragraph regarding the immigration consequences to defendant because, "That was one of the most important paragraphs in the statement." IIRP 28.

Defendant did question Ms. Krieg on how long the deportation process would take and where he would go. IIRP 28. Ms. Krieg advised the defendant she could not answer those questions. IIRP 28. Ms. Krieg was concerned that she was unable to answer defendant's questions regarding the length of time defendant would be detained prior to deportation. IIRP 24. Defendant appeared downhearted and simply wanted to return to Egypt. IIRP 29.

After the defendant pleaded guilty, Ms. Krieg asked her colleagues about immigration consequences and learned defendant would definitely be deported. IIRP 24-25. She testified her colleagues then confirmed what she had already told defendant would occur prior to his plea. IIRP 25.

Under cross-examination, Ms. Krieg reiterated that she went through the wording in defendant's plea statement "word by word." IIRP

35. Ms. Krieg again acknowledged that she told the defendant that according to his interpreter, "all of them were being deported." IIRP 35. Ms. Krieg advised the defendant that immigration law is a specialized area of law for which she is not an expert. IIRP 40. She assumed the defendant would be deported because his crime is a domestic violence assault. IIRP 40. Ms. Krieg acknowledged discussing deportation issues with her colleagues after the defendant pleaded guilty and testified that she had felt she covered the possibilities with defendant. IIRP 42.

The parties agreed to allow the court to further examine Ms. Krieg at this hearing. IIRP 43. Ms. Krieg told the court she knew defendant was aware he would be deported because of their discussion on the length of time it would take to deport him and whether the government would pay for defendant's return to Egypt. IIRP 44. Ms. Krieg had not discussed defendant's immigration status with defendant's wife, Ms. Phelps. IIRP 44.

Ms. Phelps testified at defendant's plea withdrawal hearing. IIRP 8. She spoke with Ms. Krieg three or four times over the phone about defendant's case. IIRP 8. Ms. Phelps testified that Ms. Krieg was not aware of defendant's immigration consequences, but that she would find out. IIRP 10. Although Ms. Phelps testified that Ms. Krieg never found out these consequences and led Ms. Phelps to believe there would be no immigration consequences if defendant pleaded guilty. IIRP 11. When defendant's counsel asked Ms. Phelps what Ms. Krieg did to lead Ms.

Phelps to this believe, Ms. Phelps responded, “She told me she didn’t know of any immigration consequences.” IIRP 12.

Defendant testified at this hearing. IIRP 13. He chose to testify in the English language. IIRP 13. Mr. Abou-Zaki was present at this hearing to assist the defendant. IIRP 14. Defendant testified that he spoke with Ms. Krieg four times at the jail. IIRP 15. Defendant had no trouble understanding Ms. Krieg as his interpreter was present during these conversations. IIRP 16. Ms. Krieg asked defendant whether someone from immigration had visited him at the jail, to which he replied “No.” IIRP 16. Ms. Krieg advised defendant that it was good that immigration had not contacted him. IIRP 16. Defendant stated this was the only conversation he had with Ms. Krieg about immigration and that he did not have any knowledge of immigration consequences of his plea. IIRP 16-17. When defendant’s attorney inquired about defendant’s understanding of his immigration status at the time of his plea the following exchange occurred.

Q. (Mr. Schwartz) Okay. Do you remember reading through an eight page document with your attorney and the interpreter?

A. (defendant) Yes, he never said something about immigration. Whole deal is I sign guilty because I need to get out of jail 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.

IIRP 17.

Under cross-examination, defendant claimed that the topic of his return to Egypt never came up in any of his conversations with Ms. Krieg.

IIRP 18. Defendant acknowledged he listened to Ms. Krieg as she spoke to the court during defendant's plea hearing. IIRP 18. Defendant claimed he did not understand everything Ms. Krieg said because he was crying and thinking about how to get his life back. IIRP 19. Defendant claimed he did not speak at his allocution because he was crying.<sup>8</sup> IIRP 19.

Defendant testified that after he pleaded guilty he did not plan to go back to Egypt. IIRP 19. Defendant planned to stay in the United States to stay with his wife and start his life here. IIRP 19.

Defendant acknowledged that his interpreter translated the entire plea statement for him, but that his interpreter never told him that

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<sup>8</sup> Defendant spoke briefly at his allocution. IRP 14.

defendant would go to Egypt if he pleaded guilty. IIRP 20. Defendant further stated that his interpreter never mentioned anything to him regarding deportation or immigration. IIRP 20. Defendant testified that his desire to plead guilty centered on his desire to be released from jail. IIRP 15, 20.

C. ARGUMENT.

1. BECAUSE DEFENDANT WAS AWARE OF THE COLLATERAL CONSEQUENCE OF DEPORTATION, HIS PLEA WAS VOLUNTARY AND DID NOT VIOLATE THE DUE PROCESS CLAUSE.

- a. Standard of Review.

A guilty plea forecloses appeal except for validity of the statute, sufficiency of the information, jurisdiction of the court, or circumstances surrounding the plea. State v. Cross, 156 Wn.2d 580, 621, 132 P.3d 80(2006); citing State v. Saylor, 70 Wn.2d 7, 9, 422 P.2d 477 (1966). A court's decision on a motion to withdraw a guilty plea is reviewed for abuse of discretion. State v. Padilla, 84 Wn.App. 523, 525, 928 P.2d 1141 (1997). Judicial discretion is abused if it is based on untenable grounds or for untenable reasons. State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998).

Withdrawal of a guilty plea is governed by CrR 4.2(f), which permits withdrawal where it is "necessary to correct a manifest injustice." A manifest injustice is one that is obvious, directly observable, overt, not

obscure.” State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). Examples of a "manifest injustice" include, but are not limited to, instances where the plea was involuntary, or the defendant was denied effective assistance of counsel. State v. Saas, 118 W.2d 37, 42, 820 P.2d 505 (1991); State v. Watson, 63 Wn. App. 854, 822 P.2d 327 (1992). The "manifest injustice" standard is a demanding one; the injustice must be "obvious, directly observable, overt, not obscure." Saas, 118 Wn.2d at 42.

b. Due Process Requirements.

A plea of guilty waives a number of constitutional rights. Boykin v. Alabama, 395 U.S. 238, 242-43, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); Joseph v. Butler, 838 F.2d 786, 789 (5th Cir. 1988). Thus, the Fourteenth Amendment Due Process Clause imposes certain requirements to ensure the validity of a guilty plea. Fisher v. Wainwright, 584 F.2d 691, 692 (5th Cir. 1978) (citing Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970)).

Defendant contends that the trial court erred by denying his motion to withdraw his guilty plea because it was not knowingly, intelligently, or voluntarily made as he was not correctly informed of the immigration consequences of the plea. CrR 7.8(b)(4) provides that a court may relieve a party from a final judgment with proof of the judgment's invalidity. Defendant's claim implicates federal and state due process standards. U.S. Const. amends. VI, XIV; Wash. Const. art. I, § 3; Boykin v.

Alabama, 395 U.S. 238, 242-43, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); In re Pers. Restraint of Montoya, 109 Wn.2d 270, 277, 744 P.2d 340 (1987); In re Pers. Restraint of Barr, 102 Wn.2d 265, 269-70, 684 P.2d 712 (1984). A constitutional defect renders a judgment void and subject to collateral attack under CrR 7.8(b)(4). State v. Olivera-Avila, 89 Wn. App. 313, 319, 949 P.2d 824 (1997).

In general, “[t]he court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently, and with an understanding of the nature of the charge and the consequences of the plea.” CrR 4.2(d). Voluntariness of plea is determined by considering the relevant circumstances surrounding it. State v. Williams, 117 Wn. App. 390, 398, 71 P.3d 686 (2003). Due process requires that a guilty plea be made with knowledge of its direct consequences. In re Personal Restraint Petition of Peters, 50 Wn. App. 702, 704, 750 P.2d 643 (1988). When a defendant completes a written plea statement, and admits to reading, understanding, and signing it, this creates a strong presumption that the plea is voluntary. State v. Smith, 134 Wn.2d 849, 852, 953 P.2d 810 (1998), citing State v. Perez, 33 Wn. App. 258, 261, 654 P.2d 708 (1982).

Furthermore, when a defendant, who has received the information, pleads guilty pursuant to a plea bargain, there is a presumption that the plea is knowing, intelligent and voluntary. In re Personal Restraint Petition of Ness, 70 Wn. App. 817, 821, 855 P.2d 1191 (1993), review denied, 123 Wn.2d 1009, 869 P.2d 1085 (1994). “A defendant's signature

on the plea form is strong evidence of a plea's voluntariness." State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). If the trial court orally inquires into a matter that is on this plea statement, the presumption that the defendant understands this matter becomes "well nigh irrefutable." Branch, 129 Wn.2d at 642 n.2; State v. Stephan, 35 Wn. App. 889, 894, 671 P.2d 780 (1983). After a defendant has orally confirmed statements in this written plea form, that defendant "will not now be heard to deny these facts." In re Keene, 95 Wn.2d 203, 207, 622 P.2d 13 (1981).

In the instant case, defendant signed the plea statement below the paragraph which read:

My lawyer has explained to me, and we have fully discussed, all of the above paragraphs. I understand them all. I have been given a copy of this "Statement of Defendant on Plea of Guilty." I have no further questions to ask the judge.

CP 13.

This plea statement set forth numerous paragraphs notifying the defendant of certain consequences of his guilty plea. CP 7-13. The relevant paragraph notified the defendant of the following:

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.

Defendant's interpreter signed his name under the "Interpreter's Declaration" which specified that the defendant had acknowledged his understanding of both the translation and the subject matter of the plea document. Other notifications in the plea statement indicated that defendant's second degree assault offense was a most serious offense, or a strike offense as defined by RCW 9.94A.030, and that his crime is a crime of domestic violence. CP 11. As will be demonstrated below, defendant's counsel's advice that he would be deported and the advisement in his plea form satisfied due process because deportation is a collateral consequence of his guilty plea. Therefore, defendant's plea was made knowingly and voluntarily.

2. IMMIGRATION CONSEQUENCES REMAIN COLLATERAL CONSEQUENCES OF A GUILTY PLEA. THUS, A COURT NEED NOT INFORM DEFENDANT OF THESE CONSEQUENCES FOR DEFENDANT'S PLEA TO COMPLY WITH THE DUE PROCESS REQUIREMENT THAT A PLEA BE VOLUNTARY.

In order to comply with the due process requirement that a plea be voluntary, a defendant must be informed of the direct consequences of the plea, but it is not necessary to inform him of all possible collateral consequences. United States v. Wills, 881 F.2d 823, 825 (9th Cir. 1989), State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980). A direct consequence presents a "definite, immediate and largely automatic effect on the defendant's range of punishment," Barton, 93 Wn.2d at 305 (citing

Cuthrell v. Director, 475 F.2d 1364 (4<sup>th</sup> Cir. 1973) at 305). In contrast, a collateral consequence is one that a court does not automatically impose after a defendant has entered a guilty plea,<sup>9</sup> does not automatically “alter the standard punishment”<sup>10</sup> and that involves “ancillary or consequential results which are peculiar to the individual.”<sup>11</sup>

Under this standard, direct consequences include the statutory maximum sentence,<sup>12</sup> the standard range sentence,<sup>13</sup> a mandatory minimum term arising from a special firearm allegation,<sup>14</sup> ineligibility for the special sex offender sentencing alternative,<sup>15</sup> mandatory community placement,<sup>16</sup> and restitution.<sup>17</sup>

In contrast, collateral consequences include, the possibility of habitual criminal proceedings,<sup>18</sup> mandatory sex offender registration,<sup>19</sup> mandatory DNA testing of sex offenders,<sup>20</sup> future commitment

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<sup>9</sup> Barton, 93 Wn.2d at 305.

<sup>10</sup> State v. Ward, 123 Wn.2d,488, 513-14, 869 P.2d 1062 (1994)

<sup>11</sup> State v. Cameron, 30 Wn. App. 229, 233, 633 P.2d 901 (1981)(quoting United States v. Sambro, 147 U.S. App. D.C. 75, 454 F.2d 918, 920 (D.C. Cir. 1971 )).

<sup>12</sup> CrR 4.2(g), State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980)(citations omitted).

<sup>13</sup> State v. Moon, 108 Wn. App. 59, 62, 29 P.3d 734 (2001).

<sup>14</sup> Wood v. Morris, 87 Wn.2d 501, 513, 554 P.2d 1032 (1976).

<sup>15</sup> State v. Adams, 119 Wn. App. 373, 378, 82 P.3d 1195 (2003)(citing State v. Kissee, 88 Wn. App. 817, 822, 947 P.2d 262 (1997))

<sup>16</sup> State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996);State v. Rawson, 94 Wn. App. 293, 297, 971 P.2d 578 (1999). But see State v. Acevedo, 137 Wn.2d 179, 197-98, 970 P.2d 299 (1999) (community placement is not a direct consequence where the defendant is expected to be deported on release from prison).

<sup>17</sup> Cameron, 30 Wn. App at 233.

<sup>18</sup> Barton, 93 Wn.2d at 305, State v. Johnson, 17 Wn. App. 486, 564 P.2d 1159 (1977).

<sup>19</sup> Ward, 123 Wn.2d at 513-14.

<sup>20</sup> State v. Olivas, 122 Wn.2d 73, 98, 856 P.2d 1076 (1993).

proceedings under RCW 71.09,<sup>21</sup> the loss of one's right to possess firearms,<sup>22</sup> a return to a juvenile detention facility for an adult felon,<sup>23</sup> and deportation, as will be discussed below.

A deportation proceeding that occurs subsequent to the entry of a guilty plea is merely a collateral consequence of that plea. State v. Jamison, 105 Wn. App. 572, 591-92, 20 P.3d 1010 (2001), review denied, 144 Wn.2d 1018, 32 P.3d 283 (2001)(citing In re Personal Restraint of Yim, 139 Wn.2d 581, 588, 989 P.2d 512 (1999)(citing State v. Ward, 123 Wn.2d 488, 512-13, 869 P.2d 1062 (1994)); State v. Martinez-Lazo, 100 Wn.App. 869, 874, 999 P.2d 1275 (2000), review denied, 142 Wn.2d 1003, 11 P.3d 827 (2000); as such, a defendant need not have been advised of the possibility of deportation. Fruchtman v. Kenton, 531 F.2d 946, 948-49 (9th Cir. 1976); Jamison, 105 Wn. App. at 591-92, Martinez-Lazo, 100 Wn. App. at 876, In re Personal Restraint Petition of Yim, 139 Wn.2d at 588, accord State v. Holley, 75 Wn. App 191, 198, 876 P.2d 973 (1994).

Defendant argues that the 1996 amendments to the Immigration and Naturalization Act by way of the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA),<sup>24</sup> and the Illegal Immigration Reform and

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<sup>21</sup> Abolafya v. State, 114 Wn. App. 137, 147, 56 P.3d 608 (2002).

<sup>22</sup> State v. Ness, 70 Wn. App. 817, 823, 855 P.2d 1191 (1993).

<sup>23</sup> State v. Reid, 40 Wn. App 319, 323, 698 P.2d 588 (1985).

<sup>24</sup> Pub. L. No. 104-132, 110 Stat. 1214 (1996).

Immigration Responsibility Act (IIRIRA)<sup>25</sup> converted his deportation from a collateral consequence to a direct consequence of conviction because these statutes have given the INS<sup>26</sup> “unfettered discretion” in deciding whether or not seek deportation of convicted criminals. Br. of Appellant at 26. Defendant asserts that because his offense is an aggravated felony, his deportation is “automatic and unavoidable” and thus represents a “definite” and “automatic consequence” of his guilty plea. Br. of Appellant at 26-27.

Divisions One and Three of the Washington Court of Appeals have rejected this same argument. State v. Jamison, 105 Wn. App. 572, 593, 20 P.3d 1010 (2001); State v. Martinez-Lazo, 100 Wn. App. 869, 874, 999 P.2d 1275 (2000). Following Martinez-Lazo, the court in Jamison concluded the following:

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 has no responsibility.’ (citing Martinez-Lazo, 100 Wn. App. at 877 (quoting In re Peters, 50 Wn. App. 702, 704, 750 P.2d 643 (1988), quoting Michael v. United States, 507 F.2d 461, 465 (2<sup>nd</sup> Cir. 1974))

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<sup>25</sup> Pub. L. No. 104-208, 110 Stat. 3009 (1996).

<sup>26</sup> In 2002, Congress abolished the INS and transferred its responsibilities to the Bureau of Citizenship and Immigration Services. 116 Stat. 2135 (2002).

State v. Jamison, 105 Wn. App. at 593. Moreover, the appellate court concluded that counsel's failure to provide defendant with a copy of the federal statute and failure to inform defendant that once deported, he could never reenter the United States, did not constitute deficient performance. Id. at 594.

Defendant contends that the Martinez-Lazo court's reliance upon the second Circuit's decision in Michael v. Unites States is on shaky ground after United States v. Couto, 311 F.3d 179 (2<sup>nd</sup> Cir. 2002). Defendant is mistaken. Couto did not undermine Michael and recent Ninth Circuit Decisions have upheld the principle that deportation is a collateral consequence.

In United States v. Couto, 311 F.3d 179 (2<sup>nd</sup> Cir. 2002), the defendant pleaded guilty to bribing a public official. Id. at 181. Defendant had acted through an imposter<sup>27</sup> to obtain a green card from an undercover INS agent posing as a 'corrupt' INS official. Id. at 182. Prior to her plea, defendant's counsel misinformed her that there were many things that could be done to prevent defendant from being deported, including requesting a judge for a letter recommending against deportation. Id. at 183. Defendant later moved the trial court to allow her to withdraw her guilty plea. The trial court denied her motion. Id. at 181.

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<sup>27</sup> This intermediary posed as an attorney and was also indicted. Couto, 311 F.3d at 182.

On appeal, defendant argued she received ineffective assistance of counsel, and that, as a result her plea was not knowing and voluntary, and that the trial court was required to under Fed. R. Crim. P. 11(c)(1)<sup>28</sup> to inform her of the virtually certain deportation consequences of her guilty plea. Couto, 311 F.3d at 181. The appellate court held that defendant's affirmative misrepresentations regarding deportation satisfied the first prong of the Strickland test.<sup>29</sup> Id. at 188. Having found that counsel's performance was deficient, the court concluded that there was a reasonable possibility that, but for counsel's errors, defendant would not have pleaded guilty. Id. The court vacated defendant's guilty plea and conviction. Id. at 191. In reaching its decision, the court declined to "reconsider whether the standards of attorney competence have evolved to

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<sup>28</sup> Former Fed. R. Crim. P. 11(c)(1)(2002) read as follows: Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances ...

<sup>29</sup> Though not directly discussed as part of the Court's holding on this issue, trial counsel's performance fell below an objective standard of reasonableness on many levels. Trial counsel had little contact with the defendant, obtained additional money from the defendant to hire an immigration attorney without hiring that attorney, provided her with a videotape of her actions only four days before her plea, failed to review this videotape with her, and failed to obtain information about the attorney (imposter) who misled her into the illegal transaction with the undercover INS agent, which resulted in her charges. Id. at 183-184.

the point that a failure to inform a defendant of the deportation consequences of a plea would by itself now be objectively unreasonable.” Id. at 188.

The defendant in Couto also argued that because the 1990 and 1996 Amendments to the Immigration and Nationality Act make deportation a virtually certain consequence for an alien convicted of an aggravating felony, the trial court’s failure to inform her of that consequence rendered her plea not knowing and not voluntary violating Fed R. Crim. P. 11(c)(1). Couto, 311 F.3d at 188. Though the court found this argument persuasive on its face, it declined to decide this issue. Id. at 190. The court noted that three other circuits—the First, Sixth, and Ninth – have declined to reconsider their prior holdings on this point. (Citations except United State v. Amador-Leal, 276 F.3d 511, 516-17 (9<sup>th</sup> Cir. 2002), cert. denied, 122 S. Ct. 1946 (2002), omitted.)

In United States v. Amador-Leal, 276 F.3d 511 (9<sup>th</sup> Cir. 2002), defendant, an illegal alien, pleaded guilty to possession of cocaine with intent to distribute. Id. at 513. At the plea proceeding, the magistrate judge did not explain the potential immigration consequences of defendant’s conviction. Id. Defendant later challenged his guilty plea on the basis that because he was not informed of the immigration consequences of his plea, his plea was not voluntary. Id. at 514.

While conceding that it has been the law in the Ninth Circuit since Fruchtman v. Kenton, 531 F.2d 946 (9th Cir. 1976), that the potential of

deportation is a collateral consequence of a guilty plea, defendant argued that immigration law has changed so drastically since Fruchtman that deportation is now a direct consequence. Defendant reasoned that his deportation is practically guaranteed in the wake of the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), because these statutes removed the Attorney General's authority to grant a waiver to deportation for aggravated felons and eliminated judicial review of deportation orders. Amador-Leal, 276 F.3d at 516.

Citing United States v. Littlejohn, 224 F.3d 960 (9th Cir. 2000), the defendant argued that these statutes automatically affect the range of his punishment and is a direct consequence of his guilty plea. Amador-Leal, 276 F.3d at 514. In Littlejohn, the defendant pleaded guilty to a drug offense. Littlejohn, 224 F.3d at 963. The appellate court held that the trial court erred when it failed to advise the defendant that as a consequence of his plea, defendant would be immediately ineligible for certain types of social security assistance and food stamp benefits. Littlejohn, 224 F.3d at 969. Finding prior convictions irrelevant and "no measure of judicial clairvoyance to determine applicability" necessary, the court held that defendants' ineligibility under the federal social security benefits statute<sup>30</sup> was automatic, direct and not within previous judicial

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<sup>30</sup> 21 U.S.C. § 862(a).

exceptions. Littlejohn, 224 F.3d at 969. However, the appellate court concluded such error was harmless because it did not appear that the error would have affected the defendants' decision to plead guilty. Littlejohn, 224 F.3d at 968-970.

The Amador-Leal court rejected defendant's argument finding that deportation is a 'purely civil action' separate and distinct from a criminal proceeding. The court reasoned that deportation is not part of the sentence or punishment for the crime. Id. at 516 (citing Torrey v. Estelle, 842 F.2d 234, 236 (9<sup>th</sup> Cir. 1988); INS v. Lopez-Mendoza, 468 U.S. 1032, 1038, 104 S. Ct. 3479, 82 L. Ed. 2d 778 (1984)).

The appellate court distinguished Littlejohn on the ground that unlike the immigration statutes, the social security benefit statutes are self-executing upon imposition of sentence. Amador-Leal, 276 F.3d at 516. The court reasoned further that a defendant receiving government benefits is immediately and automatically ineligible for them once convicted. Id. By contrast, the court found that immigration consequences do not arise until after the defendant serves his sentence, INS<sup>31</sup> assumes control of the defendant, and the process of removal has been initiated and executed. Id. (citing 8 U.S.C. § § 1228(a)(1) & 1231(a)(4)(A));

Amador-Leal held that the district courts are not constitutionally required to advise defendants of the potential consequences of deportation because immigration consequences continue to be a collateral consequence of a plea. Amador-Leal, 276 F.3d at 517, (9<sup>th</sup> Cir. 2002). In so doing, Amador-Leal reaffirmed that its decision in Fruchtman remains

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<sup>31</sup> In 2002, Congress abolished the INS and transferred its responsibilities to the Bureau of Citizenship and Immigration Services. 116 Stat 2135 (2002).

good law in the Ninth Circuit. Id. at 517. Accordingly, this court should decline defendant's invitation to adopt his position that is contrary to Washington and Federal precedent. As such, this court should find defendant was properly advised of the collateral consequences of deportation and that defendant's plea was knowing and voluntary.

3. DEFENDANT WAS PROPERLY ADVISED OF HIS IMMIGRATION CONSEQUENCES UNDER RCW 10.40.200(b), BECAUSE THE STATUTORY LANGUAGE WAS CONTAINED IN DEFENDANT'S PLEA STATEMENT, WHICH WAS TRANSLATED FOR HIM AND WHICH HE SIGNED.

RCW 10.40.200 provides a statutory right, independent of any constitutional right, to be advised of the deportation consequences of a guilty plea. State v. Littlefair, 112 Wn. App. 749, 769, 51 P.3d 116 (2002). Because RCW 10.40.200 does not create a constitutional right to be advised of immigration consequences, the failure to comply with this statute does not create constitutional harm. State v. Holley, 75 Wn. App. 191, 198, 876 P.2d 973 (1994).

RCW 10.40.200 sets forth the advisement a defendant must receive before the court accepts a guilty plea. The relevant portion of this statute reads as follows:

- (2) Prior to acceptance of a plea of guilty to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall determine that the defendant has been advised of the following potential consequences of conviction for a

defendant who is not a citizen of the United States: Deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. A defendant signing a guilty plea statement containing the advisement required by this subsection shall be presumed to have received the required advisement. 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. Absent a written acknowledgement by the defendant of the advisement required by this subsection, the defendant shall be presumed not to have received the required advisement.

RCW 10.40.200(2).

In the instant case, the court did not verbally advise the defendant of the immigration consequences he faced before the court accepted his plea. However, this advisement was contained in the plea statement form that his interpreter translated for him and which both defendant and his interpreter signed. Hence, defendant is presumed to have received this advisement under RCW 10.40.200(2). As previously stated, this statute comports with Washington and Federal law on the advisement of collateral consequences that may stem from a guilty plea. Defendant's counsel testified that she ultimately told the defendant he would be deported and that one of defendant's primary concerns was to be able to return to Egypt as soon as possible. Therefore, defendant was sufficiently

advised of the collateral immigration consequences under RCW 10.40.200.

Defendant cites State v. Littlefair, 112 Wn. App. 749, 51 P.3d 116 (2002), State v. Rawson, 94 Wn. App. 293, 971 P.2d 578 (1999), and Gonzalez v. Oregon, 191 Or. App. 587, 83 P.3d 921 (2004), for his argument that he did not receive an “appropriate warning” regarding his immigration consequences before he pleaded guilty. A review of these cases shows defendant’s argument lacks merit. Littlefair and Rawson are distinguishable from defendant’s case and the Oregon Supreme Court recently reversed the Oregon Court of Appeals’ decision in Gonzalez. Gonzalez v. Oregon, 340 Ore. 452, 2006 LEXIS 346 \*1.

In Littlefair, defendant’s counsel deliberately struck a portion of the defendant’s plea form that would have advised defendant that deportation was a possible consequence of his plea. Id. at 752, 756. In addition, defendant’s attorney’s never discussed deportation with defendant. Id. at 754-755, 767. Not surprisingly, the reviewing court found defendant was not properly advised of his immigration consequences to his plea under RCW 10.40.200. Id. at 767. The court declined to consider the viability of the distinction between a plea’s direct and collateral consequences.” Id. at 766, n. 46.

In the instant case, Ms. Krieg ultimately advised defendant that he would be deported. 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. Defendants' plea statement contained the proper advisement under RCW 10.40.200(2). Unlike counsel in Littlefair, Ms. Krieg went over this advisement with defendant. There is nothing misleading about Ms. Krieg's advice or the advisement contained in the plea statement. Therefore, Littlefair is not controlling. This court should find defendant was properly advised of his plea's immigration consequences under RCW 10.40.200(b).

Similarly, defendant's reliance on State v. Rawson, 94 Wn. App. 293, 971 P.2d 578 (1999), is misplaced. In Rawson, the trial court failed to inform defendant that the court was required to impose a twelve month term of community placement at his plea hearing. Id. at 294. In addition, defendant's counsel failed to strike a paragraph in the plea statement that did not apply to defendant. Id. at 294-95. That paragraph improperly informed defendant that the judge may sentence the defendant to community placement. Id. at 295. Because community placement was mandatory and a direct consequence of defendant's guilty plea, the appellate court found the sentencing court's failure to properly advise defendant of community placement, violated due process and permitted defendant to withdraw his guilty plea. Id. at 298-99. Rawson is inapplicable to the instant case because deportation is a collateral consequence of defendant's plea and Ms. Krieg informed defendant that he would be deported and properly advised defendant of the immigration consequences as set forth in his plea statement.

Finally, defendant cites Gonzalez v. Oregon, 191 Ore. App. 587, 83 P.3d 921 (2004), as persuasive authority for his argument that Ms. Krieg's advise regarding deportation was misleading. In Gonzalez, defendant's counsel told defendant that his plea to certain drug crimes 'may have an impact on his immigration status'. Gonzalez, 191 Ore. App. at 589. Before accepting defendant's plea, the court complied with an Oregon statute advising defendant of his possible deportation consequences. Id.<sup>32</sup> After discovering deportation was a certainty, defendant brought an action for post-conviction relief claiming his counsel provided inadequate legal assistance. Id. The trial court agreed and vacated defendant's conviction. Id. at 590.

The Oregon Court of Appeals reviewed the current immigration scheme and concluded that Federal law "all but requires that aliens convicted of aggravated felonies be deported." Id. at 593-94. Accordingly, the appellate court concluded counsel was obligated to tell defendant that he would be deported as a result of his guilty plea unless the United State's Attorney General chooses not to pursue deportation

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<sup>32</sup> ORS § 135.385 (2006)(2) provides, in pertinent part, as follows:

(2) The court shall inform the defendant:

...

(d) That if the defendant is not a citizen of the United States conviction of a crime may result, under the laws of the United States, in deportation, exclusion from admission to the United States or denial of naturalization.

proceedings against him. Id. The court found counsel's performance was constitutionally inadequate and affirmed the trial court. Id. at 594.

However the Oregon Supreme Court reversed the Court of Appeals' decision,<sup>33</sup> concluding that because the Oregon Constitution does not require counsel to specify the likelihood that a trial court might impose either the maximum sentence or minimum sentence, then the constitution requires no such specificity concerning deportation, a collateral consequence of a conviction. Gonzalez v. Oregon, 340 Ore. 452, 459 (2006), 2006 LEXIS 346 \*13. Accordingly, the court held that, "Petitioner's counsel did not 'fail to exercise reasonable skill and judgment' when he advised petitioner of the maximum collateral sanction available –deportation." Id. Thus, Gonzalez is opposite to defendant's position. As such, defendant's claim that Ms. Krieg's advice was inadequate or misleading, lacks merit.

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<sup>33</sup> This decision was filed after defendant filed his opening brief.

4. DEFENDANT HAS FAILED TO ESTABLISH HIS COUNSEL'S INEFFECTIVE ASSISTANCE WHERE COUNSEL ADVISED DEFENDANT HE WOULD BE DEPORTED, WHERE COUNSEL READ TO DEFENDANT HIS PLEA STATEMENT CONTAINING THE IMMIGRATION ADVISEMENT, AND WHERE COUNSEL DISCUSSED WITH DEFENDANT HIS DESIRE TO RETURN TO EGYPT.

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney's performance was deficient, and (2) that he or she was prejudiced by the deficiency. Strickland v. Washington, 466 U.S. 668, 688-89, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). The first prong of the test requires proof of "errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Strickland, at 687; State v. Ray, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991).

Under the second prong, the defendant must show counsel's deficient performance prejudiced the defendant, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). The competency of counsel is determined from a review

of the entire record below. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Courts engage in a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335.

In a plea bargaining context, 'effective assistance of counsel' merely requires that counsel 'actually and substantially assist' his client in deciding whether to plead guilty. State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1994)(quoting State v. Cameron, 30 Wn.App. 229, 232, 633 P.2d 901 (1981)). "It is counsel's responsibility to aid the defendant in evaluating the evidence against him and in discussing the possible direct consequences of a guilty plea." State v. Holley, 75 Wn. App. 191, 197, 876 P.2d 973 (1994). An attorney's failure to advise a client of the immigration consequences of a conviction, without more, does not constitute ineffective assistance of counsel under Strickland. United States v. Fry, 322 F.3d 1198, 1200 (9th Cir. 2003).

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. Moreover, Ms. Krieg went through each line of the plea form with defendant and specifically recalled reading the immigration advisement to defendant through the interpreter. Because this advisement proper under current

Federal and Washington State law, nothing more was required. Counsel's performance was not deficient.

Even if defendant has demonstrated his counsel's performance was deficient, defendant has not demonstrated prejudice. Review of the record indicates that appellant would have entered his plea even if he was not aware of that deportation was mandatory as he wanted to go to Egypt after serving his jail term. Defendant stood silent at the plea hearing as his counsel apprised the court of defendant's desire to plead guilty to the assault offense and return to Egypt. Accordingly, defendant has failed to show that but for counsel's alleged failure to advise him of this possible collateral consequence he would not have entered a plea of guilty.

Defendant relies on United States v. Kwan, 407 F.3d 1005 (9<sup>th</sup> Cir. 2004) for his argument that his counsel's alleged erroneous advice rendered counsel constitutionally deficient. Kwan is distinguishable on the ground that there counsel affirmatively misled defendant by telling him that although deportation was technically a possibility, "it was not a serious possibility." Kwan, 407 F.3d at 1008. Counsel further represented to defendant that counsel had expertise in immigration law. Id. at 1015-16. Adding to counsels' egregious conduct, was his failure to advise the court that a sentence two days shorter than the sentence the court ultimately imposed would have enabled defendant to avoid deportation. Id. at 1016. The appellate court held that counsel's performance was

objectively unreasonable and that defendant suffered prejudice. Id. at 1017-18.

In the instant case, Ms. Krieg did not affirmatively mislead defendant. Although she initially was unsure about defendant's immigration consequences, she ultimately advised defendant that he would be deported. IIRP 24-25. In addition, counsel read defendant's plea statement to defendant with his interpreter's assistance. IRP 3, IIRP 28, 35. This statement provided the necessary immigration advisement pursuant to RCW 10.40.200(2). Finally, unlike the defendant in Kwan, defendant expressed his desire to return to his native country. IIRP 24. Defendant even inquired of counsel about the length of time it would take for his deportation. IIRP 24, 28, 44. Hence, it is unlikely that defendant's decision was affected by counsel's alleged misrepresentations. Accordingly, defendant's claim of ineffective assistance of counsel must fail.

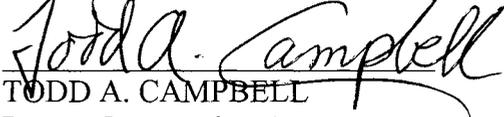
Defendant chose to plead guilty rather than go to trial. His subsequent regret is not sufficient to mandate a withdrawal of his plea. State v. Norval, 35 Wn. App. 775, 783, 669 P.2d 1264 (1983). This court should affirm the defendant's conviction.

D. CONCLUSION.

For the foregoing reasons, the State request this court affirm defendant's conviction.

DATED: JUNE 29, 2006

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6/30/06   
Date Signature