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DIVISION II

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

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STATE OF WASHINGTON,

Respondent,

vs.

**Nicholas J. Lee,**

Appellant.

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Pierce County Superior Court

Cause No. 06-1-00992-6

The Honorable Judge Kathryn J. Nelson

**Appellant's Reply Brief**

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## ARGUMENT

**I. BECAUSE THE TRIAL COURT FAILED TO TAKE “SPECIAL CARE” WITH THIS PACKAGE DEAL, THE RECORD DOES NOT ESTABLISH THAT MR. LEE’S GUILTY PLEAS WERE VOLUNTARY.**

Due process is violated by entry of a guilty plea without an affirmative showing in the record that the plea was made intelligently and voluntarily. *State v. S.M.*, 100 Wn. App. 401 at 413, 996 P.2d 1111 (2000). “Special care” must be taken when a guilty plea is part of a package deal that includes lenient treatment toward a third party. *State v. Williams*, 117 Wn. App. 390 at 400, 71 P. 3d 686 (2003). In *Williams*, Division I’s decision affirming the defendant’s conviction was based in part on its view that the record affirmatively demonstrated the absence of threats or coercion by the codefendant (the defendant’s son). *Williams*, at 401.

Here, by contrast, the record cannot be read to affirmatively demonstrate the absence of threats or coercion by Mr. Lee’s codefendants under the “special care” standard set forth in *Williams*. RP (6/18/07) 317-320. Accordingly, the record does not establish the voluntariness of this package deal and Mr. Lee’s guilty pleas must be reversed and the case remanded for a new trial. *U.S. v. Caro*, 997 F.2d 657 at 659-60 (9th Cir. 1993). In the alternative, this court should remand the case for an

evidentiary hearing to determine whether or not Mr. Lee was threatened or coerced into pleading guilty.

The benefit Mr. Lee received from the package deal is not relevant to the voluntariness of his guilty pleas, contrary to Respondent's suggestion. Brief of Respondent, p. 12. His codefendants may have exerted pressure coercing him to join in on the package deal, even if it was also to his advantage to do so. The trial judge's failure to use "special care" during the plea hearing precludes a finding of voluntariness whether Mr. Lee received a great benefit, a slight benefit, or no benefit from pleading guilty.

Without citation to authority, Respondent argues that any error created by the trial judge's failure to use "special care" was harmless error. Where no authority is cited, this Court may presume that counsel, after diligent search, has found none. *Oregon Mut. Ins. Co. v. Barton*, 109 Wn.App. 405 at 418, 36 P.3d 1065 (2001). Furthermore, due process requires an affirmative showing that a guilty plea is voluntary. *State v. S.M.*, *supra*; *see also State v. Ross*, 129 Wn.2d 279 at 284, 916 P.2d 405 (1996). Courts have not applied harmless error analysis where such affirmative evidence is lacking. *S.M.*, *supra*; *Ross*, *supra*.

Given the package nature of Mr. Lee's plea bargain, the trial court's failure to exercise "special care" precludes a finding that Mr. Lee's

guilty plea was voluntary. *Williams, supra; Ross, supra*. The state has not presented any extrinsic evidence overcoming this deficiency. Accordingly the convictions must be reversed and the case remanded for trial. *Ross, supra*.

**II. THE RECORD DOES NOT PROVIDE A FACTUAL BASIS FOR MR. LEE'S GUILTY PLEAS.**

The absence of a factual basis for a guilty plea may be challenged for the first time on appeal.<sup>1</sup> *See, e.g., State v. R.L.D.*, 132 Wn. App. 699 at 706, 133 P.3d 505 (2006). Respondent's suggestion to the contrary reveals a misunderstanding of Mr. Lee's argument, which is not grounded in the trial court's violation of CrR 4.2(d). Brief of Respondent, p. 13. Instead, the argument is constitutional: because of the inadequate factual basis in the record, the guilty pleas here were not voluntary and thus violated due process. *R.L.D., supra; see also, e.g., In re Hews*, 108 Wn.2d 579, 741 P.2d 983 (1987) ("Failure to establish a factual basis is likely to affect voluntariness." *Hews*, at 592, *internal quotation marks and citations omitted*.)

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<sup>1</sup> This is because a guilty plea entered without a proper factual basis in the record is not voluntary, and therefore violates due process and raises a manifest error affecting a constitutional right. RAP 2.5(a)(3). *See In re Keene*, 95 Wn.2d 203, 622 P.2d 360 (1980) (refusing to review petitioner's CrR 4.2(d) claim but deciding his petition on constitutional grounds.)

Respondent is unable to find a factual basis in the record for the bail jumping charge, which the state dismissed in return for Mr. Lee's agreement to the legal fiction of a prior felony and plea to Unlawful Possession of a Firearm in the Second Degree. Brief of Respondent, p. 14-17. Respondent attempts to skirt this deficiency by pointing to the original charge, which was Possession of Cocaine with Intent to Deliver, and claiming that the trial judge need only find a factual basis for that charge. Brief of Respondent, pp. 14-16, *citing State v. Bao Sheng Zhao*, 157 Wn.2d 188 at 190, 200, 137 P.3d 835 (2006). This nonsensical reading of *Zhao* is contradicted by Mr. Lee's plea form.

In *Zhao*, the Supreme Court distinguished between the "original" and "amended" charges faced by the defendant in that case. The Court did not specifically address multiple amendments to the Information; however, it made clear that its holding applied to guilty pleas to lesser charges (unsupported by a factual basis) that were entered to avoid punishment for (factually supported) greater charges. For example, in *Zhao*, the defendant was charged with two counts of first-degree child molestation, but pled guilty to two counts of conspiracy to commit indecent liberties (despite the absence of a co-conspirator).

Similarly, in this case, Mr. Lee pled guilty to avoid what his plea form described as "a substantial likelihood that [he would] be convicted of

a more serious charge at trial...” CP 7. A common-sense reading of *Zhao* requires a factual basis for the more serious charges, where there is no factual basis for the actual charges to which the accused pleads guilty. Under the state’s reading of *Zhao*, an accused can plead guilty to greater charges with more serious penalties if there is a factual basis for a lesser charge—for example, in this case, the state asserts that Mr. Lee can plead guilty to Possession with Intent and UPF 2 if there is a factual basis for Possession with Intent (as charged in the original Information). Brief of Respondent, p. 14-17. The state’s argument obviates the need for any factual basis for the UPF charge, or indeed for any charges added to the original Information.<sup>2</sup>

Because Respondent is unable to point to any factual support in the record for the bail jumping charge, there is no factual basis for Mr. Lee’s guilty pleas (which were entered, at least in part, to avoid the bail jumping charge). Accordingly, the record fails to establish that Mr. Lee’s plea was made knowingly, voluntarily, and intelligently. The convictions must be vacated and the case dismissed with prejudice. *State v. R.L.D., supra*.

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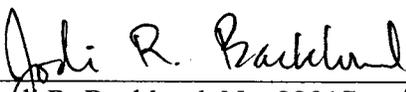
<sup>2</sup> Indeed, there is no reason to stop there—the state could amend the Information to add 100 charges without factual bases, and (under the state’s reading of *Zhao*) Mr. Lee could plead guilty to all of them as long as there were a factual basis for the original less serious charge.

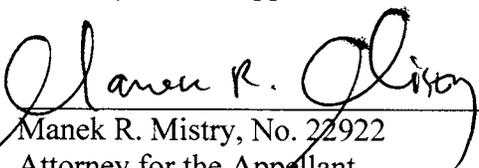
**CONCLUSION**

]Because Mr. Lee pled guilty without a sufficient factual basis, his convictions must be vacated and the case dismissed with prejudice. In the alternative, his convictions must be vacated and the case remanded for a new trial.

Respectfully submitted on May 9, 2008.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

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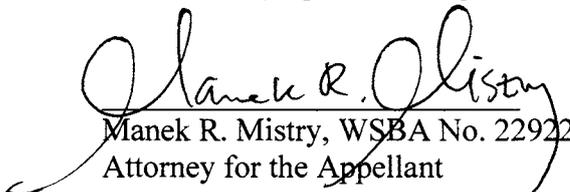
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on May 9, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 9, 2008.

  
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