
Before the Supreme Court of the State of Ohio

Case No. 2009-1987

On Appeal from the Court of Appeals of Ohio for the Eleventh District at Lake County
Case No. 2009-1-00052

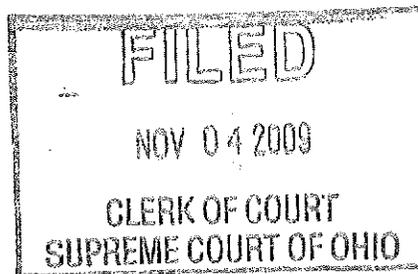
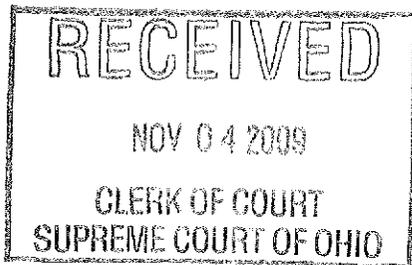
The State of Ohio

Plaintiff-Appellant

-vs-

Mr. Artem Feldman

Defendant-Appellee



**Brief in Opposition to the State's Motion for a Stay of Execution of Judgment
Pursuant to S.Ct.Rac.R. II, § 2(A)(3)(a)**

Rhys Brendan Cartwright-Jones, 0078597

100 Federal Plaza East, Suite 101
Youngstown, OH 44503-1810
330-740-0200, tel.
330-740-0200, fax
rhys@cartwright-jones.com

For Defendant-Appellant, Mr. Artem
Feldman

Teri R. Daniel, 0082157

Office of the Lake County Prosecutor
105 Main St., P.O. Box 490
Painesville, OH 44077-2077
440-350-2683, tel.
440-350-2585, fax

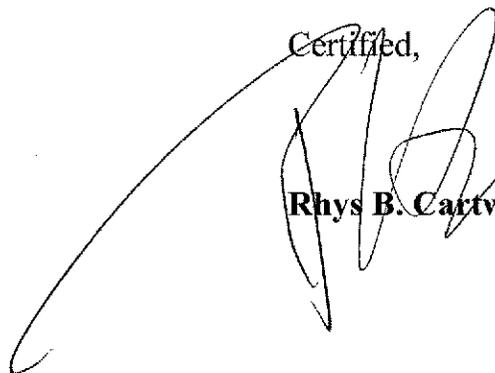
For Plaintiff-Appellee, The State of
Ohio

Proof of Service

I sent a copy of this brief opposing counsel at the address below on 

November, 2009.

Certified,



Rhys B. Cartwright-Jones

To:

Teri R. Daniel, 0082157

Office of the Lake County Prosecutor
105 Main St., P.O. Box 490
Painesville, OH 44077-2077
440-350-2683, tel.
440-350-2585, fax

For Plaintiff-Appellee, The State of Ohio

Brief in Opposition

The defense moves this Court to deny the state's motion for a stay of execution of judgment.

This case involves withdrawal of a guilty plea under R.C. 2943.031, Crim.R. 11, and Crim.R. 32.1. This Court, however, addressed the issues involved here in *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894. Indeed, this Court expressed near exasperation with trial judges' non compliance with the Revised Code and Criminal Rules' scripted plea colloquy as recently as last year. See, e.g., *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, stating, “[o]nce again, we are asked to clarify the duties of the trial court in accepting pleas to felony charges and to determine the consequences of the trial court’s failure to comply with Crim.R. 11.”

To provide some basic background, the Eleventh District for Lake County held that a trial court did not substantially comply with R.C. 2943.031 in not informing Mr. Feldman, the appellee, of the consequences of deportation, inadmissibility, and denial of naturalization prior to taking his guilty plea, rendering the plea void. The state moved to stay the district court's mandate. The defense responds.

The state offers three propositions in support of its request for a stay. None of the state's propositions in support, however, yields a right to relief in stay. Further, balancing the equities between Mr. Feldman and the state, allowing the Eleventh District's mandate to carry out is just.

The state first offers that its legal issues will become moot on appeal to this Court if this court's mandate proceeds to the trial court. They will not.

The state still has full rights of appeal under a common exception to the doctrine of mootness. That exception to the mootness doctrine occurs when issues are “**capable of repetition, yet evading review.**” *Ashtabula County Joint Voc. Sch. v. O'Brien*, 11th Dist. No. 2004-A-0092, 2006-Ohio-1794. Verily, given the state's concern that this could cause an onslaught of postconviction petitions, this is a matter “capable of repetition, yet evading review.” *Id.*

Next, the state offers that the case involves a pending case between Mr. Feldman and the Department of Homeland Security (DHS). The state, however, has no standing to assert this claim. And DHS could have—and if the agency found this matter of any significance at all probably would have—submitted an amicus brief below.

Finally, the state claims that this Court's decision will cause an onslaught of petitions similar to Mr. Feldman's under R.C. 2943.031. Simply stated, for twenty years, R.C. 2943.031's mandate directs that trial courts inform a non-citizen of the consequences of deportation, inadmissibility, and denial of naturalization. There has been no such onslaught, and there is none on the horizon.

Turning to the balance of equities, Mr. Feldman, of record, spent the better part of a year in various county jails due to an unwitting guilty plea. The state, on the other hand, has full rights of appeal. Allowing the district court's mandate to proceed will do no harm.

As a final note, the state principles its appeal in part on a conflict of law. But there is no conflict of law.

Two out of three of the state's choices of authority in its motion to the district court to certify conflict pre-date this Court's 2004 decision in *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894. And the final of the state's choices of authority does not involve the same point of law as Mr. Feldman's case.

The state's first and second offerings, *State v. Gomez*, 9th Dist. No. 02CO008036, 2002-Ohio-5225 and *State v. Lambda*, 2nd Dist. No. 18757, 2001-Ohio-7024, obviously predate the *Francis* decision by 3 and two years, respectively. In other words, there is no conflict of law as this Court's 2004 Francis decision supersedes those two cases.

The state's third offering, *State v. Encarnacion (Encarnacion II)*, 12th Dist. Nos. CA2005-05-120, CA2005-05-122, 2006-Ohio-4425, does not conflict as a matter of law. *Encarnacion II* does not involve a direct attack under R.C. 2943.031.

To provide some background, there were two *Encarnacion* appeals: one of 2004 and one of 2006. True: the **first** appeal of *Encarnacion* did involve a direct attack on R.C. 2943.031. *State v. Encarnacion (Encarnacion I)*, 12th Dist. No. CA2003-09-225, 2004-Ohio-7043. And in that case, **the court of appeals ruled in favor of the defendant and allowed withdrawal of the plea.** But the incarnation of *Encarnacion* the state cites as in conflict, *Encarnacion II*, took issue with whether the trial court properly regarded the Court of Appeals mandate in *Encarnacion I*. This is a different point of law entirely, and it does not impact the decision in Mr. Feldman's case.

There is no conflict.

Wherefore, the defense prays this Court overrule the state's motion, for stay and allow this case to proceed on its merits with the district court's mandate carrying out as ordered.

Respectfully Submitted,

Rhys Brendan Cartwright-Jones, 0078597

100 Federal Plaza East, Suite 101

Youngstown, OH 44503-1810

330-740-0200, tel.

330-740-0200, fax

rhys@cartwright-jones.com

Brief in Op to Stay Supreme.odt