

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	Case No. 2009-1987
	)	
Plaintiff-Appellant,	)	On Appeal from the
	)	Lake County Court of Appeals,
v.	)	Eleventh Appellate District
	)	
ARTEM L. FELDMAN	)	
	)	Court of Appeals Case No. 2009-L-052
Defendant-Appellee.	)	

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## STATEMENT OF THE CASE AND FACTS

In April of 2000, Defendant-Appellee Artem L. Feldman was indicted on one count of Grand Theft, a felony of the fourth degree, in violation of R.C. 2913.02(A)(1); and three counts of Forgery, felonies of the fifth degree, in violation of R.C. 2913.31(A)(3). (T.d. 17). Mr. Feldman told the trial court he was a non-citizen, and the trial court advised him of possible immigration consequences that he could face, specifically deportation. (00-CR-86 Change of Plea T.p. 4, 5). Mr. Feldman then pleaded guilty to one count of Grand Theft and one count of Forgery, and the trial court entered a nolle prosequi on the remaining counts at the State's request. (T.d. 23, 25).

In 2008, Mr. Feldman encountered U.S. Immigration and Customs Enforcement (ICE) upon reentering the country after a trip abroad. (T.d. 44). He was subsequently detained, and removal proceedings commenced against him. *Id.*

In December of 2008, Mr. Feldman filed a Postconviction Petition to Vacate a Guilty Plea and Request for Evidentiary Hearing in order to prevent his removal. (T.d. 33). The State opposed his petition, and a status conference was held on February 19, 2009. (T.d. 34, 37). Thereafter, Mr. Feldman filed a Renewed Motion to Withdraw Guilty Plea on the grounds of Crim.R. 32.1 and R.C. 2943.031. (T.d. 39). The State also opposed this motion, and ultimately, the motion was denied by the trial court. (T.d. 42, 44).

Mr. Feldman appealed to the Eleventh District Court of Appeals, raising two assignments of error, including one relating to his advisement pursuant to R.C.

2943.031. The Eleventh District Court of Appeals reversed, holding that a trial court is required to specifically advise a defendant of deportation, exclusion from admission, and denial of naturalization in order to substantially comply with R.C. 2943.031. *State v. Feldman*, 11<sup>th</sup> Dist. No. 2009-L-052, 2009-Ohio-5765.

## ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

### PROPOSITION OF LAW NO. I

SUBSTANTIAL COMPLIANCE WITH R.C. 2943.031 DOES NOT MANDATE REFERENCE TO EACH OF THE THREE SEPARATE STATUTORY IMMIGRATION CONSEQUENCES.

In *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-8694, 820 N.E.2d 355, this Court addressed the standard that applies to a R.C. 2943.031 advisement. This Court held that while reading the statute verbatim was the better practice, strict compliance was not necessary:

“Although it would have been better practice for the trial court to have read the statute verbatim, strict compliance was not necessary to put the defendant on notice that a conviction could have implications beyond the state criminal justice system. To allow a defendant now, years after the charges were brought, and after the evidence has been destroyed, to withdraw a plea into which he entered knowingly and voluntarily would be to assert *form over substance*.”

Id. at ¶47, quoting *State v. Malcolm* (2001), 257 Conn. 653, 778 A.2d 134, 141 (emphasis added). Despite the language from this Court, the holding of the Eleventh District Court of Appeals in *State v. Feldman*, 11<sup>th</sup> Dist. No. 2009-L-052, 2009-Ohio-5765, asserts form over substance. *Feldman* draws a bright-line rule<sup>1</sup> that requires an allusion to each of the immigration-related consequences mentioned in R.C. 2943.031,

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<sup>1</sup> The Eleventh District Court of Appeals itself acknowledged that the rule promulgated in *Feldman* is a bright line rule. In its judgment entry denying the State’s motion for a certified conflict, the Court of Appeals stated, “Unlike our holding in the [sic] *Feldman*, none of the conflicting cases specifically announced a positive rule regarding what constitutes a sufficient advisement.” (Nov. 27, 2009 Judgment Entry).

namely deportation, exclusion from admission, and denial of naturalization. By so doing, the Court of Appeals focused on the form of the advisement as opposed to the defendant's subjective understanding and whether the plea would have otherwise been entered; the Court of Appeals ignored the substance of the advisement.

*Feldman* is dangerous precedent for two important reasons. First, the bright-line rule established by the Eleventh District Court of Appeals essentially mandates a strict compliance standard, a standard expressly rejected by this Court. The Eleventh District Court of Appeals strayed from the definition of substantial compliance discussed in *Francis*. Second, *Feldman* ignores the fact that R.C. 2943.031 does not reflect current federal immigration law. Defendants are not being advised of the immigration consequences that they actually face but are instead being advised of the immigration consequences in place in 1989 when R.C. 2943.031 was enacted. Thus, when looking at the totality of the circumstances to determine whether substantial compliance was met, the Court of Appeals should have looked at the defendant's subjective understanding of the possible consequences he faced. Instead, the Eleventh District Court of Appeals focused solely on whether three particular words were uttered, words that no longer have any specific legal meaning.

**A. The bright-line rule set forth by the Eleventh District Court of Appeals essentially mandates a strict compliance standard.**

**1. *Ohio Law Regarding the Advisement of Federal Immigration Consequences***

R.C. 2943.031 provides:

(A) Except as provided in division (B) of this section, prior to accepting a plea of guilty or a plea of no contest to an indictment, information, or complaint charging a felony or a misdemeanor other than a minor misdemeanor if the defendant previously has not been convicted of or pleaded guilty to a minor misdemeanor, the court shall address the defendant personally, provide the following advisement to the defendant that shall be entered in the record of the court, and determine that the defendant understands the advisement:

“If you are not a citizen of the United States, you are hereby advised that conviction of the offense to which you are pleading guilty (or no contest, when applicable) may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.”

\* \* \*

(D) Upon motion of the defendant, the court shall set aside the judgment and permit the defendant to withdraw a plea of guilty or no contest and enter a plea of not guilty or not guilty by reason of insanity, if, after the effective date of this section, the court fails to provide the defendant the advisement described in division (A) of this section, the advisement is required by that division, and the defendant shows that he is not a citizen of the United States and that the conviction of the offense to which he pleaded guilty or no contest may result in his being subject to deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

This Court has held that a trial court must give the warning set forth in section (A) verbatim when accepting a guilty or no contest plea from a non-citizen defendant. *Francis* at paragraph one of the syllabus. But if the warning was not given verbatim at the time of the defendant’s plea, a trial court considering a defendant’s motion pursuant to R.C. 2943.031(D) must exercise discretion and determine whether the advisement substantially complied with R.C. 2943.031(A). *Id.* at paragraph two of the syllabus.

Unlike a motion to withdraw a plea pursuant to Crim.R. 32.1, the General Assembly determined that a failure to comply with R.C. 2943.031(A) is not subject to a manifest-injustice standard. *Id.* at ¶26. Instead, the trial court is limited to considering only the four specifically mentioned statutory criteria: (1) the trial court failed to provide the warning; (2) the warning was required; (3) the defendant is not a United States citizen; and (4) the conviction may result in deportation, exclusion, or denial of naturalization. *Id.* at ¶37. Additionally, this Court determined that the factors of timeliness and substantial compliance are also relevant considerations. *Id.* at ¶¶40, 46.

If the warning of immigration-related consequences given at the time of a defendant's plea is not a verbatim recitation of the language of R.C. 2943.031(A), a trial court considering the motion must determine whether there was substantial compliance. *Id.* at ¶48. "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving. \* \* \* The test is whether the plea would have otherwise been made." *Id.*, quoting *State v. Nero* (1990), 54 Ohio St.3d 106, 108, 564 N.E.2d 474.

## **2. *The Holding of the Eleventh District Court of Appeals in Feldman Changes the Standard to Strict Compliance***

The Eleventh District Court of Appeals did not follow this Court's directive; the Court of Appeals did not question whether the defendant subjectively understood the implications of his plea and whether the plea would have otherwise been made. Instead, the Court of Appeals asked whether the three immigration consequences listed

in R.C. 2943.031—deportation, exclusion, and denial of naturalization—were each provided by the trial court. Through this holding, the Eleventh District Court of Appeals is substituting three particular words for a defendant’s subjective understanding.

Additionally, by mandating an allusion to each consequence, the Court of Appeals is requiring strict compliance with the statute. As discussed by Judge Rice in dissent, expressly holding that a trial court is required to advise a defendant of each separate consequence demands strict compliance:

Courts have held that the term “strict compliance” does not mean “rote recitation” of a rule or statute. \* \* \* . Hence, “strict compliance does not necessarily mean ‘punctilious’ compliance if, with only minor deviations, substantial and clear disclosure of the fact or information demanded by the applicable statute or regulation occurs.” \* \* \* . However, by expressly holding that a trial court is *required* to paraphrase, or discretely itemize, each separate consequence set forth under R.C. 2943.031, the majority, by way of [*State v. Naoum*, 8<sup>th</sup> Dist. Nos. 91662, 91663, 2009-Ohio-618], essentially demands strict compliance with the statute. In this respect, the majority’s holding is fundamentally inconsistent with the standard announced by the Supreme Court in *Francis*.

*Feldman* at ¶59 (Rice, J., dissenting) (internal citations omitted) (emphasis in original). Judge Rice adhered to this Court’s definition of substantial compliance: “Substantial compliance simply requires a defendant to subjectively understand the potential effects a plea of guilty could have on his or her status as a non-citizen resident; it does not require a court to ‘punctiliously’ detail all aspects of the statute at issue.” *Id.* at ¶60 (Rice, J., dissenting).

Cases deciding what constitutes substantial compliance in terms of a R.C. 2943.031 advisement vary widely. An analysis of the case law on point shows that the rule espoused in *Feldman* is certainly the minority view of substantial compliance. It is impossible to draw a bright-line rule as to what constitutes substantial compliance because courts should look at a defendant's subjective understanding.

Certain issues regarding a R.C. 2943.031 advisement do seem to be relatively clear; no advisement, or an advisement given in writing only, is not sufficient for substantial compliance. See *State v. Ayupov*, 2<sup>nd</sup> Dist. No. 21621, 2007-Ohio-2347; *State v. Joseph*, 7<sup>th</sup> Dist. No. 05-MA-82, 2006-Ohio-1057. Additionally, prior to *Feldman*, an advisement without putting on the record that a defendant understands is not substantial compliance. *State v. Kahn*, 2<sup>nd</sup> Dist. No. 21718, 2007-Ohio-4208, at ¶36. *Feldman*, however, ignored a defendant's understanding and looked solely at the advisement given by the trial court.

Conversely, there are two cases beside *Feldman* which hold that substantial compliance requires an advisement on all three immigration-related consequences. See *State v. Naoum*, 8<sup>th</sup> Dist. Nos. 91662, 91663, 2009-Ohio-618; *State v. Ouch*, 10<sup>th</sup> Dist. No. 08AP-79, 2008-Ohio-4894. These cases are few in number, and as discussed above, increase the burden to one of strict compliance.

A majority of the cases on point fall somewhere in-between no advisement and a verbatim advisement. Four cases have held that an advisement that did not mention all three immigration-related consequences could meet the definition of substantial

compliance. In *State v. Oluoch*, 10<sup>th</sup> Dist. No. 07AP-45, 2007-Ohio-5560, the defendant was advised at his change of plea hearing that his plea could “jeopardize [his] status here in this country.” *Id.* at ¶14. He was also asked whether he understood. *Id.* The Tenth District Court of Appeals found that the trial court specifically referenced the defendant’s ability to remain in the United States. *Id.* at ¶16. Additionally, the defendant admitted to the trial court that he understood that, “‘by pleading guilty, this could jeopardize [his] status here in this country.’” *Id.* The court of appeals held that the record did not “automatically reveal the trial court’s lack of compliance with R.C. 2943.031.” *Id.* at ¶20. The appellate court remanded the case for a hearing to determine whether the defendant subjectively understood the implications of his plea concerning the possible immigration consequences. *Id.*

In *State v. Lopez*, 6<sup>th</sup> Dist. No. OT-05-059, 2007-Ohio-202, the defendant was told that the “immigration authorities” could issue him a sanction as serious as deportation and was asked whether he understood. *Id.* at ¶16-18. The Sixth District Court of Appeals held that “[w]hile it is preferable that a court warn of the immigration consequences of a plea with the statutory language read verbatim,” the advisement substantially complied with the law because the defendant subjectively understood the implications of his plea and the rights he was waiving. *Id.* at ¶19-20. Like in *Feldman*, only the consequence of deportation was mentioned, but unlike in *Feldman*, the appellate court analyzed the defendant’s subjective understanding of the consequences he faced.

Similarly, in *State v. Encarnacion*, 168 Ohio App.3d 577, 2006-Ohio-4425, 861 N.E.2d 152, the defendant was informed that he could be deported. *Id.* at ¶5-8. The Twelfth District Court of Appeals held that the trial court did not err by denying the defendant's motion to withdraw his plea. The appellate court reasoned that the defendant "was informed of the possibility that his conviction could result in deportation. He told the trial court that he understood that he could be deported as a result of the conviction and then entered his plea." *Id.* at ¶59. Again, in *Encarnacion*, the court of appeals examined the defendant's subjective understanding of his possible immigration consequences as opposed to solely looking at the number of consequences provided in the advisement. This is the proper analysis for a court of appeals.

Lastly, in *State v. Pineda*, 8<sup>th</sup> Dist. No. 86116, 2005-Ohio-6386, the defendant was advised that the "immigration department" could "begin a proceeding to have [him] excluded." *Id.* at ¶3. The defendant told the court that he did not understand and was then told he could be deported. *Id.* at ¶5-6. The defendant stated that he understood. *Id.* at ¶8. As in the above cases, the Eighth District Court of Appeals found that the trial court did not abuse its discretion in denying the defendant's motion to withdraw his plea because the advisement, while not given verbatim, substantially complied with R.C. 2943.031. *Id.* at ¶30.

Despite the cases discussed above, there are two cases<sup>2</sup> where appellate courts have found that a deportation advisement alone did not meet the burden of substantial compliance. In *State v. Hernandez-Medina*, 2<sup>nd</sup> Dist. No. 06CA0131, 2008-Ohio-418, the Second District Court of Appeals found that an advisement mentioning a defendant's status in the United States and deportation did not constitute substantial compliance. *Id.* at ¶30. The Second District Court of Appeals cited *State v. Zuniga*, 11<sup>th</sup> Dist. Nos. 2003-P-0082, 2004-P-0002, 2005-Ohio-2078, in reaching its conclusion.

In *Zuniga*, the defendant was told that he could be deported as a result of his plea of guilty and was asked if he understood. *Id.* at ¶5-6. The Eleventh District Court of Appeals found that the advisement failed to comply with R.C. 2943.031. Although the Eleventh District Court of Appeals found that the advisement was not sufficient for substantial compliance in *Zuniga*, Judge Rice indicated that *Zuniga* actually supported a finding of substantial compliance in *Feldman*. In dissent in *Feldman*, Judge Rice explained that the defendant in *Zuniga* did not enter a voluntary and intelligent plea:

In *Zuniga*, the trial court advised the defendant that pleading guilty could result in deportation, but failed to advise him of the possibility of exclusion or denial of naturalization. He eventually faced removal proceedings in a United States Immigration Court. The defendant moved the trial court to withdraw his guilty plea claiming it was his understanding that he would face deportation only if he violated his probation. The defendant averred that his misunderstanding was premised upon his attorney's mistaken advice at the time he entered his plea of guilty. This court held the trial

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<sup>2</sup> In *State v. Schlaf*, 8<sup>th</sup> Dist. No. 90825, 2008-Ohio-6151, the appellate court also found that an advisement mentioning deportation only was not sufficient for substantial compliance, but the appellate court limited its holding to the "unique facts" of that particular case. *Id.* at ¶20.

court did not substantially comply with the dictates of R.C. 2943.031 because it failed to advise the defendant that his conviction, standing alone, could result not only in deportation, but also other “related immigration consequences.” \* \* \*. This court determined the trial court's omission, in conjunction with defense counsel's wrong advice, “resulted in [the defendant's] misguided belief that he would only be deported if he violated probation.” \* \* \*. Given the totality of these circumstances, this court concluded the defendant's guilty plea was not voluntarily and intelligently entered.

Id. at ¶61 (Rice, J., dissenting) (internal citations omitted). Judge Rice further explained that the facts of *Zuniga* were materially different than the facts in *Feldman* because the advisement given by the trial court put Mr. Feldman on notice of possible immigration-related consequences and Mr. Feldman's counsel discussed with him the implications and impact of his plea on his immigration status:

A review of the totality of the circumstances of this case reveals counsel stated he had discussed with [Mr. Feldman] the implications and/or impact that a plea of guilty would have on his status as a resident non-citizen. Furthermore, the court advised [Mr. Feldman] of both the possibility of deportation and that his plea could subject him to other United States immigration laws. By alerting [Mr. Feldman] in this fashion, the court specifically indicated that appellant not only ran the risk of removal via deportation, but his residential status could be affected by other immigration procedures, not the least of which could be exclusion.

Id. at ¶66. Therefore, even though the appellate court in *Zuniga* found that an advisement regarding only one immigration consequence was not substantial compliance, the holding was not based solely on the number of consequences given in the advisement but also on the defendant's subjective understanding of the implications of his plea. Thus, even the decision of the Eleventh District Court of Appeals in *Zuniga* supports a reversal of its *Feldman* decision.

### **3. Conclusion**

This Court should reverse *Feldman* and hold that a bright-line rule requiring an allusion to each immigration consequence demands strict compliance with the statute, a standard already rejected by this Court. This Court should hold that the focus of a substantial compliance analysis should be placed on whether there was notice given of the possibility of immigration consequences and the defendant's subjective understanding of the effect of his plea, not the number of consequences referenced in an advisement.

**B. Because federal immigration law constantly changes, courts should look at a defendant's subjective understanding of the possible consequences he faced instead of whether three particular words were uttered.**

#### **1. Changes to Federal Immigration Law**

When R.C. 2943.031 was enacted in 1989, there were two equally important purposes of the statute. *Hernandez-Medina* at ¶29. The first purpose of the statute was to inform non-citizen defendants of the "particular potential" immigration consequences. *Id.* The other purpose was for a trial court to " 'determine that the defendant understands the advisement.' " *Id.*, quoting R.C. 2943.031.

At the time of the enactment, deportation and exclusion were two possible federal immigration consequences. But in 1996, Congress completely revised federal immigration laws with the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). This act eliminated the terms "deportation" and "exclusion" as terms of art in federal immigration law. Instead, these concepts were

replaced by the term “removability”. Vail, *Essentials of Removal and Relief* (2006) 12-13, Chapter 1. See also, *Calcano-Martinez v. Immigration and Naturalization Service* (2001), 533 U.S. 348, 121 S.Ct. 2268, at fn.1 (“An additional difference between the old and the new statute with regard to petitions for review is one of nomenclature. In keeping with the statute-wide change in terminology, the new provision refers to orders of ‘removal’ rather than orders of ‘deportation’ or ‘exclusion.’”). Persons who have been lawfully admitted are now charged with “grounds of removability” pursuant to INA §237(a), and persons who have never been admitted are charged with “grounds of inadmissibility” under INA §212(a). *Id.*

To be sure, many changes were made to the federal immigration laws in 1996. Ohio, however, never revised its laws to remain consistent with federal laws, causing many problems in the application of R.C. 2943.031 today. The General Assembly’s intent in enacting the statute can no longer be accomplished. Indeed, the language on which the legislature placed such great importance as to mandate the words used by trial courts no longer has any meaning in the law. The General Assembly felt so strongly about the importance of this advisement that it actually provided the language to be used, but the words upon which it relied were eliminated from law in 1996. From that point on, defendants were being advised of a status that technically no longer existed. But substantial compliance with the statute still retains the same meaning: courts must analyze whether a defendant subjectively understood that he faced possible immigration-related consequences as a result of entering a plea.

## 2. *Application of Law to this Case*

In the instant case, there was a knowing and voluntary plea. Additionally, there was substantial compliance with R.C. 2943.031. The trial court, in reviewing Mr. Feldman's R.C. 2943.031 motion, engaged in a thorough analysis and determined that Mr. Feldman subjectively understood the effect of his plea and that he entered a knowing and voluntary plea:

The court finds that the advisement given in this case substantially complies with R.C. 2943.031. The defendant was advised that his plea of guilty could subject him to immigration laws, including deportation, and the defendant indicated that he understood. Deportation is commonly understood to mean "the removal from a country of an alien whose presence is unlawful or prejudicial." \* \* \*. Thus, although the defendant may not have understood the particular methods that could be used to remove him from this country, he understood that removal was a possibility because of his conviction. That this possibility did not become a reality for more than 8 years does not make the defendant's plea involuntary, unknowing, or unintelligent. The only evidence that the defendant would not have entered into the plea agreement had he been advised that his plea could lead to deportation, exclusion, or denial of naturalization is the affidavit of Deborah Livingston, in which she indicates she asked if he would have pled guilty if it had been explained that he could be excluded and he responded "no." No evidence is presented indicating that the defendant did not understand that as a result of his conviction he could be sent back to Russia. Rather, the affidavit and the arguments of counsel indicate that the defendant did not understand that he could be "excluded" upon returning from a trip abroad. As explained above, it is not necessary for the defendant to understand in detail the procedures that can be utilized to remove him from the country. The defendant understood that he could be removed, and that is enough. Further, the assertion that the defendant would have entered into the plea agreement knowing that he would be deported without any further action on his part, but would not be willing to enter into the same plea agreement if he had known that he could be excluded from the country after he took a trip abroad is simply not credible since he has control over that situation.

(T.d. 44 at ¶17) (internal citation omitted).

Generally, immigrants understand the colloquial definition of “deportation”—not to be confused with the legal definition which no longer exists. “There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions.’” *Padilla v. Kentucky* (2010), --- U.S. ---, 130 S.Ct. 1473, 1481-1482, quoting *INS v. St. Cyr* (2001), 533 U.S. 289, 322, 121 S.Ct. 2271. Immigrants may not understand, however, terms of art like “exclusion,” “removal,” and “inadmissibility.”

At his change of plea hearing, Mr. Feldman was advised that he could face possible immigration consequences. Indeed, during his change of plea hearing, the following exchange took place:

Mr. Feldman’s counsel: Furthermore, my client is not a U.S. citizen. I have explained to him about the possible repercussions of entering a plea of guilty to this charge.

The Court: Possible deportation?

Mr. Feldman’s counsel: Yes.

(T.p. 4). This point was further reiterated to Mr. Feldman by the trial court:

The Court: Do you understand that by pleading guilty today, if the plea is accepted, that you can be subjected to some Immigration laws?

Mr. Feldman: Yes.

The Court: Or action?

Mr. Feldman: Yes.

The Court:                                Could involve deportation?

Mr. Feldman:                              Yes.

(T.p. 5). Mr. Feldman was not advised that he faced possible removal from the United States, the immigration consequence in effect at the time of his change of plea. Instead, he was advised that he could be deported, a legal term which no longer existed at the time of his change of plea. Thus, in ruling on Mr. Feldman's motion below, the trial court examined Mr. Feldman's understanding that he faced possible immigration consequences, not the precise words used, in considering whether there was substantial compliance. This task was accomplished by considering the colloquial definition of deportation. Mr. Feldman understood that he could be sent back to Russia as a consequence of his plea, and that is precisely what is occurring now.

By creating a bright-line rule with respect to the advisement that must be given by a trial court, the Eleventh District Court of Appeals rejected the analysis conducted by the trial court. The trial court, which had all the relevant facts before it, determined that Mr. Feldman understood the effect of his plea and understood that he may have immigration-related consequences as a result of his plea. The trial court found that Mr. Feldman's plea was knowing and voluntary. The Eleventh District Court of Appeals not only ignored the analysis done by the trial court but failed to conduct any analysis as to whether there was substantial compliance in terms of the definition provided by this Court: "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is

waiving. \* \* \* The test is whether the plea would have otherwise been made.” *Francis* at ¶48, quoting *Nero* at 108. Instead, the Court of Appeals simply engaged in a numbers game and looked at the number of consequences provided in the advisement. The appellate court gave no consideration to the defendant’s subjective understanding.

### **3. *Guidance from the Supreme Court of the United States***

Recently, the Supreme Court of the United States addressed the issue of advisement of noncitizen defendants in terms of immigration-related consequences. While this case specifically addressed the duty of trial counsel to provide advice to his client, much can be gleaned from the opinion. First, the Court explained the importance of *accurate* legal advice in terms of immigration-related consequences:

These changes to our immigration law have dramatically raised the stakes of a noncitizens’s criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

*Padilla* at 1480. The Supreme Court of the United States recognized the importance of accurate legal advice for noncitizens, yet the decision of the Eleventh District Court of Appeals requires trial courts to provide antiquated legal advice which is not accurate.

The Supreme Court of the United States held that due to the complexity of immigration law, trial counsel is only required to advise clients that there is a risk of adverse immigration-related consequences when the potential consequences are uncertain:

Immigration law can be complex, and it is a legal specialty all of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward \* \* \*, a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.

Id. at 1483. In his concurring opinion, Justice Alito shared the majority's concern about the difficulty of providing accurate legal advice regarding immigration-related consequences:

The task of offering advice about immigration consequences of a criminal conviction is further complicated by other problems, including significant variations among Circuit interpretations of federal immigration statutes; the frequency with which immigration law changes; different rules governing the immigration consequences of juvenile, first-offender, and foreign convictions; and the relationship between the "length and type of sentence" and the determination "whether [an alien] is subject to removal, eligible for relief from removal, or qualified to become a naturalized citizen."

Id. at 1490 (Alito, J., concurring).

The difficulty faced by trial counsel in advising a noncitizen defendant applies equally to a trial court. A common pleas judge generally has no more experience with immigration law than defense counsel. A noncitizen defendant should be provided with enough information to allow that person to stop entering a plea and seek counsel from an attorney familiar with the intricacies of immigration law. This information must also be accurate. Thus, providing a defendant with immigration-related consequences in a colloquial sense should be sufficient to substantially comply with the mandates of

R.C. 2943.031 and a specific reference to each antiquated consequence should not be the requirement.

#### **4. Conclusion**

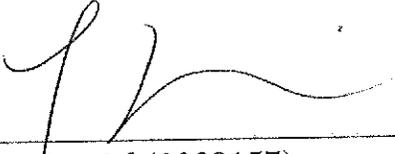
This Court should reverse *Feldman* because *Feldman* is contrary to *Francis* from this Court and also contrary to *Padilla* from the Supreme Court of the United States. *Feldman* ignores the fact that R.C. 2943.031 does not reflect current federal immigration law. Defendants are not being advised of the immigration consequences that they actually face. This Court should hold that when looking at the totality of the circumstances to determine whether substantial compliance was met when reviewing a defendant's motion pursuant to R.C. 2943.031, a court of appeals should look at the defendant's subjective understanding of the fact that he faced immigration-related consequences, not whether particular words were used to provide this advisement.

**CONCLUSION**

For the reasons discussed above, this Court should reverse the decision of the Eleventh District Court of Appeals in *Feldman* and hold that substantial compliance with R.C. 2943.031 does not mandate reference to each of the three possible immigration consequences. Instead, substantial compliance requires a court look at a defendant's subjective understanding that he faced possibly immigration-related consequences under the totality of the circumstances.

Respectfully submitted,

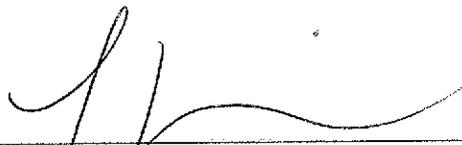
By: Charles E. Coulson, Prosecuting Attorney

By:   
\_\_\_\_\_  
Teri R. Daniel (0082157)  
Assistant Prosecuting Attorney  
Counsel of Record

COUNSEL FOR APPELLANT  
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**PROOF OF SERVICE**

A copy of the foregoing Merit Brief of Appellee, State of Ohio, was sent by regular U.S. Mail, postage prepaid, to counsel for the appellee, Rhys B. Cartwright-Jones, Esquire, Attorney & Counselor At Law, 42 N. Phelps Street, Youngstown, OH 44503, and, pursuant to S.Ct.R. XIV, Section 2, the Ohio Public Defender, Timothy Young, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, on this 12<sup>th</sup> day of May, 2010.

  
\_\_\_\_\_  
Teri R. Daniel (0082157)  
Assistant Prosecuting Attorney

TRD/klb

## **APPENDIX**

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellant,

v.

ARTEM L. FELDMAN,

Defendant-Appellee.

Case No. 09-1987

On Appeal from the  
Lake County Court of Appeals,  
Eleventh Appellate District

Court of Appeals Case No. 2009-L-052

NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

CHARLES E. COULSON (0008667)  
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LAKE COUNTY, OHIO

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CLERK OF COURT  
SUPREME COURT OF OHIO

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FILED  
OCT 30 2009  
CLERK OF COURT  
SUPREME COURT OF OHIO

COUNSEL FOR APPELLEE, ARTEM L. FELDMAN

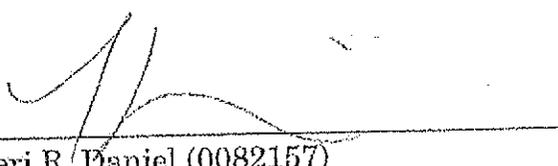
Notice of Appeal of Appellant State of Ohio

Appellant State of Ohio, gives notice of appeal to the Supreme Court of Ohio from the opinion and judgment entry of the Lake County Court of Appeals, Eleventh Appellate District, entered in *State v. Artem L. Feldman*, Court of Appeals Case No.2009-L-052 on October 23, 2009.

This case is a Claimed Appeal of Right, pursuant to S.Ct. R. II, Section 1(A)(2) as it involves a substantial constitutional question, and/or this case is a Discretionary Appeal, pursuant to S.Ct. R. II, Section 1(A)(3) as it involves a felony and raises issues of public or great general interest.

Respectfully submitted,

By: Charles E. Coulson (0008667)  
Lake County Prosecuting Attorney

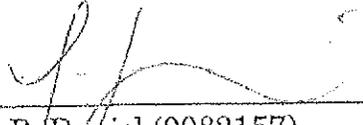
By:   
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**PROOF OF SERVICE**

A copy of the foregoing Notice of Appeal was sent by regular U.S. Mail, postage prepaid, to counsel for the appellee, Rhys B. Cartwright-Jones, Esquire, Attorney & Counselor At Law, 100 Federal Pl. East, Suite 101, Youngstown, OH 44503-1810, and, pursuant to S.Ct.R. XIV, Section 2, the Ohio Public Defender, Timothy Young, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, on this 21<sup>st</sup> day of October, 2009.

  
\_\_\_\_\_  
Teri R. Daniel (0082157)  
Assistant Prosecuting Attorney

TRD/klb

00007 0024

THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
LAKE COUNTY, OHIO

STATE OF OHIO,

:

OPINION

Plaintiff-Appellee,

- vs -

ARTEM L. FELDMAN,

Defendant-Appellant.

FILED  
COURT OF APPEALS

CASE NO. 2009-L-052

OCT 23 2009

MAUREEN G. KELLY  
CLERK OF COURT  
LAKE COUNTY, OHIO

Criminal Appeal from the Court of Common Pleas, Case No. 00 CR 000086.

Judgment: Reversed and remanded.

*Charles E. Coulson*, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

*Rhys Brendan Cartwright-Jones*, 101 City Center One Building, 100 Federal Plaza East, Youngstown, OH 44503-1810 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Artem L. Feldman, appellant herein, appeals the judgment entered by the Lake County Court of Common Pleas overruling a motion to vacate his plea of guilty to one count of grand theft and one count of forgery entered over nine years ago. At issue is whether Mr. Feldman's plea of guilty was entered knowingly and voluntarily where the trial court did not provide him, a non-citizen, the complete recitation of the statutory caveat set forth under R.C. 2943.031 highlighting the potential effects a plea of guilty would have on his residential status in the United States. For the reasons discussed in

this opinion, we reverse the judgment of the trial court and remand the matter for further proceedings.

**{¶2} Facts and Procedural Posture**

{¶3} Mr. Feldman, a Russian native and citizen, arrived in the United States under refugee status with his parents in March of 1993. In 1994, Mr. Feldman became a legal permanent resident of the United States. He has lived in the United States continuously since his arrival.

{¶4} On June 12, 2000, Mr. Feldman pleaded guilty to felony-four grand theft, in violation of R.C. 2913.02(A)(1), and one count of felony-five forgery, in violation of R.C. 2913.31(A)(3). He was later sentenced to two years community control and sixty days in jail with work release privileges.

{¶5} In September 2008, Mr. Feldman returned from a trip abroad when the United States Customs and Border Patrol ("CBP") stamped his passport "deferred." He was subsequently required to report to the CBP office in Cleveland, Ohio. Upon reporting, Immigration and Customs Enforcement ("ICE") officers took him into custody and initiated removal proceedings with the United States Department of Homeland Security.

{¶6} On December 5, 2008, Mr. Feldman filed a petition for post-conviction relief seeking to vacate his guilty plea, and, on February 27, 2009, he filed a renewed motion to withdraw his guilty plea. Mr. Feldman asserted he was entitled to relief pursuant to Crim.R. 32.1 as the circumstances surrounding his plea of guilty demonstrated it was not entered knowingly and voluntarily; specifically, he alleged his plea could not have been entered knowingly and voluntarily because the trial court

failed to adequately comply with the statutory advisement under R.C. 2943.031. In support, Mr. Feldman argued, through counsel, that even though the trial court discussed the potential for deportation, he "is somewhat clueless" and has a tendency to simply nod agreeably when addressed by an authority figure. He also claimed that the charges to which he pleaded guilty were based upon a check-theft scam arranged by a third-party. He alleged that, while a crime was committed, "it involved no knowing participation on [his] part." As a result, Mr. Feldman asserted he "got himself into an unwitting guilty plea in the same way he got himself into the check debacle: he just nodded along."

{¶7} On April 13, 2009, the trial court overruled Mr. Feldman's motions. With respect to Crim.R. 32.1, the court concluded, in relevant part:

{¶8} "The defendant has not met his burden of establishing manifest injustice. The assertions that the defendant does not understand things and simply nods with what others say is supported only by unsworn, unsigned letters from friends. Further, the allegation that the defendant's conviction stems from a scam the defendant fell for is not relevant to whether his plea was made voluntarily, knowingly, and intelligently. The defendant seeks to withdraw his plea more than 8 years after the fact. The circumstances and facts alleged by the defendant existed and were known at the time of the plea. The only change is that the defendant now faces immigration problems because of his conviction. That the defendant thought those consequences would not come to fruition because they had not occurred previously does not make his plea involuntary, unknowing, or unintelligent. The record reflects that the defendant was advised of the rights he was giving up, he understood the English language, he

understood that he could be subjected to immigration laws, he understood the charges against him, understood the potential sentence, and understood the rights he was giving up. Additionally, the defendant was represented by counsel, there has been no allegation that counsel was ineffective, and the record reflects that counsel answered all of his questions."

{¶9} The trial court further observed a sentencing judge is merely required to substantially comply with the statutory caveat under R.C. 2943.031. The court determined the advisement Mr. Feldman received met this standard. The court reasoned:

{¶10} "The defendant was advised that his plea of guilty could subject him to immigration laws, including deportation, and the defendant indicated that he understood. Deportation is commonly understood to mean 'the removal from a country of an alien whose presence is unlawful or prejudicial.' \*\*\* Thus, although the defendant may not have understood the particular methods that could be used to remove him from this country, he understood that removal was a possibility because of his conviction. \*\*\* No evidence is presented indicating that the defendant did not understand that as a result of his conviction he could be sent back to Russia. \*\*\* [I]t is not necessary for the defendant to understand in detail the procedures that can be utilized to remove him from this country. The defendant understood that he could be removed, and that is enough." (Footnote omitted.)

{¶11} Mr. Feldman now appeals the trial court's order setting forth two assignments of error for our consideration. Because the arguments asserted in each assigned error interrelate, we shall address them together. They provide:

{¶12} “[1.] The trial court erred in declining to vacate Mr. Feldman's guilty plea for failure of statutory compliance – R.C. 2943.031.

{¶13} “[2.] The trial court erred in declining to vacate Mr. Feldman's guilty plea for failure of a voluntary, knowing, and intelligent guilty plea tantamount to Crim.R. 32.1 manifest injustice.”

{¶14} Mr. Feldman's assignments of error argue the trial court erred in denying his motion to vacate his plea because it failed to advise him properly when it accepted his guilty plea in 2000.

**{¶15} Statutory Requirements for a Non-Citizen Defendant**

{¶16} R.C. 2943.031(A) states that, when a trial court accepts a guilty plea from a defendant who is not a United States citizen:

{¶17} “\*\*\* The court shall address the defendant personally, provide the following advisement to the defendant that shall be entered in the record of the court, and determine that the defendant understands the advisement:

{¶18} “If you are not a citizen of the United States you are hereby advised that conviction of the offense to which you are pleading guilty (or no contest, when applicable) may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.”

{¶19} Additionally, R.C. 2943.031(D) provides:

{¶20} “Upon motion of the defendant, the court shall set aside the judgment and permit the defendant to withdraw a plea of guilty or no contest and enter a plea of not guilty or not guilty by reason of insanity, if, after the effective date of this section, the court fails to provide the defendant the advisement described in division (A) of this

section, the advisement is required by that division, and the defendant shows that he is not a citizen of the United States and that the conviction of the offense to which he pleaded guilty or no contest may result in his being subject to deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."

{¶21} A motion to withdraw a guilty plea after a sentence has been imposed is typically subject to the "manifest injustice" standard of Crim.R. 32.1. However, when such a motion is filed pursuant to R.C. 2943.031, "the \*\*\* abuse-of-discretion standard of review applies." *State v. Francis*, 104 Ohio St.3d 490, 495, 2004-Ohio-6894. Mr. Feldman's brief seems to argue he is entitled to relief under either R.C. 2943.031 or Crim.R. 32.1. However, his position is fundamentally premised upon the claim that his guilty plea was not voluntary, knowing, or intelligent due to the trial court's failure to provide a sufficiently thorough recitation of the warning set forth under R.C. 2943.031. Accordingly, the manifest injustice standard does not apply to this case, and we shall review the trial court's judgment for an abuse of discretion. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶22} In *Francis*, supra, the Supreme Court of Ohio recognized that a trial court is not required to read the statutory warning of R.C. 2943.031 verbatim; rather, to the extent a court substantially complies with the statutory requirements, its advisement will suffice. *Francis*, supra, at 499. "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea

and the rights he is waiving. \*\*\* The test is whether the plea would have otherwise been made." Id. at 500, quoting *State v. Nero*, 56 Ohio St.3d 106, 109. Finally, although R.C. 2943.031 does not provide any time limitation within which a party must file his or her motion, the "timeliness of the motion is just one of many factors the trial court should take into account when exercising its discretion \*\*\*" in ruling on the motion. *Francis*, supra, at 497.

**{¶23} Application of Law to Mr. Feldman's Case**

{¶24} During his 2000 plea hearing, the following exchange took place between Mr. Feldman and the court:

{¶25} "THE COURT: Are you able to read, write and understand the English language?"

{¶26} "THE DEFENDANT: Yes, sir.

{¶27} "THE COURT: Are you a U.S. citizen?"

{¶28} "THE DEFENDANT: No.

{¶29} "THE COURT: What country are you a citizen of?"

{¶30} "THE DEFENDANT: Russia.

{¶31} "THE COURT: Do you understand that by pleading guilty today, if the plea is accepted, that you can be subjected to some Immigration laws?"

{¶32} "THE DEFENDANT: Yes.

{¶33} "THE COURT: Or action?"

{¶34} "THE DEFENDANT: Yes.

{¶35} "THE COURT: Could involve deportation?"

{¶36} "THE DEFENDANT: Yes.

{¶37} "THE COURT: Do you understand that this Court has nothing to do with that? Do you understand that?"

{¶38} "THE DEFENDANT: Yes."

{¶39} "THE COURT: Nothing I do or say has any effect on that procedure; do you understand that?"

{¶40} "THE DEFENDANT: Yes."

{¶41} The trial court specifically notified Mr. Feldman he could be deported; however, the only additional warning Mr. Feldman received generally advised that he could be subject to immigration laws. The question, therefore, is whether the generic caveat that Mr. Feldman could be subject to general immigration laws was sufficient to place him on notice that his plea could prevent him from reentering the country (if he left) as well as potentially deny him citizenship in the future. Although the trial court's warning could be viewed as incorporating, by reference, the more detailed statutory notification, we hold its sweeping, open-ended nature was insufficient to meet the demands of R.C. 2943.031(A) as construed by *Francis*.

{¶42} The language of R.C. 2943.031 is clear; although a trial court need not provide a verbatim recitation of each consequence, it must provide some meaningful notification of all three separate statutory consequences (i.e., deportation, exclusion, and denial of naturalization). By failing to at least touch upon each possible consequence contemplated by the General Assembly, a court cannot meet minimal standards of due process. In codifying the notification statute, the General Assembly evidently believed warning a non-citizen defendant of three separate consequences was necessary to achieve a knowing, voluntary, and intelligent plea of guilty. Given the

General Assembly's directive, we hold substantial compliance with R.C. 2943.031 demands a trial court's warning to feature at least some reference to each particular consequence designated in the statute.

{¶43} We are conscious that other courts have held that substantial compliance does not demand an allusion to each separate consequence. See *State v. Encarnacion*, 168 Ohio App.3d 577, 2006-Ohio-4425; *State v. Gomez*, 9th Dist. No. 02C008036, 2002-Ohio-5255; *State v. Lamba*, 2d Dist. No. 18757, 2001-Ohio-7024. We nevertheless believe such an approach fails to recognize the policy animating the notification requirement of R.C. 2943.031. The warning is not simply an academic, procedural obstacle which a court must overcome; rather, the purpose of the caveat is to ensure a non-citizen defendant *fundamentally appreciates* that a plea of guilty could eventuate in one of the three sanctions set forth in the statute. The substantial compliance standard established by *Francis* requires that a "defendant subjectively understand the implications of his plea and the rights he is waiving \*\*\*." *Id.* at 500, quoting *Nero*, *supra*, at 109. In light of this standard, we fail to see how a non-citizen defendant can be charged with a subjective understanding of all three statutory consequences when he or she is not apprised, in some form, of each separate consequence.

{¶44} In *State v. Naoum*, 8th Dist. Nos. 91662 and 91663, 2009-Ohio-618, the Eighth Appellate District reached a similar conclusion. In *Naoum*, the Cuyahoga County Court of Common Pleas did not advise a non-citizen defendant of the possibility of exclusion from admission to the United States. In omitting the advisement, the Eighth District held the trial court failed to substantially comply with R.C. 2943.031. The court

concluded that “[s]ubstantial compliance is not met when only 2/3 of the advisement is given.” *Naoum*, supra, at ¶23. Moreover, the court pointed out that “[w]ithout the required explanation, [the non-citizen defendant] could not and did not understand the ramifications upon his status as a non-citizen.” *Id.* at ¶24. See, also, *State v. Zuniga*, 11th Dist. Nos. 2003-P-0082 and 2004-P-0002, 2005-Ohio-2078 (warning insufficient where trial court only advises non-citizen defendant of possibility of deportation and evidence suggested defendant was misled into belief such a possibility would occur only if he violated probation.)

¶45) We agree with the court’s conclusions in *Naoum*. Namely, the trial court’s failure to advise Mr. Feldman of the three consequences set forth under R.C. 2943.031 did not rise to the level of substantial compliance. Although *Francis* clearly held that a trial court need not strictly recite the statutory advisory set forth in the code, the statute unambiguously provides that a direct advisement of the three sanctions set forth under subsection (A) is necessary for a non-citizen defendant to enter a valid plea of guilty. Without delineating each consequence set forth in the statute, we cannot conclude Mr. Feldman subjectively understood the full implication of his plea. As the court failed to provide such a warning, it therefore follows Mr. Feldman’s 2000 plea of guilty was not entered knowingly, voluntarily, and intelligently.

¶46) Timeliness

¶47) As already discussed, untimeliness is not a sufficient basis to justify a trial court’s decision to deny a motion filed pursuant to R.C. 2943.031. *Francis*, supra, at 497-498. Moreover, even considerable delay does not, on its own, support a decision to deny a R.C. 2943.031 motion when the immigration-related consequences do not

become manifest for a significant period after the plea was entered. See, e.g., *Francis*, supra, at 498; see, also, *Naoum*, supra, at ¶25.

{¶48} Here, Mr. Feldman filed his motion approximately eight years after entering his plea. During that time, it appears Mr. Feldman had not experienced any immigration-related difficulties prior to the initiation of the underlying removal proceedings. Without some triggering event that would place an unaware non-citizen defendant on notice that he could be excluded (e.g., actual exclusion), it would be somewhat arbitrary and unreasonable to give significant weight to the timing of a motion. Moreover, and most importantly, despite the state's protestations, we fail to see how the timing of the instant motion would have any significant bearing on the state's ability to move forward and prosecute Mr. Feldman's crime.

{¶49} In support of its assertion that Mr. Feldman's motion is untimely, the state asserts the bank investigator who handled the investigation which precipitated the charges to which Mr. Feldman eventually pleaded, has passed away. Without this witness, the state maintains that trying Mr. Feldman at this point would be hampered. We recognize that live witness testimony is generally preferable to, for example, documentary evidence at a trial. However, the state does not allege the evidence accumulated by the deceased was destroyed or is now unavailable due to the witness' passing. Although we are unaware of the basic facts underlying the case, we do know the crime at issue involved a check theft scam. Given the crime, it is likely that business records such as transaction logs, banking records, and other similar documentation would be sufficient to build a case. As the state has failed to establish unavoidable or

necessary prejudice due to the timing of Mr. Feldman's motion, we hold the eight-year delay does not adversely impact Mr. Feldman's argument.

**{¶50} Semantic Exactitude of Codified Language**

{¶51} The state points out that R.C. 2943.031 employs language which does not technically correspond to vernacular utilized in current federal immigration legislation. Hence, the state maintains, requiring the court to provide notice of each consequence set forth in the code elevates form over substance. We believe the opposite is true.

{¶52} The state rightly observes that R.C. 2943.031 was enacted in 1989 utilizing legal terms relating to federal immigration law as it applied at that time. However, pursuant to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the procedural terms "deportation" and "exclusion" were replaced with a unified procedure termed "removal." Kidane, Revisiting the Rules of Procedure and Evidence Applicable in Adversarial Administrative Deportation Proceedings: Lessons from the Department of Labor Rules of Evidence (2007), 57 Cath. U. L.Rev. 93, 133, f.n. 205, citing the Immigration and Nationality Act ("INA"), Sec. 240, generally (codified as 8 U.S.C. Sec. 1229a). With this in mind, the advisement upon which the legislature placed such emphasis in 1989 provides a non-citizen defendant with notice of procedures that no longer exist and thus have little, if any, technical import. Therefore, any "subjective understanding" a non-citizen defendant could glean from the statutory notification would not assist in a true appreciation of what could actually happen under current federal immigration law.

{¶53} As a strictly semantic point, the state's observations are both astute and clever. However, regardless of how the verbiage in the INA has evolved, the actual,

pragmatic consequences remain unchanged. If a non-citizen resident has been convicted of certain crimes proscribed by federal immigration laws, he or she could be either removed from this country, denied re-entry into this country, or precluded from obtaining citizenship in this country in the future. To be sure, the General Assembly would do well by modifying the language of the warning to correspond with the relevant language used in federal immigration law. Still, the current advisement, when given properly, should nevertheless place a non-citizen defendant on notice of the practical consequences of entering a plea. We therefore find the non-correspondence of nomenclature between the R.C. 2943.031 and federal immigration law an insufficient basis for demanding less of a trial court when delivering the statutory caveat.

{¶54} As we hold the trial court failed to substantially comply with R.C. 2943.031, Mr. Feldman's two assignments of error are sustained. Therefore, it is the order of this court that the judgment entry of the Lake County Court of Common Pleas be reversed and the matter remanded.

COLLEEN MARY O'TOOLE, J., concurs,

CYNTHIA WESTCOTT RICE, J., dissents with Dissenting Opinion.

---

CYNTHIA WESTCOTT RICE, J., dissents with Dissenting Opinion.

{¶55} As I would affirm the judgment entered by the trial court, I respectfully dissent.

{¶56} As the majority aptly observes, a motion to withdraw a guilty plea pursuant to R.C. 2943.031 is reviewed for an abuse of discretion. *State v. Francis*, 104 Ohio St.3d 490, 495, 2004-Ohio-6894. However, I believe the majority has lost focus of this standard and, instead, engaged in a de novo review. In so doing, the majority has simply substituted its judgment for that of the trial court.

{¶57} Further, the majority maintains a trial court must provide a non-citizen defendant with some notification of all three separate statutory consequences (i.e., deportation, exclusion, and denial of naturalization) to substantially comply with R.C. 2943.031. In support, the majority relies upon the Eighth Appellate District's holding in *State v. Naoum*, 8th Dist. Nos. 91662 and 91663, 2009-Ohio-618.

{¶58} In *Naoum*, the Eighth Appellate District held that substantially complying with R.C. 2943.031 requires a trial court to reference each of the three consequences set forth under subsection (A) of the statute. While *Naoum* is circumstantially on-point, I believe the holding in that case misunderstood the applicable standard to which a trial court must adhere. That is, by relying on *Naoum* the majority inappropriately demands strict compliance from the trial court rather than the non-constitutional substantial compliance standard announced in *Francis*.

{¶59} Courts have held that the term "strict compliance" does not mean "rote recitation" of a rule or statute. See *State v. Ballard* (1981), 66 Ohio St.2d 473, 480 (discussing strict compliance vis-à-vis advisement of constitutional rights in a Crim.R. 11 colloquy); accord *State v. Gibson*, 11th Dist. No. 2005-Ohio-0066, 2006-Ohio-4182, at ¶28. Hence, "strict compliance does not necessarily mean 'punctilious' compliance if, with only minor deviations, substantial and clear disclosure of the fact or information

demanded by the applicable statute or regulation occurs." *ContiMortgage Corp. v. Delawder* (July 30, 2001), 4th Dist. No. 00CA28, 2001 Ohio App. LEXIS 3410, \*22. However, by expressly holding that a trial court is *required* to paraphrase, or discretely itemize, each separate consequence set forth under R.C. 2943.031, the majority, by way of *Naoum*, essentially demands strict compliance with the statute. In this respect, the majority's holding is fundamentally inconsistent with the standard announced by the Supreme Court in *Francis*.

{¶60} Substantial compliance simply requires a defendant to subjectively understand the potential effects a plea of guilty could have on his or her status as a non-citizen resident; it does not require a court to "punctiliously" detail all aspects of the statute at issue. I therefore decline to follow the path trod by the court in *Naoum* and would hold the trial court substantially complied with the statutory warnings.

{¶61} Moreover, I believe this court's holding in *State v. Zuniga*, 11th Dist. Nos. 2003-P-0082 and 2004-P-0002, 2005-Ohio-2078, which concluded the trial court failed to substantially comply, actually supports my position. In *Zuniga*, the trial court advised the defendant that pleading guilty could result in deportation, but failed to advise him of the possibility of exclusion or denial of naturalization. He eventually faced removal proceedings in a United States Immigration Court. The defendant moved the trial court to withdraw his guilty plea claiming it was his understanding that he would face deportation *only if* he violated his probation. The defendant averred that his misunderstanding was premised upon his attorney's mistaken advice at the time he entered his plea of guilty. This court held the trial court did not substantially comply with the dictates of R.C. 2943.031 because it failed to advise the defendant that his

conviction, standing alone, could result not only in deportation, but also other "related immigration consequences." *Id.* at ¶44. This court determined the trial court's omission, in conjunction with defense counsel's wrong advice, "resulted in [the defendant's] misguided belief that he would only be deported if he violated probation." *Id.* Given the totality of these circumstances, this court concluded the defendant's guilty plea was not voluntarily and intelligently entered.

{¶62} Here, the trial court not only warned appellant of the possibility of deportation, but also alerted appellant his plea could subject him to certain immigration laws over which the court had no control. Appellant stated he was aware of these potential consequences, but still wished to plead guilty pursuant to the negotiated plea bargain. The record also indicates that counsel discussed the potential impact pleading guilty would have on his status as a non-citizen resident of the United States. There is no indication that counsel misinformed appellant nor is there any allegation that counsel was ineffective. Rather, during appellant's 2000 plea hearing, counsel made the following statement on record:

{¶63} "I have met with my client. It was explained to him about entering a plea of guilty, giving up certain constitutional rights that will be explained by this Court. When that plea is forthcoming, I believe, Your Honor, it will be made knowingly, voluntarily and [of] his own free will.

{¶64} "Furthermore, my client is not a U.S. citizen. I have explained to him about the possible repercussions of entering a plea of guilty to this charge."

{¶65} The court subsequently queried whether counsel advised appellant of the possibility of deportation. Counsel responded in the affirmative, pointing out that neither

he nor appellant had been contacted by any immigration officials, but he had advised appellant that deportation was a possibility of entering a plea of guilty. It is also worth noting that, during his plea colloquy with the trial court, appellant expressed his satisfaction with counsel's representation on record at the plea hearing. Thus, the reasoning in *Zuniga* supports the trial court's conclusion in the instant matter.

{¶66} A review of the totality of the circumstances of this case reveals counsel stated he had discussed with appellant the implications and/or impact that a plea of guilty would have on his status as a resident non-citizen. Furthermore, the court advised appellant of both the possibility of deportation and that his plea could subject him to other United States immigration laws. By alerting appellant in this fashion, the court specifically indicated that appellant not only ran the risk of removal via deportation, but his residential status could be affected by other immigration procedures, not the least of which could be exclusion. Even if appellant did not "realize," at the time he entered his plea, he could be excluded from the country after returning from a trip abroad, R.C. 2943.031 does not demand that a resident non-citizen possess a detailed understanding of all the procedures that could be utilized to remove him from the country. See *Francis*, generally; see, also, *State v. Encarnacion*, 168 Ohio App.3d 577, 2006-Ohio-4425; *State v. Pineda*, 8th Dist. No. 86116, 2005-Ohio-6386; *State v. Gomez*, 9th Dist. No. 02CA008036, 2002-Ohio-5255.

{¶67} Furthermore, the record is devoid of any testimony or evidence (either from appellant or from his trial counsel) that the trial court's failure to warn him of his immigration status affected his plea or prejudiced the bargain he received at the time he entered the plea. As a result, I would hold appellant failed to provide any basis for this

court to conclude that he would not have entered his plea if the court gave a more detailed warning. Substantial compliance requires a non-citizen defendant to subjectively understand that removal, regardless of how it is occasioned, is a possibility. Appellant represented, in open court, that he subjectively understood these consequences and nothing in the record contradicts this representation.

{¶68} Because the foregoing conclusion is sufficient to meet the demands of due process as outlined by the Supreme Court, the "timeliness" of appellant's motion could be viewed as inconsequential. However, it is worth pointing out that appellant's eight-year delay in filing his motion is not insignificant. I recognize that even considerable delay does not, on its own, support a decision to deny a R.C. 2943.031 motion when the immigration-related consequences do not become manifest for a significant period after the plea was entered. See, e.g., *Francis*, supra, at 498. However, under these circumstances, it appears the state could suffer prejudice due to the timing of appellant's motion. Even though the state may still have documentary evidence tending to prove its allegations beyond a reasonable doubt, the impact of the absence of a crucial witness in a criminal proceeding who possesses first-hand knowledge of the case cannot be undervalued. See *Francis*, supra, at 497; see, also, *State v. Tabbaa*, 151 Ohio App.3d 353, 2003-Ohio-299, at ¶35. (Holding, "without any time limitation, a defendant could wait until the state's evidence against him became stale, or witnesses died, or any other circumstances prejudicial to the state transpired, before seeking to withdraw a guilty plea, thereby imposing, among others, an unreasonable obligation on the state to maintain evidence and witness lists on all cases, ad infinitum.")

{¶69} There is *nothing* in the record indicating appellant took any measures, after pleading guilty in 2000, to determine what, if any, immigration laws might affect him. This passive approach led to the legal entanglement in which he now finds himself. Although he may not have expected these problems, they resulted from (1) his failure to ask any questions (or seek additional legal consultation) regarding the implications of the conviction on his immigration status and (2) his subsequent decision to leave the country. Under these circumstances, I believe appellant, as a non-citizen felon, was unreasonable for not taking a more aggressive and active personal role in determining how the federal law could impact his residential status, especially given both his counsel's and the court's clear admonitions that his conviction could have negative immigration consequences. Had appellant done so, the motion could have been filed sooner, potentially securing the availability of all relevant witnesses and evidence. Viewing the circumstances in their totality, I would hold the instant motion was not filed in a timely manner.

{¶70} Under our standard of review, we are constrained to affirm the trial court save an abuse of discretion. A court abuses its discretion if there is no sound reasoning process that would support that decision. Such an error is not merely one of judgment, but reflects a perversity of will, prejudice, partiality, or moral delinquency. *Pons v. Ohio State Medical Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122. Under this standard, "[i]t is not enough that the reviewing court, were it deciding the issue *de novo*, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result." *AAAA Enters., Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161.

Regardless of "countervailing reasoning processes," a court of appeals *must affirm* the trial court's judgment if it is neither arbitrary, unreasonable, nor unconscionable. See *Blakemore*, supra.

{¶71} Here, I would hold the trial court did not abuse its discretion; I believe the trial court's on-record conversations with both appellant and defense counsel during the 2000 plea hearing demonstrates it substantially complied with the requisite statutory advisement. By reversing the trial court, the majority is reviewing the matter *de novo* contrary to the more limited standard to which we are bound; moreover, by requiring a trial court to reiterate or paraphrase the statute, I believe the majority demands strict compliance with the statute and thus contravenes the unambiguous pronouncement of the Supreme Court of Ohio in *Francis*.

{¶72} For these reasons, I dissent.

STATE OF OHIO )  
 )SS.  
COUNTY OF LAKE )

IN THE COURT OF APPEALS  
ELEVENTH DISTRICT

STATE OF OHIO,  
Plaintiff-Appellee,

JUDGMENT ENTRY

- vs -

CASE NO. 2009-L-052

ARTEM L. FELDMAN,  
Defendant-Appellant:

FILED  
COURT OF APPEALS  
OCT 23 2009  
MARGARET G. KELLY  
CLERK OF COURT  
LAKE COUNTY, OHIO

For the reasons stated in the opinion of this court, appellant's assignments of error are with merit. It is the judgment and the order of this court that the judgment of the Lake County Court of Common Pleas is reversed and this case is remanded for further proceedings.

Costs to be taxed against appellee.

*Mary Jane Trapp*  
PRESIDING JUDGE MARY JANE TRAPP

COLLEEN MARY O'TOOLE, J., concurs,

CYNTHIA WESTCOTT RICE, J., dissents with Dissenting Opinion.

## R.C. 2943.031

(A) Except as provided in division (B) of this section, prior to accepting a plea of guilty or a plea of no contest to an indictment, information, or complaint charging a felony or a misdemeanor other than a minor misdemeanor if the defendant previously has not been convicted of or pleaded guilty to a minor misdemeanor, the court shall address the defendant personally, provide the following advisement to the defendant that shall be entered in the record of the court, and determine that the defendant understands the advisement.

“If you are not a citizen of the United States you are hereby advised that conviction of the offense to which you are pleading guilty (or no contest, when applicable) may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.”

Upon request of the defendant, the court shall allow him additional time to consider the appropriateness of the plea in light of the advisement described in this division.

(B) The court is not required to give the advisement described in division (A) of this section if either of the following applies:

(1) The defendant enters a plea of guilty on a written form, the form includes a question asking whether the defendant is a citizen of the United States, and the defendant answers that question in the affirmative;

(2) The defendant states orally on the record that he is a citizen of the United States.

(C) Except as provided in division (B) of this section, the defendant shall not be required at the time of entering a plea to disclose to the court his legal status in the United States.

(D) Upon motion of the defendant, the court shall set aside the judgment and permit the defendant to withdraw a plea of guilty or no contest and enter a plea of not guilty or not guilty by reason of insanity, if, after the effective date of this section, the court fails to provide the defendant the advisement described in division (A) of this section, the advisement is required by that division, and the defendant shows that he is not a citizen of the United States and that the conviction of the offense to which he pleaded guilty or no contest may result in his being subject to deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

(E) In the absence of a record that the court provided the advisement described in division (A) of this section and if the advisement is required by that division, the defendant shall be presumed not to have received the advisement.

(F) Nothing in this section shall be construed as preventing a court, in the sound exercise of its discretion pursuant to Criminal Rule 32.1, from setting aside the judgment of conviction and permitting a defendant to withdraw his plea.