

ORIGINAL

Before the Supreme Court of the State of Ohio

The State of Ohio

Plaintiff-Appellant

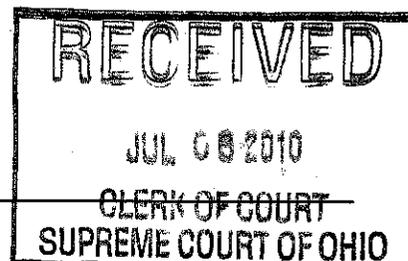
-vs-

Mr. Artem Feldman

Defendant-Appellee

Case No. 2009-1987

**On Appeal from Case No. 2009-L-52 Before
the Court of Appeals of Ohio for the
Eleventh District**



Appellee's Merit Brief

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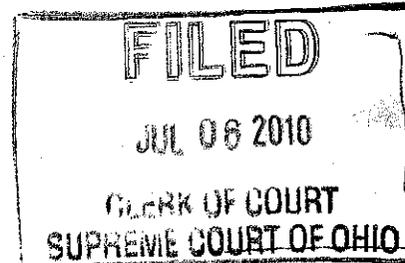
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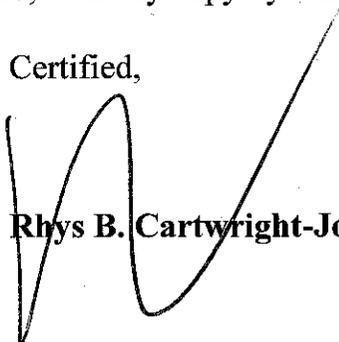
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Proof of Service

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Statement of the Case

One cannot “subjectively understand” that which one never heard.¹ In this case, the trial court never informed Mr. Feldman that upon pleading guilty to, inter alia, a felony theft charge, he could face exclusion from admission to the U.S. Of record, Mr. Feldman now faces that consequence.

Turning to the procedural posture of this cause, Mr. Feldman filed a petition to withdraw his guilty plea in the Lake County Court of Common Pleas. For cause, he offered that the plea colloquy did not comply with R.C. 2943.031, which mandates that a court recite the following script, when it takes a plea from a non citizen:

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.²

The parties do not dispute that the trial court simply said that the plea could cause Mr. Feldman to face “immigration consequences” including “deportation.”³ The court of common pleas denied the motion to withdraw.⁴ Mr. Feldman appealed.⁵ The Eleventh District reversed in favor of Mr. Feldman.⁶ The state appealed to this Court, and filed its merit brief.

¹See State v. Francis *infra* and discussion of the substantial compliance standard.

²Emphasis added.

³Plea Tr. *infra*.

⁴Record at 44.

⁵State's Br.

⁶Opinion.

Mr. Feldman responds timely and offers that although the plain text of the statute requires rote recitation of the 2943.031 script, substantial compliance with R.C. 2943.031 requires—at the very least—a court to inform a defendant that the plea may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization.

Summary of the Argument

According to R.C. 2943.031(D), “[u]pon motion of the defendant, the court shall”—i.e. must —“set aside [a] judgment and permit [a] defendant to withdraw a plea of guilty or no contest and enter a plea of not guilty ... if, after [1989], the court fail[ed]” to advise the defendant under R.C. 2943.031(A) that his plea subjects him to deportation, denial of entry, and denial of naturalization.⁷ Though the statute contains a specific script, there are three elements at its heart: (1) deportation, (2) denial of entry, and (3) denial of naturalization.⁸

Here, the trial court informed Mr. Feldman that he could “be subjected to some [i]mmigration laws” that “[c]ould involve deportation.”⁹ The trial court did not, however, inform him that he could face, inter alia, exclusion from admission to the U.S. following a short trip abroad.¹⁰ And as the facts below relate, this is precisely what Mr. Feldman now faces, having left the U.S. only to be deemed inadmissible on return. As the

⁷See *State v. Naoum*, interpreting *State v. Francis* and discussion *infra*.

⁸*Id.*

⁹Plea Tr. at pg. 5.

¹⁰*Id.*

affidavit accompanying Mr. Feldman's petition relates, Mr. Feldman had no concept of this. And having been properly advised, he would not have plead as he did.¹¹

Under R.C. 2943.031(D), this is a statutory failure rendering the plea subject to vacatur. And under Crim.R. 32.1 and R.C. 2943.031(F), this constitutes a manifest injustice such to render the plea void for an unconstitutional failure of knowing, voluntary, and intelligent waiver of one's Fifth and Sixth Amendment rights. Vacatur is the appropriate remedy.¹²

The Eleventh District appropriately found the same, and the defense asks this Court to allow that decision to stand.

Moreover, contrary to the state's arguments, requiring a trial court to recite the three basic immigration consequences of R.C. 2943.031 does not effect a standard of strict compliance. R.C. 2943.031 contains a script. And requiring rote recitation of the script would effect strict compliance. Requiring a trial court, on the other hand, to recite the three basic elements of the statute, effects simple substantial compliance. That is: it gets to the substance of the statute—the three elements—but leaves some allowance for a court to deviate from a specific script.

Likewise, contrary to the state's arguments, federal immigration law bears naught on this case. This case calls on an Ohio statute that the Ohio General Assembly directed to Ohio's common pleas judges. But to address the state's argument directly, the 1996 change in immigration law, *Illegal Immigration Reform and Immigrant Responsibility*

¹¹See Record at 33, 39.

¹²See, *infra*, *State v. Naoum*, examining Crim.R. 32.1, and R.C. 2943.031.

Act (IIRIRA), brought a change in immigration procedure and terminology relative to deportation and exclusion from admission, *not* a change in consequences. It changed the proceedings for deportation and exclusion from admission and brought them under the rubric of a proceeding called “removal.”¹³ Nevertheless, before or after IIRIRA, there are three potential consequences to a felony guilty plea for a non-citizen, regardless of what one calls them. And those consequences are: (1) deportation, (2) denial of entry, and (3) denial of naturalization.¹⁴ As this brief relates, those consequences are always present in any country that has borders.

Finally, contrary to the state's arguments, the recent U.S. Court decision in *Padilla v. Kentucky*, bears naught on this case.¹⁵ *Padilla* is a habeas case that asks whether trial counsel is ineffective for failing to warn a client of the singular consequence of deportation. It turns on the Sixth Amendment. It asks and answers what a trial attorney must do to be minimally competent so as not to render Sixth Amendment violative ineffective assistance. This case, however, involves interpretation of an Ohio Statute, that requires recitation of three elements. Indeed, the state even concedes that its offering of *Padilla* is simply for “guidance.” *Padilla*, however, guides one on a topic not at bar here. And if it has any impact, its impact is to push immigration notifications up the spectrum of constitutionality such to mandate *strict* compliance.

¹³Immigration and Nationality Act and Discussion, *infra*.

¹⁴*Infra*.

¹⁵*Infra*.

Statement of the Facts

Mr. Feldman is a 30-year-old legal permanent resident of the U.S., and a native and citizen of Russia. He arrived in the United States under refugee status with his parents Yelena and Leonid Feldman in March of 1993.¹⁶ In 1994, the Feldmans all became Legal Permanent Residents, and Mr. Feldman has lived and worked continuously in the United States since 1993.¹⁷

For the two years prior to his detention, Mr. Feldman was employed by Container Compliance Corp. as a truck driver.¹⁸ Right before he was taken into custody by I.C.E., Mr. Feldman accepted a position with a different company and was scheduled to begin his new job on October 30, 2008, but got detained.¹⁹

In early 2000s Mr. Feldman worked in computer sales. One of his higher-ups, who he only knew as *Sergei*, gave him some checks to cash.²⁰ In payment, Sergei let Artem keep a few dollars from each check, and Sergei kept the rest. The checks turned out to be fraudulent, and Sergei disappeared, leaving Artem to hold the proverbial bag. According to a family friend, “[k]nowing that Art was not very sophisticated with day to day bank transaction I was not surprised that he got lured in to this kind of scam.”²¹

The case proceeded through arraignment and pre-trial. At the time, Artem spoke little English, but his attorney arranged for him to plead guilty.

¹⁶Record at 39, Renewed Motion at pg. 4; Accord Affidavit in Support of Renewed Motion.

¹⁷Id.

¹⁸Id.

¹⁹Id.

²⁰Id.

²¹Id.

On June 12, 2000, Mr. Feldman plead guilty to the charges of Grand Theft, a felony in the fourth degree, in violation of R.C. 2913.02(A)(1), subject to division (B) of R.C. 2929.13 and Forgery, a felony in the fifth degree, in violation of R.C. 2913.31(A)(3), subject to division (B) of R.C. 2929.13, in the Court of Common Pleas at Lake County, Ohio. On October 5, 2000, Mr. Feldman was sentenced to two years of community control and 60 days in jail with work release privileges.²² Basically, Mr. Feldman forgot the ordeal and went on with the next 8 years of his life.

In September 2008, however, Mr. Feldman returned to the United States from a short trip abroad, visiting his ill grandmother. At the Atlanta, Georgia port of entry, the Customs and Border Patrol (“CBP”) stamped his passport “deferred.” Mr. Feldman was required to report to the CBP in Cleveland, Ohio at a later date. When Mr. Feldman reported to the Cleveland office on or about October 27, 2008, ICE officers took him into custody.²³ The Notice to Appear (“NTA”) charged Mr. Feldman with removability under INA § 212(a)(2)(A)(i)(I) for having been convicted of a crime of moral turpitude.²⁴ Based on the charges in the NTA, Mr. Feldman is subject to mandatory detention pursuant to INA § 236(c)(1)(A).²⁵

Mr. Feldman is currently detained at the Seneca County Jail, in Tiffin, Ohio. A custody redetermination hearing was held at the Cleveland Immigration Court, and the

²²Record at 33, Exhibit C of First Petition.

²³Record at 39, Renewed Motion at 5.

²⁴Record at 33, Exhibit D of First Petition, I.C.E. Notice to Appear.

²⁵Id.

Immigration Law Judge denied bond.²⁶ In other words, Mr. Feldman remains in County Jail for in excess of 18 months.

To this day, Artem has a tendency to nod along and say *yes* to anything any authority figure says to him. He's rather childish that way, even into his early thirties.²⁷ According to one family friend, for instance, "Although Art is 30 years old and very mechanically inclined, his trusting nature and naive personality usually [put] him at or below the maturity level of my teenage daughter."²⁸ Artem got himself into an unwitting guilty plea in the same way he got himself into the check debacle: he just nodded along, with not a thought of negative consequences.

The Eleventh District rightly took notice of this, when it reversed the trial judge's order denying Mr. Feldman's motion to withdraw his plea. The defense moves this Court to affirm the decision of the Eleventh District and to hold that the plain text of the statute requires rote recitation of the 2943.031 script, or, alternatively, that substantial compliance with R.C. 2943.031 requires—at the very least—a court to inform a defendant that the plea may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization.

²⁶Record at 39, Feldman Affidavit, attached to renewed motion.

²⁷Record at 39.

²⁸Record at 39, Feldman Affidavit, attached to Renewed Motion.

Law & Discussion

Proposition of Law:

Substantial compliance with R.C. 2943.031 mandates a reference to each of that statute's three separate immigration consequences.

(I)

Background for R.C. 2943.031: Ohio's non citizen advisement statute requires a trial Court to warn a non citizen, who enters a guilty plea, of three potential immigration consequences, that existed both before and after IIRIRA.

Looking first to the plain text of the statute, R.C. 2943.031 contains a script. According to R.C. 2943.031, a trial court, when accepting a guilty plea from a non citizen “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.” The advisement is:

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.

The keyword in R.C. 2943.031 is “shall.” Under Ohio law—and under the law of pretty much any jurisdiction that writes its statutes in modern English— “[s]*hall means must.*”²⁹

According to R.C. 2943.031(D), “[u]pon motion of the defendant, the court shall”—i.e. must —“set aside [a] judgment and permit [a] defendant to withdraw a plea of guilty or no contest and enter a plea of not guilty ... if, after [1989], the court fail[ed]”

²⁹See *Braden, Application of* (1st Dist. 1957), 105 Ohio App. 285, 86; but c.f. *State v. Gibson*, 144 Ohio Misc.2d 18, 2007-Ohio-6069 at par. 6, creating a minor exception for administrative regulations in which the word *shall* can be “directory” rather than “mandatory.”

to advise the defendant under R.C. 2943.031(A) that his plea subjects him to deportation, denial of entry, and denial of naturalization.

Following the plain text of the statute, then, the simple remedy in this case is vacatur. That is: the trial court failed to provide the appropriate plea colloquy, and R.C. 2943.031 directs that court or any court reviewing the matter to vacate the plea.

Notwithstanding, this is a case that asks what one must do to substantially comply with that statute. This brief proceeds to relate that substantial compliance requires recitation of the three R.C. 2943.031 elements.

(A)

**Background on immigration consequences:
Pre-IIRIRA, one can be “deportable” from the U.S. or “excludable” from admission
to the U.S.**

The state cites a distinction without a difference: no matter what year, no matter what regime, a non citizen can be sent out of the U.S. or denied entry into the U.S. This is a fundamental fact of life as long as there are countries with borders. That is: “[c]ourts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute...[.]”³⁰ The terms changed. The procedures changed. But the distinction between throwing someone out and not letting him in remains the same.

To provide a more legalistic framework, however, prior to 1996 and the enactment of IIRIRA, “deportation” was formal proceeding to have a non citizen sent out of the

³⁰*Gisbert v. United States Attorney General* (5th Cir. 1993), 988 F.2d 1437, 1440, citing *Shaughnessy v. United States ex rel. Mezei* (1953), 345 U.S. 206, 210; *United States ex rel. Knauff v. Shaughnessy* (1950), 338 U.S. 537.

United States.³¹ "Exclusion," referred to the formal proceeding when the government issued a determination as to an alien's admissibility to the United States.³²

Procedurally, when the government alleged that a non citizen was deportable, U.S. law required the attorney general to present clear, convincing, and unequivocal evidence of the same to an immigration law judge, who issued a ruling finding or not finding the non citizen deportable.³³ In deportation proceeding, the burden was on the government. Turning to exclusion, the pre-1996 procedure and burden of proof was different. Every applicant for admission into the United States had to demonstrate that he was not excludable and entitled to admission of some kind.³⁴ In exclusion, the burden was on the applicant to prove eligibility for admission.

(B)

Post-IIRIRA: The same two consequences remain under one name, "removal."

Following IIRIRA, both exclusion from admission to the United States and deportation from the United States fall under the rubric of a new term called "removal." Removal is the formal proceeding in which an alien's deportability from the United States or inadmissibility to the United States is determined.³⁵

³¹ See, e.g., *Woodby v. INS* (1966), 385 U.S. 276, 282-84, analyzing the then applicable deportation statute, INA §106(a)(4).

³² See, e.g., *Rodriguez v. INS* (5th Cir. 1997) 118 F.3d 1034, examining then-governing statute, 8 U.S.C. § 1182(a)(23).

³³ *Woodby supra*.

³⁴ INA § 291, 8 U.S.C. § 1361; *Matter of Arthur* (BIA 1978), 16 I&N Dec. 558.

³⁵ See, e.g., *Rodriguez v. INS supra*.

INA Section 212 defines non citizens “ineligible for admission” to the U.S. INA Section 237 defines aliens “deportable” from the U.S. and still uses the pre-1996 term, “deport.” Two discrete sections of the statute preserve that difference. And if a non citizen, who fits into either of those two classes, comes to the attention of the government, the government charges him or her with grounds of removability either under INA Sections 237 or 212.

So what changed? The terms changed. The proceedings changed. But **the basic common-sense distinction remains.** It is as simple as in and out. And it is also worth noting that R.C. 2943.031, as can be seen above, **never** used terms that patterned federal law. In that way, the statute can be seen as speaking to general potential consequences, than, as the state would have it, be seen as having to parallel federal law.

Particular to Mr. Feldman's case, the distinction comes to life. Mr. Feldman's conviction—the parties agree on this—did not make him deportable under INA Section 237. It made him inadmissible under INA Section 212. In other words, he was fine to stay in the United States. Nevertheless—and he was uninformed of this—if he, as he did, left the United States and tried to re-enter, he would and did find himself subject to removability as an inadmissible alien. This is particularly shocking given the difference between the two consequences. If the government charges one with deportability, one goes through the proceedings, and if one loses, one packs his things and makes arrangements to leave. But in the case of inadmissibility, one who leaves and comes back to the U.S. finds oneself shocked at the boarder, unable to return “home.” This is what happened to Mr. Feldman. And no one disputes that he had no warning of the same.

(II)

***State v. Francis*: In order to effect substantial compliance, a trial court must recite the three core elements of R.C. 2943.031, because if a trial court does not, a defendant can have no “subjective understanding” of the impact of his plea.**

(A)

Substantial compliance requires a defendant to subjectively understand the consequences of his plea.

This Court recognized as of 2005 that although Ohio law does not mandate a trial court to read verbatim the R.C. 2943.031 to a non citizen during a plea colloquy, a trial court must substantially comply in notifying a defendant of the contents of that statute.³⁶ And, according to 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.”³⁷

According to this Court, “[w]e hold that if some warning of immigration-related consequences was given at the time a noncitizen defendant’s plea was accepted, but the warning was not a verbatim recital of R.C. 2943.031(A)’s language,” then “a trial court considering the defendant’s motion to withdraw the plea under R.C. 2943.031(D) must exercise its discretion in determining whether the trial court that accepted the plea substantially complied with R.C. 2943.031(A).”³⁸ According to this Court, “[s]ubstantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving.”³⁹ Likewise,

³⁶ *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, ¶46; *State v. Pineda*, 8th Dist. No. 86116, 2005-Ohio-6386, ¶23, related in *State v. Naoum* infra..

³⁷ *Id.*

³⁸ *Id.* at syl. par. 2.

³⁹ *Francis*, supra, ¶48, quoting *State v. Nero* (1990), 56 Ohio St.3d 106, 110, related in *State v. Naoum*, accord *State v. Grigsby* (1st Dist. 1992), 80 Ohio App.3d

according to this Court, the test for substantial compliance “is whether the plea would have otherwise been made.”⁴⁰ Too, this Court does not mandate evidentiary hearings on the issue. According to this Court, if the pleadings and record of the plea colloquy suffice as a basis for a decision, then a court can render judgment on the pleadings.⁴¹

(B)

A defendant cannot subjectively understand that which he never heard; ergo substantial compliance requires recitation of the three key R.C. 2943.031 elements.

At this point in the argument, it becomes apparent that substantial compliance requires recitation of the three key elements of R.C. 2943.031. Turning to this Court's opinion in *Francis*, one looks to whether a “defendant subjectively understands the implications of his plea.”⁴² **This is, however, impossible if a court never informed a defendant of the potential consequences of his plea.** One cannot subjectively know what one never heard.

To draw on the earlier argument based on IIRIRA, there are still three potential consequences: (1) deportation, (2) denial of entry, and (3) denial of naturalization.⁴³ Feldman had no concept of denial of entry. Had he such a concept, he would not have pled guilty. No one disputes this.

291.

⁴⁰ Id.

⁴¹ Id.

⁴² Id.

⁴³ Infra.

(C)

The holdings of the Eleventh District and like reviewing courts does not effect strict compliance.

According to Ohio's reviewing courts, the Eleventh District in particular, “[u]nder R.C. 2943.031, when a trial court accepts a guilty plea from one who is not a citizen of the United States, it must warn the defendant that the plea 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.”⁴⁴ In light of the foregoing discussion, this is the minimum recitation that a court could provide to insure substantial compliance—i.e. that a defendant even has the opportunity to subjectively understand the consequences of his plea. The state's critique fails of those decisions, as the paragraphs here, proceed to relate.

The state offers, relative to the Eleventh District's decision in Feldman, that the court substituted “three particular words for a defendant's subjective understanding.” What the state did not recognize in making that claim is—as argued above—a **defendant cannot subjectively understand that which he never heard**. At that, a full meditation on subjective understanding was not necessary to reach the Eleventh District's conclusion.

In support of its cause, the state offers the matters of *State v. Olouch*, *State v. Lopez*, *State v. Encarnacion*, *State v. Pineda*. Each of these cases would fail a substantial compliance test.

⁴⁴ *State v. Naoum*, 8th Dist. Nos. 91662-3, 2009-Ohio-618, at par. 20; accord *State v. Zuniga*, 11th Dist. Nos. 2003-P-0002, 2005-Ohio-2078, providing the same holding.

Looking first at *State v. Olouch*, the state offers that *Olouch* mandates a hearing to determine substantial compliance. This is not the case. Both *Olouch* and this Court's decision in *Francis* indicate that some cases may require hearings and some may not.⁴⁵ Moreover, though the *Olouch* court and the state do not recognize it—it bears repeating—a defendant cannot subjectively understand that which he never heard. Hence, in these “no mention” cases—i.e. the ones in which the court makes no mention of a particular element of R.C. 2943.031—a hearing is not necessary.

Continuing to *State v. Lopez*, and *State v. Pineda*, these cases are simply bad law. The *Lopez* and *Pineda* courts reached their conclusions, citing neither law nor any argument in support. The *Lopez* court simply stated, “[w]hile a warning using the statutory language would be preferable, in our view the warning offered substantially complies with the law.”⁴⁶ The *Pineda* court did the same. *Lopez* decision does nothing more than beg the same question this case presents.

The final decision the state offers in support is *State v. Encarnacion*. That case suffers from the same problems as *State v. Lopez* and *State v. Pineda*. It concludes without particular reason that mention of deportation equals substantial compliance. It neglects to ask whether a defendant can subjectively understand that which he never heard.

⁴⁵ *State v. Olouch*, 10th Dist. No. 07 AP 45, 2007-Ohio-5560, at pars. 17, 18, citing *Francis*, supra.

⁴⁶ *State v. Lopez*, 6th Dist. no. OT-05-059, 2007-Ohio-202, at par. 20; compare *State v. Pineda* supra.

Moreover, where *Encarnacion II* does not involve a direct attack under R.C. 2943.031, it is not procedurally germane to Feldman's case.⁴⁷ 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. 2943.031.⁴⁸ 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.

In light of the foregoing, decisions similar to the Eleventh District's decision in *Feldman* make sense. Those reviewing courts recognize, for example, that “[s]ubstantial compliance is not met when only 2/3 of the advisement is given.”⁴⁹ No one disputes that “[a]lthough [a] trial court need not use the exact language set forth in the statute, the statute is clear that the trial court must advise the non-citizen defendant of **three separate consequences** that might result from a guilty plea[.]”⁵⁰ Those are deportation, exclusion from admission into the United States; and denial of naturalization.⁵¹

⁴⁷ *State v. Encarnacion (Encarnacion II)*, 12th Dist. Nos. CA2005-05-120, CA2005-05-122, 2006-Ohio-4425.

⁴⁸ *State v. Encarnacion (Encarnacion I)*, 12th Dist. No. CA2003-09-225, 2004-Ohio-7043.

⁴⁹ *State v. Naoum*, 8th Dist. Nos. 91662 and 91663, 2009-Ohio-61, at par. 37; accord *State v. Zuniga* supra; *State v. Hernandez-Medina*, 2nd Dist. No. 06CA0131, 2008-Ohio-418.

⁵⁰ *Id.*

⁵¹ *Encarnacion I* at ¶22.

In *State v. Naoum*, which patterns several other cases on point, the Eighth District found the following colloquy non substantially compliant. The trial court inquired of defendant-Naoum, “Are you a citizen?”⁵²

“No, I am not[,]” Naoum replied.

To which the court responded, “This might affect your citizenship as well.”

The court continued, “The fact of the matter is, the Department of Immigration may well look at this, two drug cases, can look at this and that could result in some ramifications by way of deportation.”

The Eighth District examined that and found that it only fulfilled two-thirds of the R.C. 2943.031 requirements—although it seems to touch only one third. Nevertheless, the colloquy in the *Feldman* case contains nothing other than the word “deportation” and a vague reference to “[i]mmigration laws.” If the *Noam* colloquy failed, then the *Feldman* colloquy really fails.

Naoum and like decisions make sense because they contemplate the core of substantial compliance—subjective understanding of the consequences of one's plea.⁵³

To repeat the theme: one cannot subjectively understand that which he never heard. Accordingly, as held by the courts addressing *State v. Naoum*, *State v. Feldman* in the Eleventh District, and like minded courts, the only way to effect subjective understanding and substantial compliance is to recite the three potential consequences of which might suffer upon entering a plea as a non citizen.

⁵²Naoum at par. 7

⁵³*State v. Francis* supra.

(D)

***Padilla v. Kentucky* does not stand for the proposition that a trial court need only inform a defendant of the possibility of deportation to satisfy the R.C. 2943.031 colloquy.**

The only point of *Padilla v. Kentucky* that bears on this case comes from a quote the state offers—

These changes to our immigration law have dramatically raised the stakes of a noncitizen'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.

While that is a nice theme, *Padilla* has no bearing on this case, save for the possibility that it may push immigration-related warnings into the realm of constitutional mandate, requiring strict compliance.⁵⁴

The state offers *Padilla* in support of the proposition that a court need only advise a defendant of the possibility that he may be deported in order to satisfy the R.C. 2943.031 colloquy. *Padilla*, however, does not apply in that regard, for the reasons that follow.

The case at bar asks for interpretation of an Ohio Statute with the Ohio General Assembly enacted and drafted to contain three elements: (1) deportation, (2) denial of entry, and (3) denial of naturalization.⁵⁵ *Padilla*, on the other hand, pertains to the Sixth Amendment right to effective assistance of counsel. That is: according to the U.S. Supreme Court, “[w]e conclude that advice regarding deportation is not categorically

⁵⁴*Padilla v. Kentucky* (U.S. 3/31/2010), No. 08-651, reported in 531 U.S.

⁵⁵*Padilla*; *Nero*; *Griggs* *supra*.

removed from the ambit of the Sixth Amendment right to counsel.”⁵⁶ In other words, *Padilla v. Kentucky* sets a base line for effectiveness of counsel under the U.S. Constitution, whereas the case at bar asks for guidance as to what a court has to say to a defendant in a plea colloquy under the Ohio Revised Code.

Finally, the questions of denial of naturalization and exclusion from admission were not before the Court in *Padilla*. Whether or not those will become Sixth Amendment requirements is a question to be addressed by the U.S. Supreme Court at another time.

Conclusion

Turning to the specifics of the plea colloquy, here, the trial court informed Mr. Feldman he might “be subjected to some [i]mmigration laws” that “[c]ould involve deportation.”⁵⁷ The trial court did not, however, inform him that he could face, inter alia, exclusion from admission to the U.S.⁵⁸

Earlier in the colloquy, the court promised to “get into that with [Artem] in much more depth[,]” but the discussion never materialized.⁵⁹

⁵⁶*Padilla supra*.

⁵⁷Plea Tr. at pg. 5.

⁵⁸*Id.*

⁵⁹Plea Tr. at pg. 4.

Turning to the acid test of *State v. Francis*—which asks whether Mr. Feldman would have pled guilty had he known what could be waiting for him eight years down the road—he could not have. No one ever informed him of the same. Vacatur is appropriate.

Respectfully Submitted,

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