

IN THE OHIO SUPREME COURT

STATE OF OHIO,

Plaintiff-Appellee,

vs.

ISSA KONA,

Defendant-Appellant.

Supreme Court Case No. 2014-0733

On Appeal from Eighth Dist. App. No.
CA-13-100191

DEFENDANT-APPELLANT ISSA KONA'S MERIT BRIEF

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I. STATEMENT OF FACTS

Kona was arrested and charged with two counts of Robbery for allegedly shoplifting a \$79.93 battery charger from Home Depot on April 1, 2006. (Docket at April 1, 2006.) As he left the store, three undercover security guards followed him out of the store and demanded the battery. (Amended Motion at p. 6.) Kona had purchased a window and asked if he could place the window in his car first. (*Id.*) The guards refused and wrestled Kona to the ground and arrested him. (*Id.*) For all intents and purposes, this case was a petty theft case. According to the Bill of Particulars filed by the prosecution on June 8, 2006, Kona was charged as follows:

That on or about April 1, 2006 at approximately 12:45 PM, 11901 Berea, in the City of Cleveland, Ohio, the Defendant, Issa Kona, unlawfully did in attempting or committing a theft offense, as defined in Section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense upon Home Depot, inflict, attempt to inflict, or threatened to inflict physical harm on Dan Moeller.

Furthermore, on or about the same date, at the same time and at the same location, the Defendant, Issa Kona, unlawfully did, in attempting or committing a theft offense, as defined in Section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense upon Home Depot, use or threaten the immediate use of force against Dan Moeller, contrary to the form or the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

(Bill of Particulars, Amended Motion at p. 3.) Counsel for Kona sought guidance from an immigration attorney, who advised him that a Robbery or Attempted Robbery conviction would be a deportable offense. (See Exhibit A-3 to Amended Motion.) Therefore, Kona plead not guilty.

The case proceeded to trial on September 20, 2006. (Journal Entry dated May 22, 2006; Journal Entry dated July 26, 2006.) On the day of trial, Kona requested a continuance to apply for the Cuyahoga County Diversion Program. (Journal Entry dated September 20, 2006.)

The trial court granted the continuance and, upon approval of the prosecutor, the trial court admitted Kona into the diversion program. (Journal Entry dated October 26, 2006.) The trial court held:

IN ACCORDANCE WITH THE PROVISIONS OF R.C. 2935.36, THE PROSECUTOR'S OFFICE HAS FOUND THAT THE DEFENDANT HAS MET ELIGIBILITY REQUIREMENTS FOR ACCEPTANCE INTO THE CUYAHOGA COUNTY PRE-TRIAL DIVERSION PROGRAM. THE DEFENDANT, AS A CONDITION OF PARTICIPATION IN THE PROGRAM, HAS KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY WAIVED HIS/HER CONSTITUTIONAL AND STATUTORY RIGHTS TO A SPEEDY TRIAL, FROM THE DATE OF HIS/HER REFERRAL TO THE PROGRAM, UNTIL THE DATE OF HIS/HER PARTICIPATION IN THE PROGRAM TERMINATES. SPECIFICALLY, THE DEFENDANT HAS WAIVED HIS/HER RIGHT TO HAVE THE CASE BROUGHT TO TRIAL WITHIN 90 DAYS OF HIS/HER ARREST AND FORMAL CHARGE(S), IF HE/SHE IS INCARCERATED, OR 270 DAYS IF HIS/HER ARREST AND FORMAL CHARGE(S), IF HE/SHE IS NOT INCARCERATED. FURTHERMORE, IF THE DEFENDANT FAILS TO COMPLETE THE PROGRAM, HE/SHE HAS GIVEN UP THE RIGHT TO HAVE THE GRAND JURY TAKE FINAL ACTION ON THIS CASE AND AGREES TO BE CHARGED BY WAY OF INFORMATION. THE DEFENDANT HAS WAIVED ALL PERIODS OF LIMITATION ESTABLISHED BY STATUTE OR RULE(S) OF COURT, THAT ARE APPLICABLE TO THE OFFENSE(S) FOR WHICH HE/SHE MAY BE CHARGED. IN ALL CASES ADMITTED INTO THE DIVERSION PROGRAM, THE DEFENDANT SHALL BE GRANTED A \$1000.00 PERSONAL BOND (CSR), AND SHALL BE PLACED UNDER THE SUPERVISION OF PROBATION DEPARTMENT'S COURT SUPERVISED RELEASE PROGRAM/DIVERSION UNIT. UPON CONSIDERATION, THE COURT HEREBY APPROVES THE DEFENDANT'S PARTICIPATION IN SAID PROGRAM, AND ORDERS THAT THIS CASE TO BE PLACED IN AN INACTIVE STATUS UNTIL FURTHER NOTICE.

(Journal Entry dated October 26, 2006.)

Kona is not a U.S. Citizen, but rather is from Palestine and has been living in the United States pursuant to a Green Card. (Amended Motion at Exhibit A-3 and A-4; Affidavit at ¶3; Hearing Transcript ("Tr.") at 6, 8, 27, 36; Diversion Packet at "Client Information.") Kona has

been in this country since 2002 with his wife and four daughters and owns his own home. (Affidavit at ¶3; Amended Motion at Exhibit A-3 and A-4.)

Because the trial court merely made a Journal Entry and never brought Kona into open court to discuss the rights he was waiving and to verify that the plea was knowingly, voluntarily or intelligently made, the trial court failed to advise Kona as to the potential of deportation, exclusion from admission to the United States or the potential for denial of naturalization based upon his admission of guilt and entry into the diversion program. (See Docket; all Journal Entries; Tr. at 5, 8, 23, 25; Affidavit at ¶¶8, 10, 11; and the Diversion Packet attached to the Amended Motion as Exhibit A-1.)

Kona was required to complete a Diversion Packet, which required him to “admit his guilt, in regard to the pending charges, in a written statement” as a condition precedent to admission into the diversion program. (Diversion Packet at “Criteria for Acceptance” at No. 6, which is attached to the Amended Motion as Exhibit A-1.) At no time was Kona advised pursuant to R.C. 2943.031(A) nor was he ever advised that the admission of guilt could lead to his deportation. (See Docket; all Journal Entries; Tr. at 5, 6, 8, 23; Affidavit of Issa Kona at ¶¶8, 10, which is attached to Defendant’s Amended as Exhibit A; and the Diversion Packet attached to Defendant’s Amended Motion as Exhibit A-1.)

The Application packet notes that a participant in the program:

MUST give a COMPLETE, ACCURATE, and TRUTHFUL statement concerning the circumstances surrounding the present charge(s), including, the DATE, TIME, AND LOCATION, AND THE NAME(S) OF ANY OTHER PERSON(S) INVOLVED. Failure to do so will preclude your client’s participation in the program.

(Diversion Packet at p.2, emphasis in original.) Furthermore, Kona was required to complete the packet, including the admission of guilt, and schedule an appointment with a Diversion Officer

within seven (7) days of receipt of the diversion packet. (*Id.*) Finally, should any participant fail to abide by all of the conditions of the Diversion Agreement, then the State had the right to use the written admission of guilt against the Kona in court. (Diversion Packet at “General Rules.”) For all intents and purposes, this admission of guilt is akin to a guilty and/or no contest plea and in fact constitutes a conviction for immigration purposes.

The Diversion Packet further provided a Waiver of Rights form. (Diversion Packet at “Waiver Form.”) That form did not advise Kona of the rights provided pursuant to R.C. 2943.031 nor did Kona waive any such rights. *Id.* See also, Affidavit at ¶8.

The State has clearly discovered the need to inform a defendant of the possibility of deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States, as the Diversion Packet has since been revised. (See Defendant’s Amended Motion at Exhibit A-2 (“Revised Diversion Packet”).) The Revised Diversion Packet now provides the following notice on the first page of the application:

* * NOTICE: If you are not a citizen of the United States, you are hereby advised that application and/or admission to the Diversion Program may have consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

Revised Diversion Packet at p. 1. See also, Tr. at 8; Affidavit at ¶8. Therefore, defendants seeking to enter into the program at this time are obtaining the appropriate warnings, unlike Kona. *Id.*

Kona successfully completed all of the terms and conditions of the diversion program. (Journal Entry dated May 2, 2007.) Therefore, and upon motion by the Prosecutor, the trial court dismissed all charges against Kona and ordered the record to be sealed. (*Id.*)

Kona was under the mistaken belief that when the dismissal occurred, his fight over these charges had concluded. (Affidavit at ¶11.) However, Kona later learned that under federal

immigration law a “conviction” includes an admission of guilt made in conjunction with this diversion program. 8 U.S.C. 1101(a)(48)(A); Affidavit at ¶13.

Kona was never advised that a “conviction” for purposes of the federal immigration statute would include admission into the diversion program even when the charges would ultimately be dismissed upon the successful completion of the program. (See Docket; all Journal Entries; the hearing transcript (“Tr.”) at 5, 8, 23, 25; Affidavit at ¶¶8, 10, 11; and the Diversion Packet attached to Defendant’s Amended Motion as Exhibit A-1.) At no time did the trial court advise Kona of his constitutional or statutory rights or that he was waiving same. (Affidavit at ¶10; Tr. at 5, 8, 23, 25.) In addition, the trial court failed to inquire as to whether or not Kona was a U.S. Citizen and failed to advise him that his application and/or acceptance into the diversion program or any admission of guilt contained in the Diversion Packet could subject Kona to deportation. (Affidavit at ¶10; Tr. at 5, 6, 8, 10, 23, 24, 25, 36) Similarly, the journal entry issued by the trial court was devoid of any notice that Kona’s participation in the diversion program could have immigration consequences if he was not a U.S. Citizen. (See Journal Entry dated October 26, 2006.) Had Kona been aware that his participation in the diversion program could have subjected him to deportation, he would not have participated in said program. (Affidavit at ¶11; Tr. at 9.) Kona entered into the diversion program under the mistaken belief that the program would allow him to avoid removal proceedings. (*Id.*)

Subsequent to the dismissal, Kona submitted an Application for Naturalization and was questioned by the Department of Homeland Security/U.S. Citizenship and Immigration Services regarding the above-captioned case and was advised that he will be subject to deportation upon the final processing of his application due to the admission of guilt executed in this case.

(Affidavit at ¶13, Tr. at 27.) Kona has been advised that the only way to avoid deportation is to withdraw the plea/admission of guilt and have the conviction vacated. *Id.* at ¶14.

Therefore, Kona immediately sought to unseal the record (Defendant's Motion to Unseal Case Previously Expunged.) The Prosecutor objected to this request. (Brief in Opposition to Unseal Records.) Ultimately, the trial court granted the Motion to Unseal. (Journal Entry dated September 9, 2008.)

Kona then filed a Motion to Vacate Plea. (Motion to Vacate Plea, Docket at October 20, 2008.) By Journal Entry dated February 19, 2009, the trial court ordered Kona to file a supplemental motion within twenty-one (21) days and provided a similar response time for the State. Kona timely filed his Amended Motion to Withdraw Plea and Vacate Judgment on March 6, 2009. (Docket at March 6, 2009.) The State filed Response to Motion to Withdraw Plea/Vacate Judgment and Amended Motion to Withdraw Plea and Vacate Judgment on March 25, 2008. (Docket at March 25, 2009.)

The trial court scheduled a hearing as to the vacation of the plea and conviction for April 4, 2013. (Journal Entry dated April 1, 2013.) It was established at the hearing, amongst other matters, that:

- Kona was required to admit his guilt in written form before the Prosecutor and/or trial court would allow him to enter into the diversion program (Tr. 3, 5, 6, 12, 24; Affidavit at ¶7);
- Kona never received the required advisement pursuant to R.C. 2943.031(A) from the trial court (Tr. at 5, 8, 23, 25; Affidavit at ¶9);
- The Diversion Packet did not provide the advisement pursuant to R.C. 2943.031(A) or inquire as to Kona's citizenship (Tr. at 8, 25; Affidavit at ¶8);

- Kona never claimed that he was a U.S. Citizen (Tr. at 5, 36; Affidavit at ¶10);
- Kona has moved the trial court to withdraw his plea and vacate the conviction (Motion to Withdraw Plea and Vacate Judgment; Amended Motion);
- Kona is not a U.S. Citizen (Affidavit at ¶3); and
- Kona has been informed by the Department of Homeland Security/U.S. Citizenship and Immigration Services that he will be subject to deportation upon the final processing of his naturalization application (Affidavit at ¶13).

The trial court ultimately denied Kona's request to withdraw his plea and vacate the conviction. (Journal Entry dated July 2, 2013.)

Kona has been advised by several immigration attorneys that in order to prevent his deportation, he must have his admission of guilt/plea withdrawn and the conviction vacated in the instant case. (Affidavit at ¶14.)

This matter was appealed to the Eighth District Court of Appeals, which upheld the decision of the trial court by ruling, without explanation, that the admission of guilt was not a guilty plea or plea of no contest. (*State v. Kona*, 8th Dist. No. 100191, 2014-Ohio-1242 at ¶22) It is from this decision that the Appellant now appeals to this Honorable Court.

II. PROPOSITIONS OF LAW AND ARGUMENT

A. PROPOSITION OF LAW NO. 1: A written admission of guilt required by a diversion program is the functional equivalent of a guilty or no contest plea for purposes of R.C. 2943.031(A).

In order to be accepted into the diversion program, Kona was required to make an admission of guilt to the charges. The trial court held that Kona could participate in said diversion program and further ruled that:

IN ACCORDANCE WITH THE PROVISIONS OF R.C. 2935.36, THE PROSECUTOR'S OFFICE HAS FOUND THAT THE DEFENDANT HAS MET ELIGIBILITY REQUIREMENTS FOR ACCEPTANCE INTO THE CUYAHOGA COUNTY PRE-TRIAL DIVERSION PROGRAM. THE DEFENDANT, AS A CONDITION OF PARTICIPATION IN THE CUYAHOGA COUNTY PRE-TRIAL DIVERSION PROGRAM, HAS KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY WAIVED HIS/HER CONSTITUTIONAL AND STATUTORY RIGHTS TO A SPEEDY TRIAL, FROM THE DATE OF HIS/HER REFERRAL TO THE PROGRAM, UNTIL THE DATE HIS/HER PARTICIPATION IN THE PROGRAM TERMINATES. SPECIFICALLY, THE DEFENDANT HAS WAIVED HIS/HER RIGHT TO HAVE THE CASE BROUGHT TO TRIAL WITHIN 90 DAYS OF HIS/HER ARREST AND FORMAL CHARGE(S), IF HE/SHE IS INCARCERATED, OR 270 DAYS IF HIS/HER ARREST AND FORMAL CHARGE(S), IF HE/SHE IS NOT INCARCERATED. FURTHERMORE, IF THE DEFENDANT FAILS TO COMPLETE THE PROGRAM, HE/SHE HAS GIVEN UP THE RIGHT TO HAVE THE GRAND JURY TAKE FINAL ACTION ON THIS CASE AND AGREES TO BE CHARGED BY WAY OF INFORMATION. THE DEFENDANT HAS WAIVED ALL PERIODS OF LIMITATION ESTABLISHED BY STATUTE OR RULE(S) OF COURT, THAT ARE APPLICABLE TO THE OFFENSE(S) FOR WHICH HE/SHE MAY BE CHARGED. IN ALL CASES ADMITTED INTO THE DIVERSION PROGRAM, THE DEFENDANT SHALL BE GRANTED A \$1000.00 PERSONAL BOND (CSR), AND SHALL BE PLACED UNDER THE SUPERVISION OF THE PROBATION DEPARTMENT'S COURT SUPERVISED RELEASE PROGRAM/DIVERSION UNIT. UPON CONSIDERATION, THE COURT HEREBY APPROVES THE DEFENDANT'S PARTICIPATION IN SAID PROGRAM, AND ORDERS THAT THIS CASE TO BE PLACED IN AN INACTIVE STATUS UNTIL FURTHER NOTICE

Journal Entry dated October 30, 2006. Thus, the trial court not only approved Kona's participation in the program, but also placed Kona under the supervision of the Probation Department. Despite allowing Kona's participation in said program and despite the supervision by the Probation Department, the trial court never asked Kona if he was a U.S. citizen or advised Kona of the potential immigration consequences of his admission of guilt or participation in the program.

The Eighth District held that a written admission of guilt was not a “guilty plea” which would require the trial court to provide the warning contained in R.C. 2943.031(A). However, an admission of guilt operates as a guilty or no contest plea under immigration laws. The purpose of the admission of guilt is to have an acknowledgement made that the defendant is guilty of the offense, which is the same thing as a guilty plea or no contest plea. Furthermore, any admission of guilt along with the successful completion of a diversion program constitutes a conviction under immigration laws. Section 1101(a)(48)(A) of the Immigration and Nationality Act defines a conviction as:

The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court, of, if adjudication of guilt has been withheld, where: (i) A judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere **or has admitted sufficient facts to warrant a finding of guilt**, and (ii) The judge has ordered some form of punishment, penalty or restraint on the alien’s liberty to be imposed.

8 U.S.C. 1101(a)(48)(A) (emphasis added). In order to participate in the program, Kona was required to provide a “complete, detailed, and accurate statement admitting your involvement/guilt to the pending charges” and the failure to so provide this admission of guilt would prevent Kona from participating in the diversion program. A defendant further cannot be admitted into the program without the trial court’s approval. Additionally, if a defendant does not complete the program, the admission of guilt that he is required to provide is permitted to be used against him by the Prosecutor. Therefore, Kona entered into a guilty plea, or at the very least, a plea of no contest, at the time he made his application and was granted admission into the Cuyahoga County Diversion Program.

A successful completion of a diversion program is the equivalent of time served or probated time for the offense as the expiation of consequences are the same. *State v. Urvan*, 4

Ohio App.3d 151, 446 N.E.2d 1161 (8th Dist. 1982) at paragraph 6 of the syllabus. One cannot have time served or probated time without a trial unless they plead guilty or no contest.

In *Padhiyar v. Holder*, 6th Dist. Court of Appeals No. 13-3758 (March 20, 2014), the appellant sought an appeal of his request for cancellation of removal proceeding due to the fact that he successfully completed a probation program and the theft charges had been dismissed under Tennessee law. The Board of Immigration Appeals denied the request as the conviction was valid for immigration purposes even though it had been vacated and dismissed under a state rehabilitative statute. The Sixth Circuit Court of Appeals noted that:

Although [appellant] may be correct that he was never convicted under Tennessee law, this argument is beside the point. [Appellant] was deemed convicted under the INA because he admitted to sufficient facts to warrant a finding of guilt and was sentenced to three years of probation as a result.

Padhiyar, supra. The Sixth Circuit further noted that:

Whether a state statute expunges a criminal conviction that has already been entered, or dismisses charges after delayed adjudication, in either case the offender has been “convicted” for the purposes of federal immigration law so long as the two requirements of 1101(a)(48)(A) are met.

Id. Thus, upon entry and completion of the diversion program, one has been convicted for immigration purposes, even if the charges are later dismissed in state court.

The fact that a defendant cannot be admitted into the diversion program without the trial court’s approval, the fact that defendant is required to admit his guilt as a condition precedent to admission; and the fact that the defendant is deemed to have served time or probated time for the offense by successfully completing a diversion program, requires the conclusion that upon completion of such a program, the defendant has plead guilty or no contest, and has been convicted of the offense pursuant to 8 U.S.C. 1101(z)(48)(A). Therefore, Kona entered a guilty

plea or, at minimum a no contest plea, at the time he was granted admission into the program and was thus, entitled to the warning required by R.C. 2943.031(A).

Rather than providing the required warning, Kona was advised that upon a successful completion of the program, his record would be expunged and the case dismissed without further consequences. At no time did either the trial court or the Prosecutor's office ask Kona if he was a U.S. citizen or advise him that his participation in this program could result in his deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. Thus, Kona did not knowingly, voluntarily, and intelligently provide an admission of guilt/guilty plea and did not knowingly, voluntarily, and intelligently enter into the diversion program.

Kona was never advised that a "conviction" for purposes of federal immigration laws included cases where the charges were dismissed and/or deferred adjudications, even though these matters remain convictions for immigration purposes. *Acosta v. Ashcroft*, 341 F.3d 218, 223 (C.A. 3, 2003) (offender "convicted" for purposes of immigration law even when charges ultimately dismissed without an adjudication of guilt after successful completion of probation); *State v. Abi-Aazar*, 154 Ohio App.3d 278, 797 N.E.2d 98 (9th Dist. 2003) (involving a case where deportation proceedings were initiated based on a treatment in lieu plea agreement.) In fact, in *Abi-Aazar, supra*, the Ninth District Court of Appeals held that the failure by the trial court to explain that a treatment in lieu plea was, for immigration purposes, a conviction, rendered the advisement ineffective and the decision to plead guilty uninformed.

In *State v. Curry*, 134 Ohio App.3d 113, 730 N.E.2d 435 (9th Dist. 1999), the Ninth District Court of Appeals addressed the consequences of an admission of guilt as a condition of a pre-trial diversion program where the defendant failed to satisfactorily complete the program:

Although a guilty plea is not required by the statute [R.C. 2935.36] as a condition for admission into a diversion program, defendant plead guilty in this case. Because the prosecutor did not recommend dismissal of the charges against defendant and because defendant had already entered a plea of guilty to charges, this matter was before the trial court solely for the purpose of sentencing defendant pursuant to his guilty plea. The state has a legitimate expectation that the trial court would sentence defendant pursuant to his guilty plea if he failed to satisfactorily complete the diversion program.

Id. at 118. Similarly, in *Strickland v. Ohio Bureau of Motor Vehicles*, 92 Ohio App.3d 755, 637 N.E.2d 95 (2nd Dist. 1994), the Second District Court of Appeals stated:

An examination of Appellant’s plea reveals that there were no conditions to her guilty plea which would have permitted her to withdraw it if she failed to abide by the conditions of the diversion program. The plea did contain the “condition subsequent” that if the appellants successfully completed the diversion program, the appellant's plea of guilty would not be accepted by the court and the charge against her would be dismissed.

Id. at 758. See also, *State v. Wallace*, 5th Dist. No. 2006 CA 00024, 2007-Ohio-65 at ¶40 (R.C. 2935.36 provides the prosecuting attorney discretion with regards to the establishment of the terms and conditions of the diversion program); *State v. Sneed*, 2nd Dist. No. 8837 (January 8, 1986) (the statute also “requires the participation of the court in the admission of persons into such program.”)

The Eighth District Court of Appeals discounted these cases finding them not applicable as the cases involved a guilty plea after a Crim.R. 11 hearing prior to entering the diversion program. *Kona* at ¶20. However, in *State v. Monk*, 64 Ohio Misc.2d 1, 639 N.E.2d 518 (1994 Hamilton), the defendant appeared for trial and discussed the possibility of entering a diversion program in lieu of prosecution. As part of the program, the defendant had to pay the costs of \$160, attend four weekly sessions and provide information of his crime to the Court and Prosecutor. The Hamilton Common Pleas Court noted that the defendant was punished for his offense by participating in the diversion program. The Court noted:

He was effectively punished for the offense by being required to participate in the program, pay for it, and to agree to the disclosure of information which could further incriminate him. In fact, his participation in the [diversion] program, costing him time, exposure and expenses, was a prerequisite for the charges being dismissed.

Monk, supra. In *Monk*, similar to the case at issue, the defendant had to issue a statement of guilt which could be used to incriminate him without having the due process provided though a Crim.R. 11 hearing.

The Eighth District Court of Appeals further claimed that Kona would not be subject to sentencing on a guilty plea, but rather would rather be charged by way of information. *Kona* at ¶21. However, as Kona was required to provide a written admission of guilt for the prosecutor to use against him, he essentially has provided a confession to the crime which he cannot contest, similar to the effect of a guilty or no contest plea.

This Eighth District Court of Appeals has further held that a successful completion of a diversion program is the equivalent of served or probated time for the contractual offense as the expiation of consequences are the same. *Urvan* at paragraph 6 of the syllabus. This Honorable Court explained:

Medina County also chose to put the defendant into the early diversion program which, under R.C. 2935.36, that county had opted to install. The purpose of the diversion program is, of course, to effect rehabilitation without the stigma of guilt. However, any view of diversion process not at war with their purposes must include a conception of them (when successfully completed) as the equivalent of served or probated time with consequent expiation of the crime.

Id. at 156. Thus, the Eighth District Court of Appeals held that a successful completion of a diversion program is the equivalent of serving a sentence for the crime charged. *Id.* at 157. See also, *Monk, supra* (“He was effectively punished for the offense by being required to participate in the [diversion] program, pay for it, and agree to the disclosure of information which could

further incriminate him. In fact, his participation in the [diversion] program, costing him time, exposure and expenses, was a prerequisite for the charges being dismissed” and that the defendant was effectively “punished for the offense.”) The net result is that, by reason of Kona’s diversion contract, Kona entered a plea of guilty or no contest, was convicted, and served a sentence for the crime for which he was charged.

Kona’s admission of guilt and successful completion of the program resulted in Kona entering a guilty plea or no contest plea, being convicted, and having served a sentence. Accordingly, Kona entered into a guilty plea and/or no contest plea at the time he completed the admission of guilt and was convicted upon his successful completion of the program. As a guilty plea or no contest plea was entered by virtue of the trial court accepting the admission of guilt, the trial court was required to provide the requisite warning in R.C. 2943.031(A).

B. PROPOSITION OF LAW NO. 2: A noncitizen is required to be advised as to potential immigration consequences pursuant to R.C. 2943.031 when required to provide a written admission of guilt as condition precedent for admission into a pretrial diversion program.

The legislative history of R. C. 2943.031 establishes that this law was enacted in response to Congressional measures limiting potential deportation relief by removing the authority of the United States Attorney General to grant discretionary waivers to deportation. *State v. Yanez*, 150 Ohio App.3d 510, 513, 2002-Ohio-7076, 782 N.E.2d 146. Thus, the purpose of the law was to inform noncitizens of potential consequences of the plea as it pertains to deportation, exclusion and/or naturalization so that the noncitizen could knowingly, voluntarily, and intelligently enter into a plea without later surprise as to the immigration consequences of that plea. *Id.* (finding that a plea is not knowingly, voluntarily, or intelligently made when the trial court failed to personally advise the defendant of the warning contained in R.C. 2943.031(A).) By enacting R.C. 2943.031, the General Assembly has transformed what could have otherwise been

considered a collateral consequence of a guilty plea into a direct consequence. *Id.* at ¶8. The First District Court of Appeals noted that the legislature’s requirement of the warning provided in R.C. 2943.031 “is an acknowledgement, at least to some defendants, the collateral consequences of a plea, namely deportation, exclusion from admission to the United States, and the denial of naturalization, may well be a more serious sanction than the imposition of a prison term.” *Id.* at ¶29.

While a withdrawal of a guilty plea is generally governed by Crim.R. 32.1, R.C. 2943.031 takes precedence over this rule, as set forth by the Ohio Supreme Court in *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6890, 820 N.E.2d 355, which held:

[A]n examination of R.C. 2943.031 in its entirety makes apparent the General Assembly’s intent to free a noncitizen criminal defendant from the “manifest injustice” requirement of Crim.R. 32.1 and to substitute R.C. 2943.031(D)’s standards in its place. The General Assembly has apparently determined that due to the serious consequences of a criminal conviction on a noncitizen status in this country, a trial court should give the R.C. 2943.031(A) warning and the failure to do so should not be subject to the manifest injustice standard even if sentencing has already occurred.

Id. at ¶26. See also, *Yanez* at ¶17.

Crim.R. 11(C)(2) lists specific matters that the trial court is required to inform the defendant of in order for the plea to be made knowingly, voluntarily, and intelligently *Id.* at ¶28-29. R.C. 2943.031(A) provides an additional warning requirement for noncitizen defendants which must be provided pursuant to Crim.R. 11(C)(2) in order for a plea to be made knowingly, voluntarily, and intelligently. *Id.* Because Kona did not understand that his guilty plea subjected him to removal, he did not understand the potential immigration impact of his plea, as required by R.C. 2943.031. Tr. at 9; Affidavit at ¶11.

R.C. 2943.031(A) requires that the trial court personally address a non-citizen defendant prior to accepting any plea of guilty or no contest:

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.

Kona was never so advised in this case. Furthermore, the exceptions found in R.C. 2943.031(B) are not applicable:

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.

While there was a written admission of guilt, at no time was Kona asked whether or not he was a citizen of the United States. Tr. at 36. These are the only statutory exceptions to the requirement to provide the warning as stated in R.C. 2943.031 (A). See *State v. Lucente*, 7th Dist. No. 03 MA 216, 2005-Ohio-1657 (noting that a "plea agreement did not negate the duty of the trial court to substantially comply with R.C. 2943.031.")

As such, the plea/admission of guilt is required to be withdrawn and the conviction is required to be vacated pursuant to R.C. 2943.031(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.

As shown above, Kona entered a guilty and/or no contest plea in written form to the charges in this case. Kona was required to admit his guilt in written form before the Prosecutor and/or trial court would allow him to enter into the diversion program. (Tr. 3, 5, 6, 12, 24; Affidavit at ¶7.) It is undisputed that Kona never received the required advisement pursuant to R.C. 2943.031(A) from the trial court. Tr. at 5, 8, 23, 25; Affidavit at ¶9. It is further undisputed that the Diversion Packet did not provide the advisement pursuant to R.C. 2943.031(A) or inquire as to Kona's citizenship. Tr. at 8, 25; Affidavit at ¶8. Kona also never orally stated on the record that he was a U.S. Citizen as no record was made at the time he entered his plea. Tr. at 5, 36; Affidavit at ¶10. Kona has moved the trial court to withdraw his plea and vacate the conviction as shown in both his Motion to Withdraw Plea and Vacate Judgment as well as in Defendant's Amended Motion. It is further undisputed that Kona is not a U.S. Citizen. Affidavit at ¶3. In his Amended Motion, Kona further advised the trial court in a sworn affidavit that:

Subsequent to the date I completed an Application for Naturalization and was questioned and interrogated by the Department of Homeland Security/U.S. Citizenship and Immigration Services about this case and the admission of guilt contained in the Diversion Packet. I have been advised that I will be subject to deportation upon the final processing of my application.

Affidavit at ¶13. A statement in an affidavit that the defendant has been advised that he will be deported is sufficient to meet the requirement for the defendant to show 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. R.C. 2943.031(D). *State v. Felix*, 8th Dist. No. 70898 (April 17, 1997) at *3. See also, *Willoughby Hills v. Qasim*, 11th Dist. No. 2006-L-199, 2007-Ohio-2860 at ¶16.

Pursuant to R.C. 2943.03 (D), the trial court “shall set aside the judgment and permit the defendant to withdraw a plea of guilty” and “enter a plea of not guilty” if the trial court failed to provide the advisement required by R.C. 2943.031(A). Additionally, R.C. 2943.031(E) provides that “[i]n 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.”

These statutory requirements are mandatory. *State v. Traish*, 133 Ohio App.3d 648, 651, 2000-Ohio-132, 729 N.E.2d 766 (7th Dist.); *State v. Weber*, 125 Ohio App.3d 120, 236, 707 N.E.2d 1178 (10th Dist. 1997). In *State v. Traish, supra*, the Seventh District Court of Appeals reversed a decision by the Youngstown Municipal Court in which the Municipal Court held that it lacked jurisdiction to consider a motion to withdraw guilty plea pursuant to R.C. 2943.031(D), stating as follows:

On remand, the Municipal Court must be aware that, because language in R.C. 2943.031(D) is mandatory, the Court has no discretion and must allow appellant to withdraw his plea if the following statutory requirements are met: (1) the advisement was not given; (2) the advisement was required to be given; (3) appellant is not a citizen of the United States; and (4) appellant may be deported, excluded, or denied naturalization as a result of his conviction of domestic violence.

Id. at 651, citing *Weber, supra*, at 125.

Where the words of a statute are clear and unambiguous, a court should look no further than the language of the statute itself in its effort to interpret the intent of the legislature. *Weber* at 128, citing *State v. Smorgala*, 50 Ohio St.3d 222, 223, 553 N.E.2d 672 (1990) and *Wingate v. Hordge*, 60 Ohio St.2d 55, 58, 396 N.E.2d 770 (1979). Here, R.C. 2943.031(D) clearly and unambiguously states that the plea must be withdrawn and the conviction set aside when these four specified conditions are met. *Weber* at 128.

Diversion programs are permitted by the legislature to rehabilitate “adults who are accused of committing criminal offenses and whom the prosecuting attorney believes probably will not offend again.” R.C. 2935.36(A). The purpose of a diversion program is to effect rehabilitation without the stigma of guilt. *Daher v. City of Cleveland*, 8th Dist. App. No. 48579 (March 28, 1995) at dissent. As Judge Jackson noted in the dissent in *Daher*, “If a diversion program is to be effective, the collateral consequences must be less than the consequences of a conviction of the charged offense.” *Id.* The First District has noted that the legislature’s warning requirement provided in R.C. 2943.031 “is an acknowledgement, at least to some defendants, that the collateral consequences of a plea, namely deportation, exclusion from admission to the United States, and the denial of naturalization, may well be a more serious sanction than the imposition of a prison term.” *Yantz* at ¶29. A noncitizen defendant will always be deemed to have plead guilty or no contest and have been convicted of the crime charged for immigration purposes when he enters a diversion program that requires an admission of guilt, and therefore, they should, at minimum, be warned of the consequences of same.

In *Daher*, the Eighth District found that because “success in a diversion program is the constructive equivalent of serving a sentence for the crime charged,” the defendant in that case was guilty of being a “gambling offender” due to his mere participation in the diversion program.

Judge Jackson noted in his dissent that: “By the majority’s opinion, a defendant is faced with the prospect of losing his property upon completion of a diversion program; the same defendant may instead demand a jury trial where upon acquittal of the charges, no forfeiture would occur. Such a result can hardly be said to promote a defendant’s participation in a diversionary program.” *Id.*

The same result is reached in the instant matter. Had Kona properly been advised that his mere participation in the program placed him at risk for deportation, Kona would have chosen to move forward to trial, where if acquitted, he would not face such a substantial penalty. Forcing a noncitizen to admit their guilt in order to participate in the program without warning the noncitizen of the consequences of same is manifestly unjust, results in a plea that is not knowingly, voluntarily, and intelligently made, violates due process and violates the intent, spirit and goals of R.C. 2943.031, R.C. 2935.36, and the diversion programs.

Even more disturbing is that Ohio courts are now finding that because of the structure of the diversion program, there is allegedly no remedy available to prevent this manifest injustice. E.g. *Kona*, at ¶19; *Qasim, supra*. The requirement to submit an admission of guilt is the equivalent of pleading guilty or no contest to a crime for immigration purposes. Because there is a guilty and/or no contest plea and punishment (i.e. time served upon the successful completion of the diversion program), a conviction exists for immigration purposes. Without a means to vacate the written admission of guilt as part of the dismissal process or to subsequently vacate the written plea though R.C. 2943.031 or Crim.R. 32.1, a noncitizen defendant faces unintended immigration consequences by choosing to participate in a program designed to reduce the stigma of guilt and to prevent such unintended consequences.

This manifest injustice could have easily been prevented. The trial court very easily could have asked the defendant if he was a U.S. citizen and then apprised him of the potential

immigration consequences prior to allowing the defendant into the program. As the Cuyahoga County Prosecutor requires a written admission of guilt as a condition to enter the program, the trial court was required to provide this warning pursuant to R.C. 2943.031. Interestingly, the Cuyahoga County Prosecutor has since revised the program materials to provide this necessary and required warning, and as of January of 2014, is now requiring a guilty plea to be made on the record.

As shown above, the required written statement of guilt is akin to a guilty and/or no contest plea and therefore, pursuant to R.C. 2943.031(A), and the spirit and intent thereof, the trial court was required to advise Kona of the potential immigration consequences, as required by statute. However, Kona was never so advised and in fact was never even asked if he was a U.S. citizen. See: *Lucente, supra* (noting that a “plea agreement did not negate the duty of the trial court to substantially comply with R.C. 2943.031.”) As the requirements of R.C. 2943.031(D) have been established by Kona, the trial court was required to withdraw the plea and vacate the judgment. Kona’s situation falls squarely within R.C. 2943.031 and his guilty plea must be withdrawn and the conviction must be vacated.

C. PROPOSITION OF LAW NO. 3: A written admission of guilt is not made knowingly, voluntarily, and intelligently when a noncitizen is not advised of potential immigration consequences.

In order to ensure a knowing, voluntary, and intelligent plea, a trial court must, prior to accepting a plea from a noncitizen, advise the defendant of his constitutional rights pursuant to Crim.R. 11, including the advisement set forth in R.C. 2943.031(A), and such advisement must affirmatively appear in the trial court’s record. The failure of the trial court to advise Kona of his rights pursuant to Crim.R. 11 was absolutely prejudicial and requires the vacating of the involuntary plea. Crim.R. 11 (C)(2) provides, in relevant part:

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

* * *

R.C. 2943.031(A) provides an additional warning requirement for noncitizen defendants which must be provided pursuant to Crim.R. 11(C)(2) in order for a plea to be made knowingly, voluntarily, and intelligently. *Yanez* at ¶¶28-29.

The trial court noted during the hearing that a defendant has the right to know the charges against him as well as the penalties he faces and that deportation is ultimately a penalty that was faced by Kona. Tr. at 34. Kona was never advised as to the potential penalty of deportation. Affidavit at ¶¶8, 10, 11. . Despite the trial court’s conclusion and despite the fact that the trial court never advised Kona as to the potential immigration penalties he faced, the trial court denied the Motion without explanation. A guilty or no contest plea is only constitutionally valid to the extent that it is voluntarily, knowingly, and intelligently entered. Kona’s plea was not knowingly, voluntarily, or intelligently made as the trial court failed to advise him that the admission of guilt could affect his immigration status. Accordingly, Kona’s plea was not constitutionally valid.

The record must affirmatively demonstrate that a plea of guilty or no contest was entered voluntarily, intelligently, and knowingly. *State v. Clark*, 119 Ohio St.3d 239, 243, 2008-Ohio-3748, 893 N.E.2d 462 at ¶25. “When a trial judge fails to explain the constitutional rights set

forth in Crim.R. 11(C)(2)(c), the guilty or no contest plea is invalid under the presumption that it was entered involuntarily and unknowingly.” *Id.* at ¶31. When a defendant is confronted with the waiver of a constitutional, statutory, or other substantial or fundamental right, such waiver must affirmatively appear in the record. *Garfield Hts. v. Brewer*, 17 Ohio App.3d 216, 217, 479 N.E.2d 809 (8th Dist. 1984); *City of Cleveland v. Chebib*, 143 Ohio App.3d 295, 2001-Ohio-3130, 757 N.E.2d 1223 (8th Dist.). There is no record of any such waiver in this case as no such waiver occurred.

There must also be meaningful colloquy between the trial court and the defendant in which the trial judge must convey accurate information to the defendant so that the defendant can understand the consequences of his or her decision and enter a plea. *Id.* See also, *Brewer*, *supra*; *Mentor v. Carter*, 11th Dist. No. 93-L-104 (March 25, 1994); *State v. Kennerly*, 11th Dist. No. 88 P 2001 (May 26, 1989). No colloquy occurred in this case concerning any of Kona’s rights.

In *State v. Clark*, *supra*, the Ohio Supreme Court reiterated the trial courts must “literally comply with Crim.R. 11” to avoid committing error. *Clark* at ¶29. As a result, “[w]hen a trial judge fails to explain the constitutional rights set forth in Crim.R. 11(C)(2)(c), the guilty or no contest plea is invalid under the presumption that it was entered involuntarily and unknowingly.” *Id.* at ¶31.

The First District has found that unless a defendant is aware of the risk of deportation, the defendant cannot enter a knowing, voluntary, and intelligent plea:

Unless the defendant is aware of the risk of deportation, he cannot appreciate whether it is in his best interest to waive his rights by entering a guilty plea....The failure...to inform...of the consequences may well be critical to the defendant’s understanding of his rights and the voluntariness of his guilty plea.

Yanez at ¶43.

Rather than providing the required warning, Kona was advised that upon a successful completion of the program, his record would be expunged and the case dismissed without further consequences. At no time did either the trial court or the Prosecutor's office ask Kona if he was a U.S. citizen or advise him that his participation in this program could result in his deportation, exclusion from admission to the U.S., or denial of naturalization. Kona was never advised that a conviction for purposes of federal immigration laws included the successful completion of the diversion program and/or deferred adjudications. In fact, in *Abi-Aazar, supra*, the Ninth District held that the failure by the trial court to explain that a treatment in lieu plea was, for immigration purposes, a conviction, rendered the advisement ineffective and the decision to plead guilty uninformed.

A guilty plea is only constitutionally valid to the extent that it is voluntarily, knowingly, and intelligently entered. The record does not reflect that the mandatory provisions of Crim.R. 11 were met. The record was made by the trial court and no colloquy was entered into between the court and Kona regarding his Crim.R. 11 rights. Kona's plea was also not knowingly, voluntarily, or intelligently made because the trial court failed to comply with R.C. 2943.031(A). Kona's plea was based on the mistaken belief that he would avoid removal proceedings. The trial court's failure to advise Kona that this guilty plea could affect his immigration status tainted Kona's plea. Thus, Kona did not knowingly, voluntarily, and intelligently provide an admission of guilt/guilty and/or no contest plea and did not knowingly, voluntarily, and intelligently enter into the diversion program. Accordingly, Kona's plea was not constitutionally valid.

The failure to comply with Crim.R. 11 constitutes reversible error. *Id.* See also, *State v. Orr*, 26 Ohio App.3d 24, 498 N.E.2d 181 (11th Dist. 1985); *Carter, supra*. The error is prejudicial even where a defendant is represented by counsel. *State v. Hays*, 2 Ohio App.3d 376,

442 N.E.2d 127 (1st Dist. 1982). Therefore, the trial court also erred when it refused to withdraw the guilty plea and vacate the conviction on this basis as well. Because the plea was not entered into voluntarily, intelligently, and knowingly, Kona is entitled to have his plea withdrawn and the conviction vacated.

D. PROPOSITION OF LAW NO. 4: A trial court should, pursuant to Crim.R. 32.1, withdraw a written admission of guilt thereby vacating the conviction for immigration purposes, where a manifest injustice will otherwise occur.

In addition to the aforementioned bases for withdrawing the plea and vacating the conviction, Kona was alternatively entitled to have the plea withdrawn and the conviction vacated pursuant to Crim.R. 32.1 to correct the manifest injustice created by the trial court's acceptance of Kona into the diversion program with a requirement to execute written admission of guilt without having provided the warning required by R.C. 2943.031(A).

R.C. 2943.031(F) provides: "Nothing in this section shall be construed as preventing a court, in the sound exercise of its discretion pursuant to Crim.R. 32.1, from setting aside the judgment of conviction and permitting a defendant to withdraw his plea." Pursuant to Crim.R. 32.1, a court may set aside the conviction after a sentence is imposed to "correct manifest injustice." A manifest justice is defined as "a clear or openly unjust act" or a "fundamental flaw in the path of justice so extraordinary that the defendant could not have sought redress from the resulting prejudice through another form of application reasonably available to him or her." *State v. Lababidi*, 8th Dist. No. 96755, 2012-Ohio-267, citing *Sneed, supra*. Section 2943.031(F), therefore, applies when conditions of R.C. 2943.031(D) are not met but conditions of manifest injustice are present, the court may exercise its discretion in setting aside the conviction and permitting a defendant to withdraw his plea of guilty or no contest.

Even the Eighth District Court of Appeals noted below that this case resulted in a manifest injustice because of the immigration consequences for participating in the diversion program as a noncitizen:

Although we sympathize with Kona and agree that the application of the immigration laws in his case result in a manifest injustice...

Kona at ¶19. However, the Court did not address the argument concerning Crim. R. 32.1.

In a substantially similar case, the Eleventh District Court of Appeals determined that where a defendant faced deportation upon completing his diversion program due to the trial court's failure to advise him of the potential consequences as required by R.C. 2943.031(A), a manifest injustice occurred. *Qasim, supra*. The Eleventh District Court of Appeals, much like the Eighth District, erroneously found that it was powerless to correct this manifest injustice:

We realize that the department of immigration may choose to proceed utilizing a dismissed conviction and a null and void plea. This would create a manifest injustice...

Id. at ¶20. However, this is the type of situation Crim.R. 32.1 was designed to rectify. Furthermore, the trial court retains limited jurisdiction over a dismissed case for purposes of correcting manifest injustices. *Logsdon v. Nicholas*, 72 Ohio St. 3d 124, 127-128, 647 N.E.2d 1361 (1995); Crim.R. 32.1.

When confronted with a similar matter, the Kings County, NY Supreme Court held that a trial court must consider potential immigration consequences when determining whether or not exceptional circumstances exist for those noncitizens eligible for a diversion program when accepting the guilty plea required of that diversion program. *New York v. Vallejo*, 953 N.Y.S.2d 553 (2012). In order to avoid the potential immigration consequences in *Vallejo*, the court permitted that defendant to enter the program without entering the required guilty plea. *Id.* See

also, *New York v. Kollie*, 959 N.Y.S. 854 (2013). Had Kona been properly advised by the trial court, he too could have sought an exception from the admission of guilt from the trial court.

Manifest injustice has resulted to Kona as he is now subject to deportation because he entered into the diversion program and executed a written admission of guilt without knowing that deportation would be a possibility, as he was never advised of the potential immigration consequences as required by R.C. 2943.031(A). The Diversion Packet warns new noncitizen offenders but failed to have any warning in place when Kona applied to the diversion program. Additionally, the trial court failed to provide the required warning pursuant to R.C. 2943.031(A). Had Kona been properly advised of his constitutional and statutory rights, he could have entered into a knowing, voluntary, and intelligent plea, sought exemption from the admission of guilt, or chosen to take the matter to trial.

It is manifestly unjust that a noncitizen defendant who pleads guilty receives a warning as to the potential effect of his plea on his immigration consequences, but that Kona, who faced the same potential immigration consequences, does not receive the warning merely because he was eligible to enter a diversion program designed to reduce the stigma of guilt for persons unlikely to reoffend. It is further manifestly unjust that the Diversion Packet has now been revised to include this warning, but Kona, again, did not receive the warning at the time he entered the diversion program. Finally, unless his plea is withdrawn and the conviction vacated pursuant to R.C. 2943.031(D), Kona has no other means available to him to remedy this manifestly unjust flaw in the system.

It is worth reiterating that the Cuyahoga County Prosecutor's office has recognized this error and has conspicuously placed the required advisements on all Diversion Packets to remedy cases like the present. As of January of 2014, the Cuyahoga County Prosecutor's office now requires a guilty plea on the record. This key evidence demonstrates that the Prosecutor's office is well aware

of the deportation consequences to noncitizens as a result of the guilty plea that is required in order to participate in the diversion program, and further highlights the manifest injustice that has occurred in this case.

The Ohio legislature has addressed the importance of advising noncitizens of the consequences of their plea in order to ensure that every person receives due process under the law. Kona's right to due process was violated when the trial court failed to provide the mandatory advisements pursuant to R.C. 2943.031(A) and Crim.R. 11, thereby tainting Kona's plea and everything that occurred subsequently, including the result of time served upon his successful completion of the program and the dismissal which followed. The result is a manifest injustice.

E. PROPOSITION OF LAW NO. 5: A trial court has jurisdiction to withdraw a written admission of guilt and vacate the conviction after a dismissal.

The trial court and the Eighth District erroneously believed that the trial court did not have jurisdiction to allow Kona to withdraw his written admission of guilt or vacate the conviction after the charges had been dismissed. However, a trial court retains jurisdiction pursuant to Crim.R. 32.1 and R.C. 2943.031(D) to withdraw a plea, vacate a conviction, to correct a manifest injustice and/or to correct the trial court's own reversible error created by its noncompliance with Crim.R. 11 and R.C. 2943.031. See R.C. 2943.031(D); Crim.R. 32.1. A trial court further retains jurisdiction to correct reversible error by vacating an erroneous dismissal entry. *Logsdon, supra*.

In the present case, the trial court failed to advise Kona of his mandatory rights pursuant to R.C. 2943.031 and Crim.R. 11. The Diversion Packet also failed to contain a warning concerning immigration consequences for participating in the diversion program.

The advisement by the trial court is mandatory and as such, the trial court was required to permit Kona to withdraw his plea upon his showing that he meet the following requirements: (1)

the advisement was not given; (2) the advisement was required to be given; (3) Kona is not a United States citizen; and (4) Kona may be deported, excluded, or denied naturalization as a result of the plea. *Francis, supra; Weber, supra; Yanez, supra.* As shown above, Kona met those requirements and established same before the trial court, thereby entitling him to have his plea withdrawn and his conviction vacated.

Since the trial court failed to provide Kona with the required advisement pursuant to R.C. 2943.031(A) and failed to go on the record delineating Kona's Crim.R. 11 rights, the trial court retained jurisdiction to correct this error pursuant to R.C. 2943.031 and Crim.R. 32.1.

IV. CONCLUSION

Noncitizen defendants who previously entered the diversion program in Cuyahoga County, Ohio are left without any remedy to avoid immigration consequences that attach to the program due to the arbitrary prerequisite of providing a written admission of guilt to enter said programs and the failure of the courts to provide the required warning pursuant to R.C. 2943.031. These noncitizen defendants are being denied due process, are being forced to enter pleas under duress, and are making pleas that are not knowingly, voluntarily or intelligently made due to the trial court's failure to provide the required warning concerning potential immigration consequences pursuant to R.C. 2943.031.

A required written admission of guilt constitutes a guilty and/or no contest plea for federal immigration purposes and therefore Kona was entitled to the protections of R.C. 2943.031. To hold otherwise circumvents the clear legislative intent behind R.C. 2943.031 and defeats the purpose of the diversion program. As such, this Honorable Court should permit Kona to withdraw his admission of guilt, vacate the conviction/admission of guilt and ensure going forward that Kona and all other noncitizen defendants in Ohio receive due process.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing “Defendant-Appellant Issa Kona’s Merit Brief” was forwarded via regular U.S. Mail to Timothy J. McGinty, Esq., Cuyahoga County Prosecutor and Diane Smilanick, Esq., Assistant Prosecuting Attorney, 1200 Ontario St., 9th Floor, Cleveland, Ohio 44113, on this 14th day of November, 2014.



JOSEPH T. BURKE (0052535)

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Counsel for Defendant/Appellant Issa Kona

IN THE OHIO SUPREME COURT

STATE OF OHIO,

Plaintiff-Appellee,

vs.

ISSA KONA,

Defendant-Appellant.

Supreme Court Case No.

On Appeal from Eighth Dist. App. No.
CA-13-100191

DEFENDANT-APPELLANT ISSA KONA'S NOTICE OF APPEAL

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Counsel for Defendant-Appellant Issa
Kona

Now comes Defendant-Appellant Issa Kona, by and through his undersigned counsel, and hereby gives notice of his appeal to the Ohio Supreme Court of the decision by the Eighth District Court of Appeals in the matter of *State of Ohio v. Issa Kona*, Cuyahoga App. No. CA-13-100191, dated March 27, 2014. A copy of said decision is incorporated herein and attached hereto as Exhibit A. This case raises a substantial constitutional question; involves a felony; and concerns matters of public or great general interest. The Memorandum in Support of Jurisdiction is being filed contemporaneously and is incorporated herein.

Respectfully Submitted,

JOSEPH T. BURKE (0052535)
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing “Defendant-Appellant Issa Kona’s Notice of Appeal” was forwarded via regular U.S. Mail to Appellee through its counsel of record, Timothy J. McGinty, Esq., Cuyahoga County Prosecutor and Diane Smilanick, Esq., Assistant Prosecuting Attorney, 1200 Ontario St., 9th Floor, Cleveland, Ohio 44113, on this ____ day of _____, 2014.

JOSEPH T. BURKE (0052535)
MICHAEL G. POLITO, ESQ. (0051930)
Counsel for Defendant/Appellant Issa Kona

[Cite as *State v. Kona*, 2014-Ohio-1242.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100191

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ISSA KONA

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-06-480390

BEFORE: Boyle, A.J., Celebrezze, J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: March 27, 2014

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Timothy J. McGinty
Cuyahoga County Prosecutor
BY: Diane Smilanick
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MARY J. BOYLE, A.J.:

{¶1} Defendant-appellant, Issa Kona, appeals the trial court's judgment denying his motion to withdraw his plea and vacate judgment. He raises four assignments of error for our review:

1. The trial court erred when it failed to provide the non-citizen defendant-appellant with the required advisement as to potential immigration consequences as required by R.C. 2943.031, as defendant-appellant's admission of guilt is equated with a guilty plea for immigration purposes.
2. Defendant-appellant's plea was not made knowingly, voluntarily, and intelligently and therefore the plea was made in violation of his constitutional rights.
3. The trial court erred when it refused to withdraw Kona's plea and vacate the conviction pursuant to Crim.R. 32.1.
4. The trial court had jurisdiction to withdraw the plea and vacate the conviction after the dismissal was recorded in this case.

{¶2} Finding no merit to his appeal, we affirm.

Procedural History and Factual Background

{¶3} In May 2006, Kona was indicted on two counts of robbery in violation of R.C. 2911.02. The police report alleged:

On Saturday, April 1, 2006, Issa S. Kona stole a Dewalt 18 volt battery charger from Home Depot located at 11901 Berea Rd., Cleveland, Ohio 44111. When Kona was confronted by security personnel outside of the store, he refused to return the stolen property after which he fought with security personnel, refusing to return the property. Kona was finally handcuffed and brought to the security office where the stolen property was recovered.

{¶4} On the day of trial, Kona requested a continuance to apply for the Cuyahoga County pretrial diversion program. As part of the application for the diversion program, Kona was required to complete a written admission of guilt statement. In his admission statement, Kona said:

On April 1, 2006, I entered the Home Depot located at 11901 Berea Road, Cleveland, Ohio and took a battery charger, removed it from its package, and hid it in my coat. I purchased a window for \$180 and exited the store.

As I left the store, I was confronted and apprehended by three (3) store security men. The battery charger was found in my coat and recovered.

The total value was \$59.00[.]

{¶5} After the state found that Kona met the eligibility requirements for the diversion program, the court approved Kona's acceptance in the program and ordered that his case be placed in inactive status until further notice.

{¶6} In May 2007, upon the state's motion, the trial court found that Kona had successfully completed the diversion program. Subsequently, the trial court dismissed Kona's case with prejudice. Kona moved to expunge the record of the case, which the state did not oppose. The trial court granted Kona's motion to expunge the record and ordered that the record be sealed.

{¶7} According to Kona, he is a citizen of Palestine, but he has been a legal resident of the United States since 2002. After his criminal case was dismissed, Kona applied to become a naturalized citizen of the United States. He was advised that because he completed the admission of guilt statement as part of his application to the diversion program, he will be "subject to deportation upon the final processing of [his]

application.” Kona contacted several immigration attorneys, who advised him that he “must withdraw [his] guilty plea and vacate [his conviction] in order to avoid deportation.”

{¶8} After Kona talked to the immigration attorneys, he moved to unseal the record of his criminal case, which the trial court granted. Kona then moved to “withdraw his plea and vacate judgment.” The trial court held a hearing on Kona’s motion in April 2013. After the hearing, the trial court denied Kona’s motion. It is from this judgment that Kona appeals.

R.C. 2943.031 — Advisement as to Possible Deportation

{¶9} In his first assignment of error, Kona argues that his admission of guilt operated as a guilty plea in the diversion program. For this reason, he maintains that the trial court was required to give him the mandatory advisement as to potential immigration consequences under R.C. 2943.031. In his second assignment of error, he contends that his “plea” was not knowingly, voluntarily, and intelligently entered into because the trial court failed to properly advise him as to potential immigration consequences under R.C. 2943.031. In his third assignment of error, he argues that the trial court erred when it denied his motion to withdraw his “plea.” And in his fourth assignment of error, he argues that the trial court had jurisdiction to withdraw his “plea.”

{¶10} The crux of Kona’s arguments throughout his appeal — or the threshold determination underlying each of his arguments — is that his admission of guilt statement that he made when applying to the pretrial diversion program was the equivalent of entering into a guilty plea. Therefore, he argues that he was entitled to all of the

protections that he would have been afforded had he actually entered a plea of guilty, including those protections under Crim.R. 11 and R.C. 2943.031. Thus, before we can reach the substantive arguments that Kona is making in each of his assignments of error, we must first agree with his threshold argument that the admission of guilt statement that he made to enter the Cuyahoga County diversion program is the equivalent to a guilty plea.

{¶11} With two exceptions that are not applicable here, R.C. 2943.031(A) provides in relevant part that

[P]rior to accepting a plea of guilty or a plea of no contest to an indictment * * *, 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.¹

{¶12} Crim.R. 11(C) details the steps a trial court must follow before accepting a plea of guilty or no contest in a felony case. The overall goals expressed in Crim.R. 11(C)(2) are to ensure that “the defendant is making the plea voluntarily,” understands “the nature of the charges” and “the maximum penalty” that may ensue, understands “the effect of the plea,” and understands the rights that he or she is waiving.

¹A trial court does not have to orally give this advisement if “(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; [or] (2) The defendant states orally on the record that he is a citizen of the United States.”

{¶13} Within that framework, Crim.R. 11(C)(2) lists specific matters the trial court is to inform the defendant of, including nonconstitutionally based matters (such as nature of the charges and the maximum penalty involved) and constitutional rights being waived (such as trial by jury and confrontation of witnesses), before the judge may accept the plea.

R.C. 2943.031(A) creates an additional warning requirement to non-citizens. To the extent that R.C. 2943.031(A) goes beyond Crim.R. 11(C)(2), the General Assembly has created a substantive right that supplements the procedural rule. *See State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355, ¶ 28-29.

R.C. 2935.36 — Pretrial Diversion Program

{¶14} Pretrial diversion programs are governed by R.C. 2935.36. This provision provides:

The prosecuting attorney may establish pre-trial diversion programs for adults who are accused of committing criminal offenses and whom the prosecuting attorney believes probably will not offend again. The prosecuting attorney may require, as a condition of an accused's participation in the program, the accused to pay a reasonable fee for supervision services that include, but are not limited to, monitoring and drug testing. The programs shall be operated pursuant to written standards approved by journal entry by the presiding judge or, in courts with only one judge, the judge of the court of common pleas[.]

R.C. 2935.36(A).

{¶15} Under R.C. 2935.36(B), an accused entering a pretrial diversion program must do each of the following:

(1) Waive, in writing and contingent upon the accused's successful completion of the program, the accused's right to a speedy trial, the preliminary hearing, the time period within which the grand jury may

consider an indictment against the accused, and arraignment, unless the hearing, indictment, or arraignment has already occurred;

(2) Agree, in writing, to the tolling while in the program of all periods of limitation established by statutes or rules of court, that are applicable to the offense with which the accused is charged and to the conditions of the diversion program established by the prosecuting attorney;

(3) Agree, in writing, to pay any reasonable fee for supervision services established by the prosecuting attorney.

{¶16} The pretrial diversion program statute further mandates the following:

(C) The trial court, upon the application of the prosecuting attorney, shall order the release from confinement of any accused who has agreed to enter a pre-trial diversion program and shall discharge and release any existing bail and release any sureties on recognizances and shall release the accused on a recognizance bond conditioned upon the accused's compliance with the terms of the diversion program. * * *

(D) If the accused satisfactorily completes the diversion program, the prosecuting attorney shall recommend to the trial court that the charges against the accused be dismissed, and the court, upon the recommendation of the prosecuting attorney, shall dismiss the charges. If the accused chooses not to enter the prosecuting attorney's diversion program, or if the accused violates the conditions of the agreement pursuant to which the accused has been released, the accused may be brought to trial upon the charges in the manner provided by law, and the waiver executed pursuant to division (B)(1) of this section shall be void on the date the accused is removed from the program for the violation.

R.C. 2935.36(C) and (D).

{¶17} Cuyahoga County's pretrial diversion program requires a defendant to complete an admission of guilt statement as part of the application into the diversion program. The instructions (at the time Kona applied to the program) stated: "You are to provide a complete, accurate, and truthful statement concerning your present criminal charge(s). This statement must admit to the crimes for which you are charged."

{¶18} Kona maintains that because he had to admit to the crimes, it was the equivalent to entering a guilty plea. He therefore contends that the trial court was required to ensure that he was admitting to the crimes voluntarily, knowingly, and intelligently pursuant to Crim.R. 11, and because he was not a United States citizen, part of a voluntary, knowing, and intelligent plea would also include the protections set forth in R.C. 2943.031.

{¶19} Although we sympathize with Kona and agree that the application of the immigration laws in his case result in a manifest injustice, we cannot agree with him that the trial court erred here. Although R.C. 2935.36(A) requires pretrial diversion programs to be “operated pursuant to written standards approved by journal entry by the presiding judge or, in courts with only one judge, the judge of the court of common pleas[,]” there is nothing in the statute that requires a trial court to ensure that a defendant knowingly, voluntarily, and intelligently enters into a pretrial diversion program. Nor is there anything in R.C. 2943.031 that requires a trial court to advise a defendant of possible immigration consequences if that defendant is entering into a pretrial diversion program. Upon a plain reading of these statutes, it is clear that Kona would have only been afforded these protections had he entered a plea of guilty or no contest. Then the trial court would have been required to follow Crim.R. 11 and R.C. 2943.031.

{¶20} Kona cites to a number of cases dealing with a diversion program, claiming that they support his arguments. But in these cases, the defendant pleaded guilty — after a Crim.R. 11 hearing — prior to entering into the diversion program. *See State v.*

Abi-Aazar, 154 Ohio App.3d 278, 2003-Ohio-4780, 797 N.E.2d 98 (9th Dist.); *State v. Curry*, 134 Ohio App.3d 113, 730 N.E.2d 435 (9th Dist.1999); *Strickland v. Ohio Bur. of Motor Vehicles*, 92 Ohio App.3d 755, 637 N.E.2d 95 (2d Dist.1994). Thus, these cases are not applicable here. Kona also cites to a number of other cases for different propositions — all of which have been reviewed by this court. None of these cases, however, supports his arguments.

{¶21} Kona further contends that if he had “failed to satisfactorily complete the terms and conditions of the diversion program, the case would have proceeded to sentencing on his guilty plea.” This is simply not true. The trial court’s judgment admitting Kona into the pretrial diversion program stated that if he failed to complete the diversion program, he “has given up the right to have the grand jury take final action on [his] case and agrees to be charged by way of information.” And R.C. 2935.36(D) states that “if the accused violates the conditions of the agreement pursuant to which the accused has been released, the accused may be brought to trial upon the charges in the manner provided by law.”

{¶22} Thus, we conclude that because Kona did not enter a plea of guilty or no contest as part of his pretrial diversion program, the trial court was not required to follow the mandates of Crim.R. 11 and R.C. 2943.031. In reaching this conclusion, Kona’s remaining arguments must fail. A trial court cannot withdraw a plea that was never entered into, nor can it vacate a conviction that does not exist.

{¶23} Accordingly, Kona’s four assignments of error are without merit.

{¶24} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, ADMINISTRATIVE JUDGE

FRANK D. CELEBREZZE, JR., J., and
EILEEN T. GALLAGHER, J., CONCUR



IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff

ISSA KONA
Defendant

Case No: CR-06-480390-A

Judge: CASSANDRA COLLIER-WILLIAMS

INDICT: 2911.02 ROBBERY
2911.02 ROBBERY

JOURNAL ENTRY

DEFENDANT'S AMENDED MOTION TO WITHDRAW PLEA AND VACATE JUDGMENT IS DENIED.
CLERK ORDERED TO SEND A COPY OF THIS ORDER TO:
JOSEPH T. BURKE, 24500 CENTER RIDGE ROAD, #175 WESTLAKE, OHIO 44145
THIS ENTRY TAKEN BY JUDGE CASSANDRA COLLIER-WILLIAMS.

07/02/2013
CPATP 07/02/2013 14:18:27



Judge Signature 07/02/2013

Joseph Burke
7-2-13

HEAR
07/02/2013

RECEIVED FOR FILING
07/02/2013 14:58:34
ANDREA F. ROCCO, CLERK



45188478

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

THE STATE OF OHIO
Plaintiff

ISSA KONA
Defendant

2007 MAY -4 A 9:25

GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

Case No: CR-06-480390-A

Judge: JOAN SYNENBERG

INDICT: 2911.02 ROBBERY
2911.02 ROBBERY

JOURNAL ENTRY

THIS CAUSE IS BEFORE THE COURT ON MOTION OF COUNTY PROSECUTOR WILLIAM D. MASON, REQUESTING AN ORDER DISMISSING THIS CASE FOR WANT OF PROSECUTION, THE DEFENDANT HAVING COMPLETED SUCCESSFULLY THE CUYAHOGA COUNTY PRE-TRIAL DIVERSION PROGRAM, IN ACCORDANCE WITH THE PROVISIONS OF R.C. 2935.36.

SAID MOTION IS WELL TAKEN. IT IS HEREBY ORDERED THAT THIS CASE BE DISMISSED WITH PREJUDICE. DEFENDANT'S MOTION FOR EXPUNGEMENT OF RECORD IS GRANTED ORDER TO SEAL RECORDS

THIS MATTER CAME ON TO BE HEARD UPON THE APPLICATION FOR EXPUNGEMENT FILED AFTER THE FINDING BY A JURY OR COURT THAT THE APPLICANT WAS NOT GUILTY OF AN OFFENSE OR THE DISMISSAL OF A COMPLAINT, INDICTMENT, OR INFORMATION NAMING THE APPLICANT AS A DEFENDANT WAS ENTERED UPON THE MINUTES OF THE COURT OR THE JOURNAL, WHICHEVER ENTRY CAME FIRST.

THE COURT HAS GIVEN NOTICE TO THE PROSECUTOR FOR THE CASE. THE COURT HAS CONSIDERED THE EVIDENCE AND THE REASONS AGAINST GRANTING THE APPLICATION SPECIFIED IN THE OBJECTION, IF ANY, FILED BY THE PROSECUTOR.

THE COURT DETERMINES THAT THE APPLICANT WAS FOUND NOT GUILTY IN THE CASE OR THE COMPLAINT, INDICTMENT, OR INFORMATION IN THE CASE WAS DISMISSED; THAT NO CRIMINAL PROCEEDINGS ARE PENDING AGAINST THE APPLICANT; AND THAT THE INTEREST OF THE APPLICANT IN HAVING THE RECORDS PERTAINING TO THE CASE SEALED ARE NOT OUTWEIGHED BY ANY LEGITIMATE NEEDS OF THE GOVERNMENT TO MAINTAIN THOSE RECORDS.

THEREFORE, IT IS HEREBY ORDERED THAT ALL OFFICIAL RECORDS PERTAINING TO THIS CASE SHALL BE SEALED AND THAT, EXCEPT AS PROVIDED IN OHIO REVISED CODE SECTION 2953.53, THE PROCEEDINGS IN THIS CASE SHALL BE DEEMED NOT TO HAVE OCCURRED.

IT IS THEREFORE ORDERED THAT THE CLERK OF COURT OF COMMON PLEAS SHALL SERVE CERTIFIED COPIES OF THIS JOURNAL ENTRY BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED UPON THE FOLLOWING:

1. THE LAW ENFORCEMENT OFFICIAL IN CHARGE OF THE LAW ENFORCEMENT AGENCY OR ORGANIZATION WHICH CAUSED THE APPLICANT'S ARREST, APPLICANT TO SUBMIT TO THE CLERK OF COURT OF COMMON PLEAS IN WRITING THE NAME AND ADDRESS OF SAID AGENCY OR ORGANIZATION; TOGETHER WITH APPLICANT'S BIRTH DATE AND SOCIAL SECURITY NUMBER;
2. THE PROSECUTING ATTORNEY OF CUYAHOGA COUNTY, OHIO;
3. THE BUREAU OF CRIMINAL INVESTIGATION IN THE OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF OHIO, APPLICANT TO SUBMIT TO THE CLERK OF COURT OF COMMON PLEAS IN WRITING APPLICANT'S BIRTH DATE AND SOCIAL SECURITY NUMBER;
4. THE CUYAHOGA COUNTY SHERIFF'S DEPARTMENT;

DIVC - 208
05/02/2007



45188478

- 5. THE APPLICANT'S ATTORNEY; AND
- 6. THE ADULT PROBATION DEPARTMENT OF THIS COURT.
- 7. THE MUNICIPAL COURT THAT ISSUED AN ORDER BINDING THE DEFENDANT OVER TO THE GRAND JURY (UNLESS DEFENDANT DIRECTLY INDICTED BY THE GRAND JURY).

IT IS FURTHER AND FINALLY ORDERED THAT NONE OF THE FOREGOING PERSONS, AGENCIES, OR ORGANIZATIONS SHALL INSPECT OR USE SAID RECORDS, NOR PERMIT THE INSPECTION OR USE OF SAID RECORDS, EXCEPT IN ACCORDANCE WITH THE APPLICABLE PROVISIONS OF OHIO REVISED CODE SECTIONS 2953.53 AND 2953.54 AS CURRENTLY ENACTED OR AS HEREINAFTER AMENDED.
 RACE WHITE; -SEX MALE; DOB 06/16/1967:

Jean S. Quabrey 5/13/07
 Judge Signature Date

THE STATE OF OHIO Cuyahoga County	} SS. I. GERALD E. FUERST, CLERK OF THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY.
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL	
<i>Expungement Order</i>	
NOW ON FILE IN MY OFFICE.	
WITNESS MY HAND AND SEAL OF SAID COURT THIS <u>15</u> DAY OF <u>May</u> A.D. 20 <u>07</u>	
GERALD E. FUERST, Clerk	
By <u><i>R. [Signature]</i></u>	Deputy

CASE INFORMATION

CR-06-480390-A THE STATE OF OHIO vs. ISSA KONA

[Printer Friendly Version](#)

Docket Information

From Date	Type	Type	Type	Type	Search
/ /					Start Search

Proceeding Date	Filing Date	Side	Type	Description	Image
03/27/2014	03/27/2014	N/A	JE	Affirmed. >Mary J. Boyle, A.J., Frank D. Celebrezze, Jr., J., and Eileen T. Gallagher, J., concur. Notice issued.	
09/09/2013	09/09/2013	D1	CL	TRANSCRIPT OF PROCEEDINGS (1) FILED AND SENT TO THE COURT OF APPEALS. (100191)	
08/12/2013	08/12/2013	D1	CL	RECORD ON APPEAL, PAGINATION SHEET AND CRIMINAL FILE SENT TO THE COURT OF APPEALS.	
07/31/2013	07/31/2013	D1	NT	NOTICE OF APPEAL, \$175.00 FILING FEE, JOURNAL ENTRY, PRAECIPE, DOCKETING STATEMENT (REGULAR), FILED AND SENT TO THE COURT OF APPEALS WITH A COPY OF THE DOCKET SHEET. THE COURT OF APPEALS NUMBER ASSIGNED IS 100191.	
07/02/2013	07/02/2013	N/A	JE	DEFENDANT'S AMENDED MOTION TO WITHDRAW PLEA AND VACATE JUDGMENT IS DENIED. CLERK ORDERED TO SEND A COPY OF THIS ORDER TO: JOSEPH T. BURKE; 24500 CENTER RIDGE ROAD, #175 WESTLAKE, OHIO 44145 THIS ENTRY TAKEN BY JUDGE CASSANDRA COLLIER-WILLIAMS. 07/02/2013 CPATP 07/02/2013 14:18:27	
06/18/2013	06/20/2013	N/A	JE	AT THE REQUEST OF THE STATE; PRETRIAL PREVIOUSLY SCHEDULED FOR 06/18/2013 AT 11:00AM IS RESCHEDULED FOR 06/26/2013 AT 09:00AM. THE PARTIES HAVE UNTIL 06/26/2013 TO REACH A RESOLUTION IN REGARDS TO DEFENDANT'S AMENDED MOTION TO WITHDRAW PLEA AND VACATE JUDGMENT. SHOULD THE PARTIES FAIL TO REACH A RESOLUTION THE COURT WILL ISSUE A RULING ON DEFENDANT'S MOTION. THIS ENTRY TAKEN BY JUDGE CASSANDRA COLLIER-WILLIAMS. 06/18/2013 CPATP 06/18/2013 13:44:34	
05/07/2013	05/07/2013	N/A	JE	COUNSEL FOR DEFENDANT PRESENT. PROSECUTOR NOT AVAILABLE. PRETRIAL NOT HELD. PRETRIAL SET FOR 06/18/2013 AT 11:00 AM. THIS ENTRY TAKEN BY JUDGE CASSANDRA COLLIER-WILLIAMS. 05/07/2013 CPATP 05/07/2013 13:57:54	
04/04/2013	04/04/2013	N/A	JE	DEFENDANT IN COURT. COUNSEL JOSEPH T BURKE AND MICHAEL G. POLITO PRESENT. PROSECUTOR(S) DIANE SMILANICK PRESENT. HEARING ON DEFENDANT'S AMENDED MOTION TO WITHDRAW PLEA AND VACATE JUDGMENT CONVERTED TO A PRETRIAL. PRETRIAL SET FOR 05/07/2013 AT 11:00 AM. THIS ENTRY TAKEN BY JUDGE CASSANDRA COLLIER-WILLIAMS. 04/04/2013 CPATP 04/04/2013 13:41:10	
04/01/2013	04/01/2013	N/A	JE	HEARING ORDERED ON DEFENDANT'S AMENDED MOTION TO WITHDRAW PLEA AND VACATE JUDGMENT. HEARING SET FOR 04/04/2013 AT 11:00 AM. THIS ENTRY TAKEN BY JUDGE CASSANDRA COLLIER-WILLIAMS. 04/01/2013 CPATP 04/01/2013 13:46:48	
03/08/2012	03/08/2012	D1	CL	TRANSCRIPT OF PROCEEDINGS (1) FILED.	
06/04/2010	06/04/2010	D1	MO	DEFENDANT'S NOTICE OF SUPPLEMENTAL AUTHORITY, FILED.	
05/01/2009	05/01/2009	D	JE	COURT REPORTER ALLOWED \$96.90 RECEIVED FOR FILING.	
04/22/2009	04/22/2009	N/A	CS	COURT REPORTER FEE	
03/25/2009	03/25/2009	P	MO	RESPONSE TO MOTION TO WITHDRAW PLEA/VACATE JUDGMENT AND AMENDED MOTION TO WITHDRAW PLEA AND VACATE JUDGMENT WITH ORAL HEARING REQUESTED, FILED.	
03/06/2009	03/06/2009	D1	MO	DEFENDANT'S AMENDED MOTION TO WITHDRAW PLEA AND VACATE JUDGMENT WITH ORAL HEARING REQUESTED, FILED.	
02/19/2009	02/25/2009	N/A	JE	PRETRIAL HELD 02/19/2009. PRETRIAL CONTINUED TO 04/09/2009 AT THE REQUEST OF DEFENDANT. THE DEFENDANT HAS 21 DAYS TO TO FILE A SUPPLEMENTAL MOTION TO VACATE PLEA. THE STATE HAS 21 DAYS AFTERWARD TO RESPOND. THIS ENTRY TAKEN BY JUDGE JOAN SYNENBERG. 02/19/2009 CPJCB 02/19/2009 16:08:13	
01/14/2009	01/21/2009	N/A	JE	PRETRIAL HELD 01/14/2009. PRETRIAL CONTINUED TO 02/19/2009 AT 01:00 PM AT THE REQUEST OF DEFENDANT. THIS ENTRY TAKEN BY JUDGE JOAN SYNENBERG. 01/14/2009 CPJCB 01/14/2009 14:26:42	
01/08/2009	01/09/2009	N/A	JE	PRETRIAL HELD 01/08/2009. PRETRIAL CONTINUED TO 01/14/2009 AT 10:00 AM AT THE REQUEST OF DEFENDANT. THIS ENTRY TAKEN BY JUDGE JOAN SYNENBERG. 01/08/2009 CPJCB 01/08/2009 10:21:29	
12/11/2008	12/15/2008	N/A	JE	FINAL PRETRIAL HELD 12/11/2008. FINAL PRETRIAL CONTINUED TO 01/08/2009 AT 09:00 AM AT THE REQUEST OF DEFENDANT. THIS ENTRY TAKEN BY JUDGE JOAN SYNENBERG. 12/11/2008 CPJCB 12/12/2008 08:33:46	
12/01/2008	12/03/2008	N/A	JE	PRETRIAL HELD 12/01/2008. FINAL PRETRIAL SET FOR 12/11/2008 AT 09:00 AM . AT THE REQUEST OF DEFENDANT. THIS ENTRY TAKEN BY JUDGE JOAN SYNENBERG. 12/01/2008 CPJCB 12/01/2008 14:36:28	
11/13/2008	11/18/2008	N/A	JE	FINAL PRETRIAL PREVIOUSLY SCHEDULED FOR 11/14/2008 AT 09:00AM IS RESCHEDULED FOR 12/01/2008 AT 09:00AM. AT THE REQUEST OF DEFENDANT. THIS ENTRY TAKEN BY JUDGE JOAN SYNENBERG. 11/13/2008 CPJCB 11/14/2008 16:22:43	
11/03/2008	11/05/2008	N/A	JE	PRETRIAL HELD 11/03/2008. FINAL PRETRIAL SET FOR 11/14/2008 AT 09:00 AM . THIS ENTRY TAKEN BY JUDGE JOAN SYNENBERG. 11/03/2008 CPJCB 11/03/2008 15:35:56	
10/20/2008	10/20/2008	D1	MO	DEFENDANT'S MOTION TO VACATE PLEA, FILED.	

Appendix000018

09/09/2008	09/10/2008	N/A	JE	DEFENDANT'S MOTION TO UNSEAL CASE PREVIOUSLY EXPUNGED IS GRANTED. ENTRY SIGNED, ATTACHED AND ORDERED FILED. OSJ. THIS ENTRY TAKEN BY JUDGE JOAN SYNENBERG. 09/09/2008 CPEDB 09/09/2008 11:36:17
08/08/2008	08/08/2008	P	MO	BRIEF IN OPPOSITION TO MOTION TO UNSEAL RECORDS, FILED.
07/28/2008	07/28/2008	D1	MO	DEFENDANT'S MOTION TO UNSEAL CASE PREVIOUSLY EXPUNGED, FILED.
06/07/2007	06/07/2007	N/A	SR	CERTIFIED MAIL RECEIPT NO. 10185501 RETURNED BY U.S. MAIL DEPARTMENT 05/29/2007 ISSA KONA MAIL RECEIVED BY ADDRESSEE 05/25/2007.
06/07/2007	06/07/2007	N/A	SR	CERTIFIED MAIL RECEIPT NO. 10185501 RETURNED BY U.S. MAIL DEPARTMENT 05/23/2007 ISSA KONA MAIL RECEIVED BY ADDRESSEE 05/21/2007.
05/24/2007	05/24/2007	N/A	SR	CERTIFIED MAIL RECEIPT NO. 10185497 RETURNED BY U.S. MAIL DEPARTMENT 05/21/2007 CUYAHOGA COUNTY SHERIFF// MAIL RECEIVED BY ADDRESSEE 05/18/2007.
05/24/2007	05/24/2007	N/A	SR	CERTIFIED MAIL RECEIPT NO. 10185496 RETURNED BY U.S. MAIL DEPARTMENT 05/21/2007 BCI&I// MAIL RECEIVED BY ADDRESSEE 05/18/2007.
05/24/2007	05/24/2007	N/A	SR	CERTIFIED MAIL RECEIPT NO. 10185499 RETURNED BY U.S. MAIL DEPARTMENT 05/21/2007 POLITO/VINCENT/ MAIL RECEIVED BY ADDRESSEE 05/18/2007.
05/24/2007	05/24/2007	N/A	SR	CERTIFIED MAIL RECEIPT NO. 10185498 RETURNED BY U.S. MAIL DEPARTMENT 05/21/2007 MASON/WILLIAM/D MAIL RECEIVED BY ADDRESSEE 05/18/2007.
05/24/2007	05/24/2007	N/A	SR	CERTIFIED MAIL RECEIPT NO. 10185500 RETURNED BY U.S. MAIL DEPARTMENT 05/21/2007 CLEVELAND POLICE DEPARTMENT// MAIL RECEIVED BY ADDRESSEE 05/17/2007.
05/24/2007	05/24/2007	N/A	SR	CERTIFIED MAIL RECEIPT NO. 10185502 RETURNED BY U.S. MAIL DEPARTMENT 05/21/2007 CLEVELAND MUNY COURT// MAIL RECEIVED BY ADDRESSEE 05/17/2007.
05/15/2007	05/15/2007	N/A	SR	Expungement request notice - Certified mail on 05/15/2007
05/15/2007	05/15/2007	N/A	SR	Expungement request notice - Certified mail on 05/15/2007
05/15/2007	05/15/2007	N/A	SR	Expungement request notice - Certified mail on 05/15/2007
05/15/2007	05/15/2007	N/A	SR	Expungement request notice - Certified mail on 05/15/2007
05/15/2007	05/15/2007	N/A	SR	Expungement request notice - Certified mail on 05/15/2007
05/15/2007	05/15/2007	N/A	SR	Expungement request notice - Certified mail on 05/15/2007
05/15/2007	05/15/2007	N/A	SR	Expungement request notice - Certified mail on 05/15/2007
05/15/2007	05/15/2007	D1	GP	REQUESTED CASE EXPUNGEMENT COMPLETED.
05/15/2007	05/15/2007	D1	CL	CERTIFIED COPIES OF SIGNED JOURNAL ENTRY OF EXPUNGEMENT SENT BY CERTIFIED RETURN REQUESTED MAIL ON 05/17/2007 PURSUANT TO COURT ORDER.
05/02/2007	05/04/2007	N/A	JE	THIS CAUSE IS BEFORE THE COURT ON MOTION OF COUNTY PROSECUTOR WILLIAM D. MASON, REQUESTING AN ORDER DISMISSING THIS CASE FOR WANT OF PROSECUTION, THE DEFENDANT HAVING COMPLETED SUCCESSFULLY THE CUYAHOGA COUNTY PRE-TRIAL DIVERSION PROGRAM, IN ACCORDANCE WITH THE PROVISIONS OF R.C. 2935.36. SAID MOTION IS WELL TAKEN. IT IS HEREBY ORDERED THAT THIS CASE BE DISMISSED WITH PREJUDICE. DEFENDANT'S MOTION FOR EXPUNGEMENT OF RECORD IS GRANTED ORDER TO SEAL RECORDS THIS MATTER CAME ON TO BE HEARD UPON THE APPLICATION FOR EXPUNGEMENT FILED AFTER THE FINDING BY A JURY OR COURT THAT THE APPLICANT WAS NOT GUILTY OF AN OFFENSE OR THE DISMISSAL OF A COMPLAINT, INDICTMENT, OR INFORMATION NAMING THE APPLICANT AS A DEFENDANT WAS ENTERED UPON THE MINUTES OF THE COURT OR THE JOURNAL, WHICHEVER ENTRY CAME FIRST. THE COURT HAS GIVEN NOTICE TO THE PROSECUTOR FOR THE CASE. THE COURT HAS CONSIDERED THE EVIDENCE AND THE REASONS AGAINST GRANTING THE APPLICATION SPECIFIED IN THE OBJECTION, IF ANY, FILED BY THE PROSECUTOR. THE COURT DETERMINES THAT THE APPLICANT WAS FOUND NOT GUILTY IN THE CASE OR THE COMPLAINT, INDICTMENT, OR INFORMATION IN THE CASE WAS DISMISSED; THAT NO CRIMINAL PROCEEDINGS ARE PENDING AGAINST THE APPLICANT; AND THAT THE INTEREST OF THE APPLICANT IN HAVING THE RECORDS PERTAINING TO THE CASE SEALED ARE NOT OUTWEIGHED BY ANY LEGITIMATE NEEDS OF THE GOVERNMENT TO MAINTAIN THOSE RECORDS. THEREFORE, IT IS HEREBY ORDERED THAT ALL OFFICIAL RECORDS PERTAINING TO THIS CASE SHALL BE SEALED AND THAT, EXCEPT AS PROVIDED IN OHIO REVISED CODE SECTION 2953.53, THE PROCEEDINGS IN THIS CASE SHALL BE DEEMED NOT TO HAVE OCCURRED. IT IS THEREFORE ORDERED THAT THE CLERK OF COURT OF COMMON PLEAS SHALL SERVE CERTIFIED COPIES OF THIS JOURNAL ENTRY BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED UPON THE FOLLOWING: 1. THE LAW ENFORCEMENT OFFICIAL IN CHARGE OF THE LAW ENFORCEMENT AGENCY OR ORGANIZATION WHICH CAUSED THE APPLICANT'S ARREST, APPLICANT TO SUBMIT TO THE CLERK OF COURT OF COMMON PLEAS IN WRITING THE NAME AND ADDRESS OF SAID AGENCY OR ORGANIZATION; TOGETHER WITH APPLICANT'S BIRTH DATE AND SOCIAL SECURITY NUMBER; 2. THE PROSECUTING ATTORNEY OF CUYAHOGA COUNTY, OHIO; 3. THE BUREAU OF CRIMINAL INVESTIGATION IN THE OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF OHIO, APPLICANT TO SUBMIT TO THE CLERK OF COURT OF COMMON PLEAS IN WRITING APPLICANT'S BIRTH DATE AND SOCIAL SECURITY NUMBER; 4. THE CUYAHOGA COUNTY SHERIFF'S DEPARTMENT; 5. THE APPLICANT'S ATTORNEY; AND 6. THE ADULT PROBATION DEPARTMENT OF THIS COURT. 7. THE MUNICIPAL COURT THAT ISSUED AN ORDER BINDING THE DEFENDANT OVER TO THE GRAND JURY (UNLESS DEFENDANT DIRECTLY INDICTED BY THE GRAND JURY). IT IS FURTHER AND FINALLY ORDERED THAT NONE OF THE FOREGOING PERSONS, AGENCIES, OR ORGANIZATIONS SHALL INSPECT OR USE SAID RECORDS, NOR PERMIT THE INSPECTION OR USE OF SAID RECORDS, EXCEPT IN ACCORDANCE WITH THE APPLICABLE PROVISIONS OF OHIO REVISED CODE SECTIONS 2953.53 AND 2953.54 AS CURRENTLY ENACTED OR AS HEREINAFTER AMENDED. RACE WHITE; -SEX MALE; DOB 06/16/1967:
12/04/2006	12/04/2006	N/A	CS	CHECK WRITTEN TO CLEVELAND MUNI COURT FOR DOCKET ID 38696950 IN THE AMOUNT OF \$50
11/08/2006	11/08/2006	D1	\$\$	PAYMENT ON ACCOUNT MADE ON BEHALF OF KONA/ISSA/S IN THE AMOUNT OF \$313.00
10/30/2006	10/30/2006	N/A	CS	COURT COST ASSESSED ISSA S KONA BILL AMOUNT 358 PAID AMOUNT 45 AMOUNT DUE 313
10/30/2006	10/30/2006	D1	CS	RC 2743.70 REPARATION FEE
10/30/2006	10/30/2006	D1	DR	COURT REPORTER FEE
10/30/2006	10/30/2006	D1	DR	SHERIFF FEES

10/26/2006	10/30/2006	N/A	JE	IN ACCORDANCE WITH THE PROVISIONS OF R.C. 2935.36, THE PROSECUTOR'S OFFICE HAS FOUND THAT THE DEFENDANT HAS MET ELIGIBILITY REQUIREMENTS FOR ACCEPTANCE INTO THE CUYAHOGA COUNTY PRE-TRIAL DIVERSION PROGRAM. THE DEFENDANT, AS A CONDITION OF PARTICIPATION IN THE CUYAHOGA COUNTY PRE-TRIAL DIVERSION PROGRAM, HAS KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY WAIVED HIS/HER CONSTITUTIONAL AND STATUTORY RIGHTS TO A SPEEDY TRIAL, FROM THE DATE OF HIS/HER REFERRAL TO THE PROGRAM, UNTIL THE DATE HIS/HER PARTICIPATION IN THE PROGRAM TERMINATES. SPECIFICALLY, THE DEFENDANT HAS WAIVED HIS/HER RIGHT TO HAVE THE CASE BROUGHT TO TRIAL WITHIN 90 DAYS OF HIS/HER ARREST AND FORMAL CHARGE(S), IF HE/SHE IS INCARCERATED, OR 270 DAYS IF HIS/HER ARREST AND FORMAL CHARGE(S), IF HE/SHE IS NOT INCARCERATED. FURTHERMORE, IF THE DEFENDANT FAILS TO COMPLETE THE PROGRAM, HE/SHE HAS GIVEN UP THE RIGHT TO HAVE THE GRAND JURY TAKE FINAL ACTION ON THIS CASE AND AGREES TO BE CHARGED BY WAY OF INFORMATION. THE DEFENDANT HAS WAIVED ALL PERIODS OF LIMITATION ESTABLISHED BY STATUTE OR RULE(S) OF COURT, THAT ARE APPLICABLE TO THE OFFENSE(S) FOR WHICH HE/SHE MAY BE CHARGED. IN ALL CASES ADMITTED INTO THE DIVERSION PROGRAM, THE DEFENDANT SHALL BE GRANTED A \$1000.00 PERSONAL BOND (CSR), AND SHALL BE PLACED UNDER THE SUPERVISION OF THE PROBATION DEPARTMENT'S COURT SUPERVISED RELEASE PROGRAM/DIVERSION UNIT. UPON CONSIDERATION, THE COURT HEREBY APPROVES THE DEFENDANT'S PARTICIPATION IN SAID PROGRAM, AND ORDERS THAT THIS CASE TO BE PLACED IN AN INACTIVE STATUS UNTIL FURTHER NOTICE.
09/20/2006	09/21/2006	N/A	JE	PRETRIAL CONTINUED TO 10/30/2006 AT 09:00 AM AT THE REQUEST OF DEFENDANT. REASON FOR CONTINUANCE: APPLIED FOR DIVERSION (FLOYD) 09/20/2006 CPMH 09/20/2006 09:10:08
09/20/2006	09/20/2006	N/A	SB	SHERIFF SERVICE FEES FOR SUBPOENA NUMBER 260226, IN THE AMOUNT OF \$11.50.
09/20/2006	09/20/2006	N/A	SB	SHERIFF SERVICE FEES FOR SUBPOENA NUMBER 260225, IN THE AMOUNT OF \$11.50.
09/20/2006	09/20/2006	N/A	SB	SHERIFF SERVICE FEES FOR SUBPOENA NUMBER 260222, IN THE AMOUNT OF \$11.50.
09/12/2006	09/12/2006	N/A	SB	SUBPOENA CLERK'S FEE
09/12/2006	09/12/2006	N/A	SB	SUBPOENA CLERK'S FEE
09/12/2006	09/12/2006	N/A	SB	SUBPOENA CLERK'S FEE
09/12/2006	09/12/2006	D	MO	WITNESS LIST AND EXHIBIT LIST, FILED.
09/05/2006	09/05/2006	D1	MO	DEFENDANT'S WAIVER OF JURY TRIAL, FILED.
07/26/2006	07/27/2006	N/A	JE	TRIAL SET FOR 09/20/2006 AT 09:00 AM. 07/26/2006 CPMH 07/26/2006 15:22:04
07/11/2006	07/24/2006	N/A	JE	PRETRIAL CONTINUED TO 07/26/2006 AT 01:00 PM AT THE REQUEST OF DEFENDANT. 07/11/2006 CPMH 07/21/2006 08:35:18
06/08/2006	06/08/2006	P	MO	STATE'S RESPONSE TO REQUEST FOR DISCOVERY UNDER RULE 16, FILED.
06/08/2006	06/08/2006	P	MO	STATE'S BILL OF PARTICULARS, FILED.
06/08/2006	06/08/2006	P	MO	DEMAND FOR DISCOVERY BY THE STATE OF OHIO, FILED.
06/07/2006	06/14/2006	N/A	JE	PRETRIAL CONTINUED TO 07/11/2006 AT 09:00 AM AT THE REQUEST OF DEFENDANT. 06/07/2006 CPMH 06/07/2006 11:15:27
05/25/2006	05/25/2006	D	MO	MOTION TO EXAMINE EXCULPATORY AND MITIGATORY MATERIAL, FILED.
05/25/2006	05/25/2006	D	MO	MOTION FOR BILL OF PARTICULARS, FILED.
05/25/2006	05/25/2006	D	MO	MOTION FOR DISCOVERY BY THE DEFENSE, FILED.
05/22/2006	05/22/2006	N/A	CS	PRISONER IN COURT
05/22/2006	05/22/2006	N/A	JE	DEFENDANT PRESENT WITH COUNSEL. DEFENDANT RETAINED JOSEPH T BURKE AS COUNSEL. READING OF INDICTMENT WAIVED. TWENTY-FOUR HOUR SERVICE WAIVED. DEFENDANT PLEAD NOT GUILTY TO INDICTMENT. ORIG BOND CONT AT 7,500.00 DOLLARS. BOND TYPE: CASH/SURETY/PROP.. JUDGE ANN T MANNEN (138) ASSIGNED (RANDOM).
05/16/2006	05/16/2006	N/A	JE	CASE CONTINUED TO 05/22/2006 AT REQUEST OF DEFENDANT.
05/15/2006	05/15/2006	D1	SR	CERTIFIED MAIL RECEIPT NO. 8368995 RETURNED BY U.S. MAIL DEPARTMENT 05/09/2006 KONA/ISSA/S MAIL RECEIVED BY ADDRESSEE 05/06/2006.
05/04/2006	05/04/2006	N/A	SR	SUMMONS - CRIMINAL(8368995) SENT BY CERTIFIED MAIL. TO: KONA/ISSA/S 3671 W 132ND ST CLEVELAND, OH 441110000
05/02/2006	05/03/2006	N/A	CR	INDICTED BINDOVER
05/02/2006	05/03/2006	N/A	GP	ARRAIGNMENT SCHEDULED FOR 05/16/2006.
05/02/2006	05/02/2006	N/A	CS	05/02/2006
05/02/2006	05/03/2006	N/A	CR	INDICTED ON 05/02/2006
05/02/2006	05/03/2006	N/A	SF	LEGAL RESEARCH
05/02/2006	05/03/2006	N/A	SF	CRIME STOPPERS
05/02/2006	05/03/2006	N/A	SF	COMPUTER FEE
05/02/2006	05/03/2006	N/A	SF	CLERK FEE
04/03/2006	04/03/2006	D1	SF	PAYMENT RECEIVED OF KONA/ISSA/S
04/03/2006	04/03/2006	D1	DR	RC 2743.70 REPARATION FEE \$45.00
04/03/2006	04/03/2006	N/A	BN	\$7500 SURETY BOND POSTED ON 04/03/2006 BY VARI/PHIL / SAFETY NATION. CAS. BOND NO. 489542
04/03/2006	04/03/2006	N/A	GP	CASH/SUR/PROP/10% BOND SET , AMOUNT \$7,500.00
04/03/2006	04/03/2006	N/A	CS	CLEVELAND MUNI COURT COST, CASE 06CRA009721
04/03/2006	04/03/2006	N/A	CR	BINDOVER CIF#CI062831Y
04/03/2006	04/03/2006	N/A	CR	CIF ENTERED
04/01/2006	04/03/2006	N/A	CR	ARRESTED 04/01/2006

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- Sec.
1439. Naturalization through service in the armed forces.
1440. Naturalization through active-duty service in the Armed Forces during World War I, World War II, Korean hostilities, Vietnam hostilities, or other periods of military hostilities.
- 1440-1. Posthumous citizenship through death while on active-duty service in armed forces during World War I, World War II, the Korean hostilities, the Vietnam hostilities, or in other periods of military hostilities.
- 1440a to 1440d. Omitted.
- 1440e. Exemption from naturalization fees for aliens naturalized through service during Vietnam hostilities or other subsequent period of military hostilities; report by clerks of courts to Attorney General.
1441. Constructive residence through service on certain United States vessels.
1442. Alien enemies.
1443. Administration.
- 1443a. Naturalization proceedings overseas for members of the Armed Forces.
1444. Photographs; number.
1445. Application for naturalization; declaration of intention.
1446. Investigation of applicants; examination of applications.
1447. Hearings on denials of applications for naturalization.
1448. Oath of renunciation and allegiance.
- 1448a. Address to newly naturalized citizens.
1449. Certificate of naturalization; contents.
1450. Functions and duties of clerks and records of declarations of intention and applications for naturalization.
1451. Revocation of naturalization.
1452. Certificates of citizenship or U.S. non-citizen national status; procedure.
1453. Cancellation of certificates issued by Attorney General, the Commissioner or a Deputy Commissioner; action not to affect citizenship status.
1454. Documents and copies issued by Attorney General.
1455. Fiscal provisions.
1456. Repealed.
1457. Publication and distribution of citizenship textbooks; use of naturalization fees.
1458. Compilation of naturalization statistics and payment for equipment.
1459. Repealed.

PART III—LOSS OF NATIONALITY

1481. Loss of nationality by native-born or naturalized citizen; voluntary action; burden of proof; presumptions.
1482. Repealed.
1483. Restrictions on loss of nationality.
- 1484 to 1487. Repealed.
1488. Nationality lost solely from performance of acts or fulfillment of conditions.
1489. Application of treaties; exceptions.

PART IV—MISCELLANEOUS

1501. Certificate of diplomatic or consular officer of United States as to loss of American nationality.
1502. Certificate of nationality issued by Secretary of State for person not a naturalized citizen of United States for use in proceedings of a foreign state.
1503. Denial of rights and privileges as national.
1504. Cancellation of United States passports and Consular Reports of Birth.

SUBCHAPTER IV—REFUGEE ASSISTANCE

1521. Office of Refugee Resettlement; establishment; appointment of Director; functions.

- Sec.
1522. Authorization for programs for domestic resettlement of and assistance to refugees.
1523. Congressional reports.
1524. Authorization of appropriations.
1525. Repealed.

SUBCHAPTER V—ALIEN TERRORIST REMOVAL PROCEDURES

1531. Definitions.
1532. Establishment of removal court.
1533. Removal court procedure.
1534. Removal hearing.
1535. Appeals.
1536. Custody and release pending removal hearing.
1537. Custody and release after removal hearing.

SUBCHAPTER I—GENERAL PROVISIONS

§ 1101. Definitions

(a) As used in this chapter—

(1) The term “administrator” means the official designated by the Secretary of State pursuant to section 1104(b) of this title.

(2) The term “advocates” includes, but is not limited to, advises, recommends, furthers by overt act, and admits belief in.

(3) The term “alien” means any person not a citizen or national of the United States.

(4) The term “application for admission” has reference to the application for admission into the United States and not to the application for the issuance of an immigrant or nonimmigrant visa.

(5) The term “Attorney General” means the Attorney General of the United States.

(6) The term “border crossing identification card” means a document of identity bearing that designation issued to an alien who is lawfully admitted for permanent residence, or to an alien who is a resident in foreign contiguous territory, by a consular officer or an immigration officer for the purpose of crossing over the borders between the United States and foreign contiguous territory in accordance with such conditions for its issuance and use as may be prescribed by regulations. Such regulations shall provide that (A) each such document include a biometric identifier (such as the fingerprint or handprint of the alien) that is machine readable and (B) an alien presenting a border crossing identification card is not permitted to cross over the border into the United States unless the biometric identifier contained on the card matches the appropriate biometric characteristic of the alien.

(7) The term “clerk of court” means a clerk of a naturalization court.

(8) The terms “Commissioner” and “Deputy Commissioner” mean the Commissioner of Immigration and Naturalization and a Deputy Commissioner of Immigration and Naturalization, respectively.

(9) The term “consular officer” means any consular, diplomatic, or other officer or employee of the United States designated under regulations prescribed under authority contained in this chapter, for the purpose of issuing immigrant or nonimmigrant visas or, when used in subchapter III of this chapter, for the purpose of adjudicating nationality.

(10) The term “crewman” means a person serving in any capacity on board a vessel or aircraft.

(11) The term “diplomatic visa” means a non-immigrant visa bearing that title and issued to a nonimmigrant in accordance with such regulations as the Secretary of State may prescribe.

(12) The term “doctrine” includes, but is not limited to, policies, practices, purposes, aims, or procedures.

(13)(A) The terms “admission” and “admitted” mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

(B) An alien who is paroled under section 1182(d)(5) of this title or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.

(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—

(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,

(v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or

(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

(14) The term “foreign state” includes outlying possessions of a foreign state, but self-governing dominions or territories under mandate or trusteeship shall be regarded as separate foreign states.

(15) The term “immigrant” means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

(A)(i) an ambassador, public minister, or career diplomatic or consular officer who has been accredited by a foreign government, recognized de jure by the United States and who is accepted by the President or by the Secretary of State, and the members of the alien’s immediate family;

(ii) upon a basis of reciprocity, other officials and employees who have been accredited by a foreign government recognized de jure by the United States, who are accepted by the Secretary of State, and the members of their immediate families; and

(iii) upon a basis of reciprocity, attendants, servants, personal employees, and members of their immediate families, of the officials and employees who have a nonimmigrant status under (i) and (ii) above;

(B) an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of for-

eign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure;

(C) an alien in immediate and continuous transit through the United States, or an alien who qualifies as a person entitled to pass in transit to and from the United Nations Headquarters District and foreign countries, under the provisions of paragraphs (3), (4), and (5) of section 11 of the Headquarters Agreement with the United Nations (61 Stat. 758);

(D)(i) an alien crewman serving in good faith as such in a capacity required for normal operation and service on board a vessel, as defined in section 1288(a) of this title (other than a fishing vessel having its home port or an operating base in the United States), or aircraft, who intends to land temporarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft;

(ii) an alien crewman serving in good faith as such in any capacity required for normal operations and service aboard a fishing vessel having its home port or an operating base in the United States who intends to land temporarily in Guam and solely in pursuit of his calling as a crewman and to depart from Guam with the vessel on which he arrived;

(E) an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such alien if accompanying or following to join him; (i) solely to carry on substantial trade, including trade in services or trade in technology, principally between the United States and the foreign state of which he is a national; (ii) solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital; or (iii) solely to perform services in a specialty occupation in the United States if the alien is a national of the Commonwealth of Australia and with respect to whom the Secretary of Labor determines and certifies to the Secretary of Homeland Security and the Secretary of State that the intending employer has filed with the Secretary of Labor an attestation under section 1182(t)(1) of this title;

(F)(i) an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study consistent with section 1184(l)¹ of this title at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in a language training program in the United States, particularly designated by him

¹ See References in Text note below.

and approved by the Attorney General after consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each non-immigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, (ii) the alien spouse and minor children of any alien described in clause (i) if accompanying or following to join such an alien, and (iii) an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described in clause (i) except that the alien's qualifications for and actual course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico;

(G)(i) a designated principal resident representative of a foreign government recognized de jure by the United States, which foreign government is a member of an international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (59 Stat. 669) [22 U.S.C. 288 et seq.], accredited resident members of the staff of such representatives, and members of his or their immediate family;

(ii) other accredited representatives of such a foreign government to such international organizations, and the members of their immediate families;

(iii) an alien able to qualify under (i) or (ii) above except for the fact that the government of which such alien is an accredited representative is not recognized de jure by the United States, or that the government of which he is an accredited representative is not a member of such international organization; and the members of his immediate family;

(iv) officers, or employees of such international organizations, and the members of their immediate families;

(v) attendants, servants, and personal employees of any such representative, officer, or employee, and the members of the immediate families of such attendants, servants, and personal employees;

(H) an alien (i) [(a) Repealed. Pub. L. 106-95, § 2(c), Nov. 12, 1999, 113 Stat. 1316] (b) subject to section 1182(j)(2) of this title, who is coming temporarily to the United States to perform services (other than services described in subclause (a) during the period in which such subclause applies and other than services described in subclause (ii)(a) or in subparagraph (O) or (P)) in a specialty occupation described in section 1184(i)(1) of this title or as a fashion model, who meets the requirements for the occupation specified in section 1184(i)(2) of this title or, in the case of a fashion model, is of distinguished merit and ability, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 1182(n)(1) of this title, or (b1) who is entitled to enter the United States under and in pursuance of the provisions of an agreement listed

in section 1184(g)(8)(A) of this title, who is engaged in a specialty occupation described in section 1184(i)(3) of this title, and with respect to whom the Secretary of Labor determines and certifies to the Secretary of Homeland Security and the Secretary of State that the intending employer has filed with the Secretary of Labor an attestation under section 1182(t)(1) of this title, or (c) who is coming temporarily to the United States to perform services as a registered nurse, who meets the qualifications described in section 1182(m)(1) of this title, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that an unexpired attestation is on file and in effect under section 1182(m)(2) of this title for the facility (as defined in section 1182(m)(6) of this title) for which the alien will perform the services; or (ii)(a) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, as defined by the Secretary of Labor in regulations and including agricultural labor defined in section 3121(g) of title 26, agriculture as defined in section 203(f) of title 29, and the pressing of apples for cider on a farm, of a temporary or seasonal nature, or (b) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession; or (iii) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training, in a training program that is not designed primarily to provide productive employment; and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him;

(I) upon a basis of reciprocity, an alien who is a bona fide representative of foreign press, radio, film, or other foreign information media, who seeks to enter the United States solely to engage in such vocation, and the spouse and children of such a representative, if accompanying or following to join him;

(J) an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Director of the United States Information Agency, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training and who, if he is coming to the United States to participate in a program under which he will receive graduate medical edu-

cation or training, also meets the requirements of section 1182(j) of this title, and the alien spouse and minor children of any such alien if accompanying him or following to join him;

(K) subject to subsections (d) and (p)² of section 1184 of this title, an alien who—

(i) is the fiancée or fiancé of a citizen of the United States (other than a citizen described in section 1154(a)(1)(A)(viii)(I) of this title) and who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after admission;

(ii) has concluded a valid marriage with a citizen of the United States (other than a citizen described in section 1154(a)(1)(A)(viii)(I) of this title) who is the petitioner, is the beneficiary of a petition to accord a status under section 1151(b)(2)(A)(i) of this title that was filed under section 1154 of this title by the petitioner, and seeks to enter the United States to await the approval of such petition and the availability to the alien of an immigrant visa; or

(iii) is the minor child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien;

(L) subject to section 1184(c)(2) of this title, an alien who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him;

(M)(i) an alien having a residence in a foreign country which he has no intention of abandoning who seeks to enter the United States temporarily and solely for the purpose of pursuing a full course of study at an established vocational or other recognized non-academic institution (other than in a language training program) in the United States particularly designated by him and approved by the Attorney General, after consultation with the Secretary of Education, which institution shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant nonacademic student and if any such institution fails to make reports promptly the approval shall be withdrawn, (ii) the alien spouse and minor children of any alien described in clause (i) if accompanying or following to join such an alien, and (iii) an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described in clause (i) except that the alien's course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico;

(N)(i) the parent of an alien accorded the status of special immigrant under paragraph (27)(I)(i) (or under analogous authority under paragraph (27)(L)), but only if and while the alien is a child, or

(ii) a child of such parent or of an alien accorded the status of a special immigrant under clause (ii), (iii), or (iv) of paragraph (27)(I) (or under analogous authority under paragraph (27)(L));

(O) an alien who—

(i) has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim or, with regard to motion picture and television productions a demonstrated record of extraordinary achievement, and whose achievements have been recognized in the field through extensive documentation, and seeks to enter the United States to continue work in the area of extraordinary ability; or

(ii)(I) seeks to enter the United States temporarily and solely for the purpose of accompanying and assisting in the artistic or athletic performance by an alien who is admitted under clause (i) for a specific event or events,

(II) is an integral part of such actual performance,

(III)(a) has critical skills and experience with such alien which are not of a general nature and which cannot be performed by other individuals, or (b) in the case of a motion picture or television production, has skills and experience with such alien which are not of a general nature and which are critical either based on a pre-existing long-standing working relationship or, with respect to the specific production, because significant production (including pre- and post-production work) will take place both inside and outside the United States and the continuing participation of the alien is essential to the successful completion of the production, and

(IV) has a foreign residence which the alien has no intention of abandoning; or

(iii) is the alien spouse or child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien;

(P) an alien having a foreign residence which the alien has no intention of abandoning who—

(i)(a) is described in section 1184(c)(4)(A) of this title (relating to athletes), or (b) is described in section 1184(c)(4)(B) of this title (relating to entertainment groups);

(ii)(I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and

(II) seeks to enter the United States temporarily and solely for the purpose of performing as such an artist or entertainer or with such a group under a reciprocal exchange program which is between an organization or organizations in the United States and an organization or organizations in one or more foreign states and which provides for the temporary exchange of artists and

² See References in Text note below.

entertainers, or groups of artists and entertainers;

(iii)(I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and

(II) seeks to enter the United States temporarily and solely to perform, teach, or coach as such an artist or entertainer or with such a group under a commercial or noncommercial program that is culturally unique; or

(iv) is the spouse or child of an alien described in clause (i), (ii), or (iii) and is accompanying, or following to join, the alien;

(Q)(i) an alien having a residence in a foreign country which he has no intention of abandoning who is coming temporarily (for a period not to exceed 15 months) to the United States as a participant in an international cultural exchange program approved by the Secretary of Homeland Security for the purpose of providing practical training, employment, and the sharing of the history, culture, and traditions of the country of the alien's nationality and who will be employed under the same wages and working conditions as domestic workers; or (ii)(I) an alien citizen of the United Kingdom or the Republic of Ireland, 21 to 35 years of age, unemployed for not less than 12 months, and having a residence for not less than 18 months in Northern Ireland, or the counties of Louth, Monaghan, Cavan, Leitrim, Sligo, and Donegal within the Republic of Ireland, which the alien has no intention of abandoning who is coming temporarily (for a period not to exceed 24 months) to the United States as a participant in a cultural and training program approved by the Secretary of State and the Secretary of Homeland Security under section 2(a) of the Irish Peace Process Cultural and Training Program Act of 1998 for the purpose of providing practical training, employment, and the experience of coexistence and conflict resolution in a diverse society, and (II) the alien spouse and minor children of any such alien if accompanying the alien or following to join the alien;

(R) an alien, and the spouse and children of the alien if accompanying or following to join the alien, who—

(i) for the 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States; and

(ii) seeks to enter the United States for a period not to exceed 5 years to perform the work described in subclause (I), (II), or (III) of paragraph (27)(C)(ii);

(S) subject to section 1184(k) of this title, an alien—

(i) who the Attorney General determines—

(I) is in possession of critical reliable information concerning a criminal organization or enterprise;

(II) is willing to supply or has supplied such information to Federal or State law enforcement authorities or a Federal or State court; and

(III) whose presence in the United States the Attorney General determines is essential to the success of an authorized criminal investigation or the successful prosecution of an individual involved in the criminal organization or enterprise; or

(ii) who the Secretary of State and the Attorney General jointly determine—

(I) is in possession of critical reliable information concerning a terrorist organization, enterprise, or operation;

(II) is willing to supply or has supplied such information to Federal law enforcement authorities or a Federal court;

(III) will be or has been placed in danger as a result of providing such information; and

(IV) is eligible to receive a reward under section 2708(a) of title 22,

and, if the Attorney General (or with respect to clause (ii), the Secretary of State and the Attorney General jointly) considers it to be appropriate, the spouse, married and unmarried sons and daughters, and parents of an alien described in clause (i) or (ii) if accompanying, or following to join, the alien;

(T)(i) subject to section 1184(o) of this title, an alien who the Secretary of Homeland Security, or in the case of subclause (III)(aa) the Secretary of Homeland Security and the Attorney General jointly, determines—³

(I) is or has been a victim of a severe form of trafficking in persons, as defined in section 7102 of title 22,

(II) is physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of such trafficking,

(III)(aa) has complied with any reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime; or

(bb) has not attained 18 years of age, and

(IV) the alien would suffer extreme hardship involving unusual and severe harm upon removal;

(ii) if accompanying, or following to join, the alien described in clause (i)—

(I) in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien; or

(II) in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien; and

(iii) if the Secretary of Homeland Security, in his or her discretion and with the consultation of the Attorney General, determines that a trafficking victim, due to psychological or physical trauma, is unable to cooperate with a request for assistance described in clause (i)(III)(aa), the request is unreasonable.

³ So in original. Probably should be "jointly, determine—".

(U)(i) subject to section 1184(p) of this title, an alien who files a petition for status under this subparagraph, if the Secretary of Homeland Security determines that—

(I) the alien has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described in clause (iii);

(II) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) possesses information concerning criminal activity described in clause (iii);

(III) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity described in clause (iii); and

(IV) the criminal activity described in clause (iii) violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States;

(ii) if accompanying, or following to join, the alien described in clause (i)—

(I) in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien; or

(II) in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien; and

(iii) the criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes; or

(V) subject to section 1184(q) of this title, an alien who is the beneficiary (including a child of the principal alien, if eligible to receive a visa under section 1153(d) of this title) of a petition to accord a status under section 1153(a)(2)(A) of this title that was filed with the Attorney General under section 1154 of this title on or before December 21, 2000, if—

(i) such petition has been pending for 3 years or more; or

(ii) such petition has been approved, 3 years or more have elapsed since such filing date, and—

(I) an immigrant visa is not immediately available to the alien because of a waiting

list of applicants for visas under section 1153(a)(2)(A) of this title; or

(II) the alien's application for an immigrant visa, or the alien's application for adjustment of status under section 1255 of this title, pursuant to the approval of such petition, remains pending.

(16) The term “immigrant visa” means an immigrant visa required by this chapter and properly issued by a consular officer at his office outside of the United States to an eligible immigrant under the provisions of this chapter.

(17) The term “immigration laws” includes this chapter and all laws, conventions, and treaties of the United States relating to the immigration, exclusion, deportation, expulsion, or removal of aliens.

(18) The term “immigration officer” means any employee or class of employees of the Service or of the United States designated by the Attorney General, individually or by regulation, to perform the functions of an immigration officer specified by this chapter or any section of this title.

(19) The term “ineligible to citizenship,” when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4(a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76) [50 U.S.C. App. 454(a)], or under any section of this chapter, or any other Act, or under any law amendatory of, supplementary to, or in substitution for, any of such sections or Acts.

(20) The term “lawfully admitted for permanent residence” means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

(21) The term “national” means a person owing permanent allegiance to a state.

(22) The term “national of the United States” means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

(23) The term “naturalization” means the conferring of nationality of a state upon a person after birth, by any means whatsoever.

(24) Repealed. Pub. L. 102-232, title III, § 305(m)(1), Dec. 12, 1991, 105 Stat. 1750.

(25) The term “noncombatant service” shall not include service in which the individual is not subject to military discipline, court martial, or does not wear the uniform of any branch of the armed forces.

(26) The term “nonimmigrant visa” means a visa properly issued to an alien as an eligible nonimmigrant by a competent officer as provided in this chapter.

(27) The term “special immigrant” means—

(A) an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad;

(B) an immigrant who was a citizen of the United States and may, under section 1435(a)

or 1438 of this title, apply for reacquisition of citizenship;

(C) an immigrant, and the immigrant's spouse and children if accompanying or following to join the immigrant, who—

(i) for at least 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States;

(ii) seeks to enter the United States—

(I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,

(II) before October 1, 2008, in order to work for the organization at the request of the organization in a professional capacity in a religious vocation or occupation, or

(III) before October 1, 2008, in order to work for the organization (or for a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in section 501(c)(3) of title 26) at the request of the organization in a religious vocation or occupation; and

(iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i);

(D) an immigrant who is an employee, or an honorably retired former employee, of the United States Government abroad, or of the American Institute in Taiwan, and who has performed faithful service for a total of fifteen years, or more, and his accompanying spouse and children: *Provided*, That the principal officer of a Foreign Service establishment (or, in the case of the American Institute in Taiwan, the Director thereof), in his discretion, shall have recommended the granting of special immigrant status to such alien in exceptional circumstances and the Secretary of State approves such recommendation and finds that it is in the national interest to grant such status;

(E) an immigrant, and his accompanying spouse and children, who is or has been an employee of the Panama Canal Company or Canal Zone Government before the date on which the Panama Canal Treaty of 1977 (as described in section 3602(a)(1) of title 22) enters into force [October 1, 1979], who was resident in the Canal Zone on the effective date of the exchange of instruments of ratification of such Treaty [April 1, 1979], and who has performed faithful service as such an employee for one year or more;

(F) an immigrant, and his accompanying spouse and children, who is a Panamanian national and (i) who, before the date on which such Panama Canal Treaty of 1977 enters into force [October 1, 1979], has been honorably retired from United States Government employment in the Canal Zone with a total of 15 years or more of faithful service, or (ii) who, on the date on which such Treaty enters into force, has been employed by the United States Government in the Canal Zone with a total of 15 years or more of faithful service and who

subsequently is honorably retired from such employment or continues to be employed by the United States Government in an area of the former Canal Zone;

(G) an immigrant, and his accompanying spouse and children, who was an employee of the Panama Canal Company or Canal Zone Government on the effective date of the exchange of instruments of ratification of such Panama Canal Treaty of 1977 [April 1, 1979], who has performed faithful service for five years or more as such an employee, and whose personal safety, or the personal safety of whose spouse or children, as a direct result of such Treaty, is reasonably placed in danger because of the special nature of any of that employment;

(H) an immigrant, and his accompanying spouse and children, who—

(i) has graduated from a medical school or has qualified to practice medicine in a foreign state,

(ii) was fully and permanently licensed to practice medicine in a State on January 9, 1978, and was practicing medicine in a State on that date,

(iii) entered the United States as a non-immigrant under subsection (a)(15)(H) or (a)(15)(J) of this section before January 10, 1978, and

(iv) has been continuously present in the United States in the practice or study of medicine since the date of such entry;

(I)(i) an immigrant who is the unmarried son or daughter of an officer or employee, or of a former officer or employee, of an international organization described in paragraph (15)(G)(i), and who (I) while maintaining the status of a nonimmigrant under paragraph (15)(G)(iv) or paragraph (15)(N), has resided and been physically present in the United States for periods totaling at least one-half of the seven years before the date of application for a visa or for adjustment of status to a status under this subparagraph and for a period or periods aggregating at least seven years between the ages of five and 21 years, and (II) applies for a visa or adjustment of status under this subparagraph no later than his twenty-fifth birthday or six months after October 24, 1988, whichever is later;

(ii) an immigrant who is the surviving spouse of a deceased officer or employee of such an international organization, and who (I) while maintaining the status of a non-immigrant under paragraph (15)(G)(iv) or paragraph (15)(N), has resided and been physically present in the United States for periods totaling at least one-half of the seven years before the date of application for a visa or for adjustment of status to a status under this subparagraph and for a period or periods aggregating at least 15 years before the date of the death of such officer or employee, and (II) files a petition for status under this subparagraph no later than six months after the date of such death or six months after October 24, 1988, whichever is later;

(iii) an immigrant who is a retired officer or employee of such an international organization, and who (I) while maintaining the status

of a nonimmigrant under paragraph (15)(G)(iv), has resided and been physically present in the United States for periods totaling at least one-half of the seven years before the date of application for a visa or for adjustment of status to a status under this subparagraph and for a period or periods aggregating at least 15 years before the date of the officer or employee's retirement from any such international organization, and (II) files a petition for status under this subparagraph no later than six months after the date of such retirement or six months after October 25, 1994, whichever is later; or

(iv) an immigrant who is the spouse of a retired officer or employee accorded the status of special immigrant under clause (iii), accompanying or following to join such retired officer or employee as a member of his immediate family;

(J) an immigrant who is present in the United States—

(i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State and who has been deemed eligible by that court for long-term foster care due to abuse, neglect, or abandonment;

(ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence; and

(iii) in whose case the Attorney General expressly consents to the dependency order serving as a precondition to the grant of special immigrant juvenile status; except that—

(I) no juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction; and

(II) no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter;

(K) an immigrant who has served honorably on active duty in the Armed Forces of the United States after October 15, 1978, and after original lawful enlistment outside the United States (under a treaty or agreement in effect on October 1, 1991) for a period or periods aggregating—

(i) 12 years and who, if separated from such service, was never separated except under honorable conditions, or

(ii) 6 years, in the case of an immigrant who is on active duty at the time of seeking special immigrant status under this subparagraph and who has reenlisted to incur a total active duty service obligation of at least 12 years,

and the spouse or child of any such immigrant if accompanying or following to join the immi-

grant, but only if the executive department under which the immigrant serves or served recommends the granting of special immigrant status to the immigrant;

(L) an immigrant who would be described in clause (i), (ii), (iii), or (iv) of subparagraph (I) if any reference in such a clause—

(i) to an international organization described in paragraph (15)(G)(i) were treated as a reference to the North Atlantic Treaty Organization (NATO);

(ii) to a nonimmigrant under paragraph (15)(G)(iv) were treated as a reference to a nonimmigrant classifiable under NATO-6 (as a member of a civilian component accompanying a force entering in accordance with the provisions of the NATO Status-of-Forces Agreement, a member of a civilian component attached to or employed by an Allied Headquarters under the "Protocol on the Status of International Military Headquarters" set up pursuant to the North Atlantic Treaty, or as a dependent); and

(iii) to the Immigration Technical Corrections Act of 1988 or to the Immigration and Nationality Technical Corrections Act of 1994 were a reference to the American Competitiveness and Workforce Improvement Act of 1998⁴

(M) subject to the numerical limitations of section 1153(b)(4) of this title, an immigrant who seeks to enter the United States to work as a broadcaster in the United States for the International Broadcasting Bureau of the Broadcasting Board of Governors, or for a grantee of the Broadcasting Board of Governors, and the immigrant's accompanying spouse and children.

(28) The term "organization" means, but is not limited to, an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action on any subject or subjects.

(29) The term "outlying possessions of the United States" means American Samoa and Swains Island.

(30) The term "passport" means any travel document issued by competent authority showing the bearer's origin, identity, and nationality if any, which is valid for the admission of the bearer into a foreign country.

(31) The term "permanent" means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law.

(32) The term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.

(33) The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

⁴So in original. Probably should be followed by "; or".

(34) The term “Service” means the Immigration and Naturalization Service of the Department of Justice.

(35) The term “spouse”, “wife”, or “husband” do not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated.

(36) The term “State” includes the District of Columbia, Puerto Rico, Guam, and the Virgin Islands of the United States.

(37) The term “totalitarian party” means an organization which advocates the establishment in the United States of a totalitarian dictatorship or totalitarianism. The terms “totalitarian dictatorship” and “totalitarianism” mean and refer to systems of government not representative in fact, characterized by (A) the existence of a single political party, organized on a dictatorial basis, with so close an identity between such party and its policies and the governmental policies of the country in which it exists, that the party and the government constitute an indistinguishable unit, and (B) the forcible suppression of opposition to such party.

(38) The term “United States”, except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States.

(39) The term “unmarried”, when used in reference to any individual as of any time, means an individual who at such time is not married, whether or not previously married.

(40) The term “world communism” means a revolutionary movement, the purpose of which is to establish eventually a Communist totalitarian dictatorship in any or all the countries of the world through the medium of an internationally coordinated Communist political movement.

(41) The term “graduates of a medical school” means aliens who have graduated from a medical school or who have qualified to practice medicine in a foreign state, other than such aliens who are of national or international renown in the field of medicine.

(42) The term “refugee” means (A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person’s nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term “refugee”

does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

(43) The term “aggravated felony” means—

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded \$10,000;

(E) an offense described in—

(i) section 842(h) or (i) of title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of title 18 (relating to firearms offenses); or

(iii) section 5861 of title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment at⁵ least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at⁵ least one year;

(H) an offense described in section 875, 876, 877, or 1202 of title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of title 18 (relating to child pornography);

(J) an offense described in section 1962 of title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that—

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

⁵ So in original. Probably should be preceded by “is”.

(ii) is described in section 2421, 2422, or 2423 of title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581–1585 or 1588–1591 of title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in—

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18;

(ii) section 421 of title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of title 50 (relating to protecting the identity of undercover agents);

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000; or

(ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds \$10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter⁶

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to an-

swer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

(44)(A) The term "managerial capacity" means an assignment within an organization in which the employee primarily—

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.

A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

(B) The term "executive capacity" means an assignment within an organization in which the employee primarily—

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

(C) If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

(45) The term "substantial" means, for purposes of paragraph (15)(E) with reference to

⁶ So in original. Probably should be followed by a semicolon.

trade or capital, such an amount of trade or capital as is established by the Secretary of State, after consultation with appropriate agencies of Government.

(46) The term “extraordinary ability” means, for purposes of subsection (a)(15)(O)(i) of this section, in the case of the arts, distinction.

(47)(A) The term “order of deportation” means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.

(B) The order described under subparagraph (A) shall become final upon the earlier of—

(i) a determination by the Board of Immigration Appeals affirming such order; or

(ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.

(48)(A) The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

(49) The term “stowaway” means any alien who obtains transportation without the consent of the owner, charterer, master or person in command of any vessel or aircraft through concealment aboard such vessel or aircraft. A passenger who boards with a valid ticket is not to be considered a stowaway.

(50) The term “intended spouse” means any alien who meets the criteria set forth in section 1154(a)(1)(A)(iii)(II)(aa)(BB), 1154(a)(1)(B)(ii)(II)(aa)(BB), or 1229b(b)(2)(A)(i)(III) of this title.

(51) The term “VAVA self-petitioner” means an alien, or a child of the alien, who qualifies for relief under—

(A) clause (iii), (iv), or (vii) of section 1154(a)(1)(A) of this title;

(B) clause (ii) or (iii) of section 1154(a)(1)(B) of this title;

(C) section 1186a(c)(4)(C) of this title;

(D) the first section of Public Law 89-732 (8 U.S.C. 1255 note) (commonly known as the Cuban Adjustment Act) as a child or spouse who has been battered or subjected to extreme cruelty;

(E) section 902(d)(1)(B) of the Haitian Refugee Immigration Fairness Act of 1998 (8 U.S.C. 1255 note);

(F) section 202(d)(1) of the Nicaraguan Adjustment and Central American Relief Act; or

(G) section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (division C of Public Law 104-208).

(b) As used in subchapters I and II of this chapter—

(1) The term “child” means an unmarried person under twenty-one years of age who is—

(A) a child born in wedlock;

(B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred;

(C) a child legitimated under the law of the child’s residence or domicile, or under the law of the father’s residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation;

(D) a child born out of wedlock, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother or to its natural father if the father has or had a bona fide parent-child relationship with the person;

(E)(i) a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years or if the child has been battered or subject to extreme cruelty by the adopting parent or by a family member of the adopting parent residing in the same household: *Provided*, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter; or

(ii) subject to the same proviso as in clause (i), a child who: (I) is a natural sibling of a child described in clause (i) or subparagraph (F)(i); (II) was adopted by the adoptive parent or parents of the sibling described in such clause or subparagraph; and (III) is otherwise described in clause (i), except that the child was adopted while under the age of 18 years; or

(F)(i) a child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 1151(b) of this title, who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child’s proposed residence; *Provided*, That the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States: *Provided further*, That no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such par-

2935.36 Pre-trial diversion programs.

(A) The prosecuting attorney may establish pre-trial diversion programs for adults who are accused of committing criminal offenses and whom the prosecuting attorney believes probably will not offend again. The prosecuting attorney may require, as a condition of an accused's participation in the program, the accused to pay a reasonable fee for supervision services that include, but are not limited to, monitoring and drug testing. The programs shall be operated pursuant to written standards approved by journal entry by the presiding judge or, in courts with only one judge, the judge of the court of common pleas and shall not be applicable to any of the following:

(1) Repeat offenders or dangerous offenders;

(2) Persons accused of an offense of violence, of a violation of section [2903.06](#) , [2907.04](#) , [2907.05](#) , [2907.21](#) , [2907.22](#) , [2907.31](#) , [2907.32](#) , [2907.34](#) , [2911.31](#) , [2919.12](#) , [2919.13](#) , [2919.22](#) , [2921.02](#) , [2921.11](#) , [2921.12](#) , [2921.32](#) , or [2923.20](#) of the Revised Code, or of a violation of section [2905.01](#) , [2905.02](#) , or [2919.23](#) of the Revised Code that, had it occurred prior to July 1, 1996, would have been a violation of section [2905.04](#) of the Revised Code as it existed prior to that date, with the exception that the prosecuting attorney may permit persons accused of any such offense to enter a pre-trial diversion program, if the prosecuting attorney finds any of the following:

(a) The accused did not cause, threaten, or intend serious physical harm to any person;

(b) The offense was the result of circumstances not likely to recur;

(c) The accused has no history of prior delinquency or criminal activity;

(d) The accused has led a law-abiding life for a substantial time before commission of the alleged offense;

(e) Substantial grounds tending to excuse or justify the alleged offense.

(3) Persons accused of a violation of Chapter 2925. or 3719. of the Revised Code;

(4) Persons accused of a violation of section [4511.19](#) of the Revised Code or a violation of any substantially similar municipal ordinance;

(5)

(a) Persons who are accused of an offense while operating a commercial motor vehicle or persons who hold a commercial driver's license and are accused of any offense, if conviction of the offense would disqualify the person from operating a commercial motor vehicle under Chapter 4506. of the Revised Code or would subject the person to any other sanction under that chapter;

(b) As used in division (A)(5) of this section, "commercial driver's license" and "commercial motor vehicle" have the same meanings as in section [4506.01](#) of the Revised Code.

(B) An accused who enters a diversion program shall do all of the following:

(1) Waive, in writing and contingent upon the accused's successful completion of the program, the accused's right to a speedy trial, the preliminary hearing, the time period within which the grand jury may consider an indictment against the accused, and arraignment, unless the hearing, indictment, or arraignment has already occurred;

(2) Agree, in writing, to the tolling while in the program of all periods of limitation established by statutes or rules of court, that are applicable to the offense with which the accused is charged and to the conditions of the diversion program established by the prosecuting attorney;

(3) Agree, in writing, to pay any reasonable fee for supervision services established by the prosecuting attorney.

(C) The trial court, upon the application of the prosecuting attorney, shall order the release from confinement of any accused who has agreed to enter a pre-trial diversion program and shall discharge and release any existing bail and release any sureties on recognizances and shall release the accused on a recognizance bond conditioned upon the accused's compliance with the terms of the diversion program. The prosecuting attorney shall notify every victim of the crime and the arresting officers of the prosecuting attorney's intent to permit the accused to enter a pre-trial diversion program. The victim of the crime and the arresting officers shall have the opportunity to file written objections with the prosecuting attorney prior to the commencement of the pre-trial diversion program.

(D) If the accused satisfactorily completes the diversion program, the prosecuting attorney shall recommend to the trial court that the charges against the accused be dismissed, and the court, upon the recommendation of the prosecuting attorney, shall dismiss the charges. If the accused chooses not to enter the prosecuting attorney's diversion program, or if the accused violates the conditions of the agreement pursuant to which the accused has been released, the accused may be brought to trial upon the charges in the manner provided by law, and the waiver executed pursuant to division (B)(1) of this section shall be void on the date the accused is removed from the program for the violation.

(E) As used in this section:

(1) "Repeat offender" means a person who has a history of persistent criminal activity and whose character and condition reveal a substantial risk that the person will commit another offense. It is prima-facie evidence that a person is a repeat offender if any of the following applies:

(a) Having been convicted of one or more offenses of violence and having been imprisoned pursuant to sentence for any such offense, the person commits a subsequent offense of violence;

(b) Having been convicted of one or more sexually oriented offenses or child-victim oriented offenses, both as defined in section [2950.01](#) of the Revised Code, and having been imprisoned pursuant to sentence for one or more of those offenses, the person commits a subsequent sexually oriented offense or child-victim oriented offense;

(c) Having been convicted of one or more theft offenses as defined in section [2913.01](#) of the Revised Code and having been imprisoned pursuant to sentence for one or more of those theft offenses, the person commits a subsequent theft offense;

(d) Having been convicted of one or more felony drug abuse offenses as defined in section [2925.01](#) of the Revised Code and having been imprisoned pursuant to sentence for one or more of those felony drug abuse offenses, the person commits a subsequent felony drug abuse offense;

(e) Having been convicted of two or more felonies and having been imprisoned pursuant to sentence for one or more felonies, the person commits a subsequent offense;

(f) Having been convicted of three or more offenses of any type or degree other than traffic offenses, alcoholic intoxication offenses, or minor misdemeanors and having been imprisoned pursuant to sentence for any such offense, the person commits a subsequent offense.

(2) "Dangerous offender" means a person who has committed an offense, whose history, character, and condition reveal a substantial risk that the person will be a danger to others, and whose conduct has been characterized by a pattern of repetitive, compulsive, or aggressive behavior with heedless indifference to the consequences.

Amended by 129th General Assembly File No. 71, HB 337, §1, eff. 1/27/2012.

Effective Date: 09-26-2003; 2008 HB130 04-07-2009

2943.031 Court to advise defendant as to possible deportation, exclusion or denial of naturalization upon guilty or no contest plea.

(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.

Effective Date: 10-02-1989

RULE 11. Pleas, Rights Upon Plea

(A) Pleas. A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or the defendant's attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) Effect of guilty or no contest pleas. With reference to the offense or offenses to which the plea is entered:

(1) The plea of guilty is a complete admission of the defendant's guilt.

(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.

(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in divisions (C)(3) and (4) of this rule, shall proceed with sentencing under Crim.R. 32.

(C) Pleas of guilty and no contest in felony cases.

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim.R. 44 by appointed counsel, waives this right.

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting a plea of guilty or no contest the court shall so advise the defendant and determine that the defendant understands the consequences of the plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications that are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest.

(D) Misdemeanor cases involving serious offenses. In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim.R. 44 by appointed counsel, waives this right.

(E) Misdemeanor cases involving petty offenses. In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such pleas without first informing the defendant of the effect of the plea of guilty, no contest, and not guilty.

The counsel provisions of Crim.R. 44(B) and (C) apply to division (E) of this rule.

(F) Negotiated plea in felony cases. When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court.

(G) Refusal of court to accept plea. If the court refuses to accept a plea of guilty or no contest, the court shall enter a plea of not guilty on behalf of the defendant. In such cases neither plea shall be admissible in evidence nor be the subject of comment by the prosecuting attorney or court.

(H) Defense of insanity. The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial.

[Effective: July 1, 1973; amended effective July 1, 1976; July 1, 1980; July 1, 1998.]

Staff Note (September 1, 2012)

Courts and litigants are advised that the Revised Code contains additional requirements, not contained in Crim.R. 11, for advising certain defendants at a plea of guilty or no contest of other possible consequences in specified circumstances. See, e.g., Sections 2943.031 (possible immigration consequences), 2943.032 (possible extension of prison term), and 2943.033 (possible firearm restriction) of the Ohio Revised Code. Other plea requirements not contained in Crim.R. 11 may also apply. See, e.g., Section 2937.07 (requiring explanation of circumstances in certain misdemeanor cases) of the Ohio Revised Code.

RULE 32.1 Withdrawal of Guilty Plea

A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.

[Effective: July 1, 1973; amended effective July 1, 1998.]