

IN THE OHIO SUPREME COURT

STATE OF OHIO,	)	Supreme Court Case No
	)	2014-0733
Plaintiff-Appellee	)	
	)	On Appeal from the Eighth
vs.	)	District App. No. CA-13-100191
	)	
ISSA KONA,	)	
	)	
Defendant-Appellant	)	

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MERIT BRIEF OF *AMICUS CURIAE* CONCERNED OHIO IMMIGRATION  
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## **I. Statement of Interest of Amicus Curiae and Overview**

The undersigned are Ohio immigration attorneys who represent non U.S. citizens facing the collateral immigration consequences of criminal matters. Court provided immigration advisements ensure that defendants consider the immigration consequences before entering a final, agreed, disposition of the criminal matter. These consequences include triggering deportation proceedings, exclusion from admission (lack of eligibility for permanent residency or any immigration status), and denial of U.S. citizenship.

Because portions of a state court criminal proceeding trigger immigration consequences<sup>1</sup>, this amicus brief offers some discussion of the relevant immigration law. Federal immigration law treats a partial admission of guilt (written or verbal on the record in a state court proceeding) as a “conviction.” This is a dramatic difference from Ohio law [see Crim.R. 32(C) – defining a conviction under state law as a plea and sentence]. As this Court held in *State v. Francis* (2004), 104 Ohio St.3d 490, 2004-Ohio-6894 at ¶29, the immigration advisement statute (R.C. 2943.031) created substantive statutory rights for defendants. The advisements help assure compliance with the Fifth Amendment (that admissions are voluntary, knowing, and intelligent), protect against self-incrimination, and implement the Sixth Amendment right to effective counsel at

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<sup>1</sup> Not contesting guilt, admitting guilt, providing a written statement or statement on the record admitting guilt; formally pleading guilty or no contest.

each critical stage of a criminal proceeding. Pretrial diversion programs (and intervention in lieu of conviction programs) have been grafted onto the traditional framework. The advisements, if given, maintain the integrity of the process. Without this Court's intervention, pretrial diversions will remain a trap for unwary, non U.S. citizens. It will not serve the rehabilitative purpose for non-violent, first time offenders who are not U.S. citizens. The statutory intervention in lieu of conviction, R.C. 2951.041 is also impacted because a written or verbal, on the record admission of drug possession has immigration consequences. See *State v. Abi-Aazar*, 154 Ohio App.3d 278, 2002-Ohio-5026 (9<sup>th</sup> Dist.) discussing intervention's guilty plea as triggering immigration's "conviction").

## **II. Statement of Facts and Case**

The Defendant, Issa Kona, was charged with robbery under R.C. 2911.02. The matter involved a \$79 battery charger from Home Depot and a scuffle in the parking lot. Kona was indicted and pled not guilty at his arraignment. The day of trial, Kona sought, and the prosecution and court permitted him to enter a pretrial diversion program under R.C. 2936.35. As a condition precedent of participation in the diversion program, the prosecution (and to be fair, the court too, for it let Kona participate in the diversion program and dismissed with prejudice the case once Kona completed the program), required Kona to admit, in writing, sufficient facts of his guilt. This written admission is the functional equivalent of a guilty or

no contest plea, and would be properly characterized as a “constructive” guilty plea or no contest plea. For comparison, had Kona’s matter gone to preliminary hearing, he would have been protected under R.C. 2937.12 (defendant allowed to make **unsworn** statement to explain evidence). By allowing Kona into the diversion program, the prosecution tacitly conceded that Kona is nonviolent and was not likely to offend again.

Had Kona not completed the diversion, the prosecution could have used his written admission against him and proceeded with the criminal matter.

In completing the diversion, Kona was put under the Court’s probation or supervision, paid the program’s supervision fee and court costs, and had his liberty restrained. The prosecution subsequently moved to dismiss the matter for want of prosecution and **with prejudice**. The Court granted such. The defendant applied to seal the record and the court granted such.

Kona then applied for naturalization (U.S. citizenship). Kona was informed that his application would place him in jeopardy of removal (deportation) because he had admitted sufficient facts to constitute guilt to a felony under federal immigration law. *Kona*, 2014-Ohio-1242 at ¶7.

Kona promptly went back to the trial court and moved to have his record unsealed. Kona then sought to vacate the dismissal of the criminal case under various theories. He claimed his admission of guilt was not knowing, voluntary,

and intelligent. After several pretrials, the trial court denied Kona's motion without opinion. *Cf. State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, ¶ 52 (failure of trial court to explain reasons "severely hampers" determining whether an abuse of discretion occurred in R.C. 2943.031 motions). The Court of Appeals affirmed. Although the panel seemed to sympathize, the Court felt that R.C. 2943.031 and Crim.R. 32.1 could not afford relief because, the court reasoned, there was no formal plea of guilty or no-contest. The Court stated that a "trial court cannot withdraw a plea that was never entered into, nor can it vacate a conviction that does not exist." *Kona*, 2014-Ohio-1242, at ¶ 22. Accord, *City of Willoughby Hills v. Qasim*, 2007-Ohio-2860 (11<sup>th</sup> Dist).<sup>2</sup> Contrast those decisions with this Court's unanimous ruling in *State ex rel. Loyd v. Lovelady*, 108 Ohio St.3d 86, 2006-Ohio-161 [R.C.3119.961 *et seq.* motion for relief from judgment trumps Civ.R. 60(B) standard and provides substantive right that may be filed years later -- the Court "**shall grant relief** from \* \* a child support order" if genetic results prove no probability of parentage) and R.C. 2943.031(D)'s language "Upon motion of the defendant, the **court shall set aside** the judgment. . ." The Legislature granted the trial courts jurisdiction to do just that.

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<sup>2</sup>But see *Qasim*, 2007-Ohio-2860 (O'Neill, J., dissenting)(R.C. 2943.031 applied even though there was a pretrial diversion dismissal).

### **III. Argument**

Prior to addressing the specific propositions of law, it is helpful to have an overview of federal immigration law and the relevant Ohio laws at issue.

#### **A. Overview of Federal Immigration law**

Criminal matters have immigration consequences for non citizens that differ from those of U.S. citizens. A U.S. citizen convicted of robbery faces incarceration and fines (direct consequences) and the loss of the right to vote while incarcerated (a collateral disability). Non U.S. citizens [ranging from lawful permanent residents, non-immigrants visa holders (workers or visitors), or the undocumented], face additional collateral immigration ones (deportation, inability to become a permanent resident, or the inability to become a U.S. citizen). Although deportation may result in loss of all that makes life worth living (banishment from the United States and forced separation from one's family), *Ng Fung Ho v. White*, 259 U.S. 276 (1922), and is "close to punishment," *Galvan v. Press*, 347 U.S. 522 (1954), the law regards immigration consequences as collateral, civil matters.

In 1989, the Ohio Legislature required that immigration advisements must be part of the criminal justice process. Three immigration concepts are mentioned in R.C. 2943.031: "naturalization," "exclusion from admission" (now called "admissibility" or "admission"), and deportation (now called removal).

Immigration law is enforced by a number of federal agencies, including, the U.S. Department of Homeland Security, U.S. Customs & Border Protection (CBP), the U.S. State Department, and the U.S. Department of Justice. The relevant immigration laws are found in the Immigration and Nationality Act (“INA”), codified in Title 8 of the U.S Code, and in implementing regulations codified in 8 C.F.R.

**B. Naturalization:** Naturalization refers to the process by which a lawful permanent resident alien obtains United States citizenship. A lawful permanent resident does not have the full rights of a U.S. citizen (voting, holding a US passport, travelling back into the U.S., not being deported). Permanent residents may apply for U.S. citizenship if they are 18 years or older, have accrued five years of continuous permanent residency, and prove they have the requisite “good moral character” during the relevant look back period. INA 316, 8 USC 1427; 8 C.F.R. 316.10(a). Many criminal convictions result in a finding of a lack of good moral character and/or placement in removal proceedings. 8 C.F.R. 316.10(b)(2)(i), (b)(2)(iv). These crimes are called crimes of moral turpitude (e.g., felonies, theft, stealing); **any** drug-related offense (other than single possession of 30 grams or less of marijuana), domestic violence offenses, and firearms offenses. Robbery is an aggravated felony under INA 101(a)(43), 8 USC 1101(a)(43) that results in **permanent** ineligibility for U.S. citizenship. 8 C.F.R. 316.10(b)(1)(ii).

**C. Exclusion from Admission (Admissibility).** To lawfully enter the United States, or to convert from various immigration status categories (temporary worker to immigrant or permanent resident), an applicant must be admissible. See INA 212(a), 8 USC 1182(a). Pre 1996, the INA had exclusion proceedings,<sup>3</sup> which were performed at the port of entry (airport, sea port, or land border post). Many non U.S. citizens enter on non-immigrant visas (tourist, student, temporary worker), no visa (visa waiver), or illegally (entering without inspection). Many criminal convictions are bars to admission for non U.S. citizens. See generally INA 212(a)(2)(crimes), 8 U.S.C. 1182(a)(2).

**D. Deportation.** Since 1996, this is now called “removal.” INA 237-240. For 100 years, the term was known as deportation. When the government seeks to expel or banish a person from the United States, it initiates a removal proceeding with the U.S. Department of Justice’s Executive Office for Immigration Review (EOIR). The proceeding begins with the issuance of a charging document, a Notice to Appear (formerly called an Order to Show Cause), an appearance in Immigration Court before an Immigration Judge. Many types of crimes – usually felonies – but sometimes, certain misdemeanors (such as two petty theft convictions), will trigger a removal or deportation proceeding.

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<sup>3</sup> The 1996 changes created a summary removal procedure at the port of entry that superseded the old exclusion proceeding.

In 1996, Congress substantially amended the INA through the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (herein called “IIRIRA”), Pub.L. No. 104-208, 110 Stat. 3009. The 1996 law rewrote and redefined a century of terminology and caselaw.

**E. A Uniform Federal Definition of “Conviction” For Immigration Purposes.**

IIRIRA Section 322 added a federal definition of “conviction” for convictions under both state and federal law. It is found in INA §101(a)(48)(A), 8 U.S.C. 1101(a)(48)(A). The federal immigration definition of “conviction” differs dramatically from the normal understanding of Ohio’s bench and bar as to what constitutes a conviction under state law. In Ohio, as in many states, a conviction is the Court’s judgment (either from a plea or decision of the trier of fact) plus imposition of a sentence, found in a court’s judgment. Cf. Crim.R. 32(C).

Not so in the immigration world. Prior to 1996, there was no definition of conviction in the INA. See *Matter of Roldan* (BIA 1999),<sup>4</sup> Int. Dec. # 3377, 22 I&N Dec. 512, 514-15 (see <http://www.justice.gov/eoir/vll/intdec/vol22/3377.pdf>.) (en banc)(“this Board, with direction from the Supreme Court and the Attorney General, struggled for more than 50 years to reconcile its definition with the

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<sup>4</sup> The Board of Immigration Appeals (“BIA”) is part of the Department of Justice’s Executive Office for Immigration Review (EOIR). It hears appeals from matters from immigration judges and its panels construe immigration statutes. Until overridden by the federal courts, BIA decisions and rulings on federal immigration law are binding on immigration agencies.

increasing numbers of state statutes providing ameliorative procedures affecting the finality of a conviction under state law”). The 1996 version of INA 101(a)(48)(A) derives from the three prong test of the Board of Immigration Appeals in *Matter of Ozkok*, 19 I&N Dec. 546, 551-52 (BIA 1988)(available at <http://www.justice.gov/eoir/vll/intdec/vol19/3044.pdf>).

In *Ozkok*, the BIA modified its precedent and established a three prong test for a conviction to be a conviction for immigration purposes: All three prongs had to be met:

1. the judge or jury has found the alien guilty or he has entered a plea of guilty or nolo contendere **or has admitted sufficient facts to warrant a finding of guilty;**
2. The judge has ordered some form of punishment, penalty, or restraint on the person’s liberty to be imposed (including but not limited to incarceration, probation, a fine or restitution, or community-based sanctions such as a rehabilitation program, a work-release or study-release program, revocation or suspension of a driver's license, deprivation of nonessential activities or privileges, or community service); **and**
3. A judgment or adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with the requirements of the court’s order, without availability of further proceedings regarding his guilt or innocence of the original charge.

*Matter of Roldan*, 22 I&N Dec. at 516-517 (quoting *Matter of Ozkok*, 19 I&N, at 551).

**F. Immigration Conviction Codified in 1996**

In 1996, Congress defined “conviction” for immigration purposes: it adopted *Ozkok*’s first two prongs – but eliminated its third. The federal statute reads, in relevant part:

- (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.

IIRIRA, Pub. L. No. 104-208, § 322(a)(1) (1996), codified as 8 USC 1101(a)(48)(A).

The House Conference Report provides the reasons Congress rejected *Ozkok*’s third prong: See *Matter of Punu* (BIA 1998), 22 I&N Dec. 224, 227 (en banc) (available at <http://www.justice.gov/eoir/vll/intdec/vol22/3364.pdf>):

“It broadens the definition of ‘conviction’ for immigration law purposes to include **all aliens who have admitted** to or been found to have committed crimes. This will make it easier to remove criminal aliens, regardless of specific procedures in States for deferred adjudication . . . .” H.R. Rep. No. 104-879 (1997), *available in* 1997 WL 9288 at \*295. Thus, it is clear that Congress deliberately modified the definition of conviction to include deferred adjudications.  
22 I & N Dec. at 227 (Emphasis supplied.)

Likewise, in *Matter of Roldan* (BIA 1999), Int. Dec. #3377 (en banc):

*Ozkok*... does not go far enough to address situations where a judgment of guilt or imposition of sentence is suspended,

conditioned upon the alien’s future good behavior...In some States, adjudication may be “deferred” upon a finding or confession of guilt, and a final judgment of guilt may not be imposed if the alien violates probation until there is an additional proceeding regarding the alien’s guilt or innocence. In such cases, the third prong of the *Ozkok* definition prevents the original finding or confession of guilt to be considered a “conviction” for deportation purposes. This new provision, by removing the third prong of *Ozkok*, clarifies Congressional intent that even in cases where adjudication is “deferred,” the original finding or confession of guilt is sufficient to establish a “conviction” for purposes of the immigration laws.

*Matter of Roldan*, at 518 [quoting H.R. Conf. Rep. No. 104-828, at 224 (1996)(Joint Explanatory Statement)].

**G. “Some form of Punishment, Penalty, or Restraint on Liberty.”**

INA 101(a)(48)(A)(ii)’s language: the judge has ordered “some form of punishment, penalty or restraint on liberty” is satisfied by being on probation, payment of a fine, restitution – even payment of court costs. *Matter of Ozkok*, prong 2 [codified by §101(a)(48)(A)]. Thus, that matter would be easily satisfied here<sup>5</sup> – contrary to the State’s argument in its jurisdictional memorandum.

Commentators summarize the situation:

In the world of immigration law, a “conviction” is not limited to a formal plea of guilt or a verdict or finding of guilt by a judge or jury, as it is under state law. Instead it encompasses a wide variety of dispositions that might surprise prosecutors and defense attorneys alike.

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<sup>5</sup> The State of Ohio’s jurisdictional memorandum, p.9, states that there was no penalty or restriction on liberty. This is incorrect.

A pretrial diversion program is often lauded as a progressive concept and allows first-time offenders to rehabilitate and reintegrate into society. In a pretrial diversion program, the defendant is usually required to attend classes, complete community service, or perform other related rehabilitative acts. When the defendant completes the assigned tasks satisfactorily, the prosecutor dismisses the charges. For a U.S. citizen defendant, the benefits of having no conviction on his or her record as well as a chance to start over and make better choices are obvious. For an alien defendant, however, completing a pretrial diversion program does not necessarily eliminate the threat of deportation. An alien's participation in a pretrial diversion program will most likely avoid a conviction for immigration purposes *if* the prosecutor does not require an admission of guilt as a prerequisite for participation in diversion programs. As discussed above, an admission of guilt coupled with *any* restraint on liberty—such as having to complete a specified drug or alcohol awareness program—is a conviction under immigration law. If a prosecutor requires an admission of guilt to enter a pretrial diversion program and this admission is recorded, then for immigration purposes the alien's participation in pretrial diversion is deemed a conviction all the same. This is true even if, as a result of successful completion of the diversion program, the prosecutor drops the charges. While the purpose of pretrial programs is to permit first-time offenders to rehabilitate without any criminal record on their file, where admission of guilt is required to participate, the result has been that aliens who participate in these programs have a conviction for immigration purposes and may be deportable depending on the type of crime committed.

D. Shenoy and S.O. Khakoo, (2008) "One Strike and You're Out! The Crumbling Distinction between the Criminal and the Civil for Immigrants in the Twenty-first Century," 35 *William Mitchell Law Review* 151-52, 159 (2008). (Footnotes omitted).

#### **H. Expungements And Sealing Of Records.**

One might properly ask, but doesn't expungement and/or sealing a conviction get rid of the "admission a/k/a "conviction" for federal purposes? No, it

does not. Federal immigration law holds that an expungement of a conviction does not remove its immigration consequences: for immigration purposes, it is still a conviction. In *Matter of Roldan*, 22 I&N Dec. 512 (1999), the BIA held that a state court action to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute” has no effect. See, e.g, *Herrera-Inirio v. INS*, 208 F.3d 299, 306 (1st Cir. 2000)(Congressional emphasis on original admission of guilt means subsequent dismissal of charges based solely on rehabilitative goals, not a defect of the underlying criminal proceedings, does not vitiate original admission).

Contrast that with R.C. 2953.52(B)(4)(sealing), which deems such proceedings as not to have occurred (although they may be used to determine whether pretrial diversion is appropriate under R.C. 2935.36 --see R.C. 2953.53.

While a conviction vacated solely for ameliorative purposes of immigration consequences of a criminal conviction still remains a valid conviction triggering deportation/removal, a conviction vacated because of legal defects (substantive or procedural) in the underlying proceeding no longer constitutes a conviction for immigration purposes. See *Matter of Adamiak* (BIA 2006), 23 I&N Dec. 878, (available at <http://www.justice.gov/eoir/vll/intdec/vol23/3525.pdf> and applying R.C. 2943.031). The BIA held:

The Ohio court’s order permitting withdrawal of the respondent’s guilty plea is based on a defect in the underlying

proceedings, i.e., the failure of the court to advise the respondent of the possible immigration consequences of his guilty plea, as required by Ohio law.

Thus, the BIA has recognized, consistent with this Court's decision in *State v. Francis*, that Ohio's R.C. 2943.031 remedies a substantive defect in the underlying proceeding.

### **I. Ohio Law – Pretrial Diversion**

The Ohio Pretrial Diversion Statute states in pertinent part:

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 the 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)(Emphasis supplied).

The diversion statute requires the accused to waive, **in writing**, the right to a speedy trial, the right to a preliminary hearing, the time period which the grand jury may consider the indictment against the accused, and the arraignment, unless the arraignment already has occurred. The accused agrees, **in writing**, to tolling of the periods of limitations by statutes and rules of court applicable to the offense, and agrees, **in writing**, to pay "any reasonable fee for supervision services established by the prosecuting attorney. R.C. 2935.36(B).

Thus, INA Section 101(a)(48)(A)(ii) is satisfied by payment of reasonable fee for supervision services, monitoring, drug testing, and even court costs.

*City of Cleveland v. Mosquito*, 10 Ohio App.3d 239, (8<sup>th</sup> Dist. 1983) (*per curiam*) recounted the legislative history of R.C. 2935.36. The Court described the success of the City of Cleveland's Selective Intervention Program in the early 1970's, Ohio's attorney General favorable opinion (1976), and the Legislature's adoption of 2935.36 in 1978 as part of H.B. 473:

Effective June 6, 1978, the General Assembly enacted R.C. 2935.36 authorizing prosecuting attorneys to establish pretrial diversion programs for certain offenders. The new law provided that the programs shall be operated pursuant to written standards approved by journal entry by the judiciary. The statute therefore calls for cooperation between the court and the prosecution to effectuate the program. The Cleveland plan was established by the court with the prosecutor's participation and acquiescence. It is to be noted, too, that under Section 2 of H.B. No. 473, the Bill which statutorily recognized the statewide pretrial diversion program, there is a "grandfather clause" preserving similar programs in existence on the effective date of the statute.

The *Mosquito* Court correctly concluded that this program requires cooperation of two branches of government – it is neither solely the prerogative of the Executive or Judicial branch. In *State v. Battersby*, 2008-Ohio-836 (11<sup>th</sup> Dist), at ¶¶16-17, the Court recognized the prosecutor's role and the courts: the court allows the Defendant to participate in diversion, and, upon the prosecutor's recommendation and motion, dismisses the matter).

The Ohio statute does not mandate that a prosecutor require the participating defendant to “admit guilt.” The statute is silent. The Legislature did not mandate that the prosecution create, or the court tolerate, a trap for non-citizens, have them confess guilt, complete the program, and end up deported.<sup>6</sup>

The existing criminal procedures of arraignment, election of pleas, the providing for preliminary hearing where the accused does not have to incriminate himself/herself, and judicial acceptance of pleas all offer protections to the accused. These protections include the immigration advisement statute. See R.C. 2943.031; also R.C. 2937.12 (accused may make a statement – not under oath, to explain evidence). When the prosecutor and court graft a new program – it should not spring a trap that violates the right against self-incrimination and trigger deportation and permanent denial of naturalization.

**J. Ohio’s Immigration Advisement Statute,  
R.C. 2943.031.**

R.C. 2943.031, the “advisement statute” was enacted in 1989 in this background --- a fluid definition of conviction for immigration purposes, along with the increasing harshness and retroactive application of immigration laws.

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<sup>6</sup> The National Association of Pretrial Services Agencies discourages conditioning eligibility in pretrial diversion/intervention programs on a formal plea of guilty. Standards 4.1 and 4.3 (available at [www.napsa.org/publications/diversion\\_intervention\\_standards\\_2008.pdf](http://www.napsa.org/publications/diversion_intervention_standards_2008.pdf))

Defendants pled no contest to crimes that were not deportable crimes when they pled; Congress retroactively changed the rules of the game.

Ohio attorney Richard I. Fleischer must be acknowledged for his role. As an attorney and immigration practitioner, Mr. Fleischer saw the collateral consequences of criminal convictions to non U.S. citizens and decided, commendably, to do something about it, and have the Legislature adopt remedial legislation. He approached Ohio Senator Barry Levey (Rep. Middletown), who sponsored the bill that became R.C. 2943.031. Mr. Fleischer testified before the relevant committee of the Ohio General Assembly. In a bi-partisan and relatively uncontested fashion, the General Assembly adopted R.C. 2943.031.<sup>7</sup>

This Court comprehensively addressed R.C. 2943.041 in *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894. In *State v. Yanez*, 150 Ohio App.3d 510, 2002-Ohio-7076 (1st Dist.), the Court recognized, R.C. 2943.031 was enacted in response to Congressional measures limiting potential deportation relief for convicted felons. *Id.*, 2002-Ohio-7076 at ¶ 7. Ohio's statute is similar in scope to 18 other jurisdictions' statutes/court rules as of 2001. *Francis*, 2004-Ohio-6894, at ¶25 [citing *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 322, fn 48 (2001)].

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<sup>7</sup>October 31, 2014, Mr. Fleischer shared with undersigned his recollections.

The advisement is a “unique statute,” *State v. Tabbaa*, 151 Ohio App.3d 353, 2003-Ohio-299, at ¶52 (Karpinski, J., dissenting); *Yanez*, 2002-Ohio-7076 at ¶29 (Gorman, J.) (“We find no other criminal statute in which the General Assembly has used quotation marks to designate the trial court’s colloquy with a defendant.”) R.C. 2943.031 does something quite atypical from Ohio statutes and court rules (postconviction, Crim. Rule. 32.1, Civ.R. 60(B)), which place strict limitations on vacating convictions and judgments (criminal or civil). R.C. 2943.031 creates a substantive right for a defendant – to have a remedy to a substantive defect in the criminal proceeding – a collateral matter – that often arises years later. When a non-citizen properly invokes the advisement statute, the trial court **shall** vacate the guilty or no-contest plea – similar to R.C. 3119.961 et seq.)(vacating a child support order in certain circumstances). The statute does not have any express time limits (although timeliness may be a factor); it provides a more relaxed standard than Crim.R. 32.1’s manifest injustice standard. *Francis*, 2004-Ohio-6894 at ¶¶ 26-27, 40-43. Like R.C. 3119.961 and R.C. 2953.21 (post conviction relief), it provides an independent procedure, available post-judgment; it allows a challenge to a substantive defect in the underlying proceedings.

This Court in *Francis* held that the advisement statute created a substantive right for the defendant and addressed a substantive defect in the criminal proceeding for this class of criminal defendants. The statute implements, on a

statutory basis – the Fifth Amendment ( knowing, voluntary and intelligent pleas or admissions of guilt) and the ancient right against self-incrimination; and the Sixth Amendment right to effective assistance of counsel. The burden is **on the trial judge** – not the accused’s lawyer, to perform the advisements. R.C. 2943.031(A) states:

[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.”

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.

The statute is concerned with protecting one of the five *Boykin* rights that trial judges must strictly state in a colloquy with a defendant under Crim.R.

11(C)(2) --- *State v. Veney*, 120 Ohio St.3d 176 (2008)(discussing *Boykin v. Alabama*, 395 U.S. 238, 243 (1969)) and due process rights of knowing, voluntary, and intelligent dispositions. In a felony case, the Court may not accept a plea of no contest to an indictment at the arraignment. R.C. 2937.06. It must wait for further proceedings, such as the preliminary hearing (or waiver of that hearing)

before a court could get to that point. R.C. 2937.09 -2937.12. A change of plea from not guilty to no contest or guilty is an admission, implicates the right against self-incrimination, and must not be lightly done.

There is a Sixth Amendment component to the immigration advisements. Under the U.S. Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010) counsel's failure to warn the defendant of the immigration consequences could be deemed ineffective assistance of counsel (at least in states without the advisement statute) and in cases, post 2010, where the advisements have not been done.<sup>8</sup>

#### **IV. Specific Responses to Propositions of Law**

Response to Proposition of Law No. 5

The trial court has jurisdiction to withdraw a written admission of guilt and vacate the conviction after a dismissal.

Since the paramount issue is whether the trial court retained some jurisdiction (such as through R.C. 2943.031) to act in light of dismissal of a

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<sup>8</sup>Courts have held *Padilla* applies prospectively rather than retrospectively; some have held that where *the Court* gives the immigration advisement, the *Padilla* claim fails. See, e.g., *State v. McCubbin* (2014), Cuyahoga No. 100944, 2014-Ohio-4216 at ¶16 (“This court has repeatedly held that the trial court’s R.C. 2943.031(A) advisement that the defendant may be deported as a result of his plea, is sufficient to overcome any prejudice caused by counsel’s failure to properly advise the defendant)(citing cases, including *State v. Lababidi*, Cuyahoga No. 96755, 2012-Ohio-267 (majority); but see *Lababidi*, Gallagher, J., concurring (noting distinct Fifth and Sixth Amendment claims and requesting Ohio Supreme Court clarification in light of R.C. 2943.031.)

criminal case with prejudice, this proposition is addressed first. The trial court dismissed the robbery proceeding with prejudice for failure to prosecute. The court of appeals held that because there was no formal plea or guilty (or of no contest), R.C. 2943.031, Crim. R 32.1 or Crim.R.11 did not apply – because there was no proceeding to vacate. *Kona*, at ¶22.

Normally, when a criminal case is dismissed, it is over, unless a statute provides otherwise. See *State v. Gilbert* (Oct. 21, 2014), 2014-Ohio 4562; *State ex rel. Flynt v. Dinkelacker* (2004), 156 Ohio App.3d 595, 2004-Ohio-1695 at ¶20<sup>9</sup>. See also *State v. Craig*, 116 Ohio St.3d 135, 2007-Ohio-5752 (prosecution may appeal dismissal of indictment for evidentiary rulings under R.C. 2945.67 even if dismissal is without prejudice).

The same rule applies to civil proceedings although Civ.R. 60(B) offers some limited relief. Some Ohio Courts of Appeals have held that under Crim.R. 57(B), Civ.R. 60(B) can apply to vacate a criminal proceeding, if there is no other applicable statute or criminal rule. See *Jackson v. Friley*, 2007-Ohio- 6755 (4<sup>th</sup> Dist.) at ¶¶15-16 (citing cases); *Miller v. Walton*, 163 Ohio App.3d 703, 2005-Ohio-4855 (1<sup>st</sup> Dist.) at ¶¶17-18 and fn. 14 [agreeing that Civ.R. 60(B) could apply under Crim.R. 57(B) in criminal matters) and noting conflict among various Ohio

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<sup>9</sup> The Court was worried in *Flynt* about conditional dismissals and prosecutions that could be reinstated forever. Cf. Crim.R. 48. Such concerns are not present here.

Courts of Appeals: yes to Civ.R. 60(B) – the 4<sup>th</sup>, 6<sup>th</sup>, and 11<sup>th</sup> District – vs. no in the 2<sup>nd</sup> and 8<sup>th</sup> Districts [no Civ.R. 60(B)] .

The Ohio Legislature has created substantive exceptions to the normal rule of finality of judgments. For example, R.C. 3119.961 et seq. (covered in *State ex rel. Lloyd v. Lovelady*, 108 Ohio St.3d 86, 2006-Ohio-161; R.C. 2943.031(D), R.C. 2953.21 (post conviction); R.C. 2945.67 (prosecutor’s appeal of dismissal for evidentiary rulings). *Lovelady* involved a post-judgment motion to vacate a child support order filed years after a default judgment. Armed with genetic tests showing that the litigant was not the father, the statute required vacating the judgment of a dismissed case where Civ.R. 60(B) would afford no relief. The statute said: “Upon the filing of a motion for relief under section 3119.961 of the Revised Code, a court shall grant from \* \* \* a child support order under which a person \* \* \* is the obligor). Similarly R.C. 2943.031(D) requires the Court “shall set aside “the judgment and permit the defendant to withdraw the guilty plea. Similarly, R.C. 2945.67 provides the prosecutor with a substantive right (an appeal by permission) of a dismissal (with or without prejudice) to address evidentiary matters and vests the courts with continuing jurisdiction. See *Tabbaa*, 2003-Ohio-299, (Karpinski, J., dissenting) at ¶56 [noting *State v. Weber*, 125 Ohio App.3d 120, 131-32 (10<sup>th</sup> Dist. 1997) compared 2945.67’s substantive right and jurisdictional qualities to R.C. 2943.031].

Moreover, the Courts retain jurisdiction to deal with collateral matters historically, such as sanctions on attorneys and litigants – See R.C. 2323.51, Civ.R. 11; Crim. R. 33 (new trial on newly discovered evidence), Crim. R. 32.1 (pleas); Civ. R. 60(B).

Essentially, the lower Courts are indulging in a legal fiction that the proceeding never existed. If the State of Ohio reindicted Mr. Kona now, he would have a good defense of double jeopardy. So the proceeding existed.

**Response to Propositions of Law Nos. 1 and 2.**

A written admission of guilt required by a diversion program is the functional equivalent of a guilty and/or no contest plea for purposes of R.C. 2943.031

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.

It is undisputed that the trial court never gave the advisement. The prosecutor’s diversion packet required Kona to provide, in writing, a “complete, detailed, and accurate statement admitting your involvement/guilt to the pending charges.” *State v. Kona*, 2014-Ohio-1242 at ¶4. Such admission triggered a conviction for immigration purposes under INA 101(a)(48)(A).

If Kona had failed to complete the diversion, the prosecution could have used his admission against him and obtained a conviction. Based upon the prior legal discussion above, Amicus agrees with Appellant that the written admission of

facts constituting guilt is the functional equivalent of a guilty or no contest plea. It could be called a constructive guilty or no contest plea. And R.C. 2943.031 should apply because it protects against admissions by the accused – of guilt, no-contest, or evidentiary statements in court or under oath. The statute is concerned with protecting the right against self-incrimination, and the due process right that a defendant's actions should be knowing, voluntary and intelligent. It also protects the Sixth Amendment right to effective assistance of counsel.

Defendants plead guilty or no contest – most often, as part of a plea bargain. Both sides benefit: the prosecution obtains a conviction to a charge and upholds the law; the defendant gets certainty and can structure his or her life or affairs. Without plea bargaining, the system would implode.

R.C. 2943.031 recognizes that many immigrant defendants do not speak English as a first language. Still others come from countries where the criminal procedure lacks the protections in the Anglo-American tradition. This is a remedial statute and it should be construed as a remedial statute – liberally in favor of the defendant. R.C. 1.11.

This appeal requires this Court to balance two well intentioned laws: the advisements and the pretrial diversion program against the backdrop of constitutional rights. The later enactment, R.C. 2943.031 is more specific and affords a remedy and post-judgment jurisdiction in which to exercise the remedy.

Since the statute is available, this Court need not use Civ.R. 60(B); but if a rule or statute is unavailing, this Court should use Civ.R. 60(B) in a criminal proceeding.

In practical terms, it would not have been difficult for the trial judge to give the immigration advisements before accepting the defendant Kona into the program. It would have taken five minutes. Defendant Kona would have been given some incentive to think about the consequences, talk to counsel about it, and reflect upon the issue. Rather than walking into a trap.

**Response to Proposition No. 3.**

A written admission of guilt is not made knowing, voluntarily, and intelligently when a noncitizen is not advised of potential immigration consequences.

Amicus agrees with this proposition. Indeed, in *Francis*, the majority asked the Court's Rule Advisory Committee to put in R.C. 2943.031's language into Crim.R 11. Ten years have passed and apparently it has been done. This would really assist the bench and bar.

**Response to Proposition 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.

R.C. 2943.031 provides an easier standard than Crim. R. 32.1's manifest injustice standard. Yet the Court of Appeals wrote:

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

*Kona*, 2014-Ohio-1242 at ¶ 19.

If Crim.R. 32.1 doesn’t cover all manifest injustice in a criminal proceeding, than it too needs the Court’s Rules Advisory Committee to make revisions. Under Crim.R. 57(B), Civ.R. 60(B)(5) would apply. See *Miller*, 163 Ohio App.3d 763, 2005-Ohio-4855, at ¶17 & fn. 14 (citing cases).

## V. Conclusion.

This case boils down to a legal fiction that the underlying proceedings never occurred; a dismissal of a criminal case with prejudice means that substantive defects underlying it are never to be rectified. Contra, R.C. 2945.67. One is reminded of a colloquy in a Gilbert & Sullivan Light Opera: Two individuals (one switched at birth) rule as one person until it is determined who is the rightful King:

Giuseppe: At the same time there is just one little grievance that we should like to ventilate.

All: (angrily). What?

Giuseppe: Don't be alarmed—it's not serious. It is arranged that, until is decided which of us two is the actual King, we are to act as one person.

Giorgio: Exactly.

Giuseppe: Now, although we act as one person, we are, in point of fact, two persons.

Annibale: Ah, I don't think we can go into that. It is a legal fiction, and legal fictions are solemn things. Situated as we are, we can't recognize two independent responsibilities.

Giuseppe: No; but you can recognize two independent appetites. It's all very well to say we act as one person, but when you supply us with only one ration between us, I should describe it as a legal fiction carried a little too far.

Annibale: It's rather a nice point. I don't like to express an opinion off-hand. Suppose we reserve it for argument before the full Court?

Marco: Yes, but what are we to do in the meantime?

Marco & Giuseppe: We want our tea.

Annibale: I think we may make an interim order for double rations on their Majesties entering into the usual undertaking to indemnify in the event of an adverse decision?

W.S. Gilbert & A. Sullivan's, "The Gondoliers, Act II, Scene 1 (1889)"  
(libretto available at [http://diamond.boisestate.edu/gas/gondoliers/gn\\_lib.pdf](http://diamond.boisestate.edu/gas/gondoliers/gn_lib.pdf)  
(pages 23-24)

Similarly, although legal fictions are solemn things, this one seems to have gone a little too far. One must ask, what is Mr. Kona supposed to do in the

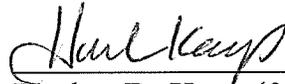
meantime? He can't naturalize and he risks being deported for a "conviction for immigration purposes" in a criminal proceeding that never occurred.

R.C. 2943.031 provides jurisdiction, a substantive right, and remedy: the trial court is granted subject matter jurisdiction in order to reopen a judgment and address substantive defects in the underlying criminal proceeding (from indictment to dismissal). It is no different than R.C. 3119.961 allowing child support proceedings to be reopened, years later, by DNA tests showing parentage or R.C. 2945.67 (prosecution's substantive right to appeal evidentiary rulings in a dismissed criminal case). A trial court judge has a role in ensuring that criminal prosecutions do not violate the rights of the accused. That obligation continues after the proceeding is over to the narrow issue of collateral immigration consequences. There is no need for Ohio law to have traps in pretrial diversion and intervention in lieu of convictions. The State of Ohio should be free to experiment with these worthwhile creative programs; non-citizens should participate in them, and the system will work if the programs provide written advisement warnings to non-citizens and trial judges take five minutes to address defendants personally and give the warnings verbatim.

The judgment below should be reversed, and this matter be remanded for further proceedings consistent with this Court's opinion.

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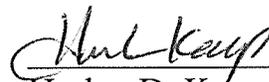
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**Certificate of Service**

I certify that on this 17<sup>th</sup> day of November, 2014, I served a true copy of the foregoing Amicus Curiae brief upon the following counsel for the parties via first class U.S. mail:

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