

ORIGINAL

IN THE OHIO SUPREME COURT

STATE OF OHIO,	}	Supreme Court Case No. 2014-0733
	}	
Plaintiff-Appellee,	}	
	}	On Appeal from the Cuyahoga County Court of
v.	}	Appeals, Eighth Judicial District, Case No. CA-
	}	13-100191
ISSA KONA,	}	
	}	
Defendant-Appellant.	}	

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**BRIEF OF AMICUS CURIAE OHIO ASSOCIATION OF CRIMINAL  
DEFENSE LAWYERS IN SUPPORT OF APPELLANT, ISSA KONA**

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FILED  
NOV 17 2014  
CLERK OF COURT  
SUPREME COURT OF OHIO

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## **STATEMENT OF INTEREST OF AMICUS**

The Ohio Association of Criminal Defense Lawyers is an organization of approximately 700 dues-paying attorney members. Its mission is to defend the rights secured by law of persons accused of the commission of a criminal offense; to foster, maintain and encourage the integrity, independence and expertise of criminal defense lawyers through the presentation of accredited Continuing Legal Education programs; to educate the public as to the role of the criminal defense lawyer in the justice system, as it relates to the protection of the Bill of Rights and individual liberties; and to provide periodic meetings for the exchange of information and research regarding the administration of criminal justice.

## **STATEMENT OF THE CASE**

Amicus adopts by reference the Statement of the Case and Facts as set forth by Appellant Issa Kona.

## **ARGUMENT**

- A. PROPOSITION OF LAW NO. 1: 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).
  
- 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.

- 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.
- 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.
- 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.

**1. The historical origins of “automatic deportation.”** This country followed a policy of open immigration for most of the first century of its existence; it wasn’t until 1875 that Congress imposed the first limitation on who might enter the country, barring convicts and prostitutes. Act of March 3, 1875, Chap. 141, 18 Stat. 477; C. Gordon & H. Rosenfield, *Immigration Law and Procedure* §1.2b, at 6. Sixteen years later, persons who had been convicted of “a felony or other infamous crime or misdemeanor involving moral turpitude” were also excluded. Act of March 3, 1891, Chap. 551, 26 Stat. 1084.

While up to that point the immigration laws barred only admission to the United States, in 1917 Congress passed an Act allowing deportation of non-citizens based on acts they committed in this country. Immigration Act of 1917, 39 Stat. 889. Again, the penalty of deportation was directed at those who had committed crimes involving “moral turpitude,” although that term was undefined.

Notable about the law was that it did not *mandate* deportation; the sentencing judge, at either the State or Federal level, could make a recommendation “that such alien not be deported.” 39 Stat. 890. As the courts repeatedly recognized, this “recommendation” was in fact binding: if the sentencing judge followed the procedure specified by the statute and made a JRAD – judicial recommendation against deportation – “the Attorney General is simply not allowed to use the

conviction for deportation.” *Janvier v. United States*, 793 F.2d 449, 452 (2d Cir. 1986). Indeed, the failure to a JRAD for a defendant facing deportation was held by several courts to constitute ineffective assistance of counsel. *United States v. Castro*, 26 F.3d 557 (5th Cir. 1994).

The courts were not the only entity empowered to relieve immigrants of the consequences a conviction might have on their immigrant status. The Attorney General also had “broad discretion” under the Immigration and Nationality Act to issue a waiver of deportation, and did so in over 10,000 cases between 1989 and 1995. *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289, 295-296, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001).

In the past quarter century, however, the landscape has changed dramatically. In 1990, Congress abolished the JRAD provision, 104 Stat. 5050, and six years later removed the Attorney General’s discretion to grant relief from deportation. 110 Stat. 3009-596.

The removal of the ability of judges and the executive to relieve a non-citizen of deportation was compounded by the simultaneous expansion of offenses for which deportation was mandatory. For example, at one time the category of deportable offenses labeled “aggravated felonies” was limited to murder, drug trafficking, and gun offenses, but no longer. Now, almost any felony will qualify; even a misdemeanor conviction of domestic violence was added to the list of deportable offenses in 1996. See amendment to 8 U.S.C. §1227, effective September 26, 1996.

And the consequences of conviction of an offense in that category are severe:

Even a long-term permanent resident who is convicted of an aggravated felony will almost certainly be quickly deported, permanently banished, disqualified from all immigration benefits, subjected to mandatory detention, and penalized by a sentence of up to twenty years in prison for illegal reentry after deportation.

Dan Kesselbrenner & Lory D. Rosenberg, *Immigration Law and Crimes* § 1:7 (2008).

As the Supreme Court recognized in *Padilla v. Kentucky*, 559 U.S. 356, 364, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2009):

These changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction ... These changes confirm our view that, as a matter of federal law, deportation is an integral part – indeed, sometimes the most important part – of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

This observation is borne out in 3 Bender, *Criminal Defense Techniques* §60A.01 (1999): “Preserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.” This was most certainly true for Mr. Kona: even if he had been convicted, his lack of a prior criminal record made him an excellent candidate for community control sanctions. Deportation, on the other hand, will result in the loss of his home and separation from his family, as well as permanent banishment from the United States.

Especially significant in the context of this case is that a conviction is not necessary to trigger the drastic consequences of deportation. Under Section 1101(a)(48)(A) of the Immigration and Nationality Act, 8 U.S.C. §1101(a)(48)(A), a defendant having “admitted sufficient facts to warrant a finding of guilt,” and the judge imposing “some form of punishment, penalty, or restraint on the alien’s liberty” is deemed to be a conviction. As set forth in the Brief of Appellant at 9-10, Mr. Kona’s entry into the diversion program, which was conditioned upon his signing a statement admitting the elements of the offense with which he was charged, is a “conviction” which will result in his deportation.

**2. The requirements of R.C. §2043.031.** In response to the increasingly Draconian effects of a criminal conviction on a non-citizen’s ability to remain in the country, in 1989 the

Ohio legislature enacted R.C. §2943.031, which imposes upon a trial court the mandatory duty to specifically advise a non-citizen of those effects:

(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.”

The result of the failure of a trial court to give the mandated warning is specified in subdivision (D):

(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.

The statute has been interpreted liberally. A defendant need not inform the court that he is not a citizen to trigger the requirement of the advisement. *State v. White*, 163 Ohio App.3d 377, 2005-Ohio-498, 837 N.E.2d 1246 (11th Dist.). As this Court held in *State v. Francis*, 104 Ohio St.3d 490, 493, 2004-Ohio-6894, 820 N.E.2d 355, ¶20, “to ensure compliance with the statute, a trial court accepting a plea should never assume that any defendant is a United States citizen, but must give the R.C. 2943.031(A) warning verbatim to *every criminal defendant* (other than certain defendants pleading to a minor misdemeanor) unless a defendant affirmatively has

indicated either in writing or orally on the record that he or she is a citizen of the United States.” (Emphasis supplied.) And the language of the advisement must be given verbatim. *Francis*, syllabus no. 1; if it is not given verbatim, the issue is whether the trial court substantially complied with the statute’s requirements. *Id.*, ¶48. Substantial compliance requires a defendant to be informed of the possibility not only of deportation, but also of exclusion from admission into the United States and denial of naturalization pursuant to the laws of the United States.

*State v. Oluch*, 10th Dist. No. 10AP-1038, 2011-Ohio-3998, ¶17

In determining substantial compliance, it is not enough that the trial court gave a general statement warning of adverse immigration consequences. *State v. Oluch, supra* (advisement that conviction “could jeopardize [defendant’s] status here in this country” insufficient); *State v. Naoum*, 8th Dist. No. 91662, 91663, 2009-Ohio-618, ¶23 (“substantial compliance is not met when only 2/3 of the advisement is given”); *State v. Zuniga*, 11th Dist. Nos. 2003-P-0082, 2004-P-002, 2005-Ohio 2078, (“as a result of pleading guilty to a felony [] you could be deported, you understand that?” not sufficient); *State v. Ouch*, 10th Dist. No. 06-AP-488, 2006-Ohio-6949 (“I need to tell him by pleading guilty and being found guilty that that may jeopardize his status in this country, and I want to make sure he understands that” not sufficient); *State v. Khan*, 2nd Dist. No. 21718, 2007-Ohio-4208 (“[t]here may be implications through the Immigration and Naturalization Department. Do you understand that?” insufficient). And where normally a reviewing court will presume the regularity of proceedings below in the absence of a record showing the contrary, that presumption is reversed in a motion to withdraw a plea under R.C. ¶2943.031: “In the absence of a record that demonstrates the court provided the deportation advisement when it was required to do so, we are to presume the defendant did not receive the

advisement.” *City of Cleveland Heights v. Roland*, 197 Ohio App. 3d 661, 666, 2012-Ohio 170, 968 N.E.2d 564 (8th Dist.).

Normally, a defendant filing a post-sentence motion to withdraw a plea must demonstrate that a manifest injustice has occurred, which virtually requires a showing of actual innocence. Crim.R. 32.1; see, e.g., *State v. Beal*, 7th Dist. No. 11 BE 4, 2012-Ohio-1408 (affirming grant of post-sentence motion to withdraw where alleged victim of sex crime testified she had concocted the allegations as revenge against defendant). But subdivision (D) of §2943.031 provides its own standard for granting relief:

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

This Court addressed that distinction in *Francis*:

In most circumstances, motions to withdraw guilty or no-contest pleas are subject to the standards of Crim.R. 32.1, which requires that after sentencing has occurred, a defendant must demonstrate ‘manifest injustice’ before a trial court should permit withdrawal of the plea. However, an 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’s status in this country, a trial court should give the R.C. 2943.031(A) warning and that failure to do so should not be subject to the manifest-injustice standard even if sentencing has already occurred.

*Francis*, *supra* at ¶26-27.

Thus, “[b]y the terms of the statute, when the advisement is not given, the defendant is not a United States citizen, and the conviction is a deportable offense, then the trial court must grant

a motion to withdraw the guilty plea.” *State v. Abi-Aazar*, 154 Ohio App. 3d 278, 284, ¶13, 2003-Ohio-4780, 797 N.E.2d 98 (9th Dist.). As *Francis* puts it, “[t]he exercise of discretion we discuss applies to the trial court’s decision on whether the R.C. 2943.031(D) elements have been established (along with the factors of timeliness and prejudice discussed below), not generally to the trial court’s discretion once the statutory provisions have been met.” ¶34.<sup>1</sup>

**3. The remedial purpose of diversion.** In 1976, the Ohio legislature passed R.C. §2935.36, allowing prosecuting attorneys to “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 purpose of such programs is “to provide a form of rehabilitation in lieu of conviction and sentence.” *Cleveland v. Mosquito*, 10 Ohio App.3d 239, 240, 461 N.E.2d 924 (8th Dist. 1983). Although the statute provides only for a program to be set up by the prosecuting attorney, the courts have inherent authority to establish such a program. *Lane v. Phillabaum*, 182 Ohio App. 3d 145, 2008-Ohio-2502, 912 N.E.2d 113 (12th Dist.).

The clear ameliorative purpose of diversion is perhaps best demonstrated by the fact that while offenses of violence are not subject to being sealed, see R.C. §2953.36(C), a person charged with such an offense – as was Mr. Kona – can enter into diversion if the prosecuting attorney makes certain findings, primarily relating to the defendant’s history and his likelihood

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<sup>1</sup> While *Francis* rejected the defendant’s view that timeliness cannot ever be a factor, it also rejected the appellate court’s view that a motion filed nine years after the plea was untimely as a matter of law. In any event, timeliness is not at issue here; Kona filed his motion to vacate his plea as soon as he learned that deportation proceedings would be instituted against him, less than three years after his admission into the diversion program, and less than two years after his completion of it.

of re-offending.<sup>2</sup> R.C. §2935.36(D) provides that upon completion of the program, the charges are dismissed, and the defendant can then apply to have the record of all proceedings, including the arrest, sealed under R.C. §2953.52 *et seq.*

That is precisely what happened to Mr. Kona: he successfully completed the diversion program and had the case sealed, only to find that his statement admitting his guilt – not required by statute, but imposed by the prosecutor’s office as a precondition to entry into the program – will result in his deportation, and the drastic consequences that will ensue.

**4. The manifest injustice of the result below.** Mr. Kona’s offense is what is known in the trade as “aggravated shoplifting”: a petty theft elevated to a felony on the theory that the defendant used force, or inflicted harm, on the victim. Had Mr. Kona gone to trial – he asked for a continuance on the day trial was scheduled so that he could apply for diversion (Journal Entry September 20, 2006) – and been convicted of the misdemeanor theft, he would not be eligible for deportation. R.C. §2935.36 was supposed to provide Mr. Kona with an alternative to running the risk of a felony conviction; the legislature enacted the statute with the specific intent of allowing first offenders such as Mr. Kona an opportunity to do that.

And had Mr. Kona chosen to enter a plea to the felony charge instead, R.C. §2943.031 would have required the judge to alert Mr. Kona to the possible impact such a plea might have on his status as a non-citizen, to specifically inform him that a conviction could result in deportation, exclusion from admission to the United States, or denial of naturalization. Again, the legislature passed the statute with the specific intent of ensuring that a defendant be made

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<sup>2</sup> The criteria for inclusion listed in R.C. §2935.36(A)(2) include the unlikelihood of a recurrence, the lack of any prior history of criminal activity, and that “[t]he accused has led a law-abiding life for a substantial time before commission of the alleged offense.”

aware that the risks of such a plea went far beyond the possibility of incarceration, but could entail deportation and the resultant loss of his home and separation from his family, as well as permanent banishment from this country.

Instead, the ameliorative purposes of these two statutes have produced a result that no one anticipated, and that no one believes is equitable. While the State of Ohio defends the result here, the best indication that it finds the result here troubling is that it has changed the program to prevent a recurrence of what happened to Mr. Kona: anyone entering diversion now is provided a plea hearing at which a non-citizen must be advised of the specific information about the consequences of such a plea upon his resident status. See Brief of Appellant at 21.

The law is not an end in itself. To be sure, we talk of doctrines and concepts, of finality of judgments and *res judicata* and jurisdiction, but we must never lose sight of the fact that our purpose is not to do law, but to do justice. As one judge observed in *City of Willoughby v. Qasim*, 11th Dist. No. 2006-L-199, 2007-Ohio-2860 (O'Neill, J., dissenting), involving an identical situation to that presented here,

I believe that courts should ensure that manifest justice should prevail wherever possible. Qasim is caught in a bureaucratic quagmire not entirely of his own making. Had the trial court told him that he was going to be deported based solely upon his plea, he would have had much more to consider than a conviction for a misdemeanor. His whole future in his new country was at stake, and he did not know it. Mistakes were made, both by Qasim and the trial court. It is within the power of this court of appeals to correct them. I believe that justice requires that we take that step in this case.

This Court should hold that Kona's statement admitting guilt as a condition for entry into the diversion programs constituted a plea, and that the failure to advise him of the potential consequences of the admission to his non-citizen status violated the provisions of R.C. 2943.031, and mandates that the admission be withdrawn, the order sealing the case be vacated, and the

matter remanded to the trial court for further proceedings, consistent with the Court's judgment.

Respectfully submitted,

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### **SERVICE**

The undersigned hereby certifies that a copy of the foregoing Brief of Amicus Ohio Association of Criminal Defense Lawyers was hand-delivered to the offices of Diane Smilanick, Assistant County Prosecutor, 1200 Ontario St., 9<sup>th</sup> Floor, Cleveland, Ohio 44113, this 17th day of November, 2014.

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