

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellant,

v.

ISSA KONA,

Defendant-Appellee.

* Case No. 2014-0733
*
* On Appeal from the Eighth Dist.
* App. No. CA-13-100191
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**MERIT BRIEF OF AMICUS CURIAE AMERICAN IMMIGRATION LAWYERS
ASSOCIATION OHIO CHAPTER IN SUPPORT OF THE DEFENDANT-APPELLEE**

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I. INTEREST OF AMICUS CURIAE

The American Immigration Lawyers Association (“AILA”) is a national association with more than 11,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. The Ohio Chapter of AILA has more than 250 members who practice throughout Ohio, and the nation. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA’s members regularly practice before DHS and before the Executive Office for Immigration Review (immigration courts and the appellate court), as well as before the United States District Courts, Courts of Appeal, and the Supreme Court of the United States. Within Ohio, AILA members routinely practice criminal law with special consideration for immigration consequences; this field is known as “cimmigration”. AILA attorneys are often called upon to analyze the collateral immigration consequence of criminal convictions which, at times, may be less desirous than the criminal plea itself.

II. STATEMENT OF THE CASE AND FACTS

Amicus Curiae adopts the Statement of the Case and Facts set forth in the brief of the Appellant/Defendant.

III. LAW AND ARGUMENT

I. Admission of the Essential Elements of the Charged Offense as Required under the Pretrial Diversion Program Constitutes a Conviction under Federal Immigration Law.

The Eighth District held even though manifest injustice would result, Mr. Kona did not enter a guilty or no contest plea as part of his pretrial diversion program. As there was no plea, no advisement was required under Ohio Revised Code section 2943.031. Additionally, the Eighth District held the trial court was not required to follow the mandates of Rule 11 due to the absence of a guilty or no contest plea. Although the Eighth District does not consider this a plea that resulted in a conviction, it cannot be disputed that the diversion program constitutes a “conviction” under federal immigration law.

It is well established that a criminal conviction may contain dire immigration consequences above and beyond any potential criminal impact. The Supreme Court has discussed the importance of deportation to a defendant’s decision as to how to proceed in a criminal case. *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). In *Padilla*, the Supreme Court stated that “deportation is an integral part – indeed, sometimes the most important part – of the penalty that may be imposed on noncitizen defendants who plead

guilty to specified crimes.” *Padilla*, 559 U.S. at 364. “[P]reserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.” *INS v. St. Cyr*, 533 U.S. 289, 322-23 (2001).

The Immigration and Nationality Act (“INA”) defines “conviction” as:

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.

8 U.S.C. § 1101(a)(48)(A)(i-ii) (emphasis added).

When the Immigration and Nationality Act was first passed, it did not contain a definition of “conviction.” Adjudicators relied on state law in determining whether a person had been “convicted.” *Matter of Roldan-Santoyo*, 22 I&N Dec. 512, 514-15 (BIA 1999). However, the definition of conviction evolved through case law and then with the enactment of the current definition of conviction found in 8 U.S.C. § 1101(a)(48). Courts have recognized that in enacting § 1101(a)(48)(A)(i-ii), Congress intended to expand the meaning of “conviction” for immigration purposes to include a broader scope of individuals. *See e.g. Pinho v. Gonzales*, 432 F.3d 193 (3d. Cir. 2005).

The Cuyahoga County’s pretrial diversion program satisfies both the finding of guilt, and the restriction of liberty component under section 1101(a)(48)(A)(i-ii) because it requires Mr. Kona admit to his guilt in the charged offenses, and the pretrial diversion program restrained Mr. Kona’s liberty. Despite the fact that Mr. Kona’s charges were subsequently dismissed and expunged, Mr. Kona’s initial admission of guilt constitutes an unequivocal admission of guilt under immigration law, with potentially dire immigration consequences. As such, when Mr.

Kona enrolled in and completed the pretrial diversion program, he was “convicted” of the crimes for immigration purposes - two counts of robbery under Ohio Revised Code section 2911.02, even though he never served a day in jail for this offense.

A. The Admission Required by the Cuyahoga County Prosecutor for Acceptance into the Pretrial Diversion Program Is an Admission of Sufficient Facts to Warrant a Finding of Guilt.

Under the Immigration and Nationality Act, if an individual has “admitted sufficient facts to warrant a finding of guilt,” that individual satisfies the first prong of § 1101(a)(48)(A)(i-ii). 8 U.S.C. § 1101(a)(48)(A)(i-ii). In its construction of statutes, a court “must give effect to the unambiguously expressed intent of Congress.” *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 843 (1984). In order to determine the plain meaning of a statute, a court “must look to the particular statutory language at issue, as well as the language and the design of the statute as a whole.” *K Mart Corp. v. Cartier, Inc.* 486 U.S. 281, 291 (1988).

Here, relying on the plain meaning of section 1101(a)(48)(A)(i-ii), Mr. Kona’s admission of guilt under the pretrial diversion program represents “sufficient facts to warrant a finding of guilt.” As a prerequisite to entering the diversion program, Mr. Kona signed an “Admission of Guilt Statement.”¹ The statement requires a sworn written factual summary of the underlying

¹ The baseline requirements under R.C. 2935.36 do not require an admission of guilt for the pretrial diversion program. *See* O.R.C. 2935.36(B). In fact, under R.C. 2935.36(B), individuals entering a pretrial diversion program are only required to: 1) waive their constitutional right to a speedy trial, a preliminary hearing, and the time period the grand jury may consider an indictment; 2) agree to the tolling of any statute of limitations of the charged crimes; and 3) pay any reasonable fees to cover the diversion program’s supervision services. *Id.*

In contrast to the baseline requirements of R.C. 2935.36, Cuyahoga County’s pretrial diversion program requires all applicants to admit guilt of the charged offense, and even requires the applicant to include a detailed description of the facts surrounding his or her guilt. For instance, under the pretrial diversion program criteria, “[t]he applicant must admit his guilt, in regard to the pending charges, in a written statement.” Exhibit A-1 pg. The admission of guilt statement

factual basis for the indictment; essentially, the functional equivalent to a guilty plea. Should the defendant violate the terms of the pretrial diversion program, the admission may be used to establish guilt. Should the defendant successfully complete the pretrial diversion program, the admission is maintained in the file, the case dismissed and the criminal conviction may then be expunged.²

As part of the required admission, Kona stated he “entered the Home Depot...took a battery charger, removed it from its package, and hid it in [his] coat.” ... As [Kona] left the store, [he] was confronted...[t]he battery charger was found in [his]coat and recovered.” This statement was notarized.

Mr. Kona admitted to sufficient facts to warrant a finding of guilt on each of the two robbery charges. The plain language of the statute establishes Mr. Kona’s admission satisfies 8 U.S.C. § 1101(a)(48)(i). This simple admission is sufficient under immigration laws to fulfill the first requirement of a conviction.

B. The Pretrial Diversion Program Imposed Restraint on Mr. Kona’s Liberty.

In *Matter of Ozkok*, the Board of Immigration Appeals concluded that all rehabilitation programs, work-release programs, or study-release programs could constitute a restraint on a person’s liberty. *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988). Courts have subsequently

form that Kona was required to complete before the court would accept him into the pre-trial diversion program, states “[y]ou 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.**” *Id.* (emphasis added). Finally, the form advises individuals that “[i]f you believe you are not guilty of the charge(s), your case will proceed to the Grand Jury. This statement [the admission of guilt statement] will be *used against you as evidence in the criminal proceeding* by the Cuyahoga County Prosecutor’s Office if you fail the Diversion Program.” *Id.*

² The surviving court record reflects that a participant successfully completed the diversion program.

reaffirmed the notion that probation and court costs alone can constitute a restraint on an individual's liberty. *See Matter of Cabrera*, 24 I&N Dec. 459, 462 (BIA 2008).

An individual accepted into the Cuyahoga County's pretrial diversion program is "placed under the supervision of the Probation's Department's Supervised Release Program/Diversion Unit." Exh. A-1 to Def's Amended Mot. to Withdraw Plea and Vacate Judgment with Oral Hearing Requested, *hereinafter* Exh. A-1. After the applicant is accepted into the pretrial diversion program, he is subsequently under supervision for *at least* six months. *Id.* In addition, he is subject to additional obligations, which can include: "payment of restitution, court costs, fines, volunteer work to a non-profit community service organization, administrative fees. . . an offender's fee, which will include a community service work charge." *Id.* Furthermore, an individual accepted into the pretrial diversion program "must not leave the county of his/her residence *without permission from the Diversion Officer*. Written permission must be obtained before leaving the State." *Id.* (emphasis added).

The above-mentioned conditions of the pretrial diversion program constituted a restraint on Mr. Kona's liberty. As a result of his admission of guilt and acceptance to the pretrial diversion program, Mr. Kona was put under supervision by the Diversion Program. Furthermore, Mr. Kona was unable to leave the state without prior approval from his diversion officer. If Mr. Kona did not satisfy these conditions, the benefit of the pretrial diversion program would be revoked, and his admission of guilt would be used against him in criminal proceedings.

When Congress enacted section 1101(A)(48)(a)(i-ii), it expanded the definition of conviction to "includ[e] convictions where the adjudication of guilt was deferred." *Salch v. Gonzales*, 495 F.3d 17, 23 (2d Cir. 2007). Here, in addition to Mr. Kona's liberty being restrained, Mr. Kona's admission could subsequently result in an adjudication of guilt. As such,

Mr. Kona's participation in Cuyahoga County's pretrial diversion program constitutes a conviction under section 1101(a)(48)(A)(i-ii), and Mr. Kona should have been advised of the impact his participation in the program would have on his immigration status.

II. Ohio Revised Code Section 2943.031 Is Applicable to Admissions of the Essential Elements of a Criminal Offense as This Is the Functional Equivalent of a Guilty or No Contest Plea.

Beginning on October 2, 1989, the Ohio Revised Code required noncitizens to receive an advisement about the effect a guilty plea may have on their immigration status in the United States. O.R.C. § 2943.031 states:

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.

O.R.C. 2943.031(A).

The purpose of the advisement is to inform a defendant about the potential adverse immigration consequences and to ensure that a defendant is willing to accept those consequences. *State v. Lucente*, 7th Dist. Mahoning No. 03 MA 216, 2005-Ohio-1657, ¶ 35; *State v. Hernandez-Medina*, 2nd Dist. Clark No. 06CA0131, 2008-Ohio-418, ¶ 29. When the trial judge gives the required warning contained in O.R.C. § 2943.031, it allows a defendant to make an informed choice as to how to proceed in his criminal case.

Ohio Revised Code section 2943.031 provides a mechanism for a defendant to withdraw his guilty or no contest plea in cases where the advisement was required but not given. Subsection (D) states:

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.

O.R.C. § 2943.031 (D).

Ohio courts have found that under the clear and unambiguous language of the statute, a trial court shall set aside a conviction and allow a defendant to withdraw a plea of guilty or no contest where four requirements are established: (1) the court failed to provide the advisement set forth in the statute; (2) the advisement was required under the statute; (3) the defendant is not a citizen of the United States; and (4) the offense to which the defendant entered a guilty plea may result in deportation, exclusion, or denial of naturalization under federal immigration laws. *See e.g. State v. Weber*, 125 Ohio App.3d 120, 707 N.E.2d 1178 (10th Dist. 1997).

Additionally, the Ohio Supreme Court has held that O.R.C. § 2943.031 created a substantive statutory right. *State v. Francis*, 104 S.Ct.3d 490, 2004-Ohio-6894, ¶ 27 (2004). The court held that “a Defendant seeking relief under O.R.C. § 2943.031(D) must make his or her case before the trial court under the terms of that statute” and “the trial court must exercise its discretion in determining whether statutory conditions are met.” *Francis*, at ¶¶ 33-36. The exercise of discretion that is discussed by the Ohio Supreme Court applies to the trial court’s decision on whether O.R.C. § 2943.031(D) elements have been established, not to the trial court’s discretion once these elements have been met. *Id.*

The parameters of O.R.C. § 2943.031 have evolved through case law since 1989. Although the statute does not contain a timeliness requirement, this Court has read a timeliness requirement into the statute. *Francis*, at ¶¶ 37-43. Thus, timeliness is a factor that the courts may consider in determining whether to grant a motion under section 2943.031, despite the absence of any such requirement in the statute.

The exact language of the statute sets off the mandated immigration advisement by quotation marks. Ohio appellate courts had previously split on whether the trial court must give the advisement verbatim, or whether only substantial compliance was required. *Compare State v. Yanez*, 150 OhioApp.3d 510, 2002-Ohio-7076, 782 N.E.2d 146, ¶ 44 (1st Dist.)(substantial compliance), with *State v. Quran*, 8th Dist. Cuyahoga App. No. 80701, 2002-Ohio-4917, ¶ 23 (strict compliance). This Court settled the issue in *Francis* and held that the standard in evaluating a motion filed pursuant to R.C. § 2943.031 is whether the trial court substantially complied with R.C. § 2943.031(A). *Francis*, at ¶ 48.³

Because the standards for interpreting O.R.C. § 2943.031 have evolved over time, the terms “guilty” or “no contest plea” should also include an admission of the essential elements of a criminal offense. This is particularly the case where the admission constitutes a functional equivalent of a guilty or no contest plea, and is a conviction for immigration purposes.

The Supreme Court in Massachusetts addressed the issue of whether its immigration advisement statute was applicable to admissions where there was no guilty or no contest plea and where the advisement statute did not specifically mention admissions. *See e.g. Commonwealth v. Villalobos*, 437 Mass. 797, 777 N.E.2d 116 (2004). Massachusetts has an immigration advisement statute. *See* Mass. G.L. ch. 278, § 29D. The previous version of the Massachusetts statute specifically stated that it was applicable only to guilty and no contest pleas. *See* Mass. G.L. ch. 278, § 29D (2003). Prior to a revision in that statute by the Massachusetts legislature,

³ In evaluating substantial compliance, some courts have required that all three potential immigration consequences (deportation, exclusion from admission to the United States and the denial of naturalization) be mentioned while others have held that there is substantial compliance without a trial court informing a defendant of all three potential adverse consequences. *Compare State v. Feldman*, 11th Dist. Lake No. 2009-L-052, 2009-Ohio-5765 (trial court must inform defendant of all three consequences), with *State v. Lopez*, 6th Dist. Ottawa No. OT-05-059, 2007-Ohio-202 (trial court not required to inform a defendant of all three potential adverse consequences for there to be substantial compliance).

Massachusetts courts held although the words of the statute were specifically limited to guilty and no contest pleas, the statute was also applicable to a defendant's admission of sufficient facts to warrant a finding of guilty⁴. *See e.g. Villalobos*, 777 N.E.2d at 119. The Massachusetts courts applied the statute to admissions "because such admissions are, in many respects, 'the functional equivalent of a guilty plea.'" *Id.* (citing *Commonwealth v. Duquette*, 386 Mass. 834, 844-46, 438 N.E.2d 334 (1982)).

In the present case, Mr. Kona's admissions are the functional equivalent of a guilty or no contest plea. The admissions are a conviction for federal immigration purposes. Additionally, the admission can potentially be used against the defendant in the future. Furthermore, the defendant receives a sentence when entering the pre-trial diversion program.

To read O.R.C. § 2943.031 to require the advisement to be given where admissions of fact are made with respect to the elements of the crime as a prerequisite to acceptance in a diversion program is consistent with the intent of O.R.C. § 2943.031. The primary goal of statutory interpretation is to determine and give effect to the General Assembly's intent in enacting the statute. *Aubry v. Univ. of Toledo Med. Ctr.*, 10th Dist. Franklin No. 11AP-509, 2012-Ohio-1313, ¶ 10 citing *State v. Banks*. 10th Dist. Franklin No. 11-AP-69, 2011-Ohio-4252, ¶ 13. O.R.C. § 2943.031 was enacted to provide a defendant with an opportunity to make a knowing and informed choice as to how to proceed on his criminal case in light of the potential adverse immigration consequences. A defendant placed in a pre-trial diversion program should not be afforded less protection than a person who enters a guilty or no contest plea when the

⁴ The Massachusetts statute was revised in 2004. It now states, "the court shall not accept a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts from any defendant in any criminal proceeding unless the court" has first given the advisement of immigration consequences set forth in the statute. Mass. G.L. ch. 278, § 29D. Thus, the Massachusetts statute now requires immigration warnings to be given to someone in Kona's position.

consequence is the same under federal immigration law. The Eighth District's holding defeats the intended statutory purpose.

As in Massachusetts, this Court should require the trial court to advise the defendant of the possible consequences of the defendant's factual admission, prior to acceptance in a pretrial diversion program. This is consistent with Ohio case law, where Ohio courts have interpreted § 2943.031 more broadly than the language of the statute. The terms guilty and no contest plea are functionally equivalent to admissions. Additionally, requiring the advisement when the defendant is required to admit the essential elements of the offense would be consistent with the intent of the General Assembly. Therefore, a trial court should be required to read the § 2943.031 immigration advisement prior to a defendant entering a pretrial program that requires admission of the elements of the offense.

III. Assuming, *Arguendo*, that Ohio Law Does Not Provide Kona with an Adequate Procedural Safeguard, the Sixth Amendment Requires Kona Be Advised of the Adverse Immigration Consequences of His Admission of Guilt Statement Prior to Acceptance in a Pretrial Diversion Program.

As noted above, Ohio law requires courts to advise noncitizen defendants about the immigration consequences of a plea. O.R.C. § 2943.031. In Mr. Kona's case, the trial court reviewed Kona's acceptance into the pretrial diversion program. However, the trial court never advised Kona of any possible adverse immigration impact as a result of his participation in the pretrial diversion program. While, as the State argues, Kona's admission of guilt statement was not, for criminal procedure purposes, a "plea," it was nevertheless the functional equivalent of a conviction for federal immigration law purposes. The statement exposed Kona to the possibility of removal, just as would a plea.

Assuming, *arguendo*, that section 2943.031 is limited to pleas and convictions in front of a judge, a gap nevertheless exists between Ohio criminal procedure and federal immigration law.

Even if Kona’s Admission of Guilt Statement does not trigger the mandatory advisement for noncitizens under section 2943.031, the Sixth Amendment to the U.S. Constitution clearly requires Kona be advised of the immigration consequences of signing that statement. Thus, the intervention of this Court is required to protect Kona from an unfair quirk in the rules of criminal procedure.

A. The Sixth Amendment Right to Effective Assistance of Counsel Requires Defendants to Be Informed of the Possibility of Adverse Immigration Consequences Stemming from a Strategic Legal Decision.

The Sixth Amendment provides as follows: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.” U.S. Const. amend. VI. The right to the assistance of counsel is not limited to the mere presence of counsel; instead, it extends to give defendants the right to the “effective” assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The constitutional minimum for “effective” assistance is that of a “reasonable attorney under the circumstances.” *Id.* The Model Rules of Professional Conduct are instructive on what is “reasonable under the circumstances.” For example, Model Rule 1.2(a) says “a lawyer shall abide by a client’s decisions concerning the *objectives of representation*.” MR 1.2(a) (emphasis added). The Supreme Court has instructed lower courts to be “highly deferential” to the strategic choices of counsel, and to avoid using “hindsight” to correct *minor* errors. *Strickland*, 466 U.S. at 689.

The right to effective assistance of counsel includes the right of a defendant to be informed of the immigration consequences of taking a plea agreement. *Padilla*, 559 U.S. at 374. In *Padilla*, the Supreme Court held the Sixth Amendment requires clients be advised of the *possibility* that criminal charges may carry a risk of adverse immigration consequences where the law is unclear or uncertain. *Id.* at 369. But when the adverse consequences of a conviction are

clearly established by law, the defendant must be informed that immigration consequences will follow from a conviction. *Id.*

The *Padilla* Court was responding to a gap between immigration and criminal procedure. At the time, some jurisdictions did not require defense attorneys to advise noncitizen clients about the potential immigration consequences of taking a particular course of action in a case. The immigration consequences of a conviction were seen as “collateral” to the conviction because they were procedurally divorced from the punishment assigned by the sentencing judge. But, as the Supreme Court repeatedly noted in *Padilla*, the omission of protections for noncitizen defendants failed to reflect two critical points. The first is that “deportation is . . . intimately related to the criminal process.” *Id.* at 365-66. In many cases, including the one at bar, “deportation is . . . the most important part . . . of the penalty imposed on noncitizen defendants.” *Id.* at 364. The second point is that deportation is a “drastic measure” and a “particularly severe penalty.” For example, deportation can tear families apart in a way that is more permanent than imprisonment.

Fortunately, *Padilla* recognized that immigration law is often enmeshed in criminal law and that deportation is a “severe” consequence of a criminal violation. Through *Padilla*, the Supreme Court thus held that the Sixth Amendment provides noncitizen defendants protection from making uninformed strategic decisions in their criminal case.

B. Under *Padilla*, Kona Was Constitutionally Entitled to Some Advisement that Entering the Diversion Program Could Result in His Deportation.

A close reading of *Padilla* shows that the case at hand is exactly the type of situation the Supreme Court meant to address. For Kona, whatever space that exists between Ohio’s advisement statute and the diversion program (if any such space actually does exist) creates a

gap between immigration and criminal law; a gap that *Padilla* and the Sixth Amendment fortunately fills.

Effective assistance of a noncitizen defendant necessarily includes advisement about the immigration consequences of criminal law. At best, Kona received no such advisement about the risk of deportation associated with entering the diversion program. At worst, the incentives of the diversion program—the fact that a defendant can have a charge expunged—affirmatively misled Kona to believe that the risk of deportation would be completely eliminated. Only the most cramped reading of *Padilla* would limit the situations in which a noncitizen defendant is entitled to an advisement to convictions resulting from plea agreements.

In the present case, it is apparent that Mr. Kona's sole consideration in his criminal case was to avoid deportation. Immediately after his arrest, Mr. Kona retained a private criminal defense attorney, Joseph Burke. Recognizing that Mr. Kona is not a United States citizen, Burke sought legal immigration advice from an immigration attorney, Carol Gedeon. Attorney Gedeon provided written advice to Mr. Kona regarding the immigration consequences of his indicted charge of burglary. To minimize the risk of an immigration impact, Gedeon advised Mr. Kona to seek reduction of the charge to a misdemeanor theft. Separate from the process of reducing the charge from the indictment, Burke and Kona started working on an alternative plan: enter into a diversion program and, upon successful completion of the program, have the conviction expunged. While not specifically contained in the record, it appears evident that the reduction of the charge from the indictment was not successful; on the day of trial, the defendant entered into the pre-trial diversion program with the assistance of his attorney. The trial court deemed Mr. Kona was eligible for, and allowed him to enroll in, the pretrial diversion program.

As discussed more fully above, Mr. Kona signed an Admission of Guilt Statement as a prerequisite to his acceptance into the pretrial diversion program. After obtaining immigration advice regarding the potential plea, and under the fatal, mistaken belief that the admission of guilt statement had no immigration consequences, Burke helped completed Kona's pretrial diversion paperwork. Kona then signed the admission and Burke notarized it. At no point was Kona advised of any adverse immigration consequences stemming from signing this admission, even though the entire point of entering the diversion program was to avoid the risk of deportation.⁵

Even if the conduct of Mr. Kona's attorney was reasonable under the circumstances, the fact remains that Mr. Kona was insufficiently advised as to the negative effect the Admission of Guilt Statement would have on his immigration status. Supreme Court case law establishes that the Sixth Amendment can be waived only by the defendant and only if the waiver is "knowing, intelligent, and voluntary." *Patterson v. Illinois*, 487 U.S. 285, 292, n.4, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988). ; The fact that only the accused can waive the right establishes unequivocally that *it is the defendant's right*, and that the relative effectiveness of the legal assistance must be viewed from the perspective of the defendant. The very text of the Sixth Amendment supports this assertion (" . . . the accused shall enjoy the right . . . to have the assistance of counsel for his defense."). Kona had a constitutional right to know that entering the diversion program could result in adverse immigration consequences. The fact that the

⁵ Burke's error here is understandable. Who would think that dropping the offense to misdemeanor theft would be better for a client than getting the case expunged? It is this quirk in the procedures associated with the diversion program, and the allure that the program creates, that make this situation unfair. This seems especially penurious where Mr. Kona sought advice from an immigration attorney.

consequences stemming from the admission were not at all obvious—and were even counterintuitive—speaks to the trickiness of the gap in the law.

The Model Rules of Professional Conduct recognize that the focus of representation is on achieving a client’s objectives. Model Rule 1.2(a) (“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation.”). Kona’s actions throughout the whole process, and the extent of Burke’s involvement in the case, demonstrate that Kona’s primary objective was to avoid or minimize the risk of deportation. It was the reason why Kona chose to enter the diversion program. Burke helped him enter the program because he himself was under the mistaken assumption that the program would minimize or eliminate the risk of exposing Kona to deportation. To the extent that Burke misled Kona about the program, his assistance was—considering Kona’s goal—objectively ineffective. It should not matter that, from a subjective perspective, Burke’s mistake was “reasonable,” when from an objective perspective (and from Kona’s perspective), the omission was patently ineffective assistance.

The State will likely argue that *Padilla* is limited to plea bargains, and that the Admission of Guilt Statement is not a plea. Therefore, defense counsel did not have any affirmative duty to advise Kona about the immigration consequences of entering the diversion program. This argument is shallow on at least two levels.

First, it is shallow in the sense that it is an incredibly cramped reading of the expansive language used in *Padilla*. As discussed above, the Court in *Padilla* repeatedly emphasizes two points: the gap between criminal and immigration law creates procedural unfairness for noncitizen defendants because the laws are in actuality so enmeshed in each other, but are treated as separate bodies, each with its own specialist attorneys. *See Padilla*, 559 U.S. at 360-75. Furthermore, deportation is such a “severe” consequence that there needs to be some additional

protection. Limiting *Padilla* to pleas and convictions would not stay true to these two points. Instead, it would create a *new* hole between criminal and immigration law, and it would, once again, relegate deportation to a “collateral consequence.” This is exactly the approach that *Padilla* rejects.

Second, the State’s argument is shallow in the sense that diversion programs are supposed to incentivize accused defendants to comply with terms and conditions imposed by the Court, in return for a reduced charge, lesser sentence, or expungement. It would be a perverse understanding of the point of the diversion program if it were designed in such a way that unknowingly traps noncitizen defendants and results in deportation.⁶

Instead of taking a narrow approach to the Sixth Amendment—an approach that would re-create some of the problems that *Padilla* solved—this court should simply apply the rule articulated by the *Padilla* Court to Kona’s case. The *Padilla* rule, stated generally, is that counsel shall advise any noncitizen defendant about the certain immigration consequences of any strategic decision or approach to resolving a criminal charge. If counsel does not give the requisite advisement, and the noncitizen defendant relies on the omission of the advisement in making a decision that results in adverse immigration consequences, then the attorney’s assistance is ineffective under *Padilla*, *Strickland*, and the Sixth Amendment.

⁶ Indeed, it seems that the Cuyahoga County prosecutor has recognized an immigration impact from the pretrial diversion program, and has amended the pretrial diversion program to include an advisement on the pretrial diversion packet. See, Defendant’s Amended Motion to Withdraw Plea and Vacate Judgment, at Exhibit A-2.

CONCLUSION

For the reasons set forth herein, this Court should overturn the decision of the Eighth District Court of Appeals.

Respectfully submitted⁷,

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⁷ Counsel for Amicus wishes to acknowledge the assistance rendered in connection with this brief by Harrison Blythe, JoAnna Gavigan, and Madeline Jack, third year students at Case Western Reserve University, Cleveland, Ohio.

CERTIFICATE OF SERVICE

A copy of the foregoing Appeal Brief was served by ordinary U.S. mail upon Diane Smilanick, Cuyahoga County Prosecutor's Office, Timothy J. McGinty, Esq., 1200 Ontario Street, Justice Center, 9th Floor, Cleveland, Ohio 44113 on this 17 day of November, 2014.

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