

IN THE OHIO SUPREME COURT

STATE OF OHIO,

Plaintiff-Appellee,

vs.

ISSA KONA,

Defendant-Appellant.

Supreme Court Case No. 2014-0733

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

DEFENDANT-APPELLANT ISSA KONA'S REPLY BRIEF

Joseph T. Burke, Esq. (0052535)
Counsel of Record
Michael G. Polito, Esq. (0051930)
Polito Paulozzi Rodstrom & Burke LLP
21300 Lorain Rd.
Fairview Park, Ohio 44126
(440) 895-1234 Telephone
(440) 895-1233 Facsimile
Email: josephburke@aol.com
Email: mpolito@pprblaw.com

*Counsel for Defendant-Appellant Issa
Kona*

Harlan D. Karp, Esq. (0042411)
Counsel of Record
Tina R. Haddad, Esq. (0041216)
850 Euclid Ave. #1330
Cleveland, Ohio 44114

and

Tanya Linetsky, Esq. (0080031)
5001 Mayfield Rd., Suite 316
Lyndhurst, Ohio 44124

*Counsel for Amicus Curiae, Concerned
Ohio Immigration Attorneys*

Diane Smilanick, Esq. (0019987)
Counsel of Record
Timothy J. McGinty, Esq. (0024626)
Tracy Regas, Esq. (0067336)
James Price, Esq. (0073356)
Cuyahoga County Prosecutor
1200 Ontario St., 9th Floor
Cleveland, Ohio 44113
(216) 443-7800 Telephone
(216) 698-2270 Facsimile

*Counsel for Plaintiff-Appellee State of
Ohio*

Russell S. Bensing, Esq. (0010602)
1350 Standard Building
1370 Ontario St.
Cleveland, Ohio 44113

*Counsel for Amicus Curiae, Ohio
Application of Criminal Defense Lawyers*

Jennifer I. Payton, Esq. (0069675)
Daniel Natalie, Esq. (0089150)
2012 W. 25th St., Suite 407
Cleveland, Ohio 44113

and

Scott Bratton, Esq. (0068302)
3150 Chester Ave.
Cleveland, Ohio 44114

*Counsel for Amicus Curiae, American
Immigration Lawyers Association, Ohio
Chapter*

John T. Forristal, Esq. (0078941)
P.O. Box 16832
Rocky River, Ohio 44116

*Counsel for Amicus Curiae, Cuyahoga
Criminal Defense Lawyers Association*

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REPLY BRIEF

I. REPLY TO OPPOSITION TO PROPOSITIONS OF LAW AND ARGUMENT

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

Appellee attempts to erroneously assert that there is no conviction in this case under Federal law based upon a new and disingenuous alleged question of fact, by alleging for the very first time that Kona's written admission of guilt was allegedly not sufficient to admit to robbery. Even if Appellee could raise this argument for the first time on appeal, *which it cannot*, the argument still fails. *Republic Steel Corp. v. Cuyahoga Cty. Bd. of Revision*, 175 Ohio St. 179, 192 N.E.2d 47 (1963), at syllabus (holding that "issues not raised in the lower court...cannot be raised for the first time on review.") Section 1101(a)(48)(A) of the Immigration and Nationality Act defines a conviction to have occurred where: (1) A judge or jury has found the noncitizen guilty, or the noncitizen 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 the imposition of some form of punishment, penalty or restraint on the noncitizen's liberty.

Appellee is now claiming, for the very first time on this Appeal, that the admission made in this case inexplicably would not be sufficient to warrant a finding of guilt as to robbery and therefore, allegedly does not meet the requirement of 8 U.S.C. 1101 (a)(48)(A). Appellee is rewriting history, as such admission of guilt was already found to be a sufficient admission to robbery by Appellee itself, which was a prerequisite for Kona to be permitted to participate in the diversion program. Namely, Kona was required to "admit his guilt, in regard to the pending charges, in a written statement" as a condition precedent to admission into the diversion program and that a "failure to do so will preclude your client's participation in the program". (Diversion

Packet, which is attached to the Defendant's Amended Motion to Withdraw Pleas and Vacate Judgment ("Amended Motion") as Exhibit A-1, at "Criteria for Acceptance" at No. 6 and at p. 2 of the packet.) By virtue of the fact he was accepted into the program and successfully completed same, his written statement was acceptable to the Prosecutor's office at the time of its creation and was a sufficient admission to robbery. It is disingenuous for the Prosecutor to now claim that Kona did not meet the requirements for diversion after he has completed the program and has appealed the lack of due process afforded to him relating to said program to the Ohio Supreme Court.

Regardless, even if Kona had only pled guilty to theft as alleged by the Prosecutor, he would still face immigration consequences for a conviction for theft. While a conviction for robbery results in a permanent denial of naturalization, a conviction for theft would result in a denial of naturalization for five years for lack of good moral character in the appropriate look back period and could potentially result in exclusion from admission if Kona left the U.S. during that period. Regardless, Kona has been advised by the Federal government that he has in fact been convicted of robbery pursuant to 8 USC 1101(a)(48)(A). (See Affidavit at 13, attached to Amended Motion.) Thus, Appellee's arguments to the contrary fail.

Appellee further claims, without any support whatsoever, that a diversion program does not constitute punishment. In fact, both Ohio and federal courts have found that participation in a diversion program constitutes punishment. For example, see: *State v. Urvan*, 4 Ohio App.3d 151, 446 N.E.2d 1161 (8th Dist. 1982) at paragraph 6 of the syllabus ("However, any view of diversion process not at war with their purposes must include a conception of them (when successfully completed) as the equivalent of served or probated time with consequent expiation of the crime."); *Acosta v. Ashcroft*, 341 F.3d 218, 223 (C.A. 3, 2003) (offender "convicted" for

purposes of immigration law even when charges ultimately dismissed without an adjudication of guilt after successful completion of probation); *Padhiyar v. Holder*, 6th Cir. No. 13-3758 (March 20, 2014) (finding that the defendant was convicted for immigration purposes even where the state dismissed charges after delayed adjudication); *State v. Abi-Aazar*, 154 Ohio App.3d 278, 797 N.E.2d 98 (9th Dist. 2003) (involving a case where deportation proceedings were initiated based on a treatment in lieu plea agreement.) In fact, in *Abi-Aazar, supra*, the Ninth District Court of Appeals held that the failure by the trial court to explain that a treatment in lieu plea was, for immigration purposes, a conviction, rendered the advisement ineffective and the decision to plead guilty uninformed.

Appellee next claims that because a select amount of cases cited by Kona were based upon the defendant asserting a guilty plea on the record in order to participate in diversion programs (which is the current practice of the Cuyahoga County Prosecutor's office), that none of the cases are allegedly applicable to establish a right to due process relating to a written admission of guilt to enter into a diversion program. However, Appellee ignores *State v. Monk*, 64 Ohio Misc.2d 1, 639 N.E.2d 518 (Hamilton, 1994), where the defendant appeared for trial and discussed the possibility of entering a diversion program in lieu of prosecution. As part of the program, the defendant had to pay the costs of \$160, attend four weekly sessions and provide information of his crime to the trial court and prosecutor. There was no formal plea required.

The Hamilton Common Pleas Court noted:

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

Monk, supra. In *Monk*, similar to the case at issue, the defendant had to issue a statement of guilt which could be used to incriminate him without having the due process provided though a Crim.R. 11 hearing. The Hamilton Court of Common Pleas found that due process did in fact apply to such a situation and, as such, the defendant in that case could not be retried for the crime for which he had successfully completed the diversion program. See also, *Urvan, supra* (finding that double jeopardy attaches to the successful completion of a diversion program) and *Cleveland v. Buchanon*, 8th Dist. No. 46046, 1983 Ohio App. LEXIS 12825 (July 7, 1983) (finding that the prosecutor's failure to recognize the defendant's rights with respect to her successful participation of the diversion program entitled the defendant to dismissal of the charges.)

Accordingly, Kona has admitted sufficient facts to warrant a finding of guilt and the judge has ordered the imposition of some form of punishment, penalty or restraint on his liberty, which constitutes a conviction under Federal law. Kona entered into a guilty plea at the time he completed his written admission of guilt and was granted admission into the diversion program. If Kona had failed to satisfactorily complete the terms and conditions of the diversion program, the case would have been determined based upon this written admission and would have then proceeded to sentencing. As this extra requirement of an extraction of an admission of guilt is required by the prosecutor, the admission of guilt is a constructive guilty plea and is subject to R.C. 2943.031 and the Due Process Clause. As a constructive guilty plea was entered by virtue of the trial court accepting the written admission of guilt and application to the diversion program, the trial court was required to provide the requisite warning as stated in R.C. 2943.031(A). Thus, the written admission of guilt was a constructive guilty or no contest plea,

and the trial court erred when it failed to provide the required warning found in R.C. 2943.031(A).

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

Appellee's new allegations that the written admission "was not a plea or admission to the indictment" belies belief. Appellee Brief at p. 11. As noted above, Kona was required to "admit his guilt, in regard to the pending charges, in a written statement" as a condition precedent to admission into the diversion program." (See Diversion Packet, attached to the Amended Motion as Exhibit A-1.) As he was accepted into the program, the Prosecutor has already deemed this written admission to be an admission of guilt to the charges that were then pending, i.e. robbery, and the prosecution is estopped from arguing otherwise. Thus, the written admission of guilt was in fact an admission to the charge by Kona.

Appellee next claims that R.C. 2943.031 only applies to formal guilty pleas or pleas of no contest and not to informal admissions of guilt. However, the statute itself states that it only would not apply where a defendant claims he/she is a citizen orally on the record or where a defendant claims he/she is a citizen in writing on a form upon which he/she is entering a guilty plea. That is it. The statute otherwise has temporal limitations (before accepting a guilty plea or plea of no contest) but no substantive legal procedure limitations exists except for the two noted above. Neither such exception applies in this case as Kona was never asked, in writing or otherwise, if he was a U.S. citizen.

Such distinction would also not be in keeping with the spirit and purpose of R.C. 2943.031. The legislative history of R. C. 2943.031 establishes that this law was enacted in response to Congressional measures limiting potential deportation relief by removing the

authority of the United States Attorney General to grant discretionary waivers to deportation. *State v. Yanez*, 150 Ohio App.3d 510, 513, 2002-Ohio-7076, 782 N.E.2d 146. Thus, the purpose of the law was to inform noncitizens of potential consequences as it pertains to deportation, exclusion and/or naturalization so that the noncitizen could knowingly, voluntarily, and intelligently enter into a plea without later surprise as to the immigration consequences of that plea. *Yanez* at 513 (finding that a plea is not knowingly, voluntarily, or intelligently made when the trial court failed to personally advise the defendant of the warning contained in R.C. 2943.031(A).)

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

R.C. 2935.36 further requires such 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.” As the court is involved with the creation and operation of the program, it is not outrageous or burdensome to require the court to provide the same warning it is required to provide to all other noncitizens who wish to enter into a plea agreement or otherwise plead guilty or no contest.

Requiring a warning to noncitizens of these same potential immigration consequences by their voluntary entry into a diversion program that requires a written admission of guilt or guilty

plea, would be keeping within the spirit and intent of both R.C. 2943.031 and R.C. 2935.36. Diversion programs are permitted by the legislature to rehabilitate “adults who are accused of committing criminal offenses and whom the prosecuting attorney believes probably will not offend again.” R.C. 2935.36(A). The purpose of a diversion program is to effect rehabilitation without the stigma of guilt. *Daher v. Cleveland*, 8th Dist. No. 48579, 1985 Ohio App. LEXIS 7511 (March 28, 1995) at dissent. As Judge Jackson noted in the dissent in *Daher*, “If a diversion program is to be effective, the collateral consequences must be less than the consequences of a conviction of the charged offense.” *Id.* A noncitizen defendant will always be deemed to have pled guilty or no contest and have been convicted of the crime charged for immigration purposes when he enters a diversion program that requires an admission of guilt, and therefore, they should, at minimum, be warned of the consequences of same.

Appellee’s argument that R.C. 2943.031 is limited to a formal plea in a courtroom and does not apply to written admission of guilt for acceptance into a diversion program, is further unpersuasive as the Court participated in this diversion program. The State would have this Court believe that the diversion program is operated without any court involvement and thus, the due process provisions and warning in R.C. 2943.031 would allegedly not be applicable. However, R.C. 2935.36 requires that the program standards be approved by the common pleas court. In this case, the court not only approved Kona’s participation in the diversion program, but also placed Kona under the supervision of the Probation Department’s Court Supervised Release Program/Diversion Unit. Journal Entry dated October 30, 2006. Furthermore, by allowing the program to require a written admission of guilt, and thus, creating a situation in which every noncitizen defendant would be convicted for immigration purposes merely by participating in the diversion program, the Cuyahoga Common Pleas Court was required to then provide the

requisite warning to all such individuals. The judiciary clearly has a role in this diversion program and for the prosecution to argue otherwise violates the separation of powers and constitutional due process. Essentially, the prosecution is sidestepping the defendant's constitutional rights to a trial by jury through a diversion program and any efforts to avoid constitutional rights of a defendant must be interpreted strictly. See, e.g., *State v. Pless*, 74 Ohio St.3d 333, 658 N.E.2d 766 (1996) (requiring strict compliance of the jury waiver statute.)

Despite allowing Kona's participation in said program and despite approving the requirements for such program, the trial court never asked Kona if he was a U.S. citizen or advised Kona of the potential immigration consequences of his admission of guilt as part of this program. As such, Kona is entitled to have the written admission of guilt withdrawn and his conviction vacated.

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

Appellee merely states that the Revised Code and Criminal Rules do not require a court to inquire into any aspect of a defendant's written admission of guilt for entry into a diversion program and thus, neither the Criminal Rules nor Revised Code would be applicable to such a program. Namely, Appellee claims that the words contained in R.C. 2935.36 and/or R.C. 2943.031 do not specifically require a trial court to ensure that a defendant knowingly, voluntarily, and intelligently enters into a pretrial diversion program. However, such an interpretation is contrary to the purposes of both R.C. 2935.36 and R.C. 2943.031, as discussed above, as well as the Criminal Rules, and such an interpretation further provides hardened criminals with more rights and protections than a person who is deemed unlikely to offend in the future, which is contrary to equal protection and due process principals.

The Prosecutor claims that pretrial diversion programs do not require any statutory or constitutional protections because they are governed by R.C. 2935.36. However, R.C. 2935.36 requires such 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.” Thus, the court is involved with the program and it is not unreasonable to require that they ask a defendant if they are a U.S. citizen and if not, provide the warning before issuing an Order allowing the defendant’s participation in a diversion program.

Furthermore, constitutional protections clearly apply to such programs or otherwise there would be no statutory requirement to “[w]aive, in writing and contingent upon the accused’s successful completion of the program, the accused’s right to a speedy trial, the preliminary hearing, the time period within which the grand jury may consider an indictment against the accused, and arraignment, unless the hearing, indictment, or arraignment has already occurred.” R.C. 2935.36(B). These waivers are required as the waiver of a constitutional, statutory, or other substantial or fundamental right, such waiver must affirmatively appear in the record. *Garfield Hts. v. Brewer*, 17 Ohio App.3d 216, 217, 479 N.E.2d 809 (8th Dist. 1984); *Cleveland v. Chebib*, 143 Ohio App.3d 295, 2001-Ohio-3130, 757 N.E.2d 1223 (8th Dist.). See also, *Monk, supra* (finding due process requirements to apply to diversion programs); *Urvan, supra* (finding that double jeopardy attaches to the successful completion of a diversion program) and *Buchanon, supra* (finding that the prosecutor's failure to recognize the defendant's rights with respect to her successful participation of the diversion program entitled the defendant to dismissal of the charges.) Thus, there is a fundamental due process right applies to diversion programs and thus, the applicable warning in R.C. 2943.031 was required to be given before the defendant could knowingly, voluntarily and intelligently enter the diversion program.

Crim.R.11, which requires that any waiver of constitutional rights by a criminal defendant be made knowingly, voluntarily and intelligently, requires strict compliance. If a court does not implement the advisement in R.C. 2943.031, then there is a potential Crim.R. 11 issue as well as constitutional issues, as the defendant is unknowingly waiving his constitutional rights. A court is required to construe a statute to avoid creating such constitutional problems. These constitutional problems are not present when a court provides the required advisement contained in R.C. 2943.031, prior to accepting any noncitizen defendant into a diversion program.

In *State v. Clark*, this Honorable Court reiterated that trial courts must “literally comply with Crim.R. 11” to avoid committing error. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462 at ¶29. As a result, “[w]hen a trial judge fails to explain the constitutional rights set forth in Crim.R. 11(C)(2)(c), the guilty or no contest plea is invalid under the presumption that it was entered involuntarily and unknowingly.” *Id.* at ¶31. The First District has found that unless a defendant is aware of the risk of deportation, the defendant cannot enter a knowing, voluntary, and intelligent plea:

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

Yanez at ¶43.

The State disingenuously claims that because R.C. 2943.031 does not contain the words “pretrial diversion program” it would not apply. The legislature may not have contemplated that a diversionary program would result in a conviction for immigration purposes because there is no requirement in the statute to provide a written admission of guilt. Such requirement is borne

solely out of the requirements proposed by the Prosecutor and accepted by the Cuyahoga County Common Pleas Court. Despite the prosecution's arguments that this Honorable Court cannot add words to the language of the statute, this Honorable Court has already added a timeliness term to this statute so as not to prejudice the prosecution. See, *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6890, 820 N.E.2d 355. Therefore, it is not unreasonable for the Court to interpret this statute to apply to constructive guilty pleas or constructive no-contest pleas, such as those that are made in the Cuyahoga County Diversion Program, so as not to prejudice defendants.

In fact, Ohio's statute is akin to the prior version of Mass. G.L. ch. 278, § 29D. The previous version of this Massachusetts statute similarly stated that it was applicable to guilty and no contest pleas. See Mass. G.L. ch. 278, § 29D (2003). The Supreme Court in Massachusetts addressed the issue of whether this version of the immigration advisement statute was applicable to similar written admissions where the advisement statute did not specifically mention admissions. See e.g. *Commonwealth v. Villalobos*, 437 Mass. 797, 777 N.E.2d 116 (2004). The 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 guilt. See e.g. *Villalobos* 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). The statute has since been amended to make clear that this interpretation is consistent with the legislative intent.

If the State's argument is examined, it has significant consequences to due process in the United States. If no due process requirements apply to diversion programs, then there is no requirement to a speedy trial, no requirement to a knowingly, voluntary and intelligent plea, no

Miranda rights, no constitutional rights and no rights against double jeopardy whenever a diversion program is involved. If the diversion program removes a defendant's due process and constitutional protections, shouldn't the defendant at the very least be made aware of what is being given up in order to enter into what is supposed to be a rehabilitative program? Luckily, Ohio Courts have already ruled that due process and constitutional protections apply with regards to diversionary programs. *Monk, supra; Urvan, supra; and Buchanon, supra.*

The State has further spuriously alleged that this case has little significance because the Cuyahoga County Court and Prosecutor have approved new requirements for the program, which include a formal plea of guilty on the record, which is then not accepted at that time by the Judge. However, if this Court adopts the State's interpretation, it will have significant consequences on the current process as well. As the program now requires an admission of guilt along with a guilty plea to be made on record, the State's contention that a strict interpretation of R.C. 2943.031 should be applied to only the items expressly noted therein is of great concern. Under the State's strict interpretation R.C. 2943.031, a trial court would only be required to provide the requisite warning when the plea is accepted and the plea is only accepted after a failure to complete the diversion program. Thus, the trial court would be under no obligation to provide the warning to any noncitizen who asserts a guilty plea on the record prior to completing the diversion program. Thus, the problem faced by Kona will continue as to any noncitizen that successfully completes the diversion program as such persons will have a conviction for immigration purposes. Furthermore, if the accused is not a U.S. citizen, there is now a record of a guilty plea made in open court along with facts sufficient to admit guilt, which will make it that much easier for the accused to be deported – without any protections to prevent same being afforded to him.

The Cuyahoga County Court and Prosecutor created the immigration issues in their diversion program by requiring a noncitizen to prepare a written admission of guilt or to appear in open court, admit their guilt, and then subject them to punishment by virtue of the restraints imposed by the diversion program, and as such, it is not unreasonable to require that the defendant be afforded with basic due process rights, including, but not limited to the required warning of R.C. 2943.031.

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.

Pursuant to Crim.R. 32.1, a court may set aside the conviction after a sentence is imposed to “correct manifest injustice.” A manifest justice is defined as “a clear or openly unjust act” or a “fundamental flaw in the path of justice so extraordinary that the defendant could not have sought redress from the resulting prejudice through another form of application reasonably available to him or her.” *State v. Lababidi*, 8th Dist. No. 96755, 2012-Ohio-267, citing *State v. Sneed*, 2nd Dist. No. 8837, 1986 Ohio App. LEXIS 5234 (January 8, 1986).

Here, it is undisputable that a conviction has occurred for immigration purposes pursuant to 8 USC 1101(a)(48)(A). In response, Appellee claims that because no formal plea was entered on the record, nothing can be vacated. However, a written statement of guilt was made, accepted by the Prosecutor and Court to allow Kona the ability to participate in a pretrial diversion program, and as the written admission of guilt and participation in the diversion program constitutes a conviction under 8 USC 1101(a)(48)(A), said written admission certainly could be withdrawn and the conviction vacated pursuant to Crim.R. 32.1. To not vacate the admission of guilt would only result in a manifest injustice to each and every noncitizen that participates in a diversion program. It is manifestly unjust that a noncitizen defendant who pleads guilty receives a warning as

to the potential immigration consequences, but that Kona, who faced the same potential immigration consequences, does not receive the warning merely because he was eligible to enter a diversion program designed to reduce the stigma of guilt for persons unlikely to reoffend.

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

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

The Appellee does not specifically address this proposition of law except to rehash the same arguments which have already been debunked above. A trial court retains jurisdiction pursuant to Crim.R. 32.1 and R.C. 2943.031(D) to withdraw a plea, vacate a conviction, to correct a manifest injustice and/or to correct the trial court's own reversible error created by its noncompliance with Crim.R. 11 and R.C. 2943.031. See R.C. 2943.031(D); Crim.R. 32.1. As shown above, a conviction has occurred resulting in manifest injustice, and thus, the trial court had jurisdiction to take action to prevent such manifest injustice.

IV. CONCLUSION

Noncitizen defendants who previously entered the diversion program in Cuyahoga County, Ohio are left without any remedy to avoid immigration consequences that attach to the program due to the arbitrary prerequisite of providing a written admission of guilt in order to enter said program, and by the failure of the courts to provide the required warning pursuant to R.C. 2943.031. These noncitizen defendants are being denied due process, are being forced to

enter pleas under duress, and are making pleas that are not knowingly, voluntarily or intelligently made due to the trial court's failure to provide the required warning concerning potential immigration consequences pursuant to R.C. 2943.031.

Today, noncitizen defendants entering into the diversion program in Cuyahoga County, Ohio are required to state their admission of facts on the record and enter a formal plea of guilty. Because the plea of guilty is not accepted by the Court at that time, under the Prosecutor and Eighth District Court of Appeal's arguments, there is no requirement to afford these parties with due process of law or provide them with the mandatory advisement contained in R.C. 2943.031. The only way to preserve due process and prevent a manifest injustice is to require that the mandatory advisement contained in R.C. 2943.031 be required to be provided to any noncitizen entering a diversion program in which the requirements to enter and/or complete said program would expose the noncitizen to possible immigration consequences.

A required written admission of guilt constitutes a guilty and/or no contest plea for Federal immigration purposes and therefore Kona was entitled to the protections of R.C. 2943.031. To hold otherwise circumvents the clear legislative intent behind R.C. 2943.031 and defeats the purpose of the diversion program. Under the State's argument, no person who enters into the diversion program has any constitutional rights without any notice or warning that they are waiving same. Thus, according to the State, it can run these diversion programs without any due process protections and without even notifying the defendant that by entering said program, they will lose all of their due process and constitutional rights. In addition to eliminating all of these important due process and constitutional rights, the State argues there should not be any requirement to even warn a noncitizen of the potential immigration consequences to such a program. This warning is essential, as in a program such as Cuyahoga County's where there is a

written admission of guilt (or now, an unaccepted guilty plea on the record) and punishment in the form of being subject to mandatory program requirements, every noncitizen participant will have a resulting conviction for immigration purposes. These noncitizens are being told that once they successfully complete this program, there will be no consequences as the case will be dismissed. Thus, the noncitizens are being misled by the Trial Court and the Prosecutor to their great detriment. The only way to allow a noncitizen to determine if entering such a program is in his or her best interests is to afford them the constitutional requirements that are supposed to be provided to every person in this country, including the necessary and required warning contained in R.C. 2943.031.

As Judge Jackson noted in the dissent in *Daher, supra*, “[i]f a diversion program is to be effective, the collateral consequences must be less than the consequences of a conviction of the charged offense.” The First District has noted that the legislature’s warning requirement provided in R.C. 2943.031 “is an acknowledgement, at least to some defendants, that the collateral consequences of a plea, namely deportation, exclusion from admission to the United States, and the denial of naturalization, may well be a more serious sanction than the imposition of a prison term.” *Yanez* at ¶29. A noncitizen defendant will always be deemed to have plead guilty or no contest and have been convicted of the crime charged for immigration purposes when he enters the diversion program in Cuyahoga County and/or any other diversion program that requires an admission of guilt, and therefore, these noncitizens should, at the very minimum, be warned of the consequences of same.

For all the foregoing reasons contained herein, in the Amicus briefs, and in Appellant’s Merit Brief, this Honorable Court should vacate the conviction, withdraw Kona’s admission of

guilt, and ensure going forward that Kona and all other noncitizen defendants in Ohio receive due process of law. To hold anything less would be manifestly unjust.

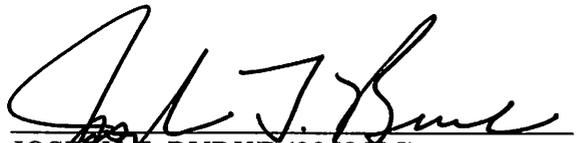
Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Joseph T. Burke". The signature is written in a cursive style and is positioned above a horizontal line.

JOSEPH T. BURKE (0052535)
MICHAEL G. POLITO, ESQ. (0051930)
Polito Paulozzi Rodstrom Burke LLP
21300 Lorain Road
Fairview Park, OH 44126
T: (440) 895-1234 | F: (440) 895-1233
josephburke@aol.com
mpolito@pprblaw.com
Counsel for Defendant/Appellant Issa Kona

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing “Defendant-Appellant Issa Kona’s Reply Brief” was forwarded via regular U.S. Mail to Timothy J. McGinty, Esq., Cuyahoga County Prosecutor T. Allan Regas and Diane Smilanick, Esq., Assistant Prosecuting Attorneys, 1200 Ontario St., 9th Floor, Cleveland, Ohio 44113, as well as the Amicus Counsel for the Concerned Ohio Immigration Attorneys: Harland D. Karp, Esq. and Tina R. Haddad, Esq., 850 Euclid Ave. #1330, Cleveland Ohio 44114 as well as Tanya Linetsky, Esq., 5001 Mayfield Rd., Suite 316, Lyndhurst, Ohio 44124; Amicus Counsel for the Ohio Association of Criminal Defense Lawyers: Russell S. Bensing, Esq., 1350 Standard Building, 1370 Ontario St., Cleveland, Ohio 44113; Amicus Counsel for American Immigration Lawyers Association, Ohio Chapter: Jennifer I. Peyton, Esq. and Daniel Natalie, Esq., 2012 W. 25th St., Suite 407, Cleveland, Ohio 44113 and Scott Bratton, Esq., 3150 Chester Ave., Cleveland, Ohio 44114 and Amicus Counsel for Cuyahoga Criminal Defense Lawyers Association: John T. Forristal, Esq. P.O. Box 16832, Rocky River, Ohio 44116; on this 23rd day of January, 2015.



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