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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2013AP646-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LEOPOLDO R. SALAS GAYTON,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District I, Affirming a Judgment of Conviction Entered by the Milwaukee County Circuit Court, Judge Dennis R. Cimpl Presiding, and from an Order Denying the Postconviction Motion, Judge Ellen R. Brostrom Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

OTHER AUTHORITIES CITED

INTRODUCTION

This case stems from a tragic accident between two drunk drivers. Leopoldo Salas Gayton entered I-94 in the wrong direction, crashed into Corrie Damske and killed her. The circuit court described Damske as a beautiful, young mother, minding her own business, tragically taken away. It repeatedly called Salas Gayton an illegal alien, highlighted his Mexican heritage, and sentenced him to the 15-year maximum term of incarceration, though he had no prior OWIs. In Wisconsin, the median term of incarceration for all OWI homicides, including those involving repeat OWI offenders, is 5 years.[1]

There are an estimated 76,000 undocumented immigrants in Wisconsin.[2] Some of them become involved in our criminal justice system, and they are entitled to due process of law. This case gives the Wisconsin Supreme Court an opportunity to establish the protocol circuit courts should follow when sentencing an undocumented immigrant. Specifically:

- A circuit court may not sentence a defendant more harshly because he is an "illegal," an "illegal alien," or an "illegal immigrant" or because of his alienage, ethnicity, or national origin.

- A circuit court may consider a defendant's immigration violation as unlawful or uncharged conduct only if it is based on accurate and reliable

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1 Eric Litke, *Scales of Justice or Roulette Wheel*? Available at: http://www.postcrescent.com/story/news/investigations/2015/11/23/judicial-sentencing-varies-wisconsin/76278810/ (last visited Dec. 14, 2015).

2 *Profile of the Unauthorized Population: Wisconsin*, Migration Policy Institute, available at: http://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/WI (last visited Dec. 18, 2015).

information and only if it reasonably relates to the sentencing decision.

The Wisconsin Supreme Court should vacate Salas Gayton's sentence and remand this case for a new sentencing hearing where the circuit court must apply these principles.

ISSUE PRESENTED

Whether a sentencing court may rely on a defendant's illegal immigrant status as a factor in fashioning a sentence; and if such reliance is improper, whether it is a structural error or subject to a harmless error analysis.

The court of appeals acknowledged that the circuit court relied upon Salas Gayton's status as an "illegal alien" from Mexico as a "minor" factor when it imposed a bifurcated sentence that included the maximum term of initial confinement. It nevertheless held that this was not an erroneous exercise of sentencing discretion. Judge Kessler filed a concurring opinion observing that, based upon the sentencing transcript, Salas Gayton could reasonably believe that the circuit court considered his immigration status a significant negative factor at sentencing, but she approved the sentence. ***State v. Salas Gayton***, No. 2013AP646-CR, unpublished slip op. ¶23 (Wis. Ct. App. Oct. 7, 2014)(App. 101).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This appeal presents an issue of first impression for Wisconsin. As suggested by this Court's decision to grant review, it is worthy of oral argument and a published decision.

STATEMENT OF THE CASE AND FACTS

The Charges and Plea

On January 6, 2011, the State filed a criminal complaint against Salas Gayton, alleging: count 1, homicide by intoxicated use of a vehicle, contrary to Wis. Stat. §§ 940.09(1)(a)1 and 939.50(3)(d); count 2, homicide by intoxicated use of a vehicle (prohibited alcohol concentration), contrary to Wis. Stat. §§ 940.09(1)(b) and 939.50(3)(d); and count 3, operating without a license - causing death, contrary to Wis. Stat. §§ 343.05(5)(b)3d (2009-10) and 939.51(3)(a). (R.2).

According to the complaint, Salas Gayton drove his vehicle in the wrong direction in the westbound lanes of I-94 in Milwaukee on the morning of January 1, 2011. He collided with the vehicle driven by Corrie Damske, and she was pronounced dead at the scene. A toxicology report showed that Salas Gayton's blood alcohol concentration ("BAC") approximately two hours and twenty minutes after the accident was .145, which is over the legal presumptive intoxication limit. (R.2).

Damske's BAC was .21—nearly 3 times the legal limit—at 7:20 a.m., the time of her death. (R.2, R. 7).[3]

The State filed an Information containing counts 1 through 3 from the complaint. Salas Gayton pled not guilty to all three counts. On May 17, 2011, the circuit court conducted

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[3] The district attorney filed a motion in limine to exclude from trial toxicology reports showing that Damske's BAC was .21. Salas Gayton pled, so the circuit court did not decide the motion. Nevertheless, under Wisconsin law, the victim's characteristics are relevant to the defendant's sentence. *See* ***State v. Gallion***, 2004 WI 42, ¶68, 270 Wis. 2d 535, 678 N.W.2d 197;. *See also* ***State v. Spears***, 227 Wis. 2d 495, ¶25, 596 N.W.2d 375 (1999)(victim's criminal record is relevant to rebut family's portrayal of her.)

a plea hearing during which Salas Gayton changed his "not guilty" plea and pled "no contest" to counts 1 and 3. Count 2 was dismissed by operation of Wis. Stat. §940.09(1m)(b). (R.4).

The Sentencing

On July 22, 2011, the Honorable Dennis R. Cimpl held a sentencing hearing. At the outset, he informed the parties that he had received a January 17, 2011 report from Dr. John Pankiewicz regarding Salas Gayton's competency, a June 29, 2011 probation department memo regarding the attempt to prepare a PSI, a restitution memo, six letters from Damske's family and friends; and a letter from Salas Gayton's fiancée. [4]

Damkse's friends and family described her as "magnificent," "beautiful," "lovely," "passionate," and devoted to her daughter, who had just turned ten. They urged the court to give Salas Gayton the maximum sentence because he is an "illegal alien," an intentional violator of American laws, a "miserable drunk," and a "killer." Consider these excerpts:

From Attorney James Friedman, a family friend:

> ***Not only was Mr. Gayton in the country illegally***, but he had no driver's license and no liability insurance so that there might be some reparation for his actions. ***He clearly availed himself of all the privileges and freedoms of being in America without being willing to assume any of the responsibilities that go along with it. He had been stopped several times by law enforcement previous to killing Corrie. Each time he escaped by***

[4]The circuit court did not include the listed letters in the record for the appeal. Thus, the court of appeals did not have them when it decided this case. The undersigned counsel was first appointed to represent Salas Gayton when his case reached the Wisconsin Supreme Court. She discovered the oversight and filed a motion to supplement the record, which this Court granted on December 9, 2015. *See* R.49-R.55.

providing phony identification. He clearly and intentionally sought never to comply with the law. Had law enforcement been able to identify him as an illegal alien, he would have been deported and this tragic accident would never have occurred.

He repeatedly and intentionally avoided law enforcement. He completely disregarded every basic requirement that applies to all of us when operating a motor vehicle. He intentionally drove around while consuming copious amounts of alcohol. He again sought to avoid law enforcement by going the wrong way on a highway and Corrie happened to be in the wrong place at the wrong time in the face of this ***purposeful law breaker who has no regard for the rights or safety of others.*** Clearly his conduct merits the most severe of punishments. In fact, the maximum penalty allowed here is nowhere near severe enough in relation to his conduct.

(App.185).

From Damske's father, Kurt Damske:

Why did Leopoldo Salas Gayton ***kill (murder)*** my daughter? ***The fact that Mr. Gayton was not even in this country legally is only a small part of the problem as I see it. He was selfish, non-law-abiding, non-empathetic, possibly miserable drunk that made choices that can kill innocents—men, women, and children. A person like him should not be allowed on the street at all.*** Be it a car or a gun, he killed and should receive the maximum penalty allowed.

(App.187).

From Peggy Lamb, Hayden's grandmother:

It is absolutely impossible to comprehend how such a horrible accident could have occurred, because:

1. ***Mr. Gaytan [sic] is in the United States illegally and therefore already a criminal.***

2. Mr. Gayton had been apprehended several times for past driving violations and was ***never turned over to immigration authorities.***

3. ***Mr. Gaytan has no regard or respect for the laws of our country and our community.***

4. ***Mr. Gayton had no right to not only live, work and drive in our country***; he certainly did not have the right to be indifferent to the safety and well being of others.

5. ***If Mr. Gayton had been turned over to the proper immigration authorities, he would not have been driving the wrong way on I-94 while intoxicated on January 1, 2011—as he would have been previously deported back to his own country.***

(App.188-189).

From Damske's sister, Jennifer Damske:

> ***[Leopoldo] was so intoxicated that he stated he didn't remember the accident. Judge Cimpl, drunk driving is not acceptable.*** Add homicide to that and it deserves nothing less than the max sentence. He took a life and put countless others in danger, including himself, with his actions . . . ***He couldn't even remember the accident! That is appalling. Please give my family and Corrie's loved ones some satisfaction and bring this man to justice. People need to know that drunk driving will not be tolerated. It kills!***

(App.192).

The circuit court said that it had reviewed all of the letters submitted. (App. 125-126). Then the district attorney argued for a "substantial period of confinement" because Salas Gayton killed "a beautiful, loving mother. She was 34

years old." (App.132). Damske, he said, "was a woman who simply was driving on the freeway." (App.131). He stressed: "She was secure in the fact that she was traveling properly in the right lane when something happened that could make any of us victims of a homicide, and that is that the defendant made a choice, perhaps because he was intoxicated not a knowing choice; but he made a choice to get on the freeway and drive the wrong way." (*Id*.) "The defendant's blood alcohol level was .145, close to twice the amount of the legal limit allowed in the State of Wisconsin for a prima facie case of intoxication," he emphasized. (App.132-133). He pointed out that Salas Gayton had previously been convicted of two violations for driving without a license. (App.133-134).

Then Damske's mother spoke at the sentencing hearing. She described how awful it was to lose her daughter and for her granddaughter to lose her mom. She also stated that "Mr. Gayton made a choice, a choice to live for years ***in this country without citizenship.***" (App.142). (Emphasis supplied). She noted that this was one of his choices that claimed the life of her daughter. (*Id*.)

Next, Michelle Friedman, Damske's friend and the wife of James Friedman, addressed the court. Among other things, she said:

> This is the moment in [sic] truth in sentencing, and what does a man who killed [Damske] ***in exchange for easy drink and selfish and irresponsible conduct deserve***? We cannot contemplate that he was down on his luck, has a fifth-grade education, is an alcoholic or any other excuse one might give.
>
> Killing Cory [sic] was ***not his first act of lawlessness***. It was just one of a series of times for which he was caught. ***He had no intentions [sic] of complying with the laws in this country, and that was proven when his feet hit U.S. soil as an illegal immigrant.***

> At the time of this homicide, he had no license, no insurance and ***no intention of respecting the law that governs our country***.
>
> ***He came to this country and availed himself of the privileges we provided to our citizens, but he had no intentions to [sic] complying with our laws. Then he stepped up his lawlessness by killin***g a productive, passionate, beautiful and loving individual . . .
>
> [W]e have the power in this case to not only issue a stiff sentence but also ***make a strong statement about*** the tragedy and pain caused by ***drinking and driving***.

(App. 146-147). (Emphasis supplied). She continued:

> The issue of punishment is one that some judges are remiss to do in similar cases and give him the maximum. 15 years in prison and after that ***swift deportation is a well-deserved punishment. . .***
>
> A punishment of less than the maximum, 15 years in jail and 10 years supervision, ***a/k/a deportation,*** would also unduly depreciate the seriousness of this crime.

(App. 148). (Emphasis supplied).

Then defense counsel spoke and stressed that Salas Gayton has no prior convictions. He has held a job and contributed to the community ever since he arrived in the United States. He has never applied for or received government aid. He did have a drinking problem but he found sobriety and had been involved in a program to help others stop drinking. (App.157-159).

Counsel noted that Salas Gayton had a prior municipal citation and misdemeanor conviction for driving without a license, but this was his first time in court for drinking and driving. (App.161-162). She noted that this offense is "committed across the board in the community by people of

all ages, races, background, citizens and non-citizens alike." (App.152). She pointed out that Salas Gayton had an almost completely clean criminal record, a point that the district attorney stipulated to. (App.154-156). She stressed:

> So to say that he had no intention of following the laws of this country and basically has broken every law that he had an opportunity to do, it's just not true, Your Honor.

(App.154).

Defense counsel argued that Salas Gayton's non-citizen status was irrelevant to the court's sentencing decision, but the court disagreed:

> Ms. Johnson: ***The fact as I see it that Mr. Salas is not a citizen in my opinion, as it relates to this case, is not terribly relevant. He came—***
>
> The Court: ***It goes to character***.
>
> Ms. Johnson: I agree. He did come to this country to work. He has positively supported himself in the community. For the most part, he stayed out of the criminal justice system. ***To say that he does not value our laws [and has] been a detriment to the community, I don't think is an honest statement.***

(App.160). (Emphasis supplied).

Counsel said that she had done research regarding the sentences given in similar cases and found that defendants had received probation with substantial condition time and community service. (App.163). She asked for two years of initial confinement with extended supervision left to the court. (App.163).

Next, the mother of Salas Gayton's fiancée spoke to the court. She explained that Salas Gayton was in love with

her daughter. He had been sober for 3.5 years but he and her daughter had had a disagreement on New Year's Eve (just before the accident), and he began to drink. (App.164-168). The court again interrupted:

> The Court: Well, according to the report that I got from Dr. Pankiewicz, he is married to somebody. ***His wife is in Mexico.***

(App.165). (Emphasis supplied). Salas Gayton explained that he had never married. (*Id*.)

Salas Gayton told the court that he used to live on the streets of Milwaukee until someone helped him find a job, a place to sleep and a church to attend. Just as someone helped him, he started to help others. (App.169-170). He begged for forgiveness. At the time of the accident, he was not even aware that he was driving. He said: "I never thought I could feel so much pain for something I did, for something I did and caused, I'm truly sorry because I drank again." (App.170).

Finally, the court began its sentencing decision, noting that it had to address restitution (which it considered easy), but the other objectives were not.

> The other goals are punishment, deterrence. That means sending a message to you, Mr. Salas as well as everybody in the community that you just can't get behind a wheel of [sic] car, 4,000 pounds, a 4,000 pound weapon, if you're intoxicated without suffering consequences. That's deterrence.
>
> Then the last goal is rehabilitation, and that's somewhat hampered in your case by your status. Because ***I don't know what the United States government is going to do with you when this sentence is over. I don't know if they're going to deport you.*** I have no power in that regard.

(App.171). (Emphasis supplied).

Highlighting the serious nature of the crime, the court said: "A young woman is dead, 34 years old, ***beautiful***, ***out on the first day of the year driving. Minding her own business*** and tragically taken away from us." (App.172)(emphasis supplied).

> There is a reason we have licenses in this country and all the world, and that is we just don't let anybody get behind that automobile which can be a weapon.
>
> Mr. Williams [district attorney] said in your state you might have been better shooting a gun at the freeway. You probably would have missed everybody, rather than aiming the weapon that you did.

(App.172).

The court recounted that Salas Gayton had been driving with a .145 BAC. Afraid that he would be stopped, he inadvertently entered the highway heading the wrong direction, and traveled for about a mile at 50 mph. (App.172-173). The court added:

> ***The fact that you're an illegal alien doesn't enter into the serious nature of the crime or the need to protect the community. It goes to character. It's a minor character flaw very honestly.***

(App.173). (Emphasis supplied).

The court told Salas Gayton to look around the courtroom because four major television stations had cameras there. "They want to know what happens to somebody who takes a car, a weapon, and drives drunk and kills somebody . [I]f I had one wish, what I would ask is that the television stations say, you drive drunk, first time, second time, third time, fourth time, fifth time, you go to prison." (App.174). The court said that Salas Gayton did not intend to kill the victim but that he did intend to drive drunk. (App.175).

Turning to the matter of Salas Gayton's character, the court said:

> ***You're from the nation of Mexico. You've got a 5th grade education. You're in this country for 13 and half years, Milwaukee for two years. You've got three kids in Mexico.***
>
> * * *
>
> You've got sporadic employment, trying to better yourself. ***That's why you're in this country. Although you're here illegally, it's a factor, a minor factor, but it goes to your character.***

(App.176). (Emphasis supplied).

Later the court said:

> ***[Ms.] Johnson correctly stated that [drinking] never interfered in his life. Never had a serious enough crime for us to try and intervene. But he could have done that on his own, even as an illegal in this country.***
>
> ***There's plenty of places on the south side of Milwaukee that cater to Latinos*** that would help them with their drinking problems. He could have done it on his own. He didn't.

(App.178). (Emphasis supplied).

> When you get out, ***if you're allowed to be in this country,*** you will seek and maintain full-time employment. While you're in prison get yourself a GED or HSED; so that even if you're not allowed back in this country and ***you go back to Mexico***, you have those skills.

(App.179). (Emphasis supplied).

On count 1, the court imposed 22 years imprisonment (15 years initial confinement/7 years extended supervision).

On count 3, it imposed 9 months imprisonment to be served concurrently.[5] (App.180).

The Postconviction Decision

Salas Gayton filed a Wis. Stat. § 809.30 postconviction motion for plea withdrawal arguing that the circuit court failed to properly advise him of the immigration consequences of his "no contest" pleas by deviating from the immigration advisement mandated by Wis. Stat. § 971.08(1)(c) and that he would likely be deported and excluded from admission to the United States because of his pleas. (R.29).[6] Alternatively, Salas Gayton moved for resentencing on the grounds that the circuit court did not explain why it imposed the maximum period of initial confinement contrary to ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197 and ***McCleary v. State***, 49 Wis. 2d 263, 182 N.W.2d 512 (1971). Lastly, he challenged the DNA surcharge imposed. (R.29). The court denied the postconviction motion without a hearing, held that the sentencing record fully complied with ***Gallion***, and set forth a sufficient rationale for imposing a DNA surcharge. (App.114-117).

The Court of Appeals Decision

Salas Gayton appealed and raised the same issues but stressed the sentencing court's improper reliance on the fact that he is an "illegal alien." The court of appeals held that the circuit court: (a) did not erroneously exercise its discretion in sentencing Salas Gayton, (b) did not improperly refer to or

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[5] For count 1, the maximum term of imprisonment is 15 years of initial confinement and 10 years of extended supervision. For count 3, the maximum term of imprisonment is nine months.

[6] Salas Gayton's counsel withdrew this particular issue from his appeal after the court of appeals decided ***State v. Mursal***, 2013 WI App 125, 351 Wis. 2d 180, 839 N.W.2d 173.

rely upon Salas Gayton's "status as an alien" as an aggravating sentencing factor, and (c) gave a sufficient reason for imposing a DNA surcharge upon Salas Gayton. (App.101-112).

Judge Kessler, concurring, noted that Salas Gayton could reasonably believe that the court considered his immigration status "a ***significant negative factor*** when imposing his sentence." (App.113). (Emphasis supplied). She said that the court of appeals is "increasingly" seeing "appeals claiming error in sentencing based on the sentencing court's multiple referrals to a defendant's race, ethnicity or immigration status." (App.113). Thus, she cautioned:

> Sentencing courts should be cognizant that defendants may perceive judicial impropriety in sentencing when multiple comments based on race, ethnicity or immigration status are made. When the perception of bias reasonably exists, the perception of fairness suffers, to the detriment of the judicial system as a whole.

(App.113).

Salas Gayton filed a petition for review that challenged all three holdings by the court of appeals. This Court granted review on one issue, which it framed for itself. (App.198).

ARGUMENT

I. Definition of Terms and General Principles of Immigration Law.

There is little Wisconsin case law regarding the intersection between immigration and criminal law. Some definitions and basic principles are thus helpful to understanding the issue in this case.

Foreigners who live in the United State without authorization or documentation are sometimes called "unauthorized immigrants," "undocumented immigrants," "illegal immigrants," "illegal aliens" and other names.[7] These terms obviously have two parts: an adjective and a noun (alien or immigrant). "Alien" according to the Department of Homeland Security and the Immigration and Nationality Act, means "any person not a citizen or national of the United States."[8] "Immigrant" means "every alien" except those who fall into certain classes of nonimmigrant aliens. 8 U.S.C. § 1101(15). All of the terms signify alienage or a person having a national origin other than the United States, *i.e.* a foreigner.

According to the Pew Research Center, there are over 11 million "unauthorized immigrants" in the United States.[9] It is estimated that nearly half of them entered the United States legally with, for example, visas or border crossing cards, and later violated the terms of their admission. The other half are believed to have evaded immigration inspectors and border patrol.[10] Thousands of "illegal immigrant" children arrive in

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[7] A concurrence to the order granting review in this case calls for the Wisconsin Supreme Court to refrain from using the term "illegal immigrant" because it is pejorative and attempts to define a person rather than his conduct. (App.200). Consistent with this view, the Associated Press recently changed its style book for authors. Now "illegal" may be used to describe conduct, not people. https://blog.ap.org/announcements/illegal-immigrant-no-more (last visited Dec. 8, 2015). One recent U.S. Supreme Court opinion uses the term "unauthorized alien." ***Arizona v. U.S***., __U.S.__, 132 S.Ct. 2492 (2012). Another uses "undocumented immigrants." ***Mohawk Industries, Inc. v. Carpenter***, 558 U.S. 100, 103 (2009).

[8] *See* http://www.dhs.gov/definition-terms (last visited Dec. 8, 2015) and 8 U.S.C. § 1101(3).

[9] *See Unauthorized Immigrants: Who they are and what the public thinks*, http://www.pewresearch.org/key-data-points/immigration/ (last visited Dec. 8, 2015).

[10] *See Modes of Entry for the Unauthorized Migrant Population*, http://www.pewhispanic.org/2006/05/22/modes-of-entry-for-the-unauthorized-migrant-population/ (last visited Dec. 8, 2015).

the United States each month—many brought here by their families.[11] In 2014, Mexicans made up about half of "unauthorized immigrants" in the United States.[12]

The terms "illegal immigrant" and "illegal alien" carry pejorative connotations. They suggest a "diminution of personhood" and are "particularly associated with racism toward Mexicans and other Latinos and Latinas." Mae Ngai, ***Impossible Subjects: Illegal Aliens and the Making of Modern American***, Note on Language and Terminology XIX, Princeton University Press 2004.[13] The Urban Dictionary defines an "illegal immigrant" as, among other things, "an illegal alien," "a criminal," "a selfish and/or cowardly person unwilling to positively change the socio-economic and political problems in his/her own country in order to benefit everyone, including him/herself, and thus runs away to another country to hide."[14] It defines an "illegal alien" as "one who resides in the country without papers. PC term is undocumented worker. Cf. wetback, mojado."[15]

The concept of an "illegal alien" is so negatively charged, that, in personal injury cases, the Wisconsin Supreme Court will not allow a jury to hear that the plaintiff

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[11] *See Influx of Central American Teen and Family Arrivals Continues*, available at: http://cis.org/vaughan/influx-central-american-teen-and-family-arrivals-continues (last visited Dec. 8, 2015).

[12] *See What We Know About Illegal Immigration from Mexico* http://www.pewresearch.org/fact-tank/2015/11/20/what-we-know-about-illegal-immigration-from-mexico/ (lasted visited Dec. 8, 2015).

[13] *See also The Evolution of the Immigration Term: Alien*, available at: http://www.npr.org/2015/08/19/432830934/the-evolution-of-the-immigration-term-alien (last visited Dec. 22, 2015).

[14] *See* http://www.urbandictionary.com/define.php?term=illegal+immigrant (last visited Dec. 8, 2015).

[15] *See* http://www.urbandictionary.com/define.php?term=illegal+alien (last visited Dec. 8, 2015). It defines a "wetback as "a derogatory term used to describe Mexicans who have immigrated illegally to the United States by swimming or wading across the Rio Grande . . ." *Id.*

is an "illegal alien" from Mexico, even though that fact is relevant to the calculation of lost future earnings and life expectancy. Such evidence is too prejudicial. ***Gonzalez v. City of Franklin***, 137 Wis. 2d 109, 138-143, 403 N.W.2d 747 (1987).

Like-minded courts explain that immigration status is a "highly charged area of political debate," and the probative value of illegal immigrant status is low while the prejudicial effect is high. ***Republic Waste Services, Ltd v. Martinez***, 335 S.W.2d 401, 409 (Tex. Ct. App. 2011); *see also* ***Salas v. Hi-Tech Erectors***, 168 Wash.22d 664, ¶20, 230 P.2d 583 (2010)(immigration status is a politically sensitive issue that can inspire passionate responses rather than reasoned deliberation). In fact, many courts hold that "[i]mmigration status alone does not reflect upon an individual's character and thus is not admissible for impeachment purposes." ***Ayala v. Lee***, 215 Md.App. 457, 480, 81 A.3d 584 (2013)(see cases cited therein). *See also*, American Bar Association, ***A Judge's Guide to Immigration Law in Criminal Proceedings***, 3-23 to 3-25 (P. Goldberg and C. Wolchok eds. 2004).[16]

Congress made improper entry into the United States a misdemeanor punishable by up to 6 months in prison and/or a $250 fine. 8 U.S.C. §1325(a) & (b). It is considered a petty offense. ***Blanton v. City of North Las Vegas, Nev***., 489 U.S. 538, 542-543 (1989). By comparison, reusing a postal stamp that has passed through the mail without being cancelled is punishable by up to one year in jail. *See* Gabriel Chin, ***Illegal Entry as a Crime, Deportation as Punishment: Immigration Status and the Criminal Process,*** 58 UCLA L. Rev. 1417, 1449 (2011) (citing 18 U.S.C. §1820).

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[16] Exceptions are made where the witness opens the door to such evidence or where exclusion of the evidence violates the defendant's right to confrontation.

The fact that a person once entered the United States improperly does not mean that he is in a perpetual state of illegality. Improper entry is not a continuing offense. ***U.S. v. Cores***, 356 U.S. 405, 408 n.6 (1958). "As a general rule, it is not a crime for a removable alien to remain in the United States." ***Arizona v. U.S.***, __U.S.__, 132 S.Ct. 2492, 2505 (2012). Nor is it a crime for undocumented immigrants to engage in unauthorized work. ***Id***. at 2504 (noting that it is a crime for *employers* to hire undocumented immigrants).

Whether they are deportable or not, undocumented immigrants have the right to due process and equal protection under the Fourteenth and Fifth Amendments to the United States Constitution:

> Whatever his status under the immigration laws, an alien is surely a "person" in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as "persons" guaranteed due process of law by the Fifth and Fourteenth Amendments.

Plyer v. Doe, 457 U.S. 202, 210 (1982); *see also* ***Yick Wo v. Hopkins***, 118 U.S. 356, 369 (1886).

Because undocumented immigrants are entitled to equal protection, they cannot be discriminated against on the basis of national origin. Citizenship and national origin are closely related concepts. Thus, the U.S. Supreme Court recognizes that discrimination on the basis of citizenship can have the effect of discrimination on the basis of national origin. ***Espinoza v. Farah Mfg. Co., Inc***. 414 U.S. 86, 92 (1973). This is especially true for Mexicans, who as noted above, comprise the largest share of the undocumented immigrants in the United States. *See* Leticia M. Saucedo, ***Mexicans, Immigrants, Cultural Narratives, and National Origin***, 44 Ariz. St. L.J. 305 (2012).

II. The Circuit Court Erred in Sentencing Salas Gayton More Harshly Because He Is an "Illegal Immigrant."

A. Standard of review and law governing sentencing.

An appellate court generally presumes that a circuit court's sentencing decision is reasonable and reviews it for an erroneous exercise of discretion. ***Gallion***, ¶17. A proper exercise of discretion is based on "facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded on proper legal standards." ***Id***., ¶19 (citing ***McCleary*** at 277).

"A defendant has a constitutional right to a fair sentencing process 'in which the court goes through a rational procedure of selecting a sentence based on relevant considerations and accurate information.'" ***State v. Travis***, 2013 WI 38, ¶17, 347 Wis. 2d 142, 832 N.W.2d 491. A sentencing decision based upon inaccurate information violates due process of law ***Id***. A sentencing decision based upon race, gender, national origin or stereotypes also violates due process of law. ***State v. Harris***, 2010 WI 79, ¶¶32, 33 n.9, 71, 326 Wis. 2d 685, 786 N.W.2d 409; *see also* ***State v. Alexander***, 2015 WI 6, ¶23, 360 Wis. 2d 292, 858 N.W.2d 662. Whether a defendant has been denied due process at sentencing is a constitutional question that an appellate court reviews de novo. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1.

When sentencing a defendant, a court is to consider the gravity of the offense, the protection of the public, the rehabilitative needs of the defendant, and other applicable

mitigating or aggravating factors. ***Gallion***, ¶41.[17] A court must identify which of these sentencing objectives is of greatest importance and "explain, in light of the facts of the case, why the particular component parts of the sentence imposed advance the specified objectives." ***Id***. ¶43. "By stating this linkage on the record," a court produces a sentence that can be more easily reviewed for a proper exercise of discretion. ***Id***. ¶43.

B. The circuit court denied Salas Gayton due process of law by relying on improper factors when sentencing him.

When a defendant asserts that a sentencing court relies on an improper factor or inaccurate information he must show more than that a reasonable observer would see it that way. He must show that the sentencing court "actually relied" on the factor. ***Harris***, ¶39. A circuit court "actually" relies on an improper factor when it gives "explicit attention" or "specific consideration" to it so that the factor "formed part of the basis for the sentence." ***Travis***, ¶28. A circuit court need not state

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[17] Non-statutory factors that a sentencing court may consider include:

> (1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention.

Gallion, ¶43 n.11.

that it actually relied on an improper factor in order for an appellate court to conclude that it did. ***Id***., ¶30.

In this case, "actual reliance" is not at issue because the circuit court explicitly stated on the record that Salas Gayton's noncitzenship was relevant because it goes to his character, that his status as an "illegal alien" "goes to character" and is a "minor character flaw," and that his presence "here illegally [is] a minor factor, but it goes to [his] character." (App.160, App.173, App.176).

These explicit statements are just the tip of the iceberg. The sentencing record is saturated with references to Salas Gayton's alienage, Mexican national origin, and "illegal alien" or "illegal" status. In their letters and statements to the court, the victim's family and friends referred to his alienage and called him an "illegal alien" in at least 19 separate sentences. To defuse the stereotypes they invoked, defense counsel referred to Salas Gayton's citizenship and reasons for coming to this country in 10 separate sentences. Salas Gayton alluded to the fact that he is not from the United States once. And the court referred to Salas Gayton's citizenship status, "illegal alien" status, alienage, Mexican national origin, and Latino heritage in 16 different sentences. Thus, at least 46 sentences in the sentencing record mention Salas Gayton's alienage or national origin. The information so permeated the proceeding that "actual reliance" is a given. *See* ***Travis***, ¶44 (actual reliance found where court mentioned inaccurate information four times at sentencing and four times at plea hearing).

1. The circuit court improperly relied upon alienage or "illegal alien" status as aggravating sentencing factors.

Though Wisconsin has not yet addressed this issue, decisions from other jurisdictions hold that a court may not

impose a more severe sentence based on a defendant's alienage[18] or status as an "illegal immigrant" or "illegal alien":

U.S. v. Leung, 40 F.3d 577, 586-587 (2d Cir. 1994)(appearance that defendant's ethnicity and alien status played a role in determining her sentence required resentencing).

State v. Mendoza, 638 N.W.2d 480, 482-483, 484 (Minn. Ct. App. 2002)("Sentencing a defendant on the basis of alienage is unconstitutional.")

State v. Zavala-Ramos, 116 Or. App. 220, 222-223, 840 P.2d 1314 (Or. Ct. App. 1992)("defendant's current illegal immigration status cannot, *per se*, be considered to be an aggravating factor" at sentencing.)

Yemson v. U.S., 764 A.2d 816, 819 (D.C. Ct. App. 1991)("Because even an illegal alien has a right to due process, a court imposing a sentence in a criminal case may not treat the defendant more harshly than any other defendant 'solely because of his nationality or alien status.'")

U.S. v. Gomez, 797 F.2d 417, 419 (7th Cir. 1986)(if misused at sentencing, defendant's status as illegal alien from a Latin American country could violate constitutional protections).

U.S. v. Borrero-Isaza, 887 F.2d 1349, 1352 (9th Cir. 1989)("the government agrees that a sentencing court cannot impose a more severe sentence on the sole basis of a defendant's alienage or nationality").

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[18] Again, according to the Department of Homeland Security, an "alien" is a person who is not a citizen or national of the United States. *See* http://www.dhs.gov/definition-terms (last visited Dec. 8, 2015) and 8 U.S.C. § 1101(a)(3).

U.S. v. Velasquez-Velasquez, 524 F.3d 1248, 1253 (11th Cir. 2008)("a judge may not impose a more severe sentence than he would have otherwise based on unfounded assumptions regarding an individual's immigration status or his personal views of immigration policy.")

U.S. v. Onwuemene, 933 F.2d 650, 652 (8th Cir. 1991)(remand for resentencing because "consideration of [the defendant's] alien status, however, violated his constitutional rights.")

In this case, the circuit court "specifically considered" and gave "explicit attention" to Salas Gayton's alienage or status as an "illegal alien" as "minor" aggravating factors in fashioning a sentence. That was a constitutional error. The Court should therefore vacate Salas Gayton's sentence and remand the case for a new sentencing hearing.

2. The circuit court improperly relied on national origin as an aggravating sentencing factor.

This court has stated—in no uncertain terms—that it is improper for a circuit court to consider a defendant's national origin at sentencing. ***Alexander***, ¶23 (citing ***Harris***, ¶33 n.9). In the United States, the labels "illegal," "illegal alien" and "illegal immigrant" implicate the Mexican nationality because Mexicans comprise the largest single group of immigrants in the United States. Indeed, here in Wisconsin, they comprise 76% of the undocumented immigrant population.[19]

[19] *What we know about illegal immigration from Mexico*, available at: http://www.pewresearch.org/fact-tank/2015/11/20/what-we-know-about-illegal-immigration-from-mexico/ (last visited Dec. 20, 2015).

Even if the label "illegal alien" can be applied to persons of other nationalities, the sentencing court here meant it to refer to Mexicans. At the sentencing hearing, no one—other than the court—referred to Salas Gayton's nationality. Neither Damske's family and friends, nor the district attorney, nor defense counsel, nor Salas Gayton referenced his Mexican or Latino heritage. The court sua sponte mentioned that Salas Gayton is from Mexico or is Latino at least 5 times. In doing so, it blended his "illegal alien" status with his national origin. If there is any doubt on this point, then simply reread the sentencing transcript and substitute the words "Great Britain" and "British" or "Switzerland" and "Swiss" for the words "Mexico" and "Mexican." The result looks absurd because in the United States the label "illegal alien" or "illegal" is not associated with persons from Great Britain or Switzerland. It is associated with Mexicans and Latinos. In this case, the court's references to Salas Gayton's status as an "illegal alien" or an "illegal" were inextricably intertwined with his national origin.

Pursuant to ***Harris*** and ***Alexander***, the circuit court's reliance on Salas Gayton's national origin at sentencing was a constitutional error. The Court should therefore vacate Salas Gayton's sentence and remand the case for a new sentencing hearing.

3. The circuit court invoked a stereotype as an aggravating sentencing factor.

"[S]tereotypes constitute improper sentencing factors, and if a circuit court considers them when imposing a sentence, it has erroneously exercised its discretion" ***Harris***, 326 Wis. 2d at ¶71 (Bradley, J dissenting, but noting that the majority agreed with this principle). Calling someone an "illegal" or an "illegal alien" is a slur that invokes a stereotype associated with Latino (usually Mexican) criminals who sneak across the border to take American jobs or

freeload off of taxpayers.[20] As noted in Argument I *supra*, this Court recognizes that "illegal alien" status is so negative, so prejudicial that it will not allow a jury to know that a personal injury plaintiff is an "illegal alien" even though that information would be relevant to the calculation of lost future earnings and life expectancy. ***Gonzalez***, 137 Wis. 2d at 138-143.

The letters and statements offered in support of Damske invoke the "illegal alien" stereotype loudly and clearly. They make disparaging assumptions like:

> ***Not only was Mr. Gayton in the country illegally, but he had no driver's license and no liability insurance so that there might be some reparation for his actions.***[21] ***He clearly availed himself of all the privileges and freedoms of being in America without being willing to assume any of the responsibilities that go along with it.***[22]
>
> ***He clearly and intentionally sought never to comply with the law. Had law enforcement been able to***

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[20]Charles Garcia, *Why 'illegal immigrant' is a slur*, available at: http://edition.cnn.com/2012/07/05/opinion/garcia-illegal-immigrants/ (last visited Dec. 15, 2015).

[21] Many states permit undocumented immigrants to obtain driver's licenses to ensure that they know how to drive safely and to permit them to obtain insurance for car accidents. Wisconsin is not one of those states. *Ten States (and DC) that Allow Driver's Licenses for People in the Country Illegally*, available at: http://immigration.procon.org/ view.resource.php?resourceID=005535 (last visited on Dec. 20, 2015).

[22]It is unknown what privileges and freedoms the author is referring to. However, undocumented immigrants commit fewer crimes than American citizens. Because they pay taxes but are not entitled to welfare and other benefits, they contribute $12 billion to Social Security annually. Ruth Marcus, *False Assumptions Underlying Trump's Immigration Plan*, The Washington Post, August 18, 2015, available at https://www.washingtonpost.com /opinions/trump-flunks-immigration/ 2015/08/18/f6f7756c-45cb-11e5-8ab4-c73967a143d3_story.html (last visited Dec. 12. 2015).

> ***identify him as an illegal alien, he would have been deported and this tragic accident would never have occurred.***[23]

(James Friedman letter, App.185-186).

> ***He was selfish, non-law-abiding, non-empathetic, possibly miserable drunk that made choices that can kill*** innocents—men, women, and children. A person like him should not be allowed on the street at all.[24]

(Curt Damske letter, App.187).

> ***Mr. Gaytan [sic] is in the United States illegally and therefore already a criminal***.[25]
>
> ***Mr. Gaytan has no regard or respect for the laws of our country*** and our community.
>
> ***Mr. Gayton had no right to not only live, work and drive in our country;***[26]
>
> ***If Mr. Gayton had been turned over to the proper immigration authorities, he would not have been driving the wrong way on I-94 while intoxicated on January 1, 2011—as he would have been previously deported back to his own country.***

(Peggy Lamb letter, App. 188).

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[23] Actually, federal officials exercise discretion in how they enforce immigration law. Unauthorized workers trying to support their families are less of a priority than those who commit smuggling or other serious crimes. ***Arizona v. U.S.***, 132 S.Ct. at 2499.

[24] Salas Gayton made the same poor choice that many American citizens make. He drove a car while he was intoxicated.

[25] Salas Gayton's presence in the United States is not an ongoing crime. *See* ***U.S. v. Cores***, 356 U.S. 405, 408 n.6 (1958); ***Arizona***, 132 S.Ct. at 2505.

[26] An undocumented immigrant may live and work in the United States without committing a crime. ***Id***.

> ***He had no intentions [sic] of complying with any of the laws of this country, and that was proven when his feet hit U.S. soil as an illegal immigrant***.
>
> ***He came to this country and availed himself of the privileges we provided to our citizens***[27]***, but he had no intentions to [sic] complying with our laws. Then he stepped up his lawlessness by killing*** . . .

(Michelle Friedman letter, App.146-147).

The circuit court called Salas Gayton an "illegal" and an "illegal alien." In fact, it went so far as to call his "illegal alien" status a "character ***flaw***." In doing this, the court echoed and validated the stereotypes invoked by Damske's family and friends. The circuit court's invocation of a stereotype as a sentencing factor was a constitutional error under ***Harris***. This Court should therefore vacate Salas Gayton's sentence and remand the case for a new sentencing.

4. If the circuit court was attempting to equate "illegal alien" status with prior unlawful or uncharged misconduct, then it did so improperly.

When sentencing a defendant, a court may consider his prior criminal history, including uncharged or unproven offenses, facts related to offenses for which the defendant has been acquitted, and charges that are dismissed as a result of a plea bargain, unless these assertions are groundless or unreliable. ***State v. Frey***, 2012 WI 99, ¶¶47-48, 343 Wis. 2d 358, 817 N.W.2d 436.

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[27] Again, it is unclear what privileges this author is referring to. However, the only evidence in the sentencing record on this subject is that Salas Gayton has never applied for or received government aid. (App. 158).

Although Wisconsin has not addressed the issue, in some jurisdictions courts may consider a defendant's unauthorized entry as prior unlawful conduct. *See e.g.* ***Gomez***, 797 F.2d at 420 (Gomez entered country to engage in drug trafficking and "admitted in open court that his entry into this country had been illegal. That illegal act is no different than any other recent prior illegal act of any defendant being sentenced for any offense."); ***Zavala-Ramos***, 116 Or. App. at 223 ("Immigration status per se is not relevant. However, circumstances that demonstrate a defendant's unwillingness to conform his conduct to legal requirements, whether or not there are criminal consequences, may be."); ***Yemson v. U.S.***, 764 A.2d at 819 (illegal alien cannot be sentenced more harshly due to nationality or alien status, but court can consider his prior violations of immigration law that "reasonably bear on the sentencing decision.")

In this case, the circuit court did not refer to Salas Gayton's "illegal alien" status as prior unlawful conduct. It did not say that Salas Gayton's entry into this country 14 years ago was a misdemeanor or a petty offense or reasonably related to the OWI homicide for which he was being sentenced. It did not mention Salas Gayton's entry into the United States even once during its sentencing rationale. (App.170-180). If the court meant that an immigration violation can be considered prior unlawful conduct, then it had to identify that factor on the record and state how that factor fit the sentencing objectives and influenced the ultimate decision. ***Gallion***, ¶43. It did not do so.

In reality, the court had little information about Salas Gayton's entry into the United States or immigration status at the time of sentencing. It heard the unsupported assertions made by Damske's family and friends during a very emotional victim allocution. And it heard defense counsel acknowledge that Salas Gayton is not a citizen and that he

came here to work almost 14 years ago. The court made no further inquiries on this subject. Instead, it repeatedly called Salas Gayton an "illegal alien," thereby echoing the unfounded assumptions made by Damske's supporters. A sentence based upon a materially untrue assumption violates due process and cannot stand. ***Tiepelman***, ¶10 (citing ***Townsend v. Burke***, 334 U.S. 736 (1948) and ***U.S. v. Tucker***, 404 U.S. 443, 447 (1972)).

As a practical matter, state sentencing courts are in no position to decide whether a person entered the United States illegally or what his immigration status is for two reasons. First and foremost, the field is preempted by federal law. Congress has invested the authority to determine immigration status exclusively in the Secretary of the Department of Homeland Security. The Secretary may delegate that power to officials under his supervision. *See* 8 U.S. C. § 1103. But state authorities do not have the jurisdiction to regulate immigration questions. ***Arizona v. U.S***., __S.Ct. at 2506-2507.

Second, a person's "immigration status" depends upon many variables. Unlawful presence can occur without unlawful entry. It is estimated that up to 40% or more of the unauthorized migrants in the United States entered lawfully on a visa (as a tourist or a student or for short term employment purposes) and then simply stayed beyond the term of the visa. Those persons are present unlawfully but they never committed a criminal violation because their entry was lawful. Their only violation of law is civil, not criminal. *See supra* Argument Section I.

Furthermore, without fact finding (by a tribunal with jurisdiction) it is hard to know whether an undocumented immigrant is present in the United States in violation of civil law. Some undocumented immigrants may not realize that they have a legal basis to stay in the United States. For

instance, they may have a claim of political asylum. 8 U.S.C. § 1158. Or they may have right to remain here under the Violence Against Women Act (which allows spouses of both genders to remain in the United States). 8 U.S.C. § 1229b(2). Or they may have a right to stay because they are victims of certain crimes. 8 U.S.C. § 1101(a)(15)(U).

The point is that sentencing courts should not be permitted to just cite "illegal entry" or "illegal alien" or "illegal immigrant" as shorthand references for prior unlawful or uncharged conduct. Doing so lumps together the drug trafficker, the crime victim, the person who came here to work, the student who overstayed a visa by a few days, and the person seeking asylum. That is inconsistent with the goal of individualized sentencing. So if a sentencing court is to consider an alleged immigration violation as prior unlawful or uncharged conduct, then it must have reliable evidence of that conduct, and the conduct must reasonably relate to the sentencing decision. *See* ***Frey***, ¶¶47-48 (re reliability); ***Gallion***, ¶43 (re linkage); ***Yemson***, 764 A.2d at 819 (re immigration status must reasonably bears on sentencing decision) (citing ***Wasman v. U.S.***, 468 U.S. 559, 563-564, (1984)).

The circuit court factored Salas Gayton's "illegal alien" status into its sentence. It did so based on insufficient, unreliable information and without explaining how being an "illegal alien" reasonably related to the sentence it chose. That was an erroneous exercise of discretion. This Court should therefore vacate Salas Gayton's sentence and remand the case for a new sentencing.

* * *

In summary, the Court can order a new sentencing hearing for any one of the four reasons above. Or it can consider them together, as facets of the larger problem in this

case. The circuit court had to sentence a defendant who is not a citizen of the United States. The victim's family and friends sought the maximum sentence based upon a constitutionally impermissible factor: the defendant's "illegal alien" status. And they invoked common stereotypes about "illegal aliens." Then the circuit court explicitly stated, several times, that the defendant's "illegal alien" status was a minor factor in its sentencing decision, while repeatedly and unnecessarily referring to his national origin, another constitutionally impermissible factor. The court did so without meaningful and reliable information about the defendant's immigration status and without explaining how his immigration status reasonably related to the harsh sentence that it imposed for the crime at issue. Simply put, the circuit court's approach to sentencing a person who is not a citizen of the United States violated several due process principles and established sentencing protocol.

III. The Court Should Remand This Case for a New Sentencing Hearing.

A. The standard of review is de novo.

Whether an error is structural or subject to a "harmless error" review is a question of law, which this Court decides de novo. ***State v. Nelson***, 2014 WI 70, ¶18, 355 Wis. 2d 722, 849 N.W.2d 317. If this Court opts for a "harmless error" review then it will conduct that analysis de novo. ***Id***.

B. The Court should order a new sentencing because the circuit court's error was structural.

The United States Supreme Court divides trial court error into two classes. "Trial errors" occur during the presentation of a case to the jury, and their effect may "be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless

beyond a reasonable doubt." ***U.S. v. Gonzalez-Lopez***, 548 U.S. 140, 148 (2006)(quoting ***Arizona v. Fulminante***, 499 U.S. 279, 307-308 (1991)). "Structural errors" are not amenable to harmless error analysis because "'they affect the framework within which the trial proceeds,' and are not 'simply an error in the trial process itself.'" ***Id.*** (quoting ***Fulminante*** at 309-310).

"A structural error at sentencing includes, for example, a biased tribunal." ***Travis***, ¶57. When a court bases a sentence on alienage, citizenship or national origin appellate courts remand the case for a new sentencing hearing without performing a "harmless error" analysis. ***Martinez v. Caceras***, 114 Nev. 735, 738, 961 P.2d 143 (1998)(remand without "harmless error" analysis); ***Leung***, 40 F.3d at 587 (same); ***U.S. v. Gonzalez***, 76 Fed. Appx. 386, 388-389 (2003)(same for national origin discrimination). Because the circuit court based Salas Gayton's sentence in part on alienage, citizenship and/or national origin, this court should vacate his sentence and remand the case for a new sentencing hearing.

C. Alternatively, if the Court opts for a "harmless error" review, then it should order a new sentencing because the circuit court's errors were harmful.

In ***Travis***, this Court noted three variations of the harmless error test for sentencings: **1.** "Errors that do not affect the substantial rights of the adverse party are harmless." ***Id***. ¶68 (citing Wis. Stat. §805.18(1)). **2.** "[A] remand [for resentencing] is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, *i.e.* that the error did not affect the [sentencing] court's selection of the sentence imposed." ***Id***. ¶69 (citing Fed. R. Crim. P. 52(a)). **3.** "[A]n error is harmless if it did not contribute to the sentence, that is, if there is no reasonable probability that the error contributed to the outcome." ***Id***. ¶70.

It is the State's burden to prove "that it is clear beyond a reasonable doubt that the same result would have occurred absent the error." ***Id***. ¶71.

Regardless of the formulation, the State cannot carry its burden of proof here because the circuit court explicitly stated that it was relying on noncitizenship and "illegal alien" status as "minor factors" and as a "character flaw." Even if this prompted the court to increase Salas Gayton's sentence by only one day, these matters "affected" or "contributed to" his sentence and thus require a new sentencing hearing.

Furthermore, despite the circuit court's comments that these were only "minor" factors, the record suggests that they played an outsized role in Salas Gayton's sentencing. The process of elimination helps prove the point.

First, note what the court said that it was ***not*** factoring into Salas Gayton's sentence. At the state's suggestion, the court did not consider unverified assertions about other crimes mentioned in Salas Gayton's competency evaluation. (App.156-157). The court also "ignored" Salas Gayton's decision not to complete the PSI. (App.175). And, notably, the court disregarded Salas Gayton's immigration status when it set the terms of his extended supervision. It observed: "I don't know what the United States Government is going to do with you when this sentence is over. I don't know if they're going to deport you. I have no power in this regard." (App.171). The court said that if Salas Gayton is allowed to live in this country during extended supervision, then, among other things, he would have to "seek and maintain full-time employment." (App.179). It "revoke[d] Salas Gayton's driving privileges in the State of Wisconsin for five years," even though Salas Gayton had none by virtue of his immigration status. (App.179).

Second, note the mitigating factors that the court ***did*** consider in choosing a sentence. The court acknowledged that Salas Gayton had no intent to kill and that this was his first drunk driving incident. (App.173, 178). It noted that Salas Gayton had been sober for several years but got into a disagreement with his girlfriend, which caused him to drink again. (App.176-177). It said: "other than January 1st, 2011, you seem to be a pretty decent guy." (App.175). It noted that Salas Gayton accepted responsibility and "did not put this family through a trial, of looking at the gruesome autopsy pictures." (App.177). The court said: "I see remorse. Rarely does a defendant come in here like you and exhibit [the] tears that you did, and they're genuine. I see that." (App.177).

Finally, note the aggravating factors that pointed to a higher sentence. The court considered that Salas Gayton was driving with a .145 BAC at about 7:00 a.m. on January 1, 2011. He didn't even know that he was driving. In an attempt to evade police he inadvertently entered I-94 the wrong way and drove for about a mile at 50 miles per hour. He sideswiped another driver. He did not have a license. (App.172-173). The court mentioned that Salas Gayton previously received a municipal citation and was convicted of a misdemeanor for driving without a license. (App.161).

The court faulted Salas Gayton for not seeking out a place that caters to Latinos to help him with his drinking problems. (App.178).[28]

The court noted the community's interest in how it would sentence Salas Gayton as evidenced by the 4 television cameras trained on the proceeding. (App.174). The court wanted the community to know what happens to someone

[28]Salas Gayton told Dr. Pankiewicz that while he had not received formal treatment, he had been in Alcoholics Anonymous and had had a sponsor. (R.11 at 2).

who takes a car—"a weapon"—and drives drunk and kills somebody. It said "if you drive drunk first time, second time, third time, fourth time, fifth time, you go to prison." (App.174).[29]

The court considered that Damske was "34 years old, beautiful, out on the first day of the year driving. Minding her own business and tragically taken away." (App.176). It also noted that she had a young daughter, and it will be tough for her to get along. (App.175). The court did not consider that Damske had a .21 BAC when she died.

The court also considered, over and over, that Salas Gayton is an "illegal alien," an "illegal," a "noncitizen," a Latino from Mexico and "not from this country." It mentioned these subjects in at least 16 sentences. For instance:

> The fact that ***you're an illegal alien*** doesn't enter into the serious nature of the crime or the need to protect the community. ***It goes to character. It's a minor character flaw very honestly.***

(App.173). (Emphasis supplied).

> Ms. Johnson: ***The fact as I see it that Mr. Salas is not a citizen*** in my opinion, as it relates to this case***, is not terribly relevant.*** He came—
>
> The Court***: It goes to character.***

(App.160). (Emphasis supplied).

> ***You're from the nation of Mexico.*** You've got a 5th grade education. ***You're in this country for 13 and a***

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[29] This statement of law is inaccurate. In Wisconsin, a first OWI is a civil offense, and a person who commits OWI homicide may be placed on probation.

> ***half years***, Milwaukee for two years. ***You've got three kids in Mexico***. . .[30]
>
> You've got sporadic employment, trying to better yourself. That's why you're in this country. Although ***you're here illegally, it's a factor, a minor factor, but it goes to your characte***r. . .
>
> [Ms.] Johnson correctly stated that [alcohol] never intervened in his life. Never had a serious enough crime for us to try and intervene. But he could have done that on his own, even as ***an illegal*** in this country.
>
> ***There's plenty of places on the south side of Milwaukee that cater to Latinos*** that would help them with their drinking problems. He could have done it on his own. ***He didn't.***[31]

(App. 175-176, 178). (Emphasis supplied).

If Salas Gayton's drunk driving and his attendant poor decisions were truly the most significant factors in the court's decision to impose the 15-year maximum term of initial confinement, then the double standard applied is startling. Defense counsel pointed out that in cases like this one courts will often give out lighter sentences or even place the defendant on probation with substantial condition time and community service. (App.163). *See* ***Gallion***, ¶47 (when sentencing a defendant courts may consider sentences given in similar cases). That is correct. One recent defendant, who drove with a .27 BAC, crossed the center line and crashed into another car, killing a baby and seriously injuring 3 others. She received a sentence of 6 months jail time,

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[30] This is inaccurate. Dr. Pankiewicz's report indicates that Salas Gayton's children are in the United States. (R.11 at 2).

[31] Again, this does not accurately reflect what Salas Gayton told Dr. Pankiewicz. (R.11 at 2).

imposed and stayed.[32] Another defendant, having no prior criminal record, crashed and killed 3 people while driving drunk and received only a 5-year term of confinement.[33] Yet another, in her first OWI, crossed the center line with a .174 BAC and crashed into and killed a high school senior. She received a one-year jail sentence.[34] In fact, according to a recent investigative news report, the median term of initial confinement imposed for an OWI homicide in Wisconsin is just 5 years.[35]

Damske's family and friends placed Salas Gayton's "illegal alien" status and all the stereotypes that went with it front and center at his sentencing hearing. His alienage and nationality were invoked one way or another in at least 46 sentences in the sentencing record. The stigma infected the entire proceeding, including the court's decision to impose the 15-year maximum term of incarceration. The court's reliance on Salas Gayton's "illegal" or "illegal alien" status to sentence him more severely was not a harmless error.

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[32] *OWI Variation: Tragedy to some, accident to others*, Postcrescent.com, available at http://www.postcrescent.com /story/news/investigations/2015/11/23/judicial-sentencing-varies-wisconsin/76278810/ (last visited Dec. 11, 2015).

[33] *Similar Cases Yield Very Different Results in Wisconsin Prison System*, Milw. Journal Sentinel, p.1, Nov. 29, 2014 available at: http://www.jsonline.com/news/wisconsin/similar-cases-yield-very-different-results-in-wisconsin-prison-system-b99394769z1-284234631.html (lasted visited Dec. 11, 2015).

[34] *Waupaca Case Raises Questions About Sentencing*, Action News 2 WBAY.com available at: http://wbay.com/2015/11/23/family-says-drunk-driver-got-away-with-murder/ (last visited Dec. 11, 2015).

[35] 35 Eric Litke, *Scales of Justice or Roulette Wheel*? Available at:http://www.postcrescent.com/story/news/investigations/2015/11/23/judicial-sentencing-varies-wisconsin/76278810/ (last visited Dec. 14, 2015).

CONCLUSION

For the reasons stated above, Leopoldo Salas Gayton respectfully requests that the Wisconsin Supreme Court reverse the court of appeals decisions and remand this case for a new sentencing hearing.

Dated this 23rd day of December, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 9,711 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 23rd day of December, 2015.

Signed:

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 23rd day of December, 2015.

Signed:

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APPENDIX

INDEX
TO
APPENDIX

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal No. 2013AP646-CR
(Milwaukee County Cir. Ct. Case No. 2011CF73)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LEOPOLDO R. SALAS GAYTON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DENNIS R. CIMPL AND ELLEN R. BROSTROM PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

CASES

Page

STATUTES

Page

OTHER AUTHORITIES

STATE OF WISCONSIN

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BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN[1]

QUESTIONS PRESENTED

1. Did the circuit court properly exercise its sentencing discretion when the court imposed the maximum period of initial confinement on defendant-appellant Leopoldo R. Salas Gayton?

   - By its decision, the circuit court implicitly answered "Yes."
   - This court should answer "Yes."

[1] The electronically filed version of this brief includes hyperlinked bookmarks intended to facilitate online reading.

2. Did the circuit court properly exercise its sentencing discretion when the court ordered Salas Gayton to pay a DNA surcharge?

   - By its decision, the circuit court implicitly answered "Yes."
   - This court should answer "Yes."

POSITION ON ORAL ARGUMENT AND PUBLICATION OF THE COURT'S OPINION

Oral argument. The State does not request oral argument.

Publication. The State does not request publication of the court's opinion. The State does request, however, that the court issue the opinion as an authored opinion rather than as a *per curiam* opinion, memorandum opinion, or summary disposition order. Wis. Stat. § (Rule) 809.23(3)(b) (authorizing citation, for persuasive value, of unpublished authored opinions issued on or after July 1, 2009).

STATEMENT OF THE CASE: FACTS AND PROCEDURAL HISTORY

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2.[2] Instead, the State will present additional facts in the "Argument" portion of its brief.

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[2] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2011-12 edition.

STANDARDS OF REVIEW

A. Exercise Of Discretion.

> Evidentiary determinations are within the trial court's broad discretion and will be reversed only if the trial court's determination represents a prejudicial misuse of discretion. [An appellate court] will find an erroneous exercise of discretion where a trial court failed to exercise discretion, the facts fail to support the decision, or the trial court applied the wrong legal standard.

State v. Burton, 2007 WI App 237, ¶ 13, 306 Wis. 2d 403, 743 N.W.2d 152 (citations omitted).

> The term "discretion" contemplates a process of reasoning which depends on facts in the record or reasonably derived by inference from the record that yield a conclusion based on logic and founded on proper legal standards. The record on appeal must reflect the circuit court's reasoned application of the appropriate legal standard to the relevant facts of the case.

State v. Delgado, 223 Wis. 2d 270, 280-81, 588 N.W.2d 1 (1999) (citations omitted).

> Under this standard, the circuit court's determination will be upheld on appeal if it is a reasonable conclusion, based upon a consideration of the appropriate law and facts of record. . . . While the basis for an exercise of discretion should be set forth in the record, it will be upheld if the appellate court can find facts of record which would support the circuit court's decision.

Peplinski v. Fobe's Roofing, Inc., 193 Wis. 2d 6, 20, 531 N.W.2d 597 (1995) (citations omitted).

B. Sentencing Discretion.

Sentencing lies within the circuit court's discretion. *See, e.g.,* ***State v. Gallion***, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197 ("It is a well-

settled principle of law that a circuit court exercises discretion at sentencing"); ***McCleary v. State,*** 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971) ("[S]entencing is a discretionary judicial act").

A sentencing court properly exercises its discretion when the court engages in a reasoning process that "depend[s] on facts that are of record or that are reasonably derived by inference from the record" and imposes a sentence "based on a logical rationale founded upon proper legal standards." ***McCleary,*** 49 Wis. 2d at 277.

When deciding on a sentence, a sentencing court must consider three principal factors: the gravity of the offense, the character of the defendant, and the need to protect the public. *See* Wis. Stat. § 973.017(2)(ad), (ag), (ak); ***McCleary,*** 49 Wis. 2d at 276; ***State v. Thompson***, 172 Wis. 2d 257, 264, 493 N.W.2d 729 (Ct. App. 1992). The court must also consider mitigating and aggravating factors. Wis. Stat. § 973.017(2)(b). A sentencing court may also consider the defendant's criminal record, history of undesirable behavior patterns, personality, character, social traits, remorse, cooperativeness, and degree of culpability; the results of the PSI; the aggravated nature of the crime; the need for close rehabilitative control; and the rights of the public. ***Gallion***, 270 Wis. 2d 535, ¶ 43 n.11; ***State v. Harris***, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984); ***State v. Lewandowski***, 122 Wis. 2d 759, 763, 364 N.W.2d 550 (Ct. App. 1985). The weight assigned to each factor lies within the circuit court's discretion. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975); ***State v. Stenzel***, 2004 WI App 181, ¶ 16, 276 Wis. 2d 224, 688 N.W.2d 20.

When reviewing a sentencing decision, an appellate court presumes that the circuit court acted reasonably. An appellate court "will not interfere with the circuit court's sentencing decision unless the circuit court erroneously exercised its discretion." ***State v. Lechner***, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998) (citation omitted). On appeal, a reviewing court will search the record for reasons to sustain a circuit court's exercise of sentencing discretion. ***McCleary***, 49 Wis. 2d at 282.

> [T]he exercise of discretion does not lend itself to mathematical precision. The exercise of discretion, by its very nature, is not amenable to such a task. As a result, we do not expect circuit courts to explain, for instance, the difference between sentences of 15 and 17 years. We do expect, however, an explanation for the general range of the sentence imposed. This explanation is not intended to be a semantic trap for circuit courts. It is also not intended to be a call for more "magic words." Rather, the requirement of an on-the-record explanation will serve to fulfill the *McCleary* mandate that discretion of a sentencing judge be exercised on a "rational and explainable basis." 49 Wis. at 276.

Gallion, 270 Wis. 2d 535, ¶ 49.

C. Sentencing Based On Allegedly Improper Factors.

A sentencing court erroneously exercises its discretion when the court imposes a sentence "*based on* or in *actual reliance upon* clearly irrelevant or improper factors." ***State v. Harris***, 2010 WI 79, ¶ 30, 326 Wis. 2d 685, 786 N.W.2d 409 (emphasis in original). A postconviction motion claiming the circuit court relied on an improper factor at sentencing must show that the court relied on an irrelevant or improper factor in imposing sentence. ***Id.*** ¶ 33; ***Gallion***, 270 Wis. 2d 535,

¶ 72 ("The defendant has the burden of showing that the 'sentence was based on clearly irrelevant or improper factors.'"). The defendant must then prove by clear and convincing evidence that the court actually relied on the irrelevant or improper factor. ***Harris***, 326 Wis. 2d 685, ¶¶ 30-35. If the defendant does so, the State can demonstrate the harmlessness of the court's reliance by proving beyond a reasonable doubt that the court would have imposed the same sentence if the court had not considered the factor. *See* ***State v. Harrell***, 2008 WI App 37, ¶ 37, 308 Wis. 2d 166, 747 N.W.2d 770.

D. Harmless Error.

> The harmless error rule . . . is an injunction on the courts, which, if applicable, the courts are required to address regardless of whether the parties do. *See* Wis. Stat. § 805.18(2) (specifying that no judgment shall be reversed unless the court determines, after examining the entire record, that the error complained of has affected the substantial rights of a party).

State v. Harvey, 2002 WI 93, ¶ 47 n.12, 254 Wis. 2d 442, 647 N.W.2d 189. "Wisconsin's harmless error rule is codified in WIS. STAT. § 805.18 and is made applicable to criminal proceedings by WIS. STAT. § 972.11(1)." ***State v. Sherman***, 2008 WI App 57, ¶ 8, 310 Wis. 2d 248, 750 N.W.2d 500 (citing *Harvey*, 254 Wis. 2d 442, ¶ 39) (footnote omitted). The statutory harmless-error rule also applies to appellate procedures. ***State v. Felton***, 2012 WI App 114, ¶ 1 n.1, 344 Wis. 2d 483, 824 N.W.2d 871 (codified version of harmless-error rule made applicable to appellate procedures by Wis. Stat. § (Rule) 809.84); ***State v. Louis***, 152 Wis. 2d 200, 202 n.1, 448 N.W.2d 244 (Ct. App. 1989) (same).

"[I]n order to conclude that an error 'did not contribute to the verdict' within the meaning of *Chapman*,[3] a court must be able to conclude 'beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***Harvey***, 254 Wis. 2d 442, ¶ 48 n.14 (footnote added). *See also* ***State v. Martin***, 2012 WI 96, ¶¶ 42-46, 343 Wis. 2d 278, 816 N.W.2d 270 (reviewing harmless-error principles and factors); ***State v. Stuart***, 2005 WI 47, ¶ 40 n.10, 279 Wis. 2d 659, 695 N.W.2d 259 (various formulations of harmless-error test reflect "alternative wording"). "The standard for evaluating harmless error is the same whether the error is constitutional, statutory, or otherwise." ***Sherman***, 310 Wis. 2d 248, ¶ 8.

"The defendant has the initial burden of proving an error occurred, after which the State must prove the error was harmless." ***Id.***

The harmless-error test applies to a claim that a sentencing court relied on a clearly irrelevant or improper factor. ***Harris***, 326 Wis. 2d 685, ¶ 30.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY EXERCISED ITS SENTENCING DISCRETION WHEN THE COURT IMPOSED ON SALAS GAYTON THE MAXIMUM TERM OF INITIAL CONFINEMENT.

Salas Gayton contends that, for two reasons, the circuit court did not properly exercise its sentencing discretion: first, the court allegedly failed

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3 ***Chapman v. California,*** 386 U.S. 18 (1967).

to explain adequately its reasons for imposing a sentence of twenty-two years of imprisonment consisting of the fifteen-year maximum term of initial confinement followed by a seven-year period of extended supervision; second, the circuit court allegedly relied on an improper factor — Salas Gayton's status as an alien illegally in the United States — to increase the harshness of the sentence.

For two reasons, this court should reject Salas Gayton's contentions and should affirm both the judgment of conviction and the circuit court's order denying Salas Gayton's motion for postconviction relief.

First, the circuit court adequately explained its reasons for the sentence. In denying Salas Gayton's postconviction motion, the court cogently explained why the sentencing judge properly exercised discretion:[4]

> The defendant also contends that Judge Cimpl erroneously exercised his discretion by failing to adequately explain his reasons for imposing a maximum sentence in this case. The defendant was driving drunk and without a valid license the wrong way on the freeway [45:51]. He hit a vehicle and killed a 34 year old woman [45:51]. The State indicated that she was hit with such force that her steering wheel and dashboard were pushed into the driver's seat. (Tr. 7/22/11, p. 12 [45:12]). The defendant was pulled over twice previously for driving without a license.

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[4] Milwaukee County Circuit Court Judge Dennis R. Cimpl imposed the sentence (45:1). Milwaukee County Circuit Court Judge Ellen R. Brostrom issued the order denying the postconviction motion (30:5).

> (Id. at 25 [45:25]). The defendant was in this country illegally for 13-14 years. (Id. at 36, 39 [45:36, 39]).
>
> The court stated its goals as punishment, deterrence, and rehabilitation. (Id. at 50 [45:50]). It considered the extremely serious nature of the crime [45:51-53], the need for protection in the community based on the defendant's inability to follow the rules [45:53-54], and the fact that the defendant hit at least one other car on the freeway without stopping [45:51] before ultimately hitting the victim's car and killing her. The court considered the defendant's character [45:54-56], his employment [45:55], his drinking problem [45:55, 56], and his remorse [45:56]. It also considered the offense from the victim's perspective [45:54]. This was an egregious offense, and the defendant has a long-standing drinking problem. Given the totality of circumstances presented, the court cannot find that there was an erroneous exercise of sentencing discretion. The sentencing record complies fully with State v. Gallion, 270 Wis.2d 535 (2004).

(30:4-5 (record cites added)). A court need not explain its sentencing decision with mathematical precision. ***Gallion***, 270 Wis. 2d 535, ¶ 49. Here, based on the totality of the record and on the totality of the court's sentencing remarks (45:49-57), the court's sentencing decision satisfied the standards set out in ***McCleary***, 49 Wis. 2d 263, and ***Gallion***, 270 Wis. 2d 535. Salas Gayton obviously does not like the sentence imposed and also obviously thinks (for some reason) that he would have received a less-severe sentence if the court had spent more time explaining its rationale. But neither ***McCleary*** nor ***Gallion*** required the court to offer more of an explanation than it provided. If anything, the egregiousness of Salas Gayton's offense — intentionally driving drunk for a mile on the wrong side of a high-speed highway and not stopping after sideswiping at least one vehicle before causing the violent collision that all-but-

instantly killed the victim — by itself, without any explanation, would have justified the imposed sentence. The court's additional remarks served to buttress the self-evident need for the severe sentence and fully satisfied the court's obligation to explain the rationale for the sentence.

Second, the court's references to Salas Gayton's status as a person illegally in the United States did not amount to reliance on an improper sentencing factor. At the outset, the State notes that in his postconviction motion to withdraw his plea, Salas Gayton did not assert this claim as a basis for asserting an erroneous exercise of sentencing discretion (29:6-9). *See, e.g.*, ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) (appellate court will not consider for the first time on appeal any issues not presented in the circuit court; "The party raising the issue on appeal has the burden of establishing, by reference to the record, that the issue was raised before the circuit court."); ***State v. Keith***, 216 Wis. 2d 61, 80, 573 N.W.2d 888 (Ct. App. 1997) ("Arguments which are not raised at the trial level are deemed waived.").

But even assuming Salas Gayton did not waive or forfeit this ground for his erroneous-exercise-of-sentencing-discretion claim, the record does not indicate that Salas Gayton's immigration status affected the circuit court's sentencing decision. The court noted that Salas Gayton's immigration status served as, at most, "a minor character flaw" (45:52) and "minor factor" (45:55). Moreover, Salas Gayton's lawyer agreed with the court that Salas Gayton's status as a person illegally in the United States "goes to character" (45:39), further waiving any basis for Salas Gayton to assert the court's

remarks as indicating an erroneous exercise of sentencing discretion.

In any event, a defendant's immigration status does not operate as an improper or irrelevant factor for sentencing purposes. *Cf., e.g.*, ***United States v. Flores-Olague***, 717 F.3d 526, 535 (7th Cir. 2013) ("A sentencing court is well within its prerogatives and responsibilities in discussing a defendant's status as a deportable alien."). In addition, the court's reference to Salas Gayton's immigration status did not fit within the category of comments characterized as "unreasonably inflammatory, provocative, or disparaging." ***United States v. Tovar-Pina***, 713 F.3d 1143, 1148 (7th Cir. 2013).

The cases on which Salas Gayton relies do not lead to a different result.[5] *See* Salas Gayton's Brief at 14. While the State agrees with Salas Gayton that a person "has a constitutional due process right not to be sentenced on the basis of his nationality or race," *see id.*, the State disagrees with his *ipse dixit*[6] adding "alien status" as one of those due-process-protected classifications, *id.* None of the cases he cited place immigration status in the protected categories of race, nationality, and gender. Even in ***United States v. Velasquez Velasquez***, 524 F.3d 1248 (11th Cir. 2008), the court

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[5] ***United States v. Velasquez Velasquez***, 524 F.3d 1248 (11th Cir. 2008); ***United States v. Leung***, 40 F.3d 577 (2d Cir. 1994); ***State v. Harris***, 2010 WI 79, 326 Wis. 2d 685, 786 N.W.2d 409.

[6] BLACK'S LAW DICTIONARY 905 (9th ed. 2009) ("[s]omething asserted but not proved").

did not hold that a person's immigration status could not affect a sentence. Rather, the court declared "that a judge may not impose a more severe sentence than he would have otherwise based on *unfounded assumptions regarding an individual's immigration status* or on his personal views of immigration policy." ***Id.*** at 1253 (emphasis added). In Salas Gayton's case, the circuit court did not rely on unfounded assumptions about Salas Gayton's immigration status or on personal views of immigration policy.

In short, the circuit court properly exercised its sentencing discretion by considering and sufficiently explaining the relevant sentencing considerations and did not rely on any irrelevant or improper factor.

II. THE CIRCUIT COURT PROPERLY EXERCISED ITS SENTENCING DISCRETION WHEN THE COURT ORDERED SALAS GAYTON TO PAY A DNA SURCHARGE.

At sentencing, the circuit court ordered Salas Gayton to provide a DNA sample and to "be responsible for all of the costs of this action, including a DNA surcharge.[7] That is part of the punishment, part of the rehabilitation" (45:58 (footnote added)). Salas Gayton does not object to providing the DNA sample, but he does object to paying the DNA surcharge. He contends that the court erroneously exercised its discretion by imposing the surcharge without providing an ade-

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7 *See* Wis. Stat. § 973.046(1g) (authorizing imposition of DNA surcharge).

quate explanation. *See* Salas Gayton's Brief at 18. *See also* 29:9-11 (postconviction motion).

Salas Gayton objects that the DNA surcharge in his case violates ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393. ***Cherry*** prohibits a court from "imposing the DNA surcharge simply because it can." ***Id.*** ¶ 10. ***Cherry*** also set out a nonexclusive list of factors for a sentencing court to consider when deciding whether to impose the surcharge:

> [W]e conclude that some factors to be considered could include: (1) whether the defendant has provided a DNA sample in connection with the case so as to have caused DNA cost; (2) whether the case involved any evidence that needed DNA analysis so as to have caused DNA cost; (3) financial resources of the defendant; and (4) any other factors the trial court finds pertinent.

Id. *See also* ***State v. Ziller***, 2011 WI App 164, ¶ 10, 338 Wis. 2d 151, 807 N.W.2d 241 (characterizing *Cherry* factors as "nonexclusive").

This court should affirm the circuit court's discretionary decision to impose the DNA surcharge.[8] The court had an obligation to require Salas Gayton to provide a DNA sample. Wis. Stat. § 973.047(1f). Consequently, Salas Gayton "has provided a DNA sample in connection with the case so as to have caused DNA cost," thus satisfying the first ***Cherry*** factor. Salas Gayton agreed to

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[8] "A circuit court's decision whether to impose a surcharge under Wis. Stat. § 973.046(1g) involves the exercise of the court's discretion." ***State v. Simonis***, 2012 WI App 84, ¶ 8, 343 Wis. 2d 663, 819 N.W.2d 328.

restitution in the amount of $11,075 (45:7), thus indicating he had the resources (per the third ***Cherry*** factor) to pay the DNA surcharge of $250. *Cf.* **Ziller**, 338 Wis. 2d 151, ¶ 13 ("Given that the court found that Ziller had the ability to pay $10,000 in restitution based on his employability, there was no reason for the court to restate that Ziller had the ability to pay the $250 DNA surcharge. What is obvious need not be repeated."). Moreover, the court did not impose the surcharge merely because the court thought it could. Rather, the court imposed the surcharge both as part of the punishment and as a matter of rehabilitation, a rationale consistent with the fourth ***Cherry*** factor.

In short, a sentencing court cannot impose the surcharge as a matter of will, caprice, or immoveable court policy. ***Cherry***, 312 Wis. 2d 203, ¶ 6 (rejecting trial court's policy of "impos[ing] the surcharge whenever possible"). But a sentencing court also need not "explicitly describe its reasons for imposing a DNA surcharge." ***Ziller***, 338 Wis. 2d 151, ¶ 12 ("If Ziller is asking this court to adopt a rule whereby a circuit court must explicitly describe its reasons for imposing a DNA surcharge, we decline to adopt such a rule. The circuit court is in the best position to examine the relevant sentencing factors in each case. The burden is therefore on the defendant to show that the sentence is unreasonable . . . ." (citation omitted)). Here, in accord with ***Cherry*** and ***Ziller***, the sentencing court provided a sufficient explanation for imposing the DNA surcharge.

CONCLUSION

For the reasons offered in this brief, this court should affirm the circuit court's order denying Salas Gayton's postconviction motion and should affirm the judgment of conviction.

Date: May 22, 2014.

Respectfully submitted,

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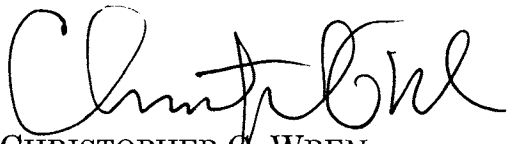
Attorney General



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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(8): FORM AND LENGTH REQUIREMENTS

In accord with Wis. Stat. § (Rule) 809.19(8)(d), I certify that this brief satisfies the form and length requirements for a brief and appendix prepared using a proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per line, and a length of 3,246 words.

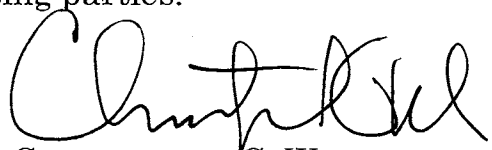
CHRISTOPHER G. WREN

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12): ELECTRONIC BRIEF

In accord with Wis. Stat. § (Rule) 809.19(12)(f), I certify that I have submitted an electronic copy of this brief (excluding the appendix, if any) via the Wisconsin Appellate Courts' eFiling System and that the electronic copy complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.



CHRISTOPHER G. WREN

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2013AP646-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LEOPOLDO R. SALAS GAYTON,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District I, Affirming a Judgment of Conviction Entered by the Milwaukee County Circuit Court, Judge Dennis R. Cimpl Presiding, and from an Order Denying the Postconviction Motion, Judge Ellen R. Brostrom Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

OTHER AUTHORITIES CITED

INTRODUCTION

This Court ordered the parties to brief whether a circuit court may rely on "illegal immigrant" status as a factor in fashioning a sentence. Salas Gayton offers a long list of cases involving defendants identified as "aliens," "illegal aliens," or "illegal immigrants." Each one states the rule that a court may not sentence a defendant based on his "alien status," "alienage," or "illegal immigration status" because doing so violates the constitution. This does not mean that a court may never mention a person's immigration or deportation status at sentencing. Some courts found this is appropriate when, for example, the defendant: (a) entered the United States illegally to distribute drugs, (b) re-entered illegally after being deported—especially if it was to commit more crimes, or (c) requested a more lenient sentence based on his deportation status. *See* Initial Br. at 21-23 and *infra* at 3-7.

Salas Gayton's case does not fall within those exceptions; it falls within the rule. A court must consider three main factors at sentencing: the nature of the crime, the defendant's character, and the need to protect the public. ***State v. Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d 535, 678 N.W.2d 197. So when the sentencing court explicitly said that Salas Gayton's "noncitizen" status goes to character, and "illegal alien" status "goes to character" and is "a minor character flaw," it was factoring his citizenship and alienage into his sentence. (App. 160, App. 173). That violates the constitution.

Consequently, the Court should reverse and remand this case for resentencing. Doing so will guide circuit courts on how to sentence noncitizens in compliance with the Fifth and Fourteenth Amendments. Circuit courts may not sentence a defendant based on his status as an "illegal," "illegal alien,"

or "illegal immigrant" or on his alienage, ethnicity or national origin. There may be cases where an immigration violation demonstrates prior unlawful conduct or an inability to conform to the law. When that situation arises, the sentencing court must have accurate and reliable information of the violation, the violation must be relevant to the crime being sentenced, and the court must state the linkage on the record.

CLARIFICATION OF THE RECORD

The State asserts that Salas Gayton cannot point to anything in the record indicating that the letters and remarks by Damske's family and friends "actually exerted an impermissible influence on the court's sentencing decision." (State's Response at 36-38). In fact, the record demonstrates such influence vividly.

The complaint against Salas Gayton does not mention his immigration status. Nor does the competency evaluation. Nor does the plea hearing transcript. The district attorney spoke at sentencing, but did not mention the subject either. The idea that Salas Gayton is an "illegal immigrant" came from one source only—the impassioned victim allocution. The sentencing court's remarks that "noncitizen" and "illegal alien" status are "character" factors were a reaction to the inflammatory stereotypes invoked by Damske's family and friends in their letters and statements. Their influence was impermissible because it is unconstitutional for a court to sentence a defendant based on citizenship, alienage, or status as an "illegal alien" or "illegal immigrant." *See* Initial Br. at 21-23 and *infra* at 3-7.

ARGUMENT

I. Definition of Terms.

The State notes that the terms "illegal immigrant" and "illegal alien" appear in thousands of cases. But bare numbers prove nothing. Perhaps like ***Gonzalez v. City of Franklin***, 137 Wis. 2d 109, 403 N.W.2d 747 (1987), those cases observe that these terms are inflammatory, or associated with Latinos. Or perhaps they were decided before the terms became slurs or before the United States Supreme Court stopped using them. The State provides no detail. Regardless, this Court has repeatedly substituted terms of art (*e.g.* "implied bias" or "collateral estoppel") with neologisms (*i.e.* "statutory bias" and "issue preclusion") without disrupting the law.

II. General Principles of Immigration.

The State ignores and thus concedes basic principles of immigration law set forth in the Initial Brief at 14-18. ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.***, 90 Wis. 2d 97, 108-109, 279 N.W.2d 493 (1979)(failure to refute an argument is a concession).

III. The Circuit Court Erred in Sentencing Salas Gayton More Harshly Based on His "Illegal Immigrant" Status.

A. The circuit court improperly relied upon Salas Gayton's "illegal alien" status as an aggravating factor.

Both aliens and "***illegal*** aliens" are guaranteed due process under the Fifth and Fourteenth Amendment. ***Plyer v. Doe***, 457 U.S. 202, 210 (1979). Thus, numerous cases rule that sentencing a defendant more harshly based on his alienage or "***illegal*** alien" status is unconstitutional. The State

responds by ignoring the broad constitutional principle and mischaracterizing cases.

For example, ***U.S. v. Leung***, 40 F.3d 577 (2d Cir. 1994) addressed whether Leung was improperly sentenced based on her "ethnic origin and alien status." ***Id***. at 585, 586. The Second Circuit remanded the case for resentencing because a "reasonable observer" might infer "that Leung's ethnicity and alien status played a role in determining her sentence." ***Id***. at 587. ***State v. Mendoza***, 638 N.W.2d 480, 482-483, 484 (Miss. Ct. App. 2002) holds point blank: "Sentencing a defendant on the basis of alienage is unconstitutional." Likewise ***U.S. v. Borrero-Isaza***, 887 F.2d 1349, 1352 (9th Cir. 1989) states: "the government agrees that a sentencing court cannot impose a more severe sentence on the sole basis of a defendant's alienage or nationality." And ***U.S. v. Onwuemene***, 933 F.2d 650, 652 (8th Cir. 1991) remanded a case for resentencing because "consideration of [the defendant's] alien status, however, violated his constitutional rights." The State ignores these rules.

Next, the State tries to distinguish ***State v. Zavala-Ramo***s, 116 Or. App. 220, 840 P.2d 1314 (Or. Ct. App. 1992) which declared that a "defendant's current illegal immigration status cannot, per se, be considered to be an aggravating factor at sentencing." The defendant had been deported and re-entered the United States. The sentencing court viewed this as an unwillingness to conform his conduct to the law. But—and the State omits this part—the court also remanded the case for resentencing because the defendant's immigration status may have been considered improperly. ***Id.*** at 223.

The State does not dispute the rule of ***U.S. v. Gomez***, 797 F.2d 417, 420 (7th Cir. 1986): "If misused, those considerations ['status as an illegal alien from a Latin American country'] could violate the constitutional protections to which aliens, including ***illegal*** aliens, are

entitled under the Fifth and Fourteenth Amendments." (Emphasis supplied). Gomez did not come to the United States to escape poverty or oppression. He was being sentenced for trafficking drugs from a country with a reputation for that business. Thus, Seventh Circuit held:

> The nationality of Gomez, and his illegal entry and entrance into the illegal drug business, ***are too related*** to be artificially separated for sentencing purposes. Gomez admitted in open court that his entry into this country had been illegal. That illegal act is no different than any other ***recent*** prior illegal act of any defendant being sentenced for any offense.

Id. at 420. (Emphasis supplied). ***Gomez***'s rule applies to this case; its holding does not because Salas Gayton did not come to this country to commit the crimes. He came here, long ago, to work.

Nor does the State dispute the rule of ***Yemson v. U.S***., 764 A.2d 816, 818 (D.C. Ct. App. 2001): A sentencing court "may not treat a defendant more harshly than any other defendant solely because of [his] nationality or alien status. That obviously would be unconstitutional." ***Yemson*** held that the sentencing court did not violate this rule by noting that the defendant had repeatedly fled the country to escape prosecution, had repeatedly been deported and convicted of illegal re-entry, and had repeatedly returned to commit more crimes. ***Id***. at 818-819. Again, ***Yemson***'s rule applies; its holding does not because Salas Gayton's situation is different.

The State makes a similar mistake with ***U.S. v. Velasquez-Velasquez***, 524 F.3d 1248, 1253 (11th Cir. 2008), which held: "a judge may not impose a more severe sentence than he would have otherwise based on unfounded assumptions regarding an individual's immigration status or his personal views of immigration policy." Contrary to the State's Response at 25, ***U.S. v. Hrneith***, 522 F. Appx. 786

(11th Cir. 2013) did not reject or modify ***Velasquez-Velasquez***'s rule. ***Hrneith*** found that its facts were "wholly distinguishable." ***Id***. at 788.

The State cites ***People v. Hernandez-Clavel***, 186 P.3d 96 (Colo. Ct. App. 2008) and ***Trujillo v. State***, 304 Ga. App. 849, 698 S.E.2d 350 (2010), but they concern whether a court may deny probation because the defendant's immigration status precludes him from complying with the terms of probation. That is not at issue here because in accepting responsibility for his actions Salas Gayton did not request probation. (App.163).

The State offers ***Sanchez v. State***, 891 N.E.2d 174 (Ind. Ct. App. 2008) for the proposition that "illegal alien status is a valid aggravating factor." It rests on the fact that Sanchez admitted to being an "illegal alien" and that "his daily disregard for the laws of this country" reflects negatively on his character. ***Id.*** at 176-177. ***Sanchez*** does not acknowledge ***U.S. v. Cores***, 356 U.S. 405, 408 n.6 (1958) and ***Arizona v. U.S.***,132 S.Ct. 2492, 2505 (2012) (improper entry is not a continuing offense).

The State cites ***U.S. v. Flores-Olague***, 717 F.3d 526 (7th Cir. 2013), but it is off point. The sentencing court made a single comment that the defendant, convicted of drug trafficking, was in the country illegally and did not speak English. It said this ***after*** stressing that it increased his sentence "only" because he maintained a premises for the purpose of distributing drugs. ***Id*** at 534. ***Flores-Olague*** did not overrule, modify or mention ***Gomez***. And its comment that a court may discuss deportation status at sentencing cited cases where the defendants themselves asked for leniency based on their deportation status. ***Id***. at 535 (citing ***U.S. v. Ramirez-Fuentes***, 703 F.3d 1038, 1047 (7th Cr. 2013); ***U.S. v. Panaigua-Verdugo***, 537 F.3d 722, 728 (7th Cir. 2008).

Lastly, the State notes ***U.S. v. Tovar-Pina***, 713 F.3d 1143 (7th Cir. 2013). That case involved a defendant who was sentenced for illegal re-entry after multiple deportations. The Seventh Circuit was not concerned about the sentencing court's comment that there is a difference between "illegal aliens" who come to the United States to work and support their families and otherwise remain free from criminal conduct and "illegal aliens" who come here to engage in criminal conduct. ***Id***. at 1147, 1148. ***Tovar-Pina*** supports Salas-Gayton's position.

Based on the cases above, the Wisconsin Supreme Court should rule that sentencing a defendant based on his alienage or "illegal alien" status violates the Fifth and Fourteenth Amendments and remand this case for resentencing.

B. The circuit court improperly relied on national origin as an aggravating sentencing factor.

The State accuses Salas Gayton of making these arguments:

> Under Salas Gayton's theory, any reference—ultimately, any knowledge—of a defendant's status as a non-citizen implicates a defendant's nationality, national origin, or alienage, and that this knowledge necessarily taints the sentencing.

(Response Br. at 28).

> So, to avoid that taint, the court could not know any national-origin, nationality, or alienage information about any defendant, resulting in major gaps in PSIs for ***all*** defendants . . .

(Response Br. at 29).(Emphasis in original).

Salas Gayton never said that citizenship discrimination is automatically national origin discrimination. He said that it ***can*** result in national origin discrimination. *See* ***Espinoza v. Farah Mfg. Co.***, 414 U.S. 86, 92 (1973). In Salas Gayton's case, the line between the two became blurred when the court repeatedly called him an "illegal alien" and an "illegal," terms that are negatively associated with Mexicans, and sua sponte repeatedly referred to his national origin, though it was irrelevant to his crimes. Thus, in this case (not every case), the defendant's "illegal alien" status became inextricably intertwined with his national origin.

Moreover, it is silly to suggest that a sentencing court may never ***know*** attributes of a defendant like national origin, alienage, race or gender. When a court sentences a defendant, it can see and ***know*** that she is female, African-American, or Asian. Such information is on CCAP and may be included in a PSI. But that does not mean a court can ***say***: "the fact that you're a female goes to your character" or "the fact that you're Black [or Asian] is a minor character flaw." Likewise, the sentencing court cannot say "the fact that you're a noncitizen goes to your character" or "the fact that you're an illegal alien is a minor character flaw." That's what the sentencing court did here, while adding multiple references to Salas Gayton's Mexican heritage. The State refuses to confront the "national origin" argument that Salas Gayton actually made. (Initial Br. 23-24).

C. The circuit court invoked a stereotype as an aggravating factor.

The State concedes that the terms "'alien' and 'immigrant' have, in some circumstances, become pejorative." (State's Response at 21). The terms "***illegal*** alien" and "***illegal*** immigrant" are even more pejorative. The State ignores this entire section of Salas Gayton's brief, and

thus presumably concedes it. ***Charolais Breeding***, 90 Wis. 2d at 108-109.

D. If the circuit court was attempting to equate "illegal alien" status with prior unlawful or uncharged conduct, then it did so improperly.

The State's Response also ignores this section of Salas Gayton's brief. A sentencing court may not say "you're a noncitizen" or "you're an illegal alien" "that goes to your character" as a shorthand reference for prior unlawful conduct or an inability to follow the law. That runs into the rule that citizenship and alienage are unconstitutional sentencing factors. It also assumes that citizenship and immigration status are binary. They are nuanced. A noncitizen may be a lawful permanent resident or a visa holder. An undocumented immigrant might have entered the United States once without inspection. Or he might have re-entered after having been deported, which is a crime. He might have been brought here by his parents. He might be an asylee or a refugee and so forth. *See* Davorin J. Odrcic, ***Immigration Consequences of Criminal Offenses***, 1-11 to 1-15 (State Bar of Wisconsin 2015). If sentencing is to be individualized, ***Gallion***, ¶48, a court may not just say "you're a noncitizen; it goes to your character."

Assuming that aspects of a person's immigration status may be considered at sentencing, then the court: (1) must have accurate and reliable information of it, (2) the information must be relevant to the sentence, and (3) the linkage must be stated on the record. ***Gallion***, ¶43. It is one thing to consider a drug trafficker's repeated re-entries after deportation as evidence of noncompliance with the law. It is another to say that a single instance of improper entry 14 years ago, an act which carries a lesser penalty than reusing a postage stamp, shows an inability to conform to the law or bears on crimes that American citizens commit frequently.

IV. The Court Should Remand This Case for a New Sentencing Hearing.

A. The circuit court's error was structural.

According to the State, "Salas Gayton cites three cases in support of his contention that this court should consider the sentencing court's alleged error a structural error rather than one subject to harmless-error analysis." (State's Response at 31). Actually, Salas Gayton cited four cases. The State ignores the most important one: ***State v. Travis***, 2013 WI 38, 347 Wis. 2d 142, 832 491. (Initial Br. at 32). ***Travis*** holds that "[a] structural error at sentencing includes, for example, a biased tribunal." ***Id.***, ¶57. Sentencing a person more harshly based on alienage or national origin is a form of discrimination or bias. That is why it violates the Fifth and Fourteenth Amendments. And that's why it is a structural error.

Furthermore, ***Leung***, ***Martinez v. State***, 114 Nev. 735, 738, 961 P.2d 143 (1998) and ***U.S. v. Gonzalez***, 76 Fed Appx. 386, 388-389 (2003) all remanded cases for resentencing—without a harmless error analysis—due to the "appearance of bias." Wisconsin requires "actual reliance" on an unconstitutional sentencing factor, but that does not change the defendant's remedy—an automatic resentencing. The State cites no case to the contrary. This Court should reaffirm that this type of error is structural.

B. If the Court applies a "harmless error" analysis, then the circuit court's errors were harmful.

The sentencing transcript establishes that the circuit court gave "explicit attention" to Salas Gayton's noncitizenship and "illegal alien" status as sentencing factors concerning his character. The State bears the burden of proving that there is no reasonable probability that those

errors contributed to his sentence. ***Travis***, ¶70. It cannot do so. Given the circuit court's own words, it is certain that Salas Gayton's citizenship and "illegal alien" status contributed at least one day to his 22-year sentence. Thus, he was harmed.

Because the median term of initial confinement for OWI homicide in Wisconsin is just 5 years, it is very likely those factors played a much larger role in his sentencing. Salas Gayton and the State agree that the *Appleton Post-Crescent* studied 332 OWI homicide cases having different facts, resulting in different harms (one versus multiple deaths), and involving defendants with different criminal backgrounds. Indeed these cases resulted in sentences as light as probation and as harsh as an enhanced 25-year term of initial incarceration (due to the defendant's 6 prior OWIs).[1] These differences underscore the discrepancy in Salas Gayton's case. He had no prior OWIs and minimal prior contact with the criminal justice system. Yet he did not receive the 5-year median term of initial incarceration. He received the 15-year maximum. What leaps out from his sentencing record are the many comments highlighting his immigration status and national origin.

CONCLUSION

Leopoldo Salas Gayton respectfully requests that the Wisconsin Supreme Court reverse the court of appeals decision and remand this case for resentencing.

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[1]Eric Litke, *Scales of Justice or Roulette Wheel?* Available at: http://www.postcrescent.com/story/news/investigations/2015/11/23/judicial-sentencing-varies-wisconsin/76278810/.

Dated this 16th day of February, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,980 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 16th day of February, 2016.

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STATE OF WISCONSIN
SUPREME COURT OF WISCONSIN
Appeal No. 2013AP646-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LEOPOLDO R. SALAS GAYTON,

Defendant-Appellant-Petitioner.

Appeal From the Circuit Court for Milwaukee County
The Honorable Dennis R. Cimpl Presiding
Circuit Court Case No. 2011CF73

NON-PARTY AMICUS BRIEF OF THE IRREVOCABLE TRUST FOR THE BENEFIT OF HAYDEN ISABELLA LAMB IN SUPPORT OF THE RESPONDENT

Dated: 2/16/16

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Page

STATUTES

OTHER AUTHORITY

INTRODUCTION

This case is not a referendum on illegal immigration. This case involves the killing of a young woman and mother, by a man who chose to drive while drinking a twelve-pack of beer and, in his inebriated state, made a U-turn on a main arterial freeway to avoid law enforcement and drove into oncoming traffic until fatally striking the victim's car. The defendant happens to be in this country illegally, a fact that played a role not only in his choices on the day in question, but also in his qualification to drive at all, since he was unlicensed, and in his failure to comply with Wisconsin's financial responsibility law, since he was uninsured.

The amicus is the Irrevocable Trust for the Benefit of Hayden Isabella Lamb ("the Trust"). The Trust was established to provide for the young daughter of the victim, Corrie Damske ("Damske"), and has been funded by the only funds resulting from this senseless tragedy: a meager recovery under Damske's uninsured motorist policy, since Petitioner Leopoldo R. Salas Gayton ("Gayton"), among other failings, did not meet Wisconsin's requirements for adequate liability insurance. The Trust wishes to be heard on narrow issues that, while not directly at issue, have become thematic overtones to Gayton's case.

Gayton argues that reference to his illegal immigrant status produced a "stigma [that] infected the entire hearing." Gayton's Brief at 37.

Accordingly, he invites the Court to prohibit any mention, in a sentencing court, of a criminal defendant's illegal immigrant status.[1] In doing so, he asks the Court to create an exception to the general rule that a sentencing court should have "full knowledge of the character and behavior pattern of the convicted defendant before imposing sentence." ***Elias v. State***, 93 Wis. 2d 278, 285, 286 N.W.2d 559 (1980). Respondent's Brief in Opposition provides ample reasons for the Court to refuse such an invitation. The Trust respectfully urges the Court to additionally consider how such a ruling would impact a victim's ability to participate in the sentencing process.

Wisconsin's Legislature has elected to strongly protect victims' rights to "provide statements concerning sentencing, disposition or parole[.]" Wis. Stat. Ann. 950.04(1v)(m). In fact, Wisconsin considers a crime victim's cooperation essential to "the general effectiveness and well-being of the criminal justice system of this state[,]" and requires that "the rights extended[] to victims . . . are honored and protected by law enforcement agencies, prosecutors and judges *in a manner no less vigorous*

[1] Gayton's Brief criticizes the circuit court's sentencing proceedings for referencing his illegal immigrant status, noting that "[t]he sentencing record is saturated with references to Salas Gayton's alienage, Mexican national origin, and 'illegal alien' or 'illegal' status." Gayton's Brief at 21. He specifically criticizes the victim impact statements for "plac[ing] Salas Gayton's "illegal alien" status and all the stereotypes that went with it front and center at his sentencing hearing. . . . The stigma infected the entire proceeding." *Id.* at 37.

than the protections afforded criminal defendants." Wis. Stat. Ann. 950(01) (emphasis added).

In order to ensure that victims' rights to provide impact statements are protected as vigorously as the rights of criminal defendants, this Court should be wary of a ruling that would inadvertently curtail victims' rights to offer impact statements.

STATEMENT OF INTEREST

The Trust has an interest in this case because trustee Sharon Hvala offered a victim impact statement during Gayton's sentencing. The Trust seeks to safeguard victim's rights to freely offer victim impact testimony in future criminal cases, as guaranteed by Wis. Stat. Ann. 950.04(1v)(m).

ARGUMENT

An underlying, if not explicit, theme of Gayton's brief is that *he* was a victim of sorts in this case. He suggests a lynch mob mentality during his allocution hearing that was obsessively focused on his illegal immigrant status. *See* Gayton's Brief at 4-8 (describing victim impact letters from James Friedman, Kurt Damske, Peggy Lamb, and Jennifer Damske and victim impact testimony from Sharon Hvala and Michelle Friedman). He seeks to parlay this theme into a legal rule prohibiting any reference to illegal immigrant status during sentencing hearings, and any reliance at all on that status by the sentencing court, even where, as here, it was part of the

overall picture that led to the event in question, and was expressly deemed simply a "minor" sentencing factor going to character. The Court should reject this argument for several reasons, described below, and amplified in the remainder of this brief.

First, it is exaggerated factually. The Impact Statements primarily focused on the profound loss Ms. Damske's death represented to her friends and family

Second, however they may be characterized, impact statements should have no bearing on appellate review of a trial court's sentencing determination. A rule prohibiting sentencing judges from entertaining any reference to a defendant's illegal immigrant status would severely curtail victims' ability to offer impact statements, leading to an unacceptable (and unworkable) policy outcome. Sentencing judges have no effective means to control what information victims introduce at sentencing hearings in their impact statements. A rule seeking to impose such control would likely have a chilling effect on victim impact statements and also put at risk otherwise lawful sentences based on such statements.

Third, even if impact statements contain information irrelevant to the underlying crime, such statements do not invalidate otherwise sound sentences. Impact statements containing information irrelevant to a liability determination may be relevant in a sentencing hearing. Moreover,

sentencing courts are presumed capable of disregarding irrelevant information when considering impact statements.

Fourth, even where sentencing courts rely upon improper sentencing factors, such reliance is not necessarily fatal to the underlying sentence if it is otherwise justified by proper sentencing factors.

1. The Impact Statements in Gayton's Sentencing Hearing Overwhelmingly Focused upon the Victims' Profound Loss.

Gayton's Brief characterizes the impact statements in his sentencing hearing as "plac[ing] Salas Gayton's 'illegal alien' status and all the stereotypes that went with it *front and center* at his sentencing hearing." Gayton's Brief at 37. This argument overstates the facts. Peggy Lamb, Colette Brunki, Arlene Carter, Jennifer Damske, James and Michelle Friedman, and Hvala all provided impact statements. The overwhelming majority of these statements addressed the profound sense of loss experienced by Damske's friends and family members.

For instance, consider the testimony offered by Sharon Hvala ("Hvala"), Damske's mother. When Hvala began to offer the court her victim impact testimony, she noted that "[she did not] even know where to begin, to express the depths of my pain and agony in losing a child especially in a tragic manner as this one." Sentencing Transcript ("Transcript") at 16:23-25. She spoke about the pain of losing her daughter, noting that:

> Everyday I wake up to the unbelievable, that I will never see my daughter again. . . . I was never able to say goodbye or hold her in my arms or tell her how much I loved her and how much she meant to me. She died alone in the most tragic way on that cold highway.

Id. at 17:19-18:02. Hvala further explained the profound absence caused by Damske's death:

> It is tearing the very heart out of myself and my family and has left us with an absence so profound that nothing again in our lives would ever be able to replace the emptiness and unimaginable loss that we feel. It has altered our family forever.

Id. at 18:04-08. Hvala recounted events in the life of Damske's daughter, Hayden Isabella Lamb ("Lamb") that Damske will never witness, such as Lamb's birthdays, highschool and college graduations, marriage, and the birth of her children. *Id.* at 20:06-20. Finally, Hvala told the court that her family would be forever haunted by Damske's senseless death. *Id.* at 21:19-23 ("I don't even know what to do or where to go with this loss, but that is what we all[] have to face for the rest of [our] lives[.]")

Similarly, Michelle Friedman ("Friedman") explained her pain over losing her friend. *Id.* at 23:10-14 ("[E]ach day I struggle with the pain that she will never, ever be here again. I will never see her smile or feel her hug or enjoy her beautiful laughter . . . for the rest of my life.") *Id.* at 23:10-14. Friedman also mourned how Lamb will suffer because of her mother's death. *See, e.g., id.* at 23:15-19; at 24:09-19 ("Hayden no longer has a mother to guide her or to love her. . . . That . . . is the big tragedy surrounding [Damske's] death for her daughter[.]").

To be sure the pain, anger and frustration expressed during Gayton's allocution hearing was certainly heightened because Gayton committed an incredibly dangerous act, directly attributable to his illegal immigrant status and, though not intended to cause Ms. Damske's death, was not too far removed from the random firing of a gun into a crowd of people. He also, because of his immigration status, was unlicensed to drive and was uninsured. Inasmuch as Damske bore the brunt of these circumstances, the reference to the status that created them is understandable.

But contrary to Gayton's brief, there was no "stereotyping" in the impact statements or by the sentencing court of illegal immigrants generally. Nothing in this record suggests that any party characterized illegal immigrants as bad people generally or that Gayton's actions reflected on illegal immigrants as a class of people. Rather, the statements reflected the view that Gayton's status as an unlicensed, uninsured driver seeking to avoid law enforcement—factors attributable to Gayton's unlawful presence in the United States—made his actions all the more reprehensible.

2. Excluding All Reference to a Defendant's Illegal Immigrant Status Would Curtail a Victim's Right to Provide an Impact Statement Under Wis. Stat. Ann. § 972.14(3)(a).

As noted, Wisconsin law recognizes the rights of victims to provide impact statements. Wis. Stat. Ann. 950.04(1v)(m). In fact, Wisconsin law

mandates that courts must affirmatively inquire whether victims want to offer impact statements and, if so, must allow victims the opportunity to offer such statements. Wis. Stat. Ann. § 972.14(3)(a) (West) (emphasis added).

Victim impact statements serve several purposes. They provide information about the full extent of harm caused by the defendant's crime, information that may prove crucial to sentencing courts. *See* Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 620 (2009). Wisconsin sentencing courts, in particular, benefit from victims' impact statements since sentences must consider the gravity and nature of an offense, including the effect on the victim. ***State v. Gallion***, 2004 WI 42, ¶ 65, 270 Wis. 2d 535, 568, 678 N.W.2d 197, 212 ("A statement from the victims about how the crime affected their lives is relevant to . . . consider[ing] . . . the gravity of the crime"). Impact statements afford sentencing courts the most direct opportunities to consider victims' understandings of their loss.

Impact statements also provide benefits to the victim. "[E]ven if a victim has nothing to say that would directly alter the court's sentence, a chance to speak still serves important purposes. . . . '[Victim] allocution is both a rite and a right." ***United States v. Degenhardt***, 405 F. Supp. 2d 1341, 1349 (D. Utah. 2005) (quoting ***United States v. De Alba Pagan***, 33 F.3d 125, 129 (1st Cir. 1994)). Other courts have observed that victim

impact statements provide therapeutic effects to their victims. *See, e.g.,* ***Kenna v. U.S.***, 435 F.3d 1011, 1017 (9th Cir. 2006).

A ruling prohibiting sentencing courts from entertaining any reference to a defendant's illegal immigrant status would have chilling effects on a victim's right to offer impact statements.

Such a ruling could prove unworkable, given the nature of victim impact statements. It is unrealistic to expect victims, in moments of profound grief, to compose impact statements that are finely tailored to concord with legal standards of relevance. To fully express the physical, psychological, or economic damage caused by a crime, a victim may choose to reference a criminal defendant's illegal immigrant status because it is relevant to the victim's understanding of the crime and of their loss. For instance, a victim such as Hvala will have difficulty avoiding the thought that, but for a criminal defendant's unlawful entry into the United States, her daughter's life would not have ended at the hands of a man who elected to drunkenly drive into oncoming traffic. For Hvala, the defendant's illegal immigrant status may be entirely relevant to her understanding of her loss.

Furthermore, sentencing courts have no practical means of ensuring that an impact statement does not mention a defendant's illegal immigrant status. Wis. Stat. Ann. 950.04 provides no methods to determine, in advance, whether impact statements are inadmissible for containing

irrelevant testimony. If this Court sanctioned a rule forbidding sentencing courts from referencing a defendant's illegal immigrant status, sentencing courts may become unwilling to admit victim impact statements. This is because under the rule suggested by Gayton, if a sentencing court allowed a victim to provide an impact statement mentioning the defendant's illegal immigrant status, its sentencing hearing becomes invalid.

3. Where Impact Statements Contain Information Irrelevant to the Underlying Crime, Such Statements Do Not Necessarily Invalidate an Otherwise Sound Sentence.

Gayton characterizes the impact statements offered by Damske's friends and relatives, containing allegedly irrelevant information on Gayton's immigration status, as tainting the validity of Judge Cimpl's sentencing hearing. However, Wisconsin's jurisprudence on the use of impact statements is clear that impact statements containing information irrelevant to the underlying crime do not necessarily taint a sentencing hearing. This is especially true because sentencing courts are presumed capable of disregarding irrelevant information in impact statements.

A court may consider evidence that is irrelevant to determining criminal liability while evaluating the defendant's character during the sentencing phase. In ***State v. Sharrard***, 2009 WI App 95, 320 Wis. 2d 484, a defendant-appellant claimed that a sentencing court improperly considered a victim's impact statement containing irrelevant information

about a previous crime. The Court of Appeals held that because discerning whether a crime is part of a "pattern of conduct" is essential to determining the defendant's character and need for incarceration and rehabilitation, sentencing courts are "entitled to consider" evidence of prior unproven offenses in victim impact statements when considering the defendant's character. *Id.* at ¶ 11. *See also* ***State v. Leitner***, 2002 WI 77, ¶ 45, 253 Wis. 2d 449, 646 N.W.2d 341; ***United States v. Lawrence***, 934 F.2d 868, 874 (7th Cir. 1991) (noting that sentencing courts may consider evidence for which the defendant has not been prosecuted).

Here, the impact statements presented Gayton's illegal immigrant status as part of a pattern of illegal conduct. As explained in *Sharrard*, Gayton's sentencing court did not err by allowing victim impact statements which noted Gayton's illegal immigrant status in portraying a pattern of conduct of disregarding the laws of the United States.

Additionally, Wisconsin jurisprudence trusts sentencing judges to ignore irrelevant information when considering impact statements and that, therefore, irrelevant portions of impact statements do not taint the entire sentencing hearing. In ***State v. Lettenberger***, a defendant-appellant claimed that an impact statement contained irrelevant remarks. 2012 WL 280358, 340 Wis.2d 497. The Wisconsin Court of Appeals rejected defendant's argument, trusting the sentencing court's ability to "determine what was pertinent in the [impact statement]" and noting that " "[i]f any of the[]

statement could be deemed not relevant to the sentence . . . it is clear that the circuit court did not rely upon any improper information at sentencing. The circuit court had sufficient information from the State and Lettenberger to exercise its sentencing discretion." *Id.*

Here, as in *Lettenberger*, the information about the seriousness of the crime sufficiently upholds Judge Cimpl's sentence. Nothing in the sentencing transcript indicates Judge Cimpl relied upon victim comments on Gayton's illegal immigrant status in determining the proper sentence; instead, the sentence is justified by Gayton's extreme disregard for human life when he ended Damske's life by drunkenly driving on the freeway into oncoming traffic.

4. Where Sentencing Courts Rely on Improper Factors During Sentencing, This Reliance Is Not Fatal to the Underlying Sentence if Justified By Proper Factors.

Nothing in the sentencing decision supports the notion that Judge Cimpl placed undue reliance on Gayton's illegal immigrant status. Nor, as previously explained, does such status constitute an improper sentencing factor. Nevertheless, courts have held that a sentencing court's reliance on improper factors, if minor, does not undermine the validity of a sentence that is otherwise based upon an appropriate consideration of the three primary sentencing factors.

In ***State v. Betters***, Betters, convicted of sexually assaulting a child, claimed that the sentencing court improperly relied upon religious factors during his sentencing hearing when it stated that "every child is a gift from God" and that Better's conduct was "an abomination in the sight of God[.]" 349 Wis.2d 428, 835 N.W. 2d 249 (Wis. App. 2013). While the Wisconsin Court of Appeals recognized the impropriety of such considerations and stressed that "the court's invocations of a religious deity were ill-advised[,]" it affirmed the sentencing court because the sentence was otherwise based upon a proper consideration of the three primary sentencing factors. *Id.* at ¶ 20. The Seventh Circuit has similarly held that where a sentencing court relies on both proper and improper factors, the sentence should be upheld if proper factors alone sufficiently justify a sentence. ***U.S. v. Franklin***, 902 F.2d 501, 508 (7th Cir. 1990).

Assuming, *arguendo*, that Judge Cimpl relied on Gayton's illegal immigrant status, such status was only a minor factor in the sentence imposed. Taken as a whole, the sentence was based on Judge Cimpl's consideration of the three primary sentencing factors under Wisconsin law: the gravity of Gayton's causing the death of Damske while drunkenly driving into oncoming traffic, his character, and the need to protect the public. Where a defendant, regardless of status, engages in such conduct, a sentencing court is well within its discretion to provide the maximum penalty the law will allow for vehicular homicide.

CONCLUSION

For the foregoing reasons, the amicus urges that this Court affirm the decision of the Court of Appeals.

Dated this 16th day of February, 2016.

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I hereby certify that this brief and appendix conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, and maximum of 60 characters per line. The length of this nonparty, amicus brief is 2989 words, as determined by a word count produced by a commercial word processor available to the general public and as allowed by Wis. Stat. § 809.19(8)(d).

Dated this 16th day of February, 2016.

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STATE OF WISCONSIN
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Appeal No. 2013AP646-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

LEOPOLDO R. SALAS GAYTON,
Defendant-Appellant-Petitioner.

NON-PARTY BRIEF OF CATHOLIC CHARITIES LEGAL SERVICES FOR IMMIGRANTS, THE NATIONAL IMMIGRANT JUSTICE CENTER, THE UNIVERSITY OF WISCONSIN LAW SCHOOL IMMIGRANT JUSTICE CLINIC, AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF WISCONSIN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

JOURNAL ARTICLES

OTHER SOURCES

INTRODUCTION

This Court granted review of Leopoldo Salas Gayton's case to decide whether Wisconsin courts should be allowed to "rely on a defendant's illegal immigrant status" at sentencing. Ct.'s Nov. 5, 2015, Order Grant Rev. at 1. It is the position of the undersigned amici that such reliance is improper and contributes to the sentencing disparities that noncitizens presently face in the American criminal justice system.[1] As such, the undersigned amici urge this Court to hold that circuit courts may not consider a defendant's "illegal immigrant status" at sentencing.

First, though it may be used colloquially, there is no such thing as "illegal immigrant status." Many immigrants who presently lack authorized status originally entered with permission,[2] and therefore never committed an immigration-related crime. *See* 8 U.S.C. § 1324(d) (failure to depart civil violation). Additionally, unlawful entry, which can be either a civil violation or a misdemeanor, 8 U.S.C. § 1325, does not foreclose a person from later being granted the right to remain, *see, e.g.,* 8 U.S.C. § 1158. The singular act of unlawful entry thus does not establish some persistent status as an "illegal immigrant." Moreover, "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States," and removal itself is a civil, not a criminal, matter. *Arizona v. United States*, ___ U.S. ___, 132 S. Ct. 2492, 2499, 2505 (2012).

Second, the term "illegal immigrant" is dehumanizing and perpetuates prejudice against immigrants. In conjunction with the fact that there is no such thing in the law as "illegal immigrant status,"

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[1] *See* Michael T. Light, *The New Face of Legal Inequality: Noncitizens & the Long-Term Trends in Sentencing Disparities across U.S. District Courts, 1992-2009*, 48 L. & Soc'y R. 447, 469 (2014).

[2] Robert Warren & Donald Kerwin, *Beyond DAPA & DACA: Revisiting Legis. Reform in Light of Long-Term Trends in Unauthorized Immigration to the U.S.*, 3 J. Migration & Human Sec. 80, 92-93 (2015).

labeling a person as an "illegal immigrant" can stand as a proxy for national origin discrimination, even though discrimination may not always be its intended use.[3] The term "illegal immigrant" should be abandoned along with any reliance on "illegal immigrant status" at sentencing.

Finally, while a sentencing court may consider that a noncitizen defendant entered the country unlawfully—if in fact that is the case—care should be taken in so doing. *See Muhur v. Ashcroft*, 382 F.3d 653, 654 (7th Cir. 2004) (noting complexity of immigration law and its application). To ensure fairness in the sentencing of noncitizen defendants, Wisconsin sentencing courts should not be allowed to consider an alleged unlawful entry absent reliable, verifiable proof thereof. Determining a person's current immigration status is a complicated inquiry that is properly within the exclusive purview of the federal immigration authorities, not Wisconsin's sentencing judges. *See, e.g., Mansour v. INS*, 230 F.3d 902, 908 (7th Cir. 2000) (deferring to BIA because of complexity in immigration matters). What is more, unlawful entry can be mitigated in a variety of ways, and thus the facts of a particular entry are relevant to the defendant's character. To ensure that reliance on an unlawful entry is fairly done—and not some proxy for national origin discrimination—sentencing courts that rely on unlawful entry should be directed to set forth clearly in the record how any unlawful entry is relevant to the defendant's sentence. *See State v. Gallion*, 2004 WI 42, ¶ 43, 270 Wis. 2d 535, 678 N.W.2d 197.

The undersigned amici urge this Court to draw a distinction between consideration of an act done in

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[3] *See* Paul Colford, *'Illegal immigrant' no more*, AP: The Definitive Source (April 2, 2013) (available at https://blog.ap.org/announcements/illegal-immigrant-no-more) (last accessed Mar. 7, 2016) (explaining why "illegal immigrant" no longer used).

contradiction to the law—unlawful entry—and a person's immigration status at the time of sentencing. We urge this Court to instruct judges that they may consider, where relevant and upon reliable and verifiable proof, a defendant's prior act of unlawful entry to the country in the same way that they would consider any other unlawful act. A defendant's "illegal immigrant status" should be off limits. Considering whether a person violated the law when entering the country may be appropriate. Considering whether a person is an "illegal immigrant" or has "illegal immigrant status" is not.

ARGUMENT

I. THERE IS NO SUCH THING AS AN "ILLEGAL IMMIGRANT" OR "ILLEGAL IMMIGRANT STATUS" IN THE LAW.

In total, the United States Code uses more than 4,000 words across twenty-three subsections to define "immigrant." 8 U.S.C. § 1101(a)(15). It does so by distinguishing those who may be called "immigrants" from other noncitizens who have any one of a hodgepodge of different rights to remain in the United States without being lawful permanent residents. *Id.* In yet another lengthy definition—1,700+ words and thirteen subsections—the code gives meaning to the term "special immigrant[s]," thereby identifying immigrants with some particular characteristic that makes them different from mere immigrants. 8 U.S.C. § 1101(a)(27). Under that definition, even a lawful permanent resident can, at times, be rightly called a "special immigrant." 8 U.S.C. § 1101(a)(27)(A).

Despite those extensive definitions, the code gives no definition to the term "illegal immigrant." In fact, even the provision making unlawful a noncitizen's entry into the United States uses neither "illegal immigrant" nor "illegal immigration." 8 U.S.C. § 1325. Instead, it discusses a noncitizen's "[i]mproper entry;" even there, the word "immigrant" is entirely

absent. *Id.* As such, there is no legal definition given to the term "illegal immigrant."

Certainly, it is true that under certain circumstances a person's entry to the country may violate the law. *See id.* But, unlawful entry is not alone determinative of a person's immigration status. *See Arizona*, 132 S. Ct. at 2505 There are a number of different pathways by which a person in the country without lawful authority may legally remain. For example:

1. Our country has a long history of providing asylum to those who come here in fear of persecution in their home country. 8 U.S.C. § 1158. How an asylum seeker enters is irrelevant to a subsequent grant of asylum. 8 U.S.C. § 1158(a)(1).
2. A crime victim who cooperates with authorities may be given permission to remain, regardless of the manner of entry. 8 U.S.C. § 1101(a)(15)(U).
3. Persons in the country without lawful authority that are subject to removal proceedings can be granted leave to remain upon satisfying certain criteria. 8 U.S.C. § 1229b.

In each of the aforementioned examples, it would be fair to say that the person may have violated the law upon entering the country but nonetheless subsequently obtained the right to remain. Thus, unlawful entry does not determine immigration status.

In sum, under federal law there is no such thing as an "illegal immigrant" or any status that a person can properly be said to have as an "illegal immigrant."

II. THE TIME HAS COME TO STOP USING THE TERM "ILLEGAL IMMIGRANT"—IT IS DEHUMANIZING AND PERPETUATES PREJUDICE AGAINST IMMIGRANTS.

The term "illegal immigrant" is not a term of art. It "was first used in 1939 as a slur by the British toward Jews who were fleeing the Nazis and entering Palestine without authorization."[4]

It is now widely accepted that the term "illegal immigrant" has negative connotations.[5] By its very structure, the term assigns to a person the status of being illegal, rather than describing some act that the person may have committed.[6] But, a person cannot be illegal; only an act can be illegal. "'As such, the term ["illegal immigrant"] is dehumanizing, 'inherently criminalizing [the person] as wrong, other, as not right.'"[7] And while the dehumanizing aspect of the term warrants abandonment, it is not the term's most harmful trait.

Use of terms like "illegal immigrant" and "illegal alien" or the suggestion that a person has "illegal immigrant status" has a prejudicial effect.[8] The term

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[4] Charles Garcia, *Why 'illegal immigrant' is a slur*, cnn.com (July 6, 2012) (available at http://www.cnn.com/2012/07/05/opinion/garcia-illegal-immigrants) (last accessed Mar. 7, 2016).

[5] *See* Lauren Gambino, *'No human being is illegal': linguists argue against mislabeling of immigrants*, theguardian.com (Dec. 6, 2015) (available at http://www.theguardian.com/us-news/2015/dec/06/illegal-immigrant-label-offensive-wrong-activists-say) (last accessed Mar. 7, 2016).

[6] Jose Antonio Vargas, *Immigration Debate: The Problem with the Word* Illegal, time.com (Sept. 21, 2012) (available at http://ideas.time.com/2012/09/21/immigration-debate-the-problem-with-the-word-illegal) (last accessed Mar. 7, 2016).

[7] Esther Yu-Hsi Lee, *The Dehumanizing History of the Words We've Used to Describe Immigrants*, thinkprogress.org (Aug. 13, 2015) (available at http://thinkprogress.org/immigration/2015/08/13/3690746/california-alien-immigrant-law) (last accessed Mar. 7 2016) (quoted source omitted).

[8] *See* Reidar Ommundsen, et al., *Framing Unauthorized Immigrants: The Effects of Labels on Evaluations*, 114:2 Psychological Reports 461, 464, 471 (2014).

"illegal alien" has specifically been found to "intensif[y] prejudice" against immigrants because listeners associate with it "increased perceptions of threat" to their society.[9] And if the term "illegal alien" causes prejudice, the term "illegal immigrant" has an even more pernicious effect, given that listeners respond to it more negatively.[10] In fact, the term "illegal immigrant" has been specifically suggested as a way by which to enflame passions against those who entered unlawfully by associating with such persons a stigma of illegality.[11]

Given the offensive nature and prejudicial effect of the term "illegal immigrant," this Court should deny it any place in our judicial system. The words that we use influence our attitudes and opinions.[12] The use of the term "illegal immigrant" should be discontinued in Wisconsin's courts.

Abandonment of the term "illegal immigrant" will avoid perpetuating the stigma and prejudice associated with it, as well as ensure that those who encounter our justice system are not dehumanized in the process. And, giving it up will do no harm to the jurisprudence of this State.

If a court finds need to reference the fact that a person entered the country unlawfully, then that fact can be plainly stated without simultaneously dehumanizing or causing prejudice to the person before the court. Rather than saying, "The defendant

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[9] Matthew R. Pearson, *How "undocumented workers" and "illegal aliens" affect prejudice toward Mexican immigrants*, 5 Social Influence 118, 128 (2010).

[10] *See* Ommundsen, et al., *supra* note 8 at 461.

[11] *See* Lutntz, Maslansky Strategic Research, *Respect for the Law & Economic Fairness: Illegal Immigration Prevention* (Oct. 2005) (available at http://images.dailykos.com/images/user/3/Luntz_frames_immigration.pdf) (last accessed Feb. 22, 2016).

[12] Andrew C.H. Szeto, Dorothy Luong, Keith S. Dobson, *Does labeling matter? An examination of attitudes and perceptions of labels for mental disorders*, 48 Soc. Psychiatry & Psychiatric Epidemiology 659, 660 (2013).

is an illegal immigrant," a court can say, "The defendant entered the country unlawfully," or "The defendant's entry without inspection constituted a misdemeanor." In fact, such clarity of language will not only avoid dehumanization or the appearance of prejudice, but it will ensure accuracy; for, as detailed above, not all those that enter unlawfully are later denied the right to lawfully remain. Changing the language of this discourse will have particular import at sentencing, where it is proper to consider the commission of an unlawful act but not one's alienage or national origin.

III. "ILLEGAL IMMIGRANT STATUS" IS NOT A PROPER SENTENCING FACTOR.

When a court aggravates a person's sentence because he or she is an "illegal immigrant," the court's language admits to the imprecision described above. There is no such thing as an "illegal immigrant" and no person has "illegal immigrant status." Whereas those words are undefined in the law, their use is not descriptive of something legal cognizable. As commonly used, the term "illegal immigrant" highlights that a person is a noncitizen and it evokes the negative stereotypes commonly associated with the term.[13]

But, sentencing a person more harshly because he or she is a noncitizen violates constitutional principles, and can never be a permissible ground on which to aggravate a sentence. *See United States v. Onwuemene*, 933 F.2d 650, 651 (8th Cir. 1991). Thus, that a person is an "illegal immigrant" or has "illegal immigrant status" is not a proper sentencing factor. *See United States v. Velasquez Velasquez*, 524 F.3d 1248, 1253 (11th Cir. 2008) (sentence cannot be based on "unfounded assumptions regarding an individual's

[13] *See* Gambino, *supra* note 5.

immigration status or on [court's] personal views of immigration policy").

Salas Gayton's sentencing hearing is exemplary of the error that arises when the term "illegal immigrant" is used to describe a noncitizen defendant. The only assertions regarding Salas Gayton's status as an "illegal immigrant" came from the unsubstantiated and unverified claims of the victim's supporters. The court's adoption of the dehumanizing and prejudicial language advanced by the victim's supporters demonstrates a bias at sentencing reflective of the inequities that noncitizen defendants currently face in the system.

It is indisputable that our justice system should treat equally the citizens and noncitizens that come before it. *See Plyer v. Doe*, 457 U.S. 202, 210 (1982). However, recent research has shown that noncitizen criminal defendants are four times more likely to be sent to prison than citizen defendants, even after accounting for factors that are normally associated with sentencing severity.[14] The greater likelihood of imprisonment increases almost twofold when the defendant is a noncitizen with no lawful authority to remain.[15] And the increased likelihood of incarceration is not the only sentencing disparity that our system imposes on noncitizens.[16] Indeed, not only are noncitizens more likely to go to prison, but they are also more likely to receive longer sentences when they do.[17]

Salas Gayton's sentence reflects the systemic prejudices endured by noncitizen defendants in our justice system: the court put him in prison for three-

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[14] Michael T. Light, Michael Massoglia, & Ryan D. King, *Citizenship & Punishment: The Salience of Nat'l Membership in U.S. Crim. Cts.*, 79 Amer. Sociological R. 825, 835 (2014). As the paper details, the disparities identified are "net of legally relevant controls" *Id.* at 837.
[15] *Id.*
[16] *Id.*
[17] *Id.*

times longer than the median sentence for his crime over the past ten years.[18] And it did so, in part, because of the opinion that he is an "illegal immigrant." While it very well may be the case that the sentencing court meant only that Salas Gayton's prior act of unlawful entry reflected negatively on his character, the court's failure to articulate that point clearly was error.

When the sentencing court labeled Salas Gayton an "illegal immigrant" without reliable, verifiable proof that he had before unlawfully entered the country, its language gave over to the prejudice and bias inherent to those terms. Thus, Salas Gayton's purported "illegal immigrant status" stood as a proxy for his status as a noncitizen. His sentencing was therefore unconstitutional.

CONCLUSION

Our justice system must treat all those who come before it equally. The terms "illegal immigrant" and "illegal immigrant status" should be abandoned. A sentencing court's consideration of a prior unlawful entry should be done, if at all, only upon the receipt of reliable and verifiable proof of the entry, as well as the facts underlying that entry. Any such consideration must be done in an on-the-record statement explaining the relevance of the unlawful entry to the sentence.

Given the sentencing court's consideration of Salas Gayton's "illegal immigrant status" and the absence from sentencing of reliable, verifiable proof of any prior unlawful entry, the undersigned amici ask this Court to remand for sentencing consistent with the principles above.

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[18] Eric Litke, *Scales of justice or roulette wheel? Analysis shows sentences vary drastically between judges*, postcrescent.com (Nov. 23, 2015) (available at http://www.postcrescent.com/story/news/investigations/2015/11/23/judicial-sentencing-varies-wisconsin/76278810/) (last accessed Mar. 7, 2016).

Dated this 7th day of March, 2016.

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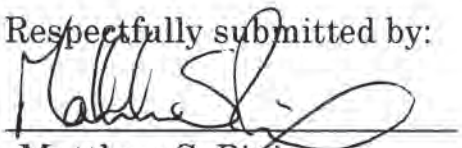

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I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Section 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2013AP646-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LEOPOLDO R. SALAS GAYTON,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District I, Affirming a Judgment of Conviction Entered by the Milwaukee County Circuit Court, Judge Dennis R. Cimpl Presiding, and from an Order Denying the Postconviction Motion, Judge Ellen R. Brostrom Presiding

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PETITIONER'S REPLY TO NONPARTY BRIEF FILED BY THE IRREVOCABLE TRUST FOR THE BENEFIT OF HAYDEN ISABELLA LAMB

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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

INTRODUCTION

Illegal immigration is an incendiary issue in the United States. Thus, contrary to the Trust's suggestion, the very last thing the petitioner, Leopoldo Salas Gayton, wants is a "referendum" on that subject. (Trust's Br. at 1).[1] What he requests is a reasoned decision, based on the United States Constitution, holding that Wisconsin sentencing courts may not just call a defendant a "noncitizen" or an "illegal alien" and deem those qualities to be "flaws" that go to his "character." He further requests a decision addressing the arguments that he has actually advanced in this case, rather than the arguments that the Trust has improperly attributed to him.

ARGUMENT

I. The Trust Misstates Salas Gayton's Position Regarding the Information a Court May Have and Consider at a Sentencing Hearing.

The Trust asserts that Salas Gayton "invites the Court to prohibit any mention, in a sentencing court, of a criminal defendant's illegal immigration status. In doing so, he asks the Court to create an exception to the general rule that a sentencing court should have 'full knowledge of the character and behavior pattern of the convicted defendant before imposing sentencing.'" (Trust's Br. at 2)(citing ***Elias v. State***. 93 Wis. 2d 278, 285, 286 N.W.2d 559 (1980)).

This is a significant mischaracterization of Salas Gayton's position. First, no one disputes that a sentencing court should have full knowledge of a defendant's character

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[1] This Reply Brief refers to the Irrevocable Trust for the Benefit of Hayden Isabella Lamb as "the Trust."

and behavior pattern. The question is whether a person's status as a "noncitizen" or "illegal alien" is demonstrative of a person's character or behavior pattern.

Second, Salas Gayton asks this Court to adopt the rule that a circuit court may not sentence a defendant more harshly because he is an "illegal," an "illegal alien," an "illegal immigrant" or because of his alienage or national origin. (Initial Br. at 1; Reply Br. at 1-2). And he has stated clearly: "***This does not mean that a court may never mention a person's immigration or deportation status at sentencing***." (Reply Br. at 1)(emphasis supplied). A sentencing court may be informed of a person's immigration status. In appropriate circumstances, a sentencing court may consider unauthorized entry when fashioning a sentence. One example is where the defendant is being sentenced for drug trafficking and he entered the United States illegally for that purpose. *See e.g.* ***U.S. v. Gomez***, 797 F.2d 417, 420 (7th Cir. 1986).

Third, if a sentencing court is to consider an alleged immigration violation as prior unlawful or uncharged conduct then it must have accurate and reliable information about the violation. The violation must be relevant to the sentence, and the link between the two must be stated on the record. (Initial Br. at 1-2; Reply Br. at 1-2). *See* ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, ¶¶678 N.W.2d 197 (court must identify relevant facts and factors, indicate how the factors fit the sentencing objectives, and state the linkage on the record). The Trust ignores this principle of sentencing law.

For example, the Trust cites ***State v. Sharrard***, 2009 WI 95, 320 Wis. 2d 484, 769 N.W.2d 878 (unpublished per curiam),[2] which concerned the sentencing of a defendant

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[2] The Trust's brief violates Wis. Stat. §809.23(3)(b). It cites ***State v. Sharrard***, 2009 WI 95, 320 Wis. 2d 484, 769 N.W.2d 878 and ***State v. Lettenberger***, 2012 WI App 40, 340 Wis. 2d 497, 812 N.W.2d

convicted of child sexual assault. A previous victim of the defendant submitted a victim impact statement making specific assertions about his behavior with her, and the defendant confirmed the essential nature of his relationship to the presentence investigation report writer. ***Sharrard*** held that the previous victim's statement revealed a pattern of behavior that cast light on the defendant's character and thus the sentencing court could consider it. ***Id***. at ¶¶14-15. Here, by contrast, the victims offered no information about Salas Gayton's entry into the United States, and the sentencing court cited no facts relating to his entry into the United States. The court simply stated that his noncitizenship and "illegal alien" status were character flaws without further explanation. It is not a crime for an undocumented immigrant to be in the United States. ***Arizona v. U.S.***, 132 S.Ct. 2492, 2505 (2012). Therefore, being a noncitizen or an "illegal alien" is not a character flaw or bad behavior.

Likewise, neither ***State v. Lettenberger***, 2012 WI App 40, 340 Wis. 2d 497, 812 N.W.2d 539 (unpublished per curiam), ***State v. Leitner***, 2002 WI 77, 253 Wis. 2d 449, 646 N.W.2d 341, nor ***U.S. v. Lawrence***, 934 F.2d 868 (7th Cir. 1991) governs Salas Gayton's situation. These cases hold that a court may consider evidence of a defendant's uncharged or unproven offenses at sentencing. That is not in dispute. Again, one of the problems here is that nobody offered—and the sentencing court did not recount—any evidence of immigration offenses by Salas Gayton. It called his noncitizenship and his "illegal alienage" character flaws. At a minimum, it sentenced him based upon his alien status in violation of the Fifth and Fourteenth Amendments. (*See* cases cited in Initial Br. at 21-23; Reply Brief at 4-7).

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539 but fails to identify them as unpublished per curiam opinions. Salas Gayton references these cases only to distinguish them.

II. Salas Gayton Has Not Asked this Court to Modify the Allocution Rights of Crime Victims.

According to the Trust: "Under the rule suggested by Gayton, if a sentencing court allowed a victim to provide an impact statement mentioning the defendant's illegal immigrant status, its sentencing hearing becomes invalid." (Trust's Br. at 10).

The scope of victim allocution is governed by Wis. Stat. §950.04(1v)(m) and Wis. Stat. §972.14(3)(a), which provide that any victim impact statement "must be relevant to the sentence." Salas Gayton has not asked the Court to change this rule. Furthermore, it is understandable that a victim's family and friends may feel overwhelmed by grief and other emotions at sentencing. But the issue for review does not concern what the victims may or may not say at sentencing. The issue concerns what ***a court*** should or should not do after ***any participant*** in a sentencing proceeding interjects an irrelevant or constitutionally impermissible sentencing factor.

For example, if the district attorney had urged the maximum sentence because Salas Gayton is a noncitizen or an "illegal alien," a constitutionally permissible response would be for the sentencing court to say: "I do not consider the defendant's citizenship or alienage. In sentencing the defendant I consider the gravity of the offense, the protection of the public, and the character of the defendant." A constitutionally ***impermissible*** response is for the sentencing court to say: "You're a noncitizen; it goes to your character. You're an illegal alien, it's a minor character flaw." The latter response requires a new sentencing hearing.

III. The Sentencing Court Committed Structural Error.

The Trust argues that a sentencing court's reliance on an improper factor does not necessarily require resentencing

and offers as an illustration ***State v. Betters***, 349 Wis. 2d 428, 835 N.W.2d 249 (Ct. App. 2013). (Trust's Br. at 13). But ***Betters*** found that the circuit court had not actually relied upon impermissible religious grounds in sentencing the defendant. ***Id.*** ¶16. Here the sentencing court explicitly stated that Salas Gayton's "illegal alien" status was a character flaw.

Alienage is not just any improper factor. Like race, gender, or national origin, it is a factor of Fifth Amendment proportions. *See* ***Plyer v. Doe***, 457 U.S. 202, 210 (1982). A court that discriminates on the basis of such factors commits a structural error that automatically requires resentencing. ***State v. Travis***, 2013 WI 38, ¶57, 347 Wis. 2d 142, 832 N.W.2d 491. The court here committed a constitutional violation that affected the framework of the sentencing proceeding. Consequently, a new sentencing hearing is necessary.

CONCLUSION

Leopoldo Salas Gayton respectfully requests that the Wisconsin Supreme Court reverse the court of appeals decision and remand this case for resentencing.

Dated this 7th day of March, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,330 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 7th day of March, 2016.

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