STATE OF WISCONSIN

IN SUPREME COURT

---

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

---

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LEOPOLDO R. SALAS GAYTON,

Defendant-Appellant-Petitioner.

---

**ON PETITION FOR REVIEW OF A DECISION OF THE WISCONSIN COURT OF APPEALS**

---

# BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

---

BRAD D. SCHIMEL
Attorney General

CHRISTOPHER G. WREN
Assistant Attorney General
State Bar No. 1013313

Attorneys For Plaintiff-Respondent State of Wisconsin

Wisconsin Department of Justice
17 West Main Street
Post Office Box 7857
Madison, Wisconsin 53707-7857
v: (608) 266-7081
f: (608) 266-9594
e: wrencg@doj.state.wi.us

February 2, 2016

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES CITED

### CASES

Page

**STATUTES**

## OTHER AUTHORITIES

STATE OF WISCONSIN

IN SUPREME COURT

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LEOPOLDO R. SALAS GAYTON,

Defendant-Appellant-Petitioner.

**ON PETITION FOR REVIEW OF A DECISION OF THE WISCONSIN COURT OF APPEALS**

# BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN[1]

## QUESTIONS PRESENTED

1. May a sentencing court rely on a defendant's illegal presence in the United States as a factor in fashioning a sentence?

   - In characterizing Salas Gayton's illegal presence in the United States as "a minor character flaw" and "a minor factor," the sentencing court implicitly answered "Yes." In denying Salas Gayton's postconviction motion (30), the circuit court did not address this issue.
   - The court of appeals answered "Yes."
   - This court should answer "Yes."

[1] To facilitate online reading, the electronically filed version of this brief includes hyperlinked bookmarks.

2. If a sentencing court must not rely on a defendant's illegal presence in the United States, does a sentencing court's error in relying on that fact qualify as structural error (automatically entitling the defendant to a new sentencing hearing), or does the court's error remain subject to harmless-error analysis?

   - Salas Gayton did not raise this issue in either the Milwaukee County Circuit Court or the Wisconsin Court of Appeals. Neither the circuit court nor the appellate court addressed this issue.
   - This court should hold that if a sentencing court errs by relying on a defendant's illegal presence in the United States, the error does not qualify as structural error and instead remains subject to harmless-error analysis.

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

**Oral argument.** Because this court granted the petition for review, the case warrants oral argument.

**Publication.** Because this court granted the petition for review, the court's opinion warrants publication.

## STATEMENT OF THE CASE: FACTS AND PROCEDURAL HISTORY

As respondent, the State opts not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2.[2] Instead, so readers without ready access to the sentencing transcript can understand the context within which the arguments of Salas Gayton and the State (as well as this court's eventual opinion) arise, the State reproduces in full the sentencing court's remarks leading to the sentencing decision.[3] The State will present any additional facts in the "Argument" portion of its brief.

### Sentencing Court's Remarks And Decision

> THE COURT: We are here for sentencing on Count 1, homicide by intoxicated use of a motor vehicle; and Count 3, operating without a license causing death.
>
> . . . .
>
> THE COURT: I have, which I have reviewed in this case, the criminal complaint obviously, a report from Dr. John Pankiewicz, dated January 17, 2011, when the competency was challenged [11], the memo from Vera, V-E-R-A, Hudson, H-U-D-S-O-N, of the probation department, dated June 29, 2011 [11], a memo from the district attorney's office re-

---

[2] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2013-14 edition.

[3] The State also requests that this court reproduce as an appendix to its opinion the full remarks of the sentencing court. Reproduction of those remarks will provide a benchmark for jurists, lawyers, and litigants assessing how, and how much (if at all), a sentencing court may refer to a defendant's national origin or may consider as a sentencing factor a defendant's illegal presence in the United States.

garding restitution dated July 8, 2011, a letter dated July 20, 2011, from Peggy Lamb, L-A-M-B, the grandmother of the victim's daughter [50], a letter from Colette, C-O-L-E-T-T-E, Brunki, B-R-U-N-K-I [51], a letter from Arlene Carter [52], a letter from Jennifer Damske, D-A-M-S-K-E [53], a letter from James Friedman, F-R-I-E-D-M-A-N [49]. Those are all on behalf of the victim, and a letter from Tanya, T-A-N-Y-A, Laffrenier L-A-F-F-R-E-N-I-E-R [54], on behalf of the defendant.

Does the State have all of those things?

MR. WILLIAMS: Yes, sir.

THE COURT: Does the defense have all of those things?

MS. JOHNSON: Yes, I do.

THE COURT: And did the defense go over all of the things with the defendant?

MS. JOHNSON: I just received the copy of the letters from the -- some of the friends and family today.

I did inform my client previously that I had received a letter to my office, so I have not reviewed in detail the different letters, but he's aware of there has been letters submitted on behalf of the victim's family. This is also the first chance I've had to talk to him about the restitution amount required.

THE COURT: Do you want the opportunity to review those letters with him? We can pass the case.

MS. JOHNSON: I don't think we need to pass the case. If you can give me just one moment to make sure.

THE COURT: I can do that. What is your position on the restitution requested of $11,075 to Sharon Hvala, H-V-A-L-A?

MS. JOHNSON: Well, based on the documentation provided, it seems to be an accurate amount; but as I just said, I just received this. I haven't had a chance to review that as well.

THE COURT: All right. So you're going to review that with your client as well?

MS. JOHNSON: Yes, I am.

THE COURT: And other than that, you're ready to go to sentencing?

MS. JOHNSON: I am.

THE COURT: And we can address the memo from the probation department after you've reviewed the other things with your client.

MS. JOHNSON: That's fine.

MR. WILLIAMS: Judge, I would ask that she review the letters from the victim's friends and family with the defendant in case there's something he deems improper and he wants to confront that.

THE COURT: Sure. Do you want to do that out here or in the back?

MS. JOHNSON: It's probably easier to do it in the back.

THE COURT: Let's do that. Let's pass the case and do that.

(Whereupon, the case was recalled.)

THE COURT: All right. We are back on the record, There was also another letter from Kirk Richard Damske [55] which I have read, and I assume you got a copy of and went over also, right, Ms. Johnson?

MS. JOHNSON: I did, Your Honor. I reviewed the letters with my client with some assistance from the interpreter. He did not feel it necessary to review each letter word-for-word, although I did so for myself.

We provided him with an accurate summary of what each of the letters contained, and he is satisfied. I don't believe there are any issues, any information that we need to keep out, and we are prepared to go forward.

THE COURT: What is the position on the restitution?

MS. JOHNSON: We agree to that amount.

THE COURT: The Court will order restitution in the amount of $11,075 to Sharon Hvala.

The Court ordered a presentence report on this matter, and I did get a memo from Vera Hudson of the probation department [11]. The parties indicated that they got it.

Did you go over that memo with your client, Ms. Johnson?

MS. JOHNSON: I did.

THE COURT: Does he have any additions or corrections to it?

MS. JOHNSON: He does not have any additions or corrections. My understanding is that when the agent came to prepare the presentence investigation, the type of questions that they were asking him to begin with, he did not understand how they were related to the case or the information that ultimately the Court was going to use to decide the sentence today.

I think he was just somewhat distrusting of how they approached him. Nonetheless, he did not complete the interview.

I now sat down with him a number of times to try and provide as much information to the Court. And it's my understanding that all parties wish to proceed today, despite the fact that he doesn't have a PSI completed.

THE COURT: So he's willing to proceed to sentencing without the PSI?

MS. JOHNSON: Correct.

THE COURT: How about the State?

MR. WILLIAMS: Yes.

THE COURT: The Court is also willing to do that. I've got enough information, I think, from Dr. Pankiewicz's report [11].

I trust, Ms. Johnson, you can fill me in if I have any questions on any background of your client.

Certainly, the questions that Ms. Hudson was asking of the help of Spanish Interpreter Patrick Ryan, R-Y-A-N, at least from the memo to me, would be relevant questions and things that any judge needs to know when he goes to sentencing in accord-

ance with the Galleon case. So I don't think that they were in any way, shape or form intrusive, but we can go ahead to sentencing without the presentence report. So the defense is now ready to go to sentencing as well?

MS. JOHNSON: Correct.

THE. COURT: Mr. Williams.

MR. WILLIAMS: I'm ready to go, Judge. Can we just ask the defendant if he's ready to go? Mr. Salas Gayton, I note that you are emotional, and that is understandable. Are you ready to go to sentencing today?

THE INTERPRETER: Yes.

THE COURT: If you need a minute, let me know. I'll try and accommodate you. Go ahead, Mr. Williams.

MR. WILLIAMS: Thank you, Judge.

. . . .

(45:3-9 (bracketed record cites added).)

[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 has stayed out of the criminal justice system. To say that he does not value our laws as been a detriment to the community, I don't think is an honest statement.

. . . .

(45:39.)

THE COURT: When I sentence somebody, I have to set goals with my sentencing. One of the goals is restitution. In this case, that was very easy. As in most cases, it's very easy. It's $11,075.

I wish the other goals were as easy. They're 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 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 this 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 are going to deport you. I have no power in that regard.

How do I accomplish these goals? Well, the first thing I look at is the serious nature of the crime, Then I look at what the community wants and demands, and I don't just speak for Cory.

I don't just speak for anybody that died as a result of a drunk driver. I speak for the entire community, the victim's side and the defendant's side. They're also victims.

Then the last thing I have to do is consider your character and everything that Leopoldo Salas is. Let's talk about the serious nature of the crime.

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.

You were driving drunk the wrong way on the freeway. There was some indication that you were afraid that you were going be to stopped for driving. You apparently had been warned by somebody, maybe the judge in Racine County that you can't drive.

There is a reason that 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 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.

You, by all accounts, didn't try to do anything about it. You entered on 35th Street. This happened on 20th Street. That's a good mile. You're driving freeway speeds, 50 miles an hour. You sideswiped a

firefighter. You don't stop. You told me in your letter, quote, I didn't even know I was driving.

THE INTERPRETER: That's the truth.

THE COURT: Yes, I know. 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.

The fact that you didn't have a driver's license entered into it, the fact that you were driving the wrong way, the fact that you were speeding, the fact you went a mile, the fact that didn't know, didn't even know that you were driving, that enters into it, because that makes what you did that much worse.

And you were drunk .145 and apparently this is the first time that you've ever been driving drunk, at least according to the law. Is that the case? I don't know.

But I am struck by a statistic I read some place and I don't know the exact statistic, but that drunk drivers who kill aren't the ones that are driving four or five times as drunk drivers. It's the first time.

That leads me to -- well, a little bit more about the problems, apparently, you had an argument, disagreement, call it what you want, so you had a couple of beers at home, and you had 12 beers in your car. You were driving around throwing beer cans out of the car, according to the complaint, I don't know.

It leaves me what the community wants. I mean, the newspapers, the media has just been full of articles and stories about drunk drivers. Our newspaper did a whole year where they talked every day about another tragedy, about drunk drivers, people that died.

Look around in the courtroom, four televisions. We've got four major television stations, four cameras in this courtroom, because the community wants to know what happens to you. They want to know what happens to somebody who takes a car, a weapon, and drives drunk and kills somebody.

That's the message that I have to get out to the community.

I was joking with my bailiff before the case started about face time that I get or he gets on TV, that doesn't make any difference, if 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.

I would -- everybody in this community thinks, pauses, as this victim's mother said, before getting behind a wheel when you have a couple of pops.

We talked about the victim. Mr. Williams talks about my last week in this court. Yeah, it is. I've seen too many young people killed. Too many parents have come here and said they're tired of burying my kids. It is a parents worse nightmare to have to bury your child. I hope this gives you closure.

There was no intent to kill here. There was an intent to drive drunk. He knew it. You knew you couldn't handle that car. That's the intent. He didn't set out to kill somebody that day, but you did set out to drive drunk.

I have read the letters [49; 50; 51; 52; 53; 54]. It's going to be tough for Hayden to get along. She's young. She has got a very good support network.

So now we talk about you which is the last thing that I have to consider. And other than January 1st of 2011, you seem to be a pretty descent guy.

I ignore what went on with the presentence writer. I can understand what happened, your lack of cooperation. You're in this country. You don't understand the ways we do things. I can understand it. I don't excuse it. It would help if I got the information anyway.

You're from the nation of Mexico. You've got a fifth grade education. You're in this country for 13 and a half years, Milwaukee for two years. You've got three kids in Mexico.

You've apparently got a temper. That's why the mother of the children left you in Chicago. Some-

thing about a restraining order is what she told Dr. Pankiewicz.

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.

It was interesting to read in Dr. Pankiewicz's report [11] that you apparently were sober for three and a half years. There it is, on page 2. Mr. Sala indicates he has had a drinking problem for many years. He has been able to stop drinking for long periods of time intermittently.

He states his last episode of sobriety was for three and a half years without relapsing. The drinking occurring on Christmas Day, 2010, and then your mother-in-law-to-be tells me about the disagreement that you had with your fiance. So I guess I know why you were drinking on New Years Eve.

I tend to buy that, given the letter she wrote me, that the change that you apparently made in your life. She talked about how one of the children knew you.

Alexis knew you as Miguel, knew you in a very bad period of time and how she said you've changed and how you were good to her and her kids. He showed me a whole new world, a world I never knew. That world is his world, a world of God.

I started going to church with him. I got to meet his church family. I really enjoy this new life. It felt like this is where I should be.

That tends to corroborate the fact that you were sober for three and a half years, and something set you off. Unfortunately, it resulted in a tragedy.

Dr. Pankiewicz diagnosed you as an alcoholic. That's true. You accepted responsibility. You didn't put this family through the trial, of looking at the gruesome autopsy pictures, of sitting here in this courtroom for a week listening to people describe what happened to their daughter and friend.

Mr. Williams talks a little bit about it and they burst into tears. You deserve some credit for that. I see the remorse. Rarely, does a defendant

come in here like you and exhibit tears that you did, and they're genuine. I see that.

Like so much else, I have to weigh everything. So you are going to go to prison. I can't put him on probation. That would unduly depreciate the seriousness of what he did.

When he gets out, if he's allowed to live in this country, well, then he'll be subject to the rules of extended supervision. And if he violates those rules, he goes back to prison for the time that I'm about to give him on extended supervision.

What are the rules? No new law violations rising to the level of probable cause. Cooperate with his agent. No contact with weapon of any kind. No contact at all with the family of Cory.

He will cooperate and participate with alcohol and drug assessment. Follow through with the recommended treatment. Mr. Johnson correctly stated that it 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.

He will be subject to random urines. No use or possession of any alcohol, illegal drugs or drug paraphernalia. No contact with drug dealers. No contact with drug users or drug houses.

The Department of Corrections has got to give him some grief counselling. He's dealing with this too. He has punish himself, and he will continue to punish himself for the rest of his life.

He asked me for forgiveness. That is not within my power. I can't forgive. Judges don't do that.

Absolutely no driving, any motor vehicle unless you have a license. I will revoke his driving privileges in the State of Wisconsin for five years as I'm required to do under this law.

When you get out, if you're allowed to be in this country, you will seek and maintain full-time

employment. While you are in prison, you get yourself a GED or an HSED; so that even if you're not allowed back in this county and you go back to Mexico, you have those skills.

You will give a DNA test, be responsible for all of the costs of this action, including a DNA surcharge. That is part of the punishment, part of the rehabilitation. The restitution will come first and then the costs. We will take the costs and the restitution out of his prison account of 25 percent.

The term of extended supervision finally will result in judgement. He's not eligible for the Challenge Incarceration Program or the Earned Release Program. Due to the serious nature of the offense, I will not give him a risk reduction sentence.

The fact that you took remorse, that you showed remorse, the fact that you've accepted responsibility does not outweigh what you did and in the matter that you did it on January 1, 2011.

So, therefore, the sentence of this Court is serving a term of confinement in the Wisconsin State Prison of 22 years, 15 years of initial confinement, seven years extended supervision Count 1. Credit for 203 days. On Count 3, nine months, concurrent to the time in Count 1. Credit for 203 days.

I have tried to be fair with you. If you don't feel I've been fair with you, your lawyer will tell you how you can appeal my decision. Basically, you have 20 days.

(45:49-59 (bracketed record cites added).)

## STANDARDS OF REVIEW

### A. Exercise Of Discretion.

When an appellate court reviews a circuit court's discretionary decision, the appellate court asks whether the circuit court exercised discretion, not whether another judge might have exercised discretion differently. ***State v. Prineas***, 2009 WI App 28, ¶ 34, 316 Wis. 2d 414, 766 N.W.2d 206.

> 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).

> 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).

### 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." ***Id.*** at 277. *See also* ***State v. Taylor***, 2006 WI 22, ¶17, 289 Wis. 2d 34, 710 N.W.2d 466 (sentencing court may properly draw inferences from the facts presented at sentencing and from the entire record).

The purposes underlying a sentence "include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶ 40. *See also* ***id.*** n.9. A sentencing court must consider three principal factors: "'(1) the gravity and nature of the offense, including the effect on the victim, (2) the character and rehabilitative needs of the offender, and (3) the need to protect the public.'" ***State v. Naydihor***, 2004 WI 43, ¶ 78, 270 Wis. 2d 585, 678 N.W.2d 220. *See also* Wis. Stat. §§ 973.017(2)(ad), (ag), (ak);[4] ***McCleary***, 49 Wis. 2d at 276; ***State v.***

---

[4] "[T]he legislature has mandated that when a court makes a sentencing decision that the court shall consider the protection of the public, the gravity of the offense, the rehabilitative needs of the defendant, and any applicable mitigating or aggravating factors, including the aggravating factors specified in subs. (3) to (8). Wis. Stat. §§ 973.01(2)(ad), (ag), (ak), and (b)." ***State v. Gallion***, 2004 WI 42, ¶ 40 n.10, 270 Wis. 2d 535, 678 N.W.2d 197.

***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;[5] ***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). On appeal, a reviewing court will search the record for reasons to sustain

---

[5] This court has specifically recognized fourteen discretionary sentencing factors a sentencing court can consider. ***Gallion***, 270 Wis. 2d 535, ¶ 43 n.11. Thus, a sentencing court can select from 16,383 possible combinations of discretionary factors. *See* http://www.calculatorsoup.com/calculators/discretemathematics/combinations.php or http://joemath.com/math124/Calculator/factorial.htm.

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 Irrelevant Or 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.

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* ***In re Commitment of 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.

"[I]n order to conclude that an error 'did not contribute to the verdict' within the meaning of *Chapman*,[6] 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,

---

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

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. To demonstrate the harmlessness of a court's reliance on an irrelevant or improper factor, the State must prove beyond a reasonable doubt that the court would have imposed the same sentence if the court had not considered the factor. *See* ***Harrell***, 308 Wis. 2d 166, ¶ 37.

## ARGUMENT

### I. A FEW WORDS ABOUT A FEW WORDS.

In concurring with the grant of the petition for review, Justice Ann Walsh Bradley (joined by Justice Abrahamson) wrote:

> I urge the majority to reconsider the use of the term "illegal" immigrant in the framing of the issue. I view the use of the term "illegal immigrant" similar to how I viewed the use of the now discredited term "illegitimate child." No child is "illegitimate" and no person is "illegal."

Justice Bradley also noted that

> the Sixth Circuit stated "We recognize that using the term 'alien' to refer to other human beings is offens[iv]e and demeaning. We do not condone the use of the term and urge Congress to eliminate it from the U.S. Code.". Flores v. U.S. Citizenship &

Immigration Servs., 718 F.3d 548, 549 n. 1 (6th Cir. 2013).

And Justice Bradley cited an article in a politics-focused newspaper in Washington, DC, that reported the introduction of a bill that "would remove the term 'illegal alien' from federal laws and prohibit executive branch agencies from using the term because it dehumanizes and ostracizes those in our society who happen to have been born elsewhere."[7]

As of January 24, 2016, searches in Westlaw showed:

- the term "illegal alien" used in 8,284 federal cases (including fifty-six cases in the Supreme Court and 444 cases in federal courts within the 7th Circuit) and in 1,901 State cases (including eleven cases in Wisconsin);
- the term "illegal immigrant" used in 1,335 federal cases (including thirteen cases in the Supreme Court and eighty cases in federal courts within the 7th Circuit) and in 561

---

[7] Correcting Hurtful and Alienating Names in Government Expression (CHANGE) Act, H.R. 3785, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/house-bill/3785/text. The bill would replace the term "alien" with the term "foreign national" and would replace "illegal alien" with "undocumented foreign national." A Westlaw search of federal and State cases for "undocumented foreign national" showed that, as of January 24, 2016, the phrase appeared in eight federal cases and six State cases, all of them antedating the introduction of H.R. 3785 on October 21, 2015.

State cases (including one case — this one — in Wisconsin); and

- the phrase "alien illegally present in the United States" used in eighty-two federal cases (including two cases in the Supreme Court and eleven cases in federal courts within the 7th Circuit) and in two State cases (neither one in Wisconsin).

Lawyers, jurists, and politicians understand the potential impact of particular words or phrases. And the State does not dispute that "alien" and "immigrant" have, in some circumstances, become pejorative, both in the United States and abroad.

But as even the Sixth Circuit conceded while recommending that Congress "eliminate ["alien"] from the U.S. Code," the value of avoiding confusion created when substituting a neologism for an existing term of art points to continuing use of the existing term: "We use ["alien"] here, however, to be consistent with the statutory language and to avoid any confusion in replacing a legal term of art[8] with a more appropriate term." ***Flores v.***

---

[8] *See* 8 U.S.C. § 1101(a)(3) ("The term 'alien' means any person not a citizen or national of the United States."); *id.* § 1101(a)(15) ("The term 'immigrant' means every alien except an alien who is within one of the following classes of nonimmigrant aliens," followed by a lengthy list of exceptions not applicable to Salas Gayton). The Department of Homeland Security uses the statutory definition of "alien" but a different definition for "immigrant." DEP'T OF HOMELAND SEC., *Definition of Terms*, http://www.dhs.gov/definition-terms (last published Aug. 10, 2015).

***U.S. Citizenship & Immigration Servs.***, 718 F.3d 548, 551 n.1 (6th Cir. 2013) (footnote added).[9]

If this court considers adopting a new word or phrase to describe the status of someone in Salas Gayton's position, the State urges the court to consider carefully, as the Sixth Circuit did, the value of consistency in legal language, especially when, as here, the court addresses an issue in a regulated domain within the exclusive constitutional authority of the federal government and where the federal government has elected to define specific terms used within that domain.

## II. IN ASSESSING THE REQUIRED SENTENCING FACTOR OF THE CHARACTER OF THE DEFENDANT, THE CIRCUIT COURT DID NOT ERR BY CONSIDERING AS "A MINOR CHARACTER FLAW" OR "A MINOR FACTOR" SALAS GAYTON'S ILLEGAL PRESENCE IN THE UNITED STATES. THIS COURT SHOULD REJECT SALAS GAYTON'S REQUEST TO PRECLUDE SENTENCING COURTS FROM CONSIDERING A PERSON'S ILLEGAL PRESENCE IN THE UNITED STATES AS A FACTOR BEARING ON A DEFENDANT'S CHARACTER.

"The responsibility of the sentencing court is to acquire 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). *See also* ***State v.***

---

[9] *See also* ***Texas v. United States***, 809 F.3d 134, 148 n.14 (5th Cir. 2015), *cert. granted*, ___ U.S. ___, 2016WL207257 (Jan. 19, 2016) (No. 15-674).

***Frey***, 2012 WI 99, ¶ 45, 343 Wis. 2d 358, 817 N.W.2d 436 ("a sentencing court needs the fullest amount of relevant information concerning a defendant's life and characteristics" (citing *Williams v. New York,* 337 U.S. 241, 247 (1949)).

> There is a
>
> > well-recognized distinction between the fact-finder's function at the guilt stage, where the fact-finder must determine whether the government has proved a defendant's guilt beyond a reasonable doubt, and the sentencing judge's role, which is to assess the defendant's character using all available information, unconstrained by the rules of evidence that govern the guilt-phase of a criminal proceeding.
>
> *State v. Arredondo,* 2004 WI App 7, ¶ 53, 269 Wis. 2d 369, 674 N.W.2d 647 (2003); WIS. STAT. § 911.01(4)(c) (rules of evidence are inapplicable to sentencing proceedings).

***Prineas***, 316 Wis. 2d 414, ¶ 28. *See also* ***State v. Damaske,*** 212 Wis. 2d 169, 180, 567 N.W.2d 905 (Ct. App. 1997).

In fulfilling its responsibility, "[a] sentencing court may consider uncharged and unproven offenses and facts related to offenses for which the defendant has been acquitted. To assure that a circuit court has full information, prosecutors may not keep relevant information from a sentencing court." ***State v. Leitner***, 2002 WI 77, ¶ 45, 253 Wis. 2d 449, 646 N.W.2d 341 (footnotes omitted). "A sentencing court may even consider evidence that has been suppressed because it was obtained in violation of the defendant's Fourth Amendment rights, as long as the law-enforcement officers did not intentionally violate the Fourth Amendment to obtain evidence with which to enhance the sen-

tence." ***State v. Marhal***, 172 Wis. 2d 491, 502, 493 N.W.2d 758 (Ct. App. 1992). *See also* ***United States v. Lawrence,*** 934 F.2d 868, 874 (7th Cir. 1991) ("[A] sentencing court may consider uncorroborated hearsay that the defendant has had an opportunity to rebut, illegally obtained evidence, and evidence for which the defendant has not been prosecuted.").

Salas Gayton urges this court to create an exception to the information about which a sentencing court may have knowledge: the court must not know — for any purpose — a person's national origin, nationality, or alienage.[10] He doesn't put the point so bluntly, of course, but his argument necessarily leads to that result.

This court should reject Salas Gayton's request.

The State agrees that a sentencing court cannot properly base a sentence on a defendant's national origin or nationality. The Supreme Court of the United States and this court have said as much. ***Pepper v. United States***, 562 U.S. 476, 489 n.8 (2011) (quoting *United States v. Leung,* 40 F.3d 577, 586 (2d Cir. 1994)); ***State v. Alexander***, 2015 WI 6, ¶ 23, 360 Wis. 2d 292, 858 N.W.2d 662. *See also* ***United States v. Gonzalez***, 765 F.3d 732, 739 (7th Cir. 2014) ("Unwarranted disparities result when the court relies on things like alien-

[10] Based on the federal definition of "alien," *see* 8 U.S.C. § 1101(a)(3), the term "alienage" amounts to a synonym for lack of United States citizenship or nationality. *Cf. Alienage*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "alienage" as "[t]he condition or status being an alien").

age, race, and sex to differentiate sentence terms.").

The State disagrees, however, that a sentencing court cannot consider a defendant's illegal presence in the United States. Salas Gayton parses various terms, including "undocumented immigrants," "illegal immigrants," and "illegal aliens." Salas Gayton's Brief at 15. His argument rests entirely on the proposition that those terms equate with nationality or national origin *per se*; that for sentencing purposes, a sentencing court can never consider a defendant's nationality or national origin; and, therefore, a sentencing court can never consider a defendant's illegal presence in the United States as a character factor for sentencing purposes. *See id.* at 15-31.

For three reasons, this court should reject Salas Gayton's argument. First, the cases cited by Salas Gayton support the State's position, not Salas Gayton's. For example, Salas Gayton cites ***United States v. Velasquez Velasquez***, 524 F.3d 1248 (11th Cir. 2008) for its declaration 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. In ***United States v. Hrneith***, 522 F. App'x 786 (11th Cir. 2013), however, the Eleventh Circuit rejected the argument of an undocumented foreign national that, like Salas Gayton's argument, "attempt[ed] to incorrectly equate his immigration status with his national origin when, in fact, the two are not synonymous." ***Id.*** at 788. The court also explained that neither of the two impermissible bases set out in ***Velasquez***

***Velasquez*** (the same bases quoted by Salas Gayton) "is reflected by the district court's [sentencing] reasoning in this case." ***Id.*** Hence, "the district court did not plainly err in considering Mr. Hrneith's illegal entry as a factor in sentencing." ***Id.*** Likewise in Salas Gayton's case.

In four cases,[11] *see* Salas Gayton's Brief at 22-23, the courts' opinions do not refer to any illegality in terms of the defendants' presence in the United States and do not indicate that a sentencing court would err if it considered such an illegality. In three cases involving defendants illegally in the United States, the courts in two cases did not find error in the sentencing courts considering the illegality. ***United States v. Gomez,*** 797 F.2d 417, 420 (7th Cir. 1986) (act of illegally entering the United States "is no different than any other recent prior illegal act of any defendant being sentenced for any offense. . . . [T]he defendant in this case admitted his illegal entry. The matter of aliens illegally entering this country for one reason or another sometimes raises emotional issues, but the illegal act of an alien is entitled to no more deference than some other prior illegal act of a citizen also being sentenced for a drug violation."); ***Yemson v. United States,*** 764 A.2d 816, 819 (D.C. Ct. App. 1991) (not error to consider "the defendant's status as an illegal alien and his history of violating the law, including any law related to

---

[11] ***United States v. Leung***, 40 F.3d 577 (2d Cir. 1994); ***United States v. Onwuemene***, 933 F.2d 650 (8th Cir. 1991); ***United States v. Borrero-Isaza***, 887 F.2d 1349 (9th Cir. 1989); ***State v. Mendoza***, 638 N.W.2d 480 (Minn. Ct. App. 2002).

immigration"). Only one case — ***State v. Zavala-Ramos***, 116 Or. App. 220, 840 P.2d 1314 (Or. Ct. App. 1992) — comes at all close to supporting Salas Gayton's contention. But even there, the court allowed consideration of immigration illegality: "Immigration status *per se* is not relevant," but the "[d]efendant had been illegally in the United States at least twice. The court could consider that pattern of conduct in determining whether it is likely that a probationary sentence would serve the purposes of the guidelines to protect the public and punish the offender." ***Id.*** at 1316 (footnote omitted).

In short, Salas Gayton has not identified any case prohibiting a sentencing court from considering as a sentencing factor a defendant's illegal presence in the United States. Rather, his cases buttress the State's position. *See also, e.g.*, ***People v. Hernandez-Clavel***, 186 P.3d 96, 100, (Colo. App. 2008) ("the sentencing court did not err in considering the circumstances surrounding defendant's status as an illegal alien in its decision whether to grant or deny defendant a sentence of probation"); ***Trujillo v. State***, 304 Ga. App. 849, 853, 698 S.E.2d 350, 354 (2010) ("the trial court did not violate Trujillo's constitutional rights by considering his illegal alien status a relevant factor in formulating an appropriate sentence" (citing cases)); ***Sanchez v. State***, 891 N.E.2d 174, 176 (Ind. Ct. App. 2008) ("illegal alien status is a valid aggravator"). *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 sentencing court's references to Salas Gayton's immigra-

tion 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).

Second, Salas Gayton hammers on the letters and statements of the victim's family and friends as so toxic and pervasive that the sentence must have rested on impermissible consideration of his nationality or national origin. The court's sentencing remarks, however, show that the court did not imbibe any prejudicial remarks in the letters and statements. As discussed later in this brief (pp. 39-41, below), the court's references to Salas Gayton's illegal presence in the United States, whether viewed in context or in isolation, did not indicate any impermissible basis for the court's sentencing decision. In setting the sentence, the court permissibly considered Salas Gayton's illegal presence in the United States. More significantly, the sentencing transcript shows that the court's decision rested on the seriousness of the crime, not in any respect on Salas Gayton's immigration status.

Third, from a policy perspective, Salas Gayton's argument leads to an unacceptable outcome. Under Salas Gayton's theory, any reference — ultimately, any knowledge — of a defendant's status as a noncitizen implicates a defendant's nationality, national origin, or alienage, and that this knowledge will necessarily taint the sentencing. Changing the label does not matter: every term — "alien," "immigrant," "unauthorized immigrant," "undocumented immigrant," "illegal immigrant," "illegal alien," "unauthorized alien," "foreign national," "undocumented foreign national" — points

to identifying a defendant as (in Salas Gayton's legal and social theory) a reviled outsider. Hence, the initial solution lies in denying a sentencing court of any knowledge of the national origin or nationality of a defendant not qualifying as a "natural born Citizen" under Article II, Section 1, Clause 5 of the United States Constitution.[12]

But shielding a sentencing court from that information would result in major gaps in a report of a presentence investigation (PSI) in any case with a noncitizen defendant, and that gap alone would necessarily telegraph knowledge of noncitizenship to the sentencing court. 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 — gaps arising from the omission of any information that could directly (*e.g.*, place of birth) or indirectly (*e.g.*, education institutions attended) provide the court with prohibited knowledge.

In effect, Salas Gayton's argument eviscerates two long-standing, fundamental principles of sentencing: that a court must have as much knowledge as possible about a defendant in order to fashion an appropriate sentence, and that sentencing judges can appropriately weigh information that, in the context of a jury trial, the same judges would exclude from the jurors' consideration. *See, e.g.*, ***Prineas***, 316 Wis. 2d 414,

---

[12] "No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; . . ." U.S. CONST. art II, § 1, cl. 5.

¶ 28; ***Damaske,*** 212 Wis. 2d at 180; ***Marhal***, 172 Wis. 2d at 502; *see also* ***Lawrence,*** 934 F.2d at 874. This court should not acquiesce in an argument that leads to that outcome.

## III. IF THE SENTENCING COURT ERRED BY CONSIDERING SALAS GAYTON'S ILLEGAL PRESENCE IN THE UNITED STATES AS "A MINOR CHARACTER FLAW" AND "A MINOR FACTOR," THE COURT'S ERROR DID NOT AMOUNT TO STRUCTURAL ERROR AND INSTEAD REMAINS SUBJECT TO HARMLESS-ERROR ANALYSIS.

### A. The Sentencing Court's Acknowledgment Of Salas Gayton's Illegal Presence In The United States Does Not Fit The Criteria For Classifying The Alleged Error As Structural.

In *Arizona v. Fulminante,* 499 U.S. 279 (1991), we divided constitutional errors into two classes. The first we called "trial error," because the errors "occurred during presentation of the 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." *Id.,* at 307-308 (internal quotation marks omitted). These include "most constitutional errors." *Id.,* at 306. The second class of constitutional error we called "structural defects." These "defy analysis by 'harmless-error' standards" because they "affec[t] the framework within which the trial proceeds," and are not "simply an error in the trial process itself." *Id.,* at 309-310. See also *Neder v. United States,* 527 U.S. 1, 7-9 (1999). Such errors include the denial of counsel, see *Gideon v. Wainwright,* 372 U.S. 335 (1963), the denial of the right of self-representation, see *McKaskle v. Wiggins,* 465 U.S. 168, 177-178, n. 8 (1984), the denial of the right to public trial, see *Waller v. Georgia,* 467 U.S. 39, 49,

> n. 9 (1984), and the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction, see *Sullivan v. Louisiana,* 508 U.S. 275 (1993).

***United States v. Gonzalez-Lopez***, 548 U.S. 140, 148-49 (2006) (footnote omitted). In effect, "[*Fulminante*] defines structural error by only two characteristics, the timing of the error and its capacity for assessment." ***State v. Nelson***, 2014 WI 70, ¶ 40, 355 Wis. 2d 722, 849 N.W.2d 317, *cert. denied,* 135 S. Ct. 1699 (2015) (citing *Gonzalez-Lopez*). *See also* ***Harris***, 326 Wis. 2d 685, ¶ 33 n.11 (citing cases explaining "errors subject to harmless error analysis versus structural errors"); ***State v. Ndina***, 2009 WI 21, ¶ 43 n.15, 315 Wis. 2d 653, 761 N.W.2d 612.[13] When asked to expand the range of errors classified as structural, this court has declined to do so. *See, e.g.*, ***State v. Pinno***, 2014 WI 74, ¶ 50, 356 Wis. 2d 106, 850 N.W.2d 207 (referring to the "limited class of structural errors" and citing *Gonzalez-Lopez*), *cert. denied,* 135 S. Ct. 870 (2014); ***State v. Travis***, 2013 WI 38, ¶¶ 54-65, 347 Wis. 2d 142, 832 N.W.2d 491; ***Martin***, 343 Wis. 2d 278, ¶¶ 43-44.

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: ***United States v. Gonzalez***, 76 F. App'x 386 (2d

---

[13] A defendant can waive a right that, if violated without a waiver, would create structural error and, by the defendant's failure to object, can forfeit such a right. ***State v. Pinno***, 2014 WI 74, ¶¶ 56-57, 356 Wis. 2d 106, 850 N.W.2d 207.

Cir. 2003); ***United States v. Leung***, 40 F.3d 577 (2d Cir. 1994); ***Martinez v. State***, 114 Nev. 735, 961 P.2d 143 (1998).[14] Salas Gayton's Brief at 32.

The courts in those cases, however, did not base their decisions on a structural-error rationale. In ***Leung***, 40 F.3d 577, the sentencing court made negative references relating to the defendant's national origin. ***Id.*** at 585. In remanding for resentencing, the Second Circuit wrote:

> In this case, we are confident that the able and experienced trial judge in fact harbored no bias against Leung because of her ethnic origin, her alien status, or any other categorical factor. Nevertheless, since "'justice must satisfy the appearance of justice,'" even the appearance that the sentence reflects a defendant's race or nationality will ordinarily require a remand for resentencing. We think there is a sufficient risk that a reasonable observer, hearing or reading the quoted remarks, might infer, however incorrectly, that Leung's ethnicity and alien status played a role in determining her sentence. The remarks differ from mere passing references to the defendant's nationality or immigrant status at sentencing, which by themselves are not sufficient grounds for vacating a defendant's sentence. We will therefore vacate Leung's sentence and remand for resentencing. Though we believe the District Judge could fairly sentence on remand, just as he undoubtedly did at the original sentencing, the appearance of justice is better satisfied by assigning the resentencing to a different judge.

***Id.*** at 586-87 (citations omitted).

***Martinez***, 961 P.2d 143, involved three appellants "who are Venezuelan citizens and illegal im-

---

[14] Salas Gayton misidentifies this case as ***Martinez v. Caceras***, 114 Nev. 735, 961 P.2d 143 (1998).

migrants in the United States." ***Id.*** at 145. At the sentencing of one of them, the judge declared:

> There's something that heightens the nature of an offense when people come from foreign lands to do offenses in another land. I know if I go to a foreign land and get in trouble there, that I'm in deeper trouble there, that I'm in deeper trouble than if I did it in this country, because of the nature of it. Because governments look unfavorably on people coming from other countries to rip us off in our country. And they know that but they decided to do it anyway.

***Id.*** Responding to the contention that "the district court improperly considered their national origin in violation of their due process rights," ***id.***, the Nevada Supreme Court wrote:

> A trial judge may not . . . consider a defendant's nationality or ethnicity in its sentence determination; consideration of these facts violates a defendant's right to due process. Thus, the district court here violated appellants' due process rights, if it based its sentencing decision, in part, upon appellants' status as illegal aliens.
>
> We cannot, however, determine from the record whether the district court actually based its sentencing decision on appellants' nationality. The record reveals that substantial factual evidence supported the district court's decision to impose the maximum sentence. Nevertheless, the Supreme Court of the United States and numerous Circuit Courts of Appeal have emphasized the importance of not only doing justice, but also insuring that justice "satisf[ies] the appearance of justice."
>
> Here, the district court's remarks go beyond "passing references to the defendant's nationality or immigrant status." In fact, the district court's remarks create the appearance that appellants' foreign nationality adversely affected its sentencing determination. Thus, we conclude that the district court's

> conduct did not "satisfy the appearance of justice" and as such, appellants' sentences cannot stand.
>
> . . . Because here, we cannot conclusively determine that the district court did not improperly rely on prejudicial matters, namely appellants' nationality, in rendering his sentencing decision, we must remand this matter for resentencing before a different judge.

***Id.*** at 145-46 (citations omitted).

In ***Gonzalez***, 76 F. App'x 386, the Second Circuit wrote:

> Although, as in *Leung,* "we are confident that the able and experienced trial judge in fact harbored no bias against [defendant] because of her ethnic origin, . . . even the appearance that the sentence reflects a defendant's race or nationality [or national origin] will ordinarily require a remand for resentencing." We believe that "there is sufficient risk that a reasonable observer, hearing or reading the quoted remarks, might infer, however incorrectly, that [Gonzalez's national origin] played a role in determining her sentence."
>
> The court's reference to "Colombian roots" is open to the interpretation that it refers to national origin. Roots is a term commonly used to describe ancestry, and a reasonable observer hearing that particular remark could believe that national origin played a role in the district court's sentencing choices. We note that a reading of the complete transcript does indeed convince us that the court was worried that Gonzalez might get back in touch with her Colombian drug contacts and engage in further importation after her release, and that the court was not motivated by any improper considerations. However, once again, we emphasize that we also with to protect the "appearance of justice." A reasonable person could believe that the court's reference to "send[ing] a message [of deterrence], especially to those who have Colombia[n] roots" indicated that it was impos-

> ing a harsher punishment because of Gonzalez's Colombian ancestry. . . .

***Id.*** at 388 (citations omitted).

So, in his short (less than one page) argument for treating the sentencing court's alleged error as structural, *see* Salas Gayton's Brief at 31-32, Salas Gayton has not identified any case classifying as structural error a sentencing court's consideration of a person's illegal presence in the United States as a sentencing factor. Nothing in the nature of the claimed error precludes applying a harmless-error analysis.

### B. Any Error In Recognizing Salas Gayton's Illegal Presence In The United States Did Not Cause Salas Gayton Any Harm.

The State does not agree that the sentencing court committed any error in remarking on Salas Gayton's illegal presence in the United States. But if the court erred with its remarks, the error did not result in any harm to Salas Gayton (see pp. 17-19 (summarizing harmless-error standards of review)).

Salas Gayton asserts that "the State cannot carry its burden of proof [on harmless error] 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.'" Salas Gayton's Brief at 33. He misstates the court's remarks. As the transcript of the court's sentencing remarks shows (reprinted in full at pp. 7-13, above), the court did not "explicitly state[ ] that it was relying on noncitizenship" as even a

factor or as a character flaw. Rather, the court noted that Salas Gayton's *illegal* presence in the United States bore on character — a position with which defense counsel agreed at sentencing (45:39)[15] — and amounted to, at most, "a minor character flaw very honestly" (45:52), "a minor factor" (45:55).[16]

Salas Gayton focuses on "at least 16 sentences," Salas Gayton's Brief at 35, in which a reference to his status as a foreign national arose, *id.* at 35-36. Those sentences occurred sporadically in the court's remarks, which cover, in total, a bit more than ten pages of the sentencing transcript (45:49-59). He also points to different, less-severe sentences imposed for purportedly equivalent crimes committed by others in other Wisconsin counties. Salas Gayton's Brief at 36-37. And he pounds on the letters and remarks of the victim's family and friends as tainting his sentence. *Id.* at 37; *see also id.* at 4–8.

---

[15] In quoting from the transcript where the court first refers to character, *see* Salas Gayton's Brief at 35 (quoting 45:39, App. 160), Salas Gayton omits the next sentence, in which his lawyer agrees that his illegal presence in the United States "goes to character."

[16] In his brief, Salas Gayton writes: "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." Salas Gayton's Brief at 17. As the sentencing transcript shows, the court obviously agreed about the significance of Salas Gayton's illegal presence in the United States: whether labeled "petty" or "minor," Salas Gayton's illegal presence remained inconsequential to the sentencing decision.

In pointing to sentencing decisions by judges in other counties and in attacking the letters and remarks of the victim's family and friends, Salas Gayton throws gorilla dust.[17] The sentencing transcript does not show any negative impact of the letters and remarks of the victim's family and friends. The court acknowledged receiving and reading the letters as well as a supportive one from Salas Gayton's fiancé (45:4). But a conscientious sentencing court ought to read letters and notes submitted by people with an interest in a defendant's sentencing. Likewise, the court heard passionate testimony from two witnesses on behalf of the victim and one witness on behalf of Salas Gayton (45:15-28, 43-46). The transcript, however, does not show the court referring to those letters and remarks in terms of the court's sentencing decision. The only reference to the letters occurs in regard to the victim's daughter: "I have read the letters. It's going to be tough for [H.] to get along. She's young. She has got a very good support network" (45:54).

A sentencing court does not have any control over the materials it receives from friends and family of either a victim or a perpetrator. The critical issue therefore concerns whether the record shows that the court relied on those materials in an improper way. Here, the letters and remarks of the victim's family and friends certainly reflect

---

[17] David Nakamura, *Say what? White House spokesman Carney dismisses GOP plan as 'gorilla dust*,' WASH. POST (Dec. 2, 2011), https://www.washingtonpost.com/blogs/44/post/say-what-white-house-spokesman-carney-dismisses-gop-plan-as-gorilla-ust/2011/12/01/gIQA1YjqJO_blog.html

their deep grief and anger. But Salas Gayton has not — and cannot — point to anything in the record indicating that those letters and remarks actually exerted an impermissible influence on the court's sentencing decision.

As for disparate sentences, Salas Gayton cites newspaper articles about different sentences imposed in counties around the State, not just in Milwaukee County or by the sentencing judge in this case. Those articles report a phenomenon well known in criminal prosecutions: cases prosecuted under a particular statute can result in significantly different sentences. The difference results because sentencing courts have discretion in weighing the significance of the three required sentencing factors and whichever discretionary factors a court decides to consider. With 16,383 possible combinations of discretionary factors available for a court to consider and weigh (see note 5, above), differences — even wide differences — should not come as a surprise. But without knowing the details of each case, the significance of those differences necessarily remains indeterminate.[18] The articles do not provide the necessary detail.

---

[18] The Appleton Post-Crescent explained its investigative protocol for its WisconINjustice series:

> The various factors at play in each case — including the defendant's criminal background and the harm caused by the offense — make comparisons difficult, but we selected 12 offenses for analysis after consulting with dozens of prosecutors, defense attorneys and legal experts. The crimes were chosen for their relative lack of extenuating circumstances (they were specific statutes that factor in prior offenses or

*(footnote continues on next page)*

Perhaps most salient, the cited articles do not provide even the smallest clue about whether the sentencing court in this case committed any error in sentencing Salas Gayton.

Finally, the court's own remarks show that the court neither imposed a sentence based on improper considerations of Salas Gayton's national origin nor harbored any animus toward Salas Gayton because of his national origin. Two of the remarks nodding in the direction of Salas Gayton's immigration status concern possible future actions by the federal government:

> Then the last goal is rehabilitation, and that's somewhat hampered in this 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 are going to deport you. I have no power in that regard.

(45:50.)

> When he gets out, if he's allowed to live in this country, well, then he'll be subject to the rules of extended supervision. And if he violates those rules, he goes back to prison for the time that I'm about to give him on extended supervision.

---

*(footnote continues from previous page)*

> the extent of the crime), their frequency (meaning we had more data to study for each judge) and the fact they had been in place for the full 10-year span.

Eric Litke, *How we analyzed sentencing in Wisconsin*, USA TODAY NETWORK-WISCONSIN (Nov. 30, 2015, 1:37 PM CST), http://www.postcrescent.com/story/news/investigations/2015/11/29/how-we-analyzed-sentencing-wisconsin/76281992/. The series focused on the harshness of the sentences imposed by judges, not on the reasons the judges offered to explain their sentencing decisions.

(45:57.) In another remark, the court specifically declared that because Salas Gayton "[didn't] understand the ways we do things," the court would not consider his non-cooperation with the PSI writer (11 (presentence investigator's memorandum)):

> I ignore what went on with the presentence writer. I can understand what happened, your lack of cooperation. You're in this country. You don't understand the ways we do things. I can understand it. I don't excuse it. It would help if I got the information anyway.

(45:54.) Three comments concerned Salas Gayton's illegal presence in the United States, one of them noting Salas Gayton's purpose as "trying to better [him]self":

> 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.

(45:55.)

> 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.

(45:52.)

> He will cooperate and participate with alcohol and drug assessment. Follow through with the recommended treatment. Mr. Johnson correctly stated that it 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.

(45:57.) Finally, a reference to national origin occurred in a straightforward, anodyne recitation of some basic facts about Salas Gayton:

> You're from the nation of Mexico. You've got a fifth grade education. You're in this country for 13 and a half years, Milwaukee for two years. You've got three kids in Mexico.

(45:55.)[19]

The court's references to national origin, whether seen in isolation (as above) or in the context of the court's lengthy sentencing remarks (45:49-59; *see also* pp. 7-13, above), do not resemble in any way the judicial comments that have prompted courts (including the courts issuing the decisions cited by Salas Gayton) to order resentencing. The court's sentencing remarks here do not even hint at the animus (implicit or explicit) underlying the judicial remarks in those cases. The remarks here do not lead to a conclusion that Salas Gayton's sentence rested in any respect on an impermissible consideration of Salas Gayton's national origin.

Moreover, the only remarks tied to a sentencing factor concerned the illegality of Salas Gayton's presence in the United States, not to national origin by itself. As the State argued earlier in this brief, a sentencing court has a right to know that a defendant has failed to comply with obligations under State law or under federal law (including immigration laws), and has a duty to exercise discretion in deciding how much weight to attach to those failures. Here, the court substantially discounted Salas Gayton's illegality, calling it "a mi-

---

[19] Salas Gayton objects that the court erred in the reference to children in Mexico. Salas Gayton's Brief at 36 n.30. If so, defense counsel contributed to the error (45:44).

nor character flaw very honestly" (45:52), "a minor factor" (45:55). Thus, even assuming the sentencing court considered Salas Gayton's illegal presence in the United States, the court did not err by doing so, especially when the court attached little significance to that illegality.

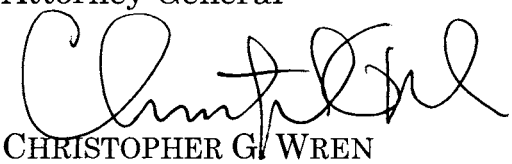
## CONCLUSION

For the reasons offered in this brief, this court should affirm the decision of the Wisconsin Court of Appeals that affirmed the denial of Salas Gayton's postconviction motion seeking plea withdrawal or, alternatively, resentencing, and that affirmed Salas Gayton's judgment of conviction. In considering the required sentencing factor of the character of the defendant, the circuit court did not err by considering Salas Gayton's illegal presence in the United States. In addition, even if the circuit court erred, the error did not qualify as structural error and instead remained subject to harmless-error analysis. Under the standards for assessing harmless error, any error here did not cause Salas Gayton any harm.

Date: February 2, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General



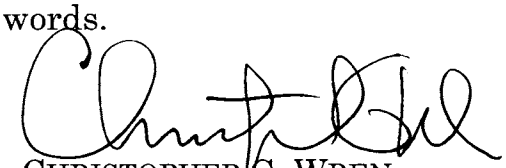
CHRISTOPHER G. WREN
Assistant Attorney General
State Bar No. 1013313

Attorneys For Plaintiff-
Respondent State of Wisconsin

Wisconsin Department of Justice
17 West Main Street
Post Office Box 7857
Madison, Wisconsin 53707-7857
v: (608) 266-7081
f: (608) 266-9594
e: wrencg@doj.state.wi.us

## 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 10,889 words.



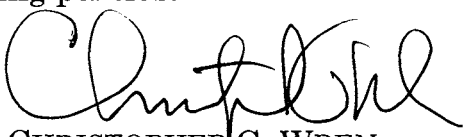
CHRISTOPHER G. WREN

## 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