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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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-Velasque***z'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 Cir. 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.

[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.

Signed:

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