

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

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OF WISCONSIN**

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

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

**NON-PARTY BRIEF OF CATHOLIC CHARITIES LEGAL
SERVICES FOR IMMIGRANTS, THE NATIONAL
IMMIGRANT JUSTICE CENTER, THE UNIVERSITY OF
WISCONSIN LAW SCHOOL IMMIGRANT JUSTICE CLINIC,
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INTRODUCTION

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. “ILLEGAL IMMIGRANT STATUS” IS NOT A PROPER SENTENCING FACTOR.

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

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

¹³ *See Gambino, supra* note 5.

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

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

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

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

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

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

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

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

CONCLUSION

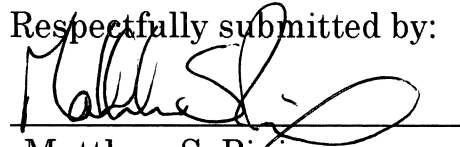
Our justice system must treat all those who come before it equally. The terms “illegal immigrant” and “illegal immigrant status” should be abandoned. A sentencing court’s consideration of a prior unlawful entry should be done, if at all, only upon the receipt of reliable and verifiable proof of the entry,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

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

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

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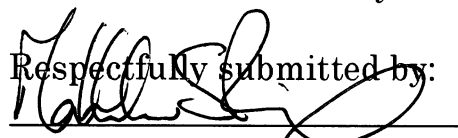
CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced 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 full line of body text. The length of this brief is 2,558 words, as counted by the commercially available word processor Microsoft Word.

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

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

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