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STATE OF WISCONSIN
IN SUPREME COURT
Case No. 2013AP646-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LEOPOLDO R. SALAS GAYTON,

Defendant-Appellant-Petitioner.

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

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

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INTRODUCTION

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. The Sentencing Court Committed Structural Error.

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

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

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

CONCLUSION

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

Dated this 7th day of March, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

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

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

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

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

Dated this 7th day of March, 2016.

Signed:

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