STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2017AP2445 CR

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

MARSHAWN TERELL JOHNSON,

Defendant-Appellant

On appeal from the Circuit Court for Douglas County,

The Honorable Kelly J. Thimm, presiding

BRIEF AND APPENDIX OF THE DEFENDANT-APPELLANT

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I. Table of Contents.

I. Table of Contents. ii

II. Table of Authorities. iii

III. Statement of issues presented for review. 1

IV. Statement on oral argument and publication. 1

V. Statement of Case and Facts. 2

A. Proceedings below and jurisdiction. 2

B. Facts of the case. 3

VI. Argument. 13

A. Summary of Argument. 13

B. The circuit court erroneously exercised its sentencing discretion when used the fact that Johnson was not a resident of Superior, Wisconsin, but rather was a resident of Chicago Illinois, as an aggravating factor justifying a harsher sentence than Johnson would have received had he been a resident of Superior who was found a party to the crime of possession of heroin with the intent to deliver. 14

1. Standard of Review. 14

2. The Privileges and Immunities Clause, Generally. 14

3. The Privileges and Immunities Clause, Specifically with regard to sentencing. 15

4. The trial court did use the fact that Johnson came from Chicago as an aggravating factor to justifying a harsher sentence than Johnson would have received had he been a resident of Superior who was found in possession of heroin with the intent to deliver. 17

VII. Conclusion. 20

VIII. Certifications. 21

II. Table of Authorities.

Cases

Austin v. New Hampshire, 420 U.S. 656 (1975) 15

Buckner v. State, 56 Wis.2d 539, 202 N.W.2d 406 (1972) 1, 15-17

Hague v. CIO, 307 U.S. 496, 511 (1939) 15

Hicklin v. Orbeck, 437 U.S. 518 (1978) 15

Kirk v. Credit Acceptance Corp., 2013 WI App 32, 346 Wis. 2d 635, 829 N.W.2d 522 6

McCleary v. State, 49 Wis.2d 263, 182 N.W.2d 512 (1971) 10

Paul v. Virginia, 75 U.S. 168, 180 (1868) 15

Saenz v. Roe, 526 U.S. 489, 501-02 (1999) 19

State v. Alexander, 2015 WI 6, ¶ 17, 360 Wis.2d 292, 858 N.W.2d 662 14

State v. Duarte, 2014 WI App 71, 354 Wis.2d 623, 848 N.W.2d 904 .... 1, 15-17, 19

State v. Harris (Landray M.), 2010 WI 79, 326 Wis.2d 685, 786 N.W.2d 409 14

State v. Palko, 122 Conn. 529, 191 A. 320, 325, 113 A.L.R. 628 (Conn., 1937) .. 14

State v. Scherreiks, 153 Wis.2d 510, 451 N.W.2d 759 (1989) 3

Taylor v. Conta, 106 Wis.2d 321, 327-28, 316 N.W.2d 814 (1982) 15

Statutes

Wis. Stat. § 808.03(1) 3

Wis. Stat. § 809.30 3

Wis. Stat. § 961.41(1m)(d)3 ..... 2, 6, 7

Wis. Stat. § 961.41(3g)(am) 6

Wis. Stat. § 961.41(3g)(d) 6

Constitutional Provisions

U.S. Const. art IV § 2 ..... 1, 13, 14

Wis. Const. art. VII § 5 3

III. Statement of issues presented for review.

This appeal presents the following issue for review. Namely, did the trial court erroneously exercise its sentencing discretion, and violate the Privileges and Immunities Clause of Article IV, Section 2, of the United States Constitution, by handing down a harsher sentence because Johnson traveled from Chicago, Illinois to commit his crime, than Johnson would have received had he been resident of Superior, Wisconsin? The circuit court in its decisions below answered this question, No.

IV. Statement on oral argument and publication.

Cases involving an alleged violation of the Privileges and Immunities Clause in criminal sentencing are exceedingly rare. In fact, the undersigned counsel has found only two cases, both coincidently in Wisconsin, which addressed the subject, namely *Buckner v. State*, 56 Wis.2d 539, 202 N.W.2d 406 (1972), and *State v. Duarte*, 2014 WI App 71, 354 Wis.2d 623, 848 N.W.2d 904 (an unpublished case cited only for it persuasive value; Appx. 41-42). In both *Buckner* and *Duarte*, the Court of Appeals did not find violations of the Privileges and Immunities Clause, because the trial court did not actually rely upon the fact that the defendants were from a particular place. Implicit in both decisions was the assumption that had the trial courts actually relied upon the fact that the defendant was from a particular place as a factor in its sentence, the sentences would have been an erroneous exercise of discretion. This case is distinguishable from both *Buckner* and *Duarte* because here the trial court actually did rely on the fact that Johnson traveled from a particular place, namely Chicago, Illinois, as an aggravating factor to justify a harsher sentence.

Wisconsin is bordered by four States, with the large metropolitan areas of Minneapolis/St. Paul, Minnesota,[1] and Chicago, Illinois,[2] located close to its borders. It is inevitable that crimes will be committed within its borders by citizens from other States. This naturally places stress upon the norms of comity which exists between the separate States. References during sentencing to a criminal defendant's citizenship in a different State is a recurring issue in the State of Wisconsin. Further guidance to the circuit courts would be desirable. This court's decision should be published. And this court would also benefit from oral argument.

V. Statement of Case and Facts.

A. Proceedings below and jurisdiction.

On March 16, 2016, Marshawn Terrell Johnson was convicted, after a jury trial, of possession of heroin (>10-50g) with intent to deliver, as a party to a crime, a class D felony, under §§ 961.41(1m)(d)3, and 939.05 Wis. Stat. (R.72 and R.37; Appx. 1-4). On May 13, 2016, the Douglas County Circuit Court, the Honorable Kelly J. Thimm, sentenced Johnson to 18 years state prison, with 8 years of initial confinement followed by 10 years of extended supervision. (R.72; Appx. 1-2). Johnson is currently serving his sentence at the Jackson Correctional Institution.

On June 6, 2016, Johnson filed his notice of intent to pursue post-conviction relief, which was subsequently deemed by this Court as timely filed. (R.73; *See*, this Court's Order dated January 23, 2018). On September 11, 2017, Johnson filed a motion for post-conviction relief, requesting that the circuit court vacate his sentence and order a resentencing hearing before a new judge. (R.84).

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[1] According to census data Minneapolis/St. Paul is the sixteenth largest metropolitan statistical area in the United States as defined by the United States Office of Management and Budget. *See, List of metropolitan statistical areas*. Wikipedia. https://en.wikipedia.org/wiki/List_of_metropolitan_ statistical_areas (accessed: February 8, 2018).

[2] According to census data Chicago is the third largest metropolitan statistical area in the United States as defined by the United States Office of Management and Budget. *See, List of metropolitan statistical areas*. Wikipedia. https://en.wikipedia.org/wiki/List_of_metropolitan_statistical_areas (accessed: February 8, 2018).

A hearing was held on the post-conviction motion on December 6, 2017, and a written order denying the motion was entered on December 7, 2017. (R.114:1 and R.90; Appx. 30 and 5). Johnson then filed his notice of appeal. (R.92). He now appeals his sentence and the trial court's denial of his post-conviction motion. He requests this Court to vacate his sentence and remand the case for a resentencing hearing before a new judge.

This is an appeal from a final judgment and sentence of a circuit court in a criminal case, as well as the denial of a post-conviction motion filed under Wis. Stat. § 809.30. This court has jurisdiction under Wis. Const. art. VII § 5; and Wis. Stat. §§ 808.03(1) and 809.30. See also, *State v. Scherreiks*, 153 Wis.2d 510, 451 N.W.2d 759 (1989).

B. Facts of the case.

Johnson was arrested on October 27, 2015, during the execution of a search warrant upon a residence located at 1520 Ogden Avenue, in the City of Superior, Douglas County, Wisconsin. (R.108:134-35). The residence located at 1520 Ogden Avenue had been suspected by local law enforcement as being a place of drug trafficking for at least one month. (R.1:2). Local law enforcement began surveilling the residence on the morning of October 27th and during that time saw Johnson on at least two occasions exit the residence and enter a car, only to circle the block, and return to the residence shortly afterward. (R.108:239-40). On the last of these occasions Johnson was approached by two officers who attempted to take him into custody. (R.109:6). When Johnson saw the officers approach him, he turned and ran down an alley between John and Ogden Avenues. *Id.* A small package of suspected heroin was later found in that alleyway. (R.109:9-10). That package, however, was never tested and Johnson was not seen throwing it. (R.109:16-18).

Originally, the search warrant was supposed to be a "knock and announce" warrant. (R.108:135-36). Once Johnson had fled from the officers, however,

there was a concern that he might be running back to the residence at 1520 Ogden Avenue to warn the codefendants of the police presence. *Id.* A decision was therefore made to immediately enter and secure the residence without knocking or announcing. *Id.* Inside the residence at 1520 Ogden Avenue law enforcement found Michael Jenkins and Braxton Ray Lahti, who were in the living room. *Id.* In the bathroom was James Mullens, and in the northwest bedroom they found Matthew A. Thompson, Lydia Shanae Higgins and a Michael Tisdale. *Id.* Also in the residence was the infant daughter of Thompson and Higgins. (R.108:75).

Inside the living room Jenkins was sitting on a couch. (R.108:135-36). In Jenkin's left sweatshirt pocket the officers found a package of heroin weighing 59.51 grams.[3] (R.108:137-38 and 175-76). Sitting on a different couch was Lahti and located next to Lahti was a small package of heroin weighing 0.5 grams.[4] (R.108:146 and 175-76). Sitting on an end table was a smaller package of heroin weighing 16.3 grams.[5] (R.108:143 and 175-76). DNA testing would identify the DNA profiles of two males on the 16.3 grams package. (R.108:193-94). Johnson's DNA matched the "major profile," that is, the profile of the DNA most represented on the package. *Id.* Jenkins was excluded as a contributor of the DNA found in the major profile. *Id.* There was insufficient DNA from the "minor profile" to support any comparisons. (R.50:2).

Thompson and Higgins both testified to the drug trafficking activities which were taking place out of the residence at 1520 Ogden Avenue. (R.108:73-132 and 210-28). According to Thompson, 1520 Ogden Avenue was Mullin's home and Thompson, Higgins and their infant daughter came to reside there just a few days before October 27, 2015. (R.108:75-6). Thompson testified about a connection he and Higgins had with a Chicago drug dealer known only by the name of "Bone." (R.108:115). Higgins and "Bone" would arrange for couriers to

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[3] Less packaging, 48.064 grams. (R.108:176).
[4] Less packaging, 00.410 grams. (R.108:176).
[5] Less packaging, 11.657 grams. (R.108:176).

bring heroin from Chicago, Illinois, to Superior, Wisconsin. (R.108:118). "Bone" would text Higgins and inform her when the couriers would be arriving at the bus station in West Duluth. (R.108:79). Higgins would then pick up the couriers from the bus station and allow them to traffic heroin from their residence. (R.108:79). In exchange for letting the couriers stay at their residence, Thompson and Higgins would receive free heroin. (R.108:84-5). Thompson and Higgins would also assist the couriers by arranging sales of heroin to their regular customers. (R.108:89-90 and 132). Thompson also admitted to personally making some of the deliveries himself. (R.108:107-11).

Higgins described the same sort of arrangement with Johnson and Jenkins. (R.108:210-28). Higgins testified to having picked up Johnson and Jenkins on October 26, 2015, the day before the arrests. (R.108:212-13). She admitted to having received drugs in exchange for assisting Johnson and Jenkins in the deliveries of heroin. (R.108:214). She also admitted to personally making at least two of the deliveries herself. (R.108:218).

At trial Johnson took the stand and testified that he had come to Superior with his cousin Jenkins to meet girls. (R.109:95-6). It was only after they arrived at 1520 Ogden Avenue that he learned Jenkins was there to make deliveries of heroin. (R.109:97-8). Johnson testified that he did not agree with what Jenkins was doing and did not participate in the selling of the heroin. (R.109:99). He admitted to buying some marijuana to help calm himself down. (R.109:100). Later he said he went out for a walk when "a black car approached me with tinted windows. A man, a bald-headed man with a goatee hopped out of the car, not all the way, reached over the top of the car and aimed a gun and I ran." (R.109:102-03). To Johnson, being from Chicago, this seemed the natural thing to do. *Id.* The jury saw things differently, however, and returned a verdict of guilty. (R.109:178-79 and R.37; Appx. 3-4).

The disposition of the codefendants cases

An understanding of what happened to the codefendants in the disposition of their cases is essential to understanding what happened in this case. There were four persons arrested and charged as parties to the crime of possession of heroin (>10-50g) with intent to deliver. Two of the codefendants were African-Americans from Chicago, Illinois. They were Michael Elijah Jenkins and Marshawn Terell Johnson. Two of the codefendants were Caucasians from Superior, Wisconsin. They were Matthew A. Thompson and Lydia Shanae Higgins. Jenkins and Johnson both received lengthy prisons sentences. Thompson and Higgins both had their sentences withheld and were placed on probation.

Michael Elijah Jenkins, who is Johnson's cousin and resides in the City of Chicago, Illinois, was charged as a party to the crime of possession of heroin (>10-50g) with intent to deliver, a class D felony, under § 961.41(1m)(d)3, Wis. Stat. To that charge he ultimately pled guilty and was sentenced to 11 years prison, with 5 years initial confinement followed by 6 years of extended supervision. (*See*, Douglas County Court file no. 15CF415; *Kirk v. Credit Acceptance Corp*., 2013 WI App 32, ¶ 5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522 (this court may take judicial notice of CCAP entries)). Jenkins and Johnson were the only African-Americans charged in the incident.

Matthew A. Thompson, was residing at 1520 Ogden Avenue, Superior, Wisconsin. He aided and abetted the couriers sent by "Bone" by arranging sales heroin to their regular customers. (R.108:89-90 and 132). He also admitted to personally making some of the deliveries himself. (R.108:107-11). He was also charged as a party to the crime of possession of heroin (>10-50g) with intent to deliver, a class D felony, under § 961.41(1m)(d)3, Wis. Stat.; possession of narcotic drugs, a class I felony, under § 961.41(3g)(am), Wis. Stat.; possession of drug paraphernalia, an unclassified misdemeanor, under § 961.573(1), Wis. Stat.; and possession of amphetamine, an unclassified misdemeanor, under § 961.41(3g)(d), Wis. Stat. Ultimately, the charge of possession of heroin (>10-50g)

with intent to deliver was dismissed on the prosecutor's motion, prosecution of the possession of narcotic drugs charge was deferred pursuant to an agreement, and Thompson ended up pleading guilty to the two misdemeanor charges for which he received withheld sentences and was placed on probation for two years. (*See*, Douglas County Court file no. 15CF412; R.107:6).

Lydia Shanae Higgins, was also residing at 1520 Ogden Avenue, Superior, Wisconsin. She admitted to making two deliveries of heroin out of the residence and was the party who would arrange with "Bone" for the couriers to bring heroin from Chicago, Illinois, to Superior, Wisconsin. (R.108:118 and 218). She was also charged as a party to the crime of possession of heroin (>10-50g) with intent to deliver, a class D felony, under § 961.41(1m)(d)3, Wis. Stat.; and possession of narcotic drugs, a class I felony, under § 961.41(3g)(am), Wis. Stat. Ultimately, the charge of possession of heroin (>10-50g) with intent to deliver was dismissed on the prosecutor's motion. Higgins pled guilty to the charge of possession of narcotic drugs and received a withheld sentence and was placed on probation for two years. (*See*, Douglas County Court file no. 15CF417; R.107:6).

Braxton Ray Lahti, who also resided in Superior, Wisconsin, was charged with possession of narcotic drugs, a class I felony, under § 961.41(3g)(am), Wis. Stat. Ultimately, Lahti pled guilty to the charge of possession of narcotic drugs and received a withheld sentence and was placed on probation for three years. (*See*, Douglas County Court file no. 15CF414).

James Mullens, to whom the residence at 1520 Ogden Avenue actually belonged, and Michael Tisdale were not charged with any crimes.

Sentencing

Sentencing was held on May 13, 2016. (R.107:1; Appx. 6). Prior to sentencing a presentence investigation and report (PSI) was ordered and submitted. (R.61 and R.64). The PSI noted no criminal record, though Johnson did self-report having been twice charged with robbery as a juvenile. (R.64:4). The PSI writer was unable to independently verify these charges despite numerous

attempts to contact various agencies in Chicago. *Id.* The PSI noted that Johnson had been accepted for entrance by two colleges in the Chicago area. (R.64:7). And that Johnson has resided in the Chicago area his whole life. (R.64:9). The writer reported that Johnson was polite and cooperative and had no problems completing the required paperwork. (R.64:10). The writer, however, took Johnson to task for not taking responsibility for this offense. *Id.* The writer also took special notice that Johnson had traveled some 500 miles from Chicago, Illinois to commit this crime in Superior, Wisconsin. *Id.* The writer wrote that "[t]here was a conscious decision made to commit a criminal act in another state" and noted that the destructive impact of heroin use in the Twin Ports (Superior/Duluth) cannot be overstated. *Id.* The PSI recommended an 8-10 year sentence, with 4-5 years of initial incarceration followed by 4-5 years of extended supervision. *Id.*

At the sentencing hearing the State stressed its particular frustration with the fact that Johnson had come from Chicago, Illinois, to commit a crime in Superior, Wisconsin. The State made the following argument:

> I think the most frustrating thing in this case also is the fact that there was travel from Chicago to Duluth and to Superior crossing three state lines. Technically this could have gone -- been a Federal case so that is a very big, frustrating aspect of this case that we have individuals that are coming in from Chicago. He is most certainly not the first individual that has been sent up from Chicago. He has not been the last since this offense has occurred, *but the stream from Chicago needs to stop, and I think obviously [a] message needs to be sent,* not only from the dealers that are in Chicago that we believe are sending these individuals up here, but also the individuals that are coming and the individuals that are purchasing from the dealers.

(R.107:4; Appx. 10) (emphasis added). The State made a sentence recommendation of an 18-year prison sentence, with 8 years of initial incarceration followed by 10 years of extended supervision. (R.107:5; Appx. 11). At the conclusion of the State's comments the circuit court inquired into claims of "disparate treatment of codefendants." (R.107:6; Appx. 12). The State acknowledged that Thompson and Higgins had received probation dispositions, and also had their Class D felony possession of heroin charges had been

dismissed. (R.107:6-8; Appx. 12-14). The prosecutor noted that Thompson and Higgins had cooperated with law enforcement, testified at trial, and entered treatment. *Id.* The prosecutor concluded by stating that "... I do think that there is a difference bringing the drugs -- physically bringing the drugs to the community versus helping to provide individuals to purchase the drugs." (R.107:9; Appx. 15)

Trial counsel for Johnson opened his remarks by observing that "...[t]here is a big difference between Matt Thompson and Marshawn Johnson...," Johnson had no prior criminal record. (R.107:8; Appx. 14). He observed that Johnson was young, 19 years of age, and had a supportive family. *Id.* He noted that Higgins and Thompson, both admitted to making many deliveries of heroin when their one-year-old child was in the house. (R.107:9; Appx. 15). He noted that Thompson's testimony reflected that he and Higgins would invite people from Chicago to sell heroin out of their home; and that they would actively assist these persons by personally making deliveries of heroin themselves. *Id.* And yet, counsel noted, Thompson got a deferred judgment and an opportunity to enter treatment. *Id.*

Johnson's counsel reminded the circuit court that it had received letters of support for Johnson from two different school officials, which suggested that Marshawn Johnson was an active and productive member of his community. (R.107:11; Appx. 17). He noted that Johnson's mother, who was in the courtroom, had done everything she could to surround Johnson with loving and positive influence; to set a good example and work ethic for Johnson and his brother. (R.107:12; Appx. 18). Defense counsel recommended that the circuit court impose and stay a prison sentence of 8 years, with 4 years of initial incarceration followed by 4 years of extended supervision. (R.107:13; Appx. 19). Counsel then recommended a five-year probationary period, with one-year of conditional time in jail. *Id.* Counsel argued that this would be appropriate given Johnson's youth, his acceptance to college, Johnson's supportive family and community, and the probationary dispositions that had already been given to other

codefendants. *Id.* Johnson exercised his right of allocution, apologizing for the trouble he had caused the community and promising to keep himself away from these types of situations and to move forward in a positive route from here on. (R.107:15; Appx. 21). Johnson did not, it should be acknowledged, admit to having committed the crimes for which he was being sentenced. *Id.*

The circuit court then recessed to review the letters which had been submitted to the court. (R.107:16; Appx. 22). After the recess, the court cited the *McCleary*[6] sentencing factors and began by making findings as to the seriousness of the offense. *Id.* The circuit court observed that "[e]verybody agrees heroin is killing people in our community." *Id.* That babies were being born addicted to heroin; and that seeing a baby go through withdrawal is a harrowing sight to see. (R.107:17; Appx. 23). The circuit court then stated the following:

> The other part of the offense that makes it serious is Mr. Johnson comes up from Chicago and brings this poison to our community. I cannot overstate how serious that is, bringing this drug to our community and the interesting part, I looked at the letters that Mr. Johnson had sent on his behalf, and I'm sure there's more but the Mr. Johnson that's in these letters isn't the Mr. Johnson that came from Chicago, came to Superior and was slinging drugs out of a house in Superior. He was the nice person in the letter: He made a choice when he came up on the bus to do what he did.

Id.

The court then began to make its findings as to Johnson's character. It found his version of events to be unconvincing, and found his continuing to "sell this lie," and not accept responsibility, spoke poorly to his character. (R.107:18; Appx. 24). The court also felt the fact that Johnson was *not* a heroin addict actually spoke against his character, in that the dealer who is an addict is largely selling the heroin to feed his addiction, and not solely to make money, as was the case with Johnson. *Id.* On the other hand, the circuit court found that Johnson had graduated high school, was accepted to college, had a supportive family, and had

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[6] *McCleary v. State*, 49 Wis.2d 263, 182 N.W.2d 512 (1971).

people in the community willing to send letters of support despite knowing the seriousness of the charge. *Id.*

The circuit court then moved on to the protection of the public. (R.107:19; Appx. 25). The court opened by saying:

> The need to protect the public, and this is where I think there's not much mitigation. We have specific and general deterrence. Specifically, Mr. Johnson needs to get the message he cannot go into our community and sell drugs and the community and those around the community need to get the message they're not going to bring heroin into Superior and sell it to our people. *They cannot do it and that's the aggravating factor bringing this drug from Chicago into the Superior community.*

Id. (emphasis added). The circuit court also addressed the disparities in the sentences between the codefendants and acknowledged that there was going to be a discrepancy between the sentence received by Johnson, and those received by the codefendants from Superior:

> Quite frankly, there's this discussion of the other codefendants; and I'm moved by the fact that the co-defendants received quite lenient dispositions. Quite frankly, it makes me second -- gives me second thought that they shouldn't have been treated so leniently and ultimately I believe I was the judge on those cases and I think that I probably did the wrong thing. They should have probably been treated more partially, not as lenient as they were treated, but the difference between those people and Mr. Johnson is the offense level is obviously different. It was a joint recommendation. They cooperated. Accepted responsibility which is something that Mr. Johnson continues not to do.

(R.107:19-20; Appx. 25-26). It is unclear from the circuit court's remarks whether the court was aware, or unaware, that Johnson, Jenkins, Thompson and Higgins were all originally arrested and charged with possession of heroin (>10-50g) with intent to deliver.

The court considered, then rejected probation as a sentence alternative. (R.107:21; Appx. 26). The court also rejected the recommendation of the PSI writer, stating that:

> I toil with the appropriate length of prison time here, but it comes down to a message needs to be sent to Mr. Jenkins and the community. This behavior is not going to be tolerated. And by sending a message, I believe we are protecting the public, both

> generally and specifically here and the message needs to be sent directly to Mr. Jenkins, you are not getting away with this behavior lightly.

(R.107:21-22; Appx. 27-28). The circuit court accept the recommendation of the State and sentenced Johnson to 18-years prison, with 8 years of initial incarceration to be followed by 10 years of extended supervision. *Id.*

On December 7, 2017, a hearing was held on Johnson's postconviction motion raising the same Privileges and Immunities argument made in this brief. (R.84 and R.114). The circuit court elaborated on Johnson sentence as follows:

> when I was sentencing Mr. Johnson, the law is unsettled whether or not somebody can be punished differently because they are from another area or city or state. But that withstanding, my point was, to me it's an aggravating factor: The drug dealer that comes from out of the area and brings the drugs here; as opposed to a lower-level dealer who would have gotten the drugs from out of the area, kind of the street-level dealer versus the individual, like Mr. Johnson, who -- Mr. Johnson actually was the -- I guess wholesaler and then the retailer. So he took on two additional roles, as opposed to one role. And that's how I looked at it.
>
> I didn't look at it, Well, Mr. Johnson is from Chicago he needs to be punished because he's from Chicago. I looked at Mr. Johnson being the wholesaler and the retailer and that was the point behind my sentence, which is different than an individual who was the retailer here, but not also the wholesaler, because of taking on those two additional responsibilities.

(R.114:7-8; Appx. 36-37). Thus, in the circuit court's reasoning, a resident of Superior, Wisconsin, who happens to get his drugs from Chicago, Illinois, and then proceeded to sell those drugs in Superior, is merely a "retailer" of heroin. While Johnson, because he is a citizen of Chicago, Illinois, who traveled to Superior for the purpose of selling heroin, became by virtue of that journey is both a "wholesaler" and a "retailer", and thus deserving of harsher punishment. Johnson then filed this appeal. (R.92).

VI. Argument.

A. Summary of Argument.

Wisconsin law provides that a defendant is entitled to a resentencing hearing if the trial court erroneously exercises its sentencing discretion. It has been further held that a circuit court will have erroneously exercised its sentencing discretion when it actually relied on clearly irrelevant or improper factors.

At Johnson's sentencing hearing the State urged the circuit court to treat the fact that Johnson traveled from Chicago, Illinois, as an aggravating factor in his crime, justifying a harsher sentence than he would receive if he had been a native of Superior, Wisconsin. Unfortunately, the Court accepted this argument and treated this as "... the aggravating factor bringing this drug from Chicago into the Superior community," and handed down a harsher sentence than Johnson would have received had he been a resident of Superior who was found to be a party to the crime of possession of heroin with the intent to deliver. The Court expressly did this in order to send a "message" to the Chicago community that they cannot bring drugs into Superior, Wisconsin.

The Privileges and Immunities Clause of Article IV, Section 2, of the United States Constitution places the citizens of each State upon the same footing with citizens of other States and secures to them the equal protection of their laws when they travel to other States. Imposing a harsher sentence upon Johnson because he came from Chicago was violative of the Privileges and Immunities Clause, and an improper factor in his sentencing. Johnson should have been sentenced no differently for having traveled from Chicago than he would have been sentenced had he lived in Superior. His sentence should be vacated, and a resentence hearing should be held before a new judge.

B. The circuit court erroneously exercised its sentencing discretion when used the fact that Johnson was not a resident of Superior, Wisconsin, but rather was a resident of Chicago Illinois, as an aggravating factor justifying a harsher sentence than Johnson would have received had he been a resident of Superior who was found a party to the crime of possession of heroin with the intent to deliver.

1. Standard of Review.

The "[r]eview of a sentencing decision is 'limited to determining if discretion was erroneously exercised.'" *State v. Harris (Landray M.)*, 2010 WI 79, ¶ 30, 326 Wis.2d 685, 786 N.W.2d 409. "A circuit court erroneously exercises its sentencing discretion when it `actually relies on clearly irrelevant or improper factors.'" *State v. Alexander*, 2015 WI 6, ¶ 17, 360 Wis.2d 292, 858 N.W.2d 662, citing *State v. Harris (Landray M.)*, 2010 WI 79, ¶ 66, 326 Wis.2d 685, 786 N.W.2d 409. "A defendant bears the burden of proving, by clear and convincing evidence, that the sentencing court actually relied on irrelevant or improper factors." *Alexander*, 2015 WI 6 at ¶ 17. If the defendant proves the sentencing court actually relied on irrelevant or improper factors, then the burden shifts to the State to prove the error was harmless. Id. at ¶ 18-19.

2. The Privileges and Immunities Clause, Generally.

Article IV, Section 2 of the United States Constitution provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Where questions as to rights of the accused secured under provisions of this clause are raised on appeal in a criminal case, a state court should look to decisions of the United States Supreme Court for proper construction thereof. *State v. Palko*, 122 Conn. 529, 191 A. 320, 325, 113 A.L.R. 628 (Conn., 1937).

"It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the

advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this." *Paul v. Virginia*, 75 U.S. 168, 180 (1868). "The privileges and immunities clause ''establishes a norm of comity', *Austin v. New Hampshire*, 420 U.S. 656, 660, 95 S.Ct. 1191, 1194, 43 L.Ed.2d 530 (1975), that is to prevail among the States with respect to their treatment of each other's residents.' *Hicklin v. Orbeck*, 437 U.S. 518, 523-24, 98 S.Ct. 2482, 2486-87, 57 L.Ed.2d 397 (1978)." *Taylor v. Conta*, 106 Wis.2d 321, 327-28, 316 N.W.2d 814 (1982). "By this clause the Constitution expressly limits a state's power to discriminate against inhabitants of other states." *Id.* citing, *Hague v. CIO*, 307 U.S. 496, 511 (1939).

3. The Privileges and Immunities Clause, Specifically with regard to sentencing.

Cases involving an alleged violation of the Privileges and Immunities Clause in criminal sentencing are exceedingly rare. In fact, the undersigned counsel has found only two cases, both coincidently in Wisconsin, which addressed the subject, namely *Buckner v. State*, 56 Wis.2d 539, 202 N.W.2d 406 (1972), and *State v. Duarte*, 2014 WI App 71, 354 Wis.2d 623, 848 N.W.2d 904 (an unpublished case; Appx. 41-42).

In *Buckner*, the trial court stated the following in its sentencing decision:

> 'You have to consider in my opinion, and maybe this is bad penal law, but you have to consider the deterrent factor of a sentence. If it has no other effect, it must have that. Here are four boys from Chicago, came in here to have a little fun in Madison. I had a first-degree murder last November where a couple of fellows came from Milwaukee to have a little fun in Madison, and an innocent victim was

> murdered. Well, I think it's about time that the word got around that this cannot happen in Madison, Wisconsin. I went through five and one-half years as district attorney, and I tried one first-degree murder case. I was a judge for 13 years, I had one first-degree murder case; and in six months I have had three first-degree murder cases and a second-degree murder case.'

Buckner, 56 Wis.2d at 551-52. This Court wrote that "[w]e are satisfied from the quoted portion of the record that the trial court was making a general protestation against the rise in callousness for human life" and that "[t]he record does not sustain the charge that the trial court imposed its sentence on this particular defendant because he was from a particular place—Chicago." Id.

In *Duarte*, trial court made the following comments at sentencing:

> Your folks moved to Green Bay when you were a teenager because they wanted you to get away from the dangers of California. They wanted to provide a better life for you, and you indicate in your statement that you lived a normal childhood, you were happy all the time, you were going to school, you were playing with friends, and that your relationship with your family was very close.
>
> These behaviors in Brown County are the behaviors I'm most concerned about. They're inconsistent with the family objective to get away from problems and troubles in California, whatever those may be. Because the problems and the troubles you caused in Green Bay, Wisconsin are unacceptable, and it sounds to me like they're the exact type of problems that you and your family wanted to get away from, and I'm not going to let you bring those here, Mr. Duarte. That's not going to happen. That's not going to happen here, Mr. Duarte. That may be the average course of affairs in California, but that isn't going to fly here in Green Bay.

Duarte, 2014 WI App 71, ¶ 3. The Court of Appeals wrote that "Duarte makes no cognizable argument about how the court's reference to the move from California was an improper factor or how that reference lacked a reasonable nexus to the court's discussion of Duarte's character" and that "Duarte has also failed to demonstrate that the sentence was actually based on Duarte not being a Brown County native." Duarte, 2014 WI App 71, ¶¶ 5-6.

In both *Buckner* and *Duarte*, the Court of Appeals did not find violations of the Privileges and Immunities Clause, because the trial court did not actually rely upon the fact that the defendants were from a particular place. However, implicit in both decisions was the assumption that had the trial courts actually relied upon

the fact that the defendant was from a particular place as a factor in its sentence, the sentences would have been erroneous exercises of discretion.

4. The trial court did use the fact that Johnson came from Chicago as an aggravating factor to justifying a harsher sentence than Johnson would have received had he been a resident of Superior who was found in possession of heroin with the intent to deliver.

This case is distinguishable from both *Buckner* and *Duarte* because the circuit court did actually rely on the fact that Johnson came from a particular place, that is Chicago, as an aggravating factor to justify a harsher sentence. Moreover, the State expressly urged the circuit court to treat the fact that Johnson was from Chicago as an aggravating factor, for the purpose of sending a "message" to the Chicago community that Superior was not going to tolerate any more heroin coming from Chicago. The circuit court was not simply protesting "the rise in callousness for human life" as was the case in *Buckner*.

The defendant's being from Chicago was actually relied upon as an aggravating factor in his sentencing. This is clearly, and expressly, stated in the sentencing transcript. The Court stated that: "[s]pecifically, Mr. Johnson needs to get the message he cannot go into our community and sell drugs and the community and those around the community need to get the message they're not going to bring heroin into Superior and sell it to our people. They cannot do it and *that's the aggravating factor bringing this drug from Chicago into the Superior community*." (R.107:19; Appx. 25; emphasis added). The circuit court could not have been more explicit in what it was doing. Furthermore, the circuit court was being urged by the State to consider the defendant's city of origin as an aggravating factor, stating "the stream from Chicago needs to stop, and I think obviously [a] message needs to be sent...." (R.107:8; Appx. 14). The Court's comments make it clear that it was the Court intention to send a "message" to the community in Chicago that bring drugs from Chicago into the Superior community will be treated more harshly, as a matter of "general deterrence." *Id*.

The circuit court's attempt to draw a distinction between "wholesalers" and "retailers" does nothing but reinforce the argument that the court was imposing a harsher punishment because Johnson was a citizen of Chicago, Illinois. The facts adduced at trial showed that Thompson and Higgins, who were both residents of Superior, Wisconsin, conspired with a man named "Bone" to bring heroin from Chicago, Illinois, for the purpose of selling those drugs in Superior, Wisconsin. (R.108:118). "Bone" was the actual "wholesaler." Johnson and Jenkins were simply the couriers who also conspired with "Bone" to bring heroin from Chicago, Illinois, for the purpose of selling those drugs in Superior, Wisconsin. (R.108:79). All four were arrested and charged with possession of heroin (>10-50g) with intent to deliver, as parties to the crime. Both defendants Thompson and Higgins admitted at the trial to having made deliveries of heroin, and to have aided and abetted defendants Jenkins and Johnson in the delivery of heroin. (R.108:107 and 218). Thompson and Higgins just as surely participated in the flow of drugs from Chicago to Superior. It was Thompson and Higgins who reached out to "Bone" to send heroin to their home in Superior. That Johnson and Jenkins were the couriers is a distinction without significance. While each of the codefendants played their own separate roles in the crime, they all aided and abetted in the commission of the same crime.

And yet the two white defendants of Superior, Wisconsin received probation dispositions while the two black defendants from Chicago, Illinois received lengthy prison sentences. Clearly, the fact that Jenkins and Johnson came from Chicago, Illinois, worked as an aggravating factor in their lengthy prison sentences. The considerable disparities between the sentences received by the two African-American defendants from Chicago, Illinois, and the two Caucasian defendants of Superior, Wisconsin, cannot be waived away simply by arguing that the Caucasian defendants testified at trial and the African-American defendants did not.

Both the State and the circuit court made much of the fact that Johnson got on a bus in Chicago, Illinois and came up to Superior, Wisconsin to commit a crime. (R.107:8 and 17; Appx. 14 and 23). To be sure, possessing heroin with the intent to distribute, is a serious crime, but getting on a bus and traveling to another State is not an aggravating factor. The Privileges and Immunities Clause, among other things, protects a constitutional "right to travel," which includes a right to travel free from "...the disabilities of alienage in the other States, and giving [the Citizens of Each State] equality of privilege with citizens of those States." *Saenz v. Roe*, 526 U.S. 489, 501-02 (1999). Johnson and Jenkins did not forfeiture their right to equal protection and due process under Wisconsin law when they stepped on that bus. Thompson and Higgins also aided and abetted in the "*bringing this drug from Chicago into the Superior community,*" but for Johnson it was treated as an aggravating factor. That Johnson traveled from Chicago, Illinois was neither relevant to any element of his crime, nor a proper factor for consideration in his sentencing.

Johnson being from Chicago, Illinois, bore no reasonable nexus to Johnson's character, as arguably was the case in *Duarte*. Being from Chicago does not make Johnson a bad person. Nor does his traveling from Chicago bear a reasonable nexus to the gravity of the offense, or to the protection of the public. The crime of possession of heroin with the intent to distribute has the same gravity, whether the defendant be from Chicago, Illinois or from Superior, Wisconsin. The gravity of the offense does change because the defendant travels from some particular place. And the need to protect the public will be the same whether the defendant hails from Chicago, Illinois, as Johnson did, or is homegrown in Superior, Wisconsin, like Thompson and Higgins.

VII. Conclusion.

Wherefore, Mr. Johnson respectfully requests that this Court vacate his sentence and remand this case to the circuit court for a resentencing hearing before a new judge.

Respectfully submitted February 16, 2018.

This brief has been electronically signed by:

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VIII. Certifications.

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 6192 words.

I further certify that I personally served the State of Wisconsin, Plaintiff-Respondent, with three copies of this brief the same day it was filed with this court.

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

Finally, I further certify that pursuant to Rule 809.19(12)(f) if I have submitted an electronic copy of this brief, excluding the appendix. The text of the electronic copy of the brief is identical in content and format 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.

Dated February 15, 2018.

This brief has been electronically signed by:

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CERTIFICATION OF MAILING

I certify that this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by priority mail on 2/16/2018. I further certify that the brief was correctly addressed and postage was pre-paid.

Date: 2/16/2018.

Signature: _____