STATE OF WISCONSIN
IN THE COURT OF APPEALS
DISTRICT II

Appeal Nos. 2018AP311-CR and 2018AP312-CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Esmeralda Rivera-Hernandez,

Defendant-Appellant.

APPEAL OF AN ORDER OF THE CIRCUIT COURT OF SHEBOYGAN COUNTY,
HONORABLE DANIEL J. BOROWSKI, PRESIDING
TRIAL COURT CASE NOS. 2016CM490 AND 2017CM321

BRIEF OF DEFENDANT-APPELLANT ESMERALDA RIVERA-HERNANDEZ

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Dated: May 21, 2018

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I. STATEMENT OF THE ISSUES

Did the trial court, in its refusal to allow the amendment of the criminal Complaint to non-criminal ordinance violations, properly exercise its discretion?

Trial Court Answered: Yes.

II. ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary. Yet the opinion of this court for this case should be published due to the issue of a defendant's undocumented immigration status, raised in this case.

III. STATEMENT OF THE CASE

The State of Wisconsin ("State") filed a Complaint against Esmeralda Rivera, aka Rivera-Hernandez ("Rivera") on July 1, 2016 in the Sheboygan County Circuit Court [R2].1 The Complaint consisted of two misdemeanor counts: misdemeanor battery, and disorderly conduct [Id.]. Rivera entered a plea of not guilty at the initial appearance hearing of July 5, 2016 [R78].

On October 31, 2016 the State made an oral motion to dismiss its case, arguing that the victim "has become uncooperative," and "has been nonresponsive" [R76:3]. The court required the State to make a written statement to the court to

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1In that there are two trial court cases involved in this appeal, references to the Record for 16CM490 include the standard "R." References herein to the second trial court case, 17CM321, are by use of "RR."

support its motion to dismiss [Id.:4-5]. The State filed a letter brief with the court on November 14, 2016 [R20].

The next court hearing was held January 5, 2017 [R74]. The court addressed the pending State motion to dismiss, but adjourned the matter for a follow up hearing on January 11, 2017, and invited further written submissions [Id.:12]. On January 11, 2017 Rivera's attorney filed a brief with the court, in support of the State's motion to dismiss [R24]. On January 11, 2017 the court held a hearing, and decided against the State's motion to dismiss [R75].

The next court hearing was held on March 16, 2017 [R77]. The State made an oral motion to amend the two criminal misdemeanors to two county ordinance violations of disorderly conduct [Id.:1-2]. Rivera's attorney explained to the court that one additional matter, that was not argued in the motion to dismiss hearing of January 11, 2017, related to Rivera's immigration status [Id.:3-4].

The next court hearing was held on April 4, 2017, and the pending oral motion regarding amendment of the criminal counts to ordinance violations was further discussed [R83:31-35]. The court set a deadline for written submission by either party [Id.:35]. Rivera's attorney on April 17, 2017 filed a response brief to the State's motion to amend [R36].

On April 18, 2017 the court heard final arguments regarding the motion to amend, and ultimately denied the State's motion [R81:3-16].

On April 19, 2017 the jury trial commenced [R84]. Yet due to a medical emergency of Rivera later in the day, the court granted Rivera's request for mistrial [Id.].

A second Criminal Complaint was filed against Rivera on May 22, 2017 [RR2]. The Complaint consisted of three misdemeanor counts, all for misdemeanor bail jumping, and all relating to the violation of a bond condition set on July 5, 2016 during the 16CM490 initial appearance [Id.].

On June 12, 2017 Rivera appeared for an initial appearance regarding the 17CM321 case [RR3]. Rivera entered a plea of not guilty [Id.].

On June 27, 2017 a Plea Questionnaire/Waiver of Rights form was filed with the court for both cases [R51; RR10]. The plea hearing was held for both cases on June 27, 2017 [R83]. The sentencing hearing for both cases was held on July 7, 2017 [R83].

A Notice of Right to Seek Postconviction Relief was filed for both cases on July 10, 2017 [R55; RR14]. A Judgment of Conviction was filed for each case on July 12, 2017 [R57; RR17]. As to 16CM490, Rivera was found guilty on the Battery

misdemeanor, and received a withheld sentence with probation of 24 months [R57]. As to 17CM321, Rivera was found guilty of one count of misdemeanor bail jumping, and given a withheld sentence with probation of 24 months [Id.].

A notice of appeal was by the undersigned as to both cases [R66; RR26]. By Order of April 13, 2018, this court granted the undersigned's motion to consolidate the two cases for purposes of briefing and disposition. Id. Furthermore, this court set a deadline of May 23, 2018 for the filing of appellant's brief and appendix. Id.

IV. STATEMENT OF FACTS

As noted above, Rivera's attorney on March 16, 2017 first raised with the court the immigration status of her client [R77]. Rivera's attorney expressly stated to the court during the March 16, 2017 hearing the following:

> "I do have one brief thing that I did want to put on the record that's changed since last time, is that I did inform the Court her immigration status. **She is—she did apply for DACA and given the political climate it's one of the reasons that we're seeking ordinance instead of going to trial on this this.** I just wanted to put that on the record." And "**I'm just noting it for the record because of**

my last brief [in support of motion to dismiss], it does indicate the effect on Defendant and the proceedings and the possible deportation is quite a large effect on the Defendant and so it's just something that I'm noting."

[Id.:3-4](emphasis added).

Prior to this date, the court had held a hearing on January 11, 2017, in regards to the State's motion to dismiss [R75]. During the January 11, 2017 hearing, the court recognized that there may be improper motives of the Complainant, as the Defendant had testified against the Complainant's brother in another case [Id.]. The State, in her brief to the court dated November 11, 2016, referenced the other case2, writing that, "the Defendant [Rivera] testified against her ex-boyfriend on domestic violence charges, which has created bad blood between her and Ms. Prado [Complainant], and contributed to the facts in this case" [R20:1].

An additional argument made by the State within its November 11, 2016 letter brief to the court was in regards to texts allegedly sent by Ms. Prado to Rivera. The State writes:

"Specifically, it was brought to the State's attention that

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2 The other case is State of Wisconsin v. Otilio Prado, Milwaukee County Case No. 2012CF3008. A copy of the June 27, 2012 Information is part of the Appendix to this brief. Also within the Appendix is the CCAP record of the case, that shows Rivera's role as victim in the case.

on September 9, 2016 and September 14, 2016, Ms. Prado sent several threatening and harassing text messages to the victim (attached), which were subject to a complaint being filed with the Milwaukee Police Department. When these text messages were received by the State, we tried to reach out to Ms. Prado via telephone and letter, asking that she contact our office immediately to discuss the text messages and the case in general. Our office received no response" [Id.].

The State ends her letter brief with the following argument:

"The Defendant is 22 years old with no prior criminal convictions. The State believes that, given the history between these two individuals as well as Ms. Prado's actions since charging the case, it is not in the public interest to pursue these charges. Additionally, should the case go to trial, the State has further concerns about the credibility and overall cooperativeness of its victim. There was an original plea agreement in the case between the parties for a deferred conviction agreement (DCA), with conditions including no contact with Ms. Prado. However, given Ms. Prado's actions, specifically making contact with

the Defendant in a threatening manner despite requesting a no contact order, the State no longer believes a DCA is appropriate and that straight dismissal is best" [Id.:1-2].

Rivera's counsel set forth, in her letter brief to the court dated January 11, 2017, factors for the court to consider, in regards to the State's motion to dismiss. [R24]. One of the factors listed is "Effect on the Defendant" [Id.:3]. Rivera's counsel writes in her brief:

"*Effect on the Defendant*. In this case Ms. Rivera has appeared in court on six occasions in this case. She resides in Milwaukee County with her child and is working while going to school to get her GED. Ms. Rivera has no prior criminal record. Denying the State's Motion to Dismiss would negatively affect Ms. Rivera because since the case has carried on since July, it will be harder for her to prepare for trial. The adjournments in this case have been because the prosecution did not prepare the Deferred Conviction Agreement, and for the State to look into text messages provided to them by the defense on September 15, 2016 or to contact the victim. With the exception of an adjournment requested by counsel based on a scheduling conflict at the beginning of the case, all

adjournment requests have all been for the State to prepare" [Id.].

Rivera's attorney stated the following as a portion of her written response to the State's motion to amend:

> "The State's request to amend to two ordinance violations is in the public interest in this case. Ms. Rivera would face consequences for the allegations against her and the victim would not be put through the experience of testifying at trial." [R36].

During the April 18, 2017 hearing, in which the court fully reviewed the State's and Rivera's arguments to allow amendment of the case, the court made the following statements in regards to Rivera:

-that Rivera is "an illegal immigrant." [R81:10];

-that Rivera is "an illegal alien." [Id.:11];

-that Rivera is "here illegally in this country." [Id.:15].

The court denied the State's motion to amend for the same reasons as set forth in the motion to dismiss proceeding of January 11, 2017, and "also on the merits denying it as it relates to the immigration." [Id.:14].

V. ARGUMENT

A. Standard of Review and Burden of Proof

Pursuant to Wis. Stat. 971.29(1), a complaint or

information may be amended at any time prior to arraignment without leave of court. Id. Rivera was arraigned on July 5, 2016. "When the jurisdiction of the court is invoked by the commencement of a criminal proceeding, the court can exercise the discretion described in *Guinther, et al. v. City of Milwaukee*, 217 Wis. 334, 258 N.W. 865 (1935)." State v. Conger, 325 Wis. 2d 664, 671, 797 N.W. 2d 341 (2010), quoting State v. Kenyon, 85 Wis. 2d 36, 45, 270 N.W. 2d 160 (1978).

The Conger court continued, "*Guinther* established a court's authority to reject a dismissal of a charge. Further, the court's analysis focused on the legal sufficiency of the lower court's rejection of the plea rather than a de novo review of the facts." Conger at 671, quoting Kenyon at 47. Conger concluded the review standard as the following:

"We will sustain a court's discretion if the court: (1) examined the relevant facts; (2) applied a proper standard of law; and (3) using a demonstrably rational process, reached a conclusion that a reasonable judge could reach." Conger at 671, citing Loy v. Bunderson, 107 Wis. 2d 400, 414-15, 320 N.W. 2d 175 (1982).

As to the present case, the trial court indeed had the discretion to deny the State's motion to amend the case, because the motion to dismiss was made after Rivera's arraignment.

There is no de novo review by this appellate court. Rather this appellate court reviews whether the trial court examined the relevant facts, applied a proper standard of law, and used a demonstrably rational process to reach a conclusion that a reasonable judge could reach.

The burden of proof is upon Rivera.

B. Trial court failed to examine the relevant facts relating to Rivera; the trial court mischaracterized Rivera as an "illegal."

As stated above, the trial court, during the hearing of April 18, 2017, three times mischaracterized as an illegal alien or illegal immigrant, who was illegally in the United States. Yet Rivera's attorney had indicated during the hearing of March 16, 2017 that Rivera was a DACA applicant. DACA stands for Deferred Action for Childhood Arrivals, and is an American immigration policy that was announced by President Baraka Obama on June 15, 2012. The policy applies to individuals who were brought to the United States illegally as children, and allowed applicants to receive a renewable two-year period of deferred action from deportation and become eligible for a work permit in the U.S. Unlike the proposed federal DREAM act, DACA did not provide a path to citizenship for recipients.

As explained in greater detail within the next Argument sub-section, Rivera as a child brought illegally into the United

States, was not and is not an "illegal" alien, "illegal" immigrant, or "illegally" in the United States. The trial court's mischaracterization of Rivera seriously affected the trial court's examination of the facts. By not correctly recognizing Rivera's immigration status, the factual mistake upset the balancing test that the trial court used to decide the State's amendment motion.

C. **Trial court failed to apply a proper standard of law, because the trial court improperly evaluated Rivera's reasoning and recommendations for the amendment motion.**

The trial court correctly utilized Conger to decide the State's motion to amend. Conger evaluated which factors should be considered in deciding whether to reject a plea agreement.[3] Id. at 676. The court stated,

> "We agree that it would be impossible to set forth an exhaustive list that would apply to the variety of facts and charges that face circuit courts every day. However, we can identify some of the factors that could apply depending on the circumstances.
>
> To begin, *Kenyon* [State v. Kenyon, 85 Wis. 2d 36, 270 N.W. 2d 160 (1978)] sketched the broad outlines of the appropriate inquiry into whether a plea is in the public interest. In that case, we noted that the circuit court should take into account 'the public's right to have the crimes actually committed fairly prosecuted and to the protection of the rights of third persons." *Kenyon*, 85 Wis. 2d at 47, 270 N.W. 2d 160, as well as 'the public interest in proper enforcement of its laws and the public interest in allowing the prosecutor sufficient freedom to

[3] The proposed plea agreement in Conger "reduced the felony charge to three counts of misdemeanor possession of marijuana with intent to deliver." Id. at 669. So in effect the court was asked to amend the criminal case.

> exercise his legitimate discretion, to employ to the best effect his experience and training, and to make the subjective judgment implicit in the broad grant of authority under sec. 59.47 Stats.' *Id*.
>
> Given these contours, a sensible—and important—starting point for a circuit court evaluating a plea is to consider the reasons stated by the prosecutor and defense counsel for recommending the plea agreement. Giving weight to the prosecutor's recommendation and supporting reasoning reflects the court's interest in honoring the public interest in providing a prosecutor freedom to exercise the discretion that his or her position authorizes. **Likewise, the court's evaluation of the defense attorney's reasoning and recommendations reflects a balancing consideration of the public interest in a fair prosecution.**" Id. at 688. (emphasis added)(endnote omitted).

The Conger court repeatedly references the same court's Kenyon decision. "[A]s we noted in *Kenyon*, and explain herein, consideration of the views of the prosecutor as well as the defense attorney certainly enter into that determination." Conger at 675.

In Kenyon, the court reversed the trial court's decision, by which the trial court had denied the State's motion to dismiss a criminal Complaint. Id. at 44. The court found that,

> "While the trial court was not without authority to rule, it erred in denying the motions since it failed to make any determination concerning how granting or refusing the motion would affect the public interest. While the **concerns expressed by the court for the defendant were legitimate and proper and go to the public interest to a limited degree**, there must also be some concern with the public's right to have the crimes actually committed fairly prosecuted and to the protection of the rights of third persons." Id. at 41. (emphasis added).

Therefore, pursuant to Conger and Kenyon, the trial court in the present case was to apply the concerns of the defendant to the overall public interest calculation employed by the court.

Yet due to the trial court's erroneous characterization of Rivera as an "illegal," the public interest calculation became erroneous, and is reversible error.

During the April 18, 2017 hearing, the trial court cited State v. Gayton, 370 Wis. 2d 264, 882 N.W. 2d 459 (2016). [R81:10]. The trial court stated:

> "[W]isconsin Supreme Court actually found that a Court may at sentencing consider immigration status as an adverse consequence in sentencing to the character of the defendant because they're here illegally. In that case it's a unique case because it tied directly into the ability to get a driver's license. And the Court found that it was also relevant but also said that the Court consider it as a part of character." Id.

The trial court further stated that it had the discretion to completely ignore Rivera's status as part of the public interest calculation:

> "[I] think the Salas [Gayton] case gives the Court discretion as to how it all plays out because in that same case it says (as read), 'the defendant's nationality is one of several factors a Court may not rely upon when imposing sentence.' It was a sentencing case." [R81:11].

Yet the April 18, 2017 hearing was not a sentencing hearing or a plea hearing.[4] The motion to amend proceeding involved

[4] The trial court during the April 18, 2017 hearing also cited State v. Ortiz-Mondragon, 364 Wis. 2d 1, 866 N.W. 2d 717 (2015).

instead a broader public interest calculation. As stated in Conger:

> "It is true, as this court noted in *Kenyon*, that the public standard is 'admittedly broad,' and that '*Guinther* sheds little light on the various factors and considerations which may legitimately be included under this rubric.' *Kenyon*, 85 Wis. 2d at 46, 270 N.W. 2d 160. It is also true that *Kenyon* did not ameliorate that problem. Rather, this court simply noted that '[i]t would be impossible to make an exhaustive list of just what to take into account in this regard. *Id*. at 47, 270 N.W. 2d 160." Conger at 676.

It is clear from Conger and Kenyon that a trial court is not restricted from standards in a plea or sentencing hearing to evaluate a defendant's position in a motion to amend proceeding. Although the trial court repeatedly admonished Rivera's counsel for not providing the court with a supportive, on point case regarding the immigration status issue of Rivera,

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[R81:10]. In Ortiz, the court denied a defendant's post-conviction motion to withdraw his plea. Ortiz-Mondragon at 1. Although the central issue in the case was whether defense counsel should have done more than just warn his client about the risk of adverse immigration consequences, the case also showed how the trial court's only obligation in a plea hearing, in regards to potential immigration consequences, is to give the standard warning of the following to the defendant:

> "If you're not a citizen of the United States, the plea you offer me could result in your deportation, the exclusion of admission, or the denial of naturalization under federal law." Id. at 37.

The trial court relied upon Ortiz-Mondragon to erroneously equate a trial court's non-consideration of a defendant's immigration status in a plea matter with its conclusion that a trial court does not consider a defendant's immigration status in a motion to amend hearing.

Conger and Kenyon was sufficient case law to fully consider Rivera's status in the public interest calculation.

Furthermore, Rivera is not an "illegal," " illegal" alien, or "illegally" living in the United States. As stated in the concurring opinion of the Gayton case,

> "Of the estimated 11 million undocumented immigrants in the United States, 76,000 live in Wisconsin, a group that encompasses a great diversity of individuals and experiences. Despite a perception held by some that all undocumented immigrants are law breakers or criminals, **many immigrants are undocumented due to circumstances beyond their control. For example, so-called DREAMERS are undocumented immigrants who were brought to the United States when they were young. *Plyler v. Doe,* 457 U.S. at 219–20, 102 S.Ct. 2382 (explaining that children who were brought to the United States unlawfully are not similarly situated to adults who entered the country unlawfully**)." Gayton at 303-304 (emphasis added).

"In *Plyler v. Doe,* the United States Supreme Court struck down a Texas statute that allowed schools to deny enrollment to undocumented immigrant children. 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786." Gayton, concurring opinion, at 298.

The United States Supreme Court in Plyler has described the Children who entered the United States by their parents unlawful entry as "special members of this underclass:"

> "Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial "shadow

population" of illegal migrants—numbering in the millions—within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.

The children who are plaintiffs in these cases are special members of this underclass. Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants. At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated. Their "parents have the ability to conform their conduct to societal norms," and presumably the ability to remove themselves from the State's jurisdiction; but the children who are plaintiffs in these cases "can affect neither their parents' conduct nor their own status." *Trimble v. Gordon*, 430 U.S. 762, 770, 97 S.Ct. 1459, 1465, 52 L.Ed.2d 31 (1977). Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.

'[V]isiting . . . condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual

> **responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual—as well as unjust—way of deterring the parent."** *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175, 92 S.Ct. 1400, 1406, 31 L.Ed.2d 768 (1972) (footnote omitted). Plyler at 218-220 (endnotes omitted)(emphasis added).

There is an important distinction between entering the United States illegally, and remaining in the United States once within the country. As stated in the concurring opinion of Gayton, "[t]he act of unlawful entry into the United States is a federal crime, punishable by a fine and/or imprisonment of not more than six months for a first offense. 8 U.S.C. sec 1325(a)." Gayton at 306. Yet "**It is not a crime for an undocumented immigrant to remain in the United States**." Id. (emphasis added).

The trial court did not distinguish the status of Rivera's parents versus herself. Her parents illegally entered the United States when Rivera was a minor, but Rivera herself did not enter illegally. Rivera was not illegally in the United States at the time of April 18, 2017 hearing.

The trial court should have considered Rivera's risk of deportation, if the court would not allow the amendment. By not allowing the amendment, Rivera was at risk of criminal conviction. The trial court should have considered also the type of criminal conviction (battery) that Rivera faced.

In Ortiz-Mondragon, the court analyzed the issue of an "alien"5 and deportation/exclusion. Id. at 23-24. The court stated:

> "The relevant immigration statutes authorize deportation and exclusion of an alien who is convicted of a 'crime involving moral turpitude.' Under certain circumstances, '[a]ny alien who. . .is convicted of a crime involving moral turpitude. . . is deportable." 8 U.S.C. sec. 1227(a)(2)(A)(i). Any such alien 'shall upon the order of the Attorney General be removed. . .' 8 U.S.C. sec. 1227(a) (intro.). The Attorney General may not 'cancel removal' of an alien who is 'inadmissible or deportable' due to a conviction for a crime involving moral turpitude. See 8 U.S.C. sec. 1229b(b)(1)(C). Further, an alien is 'ineligible to receive visas and ineligible to be admitted to the United States if 'convicted of . . . a crime involving moral turpitude. . .' 8 U.S.C. sec. 1182(a)(2)(A)(i)(I)." Ortiz-Mondragon at 23-24.

> "However, the Immigration and Nationality Act, which includes those statutory provisions, does not define "crime involving moral turpitude." *See Padilla,* 559 U.S. at 361, 130 S.Ct. 1473; *id.* at 377–78, 130 S.Ct. 1473 (Alito, J., concurring). The Code of Federal Regulations also does not define that term. *Garcia v. State,* 425 S.W.3d 248, 260 (Tenn.2013) ("[A] crime involving moral turpitude is nowhere defined in the [Immigration and Nationality] Act or in the Code of Federal Regulations."). The Immigration and Nationality Act does not even list examples of crimes involving moral turpitude. *Lopez–Penaloza v. State,* 804 N.W.2d 537, 544 (Iowa Ct.App.2011) ("The [Immigration and Nationality Act] does not

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5 Endnote ten in Ortiz-Mondragon states in its entirety, "The term 'alien' means any person not a citizen or national of the United States." 8 U.S.C. sec. 1101(a)(3). " See also Gayton at 297 (concurring opinion): "The term 'alien' refers to any person who is not a citizen of the United States. 8 U.S.C. sec. 1101(a)(3). 'Alienage' is the condition of being a noncitizen. Black's Law Dictionary (88 10th ed, 2014)." Id.

> define the term 'moral turpitude' or list [crimes involving moral turpitude]."). Ortiz-Mondragon at 24.

Ortiz-Mondragon shows the uncertainty of whether a crime, such as battery, is a crime involving moral turpitude. The trial court knew that Rivera was a young mother with a child. The trial court was also aware of the volatility of the immigration laws:

> "So we have interjected in this case by the defense counsel the concept of immigration, which is a highly politically charged issue right now, quite honestly" [R81:8].

Instead of the court fully exploring the effect of a potential criminal conviction upon Rivera, and a potential deportation of Rivera, and even a potential separation of Rivera from her child (which is a public interest matter in that the child would potentially become a ward of the government), the trial court instead found that,

> > "[t]he public's interest and the personal convenience, the personal interest of the defendant are not the same. Fair prosecution of crimes, yes" [Id.:6].

At the time of the April 18, 2017 hearing, Rivera was not an "illegal." If she had been, perhaps the trial court's reasoning would have more traction, because as an "illegal" before the Complaint was filed on July 1, 2016, there would be less of an obligation to fully apply a defendant's concerns to the public

interest analysis. Yet as an undocumented alien, it is arguable that the trial court had an even greater duty to consider Rivera's position than the trial court would with a normal defendant with full citizenship. The full citizenship defendant has no risk of deportation if a motion to amend is denied, and there is a later criminal conviction. Yet a defendant with Rivera's status does have the risk.

VI. CONCLUSION

This appellate court reviews whether the trial court correctly examined the relevant facts, applied the proper standard of law, and used a demonstrably rational process to reach a conclusion that a reasonable judge could reach.

Rivera argues that the trial court, by its April 18, 2017 decision denying the State's motion to amend the criminal complaint to non-criminal violations, failed to both correctly examine the relevant facts, and also failed to apply the correct standard of law.

The trial court incorrectly and repeatedly characterized Rivera as an "illegal." Rivera was and is an undocumented immigrant, who was brought into the United States as a child. By characterizing Rivera as an "illegal," her status as a defendant in the public interest analysis of Conger was

incorrectly applied. The trial court's actions are reversible error.

Furthermore, the trial court failed to apply the correct standard of law. It is clear from Conger and Kenyon that a defendant's position is within the public interest. The trial court erroneously applied a plea hearing or sentencing hearing standard to Rivera's status argument. Yet the motion to amend public interest standard is much broader. The trial court failed to allow adequate consideration of Rivera's undocumented status, and the effect of a potential criminal conviction upon Rivera and her daughter. The erroneous application of law by the trial court is reversible error.

For all of the reasons set forth herein, it is respectfully requested that the judgment of conviction be vacated, and that the case be remanded to the circuit court for a new hearing regarding the State's motion to amend.

Dated this 21st day of May, 2018 in Sheboygan, Wisconsin.

Respectfully submitted,

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CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of the brief, is an appendix that complies with s. 809.12(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral and written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 names 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.

I further certify that this brief conforms to the rules contained in s. 809.19 (8)(b) for a brief and appendix produced with monospaced font. The length of this brief is twenty-one pages.

I finally certify that the brief and appendix that was electronically filed by the undersigned on May 21, 2018 is identical to the brief and appendix that the undersigned mailed to the Wisconsin Court of Appeals on May 21, 2018.

Dated this 21st day of May, 2018.

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