IN THE SUPREME COURT OF IOWA

Supreme Court No. 18-0955

STATE OF IOWA,
Plaintiff-Appellee,
vs.
GUILLERMO AVALOS VALDEZ,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR WOODBURY COUNTY

The Honorable John. D. Ackerman

APPELLANT'S BRIEF

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CERTIFICATE OF SERVICE

The undersigned certifies that on February 1, 2019 a true copy of the foregoing instrument was served upon Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Guillermo Avalos Valdez, Fort Dodge Correctional Facility, 1550 L Street, Fort Dodge, IA 50501-5767.

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ROUTING STATEMENT

The Iowa Supreme Court should retain this case because it raises an issue of first impression, namely, the appropriate role of a criminal defendant's immigration status in sentencing. *See* Iowa R. App. P. 6.1101(2)(c).

STATEMENT OF THE CASE

A. Nature of the Case.

This is a direct appeal by Guillermo Avalos Valdez ("Valdez") following the District Court's sentence of imprisonment following Valdez's guilty plea and conviction of Possession with Intent to Deliver a Controlled Substance (Marijuana) in violation of Iowa Code 124.401(1)(c)(5).

B. Course of Proceedings.

The State and Valdez entered into a plea agreement in which Valdez agreed to enter a plea of guilty to Possession with Intent to Deliver Marijuana in exchange for the State's agreement to dismiss a drug stamp tax violation. (APP-7–8, Plea Agreement, at ¶¶ 3, 5). The parties were free to present evidence and arguments concerning the sentence to be imposed on the Possession with Intent Charge. (APP-7–8, Plea Agreement, at ¶ 4).

Valdez entered a guilty plea on May 22, 2018. The Court accepted Valdez's guilty plea and immediately proceeded to sentencing at Valdez's request. (APP-22–23, Plea and Sentencing Tr. 26:9–27:2). After hearing arguments from the parties, the Court

rejected Valdez's request for probation and sentenced him to a ten-year indeterminate term of imprisonment. (APP-27, Plea and Sentencing Tr. 31:1-9; APP-35–41, Judgment and Sentence).

Valdez filed a timely notice of appeal on May 31, 2018. (APP-45, Notice of Appeal).

C. Disposition of the Case in District Court.

On May 22, 2018, the Court entered a Judgment and Sentence accepting Valdez's guilty plea on the charge of Possession with Intent to Deliver Marijuana, denied Valdez's request for probation, and sentenced Valdez to an indeterminate term of ten (10) years in prison. (APP-33, 35, Judgment and Sentence).

STATEMENT OF THE FACTS

Guillermo Avalos Valdez ("Valdez") was born in Mexico and brought to the United States without paperwork as a child in 1997. (CONF. APP-30, PSI at 5). In the twenty years Valdez has lived in the United States, Valdez's only conviction before the instant offense was a vandalism conviction for which he received probation. (CONF. APP-27, PSI at 2).

In January 2018, the State charged Valdez with (1) aiding and abetting Manuela Cibrian Lopez with possession with intent to deliver 50-100 kilograms of marijuana in violation of Iowa Code section 124.401(1)(c)(5), a class C felony, and (2) a drug tax stamp violation, a class D felony. (APP-4, Trial Information at 1). In May, the State and Valdez reached a plea agreement in which Valdez agreed to plead guilty to the possession with intent charge in exchange for the State's agreement to dismiss the drug tax stamp charge. (APP-7–8, Plea Agreement ¶¶ 3–5). The plea agreement permitted the State and Valdez to present evidence and argument for the appropriate sentence. (APP-7–8, Plea Agreement ¶ 4).

A Pre-Sentence Investigation Report (PSI) was prepared before sentencing. The PSI stated, among other things, that Valdez scored "in the low category for future violence," the "low category for future victimization," and would be supervised at the "low normal level of supervision should he be supervised in the community." (CONF. APP-33, PSI at 8). The PSI also stated that Valdez was an undocumented immigrant and was being held on an Immigration and Customs Enforcement hold. (CONF. APP-33, PSI at 8).

A plea and sentencing hearing was held on May 22, 2018. The only disputed issue at sentencing was whether Valdez should be sentenced to prison or probation. The State recommended prison in part because Valdez had an "immigration hold which will make it difficult for him to complete probation." (APP-24–25, Plea and Sentencing Tr. at 28:23–29:4).

Valdez's trial counsel asked for probation. (APP-25, Plea and Sentencing Tr. 29:9–10). Trial counsel noted that the PSI indicated Valdez "has a low category for future violence, a low category for future victimization, and that the IRR would indicate he could be

supervised initially on a low/normal level in the community." (APP-25, Plea and Sentencing Tr. 29:10–16). Addressing Valdez's immigration status, trial counsel stated:

> I realize he has an immigration hold, but he, essentially, only has one prior conviction for vandalism back in 2008; so he really doesn't have a criminal history to speak of at all.
>
> With probation, I realize he's going to be taken into custody by immigration. He has the hold. It's likely he will be deported. I know there are times, at least in federal court, where we have made a term of probation "You shall not illegally re-enter the United States" so that if he ever comes back to the United States he will be in violation of his probation and he would be brought back to court.
>
> He's requesting that he be given that opportunity to deal with his immigration and let them make that determination. Otherwise, other than the quantity involved here, if he was here as a United States citizen, I think that probation would be something that would definitely be a possibility. So we are asking that he be treated the same as someone else would and let immigration handle the immigration consequences that he is aware of.

(APP-25, Plea and Sentencing Tr. 29:17–30:12).

The district court then sentenced Valdez to prison for an indeterminate term of ten years. (APP-27, Plea and Sentencing Tr. at 31:5–7). After noting the charge (possession with intent to deliver 50-100 kilograms of marijuana), the district court expressly

stated that the reason it denied Valdez probation was based on Valdez's immigration status:

> I don't think probation would be appropriate with pleading to this charge given his immigration status. He won't be available if I were to award probation, as I understand it. So I don't think probation is an appropriate sentence here.[1]

(APP-29, Plea and Sentencing at 33:1–6).

Accordingly, the district court entered its Judgment and Sentence and sentenced Valdez to prison for an indeterminate term of ten years. (APP-32, Judgment and Sentence). Valdez now appeals. (APP-45, Notice of Appeal).

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[1] The district court also made reference to other factors during sentencing. (APP-28–29, Plea and Sentencing at Tr. 32:21–33:13; APP-41, Judgment and Sentence at 10). Unlike its express statement that probation would not be appropriate based on Valdez's immigration status, however, the district court did not state how, if at all, the other factors impacted its decision to deny probation. (APP-28–29, Plea and Sentencing at Tr. 32:21–33:13).

ARGUMENT

I. THE DISTRICT COURT ERRED IN SENTENCING VALDEZ TO PRISON RATHER THAN PROBATION BASED ON VALDEZ'S IMMIGRATION STATUS

A. Introduction.

Iowa is an indeterminate sentencing jurisdiction in which the determination whether a criminal defendant should be sentenced to probation or prison is paramount. Given the prevalence of plea negotiations, this issue (probation v. prison) is often the primary, if not only, disputed issue in a criminal case. In this case, the district court erred by basing its decision to sentence Valdez to prison on Valdez's immigration status and by effectively employing a per se rule that requires prison for non-U.S. Citizens who are confronted with the possibility of deportation under federal immigration law. Valdez's sentence should be vacated and the case remanded for resentencing.

B. Standard of Review.

The district court's sentencing decision must be vacated when "the defendant demonstrates an abuse of the trial court's discretion or a defect in the sentencing procedure such as the trial court's

consideration of impermissible factors." *State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998). Additionally, "if a court in determining a sentence uses any improper consideration, resentencing of the defendant is required, even if it was merely a secondary consideration." *State v. Lovell*, 857 N.W.2d 241, 242 (Iowa 2014).

The Court reviews constitutional questions de novo. *State v. Storm*, 898 N.W.2d 140, 144 (Iowa 2017).

C. Error Preservation.

Defense counsel did not object to the district court's sentence in the trial proceeds below. However, a claim for an improper or illegal sentence need not be raised before the district court for error to be preserved. *See State v. Young*, 292 N.W.2d 432, 435 (Iowa 1980); *State v. Luckett*, 387 N.W.2d 298, 301 (Iowa 1986) ("It was not necessary for defendant to either object to the sentence or raise the point by way of a post-trial motion. Error was not waived and we accordingly address the merits of the assignment."); *State v. Ohnmacht*, 342 N.W.2d 838, 843 (Iowa 1983) ("Void sentences are not subject to the usual concepts of waiver, whether from a failure

to seek review or other omissions of error preservation."); *State v. Wilson*, 294 N.W.2d 824, 826 (Iowa 1980); *see also State v. Thomas*, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994).[2]

D. Discussion.

1. Valdez's Sentence Runs Afoul the Due Process and Privileges and Immunities Clauses of the Iowa Constitution Because the Record Fails to Establish the Denial of Probation was Based on Anything Other than Valdez's Immigration Status.[3]

Undocumented immigrants are entitled to the protections afforded by the due process[4] and privileges and immunities clauses[5] of the Iowa and Federal Constitutions. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 210–16, 102 S. Ct. 2382, 2391–2394, 72 L. Ed. 2d 953 (1982); *Reno v. Flores*, 507 U.S. 292, 306, 113 S. Ct. 1439, 1449,

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[2] To the extent error was not preserved, Valdez asserts his trial counsel was ineffective for failing to object to the district court's sentence and suffered prejudice for the reasons stated below. Iowa Constitution, art. I, § 10; U.S. Const. Amend. VI; *Simmons v. State Pub. Defender*, 791 N.W.2d 69, 75 (Iowa 2010).

[3] Valdez also asserts that his sentence violates the Due Process and Equal Protection Clauses of the United States Constitution.

[4] "[N]o person shall be deprived of life, liberty, or property, without due process of law." Iowa Const. art I, § 9.

[5] "All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." Iowa Const. art I, § 6.

123 L. Ed. 2d 1 (1993). Iowa courts have not addressed whether, and to what extent, the district court may base its sentencing decision on the defendant's immigration status, but decisions in other jurisdictions offer guidance.

The law is unsettled on the extent to which a defendant's immigration status is relevant to determining if a defendant should be sentenced to prison or probation. *See State v. Cerritos-Valdez*, 889 N.W.2d 605, 611 (Neb. 2017) (stating "the law in this area is not well settled"). In Minnesota, for example, the Minnesota Court of Appeals held that a defendant's immigration status should play no role in sentencing decisions. *See State v. Mendoza*, 638 N.W.2d 480, 484 (Minn. Ct. App. 2002) ("[P]possible deportation is not a proper consideration in criminal sentencing.").[6] Other jurisdictions, on the other hand, permit the trial court to take immigration status into account for various purposes. *See, e.g.*, *Cerritos-Valdez*, 889 N.W.2d at 611; *People v. Cesar*, 14 N.Y.S.3d 100, 105–106 (Sup. Ct. App. Div. 2015); *Trujillo v. State*, 698 S.E.2d

[6] The Minnesota Supreme Court, however, has reserved the issue. *See State v. Kebaso*, 713 N.W.2d 317, 324 (Minn. 2006).

350, 353–54 (Ga. Ct. App. 2010); *People v. Hernandez-Clavel*, 186 P.3d 96, 98–99 (Colo. Ct. App. 2008); *People v. Cisneros*, 100 Cal. Rptr. 2d 784, 188 (Cal. Ct. App. 2000); *see also State v. Zavala-Ramos*, 840 P.2d 1314, 1316 (Or. Ct. App. 1992) ("Immigration status is per se not relevant" but may be considered in some circumstances); *Yemson v. United States*, 764 A.2d 816, 819 (D.C. 2001); *see also United States v. Flores-Olague*, 717 F.3d 526, 535 (7th Cir. 2013); *United States v. Loaiza-Sanchez*, 622 F.3d 939, 942 (8th Cir. 2000).

Despite the conflicting views among jurisdictions, a common thread emerges from cases that allow a defendant's immigration status to be considered: A defendant's immigration status may not be the *sole factor* that the district court relies on when determining whether to sentence the defendant to prison. *See, e.g.*, *Cerritos-Valdez*, 889 N.W.2d at 611; *Cesar*, 14 N.Y.S.3d at 106; *Trujillo v. State*, 698 S.E.2d at 354; *Hernandez-Clavel*, 186 P.3d at 99; *State v. Martinez*, 165 P.3d at 1057; *Cisneros*, 100 Cal. Rptr. 2d at 785; *State v. Zavala-Ramos*, 840 P.2d 1314, 1316 (Or. Ct. App. 1992).

One illustrative case applying this "sole factor" framework is *People v. Cesar*, 14 N.Y.S. 3d 100 (Sup. Ct. App. Div. 2015). In that case, the trial court sentenced the defendant to prison in lieu of incarceration. During sentencing, the trial court reasoned that prison was appropriate because "if the defendant were to be placed on probation, he would be in immediate violation of such sentence since probation typically prohibits the violation of any law, and the defendant's undocumented status would constitute a violation of federal immigration law." 14 N.Y.S.3d at 103. The defendant appealed, asserting that the court's reliance on his immigration status was improper and violated his due process and equal protection rights under the state and federal constitutions. *Id.* at 104. On appeal, the *Cesar* court reversed and vacated the sentence.

After noting that the issue was one of first impression in New York, the *Cesar* court held

> it is impermissible for a sentencing court to refuse to consider a sentence of probation for an undocumented defendant solely on the basis of his or her immigration status. Doing so violates the Due Process and Equal Protection clauses of the Federal and New York constitutions by treating certain defendants differently from others based upon their undocumented presence in this state.

Id. at 106. The *Cesar* court, applying its holding to the facts of the case, vacated the defendant's sentence because the trial court denied the defendant probation based on the defendant's status as an undocumented immigrant. *Id.* at 107.

In this case, even if Valdez's immigration status should have been considered at all, the district court improperly based its decision to sentence Valdez to prison on his immigration status under *Cesar* and similar authority. During sentencing in this case, the district court expressly explained on the record that he sentenced Valdez to prison in lieu of probation because of Valdez's immigration status, stating:

> I don't think probation would be appropriate with pleading to this charge *given his immigration status*. He won't be available if I were to award probation, as I understand it. *So I don't think probation is an appropriate sentence here*.

(APP-29, Plea and Sentencing Tr. 33:1–6 (emphasis added)).

Further, the district court's passing reference to other sentencing factors[7] is insufficient to satisfy due process and equal

[7] For example, after explaining its rationale for imposing prison, above, the court noted "I've considered the nature of the offense committed and the contents of the presentence investigation

protection principles. The district court unequivocally stated that it was sentencing Valdez to prison in lieu of probation "given [Valdez's] immigration status." (APP-29, Plea and Sentencing Tr. at 33:1–6 (emphasis added)). The court, however, made only general references to other sentencing factors and failed to explain how those factors impacted the probation vs. prison sentencing decision. Those references are simply insufficient to affirm Valdez's sentence given the totality of circumstances in this case, particularly the court's comments concerning Valdez's immigration status.[8] *See State v. Thacker*, 862 N.W.2d 402, 408 (Iowa 2015) ("A terse and succinct statement is sufficient, however, *only when the reasons for the exercise are obvious in light of the statement and record before the court*." (emphasis added); *State v. Hill*, 878

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report and the plea agreement." (APP-29, Plea and Sentencing Tr. at 33:7–14).

[8] There is also no indication that the district court considered other options or invited counsel to offer other viable solutions to address the court's concerns arising from Valdez's immigration status. *See Trujillo*, 698 S.E.2d at 355 (noting that the trial court "invited [the defendant's] counsel to offer viable solutions that addressed its concerns" and "made clear that it had considered—and rejected—the option of waiving those conditions with which [the defendant] could not comply.").

N.W.2d 269, 275 (Iowa 2016) (stating sentencing courts should "give more detailed reasons for a sentence specific to the individual defendant and crimes"); *see also Martinez v. State*, 961 P.2d 143, 145 (Nev. 1998) ("We cannot, however, determine from the record whether the district court actually based its sentencing decision on appellants' nationality. The record reveals that substantial factual evidence supported the district court's decision to impose the maximum sentence. Nevertheless, the Supreme Court of the United States and numerous Circuit Courts of Appeal have emphasized the importance of not only doing justice, but also insuring that justice satisfies the appearance of justice." (citations and internal quotation marks omitted)).

Therefore, under *Cesar* and the view of several jurisdictions addressing the issue, Valdez's sentence should be vacated because the record is inadequate to show that court's denial of probation was based on anything other than Valdez's immigration status.

2. Alternatively, the Iowa Supreme Court Should Recognize A More Muscular Framework Under the Iowa Constitution.

Assuming the district court's passing reference to various sentencing factors was sufficient to satisfy the "sole factor"

framework (it is not), Valdez respectfully requests the Iowa Supreme Court to adopt a more muscular test that recognizes greater flexibility and, at a minimum, prohibits the district court from denying a criminal defendant probation when the primary reason for the sentencing determination is the defendant's immigration status.[9] As this case illustrates, if passing references to other sentencing factors is adequate to overcome the sole-factor test, a muscular standard is required if the due process and equal protection clauses are to have any meaning in the sentencing context. *See Thacker*, 862 N.W.2d at 410; *Hill*, 878 N.W.2d at 275.

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[9] The Iowa Supreme Court has repeatedly recognized its authority to interpret the Iowa Constitution to provide greater protection than the Federal Constitution. In the equal protection context, the Court has consistently engaged in an independent analysis under the Iowa Constitution. *See, e.g.*, *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009); *Racing Ass'n of Cent. Iowa v. Fitzgerald (RACI)*, 675 N.W.2d 1, 7 (Iowa 2004). The Court has also recognized its authority to independently interpret the Iowa Constitution's due process clause. *See, e.g.*, *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 233 (Iowa 2018) (interpreting article I, section 9 and observing "The provision is 'nearly identical in scope, import and purpose to the Federal Due Process Clause. Despite this likeness, we jealously guard it as our right and duty to differ from the Supreme Court, in appropriate cases, when construing analogous provisions under the Iowa Constitution.").

A more muscular approach under the Iowa Constitution is also supported by the tenuous link between the prospect of deportation and the offense in question. In *United States v. Alvarez-Cardenas*, the Ninth Circuit observed:

> The possibility of deportation does not speak to the offense in question, nor does it speak to the offender's character . . . . A defendant's crime is no less serious, nor is his history of past actions changed because he may be subjected to deportation at some point in the future. In addition, were we to find that merely being an alien who is subject to possible deportation should affect a sentencing decision, we would be treating aliens differently simply because they are not citizens of this country.

902 F.2d 734, 737 (9th Cir. 1990).

Additionally, greater protection under the Iowa Constitution is warranted in light of the constitutional overtones arising from other protected interests at play when an immigrant is sentenced. A person's immigration status is intertwined with that person's citizenship and national origin, which cannot constitutionally be the basis for imposing a harsher sentence. *See, e.g.*, *United States v. Gomez*, 797 F.2d 417, 419 (7th Cir. 1986) (observing that giving defendant harsher sentence based on nationality "obviously would be unconstitutional"); *United States v. Borrero-Isaza*, 887 F.2d

1349, 1356 (9th Cir. 1989) (vacating sentence where district court imposed sentence based on national origin of defendant). Some courts have also observed that it would be unconstitutional to impose harsher sentences based on the defendant's alienage. *See United States v. Onwuemene*, 933 F.2d 650, 651 (8th Cir. 1991) ("[S]entencing an offender on the basis of factors such as race, national origin, or alienage violates the Constitution.");[10] *Gomez*, 797 F.2d at 419 ("The government specifically disavowed any suggestion that the defendant or others similarly situated be treated more harshly solely because of their nationality or alien status. That obviously would be unconstitutional.").

This overlap is reflected in recent legal scholarship. Commentators have recognized that there is a growing trend in which non-U.S. Citizens are receiving harsher sentences than U.S. citizens. One recent study concluded that "Non-U.S. citizens are

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[10] *Onwuemene* was called into question in *United States v. Loaiza-Sanchez*, 622 F.3d 939, 941 (8th Cir. 2010), which noted, *inter alia*, that the statements relied on by the *Onwuemene* court were made in pre-Guidelines decisions. Unlike the federal criminal justice system, however, Iowa has not adopted sentencing guidelines.

over three times more likely to be incarcerated compared to similarly situated U.S. citizens." Michael T. Light, *The New Face of Legal Inequality: Noncitizens and the Long-Term Trends in Sentencing Disparities Across U.S. District Courts, 1992-2009*, 48 Law & Soc'y Rev. 447, 465 (2014). Non-citizens are also receiving longer terms of incarceration. *Id.* at 466 (concluding that non-citizens receive an "additional 6.5 months of incarceration compared to similarly situated U.S. Citizens."). According to these and other studies, legal scholars have observed that "Hispanics may have replaced African Americans as the most disadvantaged group at criminal sentencing." *Id.* at 470; *see also* Yolanda Vazquez, *Crimmigration: The Missing Piece of Criminal Justice Reform*, 51 U. Rich. L. Rev. 1093, 1098–99 (2007) ("In local and state courts, noncitizens are increasingly prosecuted and sentenced to a term of incarceration").

Given the overlap between one's immigration status, citizenship, national origin, and ethnicity, the district court's reliance on one's immigration status should be carefully circumscribed to ensure the protection of the defendant's other

constitutionally protected interests. *See Martinez v. State*, 961 P.2d 143, 145 (Nev. 1998) ("A trial judge may not, however, consider a defendant's nationality or ethnicity in its sentence determination; consideration of these facts violates a defendant's right to due process. Thus, the district court here violated appellant's due process rights, if it based its sentencing decision, in part, upon appellant's status as illegal aliens.").[11]

In short, the Iowa Supreme Court should recognize a more muscular framework in which the defendant's immigration status may not be the primary basis for the court's sentencing decision. Such an approach gives teeth to Iowa's due process and privileges and immunities clauses in the sentencing context where the defendant's immigration status is being considered, recognizes the tenuous relationship between the defendant's immigration status and the crime for which he was convicted, and is supported by legal scholarship demonstrating the rising trend of non-citizens being incarcerated in U.S. prisons more than any other group. That issue,

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[11] The Nevada Supreme Court later clarified *Martinez* in *Ruvalcaba v. State*, 143 P.3d 468, 470 (Nev. 2006).

however, can be reserved for another day because, even under the "sole factor" test, Valdez's sentence violates the due process and privileges and immunities clause of the Iowa Constitution.[12]

CONCLUSION

For the reasons stated above, Valdez respectfully requests his sentence be vacated and the case remanded for resentencing.

REQUEST FOR ORAL SUBMISSION

Valdez respectfully requests oral argument.

Respectfully submitted,

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[12] For the reasons stated above, if the court recognizes a test that, at a minimum, prohibits immigration status to be the primary basis for a sentencing decision, Valdez's sentence clearly is in violation of the due process and privileges and immunities clauses of the Iowa Constitution.

CERTIFICATE OF COST

I, Scott M. Wadding, certify that there was no cost to reproduce copies of the preceding brief because the appeal is being filed exclusively in the Appellate Courts' EDMS system.

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1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 4,598 words, excluding parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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I, Scott M. Wadding, certify that on February 1, 2019, I served this document by filing an electronic copy of this document with Electronic Document Management System to all registered filers for this case. A review of the filers in this matter indicates that all necessary parties have been and will be served in full compliance with the provisions of the Rules of Appellate Procedure.

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