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, JUDGE

APPELLEE'S BRIEF

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Yemson v. United States, 764 A.2d 816 (D.C. 2001)
Iowa Code § 907.6
Third Jud. Dist. Dep't of Corr. Serv., Annual Report FY 2018, https://doc.iowa.gov/sites/default/files/documents/2018/11/3rd_district_annual_report_fy2018.pdf

ROUTING STATEMENT

The Supreme Court should not retain this case because the defendant cannot meet his own proposed test. He seeks retention to explore "the appropriate role of a criminal defendant's immigration status in sentencing" and proposes tests prohibiting immigration status from being the "sole factor" or "primary reason" for a sentence. Def. Br. at 8, 19, 23–24. But the district court's statement of reasons establishes that it would have imposed the same sentence on a United States citizen caught trafficking over 180 pounds of drugs. *See* Tr. p. 32, line 21 – p. 33, line 1; App. 28–29 ("The statement that you think this Court would give a U.S. citizen with the same record a suspended sentence is not accurate."). Because the defendant fails to meet the factual predicate of his own proposed test, the Court of Appeals can apply familiar principles to review the sentencing court's exercise of discretion. Therefore, this case should be transferred. *See* Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

Defendant Guillermo Avalos Valdez appeals the sentence imposed following his guilty plea for possessing with intent to deliver more than 50 kilograms of marijuana.

Course of Proceedings

The State accepts the defendant's statement of the course of proceedings as substantially correct.

Facts

On Christmas Eve of 2017, defendant Valdez was stopped for speeding on Interstate 29 in Woodbury County. Minutes (Simoni report at 7–8); Conf. App. 12–13. The deputy smelled a very strong odor of marijuana coming from the vehicle. Minutes (Simoni report at 8); Conf. App. 13. The female passenger admitted she and Valdez had just smoked a "joint" before getting pulled over. Minutes (Simoni report at 8); Conf. App. 13.

A K9 alerted to the presence of narcotics in the vehicle. Minutes (Fay report at 2); Conf. App. 7. A deputy found a marijuana grinder and a package containing approximately half a pound of marijuana under the center console. Minutes (Fay report at 2); Conf. App. 7. Another deputy found a loaded .45-caliber pistol under the passenger seat. Minutes (Fay report at 2, Simoni report at 8–9); Conf. App. 7, 13–14.

As deputies continued searching the vehicle, they opened two hockey-style bags taking up the entire rear seat and the back of the

vehicle. Minutes (Fay report at 2–3); Conf. App. 7–8. They also found two large boxes wrapped in Christmas paper. Minutes (Fay report at 3); Conf. App. 8. The two large bags and two large boxes were stuffed with numerous heat-sealed bags of marijuana. Minutes (Fay report at 2–3, Simoni report at 9); Conf. App. 7–8, 14.

Valdez and his passenger both had tattoos of the grim reaper. Minutes (Cleveringa report at 5–6); Conf. App. 10–11. The .45-caliber pistol also bore a symbol of the grim reaper. Minutes (Cleveringa report at 6); Conf. App. 11. The grim reaper is a gang symbol commonly used by Mexican cartel drug traffickers. Minutes (Cleveringa report at 6); Conf. App. 11.

In total, deputies seized approximately 184 pounds of marijuana. Minutes (Fay report at 4, Jansen report at 12–13); Conf. App. 9, 17–18.

ARGUMENT

I. The District Court Properly Declined to Suspend the Sentence Because Valdez Was Caught Trafficking 184 Pounds of Drugs and Faced Imminent Deportation if Released on Probation.

Preservation of Error

"[E]rrors in sentencing may be challenged on direct appeal even in the absence of an objection in the district court." *State v. Lathrop*, 781 N.W.2d 288, 293 (Iowa 2010).

Standard of Review

"Because the sentence imposed does not fall outside statutory limits, our review is for abuse of discretion." *State v. Jose*, 636 N.W.2d 38, 41 (Iowa 2001).

Discussion

Defendant Valdez is in prison for trafficking 184 pounds of marijuana. Although the sentencing court mentioned his "immigration status," Valdez's status as an undocumented immigrant facing impending deportation was a proper factor to consider. And contrary to Valdez's protests, his undocumented status was not the "sole factor" or "primary reason" the sentencing court denied probation. Because Valdez fails to demonstrate an abuse of discretion, this Court should not interfere with his sentence.

A. Valdez's impending deportation was a proper factor to consider when denying probation.

Valdez will be deported. He was convicted for trafficking 184 pounds of marijuana (Minutes, Fay report at 1–4; Conf. App. 6–9), which is the type of offense that makes his deportation "virtually mandatory." *See Padilla v. Kentucky*, 559 U.S. 356, 359 (2010). When Valdez pleaded guilty, he was subject to a "hold" from Immigration and Customs Enforcement (ICE) and if released on probation, "he's going to be taken into custody by immigration." Tr. p. 29, lines 21–22; App. 25. His attorney, who practices immigration law, said Valdez "likely" will be deported and had only "a very slim chance, if any" of avoiding removal. Tr. p. 17, line 23 – p. 18, line 4, p. 18, lines 23–25, p. 29, line 23; App. 13–14, 25. His conviction constitutes an aggravated felony under immigration law, which subjects him to deportation, mandatory detention, disqualification from cancellation of removal, and a permanent bar to reentry. Tr. p. 18, lines 12–19; App. 14.

Valdez's impending deportation made him a poor candidate for probation. Probationers must comply with conditions of probation designed "to promote rehabilitation of the defendant or protection of the community." Iowa Code § 907.6. Probationers from Woodbury

County are supervised by officers from the Third Judicial District Department of Correctional Services, who ensure the probationer seeks employment, gains educational assistance, obtains treatment, pays court costs and restitution, maintains regular contact with probation officials, and follows any other conditions imposed by the court. Third Jud. Dist. Dep't of Corr. Serv., Annual Report FY 2018, at 18.[1] If Valdez had been granted probation and then deported to Mexico, there would be no way for an Iowa probation officer to monitor his progress toward gaining lawful employment, going to school, obtaining drug treatment, or complying with any other terms of his probation. And Valdez points to no authority permitting transfer of probation supervision to Mexico. *See* Iowa Code ch. 907B (adopting the Interstate Compact for Adult Offender Supervision, which allows transferring probation supervision to "a state of the United States, the District of Columbia, and any territorial possessions of the United States," but not to a foreign nation). Rather, Valdez's only proposal was to make "a term of probation 'You shall not illegally re-enter the United States' so that if he ever comes

[1] *Available at* https://doc.iowa.gov/sites/default/files/documents/2018/11/3rd_district_annual_report_fy2018.pdf (last visited Jan. 31, 2019).

back to the United States he will be in violation of his probation and he would be brought back to court." Tr. p. 29, line 23 – p. 30, line 3; App. 25–26. Such an arrangement would have left Valdez unpunished for his significant drug-trafficking offense and would not have fulfilled the rehabilitative goals of probation. Because probation is not a viable option for deported individuals, the district court did not abuse its discretion by considering Valdez's imminent-deportation status.

Valdez's imminent-deportation status should not be conflated with alienage, national origin, or undocumented status. Valdez places himself in the broader category of "undocumented immigrants" (Def. Br. at 17), but he actually belongs to a narrower category of undocumented immigrants facing certain and imminent deportation. The district court's exercise of discretion transcended Valdez's foreign citizenship and his lack of papers to cross the border. It specified the concern that Valdez "won't be available if I were to award probation." Tr. p. 33, lines 3–4; App. 29. Accordingly, this Court should confine its review to consideration of Valdez's deportation status, not a generalized "immigration status," citizenship, national origin, or ethnicity. *See, e.g.*, *United States v. Lopez-Salas*, 266 F.3d 842, 846

n.1 (8th Cir. 2001) ("[A] person's legal status as a deportable alien is not synonymous with national origin." (citing *United States v. Restrepo*, 999 F.2d 640, 644 (2d Cir. 1993))).

Even if the Court considers the broader category of "immigration status," Valdez admits that "other jurisdictions . . . permit the trial court to take immigration status into account for various purposes." Def. Br. at 18. Those reasons include:

- Deported people cannot comply with the normal conditions of probation or achieve the rehabilitative purpose of probation. *See, e.g.*, *People v. Sanchez*, 235 Cal. Rptr. 264, 267 (Cal. Ct. App. 1987) ("Obviously, a convicted illegal alien felon, upon deportation, would be unable to comply with any terms and conditions of probation beyond the serving of any period of local incarceration imposed."); *People v. Espinoza*, 132 Cal. Rptr. 2d 670, 675 (Cal. Ct. App. 2003) (finding no abuse of discretion "where the defendant faces a substantial likelihood of imminent deportation, such that his probation cannot effectively be conditioned on completion of a drug treatment program"); *People v. Hernandez-Clavel*, 186 P.3d 96, 100 (Colo. Ct. App. 2008) (noting that "because it appeared that defendant was likely to be deported, he could not benefit from

participation in probation and would suffer no consequences for his criminal behavior"); *State v. Svay*, 828 A.2d 790, 794 (Me. 2003) ("The consequence of deportation may be considered by a sentencing court because, among other reasons, the impact that a particular sentence will have on the offender is relevant to the offender's likelihood of rehabilitation."); *State v. Morales-Aguilar*, 855 P.2d 646, 648 (Or. Ct. App. 1993) (noting that "because [the defendant] faced immediate deportation, imposition of the presumptive probationary sentence would not serve to accomplish the goals of the guidelines").

- Undocumented immigrants—especially those facing deportation—may lack ties to the community necessary for reintegration into law-abiding society. *See*, *e.g.*, *People v. Cisneros*, 100 Cal. Rptr. 2d 784, 788 (Cal. Ct. App. 2000) ("An illegal alien may be a poor candidate for probation given typically limited ties to the community and the prospect of deportation."); *United States v. Flores-Olague*, 717 F.3d 526, 535 (7th Cir. 2013) (noting the defendant's undocumented status and his inability to speak English "are relevant to a fairly determined sentence because they reflect the strength of the defendant's ties to the community as

they relate to the likelihood of his successful post-incarceration adjustments to society").

- Undocumented immigrants who are not deported cannot gain lawful employment. *See*, *e.g.*, *Hernandez-Clavel*, 186 P.3d at 100 (noting the defendant "could not maintain lawful employment and, consequently, could not successfully meet that condition of probation"); *Trujillo v. State*, 698 S.E.2d 350, 353 (Ga. Ct. App. 2010) (recognizing the sentencing court "could not order Trujillo, an illegal alien, to obtain suitable employment—a standard condition of probation—without ordering him to violate the law and/or be an accessory to any employer who would hire him in violation of the law").
- Disregard for immigration law could bear on the person's willingness to comply with probation. *See*, *e.g.*, *Yemson v. United States*, 764 A.2d 816, 819 (D.C. 2001) ("This does not mean . . . that a sentencing court, in deciding what sentence to impose, must close its eyes to the defendant's status as an illegal alien and his history of violating the law, including any law related to immigration."); *Sanchez v. State*, 891 N.E.2d 174, 176–77 (Ind. Ct. App. 2008) ("[A]s the trial court properly noted, he is an illegal

alien and his daily disregard for the laws of this country also speaks to his character."); *State v. Zavala-Ramos*, 840 P.2d 1314, 1316 (Or. Ct. App. 1992) ("Defendant had been illegally in the United States at least twice. The court could consider that pattern of conduct in determining whether it is likely that a probationary sentence would serve the purposes of the guidelines to protect the public and punish the offender."); *State v. Salas Gayton*, 882 N.W.2d 459, 472 (Wis. 2016) ("Because Salas Gayton has previously engaged in conduct contrary to federal immigration law, his prior disregard for the law was an acceptable factor for the circuit court to include in its assessment of his character.").

These cases offer persuasive reasoning, so this Court should join the national consensus that permits a sentencing court to consider the defendant's undocumented status when denying probation.

This Court should not follow the outlier view expressed by the Minnesota Court of Appeals. In *State v. Mendoza*, 638 N.W.2d 480, 484 (Minn. Ct. App. 2002), the court concluded "that possible deportation because of immigration status is not a proper consideration in criminal sentencing," reasoning that "it would be considering a possible collateral consequence . . . which is beyond the

control of the district court and which may or may not occur . . ." *Mendoza*'s holding is not persuasive in Valdez's case. First, it is not even clear that the Minnesota Supreme Court would follow *Mendoza*'s holding. *See State v. Kebaso*, 713 N.W.2d 317, 324, n.7 (Minn. 2006) (making clear "we do not address its broad assertion that 'possible deportation because of immigration status is not a proper consideration in criminal sentencing'" and stating "we leave resolution of this broader question for another day"). Second, *Mendoza*'s reference to deportation being a "collateral" consequence predates more recent cases recognizing that certain immigration consequences "will almost certainly follow" convictions for crimes such as drug trafficking. *See Diaz v. State*, 896 N.W.2d 723, 730 (Iowa 2017) (interpreting *Padilla*, 559 U.S. 356). Third, Valdez's circumstances are distinguishable. Unlike *Mendoza* that involved "possible deportation" "which may or may not occur" (*Mendoza*, 638 N.W.2d at 484), Valdez has a "very slim chance, if any" of avoiding the immigration consequences of his drug trafficking conviction. Tr. p. 18, lines 12–25; App. 14; *see also* Tr. p. 29, lines 17–23; App. 25 (noting Valdez had an ICE hold, would be taken into custody, and would "likely" be deported). Thus, even if *Mendoza* were a correct

statement of the law, it would not apply undocumented immigrants like Valdez who face imminent deportation.

The district court did not abuse its discretion by considering Valdez's "immigration status." He is a convicted drug trafficker who faced immediate detention and deportation if he were released on probation. And once deported, Valdez could not be supervised to ensure he was fulfilling the purposes of probation. That imminent-deportation status was relevant to the decision whether to grant probation, so this Court should not interfere.

B. Valdez's undocumented status was not the "sole factor" or "primary reason" for denying probation.

Valdez fails to meet the parameters of his own proposed tests. First, he notes the "common thread" from other states that the "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." Def. Br. at 19 (citing *State v. Cerritos-Valdez*, 889 N.W.2d 605, 611 (Neb. 2017)). Later, he proposes a "more muscular test" under Iowa law that "prohibits the district court from denying a criminal defendant probation when the primary reason for the sentencing determination is the defendant's immigration status."

Def. Br. at 23–24. However, Valdez overlooks the district court's sentencing explanation that forecloses his "sole factor" and "primary reason" tests.

Valdez's analysis under both tests rests on an incomplete reading of the sentencing court's statement of reasons. He contends the court gave only "passing reference to other sentencing factors." Def. Br. at 21, 24. It is true that the court referenced general factors such as the maximum opportunity for rehabilitation, protection of the community, the nature of the offense, the presentence investigation report, and the plea agreement. Tr. p. 33, lines 7–14, Judgment (5/22/2018) at 10; App. 29, 41. But there was more to the court's explanation than those succinct statements.

Valdez was convicted of a serious drug-trafficking offense. He admitted that he and his accomplice knowingly transported over 50 kilograms of marijuana with the intent to deliver. Tr. p. 21, line 24 – p. 23, line 25; App. 17–19. He was at the wheel of a large SUV filled with 184 pounds of marijuana packaged in numerous heat-sealed bags. Minutes (Fay report at 4, Jansen report at 12–13); Conf. App. 9, 17–18. He had a tattoo of a marijuana leaf and a grim reaper, which are symbols commonly used by Mexican cartel drug traffickers.

Minutes (Cleveringa report at 6); Conf. App. 11. These facts support that Valdez was a significant drug trafficker deserving of harsh punishment regardless of his immigration status.

The district court made clear that the nature of Valdez's offense—not his immigration status—was the primary purpose for imposing a prison sentence. His attorney suggested that "if he was here as a United States citizen, I think that probation would be something that would definitely be a possibility." Tr. p. 30, lines 6–9; App. 26. But the district court expressly rejected that suggestion:

> I want to address some of your comments. The statement that you think this Court would give a U.S. citizen with the same record a suspended sentence is not accurate. 180 pounds of marijuana is one big deal, and it's – he's a danger to the community. . . .

Tr. p. 32, line 21 – p. 33, line 1; App. 28–29. This explanation demonstrates the court would have imposed the same sentence of imprisonment on a United States citizen. The deciding factor was the 184 pounds of marijuana, not Valdez's immigration status.

This Court does not need to create a "more muscular" test. The primary reason for Valdez's sentence was the 184-pound quantity of marijuana he possessed, indicating he was a significant drug trafficker who presented a danger to the community. His imminent

deportation for that offense provided an additional reason to deny probation, but it was not the "sole factor" or "primary reason" for his sentence. Consequently, Valdez fails to demonstrate an abuse of the sentencing court's wide discretion.

CONCLUSION

The Court should affirm Guillermo Avalos Valdez's sentence.

REQUEST FOR NONORAL SUBMISSION

Oral argument is not necessary to review the sentencing court's exercise of discretion denying probation for the defendant who was caught trafficking 184 pounds of drugs.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **2,987** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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