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COURT OF APPEALS OF WISCONSIN  
DISTRICT I

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Appeal No. 2013AP646-CR

LEOPOLDO R. SALAS GAYTON,

Defendant-Appellant.

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**APPEAL FROM THE CIRCUIT COURT  
OF MILWAUKEE COUNTY CASE NO. 2011-CF-73,  
THE HONORABLE DENNIS R. CIMPL AND  
ELLEN R. BROSTROM, PRESIDING**

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**BRIEF AND APPENDIX OF DEFENDANT-APPELLANT  
LEOPOLDO R. SALAS GAYTON**

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## ISSUES PRESENTED FOR APPEAL

1. Whether Salas Gayton is entitled to an order vacating his sentence and ordering a new sentencing hearing because the circuit court erroneously exercised its sentencing discretion by failing to provide a rational basis for imposing the maximum period of initial confinement and by improperly relying on Salas Gayton's alien status to impose a harsher sentence.

The circuit court denied Salas Gayton's postconviction motion for resentencing.

2. Whether Salas Gayton is entitled to an order vacating the DNA surcharge imposed because the circuit court failed to consider any and all proper factors and failed to explain its rationale for imposing the surcharge.

The circuit court denied Salas Gayton's postconviction motion to vacate the DNA surcharge imposed.

## **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

Defendant Salas Gayton does not request oral argument and expects that the briefs will fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side. This case involves the application of well-settled rules of law to a recurring fact situation; as such the publication criteria set forth in Wis. Stat. § 809.23(1)(a) will likely not be met.

## STATEMENT OF THE CASE

On January 6, 2011, the State filed a criminal complaint against Salas Gayton, alleging: count one, homicide by intoxicated use of a vehicle, contrary to Wis. Stat. §§ 940.09(1)(a)<sup>1</sup> and 939.50(3)(d) ; count two, homicide by intoxicated use of a vehicle (prohibited alcohol concentration), contrary to Wis. Stat. §§ 940.09(1)(b) and 939.50(3)(d); and count three, operating without a license - causing death, contrary to Wis. Stat. §§ 343.05(5)(b)3d (2009-10)<sup>2</sup> and 939.51(3)(a). (R.2, App. 1-4.)

The complaint alleged that on January 1, 2011, Salas Gayton was traveling eastbound in his vehicle in the westbound lanes of I-94 in Milwaukee. (R.2:2, App. 2.) While he was traveling down the freeway in the wrong direction, Salas Gayton's vehicle collided with the vehicle of Corrie Damske. (*Id.*) Ms. Damske, who was alone in her vehicle, was pronounced dead at the scene. (R.2:3, App. 3.) A toxicology report found that Salas Gayton's blood alcohol content approximately two hours and twenty minutes after the accident was .145, which is over the legal presumptive intoxication limit. (*Id.*)

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<sup>1</sup> Unless otherwise noted, all references to the Wisconsin statutes are to the current 2011-12 version.

<sup>2</sup> This was the version of the Wisconsin statutes in effect at the time Salas Gayton was charged and sentenced. Subsequent to Salas Gayton's sentencing, the legislature amended the penalties for this offense. *See* 2011 Wis. Act 113 §§ 4-5.

On January 26, 2011, the State filed an Information containing counts 1 through 3 from the Complaint. (R.4.) Salas Gayton pled not guilty to all three counts. (R.40:4.) On May 17, 2011, the circuit court conducted a plea hearing during which Salas Gayton changed his not guilty plea and pled no contest to counts one and three. (R.44:7, App. 30.) Count two was dismissed by operation of law. (R.44:3, App. 26.)

On July 22, 2011, the Honorable Dennis R. Cimpl sentenced Salas Gayton on count one to 22 years imprisonment (15 years initial confinement/7 years extended supervision). (R.45:59, App. 98.) For count one, maximum initial confinement is 15 years and 10 years extended supervision. Wis. Stat. § 940.09(1)(a); Wis. Stat. § 939.50(3)(d); Wis. Stat. § 973.01(2)(b)4., (d)3. On count three, Salas Gayton was sentenced to 9 months imprisonment to be served concurrently with his sentence for count one. (R.45:59, App. 98.) For count three, the maximum term of imprisonment is nine months. Wis. Stat. § 343.05(5)(b)3d.(2009-10); Wis. Stat. § 939.51(3)(a).

On November 23, 2012, Salas Gayton filed a Wis. Stat. § 809.30 postconviction motion for plea withdrawal because the circuit court failed to properly advise him of the immigration consequences of his no contest pleas by deviating from the immigration advisement mandated by Wis. Stat. § 971.08(1)(c), and because he will likely be deported and

excluded from admission to the United States as a result of his pleas. (R.29:1, 5, App. 5, 9.) Alternatively, Salas Gayton moved for resentencing on the grounds that the circuit court erroneously exercised its discretion in sentencing Salas Gayton when it failed to give an adequate explanation for imposing the specific sentence chosen and failed to explain why the maximum period of initial confinement was the minimum amount of custody consistent with the three primary sentencing factors. (R.29:1, App. 5.) Finally, Salas Gayton moved for an order vacating the DNA surcharge imposed on the ground that the circuit court failed to consider proper factors and explain its rationale when imposing the surcharge. (*Id.*) Salas Gayton requested an evidentiary hearing on his motion. (R.29:12, App. 16.)

On November 27, 2012, without conducting an evidentiary hearing, the circuit court by Honorable Ellen R. Brostrom, denied the postconviction motion in its entirety in a written order. (*See generally* R.30, App. 19-23.)

## **STATEMENT OF THE FACTS**

### **I. Sentencing Hearing**

After Salas Gayton pleaded no contest to Counts one and three, the circuit court conducted a sentencing hearing on July 22, 2011.

(R.45, App. 40-100.)

**A. The State's position**

The State recommended a substantial period of confinement in the Wisconsin State Prison system. (R.45:13, App. 52.) It based its recommendation on the seriousness of the offense. (*Id.*) It noted that Salas Gayton made a choice, though not a knowing one, "to get on the freeway and drive the wrong way" while intoxicated. (R.45:10, 11, App. 49-50.) The State also noted that this accident occurred while Salas Gayton did not have a valid driver's license and had twice previously been cited for operating without a valid driver's license. (R.45:12-13, App. 51-52.)

**B. Defense counsel's position**

Salas Gayton's counsel highlighted that Salas Gayton had no intention of causing harm or injury to anyone. (R.45:31, App. 70.) The fact that he was intoxicated affected his ability to exercise good judgment and to safely operate a car, but he never intended to harm the victim. Salas Gayton's counsel conceded, however, that the fact that this tragedy occurred while Salas Gayton was driving without a valid driver's license was an aggravating factor. (*Id.*)

Defense counsel also spoke to the many positive attributes of Salas Gayton's character explaining sincerely that "Mr. Salas [Gayton] is probably one of the [most] spiritual and insightful clients that I have

ever worked with." (R.45:32-33, App. 71-72.) Counsel described a client "that was deeply remorseful, shocked and confused and scared" and that truly appreciated the emotional pain of the victim's family and friends. (*Id.*)

At the time of the offense, Salas Gayton was 41 years old, had been in the United States for approximately 14 years, and had a minimal prior record with no previous convictions for driving while intoxicated. (R.45:33, 40, App. 72, 79.) Salas Gayton came to the United States from Mexico for a chance at a better life and has always worked, supported himself, and contributed positively to the community since coming to the United States. (R.45:36-37, App. 75-76.) Although as a younger man Salas Gayton experienced issues with drugs and alcohol, he achieved sobriety "for a long period of time prior to this incident." (R.45:37, App. 76.) He became involved in a local program helping others achieve sobriety and has dedicated his life to following God. (*Id.*)

Based on these factors, defense counsel agreed that prison time was appropriate, but nowhere near the maximum term of initial confinement. (R.45:42, App. 81.) She recommended two years initial confinement with a period of extended supervision left to the court's discretion. (*Id.*)

Salas Gayton made a statement to the court expressing remorse, and apologizing for his actions and for relapsing the evening of the incident. (R.45:47-49, App. 86-88.)

**C. The circuit court's sentence**

The circuit court began by explaining the goals its sentence must achieve, including restitution, punishment, deterrence, and rehabilitation, and the three primary sentencing factors to consider, the community's needs, the seriousness of the offense, and the defendant's character. (R.45:50-51, App. 89-90.)

The court noted the seriousness of the offense: that a young woman was dead as a result of Salas Gayton's decision to drive on the freeway in the wrong direction without a valid license while intoxicated and did so for nearly a mile at highway speeds before he struck Ms. Damske's vehicle. (R.45:51, App. 90.) The court noted there was no intent to kill, but there was an intent to operate a vehicle while intoxicated. (R.45:54, App. 93.)

Assessing Salas Gayton's character, the court identified his status as an illegal alien as an aggravating factor relevant to his character. (*See* R.45:52, 55, App. 91, 94.) The court stated: "Although, you're here illegally, it's a factor, a minor factor, but it goes to your character." (R.45:55, App. 94.) Other than this incident, the court

noted Salas Gayton seemed "a pretty descent [sic] guy." (R.45:54, App. 93.) The court found he had been sporadically employed since in the United States "trying to better [him]self." (R.45:55, App. 94.) The court noted Salas Gayton's history of issues with alcohol and his recovery for long periods of time only to relapse shortly before this incident. (R.45:55-56, App. 94-95.) The court also noted Salas Gayton's devotion to his church and fiancée. (*Id.*) The court acknowledged that Salas Gayton had accepted responsibility for his actions and demonstrated genuine remorse. (R.45:56, App. 95.) The court likewise noted that by pleading no contest, Salas Gayton spared the victim's family from having to endure a gruesome trial. (*Id.*)

The circuit court then imposed the sentence as follows:

The fact that you took remorse, that you showed remorse, the fact that you've accepted responsibility does not outweigh what you did and in the matter [sic] that you did it on January 1, 2011.

So, therefore, the sentence of this Court is serving a term of confinement in the Wisconsin State Prison of 22 years, 15 years of initial confinement, seven years extended supervision on Count 1. Credit for 203 days. On Count 3, nine months, concurrent to the time in Count 1. Credit for 203 days.

(R.45:59, App. 98.) The circuit court also ordered restitution in the amount of \$11,075 to the victim's mother. (R.45:7, 15, App. 46, 54.) Among other conditions imposed, the circuit court imposed a DNA

surcharge reasoning only that this was "part of the punishment, part of the rehabilitation." (R.45:58, App. 97.)

## **STANDARDS OF REVIEW**

The two issues on appeal require the court to review the circuit court's exercise of its sentencing discretion, which is reviewed for an erroneous exercise of discretion. *State v. Harris*, 2010 WI 79, ¶ 30, 326 Wis. 2d 685, 786 N.W.2d 409; *State v. Cherry*, 2008 WI App 80, ¶ 4, 312 Wis. 2d 203, 752 N.W.2d 393.

## **ARGUMENT**

### **I. THE CIRCUIT COURT ERRONEOUSLY EXERCISED ITS SENTENCING DISCRETION ENTITLING SALAS GAYTON TO A NEW SENTENCING HEARING.**

The circuit court erroneously exercised its sentencing discretion by failing to adequately explain its reasons for imposing the maximum term of initial confinement and by improperly relying on Salas Gayton's alien status to impose a harsher sentence. As such, this Court should vacate the circuit court's sentence and order a new sentencing hearing.

#### **A. Legal Standard**

This Court reviews sentencing decisions to determine whether the circuit court erroneously exercised its discretion. *Harris*, 326 Wis. 2d 685, ¶ 3. Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. *McCleary v.*

*State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). Circuit courts are required to specify on the record the objectives of the sentence, which include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others. *State v. Gallion*, 2004 WI 42, ¶ 40, 270 Wis. 2d 535, 678 N.W.2d 197.

Courts are to identify the general objectives of greatest importance and to describe the facts relevant to these objectives. *Id.* ¶¶ 41-42. Courts must also identify the factors that were considered in arriving at the sentence and indicate how those factors fit the objectives and influence the decision. *Id.* ¶ 43. In short, the circuit court must, by reference to the relevant facts and factors, explain how the sentence's component parts promote the sentencing objectives. *Id.* ¶ 46.

As this Court recognized in *State v. Ziegler*, *Gallion* conveyed a message to appellate courts: they are not permitted to engage in "implied reasoning" by the sentencing court when reviewing a sentence. 2006 WI App 49, ¶ 25, 289 Wis. 2d 594, 712 N.W.2d 76 (quoting *Gallion*, 270 Wis. 2d 535, ¶ 50). Rather, a reviewing court must provide an "on-the-record explanation for the particular sentence

imposed.'" *Id.* (quoting *Gallion*, 270 Wis. 2d 535, ¶ 50). The circuit court did not provide Salas Gayton with this explanation.

**B. The Circuit Court Failed to Adequately Explain Its Reasons for Imposing Its Sentence.**

The circuit court erred when imposing a 22-year sentence, including the maximum 15-year period of initial confinement, without explaining on the record the linkage between the relevant facts, the sentence's component parts and the sentencing objectives, as required under *Gallion*. 270 Wis. 2d 535, ¶ 46.

The supreme court has held that in each case, the sentence imposed shall call for the minimum amount of custody or confinement, which is consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant. *Id.* ¶ 44. The circuit court failed to explain how it came to the conclusion that the minimum amount of confinement that met the sentencing goals in Salas Gayton's case was the maximum period of initial confinement under the statute.

Instead, the circuit court listed the generic goals of punishment, deterrence, and rehabilitation. (R.45:50, App. 89.) It then listed some of the background facts of the case and pronounced a sentence without explaining how those factors were weighed or where it came up with

the numbers it selected: 15 years of initial confinement and 7 years extended supervision on Count one and 9 months imprisonment on Count three, to be served concurrent to the sentence for Count one. (R.45:59, App. 98.) Under *Gallion*, engaging in this type of implied reasoning is not enough. The circuit court is required to provide an on-the-record explanation for the particular sentence imposed. *Gallion*, 270 Wis. 2d 535, ¶ 50. Salas Gayton received no such explanation here.

The circuit court did not explain what about this crime and this defendant warrant the maximum period of initial confinement. The crimes to which Salas Gayton pled guilty are no doubt serious, but the circuit court nevertheless failed to explain how or why Salas Gayton in particular requires a more serious sentence than any other defendant faced with the exact same serious charges. The court found that Salas Gayton had no intent to kill (R.45:54, App. 93), and that he exhibited true remorse, (R.45:56, App. 95). The court noted that with the exception of one municipal citation and one misdemeanor, Salas Gayton's record was clean. (R.45:40, App. 79.) The circuit court failed to explain the linkage between the stated sentencing objectives, these facts (or any other relevant facts), and the sentence imposed. Rather, the circuit court listed sentencing objectives, listed certain facts, and

then named a sentence; this kind of implied reasoning is not enough.

*Gallion* requires more to properly exercise sentencing discretion.

**C. The Circuit Court Improperly Relied on Salas Gayton's Alien Status to Impose a Harsher Sentence.**

Discretion is erroneously exercised when a sentencing court actually relies on clearly irrelevant or improper factors. *Harris*, 326 Wis. 2d 685, ¶ 3. Salas Gayton has a constitutional due process right not to be sentenced on the basis of his nationality or race, including his alien status. *See id.* ¶ 33 & n.9 (citing *United States v. Munoz*, 974 F.2d 493, 495 (4th Cir. 1992), for the proposition that sentences imposed on the basis of race or national origin violate due process)); *United States v. Velasquez Velasquez*, 524 F.3d 1248, 1253 (11th Cir. 2008) (holding that a judge may not impose a more severe sentence than he would have otherwise based on unfounded assumptions regarding an individual's immigration status); *United States v. Leung*, 40 F.3d 577, 586-87 (2d Cir. 1994) (noting a "defendant's race or nationality may play no adverse role in the administration of justice, including at sentencing" and vacating a sentence based on the court's comments about the defendant's ethnicity

and alien status at sentencing).<sup>3</sup> Considering Salas Gayton's immigration status as an aggravating sentencing factor is improper. Improper factors may not be relied upon by the court—at all—in the imposition of a sentence. *Harris*, 326 Wis. 2d 685, ¶ 3.

The circuit court made clear that it actually relied on Salas Gayton's alien status as an aggravating sentencing factor. The court reiterated multiple times that it was considering Salas Gayton's alien status because the court found it directly relevant to a sentencing factor—his character. (R.45:52, 55, App. 91, 94.) The court stated that Salas Gayton's citizenship "goes to character" and is "a minor character flaw." (R.45:52, App. 91.) The court admitted that "[t]he fact that [Salas Gayton is] an illegal alien doesn't enter into the serious nature of the crime or the need to protect the community. It goes to character." (R.45:52, App. 91.) While explaining the rules of extended supervision, the court called Salas Gayton "an illegal" and commented that although Salas Gayton had never done anything to make the government aware of his drinking problem, "[t]here's plenty of places on the south side of

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<sup>3</sup> "The United States and Wisconsin constitutions generally provide due process guarantees with no substantive differences. *Compare* U.S. Const. Amend. XIV *with* Wis. Const. Art. I, § 1." *State v. Wood*, 2010 WI 17, ¶ 17 n.9, 323 Wis. 2d 321, 780 N.W.2d 63.

Milwaukee that cater to Latinos that would help them with their drinking problems." (R.45:57, App. 96.)

The circuit court's comments with respect to Salas Gayton's citizenship status made clear that it was actually relying on this as an aggravating factor relevant to his character. Stated otherwise, the circuit court deemed Salas Gayton a lower-character individual than someone whose citizenship status is unknown or who is a United States citizen and imposed a harsher sentence as a result. That the circuit court imposed the maximum term of initial confinement suggests Salas Gayton received an unduly harsh sentence motivated by his immigration status. Salas Gayton's immigration status is an irrelevant and improper factor that the circuit court actually relied on in imposing his sentence. This reliance was an erroneous exercise of sentencing discretion. *See Harris*, 326 Wis. 2d 685, ¶ 3.

**D. The Circuit Court Did Not Cure Its Erroneous Exercise of Discretion in Its Decision Denying Postconviction Relief.**

In response to Salas Gayton's postconviction motion, the circuit court again provided a generic list of sentencing goals—punishment, deterrence, and rehabilitation—without explaining how those goals relate to each other, to the facts of this case, or to the sentence ultimately imposed. (R.30:4, App. 22.) The court gave a brief catalog of

some of the facts considered at sentencing and then held that the sentencing record complies fully with *Gallion*. (R.30:4-5, App. 22-23.) But *Gallion* requires more than a mere list of sentencing goals followed by a list of facts and a sentence seemingly pulled from midair. *See Ziegler*, 289 Wis. 2d 594, ¶ 25. *Gallion* does not permit courts to engage in implied reasoning. Courts are instead required to explain the linkage between the relevant facts, the sentence's component parts, and the sentencing objectives. *Gallion*, 270 Wis. 2d 535, ¶ 46. The circuit court erroneously exercised its sentencing discretion when it failed to do this.

The postconviction court additionally failed to cure the erroneous exercise of sentencing discretion because it continued to rely on the improper fact of Salas Gayton's alien status to explain the circuit court's reasons for imposing the maximum sentence in this case. (R.30:4, App. 22 (justifying maximum sentence by noting that "The defendant was in this country illegally for 13-14 years.")) Reliance on this irrelevant and improper factor constitutes an erroneous exercise of sentencing discretion.

## II. THE CIRCUIT COURT ERRONEOUSLY EXERCISED ITS DISCRETION IN IMPOSING THE DNA SURCHARGE ENTITLING SALAS GAYTON TO AN ORDER VACATING THE DNA SURCHARGE.

The circuit court erroneously exercised its discretion in failing to consider and set forth any and all factors pertinent to the imposition of a DNA surcharge and in failing to set forth on the record its rationale underlying its decision to impose the DNA surcharge. As such, the Court should reverse the order on the DNA surcharge.

It is within the circuit court's discretion under Wis. Stat. § 973.046(1g)<sup>4</sup> to decide whether to impose a DNA surcharge when the court sentences a defendant to a felony not involving a sex crime.<sup>5</sup> *Cherry*, 312 Wis. 2d 203, ¶ 5. To properly exercise its discretion, the sentencing court must (1) "consider any and all factors pertinent to the case before it" and (2) "set forth in the record the factors it considered and the rationale underlying its decision for imposing the DNA surcharge in that case." *Id.* ¶ 9. The circuit court must "do something more than stating it is imposing the DNA surcharge simply because it can"; it must sufficiently explain its rationale on the record. *Id.* ¶¶ 10,

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<sup>4</sup> Wis. Stat. § 973.046(1g) states: "Except as provided in sub. (1r), if a court imposes a sentence or places a person on probation for a felony conviction, the court may impose a deoxyribonucleic acid analysis surcharge of \$250."

<sup>5</sup> When the circuit court sentences a defendant to a felony involving a sex crime contrary to Wis. Stat. §§ 940.225, 948.02(1) or (2), 948.025, or 948.085, the circuit court *must* impose a DNA surcharge. Wis. Stat. § 973.046(1r); *Cherry*, 312 Wis. 2d 203, ¶ 5.

7. A circuit court erroneously exercises its discretion in failing to do the foregoing. *See id.* ¶¶ 7-11.

In *Cherry*, the circuit court imposed a DNA surcharge, the stated reasons for this decision were that "the trial court's policy is to impose the surcharge whenever possible" and "the court has the statutory authority to order the surcharge for the purpose of supporting the DNA database program." *Id.* ¶ 6. The court of appeals reversed the DNA surcharge imposed because the record did not show that the circuit court considered all factors pertinent to the case before it and did not set forth its rationale. *Id.* ¶¶ 9-11.

*Cherry* directs circuit courts to consider the facts of the individual case and not automatically impose blanket rules on any particular group of defendants. *Id.* ¶¶ 9-10. The trouble with the circuit court's rationale in *Cherry* was that it could support the imposition of a DNA surcharge in every single case. *Id.* ¶ 10; *see also State v. Williams*, No. 2012AP357-CR, 2013 WL 322653, at \*1-2 (Wis. Ct. App. Jan. 29, 2013) (unpublished) (holding that the circuit court's rationale that it was imposing a DNA surcharge merely "'based on the seriousness of the offense and the fact that a weapon was involved'" did not satisfy the *Cherry* requirements because it was "not specific to this case" and "could apply to every felon in possession of a firearm"), App. 101-03.

Although the *Cherry* court declined to provide an exhaustive list of factors to consider, it identified some factors to be considered, including:

(1) whether the defendant has provided a DNA sample in connection with the case so as to have caused DNA cost; (2) whether the case involved any evidence that needed DNA analysis so as to have caused DNA cost; (3) financial resources of the defendant; and (4) any other factors the trial court finds pertinent.

*Cherry*, 312 Wis. 2d 203, ¶ 10.

Here, the circuit court's complete discussion regarding the DNA surcharge was two short sentences: "You will give a DNA test, be responsible for all of the costs of this action, including a DNA surcharge. That is part of the punishment, part of the rehabilitation." (R.45:58, App. 97.) The postconviction court did even less, summarily concluding without analysis "that Judge Cimpl set forth a sufficient rationale for the imposition of the DNA surcharge." (R.30:5, App. 23.)

This record does not reflect consideration of any and all factors pertinent to this case. *Cherry*, 312 Wis. 2d 203, ¶ 9. Indeed, the circuit court failed to consider *any* factors unique to this case, including any of the factors set out in *Cherry*. Significantly, if the circuit court had considered the pertinent factors, it likely would not have imposed the DNA surcharge. Salas Gayton had not provided a DNA sample as evidence in connection with this case and, given Salas Gayton's

indigent status and the other court costs and restitution imposed (R.29:11, App. 15; R.45:58, App. 97.), he does not have the financial resources to easily pay the surcharge.

Moreover, the circuit court failed to articulate on the record its rationale underlying its decision to impose the DNA surcharge. *See Cherry*, 312 Wis. 2d 203, ¶ 9. Instead, the totality of its reasoning was that the DNA surcharge was being imposed as "part of the punishment, part of the rehabilitation." (R.45:58, App. 97.) What's missing is the court's explanation of *why* a DNA surcharge is appropriate to punish and rehabilitate Salas Gayton. If this reasoning is sufficient, it would justify imposing a DNA surcharge in every single felony case. This sort of vague, canned reasoning is exactly what *Cherry* identified as insufficient and amounting to an erroneous exercise of discretion. *See Cherry*, 312 Wis. 2d 203, ¶ 10. As such, the court should vacate the order imposing the DNA surcharge.

## CONCLUSION

For the foregoing reasons, Salas Gayton asks that this Court reverse the circuit court's postconviction order denying Salas Gayton's resentencing request and issue an order vacating the sentence and order a new sentencing hearing. Additionally, Salas Gayton requests

that this Court reverse the circuit court's postconviction order denying his request to vacate the DNA surcharge and issue an order vacating the DNA surcharge.

Dated this 27th day of February, 2014.

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COURT OF APPEALS OF WISCONSIN  
DISTRICT I

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Appeal No. 2013AP646-CR

LEOPOLDO R. SALAS GAYTON,

Defendant-Appellant.

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**FORM AND LENGTH CERTIFICATION**

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I hereby certify this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4,129 words.

Dated this 27th day of February, 2014.

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**CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)**

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I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all

opposing parties.

Dated this 27th day of February, 2014.

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**CERTIFICATE OF THIRD-PARTY COMMERCIAL DELIVERY**

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I certify that pursuant to Wis. Stat. § 809.80(3)(b)2. on February 27, 2014, the Brief and Appendix of Defendant-Appellant Leopoldo R. Salas Gayton was delivered to Federal Express for delivery to the Clerk of the Clerk of the Wisconsin Court of Appeals within three calendar days. I further certify that the brief was correctly addressed.

Dated this 27th day of February, 2014.

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