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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2014AP2981-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TABITHA A. SCRUGGS,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District II, Affirming a Judgment of Conviction Entered in the Racine County Circuit Court, the Honorable Allan Torhorst, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUE PRESENTED

Tabitha Scruggs committed a burglary on December 30, 2013. Two days later, a new law went into effect, requiring sentencing courts to impose a $250 DNA surcharge for every felony conviction and a $200 DNA surcharge for every misdemeanor, regardless of whether any DNA was taken or analyzed in connection with the case. Ms. Scruggs was sentenced on June 9, 2014. Does retroactive application of the mandatory DNA surcharge violate the prohibitions against *ex post facto* laws in the state and federal constitutions?

The circuit court imposed the surcharge and denied Ms. Scruggs' postconviction motion to vacate the surcharge.

The court of appeals affirmed, holding that retroactive imposition of a single mandatory DNA surcharge did not violate *ex post facto*.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case presents an issue of statewide concern, meriting both oral argument and publication.

STATEMENT OF FACTS

On December 30, 2013, the State filed a complaint charging Tabitha Scruggs with one count of burglary as a party to a crime, contrary to Wis. Stat. §§ 943.10(1m)(a) and 939.05. (1). The complaint alleged that on December 30, 2013, Ms. Scruggs drove an accomplice to a residence in Racine where he broke two front windows and stole a TV, a

PlayStation, and a video game. (1). A witness watched the burglary from across the street, and police found a car matching a description of the car used in the burglary. (1:1-2). Police saw Ms. Scruggs and the accomplice take the TV from the car and begin moving it into a residence. (1:2). An officer stopped them and saw the remaining stolen items in the car. (1:2).

On April 1, 2014, Ms. Scruggs pled no contest to one count of burglary as a party to a crime. (18:7). On June 9, 2014, the court sentenced Ms. Scruggs to 18 months in confinement, followed by 18 months of extended supervision. (19:13). The court stayed that sentence and placed Ms. Scruggs on probation for three years. (19:13). The court also stayed six months of condition time. (19:15).

Concerning costs and surcharges, the sentencing court stated: "You'll be obligated to pay the court costs and supervision fees. You will be obligated to provide a DNA sample for genetic testing." (19:14). The court did not specifically impose a DNA surcharge under Wis. Stat. § 973.046. Nevertheless, a $250 DNA surcharge appears on the judgment of conviction. (9:2; App. 113).

On November 20, 2014, Ms. Scruggs filed a postconviction motion asking that the court vacate the DNA surcharge. (12). The motion argued that imposing the mandatory surcharge violated the *ex post facto* law clauses of the United States and Wisconsin constitutions. (12). The motion also argued that the surcharge should be vacated even if the court applied the version of the DNA surcharge statute in place at the time of the offense because the court offered no reason for imposing a discretionary surcharge. (12).

On December 11, 2014, the circuit court entered an order denying the postconviction motion. (13:3; App. 117).

The court ruled that there was no *ex post facto* violation because the act which created the mandatory DNA surcharge was published prior to Ms. Scruggs' offense. (13:3; App. 117). The court ruled that it was "immaterial" that the law did not actually go into effect until two days after the underlying offense was committed. (13:3; App. 117).

On October 21, 2015, the court of appeals affirmed, but on different grounds. ***State v. Scruggs***, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146; (App. 101). The court held that the mandatory DNA surcharge was not punitive in effect or intent when applied to a person sentenced for a single felony; therefore, there was no *ex post facto* violation. ***Id.***, ¶¶ 10-18.

ARGUMENT

I. The Mandatory DNA Surcharge Is an Unconstitutional *Ex Post Facto* Law When Applied Retroactively, So the Mandatory Surcharge Imposed in This Case Should Be Vacated.

Any statute "which makes more burdensome the punishment for a crime, after its commission . . . is prohibited as *ex post facto*." ***Collins v. Youngblood***, 497 U.S. 37, 42 (1990). Both the United States and Wisconsin constitutions prohibit *ex post facto* laws. U.S. Const. art I, § 10; Wis. Const. art. I, § 12.

Here, Ms. Scruggs was convicted for a burglary that occurred on December 30, 2013. When she committed the offense, the mandatory DNA surcharge did not exist. At that time, circuit courts were required to impose a $250 DNA surcharge in certain felony sex offenses, and had discretion to impose the surcharge in any other felony case. Wis. Stat.

§ 973.046; ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393.[1]

Between the time Ms. Scruggs committed the burglary and when she pled guilty, the law changed. On January 1, 2014, a new version of section 973.046 went into effect. 2013 Wis. Act 20, §§ 2355, 9326, 9426. The new version required the circuit court to impose a $250 DNA surcharge for every felony conviction, and a $200 DNA surcharge for every misdemeanor conviction. Wis. Stat. § 973.046(1r).[2]

The act specified that the new surcharge would apply to sentences imposed on or after January 1, 2014, regardless of when the underlying offense occurred. 2013 Wis. Act 20, §§ 9326, 9426. Ms. Scruggs was ordered to pay the mandatory surcharge. (9; App. 113). This court should vacate the surcharge because retroactively applying the mandatory DNA surcharge violates the state and federal prohibitions against *ex post facto* laws.

Whether an amended statute violates *ex post facto* is a question of law that this court reviews *de novo*. ***State v. Haines***, 2003 WI 39, ¶ 7, 261 Wis. 2d 139, 661 N.W.2d 72. The defendant bears the burden of overcoming the court's

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[1] At the time the offense was committed, the relevant portion of section 973.046 read as follows:

"(1g) 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.

(1r) If a court imposes a sentence or places a person on probation for a violation of s. 940.225, 948.02(1) or (2), 948.025, 948.085, the court shall impose a deoxyribonucleic acid analysis surcharge of $250."

[2] "(1r) If a court imposes a sentence or places a person on probation, the court shall impose a deoxyribonucleic acid analysis surcharge, calculated as follows: (a) For each conviction for a felony, $250. (b) For each conviction for a misdemeanor, $200."

presumption that laws are constitutional. ***State v. Radaj***, 2015 WI App 50, ¶ 11, 363 Wis. 2d 633, 866 N.W.2d 758. Wisconsin courts generally construe the *ex post facto* clause of the Wisconsin Constitution consistently with the *ex post facto* clause of the United States Constitution. ***State v. Thiel***, 188 Wis. 2d 695, 699, 524 N.W.2d 641 (1994).

A law violates *ex post facto* when it is: (1) retrospective; and (2) disadvantageous to the defendant. ***Weaver v. Graham***, 450 U.S. 24, 29 (1981).

A. The mandatory surcharge is retrospective when applied to criminal defendants who committed their offense before January 1, 2014.

Here, the statute in question is undoubtedly retrospective, and the State has never disputed that fact. If "the law changes the legal consequences of acts completed before its effective date," it is retrospective, and may violate *ex post facto*. ***Id.*** at 31, 36.

Here, the legal consequences accompanying Ms. Scruggs' conviction changed after she committed the offense. The DNA surcharge was discretionary at the time she completed the offense, but mandatory at the time she was sentenced. Laws that make mandatory what was previously discretionary may violate *ex post facto*. ***Weaver***, 450 U.S. at 32 n.17. Because the amended surcharge statute requires Ms. Scruggs to pay a surcharge that was not required at the time of the offense, the statute is retrospective.

B. The surcharge is punitive because it increases the mandatory punishment for completed crimes.

When deciding whether a law disadvantages a defendant, the court employs a two-step "intent-effects" test, designed to determine whether the statute is punitive. ***State v. Rachel***, 2002 WI 81, ¶¶ 31-33, 254 Wis. 2d 215, 647 N.W.2d 762 (citing ***Hudson v. United States***, 522 U.S. 93, 99 (1997)). First, the court must decide "whether the legislature either expressly or impliedly indicated a preference that the statute in question be considered civil or criminal." ***Id.***, ¶ 32. If the legislature intended the new statute to be punitive, retroactive application violates *ex post facto*. *See* ***id.***, ¶¶ 32, 40.

Second, the court examines the effect of the statute. Even if the legislature did not intend to create a punitive statute, it may still be unconstitutional if it is "so punitive" as to "transform what was clearly intended as a civil remedy into a criminal penalty." ***Id.***, ¶ 33 (quoting ***Hudson***, 522 U.S. at 99). When assessing a statute's effect, a number of factors may "guide the analysis":

> (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as punishment; (3) whether it comes into play only on a finding of *scienter*; (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.

Id.

Importantly, when deciding whether a law violates *ex post facto*, "The inquiry looks to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular individual." ***Weaver***, 450 U.S. at 33. The court must "evaluat[e] the 'statute on its face' to determine whether it provided for what amounted to a criminal sanction." ***Hudson***, 522 U.S. at 101.

Of course, every *ex post facto* challenge is inherently an "as applied" challenge in a certain sense. The challenge only seeks to bar *retroactive* application of the statute. To make a facial challenge, Ms. Scruggs would have to show that "the law cannot be enforced under any circumstances." ***League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker***, 2014 WI 97, ¶ 13, 357 Wis. 2d 360, 851 N.W.2d 302. That is obviously not the case here. When applied prospectively, there is no *ex post facto* problem with the mandatory DNA surcharge. But when examining whether retroactive application violates *ex post facto*, this court must examine the statute on its face, not based on the specific effect the statute had on Ms. Scruggs. ***Hudson***, 522 U.S. at 101-02; ***Rachel***, 2002 WI 81, ¶ 34.

The court of appeals' opinions in this case and ***Radaj*** are squarely at odds with this requirement. Instead of examining the statute on its face, the court of appeals has examined how the statute should apply depending on whether one or multiple surcharges were imposed. ***Scruggs***, 2015 WI App 88; ***Radaj***, 2015 WI App 50. But it does not matter how many surcharges were imposed. *See* ***Hudson***, 522 U.S. at 101-02. The only question is whether the mandatory DNA surcharge statute, on its face, is punitive under the intent-effects test.

1. The mandatory DNA surcharge is intended to impose a new criminal penalty.

The text of the statute, as well as its legislative history, demonstrates that the legislature intended the mandatory DNA surcharge as a criminal penalty. Determining whether the legislature intended the statute to be punitive "is primarily a matter of statutory construction, and we must ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." ***Rachel***, 2002 WI 81, ¶ 40. "[S]tatutory interpretation begins with the language of the statute." ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110.

The plain text of the amended DNA surcharge statute reflects a punitive intent because the surcharge bears no relation to actual DNA cost created by the defendant. *See* ***Radaj***, 2015 WI App 50, ¶¶ 25, 29. If the DNA surcharge were intended as a cost-recovery measure, then it should match (at least roughly) DNA cost. Instead, the surcharge imposes a flat fine: $200 for every misdemeanor and $250 for every felony. It does not matter what DNA cost the defendant or the case produced. A person convicted of one misdemeanor in a case involving considerable DNA analysis pays only $200, while a person convicted of five felonies in a case involving no DNA cost must pay $1250. And the statute contemplates no upper limit to the number of surcharges that could be imposed.

The court of appeals observed that this component of the statute—tying "the amount of the surcharge to the number of convictions,"—is evidence of punitive intent. ***Radaj***, 2015 WI App 50, ¶ 21. The court did not hold that the statute was

intentionally punitive because it found it to have a punitive effect. Nevertheless, the court pointed out that using the number of convictions to decide the number of surcharges, "something seemingly unrelated to the cost of the DNA-analysis-related activities that the surcharge funds, casts doubt on legislative intent." ***Radaj***, 2015 WI App 50, ¶ 21.

By tying the surcharge to the number of convictions, the legislature is deliberately punishing more severe offenders more harshly than those with fewer convictions. There is nothing inherent in multiple convictions that requires multiple surcharges. This is simply a punitive measure that enhances the penalty for each conviction. Even the court of appeals acknowledged that it could not conceive of any reason why DNA costs "would generally increase in proportion to the number of convictions, let alone in *direct* proportion to the number of convictions." ***Id.***, ¶ 32 (emphasis added).

The fact that this penalty is called a "DNA surcharge" does not control the outcome in this case. "A fine is a fine even if called a fee, and one basis for reclassifying a fee as a fine would be that it bore no relation to the cost for which the fee was ostensibly intended to compensate." ***Mueller v. Raemisch***, 740 F.3d 1128, 1133 (7th Cir. 2014). That is exactly what is happening here: although labeled a "DNA surcharge," the assessment bears no relation to the DNA costs created by any particular defendant. It is simply a per-conviction fine.

Imposing a higher surcharge in felony cases also reflects punitive intent. If the surcharge were actually intended to offset the costs of DNA testing, there would be no reason to impose a higher surcharge in felony cases than misdemeanor cases. Surely it does not cost more to test a felon's DNA than a misdemeanant's. The only rational reason

for this discrepancy is to impose a greater punishment on those defendants whose criminal culpability is greater.

Placement of the DNA surcharge within the criminal sentencing statutes also reflects a legislative intent to punish. As this court has stated: "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Kalal***, 2004 WI 58, ¶ 46. Here, the surcharge is situated squarely within the criminal sentencing statutes, which address criminal penalties and their imposition. In contrast, court costs and other non-punitive surcharges are addressed in Chapter 814. This placement suggests that the legislature intended to impose a criminal penalty.

Even if the statutory text does not unambiguously reflect punitive intent, the limited legislative history of the statute reflects that intent.[3] The amended DNA surcharge was accompanied by a massive expansion of DNA collection in Wisconsin. Instead of taking DNA samples only after a felony conviction, the legislature proposed taking DNA samples after every felony *arrest*, specified misdemeanor arrests, and every misdemeanor conviction. (LFB Memo, 2-4); Wis. Stat. §§ 165.76, 973.047.[4] The Legislative Fiscal

[3] The legislative history consists of a memo from the Legislative Reference Bureau to the Joint Committee on Finance. Legislative Reference Bureau, DNA Collection at Arrest and the DNA Analysis Surcharge, May 23, 2013, *available at* https://docs.legis.wisconsin.gov/misc/lfb/budget/2013_15_biennial_budget/102_budget_papers/410_justice_dna_collection_at_arrest_and_the_dna_analysis_surcharge.pdf (last visited Mar. 31, 2016).

[4] In response to the Supreme Court's decision in ***Maryland v. King***, 133 S. Ct. 1958 (2013), which limited post-arrest DNA collection

Bureau estimated that the mandatory surcharge would provide over $3.5 million in revenue for the 2014-15 fiscal year to pay for the expanded DNA collection. (LFB Memo, 2).

The mandatory surcharge is not non-punitive simply because the proceeds are being used to pay for DNA collection. Court-imposed fines also support government activities, but they are still punitive. *See* ***State v. Ramel***, 2007 WI App 271, ¶ 15, 306 Wis. 2d 654, 743 N.W.2d 502. The problem is that the legislature is not proportionately splitting the bill for the new DNA costs it has created. That makes it punitive. *See* ***Mueller***, 740 F.3d at 1133. Instead of collecting money from those creating a DNA cost, the statute is arbitrarily punishing those convicted of crimes—and tying the amount owed to the number of convictions—without any regard for the DNA cost they did or did not create.

It is not difficult to conceive a surcharge that would have been non-punitive. Requiring a person to pay a surcharge once, after his or her DNA sample is taken, or requiring a surcharge in a case involving DNA testing makes sense as a cost-recovery measure. But requiring convicts to pay as many surcharges as they have convictions, without *any* consideration of whether they created a DNA cost is simply punitive. ***Radaj***, 2015 WI App 50. Therefore, the mandatory DNA surcharge violates *ex post facto* when applied

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to "serious offenses," the legislature scaled back post-arrest DNA collection to "violent crimes." 2013 Wis. Act 214; Wis. Stat. § 165.76(gm). Notably, the DNA surcharge was not correspondingly scaled back. Thus, the State is collecting just as much money, but collecting far fewer DNA samples. Presumably, if the amended surcharge was merely intended to pay for expanded DNA testing, the surcharge should have been scaled back to account for the reduced DNA collection.

retroactively, and this court should vacate the DNA surcharge in this case.

2. The mandatory surcharge is so punitive that even if it was intended as a civil assessment, it has the effect of a criminal penalty.

Even if this court finds that the legislature did not intend the new DNA surcharge to be punitive, it may still violate *ex post facto* if it is "so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." ***Rachel***, 2002 WI 81, ¶ 33. Here, the effect of a $200 or $250 DNA surcharge for every conviction, regardless of DNA cost, is so punitive that it has become a criminal penalty.

The court of appeals in this case erred by completely failing to consider the "effect" portion of the intent-effects test. ***Scruggs***, 2015 WI App 88, ¶ 18. Although similar facts suggest punitive intent and punitive effect, the two prongs of the test require separate analysis. The entire purpose of the "effects" half of the test acknowledges that sometimes statutes that are not intended to be punitive produce results that are so onerous that they violate *ex post facto*. Thus, the court must analyze not only whether the statute is deliberately punitive, but whether the actual outcomes from applying the statute are punitive.

The effect of the mandatory DNA surcharge is punitive because it is not merely intended to compensate for the DNA costs created by a particular defendant. As noted above, the surcharge is completely unrelated to the costs created by the defendant.

First, the surcharge is collected in every case, for every conviction, regardless of whether DNA is collected or analyzed. The amended surcharge imposes a blanket rule to take a surcharge for every conviction.

Take, for example, the defendant from ***Radaj***. He was initially charged with *21* misdemeanors and felonies. 2015 WI App 50, ¶ 2. Had he eventually pled to 21 misdemeanors, he would have been charged $4200 in DNA surcharges.[5] In reality, he pled to four felonies and had to pay "only" $1000 in DNA surcharges. ***Id.***, ¶ 5.

The court of appeals properly recognized that this feature of the amended DNA surcharge—that the cost increased with each conviction—rendered it punitive in effect, even if that was not the legislature's intent. ***Id.***, ¶ 29. The court explained that in cases involving monetary fees,

> a critical inquiry is whether there is a rational connection between the amount of the fee and the non-punitive activities that the fee is intended to fund, or if instead the amount of the fee is excessive in relation to that purpose. If there is no rational connection and the fee is excessive in relation to the activities it is intended to fund, then the fee in effect serves as an additional criminal fine, that is, the fee is punitive.

Id., ¶ 25. The court was unable to conceive of any reason why DNA cost would increase with the number of convictions, and held that "this per-conviction approach to setting the

[5] Of course, the DNA surcharge is only one of the many fees or surcharges a Wisconsin felon may pay. *E.g.*, Wis. Stat. §§ 814.60 ($163 in court costs); 973.045(1)(b) ($92 victim/witness surcharge); 165.755 ($13 crime lab surcharge); 973.06(1)(g) (10 percent restitution surcharge); 973.20(11)(a) (5 percent restitution surcharge); 302.46(1) ($10 jail surcharge); 757.05 (26 percent penalty surcharge); 973.055 ($100 domestic abuse surcharge).

DNA surcharge" rendered it punitive, so retroactive application violated *ex post facto*. ***Id.***, ¶ 29.

The amended surcharge is also punitive in effect because if the surcharge were actually intended to compensate the State for the costs of DNA analysis, there would be no reason to distinguish between felonies and misdemeanors. By correlating the "amount of the fine imposed" to "the degree" of the offense, the surcharge is effectively punitive under *ex post facto*. ***People v. Stead***, 845 P.2d 1156, 1160 (Colo. 1993).

A non-punitive measure would be something like a one-time fee covering the cost of DNA collection and analysis. That was precisely the circumstance in South Carolina, where the Fourth Circuit upheld a DNA surcharge that was imposed *upon defendants who supplied a DNA sample*. ***In re DNA Ex Post Facto Issues***, 561 F.3d 294 (4th Cir. 2009). There, the statute at issue read: "A person who is required to provide a sample pursuant to this article must pay a two hundred and fifty dollar processing fee which may not be waived by the court." ***Id.*** at 297. Thus, a defendant only had to pay a $250 DNA fee if he or she created a DNA cost. The defendants argued that the statute violated *ex post facto* when applied retroactively. ***Id.*** at 298. The appellate court upheld the surcharge, holding that the statute was clearly compensatory in nature because *the DNA surcharge was directly related to actual DNA cost*. ***Id.*** at 299. In contrast, Wisconsin's surcharge bears no relation to DNA cost, and is simply a per-conviction fine of $200 or $250.

It is difficult to find closely analogous statutes in other states because Wisconsin's mandatory DNA surcharge statute is so uniquely severe. Although other states have required convicts to retroactively pay for the costs of DNA testing,

e.g., ***People v. Higgins***, 13 N.E.3d 169 (Ill. App. Ct. 2014), no other state calls upon defendants to keep paying DNA surcharges for every conviction, regardless of DNA cost.

Even under more lenient schemes, however, other jurisdictions have found financial penalties to violate *ex post facto* when applied retroactively. A series of other jurisdictions have concluded that similar financial penalties violate *ex post facto* and cannot be applied retroactively. ***United States v. Jones***, 489 F.3d 243, 254 n.5 (6th Cir. 2007); (*ex post facto* prevented increased "special assessment" on convictions after commission of crime); ***Eichelberger v. State***, 916 S.W.2d 109, 112 (Ark. 1996); (same result for restitution); ***Matter of Appeal in Maricopa Cnty. Juvenile Action No. J-92130***, 677 P.2d 943, 947 (Ariz. Ct. App. 1984) (restitution and "monetary assessment"); ***People v. Batman***, 71 Cal. Rptr. 3d 591, 593-94 (2008) (DNA assessment); ***People v. Stead***, 845 P.2d 1156, 1159 (Colo. 1993) ("drug offender surcharge"); ***Cutwright v. State***, 934 So. 2d 667, 668 (Fla. Dist. Ct. App. 2006) (court costs); ***People v. Rayburn***, 630 N.E.2d 533, 538 (Ill. Ct. App. 1994) (fine for "Family Abuse Fund"); ***State v. Corwin***, 616 N.W.2d 600, 602 (Iowa 2000) (restitution); ***State v. Theriot***, 782 So. 2d 1078, 1085-87 (La. Ct. App. 2001) (change of fine from discretionary to mandatory violated *ex post facto*); ***Spielman v. State***, 471 A.2d 730, 735 (Md. 1984) (restitution); ***People v. Slocum***, 539 N.W.2d 572, 574 (Mich. Ct. App. 1995) (restitution); ***State v. McMann***, 541 N.W.2d 418, 422 (Neb. Ct. App. 1995) (restitution); ***People v. Stephen M.***, 824 N.Y.S.2d 757 (N.Y. Crim. Ct. 2006) (DNA fee); ***Commonwealth v. Wall***, 867 A.2d 578, 580-81 (Pa. Super. Ct. 2005) (OWI assessment); ***State v. Short***, 350 S.E.2d 1, 2-3 (W.Va. 1986) (restitution); ***Loomer v. State***, 768 P.2d 1042, 1049 (Wyo. 1989) (costs).

The court of appeals' approach—reaching different results depending on the number of surcharges—not only contradicts Supreme Court precedent requiring an examination of the face of the statute, but will produce a series of bizarre results, where the DNA surcharge depends more on plea bargaining and good timing than it does on DNA cost. Inexplicably, the court in ***Radaj*** recognized this problem, but still limited its holding to cases involving multiple surcharges. Take, for example, a defendant facing charges in two separate cases, each charging two separate counts. Under the court of appeals' approach, that defendant could face a number of different outcomes when retroactively applying the mandatory surcharge, and *none* of those outcomes would have anything to do with DNA cost. Plea bargaining would play an infinitely bigger role. If the defendant pled guilty to one count in each case, he would pay two mandatory surcharges. ***Scruggs***, 2015 WI App 88. If the defendant pled guilty to both counts in one case, he would face only one *discretionary* surcharge. ***Radaj***, 2015 WI App 50. If he pled guilty to three of the four counts, he would face a mandatory surcharge in one case, and a discretionary surcharge in the other. These results make no sense, and demonstrate that the mandatory DNA surcharge has nothing to do with requiring defendants to pay for the DNA costs they create.

Conveniently, applying *ex post facto* produces a simple rule: the discretionary surcharge applies if the offense occurred before January 1, 2014, and the mandatory surcharge applies if the offense occurred from January 1, 2014 onward. This straightforward rule ends all the confusion resulting from the court of appeals' opinions, and provides a simple rule for future application.

The only remedy for an *ex post facto* violation is to enforce the statute that existed at the time of the offense. ***Weaver***, 450 U.S. at 36 n.22. Therefore, this court should vacate the mandatory DNA surcharge, and remand so the circuit court can decide whether to impose a single discretionary surcharge applying ***Cherry***.

CONCLUSION

For the reasons stated above, Ms. Scruggs asks that this court reverse the court of appeals' decision, hold that retroactive application of the mandatory DNA surcharge violates *ex post facto*, and remand to the circuit court so it may decide whether to impose a single discretionary DNA surcharge under the version of section 973.046 that was in effect at the time of the offense.

Dated this 5th day of April, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4,452 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 5th day of April, 2016.

Signed:

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or 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 one or more initials or other appropriate pseudonym or designation 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.

Dated this 5th day of April, 2016.

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ON REVIEW OF A DECISION OF THE COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE RACINE COUNTY CIRCUIT COURT, THE HONORABLE ALLAN B. TORHORST, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2014AP2981-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TABITHA A. SCRUGGS,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE RACINE COUNTY CIRCUIT COURT, THE HONORABLE ALLAN B. TORHORST, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

ISSUE PRESENTED

When Tabitha Scruggs committed a burglary in 2013, Wis. Stat. § 973.046 permitted the circuit court to impose, in its discretion, a $250 DNA surcharge. After the offense, but before sentencing, the statute was amended to make the surcharge mandatory and Scruggs was required to pay a $250 surcharge. Does the application of the mandatory surcharge statute to Scruggs violate the ex post facto clauses of the United States and Wisconsin Constitutions?

The circuit court held that the mandatory surcharge statute was not an unconstitutional ex post law as applied to Scruggs because the legislation creating the mandatory surcharge was enacted before Scruggs committed her offense.

The court of appeals held that the statute did not violate the prohibition against ex post facto laws because Scruggs failed to demonstrate beyond a reasonable doubt that the $250 DNA surcharge imposed on her for a single felony constitutes a punishment.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in any case important enough to merit this court's review, oral argument and publication of the court's decision are warranted.

STATEMENT OF THE CASE

Scruggs was convicted of one felony count for a burglary that she committed on December 30, 2013. (9:1, Pet-Ap. 112.) When she committed the crime, the imposition of a DNA surcharge was discretionary for that offense; the surcharge was mandatory only for certain sex crimes. *See* Wis. Stat. § 973.046(1g), (1r) (2011-12); *State v. Cherry*, 2008 WI App 80, ¶ 5, 312 Wis. 2d 203, 752 N.W.2d 393.

Earlier in 2013, the legislature amended the DNA surcharge statute, effective January 1, 2014, to make the surcharge mandatory for all felony

convictions. *See* Wis. Stat. § 973.046(1r)(a) (2013-14)[1]; 2013 Wis. Act 20, §§ 2354, 2355 (amending Wis. Stat. § 973.046(1r) and creating Wis. Stat. § 973.046(1r)(a)); 2013 Wis. Act 20, § 9426(1)(am) (effective date of first day of the sixth month after July 1, 2013, publication date). When Scruggs was sentenced on June 9, 2014, the court imposed a $250 DNA surcharge. (9:1-2, Pet-Ap. 112-13.)

Scruggs filed a postconviction motion asking the court to vacate the DNA surcharge. (12:1-5.) She argued that "the new statute violated *ex post facto* as applied" to her. (12:4.) The circuit court denied the motion, holding that "[t]he fact that the particular DNA surcharge section that applies to her became effective two days after she committed the crime is immaterial" because "[t]he law was in effect when Scruggs committed her crime." (13:3, Pet-Ap. 117.)

The court of appeals affirmed on different grounds. *State v. Scruggs*, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146; Pet-Ap. 102-11. It noted that the State conceded that the circuit court erred when it held that the 2014 amendment was in effect when Scruggs committed the crime. *See id*. ¶ 5; Pet-Ap. 104. Instead, applying the "intent-effects" test used in *State v. Rachel*, 2002 WI 81, 254 Wis. 2d 215, 647 N.W.2d 762, the court of appeals held that imposing a single mandatory DNA surcharge was an not ex post facto violation because Scruggs had not demonstrated that the single surcharge imposed on

[1]All subsequent statutory references are to the 2013-14 version of the statute unless otherwise noted.

her constituted a punishment. *See Scruggs*, 365 Wis. 2d 568, ¶¶ 7-19, Pet-Ap. 105-11.

The court first observed that in *State v. Radaj*, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758, it had held that the new mandatory surcharge was an ex post facto violation as applied to a defendant to whom the $250 surcharge was imposed for each of multiple felony convictions. *See Scruggs*, 365 Wis. 2d 568, ¶ 9, Pet-Ap. 106. It noted that in *Radaj*, it had assumed without deciding that the legislature's intent was nonpunitive, but that it had concluded that the effect of assessing a $250 DNA surcharge for each felony conviction was to punish a defendant because "there could be no reason why the costs associated with running the DNA data bank would generally increase in proportion to the number of convictions." *Id*.

The court further noted that in *Radaj* it had "left for another day" the issue presented in *Scruggs*, whether the result might be different if Radaj had been convicted of a single felony carrying with it a mandatory $250 surcharge. *Id.* Because Scruggs's appeal "involves only a single felony conviction," the court said, "*Radaj* does not control our decision." *Id*.

Turning to the legislative intent inquiry, the court concluded, based on "the statute and its history, . . . that the legislature was motivated by a desire to expand the State's DNA data bank and to offset the cost of that expansion, rather than a punitive intent." *Id*. ¶ 10, Pet-Ap. 106. It noted that the 2014 amendment "was part of a larger initiative

by the State to expand the collection of DNA samples." *Id*., Pet-Ap. 107. The court stated that "to offset the increased burden on the Department of Justice (DOJ) in collecting, analyzing, and maintaining the additional DNA samples, the legislature imposed the $250 surcharge on felony convictions to be deposited with the DOJ to pay for operating its DNA data bank." *Id*. ¶ 11, Pet-Ap. 107. "That the DNA surcharge is specifically dedicated to fund the collection and analysis of DNA samples and the storage of DNA profiles—all regulatory activities—evidences a nonpunitive cost-recovery intent." *Id*. ¶ 12, Pet-Ap. 108.

The court further found that "[t]he relatively small size of the surcharge also indicates that the fee applied here was not intended to be a punishment, but rather an administrative charge to pay for the collection of the sample from Scruggs, along with the expenditures needed to administer the DNA data bank." *Id*. ¶ 13, Pet-Ap. 108 The amount of the surcharge was rational, the court concluded, noting that it is consistent with the DNA fee charged in other jurisdictions and that "[t]he connection between the fee and the costs it is intended to cover 'need not be perfect to be rational.'" *Id.*

The court rejected Scruggs' contention that "the $250 DNA surcharge for a felony conviction reflects a punitive intent because the surcharge is higher than the $200 surcharge for a misdemeanor conviction, and is imposed regardless of whether she provided a sample in the past." *Id*. ¶ 14, Pet-Ap. 108. "[T]his is an 'as applied' challenge," the court noted,

"and as to Scruggs's single felony conviction, the $250 surcharge does not evidence a punitive intent." *Id*.

Moreover, the court said, "Scruggs has pointed to nothing, other than speculation, that the disparity between the surcharges on a conviction for a felony as compared to a misdemeanor reflects that the legislature was motivated by a punitive intent." *Id*., Pet-Ap. 108-09. "In any event, the legislature might have reasoned that because DNA evidence is more often used in prosecuting felony cases and, in turn, in subsequent law enforcement investigations, that those offenders should bear more of the cost of operating the DNA data bank." *Id*., Pet-Ap. 109. "Additionally," the court said, "even before the 2014 Amendment, when the imposition of a DNA surcharge for a felony conviction was left to the discretion of the sentencing court, the surcharge was still $250. Since there has been no change in the amount of the DNA surcharge on a felony conviction, it cannot be said the same surcharge now reflects that the legislature was motivated by a punitive intent." *Id*.

The court added that its conclusion that the statute "evidences a nonpunitive cost-recovery intent is bolstered by its language expressly denominating the fee assessed against felony offenders such as Scruggs as a 'surcharge,' a civil nonpunitive label, rather than as a 'fine' or 'penalty.'" *Id*. ¶ 17, Pet-Ap. 110. "While not dispositive, '[w]e give "great deference to such labels."'" *Id*. (quoting *Radaj,* 363 Wis. 2d 633, ¶ 17).

The court concluded that "Scruggs has failed to carry her burden showing beyond a reasonable doubt that the legislature intended to punish her." *Id*. ¶ 18, Pet-Ap. 110.

The court further held that Scruggs had not "carried her burden of showing that the effect of the $250 DNA surcharge is to impose a criminal penalty." *Id*., Pet-Ap. 110-11. It observed that "[f]or support, Scruggs relies on many of the same arguments as demonstrative of the punitive effect of the $250 DNA surcharge, which we have already rejected as lacking in merit." *Id*., Pet-Ap. 111.

ARGUMENT

The sole issue before this court is whether requiring Scruggs to pay a single mandatory $250 DNA surcharge under a statutory amendment to Wis. Stat. § 973.046 that took effect after she committed her crime violates the ex post facto clauses of the United States and Wisconsin Constitutions.[2] The court of appeals held that the application of the new mandatory surcharge was not an ex post facto violation because Scruggs failed to carry her burden of demonstrating that a single

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[2] Wisconsin Stat. § 973.046 provides in relevant part:

> **(1r)** If a court imposes a sentence or places a person on probation, the court shall impose a deoxyribonucleic acid analysis surcharge, calculated as follows:
>
> (a) For each conviction for a felony, $250.
>
> (b) For each conviction for a misdemeanor, $200.

surcharge has either a punitive intent or a punitive effect. Scruggs argues in this court that the amended statute has both a punitive intent and a punitive effect, precluding its retroactive application in this case.

Before addressing that issue, the State notes that the parties agree on several points. First, even though the bill amending Wis. Stat. § 973.046 was enacted before Scruggs committed her offense, the relevant date for ex post facto purposes is the January 1, 2014, effective date of the statute.[3] *See Weaver v. Graham*, 450 U.S. 24, 31 (1981) ("The critical question is whether the law changes the legal consequences of acts completed before its effective date."). The circuit court erred, therefore, when it held that "[t]he fact that the particular DNA surcharge section that applies to her became effective two days after she committed the crime is immaterial" because "[t]he law was in effect when Scruggs committed her crime" (13:3, Pet-Ap. 117).

Second, if the DNA surcharge is punitive, as Scruggs contends, amending the statute to make mandatory what previously was discretionary is an ex post facto violation with respect to defendants who committed their offense before the effective date of the amendment. *See Lindsey v. Washington*, 301 U.S. 397, 400 (1937) (ex post facto violation to apply new criminal penalty where "[t]he effect of the

[3] *See* 2013 Wis. Act 20, § 9426(1)(am) (effective date of Wis. Stat. § 973.046(1r)(a)) is the first day of the sixth month after the Act's July 1, 2013, publication date).

new statute is to make mandatory what was before only the maximum sentence").

Third, if the court agrees with Scruggs that applying the mandatory DNA surcharge to her is unconstitutional, the remedy is to apply the discretionary DNA surcharge statute that was in effect when she committed the crime. *See Weaver*, 450 U.S. at 36 n.22 ("The proper relief upon a conclusion that a state prisoner is being treated under an *ex post facto* law is to remand to permit the state court to apply, if possible, the law in place when his crime occurred.").

But, for the reasons discussed below, the court of appeals correctly concluded that the application of the amended DNA surcharge to Scruggs is not an ex post facto violation. Accordingly, this court should affirm the decision of the court of appeals.

I. THE ONLY ISSUE BEFORE THE COURT IS WHETHER IMPOSITION OF A SINGLE MANDATORY DNA SURCHARGE IS AN EX POST FACTO VIOLATION.

Scruggs argues that the court of appeals erred when it limited its analysis to the imposition of a single DNA surcharge. *See* Scruggs' brief at 7. She contends that "[t]he only question is whether the mandatory DNA statute, on its face, is punitive" and that "it does not matter how many surcharges were imposed." *Id*.

Her argument in support of that proposition is terse, consisting of just two sentences. "[W]hen deciding whether a law violates *ex post facto*," she writes, "'[t]he inquiry looks to the challenged provision and not to any special circumstances that may mitigate its effect on the particular individual.'" *Id*. (quoting *Weaver*, 450 U.S. at 33). "The court must 'evaluat[e] the "statute on its face" to determine whether it provided for what amounted to a criminal sanction.'" *Id*. (quoting *Hudson v. United States*, 522 U.S. 93, 101 (1997)).

Scruggs did not make that argument in the court of appeals. In its court of appeals brief, the State, in response to arguments in Scruggs' brief-in-chief that were based on the imposition of multiple surcharges, argued that those arguments were not relevant because her claim is an as-applied challenge to the statute. *See* State's court of appeals brief at 8. The State noted that "in an as-applied challenge, [the court] assess[es] the merits of the challenge by considering the facts of the particular case in front of us, 'not hypothetical facts in other situations.'" *Id*. at 9 (quoting *State v. Wood*, 2010 WI 17, ¶ 13, 323 Wis. 2d 321, 780 N.W.2d 63). For that reason, the State argued, "Scruggs's argument must be limited . . . to the facts of her case, which involve a single $250 surcharge." *Id*.

Scruggs' reply brief did not challenge the State's characterization of her claim; she did not cite *Weaver* or *Hudson*, nor did she argue that the court must evaluate the statute on its face to determine whether it imposes a criminal sanction. *See* Scruggs'

court of appeals reply brief at 1-4. By failing to respond in her reply brief to the State's argument, Scruggs conceded the point. *See Shadley v. Lloyds of London*, 2009 WI App 165, ¶ 26, 322 Wis. 2d 189, 776 N.W.2d 838. The court of appeals can hardly be faulted for conducting an as-applied analysis based on the facts of Scruggs' case.

More importantly, United States Supreme Court precedent does not require this court to examine, when determining whether the statute violates ex post facto as applied to Scruggs, whether the amended surcharge statute is punitive as applied to defendants convicted of multiple offenses.

One of the cases cited in *Weaver* for the proposition that the ex post facto inquiry "looks to the challenged provision and not to any special circumstances that may mitigate its effect on the particular individual" is *Lindsey*. *See Weaver*, 450 U.S. at 33. In *Lindsey*, the maximum sentence for the offense when the defendant committed the crime was fifteen years. *See Lindsey*, 301 U.S. at 398. Before the defendant was sentenced, however, the statute had been amended to impose a mandatory fifteen-year sentence. *See id*. at 400.

In the passage cited in *Weaver*, the *Lindsey* Court held that regardless of the sentence actually imposed, what is relevant for ex post facto purposes is the increase in the possible penalty. The Court held that "the ex post facto clause looks to the standard of punishment prescribed by a statute,

rather than to the sentence actually imposed. *Id*. at 401. "[A]n increase in the possible penalty is ex post facto regardless of the length of the sentence actually imposed, since the measure of punishment prescribed by the later statute is more severe than that of the earlier." *Id*., citations omitted.

In another of the cases cited in *Weaver*, *Dobbert v. Florida*, 432 U.S. 282 (1977), the Court explained what it meant by those statements in *Lindsay*. The defendant in *Dobbert* argued that changes in Florida's death penalty statute could not be retroactively applied to him. *See Dobbert*, 432 U.S. at 284. One of his challenges was to a portion of the statute that provided that anyone sentenced to life imprisonment must serve at least twenty-five years before becoming eligible for parole; the prior statute contained no such limitation. *See id*. at 298. The Court held that because the defendant had been sentenced to death, he could not bring an ex post facto challenge to a change in the law that had no effect on him. *See id*. at 298-301.

In reaching that conclusion, the Court contrasted Dobbert's case to *Lindsay*. The Court said that "*Lindsey* must be read . . . to mean that one is not barred from challenging a change in the penal code on ex post facto grounds simply because the sentence he received under the new law was not more onerous than that which he might have received under the old." *Id*. at 300. But, the Court held, "[i]t is one thing to find an ex post facto violation where under the new law a defendant must

receive a sentence which was under the old law only the maximum in a discretionary spectrum of length," the court held. *Id*. "[I]t would be quite another to do so in a case, such as this, where the change has had no effect on the defendant in the proceedings of which he complains." *Id*.

In this case, the amended DNA surcharge statute did not impose multiple DNA surcharges on Scruggs. On its face, the statute requires the imposition of a single $250 surcharge on a defendant who, like Scruggs, has been convicted of a single felony. *See* Wis. Stat. § 973.046(1r)(a). The change to the statute that imposes multiple surcharges on defendants who are convicted of multiple offenses "had no effect on the defendant in the proceedings of which [s]he complains." *Dobbert*, 432 U.S. at 300. The only question before this court, therefore, is whether imposing a single mandatory DNA surcharge on Scruggs is an ex post facto violation.

II. REQUIRING SCRUGGS TO PAY A SINGLE MANDATORY $250 DNA SURCHARGE DOES NOT VIOLATE THE FEDERAL OR STATE EX POST FACTO CLAUSES.

An ex post facto law is a law "which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at

the time when the act was committed." *State v. Thiel*, 188 Wis. 2d 695, 703, 524 N.W.2d 641 (1994). Scruggs argues that retroactively applying the change in the DNA surcharge statute violates ex post facto because the amended statute "increases the mandatory punishment for completed crimes." Scruggs's brief at 6.

In any challenge to law on ex post facto grounds, "the threshold question is whether the [law] is punitive." *City of South Milwaukee v. Kester*, 2013 WI App 50, ¶ 21, 347 Wis. 2d 334, 830 N.W.2d 710. The court employs a two-part "intent-effects" test to determine whether a law applied retroactively is punitive. *See id.*, ¶ 22; *Rachel,* 254 Wis. 2d 215, ¶ 38. First, the court looks at the legislature's intent in creating the law. *See Kester*, 347 Wis. 2d 334, ¶ 21. If the court finds that the intent was to impose punishment, the law is considered punitive and the inquiry ends there. *Id.* If the court finds that the intent was to impose a civil and nonpunitive regulatory scheme, it "must next determine whether the effects of the sanctions imposed by the law are 'so punitive . . . as to render them criminal.'" *Id.* (citation omitted).

The court of appeals correctly concluded that Scruggs has not demonstrated either that the legislature intended the mandatory DNA surcharge to be punishment or that the $250 surcharge she is required to pay has a punitive effect on her. Accordingly, this court should affirm the court of

appeals' decision rejecting Scruggs' ex post facto claim.[4]

A. Standard of review.

The constitutionality of a statute presents a question of law that this court reviews de novo. *State v. Cole*, 2003 WI 112, ¶ 10, 264 Wis. 2d 520, 665 N.W.2d 328.

A party challenging the constitutionality of a statute "bears a heavy burden." *State v. Smith*, 2010 WI 16, ¶ 8, 323 Wis. 2d 377, 780 N.W.2d 90. "It is insufficient for the party challenging the statute to merely establish either that the statute's constitutionality is doubtful or that the statute is probably unconstitutional." *Id.* "Instead, the party challenging a statute's constitutionality must 'prove that the statute is unconstitutional beyond a reasonable doubt.'" *Id*. (quoted source omitted). "The burden of proof that challengers face, beyond a reasonable doubt, is the same in both facial and as

[4] Scruggs does not argue that she enjoys greater protection under the Ex Post Facto Clause of the Wisconsin Constitution, Wis. Const. art. I, § 12, than under its federal counterpart. She acknowledges that this court construes the State provision similarly to the federal provision. *See* Scruggs' brief at 5; *see also Thiel*, 188 Wis. 2d at 699 ("We have long looked to the pronouncements of the United States Supreme Court in construing the Ex Post Facto Clause of the Federal Constitution as a guide to construing the Ex Post Facto Clause of the Wisconsin Constitution.") (footnote omitted).

applied constitutional challenges." *Appling v. Walker*, 2014 WI 96, ¶ 17 n.21, 358 Wis. 2d 132, 853 N.W.2d 888.

B. Scruggs has not shown that the legislature intended the DNA surcharge be a punishment.

Scruggs argues that the text of the amended statute and its legislative history demonstrate that the legislature intended the mandatory DNA surcharge as a criminal penalty. *See* Scruggs' brief at 8. The court of appeals rejected that argument, *see Scruggs*, 365 Wis. 2d 568, ¶¶ 10-18, Pet-Ap. 106-10, and rightly so.

As the court of appeals observed, the 2014 amendment that made the DNA surcharge mandatory "was part of a larger initiative by the State to expand the collection of DNA samples." *See id*. ¶ 10, Pet-Ap. 107 (citing 2013 Wis. Act 20, §§ 2354, 2355, 2356; Legislative Fiscal Bureau, Paper #410, DNA Collection at Arrest and the DNA Analysis Surcharge 2-8 (May 23, 2013)) ("LFB #410").[5] The legislature's intent in making the statutory changes, the court found, was "a desire to expand the State's DNA data bank and to offset the cost of that expansion, rather than a punitive intent." *Id*., Pet-Ap. 107.

[5]The LFB memorandum is included in the appendix to this brief. (R-Ap. 101-19.)

The court of appeals observed that "[s]ince its introduction into the courtroom, DNA evidence has been a powerful tool in not only identifying criminal perpetrators but also in exonerating innocent persons, and the 2014 Amendment reflects the State's desire to facilitate those purposes through a larger pool of DNA specimens." *Id*. ¶ 10; Pet-Ap. 107 (citing LFB #410 at 8). "[T]o offset the increased burden on the Department of Justice (DOJ) in collecting, analyzing, and maintaining the additional DNA samples, the legislature imposed the $250 surcharge on felony convictions to be deposited with the DOJ to pay for operating its DNA data bank." *Id*. ¶ 11 (citing Wis. Stat. §§ 165.77, 973.046(3); LFB #410 at 2-3). The court noted that under Wis. Stat. § 973.046(3), "[a]ll moneys collected from deoxyribonucleic acid analysis surcharges shall be deposited by the secretary of administration as specified in s. 20.455(2)(Lm) and utilized under s. 165.77,"which is the DNA analysis and data bank statute. *Id*.

The DNA-related functions funded by the surcharge are not limited to those associated with the collection and analysis of a defendant's DNA sample. As the court of appeals observed, "[i]n addition to the initial collection of defendants' DNA specimens, the creation of DNA profiles and their entry into the data bank, Wis. Stat. § 165.77 requires DOJ to analyze DNA when requested by law enforcement agencies regarding an investigation; upon request by a defense attorney, pursuant to a

court order, regarding his or her client's specimen; and, subject to DOJ rules, at the request of an individual regarding his or her own specimen." *Id*. ¶ 12 (citing Wis. Stat. § 165.77(2)(a)1.), Pet-Ap. 107. "DOJ may compare the data obtained from a specimen with data obtained from other specimens and provide those results to prosecutors, defense attorneys, or the subject of the data." *Id*. (citing Wis. Stat. § 165.77(2)(a)2.), Pet-Ap. 107-08. In addition, "DOJ is required to maintain a data bank based on data obtained from its analysis of DNA specimens." *Id*. (citing Wis. Stat. § 165.77(3)), Pet-Ap. 108. The DNA surcharge funds all of those activities.

Based on the text of the statute and its legislative history, the court of appeals concluded that the fact that the DNA surcharge "is specifically dedicated to fund the collection and analysis of DNA samples and the storage of DNA profiles—all regulatory activities—evidences a nonpunitive cost-recovery intent." *Id*. ¶ 12, Pet. Ap. 108.

In support of her argument that the legislature intended the surcharge to be a new criminal penalty, Scruggs cites the description in the LFB memorandum of the expansion of the DNA collection program and the memorandum's estimate that the surcharge change would provide about $3.5 million in revenue during the 2014-15 fiscal year. *See* Scruggs's brief at 10-11. But she does not identify, nor has the State's examination revealed, any language in the LFB memorandum that suggests a punitive intent behind the surcharge. To the

contrary, as the court of appeals correctly observed, the memorandum explains that the increased revenue generated by the surcharge amendments would be used to fund the cost of expanding the DNA databank under other provisions of the new law. *See* LFB #410 at 13 (R-Ap. 113) ("The funding for this proposal would primarily come from an amended and expanded DNA surcharge."). The LFB memorandum supports the conclusion that the intent of the amendment to the surcharge statute was not punitive but to provide funds for an expanded DNA collection and analysis program and the resulting larger DNA databank.

Scruggs' claim that the legislature had a punitive intent focuses primarily on the cost of collecting and analyzing an individual defendant's DNA sample. *See* Scruggs' brief at 8 ("The plain text of the amended DNA surcharge statute reflects a punitive intent because the surcharge bears no relation to the actual DNA cost created by the defendant."). That argument overlooks the fact that, as the court of appeals explained, the DNA surcharge funds all of the DNA-related activities of the State Crime Lab, not just those activities related to the collection and analysis of an individual defendant's DNA.

Scruggs also argues that "[i]mposing a higher surcharge in felony cases also reflects punitive intent." Scruggs' brief at 9. "If the surcharge were actually intended to offset the costs of DNA testing," she contends, "there would be no reason to impose a higher surcharge in felony cases than misdemeanor cases." *Id*.

The court of appeals rejected that argument, for two reasons. First, it said, "this is an 'as applied' challenge, and as to Scruggs's single felony conviction, the $250 surcharge does not evidence a punitive intent." *Scruggs*, 365 Wis. 2d 568, ¶ 14, Pet-Ap. 108.

Second, the court said, "Scruggs has pointed to nothing, other than speculation, that the disparity between the surcharges on a conviction for a felony as compared to a misdemeanor reflects that the legislature was motivated by a punitive intent." *Id*., Pet-Ap. 108-09. "In any event, the legislature might have reasoned that because DNA evidence is more often used in prosecuting felony cases and, in turn, in subsequent law enforcement investigations, that those offenders should bear more of the cost of operating the DNA data bank." *Id*., Pet-Ap. 109. "Additionally," the court said, "even before the 2014 Amendment, when the imposition of a DNA surcharge for a felony conviction was left to the discretion of the sentencing court, the surcharge was still $250. Since there has been no change in the amount of the DNA surcharge on a felony conviction, it cannot be said the same surcharge now reflects that the legislature was motivated by a punitive intent." *Id*.

As noted in the previous section of this brief, Scruggs has challenged the court of appeals' treatment of her claim as an as-applied challenge. But she makes no attempt to respond to the remainder of court of appeals' analysis, which cogently refutes Scruggs' argument that the

difference between the felony and misdemeanor surcharges demonstrates a punitive intent; she simply ignores it. *See* Scruggs' brief at 9-10.

The court of appeals added that its conclusion "that the statute evidences a nonpunitive cost-recovery intent is bolstered by its language expressly denominating the fee assessed against felony offenders such as Scruggs as a 'surcharge,' a civil nonpunitive label, rather than as a 'fine' or 'penalty.'" *Scruggs*, 365 Wis. 2d 568, ¶ 17, Pet-Ap. 110. Scruggs argues that "[t]he fact that this penalty is called a 'DNA surcharge' does not control the outcome in this case." Scruggs' brief at 9. The court of appeals acknowledged that a nonpunitive label is not dispositive. *See Scruggs*, 365 Wis. 2d 568, ¶ 17, Pet-Ap. 110. But, it added, "[w]hile not dispositive, '[w]e give "great deference to such labels.'"" *Id*. (quoting *Radaj,* 363 Wis. 2d 633, ¶ 17). While Scruggs ignores the "great deference" that the court affords a nonpunitive label used by the legislature, this court should not.

Scruggs contends that the court should disregard the nonpunitive "surcharge" label because the surcharge "bears no relation to the DNA costs created by any particular defendant." Scruggs' brief at 9. But again, that argument ignores the fact that the surcharge funds all of the State Crime Lab's DNA-related functions, not just those related to the collection and analysis of an individual defendant's DNA.

The court of appeals further reasoned that "[t]he relatively small size of the surcharge also indicates that the fee applied here was not intended to be a punishment, but rather an administrative charge to pay for the collection of the sample from Scruggs, along with the expenditures needed to administer the DNA data bank." *Scruggs*, 365 Wis. 2d 568, ¶ 13, Pet-Ap. 108 The amount of the surcharge was rational, the court concluded, noting that it is consistent with the DNA fee charged in other jurisdictions and that "[t]he connection between the fee and the costs it is intended to cover 'need not be perfect to be rational.'" *Id.* (quoting *Radaj,* 363 Wis.2d 633, ¶ 30).

Scruggs counters that the amended DNA surcharge statute demonstrates a punitive intent because it imposes a separate surcharge for each conviction. *See* Scruggs' brief at 8-9. But even if the fact that multiple surcharges could be imposed on other defendants were relevant to Scruggs' challenge to the single surcharge imposed on her, an equally plausible inference about the legislature's intent is that the legislature was not seeking to punish offenders but to maximize the funding of the State Crime Lab's DNA operation.

It is Scruggs' burden to prove beyond a reasonable doubt that the statute is unconstitutional. *See Smith*, 323 Wis. 2d 377, ¶ 8. But Scruggs' speculation that the legislature intended the DNA surcharge to be punitive is not based on any evidence or facts in the record.

That omission is fatal to Scruggs' claim. In an action challenging on ex post facto grounds the annual fee imposed on registered sex offenders in Wisconsin, the Seventh Circuit held that the plaintiffs could not succeed without evidence that the fee was grossly disproportionate to the annual cost of keeping track of a registrant. *See Mueller v. Raemisch*, 740 F.3d 1128, 1134 (7th Cir. 2014). "The burden of proving that it is a fine is on the plaintiffs," the court said, "and since they have presented no evidence that it was intended as a fine, they cannot get to first base without evidence that it is grossly disproportionate to the annual cost of keeping track of a sex offender registrant—and they have presented no evidence of that either." *Id*.

In this case, the court of appeals concluded that "Scruggs has failed to carry her burden showing beyond a reasonable doubt that the legislature intended to punish her." *Scruggs*, 365 Wis. 2d 568, ¶ 18, Pet-Ap. 110. This court should reach the same conclusion.

C. Scruggs has not shown that imposing a $250 DNA surcharge had a punitive effect on her.

Scruggs argues that the mandatory DNA surcharge "is so punitive that even if it was intended to be a civil assessment it is a criminal penalty." Scruggs' brief at 12. But she does not argue that requiring her to pay a single $250 surcharge is punitive. Instead, she argues that applying the surcharge to individuals convicted of multiple

offenses amounts to a financial penalty. *See* Scruggs' brief at 9.

But in an as-applied challenge, the court assesses the merits of the challenge by considering the facts of the particular case, not hypothetical facts in other situations. *See Wood*, 323 Wis. 2d 321, ¶ 13. And, as discussed above, *see supra* at 12-13, even accepting Scruggs' contention that the punitive effect is evaluated by examining the statute on its face, the DNA surcharge statute, on its face, imposes only a single surcharge on someone like Scruggs who is convicted of a single offense.

Under the "effects" prong of the intent-effects test, the court determines "whether the sanctions imposed by [the statute] are 'so punitive in form and effect as to render them criminal' despite the legislature's intent to the contrary." *Rachel*, 254 Wis. 2d 215, ¶ 42, (quoted sources omitted). "In applying the second part of the test, [the court] afford[s] the legislative preference for the civil label great deference." *Id*. "Only with 'the clearest proof' will [the court] find that what has been denominated a civil remedy is, in actuality, a criminal penalty." *Id*.

In making that determination, a number of factors guide the analysis:

> (1) [w]hether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of *scienter;* (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; (5) whether the

> behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.

Rachel, 254 Wis. 2d 215, ¶ 33 (quoting *Hudson*, 522 U.S. at 99-100). Those factors provide "useful guideposts," *Hudson*, 522 U.S. at 99, and no factor is dispositive, *see Kester*, 347 Wis. 2d 334, ¶ 22 (citing *Smith v. Doe,* 538 U.S. 84, 97 (2003)).

In *Radaj*, the court of appeals said with respect to the imposition of multiple DNA surcharges that "it seems obvious that some of these non-exclusive factors cut in favor of Radaj and some factors cut in favor of the State." *Radaj*, 363 Wis. 2d 633, ¶ 23. "For example," the court noted, "under the fifth factor, the DNA surcharge applies to behavior that is already a crime, suggesting that the surcharge has the effect of punishing criminal behavior." *Id*. "On the other hand, under the first factor, the surcharge does not punish by imposing an affirmative restraint." *Id.* The court said that in its view, "the factors with the clearest relevance here, and those that are most heavily disputed by the parties, are the fourth, sixth, and seventh factors." *Id*. ¶ 24.

Although Scruggs quotes the *Rachel* factors in her description of the intent-effects test, *see* Scruggs' brief at 6, she does not refer to them when she argues that the surcharge has a punitive effect, *see id.* at 12-17. Instead, she argues that the surcharge has a punitive effect because "it is not merely intended to compensate for the DNA costs created by a particular defendant." *Id*. at 12. That is so, she

contends, because "the surcharge is collected in every case, for every conviction, regardless of whether DNA is collected or analyzed." *Id*. at 13.

Scruggs' logic is flawed. She is arguing that the surcharge has a punitive effect because it has a punitive intent. But she does not explain why a statute enacted with punitive intent necessarily has a punitive effect. Nor does she explain why the fact that the surcharge is collected regardless of whether DNA is collected or analyzed in that case means that the surcharge is punitive. As the State explained in its discussion of the statute's intent, the surcharge pays for all of the State Crime Lab's DNA-related activities, not just those associated with a particular defendant.

Scruggs further argues that "[t]he amended surcharge is also punitive in effect because if the surcharge were actually intended to compensate the State for the costs of DNA analysis, there would be no reason to distinguish between felonies and misdemeanors." Scruggs' brief at 14. Again, Scruggs is arguing that the surcharge has a punitive effect because it has a punitive intent.

When determining whether the DNA surcharge is unconstitutional, "the burden is on [Scruggs] to show by the 'clearest proof' that there is no rational connection between the method of calculating the surcharge and the costs the surcharge is intended to fund." *Radaj*, 363 Wis. 2d 633, ¶ 34. Scruggs has not met that burden because she has not attempted to present any evidence showing that the $250 surcharge imposed on her is not rationally

related to the State's DNA-related costs under Wis. Stat. § 165.77.

III. CASE LAW FROM OTHER JURISDICTIONS SUPPORTS THE CONCLUSION THAT THE DNA SURCHARGE IS NOT PUNITIVE.

In determining whether Wisconsin's DNA surcharge is punitive, decisions from other jurisdictions provide guidance because "[a]ll 50 states and the federal government have adopted DNA collection and data bank storage statutes that, although not identical, are similar to the one in Wisconsin." *Green v. Berge*, 354 F.3d 675, 676 (7th Cir. 2004). At least four jurisdictions, including the Fourth Circuit Court of Appeals, have held that a DNA fee or surcharge is not punitive and that imposing the fee on defendants who committed an offense before the fee's effective date is not an ex post facto violation. *See In re DNA Ex Post Facto Issues*, 561 F.3d 294, 299-300 (4th Cir. 2009); *People v. Higgins*, 13 N.E.3d 169, ¶¶ 16-20 (Ill. App. Ct. June 19, 2014) (retroactive application of $50 increase in DNA analysis fee not an ex post facto violation because the fee is not punishment); *Commonwealth v. Derk*, 895 A.2d 622, 625-30 (Pa. Super. Ct. 2006) (requiring convicted defendant to provide a DNA sample and pay DNA cost is not punitive); *State v. Thompson*, 223 P.3d 1165, 1171 (Wash. Ct. App. 2009) (because DNA fee is not punitive, it is not an ex post facto violation to apply new version of statute that makes imposition of the fee mandatory).

In the Fourth Circuit case, a prisoner challenged on ex post facto grounds a South Carolina law requiring that certain prisoners provide DNA samples for South Carolina's DNA bank and pay a $250 processing fee. *In re DNA Ex Post Facto Issues*, 561 F.3d at 297. The Fourth Circuit first held that the requirement that a prisoner provide a DNA sample was not punitive because its purpose was to allow the State Law Enforcement Division (SLED) to compile the state DNA database by developing DNA profiles on samples for law enforcement and other purposes. *Id*. at 299.

The court then held that "[t]he requirement that those providing the samples pay a $250 processing fee also is not punitive in nature." *Id*. at 299-300. It noted that South Carolina law "expressly provided that the funds generated by the fees will be 'credited to [SLED] to offset the expenses SLED incurs in carrying out the provisions of this article.'" *Id*. at 300. The court further stated that "the relatively small size of the fee also indicates that it was not intended to have significant retributive or deterrent value." *Id*. "Thus," the court concluded, "the 'structure and design' of the statute demonstrate that the fee was intended to be an administrative charge to pay for the substantial expenditures that would be needed to implement, operate, and maintain the DNA database." *Id*.

The Fourth Circuit's reasoning applies with equal force here. As in South Carolina, the funds collected as a DNA surcharge in Wisconsin are used exclusively to support the operation of the state's DNA data bank. Under Wis. Stat. § 973.046(3), "[a]ll

moneys collected from deoxyribonucleic acid analysis surcharges shall be deposited by the secretary of administration as specified in s. 20.455(2)(Lm) and utilized under s. 165.77." Section 165.77, in turn, is the DNA analysis and data bank statute. Wisconsin's DNA surcharge is thus related to the collection and analysis of DNA samples and the storage of DNA profiles – that is the only use for the surcharge.

Moreover, as in South Carolina, the relatively small size of the fee – $250 for a felony conviction, *see* Wis. Stat. § 973.046(1r)(a) – "also indicates that it was not intended to have significant retributive or deterrent value." *In re DNA Ex Post Facto Issues*, 561 F.3d at 300. Scruggs faced a possible fine of $25,000 on the burglary charge pursuant to Wis. Stat. § 939.50(3)(f). (2:1.) The fact that the DNA surcharge is just one percent of the potential fine further demonstrates that the surcharge was not intended to have retributive or deterrent value.

In two jurisdictions, California and New York, courts have held that applying a DNA fee to defendants who committed their offense before the enactment of the fee statute was an ex post facto violation. However, those decisions do not support Scruggs's claim that applying Wisconsin's mandatory DNA surcharge to her is an ex post facto violation.

California's statute, unlike Wisconsin's, expressly describes the DNA assessment as "an additional penalty." *See People v. Batman*, 71 Cal.

Rptr. 3d 591, 593 (Cal. Ct. App. 2008). The statutory language itself, therefore, indicates a punitive intent.

New York's intermediate appellate court has held that the DNA databank fee could not be applied to crimes committed before the effective date of the legislation imposing that fee. *See*, *e.g.*, *People v. Diggs*, 900 N.Y.S.2d 918, 919 (N.Y. App. Div. 2010); *People v. Hill*, 807 N.Y.S.2d 310, 310 (N.Y. App. Div. 2006). But it did so without any analysis and simply accepted the state's concession that the fee should not be applied. *See id.* Moreover, that court subsequently questioned the correctness of that concession based on a later decision by the New York Court of Appeals in *People v. Guerrero*, 904 N.E.2d 823 (N.Y. 2009), a case involving other criminal surcharges and fees. *See People v. Foster*, 927 N.Y.S.2d 92 (N.Y. App. Div. 2011). The *Foster* court said that *Guerrero* "has now cast doubt upon the determination that the retroactive imposition of the various fees and surcharges mandated by [the statute] represents an unconstitutional ex post facto penalty" because, "[a]s *Guerrero* highlights, the Legislature intended the various surcharges and fees authorized by [the statute] to be revenue-generating measures rather than punishment." *Id*. at 99.

Scruggs cites a number of cases from other jurisdictions in which, she says, "similar financial penalties" have been found to be an ex post facto violation. *See* Scruggs' brief at 15. But she does not explain why those "financial penalties" are similar to Wisconsin's DNA surcharge. Many of the cases she cites involve restitution. *See id. O*ther courts, including the Seventh Circuit, have held that

restitution is not punishment for ex post facto purposes. *See United States v. Newman*, 144 F.3d 531, 538 (7th Cir. 1998) ("Newman's ex post facto claim falters on this ground because we do not believe that restitution qualifies as a criminal punishment."); *United States v. Crawford*, 115 F.3d 1397, 1403 (8th Cir. 1997) ("restitution is not 'punishment' within the meaning of the *ex post facto* clause"); *United States v. Hampshire*, 95 F.3d 999, 1006 (10th Cir. 1996) (same).

Some of the cases Scruggs cites are not even arguably comparable to the DNA surcharge, as they involve statutes that expressly impose fines. *See People v. Rayburn*, 630 N.E.2d 533, 538 (1994) ("fine for the Family Abuse Fund"); *State v. Theriot*, 782 So. 2d 1078, 1086 (La. Ct. App. 2001) ("In 1997 the law changed to provide for a mandatory fine as follows, 'and shall be fined two thousand dollars.'"). It would be difficult to argue that a legislature did not intend something that it labeled as a "fine" to be punitive. And Scruggs' citation of the Illinois Court of Appeals' decision in *Rayburn* to support her argument is particularly misplaced, as that court recently held that the retroactive application of an increase in Illinois' DNA analysis fee was not an ex post facto violation. *See Higgins*, 13 N.E.3d 169, ¶¶ 16-20.

None of these cases is controlling, of course. But of the six jurisdictions that have addressed whether the retroactive application of a DNA surcharge was an ex post facto violation, four have held that it was not. In one of the two jurisdictions that reached the opposite conclusion, California, the statute described the DNA assessment as "an

additional penalty," which Wisconsin's statute does not do. And in the other of those two jurisdiction, New York, the intermediate appellate court has said that its conclusion has been called into doubt by a subsequent decision of that state's highest court. As a majority of other courts have done, this court conclude that applying the mandatory DNA surcharge to Scruggs is not an ex post facto violation.

CONCLUSION

For the reasons stated above, the court should affirm the decision of the court of appeals affirming the judgment of conviction and the order denying postconviction relief.

Dated this 25th day of April, 2016.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,382 words.

_____

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

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. § (Rule) 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 25th day of April, 2016.

_____

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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2014AP2981-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TABITHA A. SCRUGGS,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE RACINE COUNTY CIRCUIT COURT, THE HONORABLE ALLAN B. TORHORST, PRESIDING

SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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APPENDIX CERTIFICATION

I hereby certify pursuant to Wis. Stat. § (Rule) 809.19(3)(b) 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.

Dated this 25th day of April, 2016.

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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix that complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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Jeffrey J. Kassel
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TABITHA A. SCRUGGS,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District II, Affirming a Judgment of Conviction Entered in the Racine County Circuit Court, the Honorable Allan Torhorst, Presiding.

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I. The Mandatory DNA Surcharge Is an Unconstitutional *Ex Post Facto* Law When Applied Retroactively, So the Mandatory Surcharge In This Case Should Be Vacated.

A. This court must examine the mandatory DNA surcharge statute on its face to determine whether retroactive application violates *ex post facto*.

This court must decide whether the mandatory DNA surcharge is punitive by examining the text of the statute on its face. ***Weaver v. Graham***, 450 U.S. 24, 33 (1981). It does not matter how many surcharges Ms. Scruggs was ordered to pay. The question is simply whether the mandatory DNA surcharge is punitive, regardless of "any special circumstances that may mitigate its effect on a particular individual". ***Id.***

The State claims that Ms. Scruggs has not preserved this argument, and that her argument in the court of appeals was only an "as applied" challenge to the imposition of a single surcharge. (Respondent's Brief at 10). This is plainly not the case. Ms. Scruggs' initial brief to the court of appeals argued that the court "should vacate the DNA surcharge in this case and hold that the surcharge violates ex post facto *when applied to offenses committed before January 1, 2014*." (Appellant's Court of Appeals Brief at 5). Thus, Ms. Scruggs' argument can be characterized as an "as applied" challenge only insofar as it only seeks to bar *retroactive* application of the statute.

Ex post facto challenges are unusual because the phrases "as applied" and "facial" both apply. All *ex post facto* arguments are inherently "as applied" because they only seek to bar *retroactive* application of a statute; the challenge has no effect on *prospective* application of the statute. But an *ex post facto* challenge is also a "facial" challenge because the court must examine the statute on its face. ***Weaver***, 450 U.S. at 33; ***Hudson v. United States***, 522 U.S. 93, 101 (1997). Thus, in this case, the court must decide whether the DNA surcharge statute, when applied retroactively, violates *ex post facto*.

Even if this court believes Ms. Scruggs has not preserved an argument that the DNA surcharge statute must be examined on its face, Supreme Court precedent is clear that this is how an *ex post facto* challenge is resolved. ***Id.*** There is no basis for this court to misapply that precedent, and review this statute on an "as applied" basis.

The State points to one case, ***Dobbert v. Florida***, 432 U.S. 282 (1977), to support its claim that an *ex post facto* challenge can be based on the penalty imposed on a particular defendant. There, the defendant committed a capital felony and was sentenced to death. ***Id.*** at 284-87. While the defendant's case was pending in the trial court, a new statute was enacted, providing that "anyone sentenced to life imprisonment must serve at least 25 years before becoming eligible for parole." ***Id.*** at 298. At the time of the offense, the statute did not include that limitation. ***Id.*** The defendant argued that this change violated *ex post facto*. The Court identified the obvious flaw in the defendant's argument: he had been sentenced to death, so the new parole eligibility statute had no effect on him or his sentence. ***Id.*** Therefore, the Court denied his challenge. ***Id.*** at 299-300.

Dobbert in no way limited the requirement that a reviewing court examine the face of the statute when resolving an *ex post facto* challenge. It simply pointed out the obvious: a defendant cannot raise an *ex post facto* challenge to a penalty that does not apply to him in the first place. ***Dobbert*** might be analogous to this case if Ms. Scruggs were challenging the DNA surcharge in this case, even after the court decided to waive the surcharge. But that is plainly not the case. Ms. Scruggs is challenging a statute that has undeniably been applied to her case retroactively. Therefore, this court should adhere to longstanding precedent and decide whether the mandatory DNA surcharge statute is punitive in intent or effect based on the text of the statute, not based on the number of surcharges imposed.

B. The mandatory DNA surcharge is punitive in intent.

The plain text of the amended DNA surcharge statute reflects a punitive intent because the surcharge bears no relation to the actual DNA costs created by the defendant. A defendant pays as many surcharges as there are convictions, regardless of DNA cost incurred by the State. The State emphasizes that the mandatory surcharge is non-punitive because it will be used to fund many activities related to DNA collection and analysis, not simply collecting DNA from convicts. (Respondent's Brief at 17-18, 19, 21). Ms. Scruggs does not dispute that the surcharge funds a range of DNA-related activities. The problem is how the State has chosen to pay for these activities. Instead of making a person pay a fee proportional to the DNA cost her or she creates, the legislature has tethered DNA cost to whether a person has been convicted of a misdemeanor or felony, and how many convictions there are.

A surcharge that is imposed without a rational relationship to the costs created by the defendant is punitive. *See* ***Mueller v. Raemisch***, 740 F.3d 1128, 1133 (7th Cir. 2014); ***State v. Radaj***, 2015 WI App 50, ¶¶ 25, 29, 363 Wis. 2d 633, 866 N.W.2d 758. And that is precisely what the State has done here. The mandatory DNA surcharge is an unlimited fine, requiring as many surcharges as there are convictions, without any regard for whether any DNA testing was involved in the defendant's case. Two defendants, both convicted of one felony are charged $250, even though one case may involve substantial DNA testing, while the other requires none. The irrational structure of this surcharge reflects punitive intent.

As Ms. Scruggs noted in her initial brief, it is not difficult to imagine a non-punitive scheme, where the government is simply recovering the money it spent on DNA analysis in a particular defendant's case. The government could impose a DNA surcharge when a DNA sample is taken, or in any case involving DNA testing. The government could even require a higher fee in cases involving a certain amount of DNA testing. This would then be supplemented by Wis. Stat. § 974.07(12), which already requires defendants to pay the costs of postconviction DNA testing. Taken together, these provisions would rationally relate the amount a defendant pays in DNA surcharges to the amount of DNA cost he or she creates. The surcharge may not perfectly reflect DNA cost, but it would not need to. ***Radaj***, 2015 WI App 50, ¶ 30 (a surcharge and the costs it is intended to cover need not be perfect to be rational"). Such a scheme would still be non-punitive by rationally connecting the surcharge the defendant pays to the costs the defendant creates.

Instead, the government has created a system that simply punishes more severe offenders more harshly. The

person with more convictions is punished more harshly than the person with fewer convictions, and the felon is punished more severely than the misdemeanant. By correlating the severity of the surcharge to the severity of the convictions in this way, the statute reveals punitive intent. *See* ***People v. Batman***, 71 Cal. Rptr. 3d 591 (2008); ***People v. Stead***, 845 P.2d 1156, 1160 (Colo. 1993).[1]

Requiring convicts to pay as many surcharges as there are convictions, without any consideration of whether they created a DNA cost is simply punitive. The surcharge does not rationally reflect the DNA cost created by any particular defendant. Therefore, retroactive application of the mandatory DNA surcharge violates *ex post facto*.

C. The mandatory DNA surcharge is punitive in effect.

Even if the legislature did not intend the new DNA surcharge to be punitive, it is so punitive in effect that it must be deemed a penalty. As noted above, the court must assess the punitive effect of the statute on its face, not by looking to circumstances "that may mitigate its effect on the particular individual." ***Weaver***, 450 U.S. at 33. Thus, it is irrelevant that Ms. Scruggs has only been ordered to pay one DNA surcharge. The question is whether a per-conviction surcharge of $200 or $250 is punitive in effect.

The court of appeals' opinion in ***Radaj*** convincingly sets forth why the surcharge is punitive. It observed that when assessing punitive effect, the court should examine "whether there is a rational connection between the amount of the fee

[1] The State made no argument refuting Ms. Scruggs' point that placement of the surcharge among the criminal sentencing statutes, rather than the non-punitive costs/surcharge statutes, reflects punitive intent.

and the non-punitive activities that the fee is intended to fund, or if instead the amount of the fee is excessive in relation to that purpose." 2015 WI App 50, ¶ 25. Because there was no rational basis to conclude that DNA cost increases with the number of convictions—let alone in perfect correlation to the number of convictions—the court found the statute unconstitutional. ***Id.***, ¶ 29. For this scheme to be non-punitive, "there must be some reason why the cost of the DNA-analysis related activities . . . increases with the number of convictions." ***Id.***, ¶ 30. The court aptly noted that no such reason exists. The surcharge is simply imposed for every conviction without *any* consideration of what DNA cost the defendant created.

The surcharge is punitive because defendants are required to pay an unlimited number of DNA surcharges, even when they create no DNA cost. A defendant convicted of ten felonies must pay a $2500 surcharge, even in a case involving no DNA testing. This irrational apportionment of DNA cost results in arbitrary punishment of defendants, rather than a legitimate scheme to recoup DNA costs created by a defendant. Therefore, the DNA surcharge is also punitive in effect.

D. The cases cited by the State from other jurisdictions are distinguishable because their DNA fees are much more limited than Wisconsin's new surcharge.

The State suggests that if this court finds the mandatory surcharge to be punitive, it would be going against the trend in other states, finding their own DNA surcharges to be non-punitive. (Respondent's Brief at 27-32). But the State fails to acknowledge that Wisconsin's new DNA surcharge statute is significantly more expansive than those in other

jurisdictions. The breadth of Wisconsin's mandatory surcharge makes it unlike any of the other jurisdictions cited by the State.

In South Carolina, a defendant only pays one DNA surcharge when he or she provides a DNA sample. ***In re DNA Ex Post Facto Issues***, 561 F.3d 194, 297 (4th Cir. 2009). Thus, unlike Wisconsin, a defendant only pays a DNA surcharge when he or she creates a DNA cost. The fee is clearly related to the cost it is supposed to cover, and can rationally be characterized as a cost-recovery measure.

The same is true in Illinois. Defendants there are only required to provide one DNA sample, and then pay one DNA surcharge in connection with that sample. ***People v. Marshall***, 950 N.E.2d 668, 679 (Ill. 2011). Thus, unlike Wisconsin, there is not an endless stream of DNA surcharges. Illinois' surcharge, which only requires payment when a defendant creates a DNA cost, can easily be characterized as non-punitive. ***People v. Higgins***, 13 N.E.3d 169 (Ill. App. Ct. 2014).

Pennsylvania's DNA surcharge statute appears to authorize a $250 DNA surcharge for every case involving a felony conviction. 44 Pa. Cons. Stat. §§ 2303 and 2322. However, like South Carolina and Illinois, the courts seem to interpret the statute to authorize a surcharge only when the defendant provides a DNA sample. *See* ***In re C.M.***, No. 1917 MDA 2013, 2014 WL 10844418, at *1 (Pa. Super. Aug. 19, 2014) (the defendant was required to "submit a buccal sample for DNA testing (and pay the associated cost of $250.00")); ***Commonwealth v. Bucano***, No. 2292 EDA 2015, 2016 WL 1408019, at *6 (Pa. Super. Apr. 11, 2016) (the defendant was required to provide a DNA sample "and pay the $250.00 fee associated with this requirement"). At the very least, the

Pennsylvania courts only require one surcharge per case, rather than one for each conviction. *See* ***Commonwealth v. Everett***, No. 2046 WDA 2014, 2016 WL 1615523 (Pa. Super. Apr. 21, 2016).

Washington is the only other State that clearly allows a surcharge even when a defendant does not provide a DNA sample. ***State v. Thornton***, 353 P.3d 642 (Wash. Ct. App. 2015). But even Washington does not require a surcharge for each *conviction*. ***State v. Stoddard***, 366 P.3d 474 (Wash. Ct. App. 2016) (defendant required to pay one DNA surcharge despite multiple convictions qualifying for the surcharge under Wash. Rev. Code. § 43.43.7541). Moreover, Washington only collects surcharges in felony cases and certain sex-related offenses, and its surcharge is only $100, compared with $200 or $250 in Wisconsin. Wash. Rev. Code. §§ 43.43.7541, 754(1).

The cases cited by the State are unpersuasive because none addressed a DNA surcharge nearly as expansive as Wisconsin's. A more analogous out-of-state comparison comes from Colorado, in ***People v. Stead***, 845 P.2d 1156 (Colo. 1993). There, the defendant was convicted of possession with intent to deliver marijuana, and he was ordered to pay a $1000 drug offender surcharge. ***Id.*** at 1157-58. The surcharge, which was enacted after the offense, was intended to pay costs "associated with substance abuse assessment, testing, education, and treatment in Colorado." ***Id.*** at 1158. The Colorado Supreme Court found that the surcharge was punitive, pointing out that it was part of the criminal code, it was only imposed after a criminal conviction, the amount of the fine was correlated to the degree of the offense (it increased from $500 to $3000 depending on the felony class), and the proceeds were used

for prevention and rehabilitation. ***Id.*** at 1160. Thus, the court held that retroactive application violated *ex post facto*.

This court should reach the same result concerning the DNA surcharge for largely the same reasons identified in ***Stead***. The mandatory DNA surcharge is found among the criminal sentencing statutes, it can only be imposed after a criminal conviction, and the fee imposed is based entirely on the severity of the offense and the number of convictions. The State is not simply trying to recoup the money it spent on DNA analysis in a particular defendant's case. If that was the goal, it could have more carefully tailored the surcharge to match DNA cost. Rather, this per-conviction surcharge is a fine. Therefore, this court should vacate the mandatory surcharge and remand so the circuit court can decide whether to impose a single discretionary surcharge.

CONCLUSION

For the reasons stated above and in her initial brief, Ms. Scruggs asks that this court reverse the court of appeals' decision, hold that retroactive application of the mandatory DNA surcharge violates *ex post facto*, and remand to the circuit court to decide whether to impose a discretionary surcharge under the version of Wis. Stat. § 973.046 that was in effect at the time of the offense.

Dated this 10th day of May, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,499 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 10th day of May, 2016.

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