STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2014AP2187-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross-Appellant,

v.

KYLE LEE MONAHAN,

Defendant-Appellant-Cross-Respondent.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND CROSS-APPEAL FROM AN ORDER GRANTING POSTCONVICTION RELIEF ENTERED IN THE LAFAYETTE COUNTY CIRCUIT COURT, THE HONORABLE WILLIAM D. JOHNSTON, PRESIDING

COMBINED BRIEF OF RESPONDENT AND CROSS-APPELLANT

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RESPONDENT'S BRIEF

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. Monahan's appeal may be resolved by applying well-established legal principles to the facts of this case.

STATEMENT OF THE CASE

Given the nature of the arguments raised in the appellant's brief of defendant-appellant-cross-respondent Kyle Lee Monahan, the State exercises its option not to present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a). The relevant facts and procedural history will be discussed in the argument section of this brief.

ARGUMENT

Monahan was convicted following a jury trial of homicide by intoxicated use of a motor vehicle (132:1). As Monahan correctly observes, *see* Monahan's brief at 13, the only issue at trial was whether Monahan or the woman killed in the crash, Rebecca Cushman, was the driver.

Monahan argues on appeal that the trial court erred when it excluded evidence of the vehicle's speed between the time it left the Leahy residence and its arrival in Shullsburg. That evidence, he contends, was relevant to the identity of the person who was driving after the car left Shullsburg following a brief stop. The crash occurred several minutes after the car left Shullsburg (101:Exhibits 114-117; 160:69-70).

The State agrees with Monahan that the trial court erred when it excluded the speed evidence as inadmissible other acts evidence. The vehicle's speed after it left the Leahy residence was not other acts evidence but part of the continuum of facts relevant to the crime. *See State v. Dukes*, 2007 WI App 175, ¶ 28, 303 Wis. 2d 208, 736 N.W.2d 515 ("Evidence is not 'other acts' evidence if it is part of the panorama of evidence needed to completely describe the crime that

occurred and is thereby inextricably intertwined with the crime.").

But while the trial court erred by excluding that evidence, Monahan is not entitled to a new trial because the error was harmless. Accordingly, the court should affirm the judgment of conviction.

I. STANDARD OF REVIEW.

A circuit court's erroneous exclusion of evidence is subject to the harmless error rule. *State v. Hunt*, 2014 WI 102, ¶¶ 21, 26, 360 Wis. 2d 576, 851 N.W.2d 434. Whether an error was harmless presents a question of law that an appellate court reviews de novo. *Id.*, ¶ 21.

"Harmless error analysis requires [the court] to look to the effect of the error on the jury's verdict." *Id.*, ¶ 26. For the error to be deemed harmless, the party that benefited from the error must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Id*. "Stated differently, the error is harmless if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *Id*. (quoted sources omitted).

II. THE EXCLUSION OF THE SPEED EVIDENCE WAS HARMLESS ERROR.

The State presented a compelling case that proved that Monahan was driving Rebecca Cushman's car when it crashed. That evidence included Monahan's statements in which he not only said that he was the driver but accurately described how the accident began, expert

testimony by a crash reconstructionist, evidence that the driver's seat was positioned farther back than it would have been had Ms. Cushman been driving, and the identification of Monahan's DNA in the center of the driver's side airbag. Given the strength of the State's case, it is clear beyond a reasonable doubt that the jury would have convicted Monahan even if it had heard the excluded evidence about the speed of the vehicle between the Leahy residence and Shullsburg.

Monahan's statements. In the hours after the crash, Monahan made many statements about who was driving the car. He told some people that he did not know or did not remember who the driver was (152:27, 44; 153:48). On at least five different occasions, though, Monahan said that he was the driver.

- The crash occurred around 8:00 p.m. (152:18). Shullsburg firefighter Tim Corley, who was one of the first to arrive at the scene, found Monahan in a cornfield (153:8-10). As EMTs attended to Monahan in the field, Corley knelt a couple of feet away (153:11). They asked Monahan how many people were in the car, and Monahan said that he did not know (153:12). After they asked him several times who was driving, Monahan responded, "I was driving, I guess" (*id.*).

- Deputy Paul Klang responded to the scene of the crash (152:65-66). Klang approached Monahan as Monahan was lying on an immobilization backboard by the side of the road (152:71) Klang testified that as he approached Monahan, he heard him say, "That is the last time I will drink and drive" (152:72). (As Monahan notes in his brief, *see* Monahan's brief at 3, an EMT testified

that Monahan said, "I fell asleep" and "I'll never drink again" (160:37-38).)

Klang asked Monahan who he was and Monahan gave his name (152:71). Klang then asked him if he was the driver and Monahan said that he did not remember (152:71). Monahan then asked if there was a female in the vehicle (*id.*). When Deputy Klang said yes, Monahan said, "I was probably driving, then" (*id.*).

▸ Deputy Michael Gorham also spoke to Monahan as Monahan was lying on the backboard (152:91). When he asked Monahan how many people were in the car, Monahan responded, "It depends who's asking" (152:91). Deputy Gorham explained that the fire department was asking because they were trying to identify the number of victims (*id.*). He again asked Monahan who the driver was, and Monahan responded, "I might have been, I guess" (*id.*).

Deputy Gorham then conferred with his sergeant, who directed Gorham to get a recorded statement (152:92). Gorham told Monahan that one of the firefighters had seen Monahan driving the car in Shullsburg just before the accident and said to Monahan, "so you were the driver" (152:92). Monahan responded, "Yeah, I guess" (*id.*). Deputy Gorham again asked, "You were?" and Monahan said, "Yeah" (*id.*).[1]

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[1]In his brief, Monahan states that Deputy Gorham "testified that he later interviewed firefighters and none had in fact seen Kyle driving the car out of Shullsburg." Monahan's brief at 6. In fact, Gorham testified that he had interviewed just two firefighters and neither of them had seen Monahan driving (152:98). Gorham testified that he did not continue his investigation into the identity of the firefighter because Monahan had admitted to being the driver (152:104). Deputy Gorham was firm in his testimony

Deputy Gorham asked Monahan how the crash had occurred (152:93). Gorham testified that Monahan responded, "My tires went off the side of the road and I believe it was I lost control" (*id.*). Gorham's recording of his conversation with Monahan, which was played for the jury (152:93), shows that Monahan said, "I just remember fuckin' my tires going off the [edge or ditch] and I could not correct it" (92:Exhibit12, at 01:00–01:04).

Monahan indicates that the bracketed word in his statement is either "ditch" or "edge." *See* Monahan's brief at 6. The State believes that the word is "edge" but agrees it might be "ditch." However, it makes no difference to the State's argument which word Monahan used. What is important is that Monahan said that *his* tires went off the road and that *he* could not correct it.

Monahan's statement to Deputy Gorham was compelling evidence because the recording was played for the jury (152:93). The jury was able to hear that Monahan, while clearly in pain, sounded alert and responded appropriately to the deputy's questions (92:Exhibit12, at 00:11–01:19).

Monahan's description of the how the crash occurred is significant because it was consistent with the testimony of both parties' crash reconstruction experts. The State's expert, Trooper Thomas Parrott, testified that skid marks indicated that at the beginning of the accident, the vehicle went just off the road onto the shoulder, came back on to the road, and began to spin counterclockwise (154:110). The defense expert, Paul Erdtmann, likewise testified at the beginning

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that a Shullsburg firefighter told Gorham at the scene that he saw a man driving the car (152:98-99, 104, 129-30).

of the accident the vehicle momentarily went off the edge of the roadway and began to rotate counterclockwise (160:74).

▸ Monahan was transported from the crash scene to a hospital by helicopter air ambulance (154:7-9). He was assessed by an air ambulance medic and nurse, who determined that he was "conscious, alert, and oriented times three and answers all questions appropriately" (154:10, 27). The nurse determined that Monahan's Glasgow score, which assesses a patient's level of neurological intactness, was at the highest possible score of fifteen (154:29-30).

Both the medic and the nurse testified that the report they prepared stated that Monahan said that he remembered the accident and appeared to have full recall of the incident (154:10-11, 27). Monahan told them that he was the driver of the vehicle (154:11, 27-28).

Monahan also said that he was wearing his seatbelt (*id*.). That statement conflicted with the testimony of the crash reconstruction experts, who testified that the seatbelts had not been in use (154:62; 160:65).

▸ Patricia Smith, a nurse who worked at the hospital's neuro/trauma unit, testified that the patient record she prepared for Monahan indicated that at 12:30 p.m., after he had undergone surgery, Monahan was alert (160:5, 9). His sedation was turned off to allow the staff to conduct a thorough neurological examination (160:9). Smith's report stated that Monahan "has remained calm while sedation has been off and is able to indicate that he understands his injuries and where he is" (*id*.) She testified that Monahan

was very calm and understood directions and that he was neurologically intact, with an understanding of what was going on in his surroundings (160:16).

Nurse Smith reported that Monahan asked for a pen and paper (160:9). (He was unable to speak because he was intubated with a breathing tube (160:10).) Smith's report stated that "[p]atient wrote that he remembered the accident, writing that he was going too fast over a hill and lost control of the vehicle" (160:9).

In all of the statements he made about the crash, Monahan only once denied that he was the driver. Trooper Ryan Zukowski testified that when he interviewed Monahan ten days after the crash, Monahan said that he had no idea who was driving (153:48). However, when Trooper Zukowski met with Monahan several months later to collect a DNA sample, Monahan said as he signed a consent form, "It doesn't matter, you know, I wasn't driving" (153:57-58).

Monahan spoke to Trooper Thomas Parrott in July, 2012, more than ten months after the crash (154:85). Parrott testified that Monahan said that the last thing he remembered was holding Ms. Cushman by the left hand, apparently referring to Monahan's left hand, but that Monahan never denied being the driver or said that Ms. Cushman was driving (154:96, 98-99). In response to Parrott's comment "there are a lot of times where I have the good guys make bad mistakes," Monahan said, "I just really can't . . . I don't know how to answer that because it just happened. It's not like I mean to it – to F'ing happen" (154:93-94).

Crash reconstruction evidence. The State's crash reconstruction expert was Trooper Parrott, a senior trooper assigned to the Technical Reconstruction Unit (154:42). Trooper Parrott is a certified crash reconstruction analyst who has more than twenty years of training and experience in crash reconstruction, has published papers on crash reconstruction, and is an instructor in crash reconstruction at the Wisconsin State Patrol Academy (98:Exhibit 77:1-18; 154:42-51).

Trooper Parrot examined the physical evidence from the scene, including tire marks, the damage to the vehicle, the topography of the roadway, the furrowing of the ground that occurred when the vehicle went off the road, and the location of debris, as well as speed information derived from GPS data, DNA evidence, and witness statements (154:42-136). Based on that information, Trooper Parrott reconstructed the sequence of events during the crash and concluded that Monahan was driving when the car crashed (*id.*).

Trooper Parrott testified that the window on the front passenger side of the car was open when the car crashed and that the driver's side front window was closed and remained intact (154:61). He calculated that the car was going between 87 and 98 miles an hour at the beginning of the crash (154:67).

The crash began, Parrott testified, when the car went off the right edge of the road, came back onto the roadway, and started to rotate counterclockwise (94:Exhibit 75:1-2; 154:66-67, 110). The car skidded across the roadway, went into a ditch, and bottomed out, furrowing the ground as it slid in the ditch (94:Exhibit 75:2-4;

154:66, 112). As the car slid sideways in the ditch, with the front end facing away from the road, it went airborne and began to tumble sideways (94:Exhibit 75:4; 154:66, 108-09). He characterized what occurred as "a high lateral roll-over type of crash" (154:75). The car then hit the ground and began an end-over-end rollover that continued until it tumbled to its final rest (154:114-15).

Trooper Parrott testified that as the vehicle went sideways in the ditch before rolling over, the occupants went from moving forward toward the dash to moving sideways toward the passenger side of the car (154:116-17). When the car hit the ground after it first went airborne, Trooper Parrott testified, the occupants "move[d] forcibly towards the passenger side" (154:118).

Parrott testified that, in general, "those occupants that are closest to the leading edge of the vehicle as it rolls will be the first to come out" and that "[t]he leading edge in this case was the passenger's side of the car" (154:130). He also testified that Ms. Cushman was found beyond the point where the car first went airborne and that the car continued past her, indicating that she came out first (154:131-32, 134). Monahan was found beyond the car's final resting place, which indicated that he was the last person out of the car (*id.*).

The condition of the clothing worn by Monahan and Ms. Cushman was part of evidence that led Trooper Parrott to conclude that Ms. Cushman was in the passenger seat. The furrowing of the car in the ditch caused dirt to enter the passenger side of the car (154:117). Parrott testified that Ms. Cushman's clothing had a "great deal of dirt on them" (154:122) and that

Monahan's clothing had "dramatic[ally]" less dirt on them than Ms. Cushman's clothing (154:128).

Trooper Parrott also testified that he saw a pattern of dots of the brake pedal in photographs taken by Trooper Zukowski at the scene (153:42-43) that was more consistent with the pattern on the athletic shoes that Monahan was wearing than the smooth-soled sandals that Ms. Cushman was wearing (154:80-83). He based that opinion on his general training and experience and acknowledged that he had no specialized training and could not render an expert opinion on the identification of an individual sole (154:83). He also acknowledged that a State Crime Lab analyst found that "the condition of the pedals at the time they received them" did not allow the analyst "to evaluate the footwear versus the pedal up to their standards" (154:84).

Trooper Parrott testified that based on all the information available to him, it was not possible for the driver of the car to have been ejected first (154:135-36). He opined that Monahan was the driver (154:136).

The defense crash reconstruction expert, Paul Erdtmann, has a master's degree in mechanical engineering and a background in airbag design and has worked for eight years for an engineering company doing primarily accident reconstruction work (160:53-56). Mr. Erdtmann based his reconstruction on evidence collected by law enforcement after the crash, his inspection of the crash site two years later, and occupant testing using models and a vehicle comparable to the crashed vehicle (160:57-59, 110).

Mr. Erdtmann testified that it was equally possible that Monahan and Ms. Cushman was the driver (160:95). His ultimate opinion was that it cannot be determined which of them was driving (160:135).

Mr. Erdtmann agreed with Trooper Parrott that Ms. Cushman was the first occupant to be ejected from the vehicle (160:94, 100, 113). He described the two scenarios under which it was possible for either Monahan or Ms. Cushman to have been the driver even though Ms. Cushman was ejected first (160:92-100). In the scenario in which Ms. Cushman was the driver, Erdtmann testified, she was ejected through the sunroof as the car rolled over (160:94).

Mr. Erdtmann testified that the front airbags deployed at the beginning of the car's furrowing in the ditch (160:121-22), before it began to roll over (160:76-78). He contended that even though the vehicle was traveling mostly sideways, there was sufficient front-to-rear deceleration when the vehicle was furrowing to cause the front airbags to deploy (160:121-23).

Called as a rebuttal witness, Trooper Parrott testified that airbag system modules do not "wake up, let alone deploy" until a vehicle experiences one to two G's of deceleration (155:89). He testified that the Cushman vehicle would not have experienced even one G prior to it striking the ground after rolling over end-to-end and that it was not possible for the airbag to have deployed when it went into the ditch and began furrowing (155:90). He testified that Ms. Cushman would have been ejected before the front airbags deployed (155:91).

Trooper Parrott's rebuttal testimony refuted Mr. Erdtmann's description of the scenario under which Erdtmann believed that Ms. Cushman could have been the driver. Monahan did not present any evidence to challenge Trooper Parrott's rebuttal testimony or otherwise rehabilitate Mr. Erdtmann's testimony.

In addition, Mr. Erdtmann acknowledged on cross-examination that witness statements are one source of information that may be considered when determining what happened in a crash (160:136-37). In this case, he testified, he gave no weight to any of the statements of the witnesses who stated that Monahan had said that he was the driver because those statements were inconsistent with Monahan's statement to Trooper Parrott (160:135-37). Erdtmann's wholesale disregard for Monahan's multiple statements that he was the driver further undermined his conclusion that either occupant could have been the driver.

Position of the seats. The position of the front seats in the crashed vehicle provided additional evidence that Monahan was the driver. The driver's seat was positioned four inches farther back than the front passenger seat (153:92). Trooper Zukowski, who also is a crash reconstruction specialist, testified that the seat position would not have changed on impact because the crash was so violent that there would not have been electrical power to move the electronically controlled seats (153:19, 95).

Trooper Zukowski also testified that larger people generally require the seat position to be more rearward and that smaller people generally have their seat more forward (153:96). Ms.

Cushman was about six inches shorter than Monahan – she was about five feet, six inches tall and Monahan is six feet to six feet, one inch tall (154:129-30). Ms. Cushman's mother testified that when Ms. Cushman was driving "[s]he would always have her seat as close up to the steering wheel as she possibly could" (155:115).

To counter the State's seat position evidence, Mr. Erdtmann obtained a car of the same make, model, and year as Rebecca Cushman's car, set up the seat and steering wheel positions in the same positions as Ms. Cushman's car, and had individuals who were about the same size and stature as Monahan and Ms. Cushman sit in the vehicle (160:82-86). Erdtmann testified that the woman was able to reach the steering wheel without leaning forward and that "her feet are comfortably in front of her, and she's able to reach both the brake pedal and the accelerator pedal" (160:88). Erdtmann also testified that the male model was able to sit comfortably in the passenger seat without his knees touching the glove box (160:89). He opined that the seat position did not exclude either of the occupants from being in the driver's seat or passenger seat (160:90).

But the photographs of Erdtmann's demonstration, which were shown to the jury (160:82), painted a different picture, particularly with respect to the driver's seat. The photos show that while the female model was able to reach the steering wheel and pedals, she had to extend her arms and legs to do so (101:Exhibits 152-156). That position was inconsistent with the testimony of Ms. Cushman's mother that Ms. Cushman kept her seat as close to the steering wheel as possible (155:115). And, her mother testified, the model in Erdtmann's reconstruction "is much farther back

than Rebecca would have been" (155:117). The defense did not present any evidence that contradicted Ms. Cushman's mother's testimony about Ms. Cushman's driving position.

DNA evidence. A DNA analyst from the State Crime Lab tested several items she received from the crashed vehicle as well as samples from Monahan and Ms. Cushman (153:147-49). The analyst was able to find testable biological material on only one item, the driver's side airbag (153:151-54). She testified that her analysis revealed a mixture of two individuals consisting of a major component and a minor component (153:154). Monahan was the source of the major component (153:154-55). The analysis of the minor component was inconclusive; the analyst was unable to include or exclude Ms. Cushman as the source of the minor component or determine whether the minor component came from a male or female (153:155).

Monahan's crash reconstruction expert, Mr. Erdtmann, testified that although the State Crime Lab could not identify the second contributor, he believed it likely was Ms. Cushman because she was the other person in the vehicle (160:80-81). On cross-examination, Erdtmann acknowledged that he had no training or experience in DNA analysis and that his opinion regarding the identity of the second contributor was "[t]o a reasonable degree of engineering certainty" rather than to a "DNA analysis certainty" (160:114, 116).

The defense evidence. In addition to his crash reconstruction expert, who could say only that he could not tell who the driver was (160:95, 135), Monahan put on several witnesses in an attempt to show that Ms. Cushman was driving at

the time of the crash. Their testimony fell far short of accomplishing that goal.

Linda Scott testified that Ms. Cushman was driving when Cushman and Monahan left the Leahy residence. But her testimony was undermined considerably by her description of the vehicle: she described it as "a small little sports car" (160:147, 148). In fact, Ms. Cushman's car was a 2001 Saab 9-5 station wagon (160:82). The jury was shown a picture of the intact 2001 Saab 9-5 station wagon that Mr. Erdtmann used in his demonstration (101:Exhibit 134; 160:82), and by no stretch of the English language could that station wagon be described as a "small little sports car."

Jason Scott testified that he remembered Monahan and Ms. Cushman leaving the party (160:157). He testified that Monahan and Cushman walked past him and exchanged greetings with him, that they walked to the vehicle, that she got in the driver's side, and that they drove off (*id*.).

Mr. Scott gave varying estimates of how far away Monahan and Ms. Cushman were when they got in the car. He first said that it was a hundred yards (160:160). When defense counsel observed that that was pretty far, Mr. Scott said, "let me take that back. I'm not good at distances. I want to say probably a hundred feet, a hundred, 200 feet something like that" (*id*.). He then testified the distance was that from the witness seat to the back of the courtroom (*id*.).

Mr. Scott's testimony not only was inconsistent with respect to how far away Monahan and Ms. Cushman were when he saw

them get in the car, it also conflicted with Monahan's testimony about what happened when he and Ms. Cushman left the Leahy residence. Monahan testified that at some point Ms. Cushman had wandered away from him and he went looking for her (155:40). Someone told him that she was sitting in her car (*id*.). He went to her and asked her what was going on and whether she was bored (155:40-41). She told him that she was tired and wanted to go (155:41). He said that they could go "[a]nd then I hopped in and we left" (*id*.).

Monahan testified that Ms. Cushman was driving when they left the Leahy residence (155:41). But he did not testify that she was driving when the car went off the road. Rather, he testified that he did not recall anything between the time they left the Leahy party and waking up in the hospital (155:41-42).

Monahan asserts that during closing argument, "the state argued that Mr. Monahan and Ms. Cushman must have switched positions after leaving the Leahy party during the two-minute stop in Shullsburg." Monahan's brief at 12. That is not correct. The State's theory was not that Monahan and Ms. Cushman switched positions in Shullsburg. The prosecutor made no mention of that scenario during her initial closing argument (156:23-48). Rather, the prosecutor only discussed a switched-position scenario in her rebuttal closing argument, when she responded to defense counsel's closing argument that the Scotts' testimony showed that Ms. Cushman was driving when she and Monahan left the Leahys' and that there was no evidence that they switched places (156:51-53).

The prosecutor argued that the Scotts' testimony that Ms. Cushman was driving was not credible (156:83-84). She then added that even if, for the sake of argument, those witnesses were correct, the evidence showed that there was a two-minute stop in Shullsburg and all of the evidence gathered after the crash showed that Monahan had been driving when the car crashed (156:84-85).

The State recognizes that the prosecutor, in her closing argument, argued that it made no sense for Ms. Cushman, who was unfamiliar with the area, to have been driving at speeds of forty to fifty miles an hour over the speed limit (156:32, 44-45). If the jury believed the Scotts' testimony that Ms. Cushman was driving when she and Monahan left the Leahy residence, evidence that the car was being driven very fast between the Leahys' and Shullsburg would have undercut the inference the prosecutor was asking the jury to draw. But, for the reasons just discussed, the Scotts' testimony had significant credibility problems.

More importantly, the prosecutor told the jurors that they did not "have to just rely on your common sense. We obviously had to put on evidence to meet our burden, and we did that" (156:32). The prosecutor then explained at length and in detail why the evidence, including the crash reconstruction evidence, the seat position evidence, the DNA evidence, and Monahan's own statements, satisfied the State's burden (156:32-48).

Given the strength of the State's case, it is clear beyond a reasonable doubt that the jury would have convicted Monahan even if it had

heard the excluded evidence about the speed of the vehicle between the Leahy residence and Shullsburg. This court should conclude, therefore, that the exclusion of the speed evidence was harmless error.

CONCLUSION

For the reasons stated above, the court should affirm the judgment of conviction.

Dated this 5th day of May, 2015.

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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 4,498 words.

_____
Jeffrey J. Kassel
Assistant Attorney General

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 5th day of May, 2015.

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Jeffrey J. Kassel
Assistant Attorney General

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CROSS-APPELLANT'S BRIEF

ISSUE PRESENTED

When defendant-appellant-cross-respondent Kyle Lee Monahan committed the offense of homicide by intoxicated use of a vehicle in 2011, imposition of the DNA surcharge for that offense was discretionary. The surcharge statute was later amended to make the imposition of the DNA surcharge mandatory for all felony offenses. When the court sentenced Monahan, it imposed the

mandatory surcharge that was in effect at the time of sentencing. Does applying the mandatory DNA surcharge to Monahan violate the federal and state constitutional prohibitions against ex post facto laws?

The circuit court held that imposition of the mandatory DNA surcharge violated the ex post facto clauses and granted Monahan's post-conviction motion to vacate the surcharge.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. If the court has not yet decided any of the other pending cases addressing the constitutionality of applying the mandatory DNA surcharge to individuals convicted of felonies committed before the mandatory surcharge's effective date, publication of the court's decision would be appropriate.[2]

STATEMENT OF THE CASE

Monahan was convicted of homicide by intoxicated use of a motor vehicle (132:1). When he committed the offense on August 20, 2011 (7:1), the imposition of a DNA surcharge was discretionary for that crime; 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

[2]The issue raised by the State's cross-appeal is also before the court of appeals in *State v. Gregory Mark Radaj*, case no. 2014AP2496-CR (submitted on briefs April 10, 2015), *State v. Gregory M. Radaj*, case no. 2015AP21-CR (awaiting assignment), and *State v. Tabitha A. Scruggs*, case no. 2014AP2981-CR (same).

N.W.2d 393. The legislature later 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); 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). As a result, when Monahan was sentenced on January 23, 2014, a $250 DNA surcharge was imposed (132:1;159:87; Cross-A-Ap. 109).

Monahan filed a postconviction motion to vacate the DNA surcharge, contending that the amended statute was an unconstitutional ex post facto law as applied to him (161:1-4). Following a nonevidentiary hearing, the circuit court ruled that the amended surcharge statute "works to make it more punitive for the defendant" and held that the amended statute violates the ex post facto clause as applied to Monahan (177:16-17; Cross-A-Ap. 107-108). The court then entered a written order granting Monahan's postconviction motion and directing that the judgment of conviction be amended to remove the surcharge (170:1; Cross-A-Ap. 101).

ARGUMENT

Monahan argued in his postconviction motion that the mandatory DNA surcharge imposed by Wis. Stat. § 973.046(1r)(a) (2013-14) is unconstitutional as applied to him (161:1-4). He contended that the surcharge violates the ex post facto clauses of the federal and state constitutions because it imposes punishment that was not applicable when she committed this offense (*id.*).

The circuit court agreed with Monahan's position and vacated the surcharge (170:1; 177:16-17; Cross-A-Ap. 101, 107-108).

The parties agree on one point. If the DNA surcharge is punitive, as Monahan claims, 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 State ex rel. Singh v. Kemper*, 2014 WI App 43, ¶¶ 11-13, 353 Wis. 2d 520, 846 N.W.2d 820. The question for this court, then, is whether the DNA surcharge is punitive. For the reasons discussed below, the court should conclude that it is not.

I. 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 statute enjoys a presumption of constitutionality. *State v. Smith*, 2010 WI 16, ¶ 8, 323 Wis. 2d 377, 780 N.W.2d 90. To overcome that presumption, the party challenging a statute's constitutionality "bears a heavy burden." *Id.* "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); *see also Singh*, 353 Wis. 2d 520, ¶ 9 (defendant "bears the burden of establishing a violation of the ex post facto clauses of the United States and

Wisconsin Constitutions"). "The burden of proof that challengers face, beyond a reasonable doubt, is the same in both facial and as applied constitutional challenges." *Appling v. Walker*, 2014 WI 96, ¶ 17 n.21, 358 Wis. 2d 132, 853 N.W.2d 888.

II. THE MANDATORY DNA SURCHARGE STATUTE DOES NOT VIOLATE THE EX POST FACTO CLAUSE AS APPLIED TO MONAHAN.

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). Monahan argued below that the change in the DNA surcharge is an ex post facto violation because it imposes a new criminal penalty (161:2-3).

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 answer whether a law applied retroactively is punitive. *See id.*, ¶ 22.

First, the court looks at the legislature's intent in creating the law. *See id.* 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 considers a number of non-dispositive factors in this part of the test. *See id.* "Only the 'clearest proof' will convince [the court] that what a legislative body has labeled a civil remedy is, in effect, a criminal penalty." *Id*. (citation omitted).

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) – "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. In this case, Monahan faced a possible fine of $100,000 on the Class D homicide charge (7:1). *See* Wis. Stat. § 939.50(3)(d) (2011-12). The fact that the DNA surcharge is just one quarter of one percent of the potential fine demonstrates that the surcharge is not punitive in intent or in effect.

There is scant legislative history for the statutory amendment that changed the felony DNA surcharge from discretionary to mandatory, but what legislative history there is supports the conclusion that there was no punitive intent behind the change. The statutory change was part of the 2013-15 biennial budget bill. *See* 2013 Wis. Act 20, §§ 2354, 2355. The Legislative Fiscal Bureau prepared a budget summary paper on the expansion of DNA collection and changes to the DNA surcharges made by the bill. *See* Legislative Fiscal Bureau, DNA Collection at Arrest and the DNA Analysis Surcharge (May 23, 2013) (Cross-A-Ap. 111-129) (available at http:// legis.wisconsin. gov/lfb/publications/budget/201315%20Budget/ Documents/Budget%20Papers/410 .pdf). The LFB budget paper estimated that the surcharge change would provide about $3.5 million in revenue during the 2014-15 fiscal year. *See id*. at 2 (Cross-A-Ap. 112). The budget paper 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 id.* at 13 (Cross-A-Ap. 123) ("The funding for this proposal would primarily come from an amended and expanded DNA surcharge.").

There is nothing in the LFB budget paper that suggests a punitive intent behind the DNA surcharge. *See id*. at 1-19 (Cross-A-Ap. 111-129). Rather, the budget paper supports the conclusion that the intent of the amendment to the surcharge statute is not punitive but to provide funds for an expanded DNA collection and analysis program and the resulting larger DNA databank.

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 Monahan's claim that applying Wisconsin's DNA surcharge to him 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. And while 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, it did so without any analysis and simply accepted the state's concession that the fee should not be applied. *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). New York's intermediate appellate court subsequently questioned the correctness of that concession based on a later decision by New York's highest court 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.

The conclusion that Wisconsin's DNA surcharge is not punitive is further supported by the Seventh Circuit's decision in *Mueller v. Raemisch*, 740 F.3d 1128 (7th Cir. 2014), which rejected an ex post facto challenge to Wisconsin's sex offender registration statute. One of the provisions at issue in *Mueller* was the $100 annual registration fee that the statute imposes on convicted sex offenders. *Id.* at 1130. The district court held that the fee was "a fine, which is a form of punishment and so cannot constitutionally be imposed on persons who committed their sex crimes before the fee provision was enacted." *Id.* at 1130.

The Seventh Circuit reversed. It agreed with the State that the fee was indeed a fee, not a fine. The court observed that "[b]y virtue of their sex offenses the plaintiffs have imposed on the State of Wisconsin the cost of obtaining and recording information about their whereabouts and other

circumstances. The $100 annual fee is imposed in virtue of that cost, though like most fees it doubtless bears only an approximate relation to the cost it is meant to offset." *Id*. at 1133. "A fine, in contrast, is a punishment for an unlawful act; it is a substitute deterrent for prison time and, like other punishments, a signal of social disapproval of unlawful behavior." *Id*.

The court acknowledged that "[l]abels don't control" and said that "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." *Id*. However, the court held, the challengers "presented no evidence that it was intended as a fine," nor had they shown that the fee was "grossly disproportionate to the annual cost of keeping track of a sex offender registrant." *Id*. at 1134. It found that there was no basis to conclude "that $100 is so high that it must be a fine." *Id*.

The Seventh Circuit concluded that the fee "is intended to compensate the state for the expense of maintaining the sex offender registry. The offenders are responsible for the expense, so there is nothing 'punitive' about making them pay for it. . . . The state provides a service to the law-abiding public by maintaining a sex offender registry, but there would be no service and hence no expense were there no sex offenders. As they are responsible for the expense, there is nothing punitive about requiring them to defray it." *Id*. at 1135 (citing, *inter alia*, *In re DNA Ex Post Facto Issues,* 561 F.3d at 299–300).

Raemisch demonstrates that a fee or surcharge is not punitive simply because it is imposed as a consequence of a criminal conviction. The fact that the DNA surcharge is included in the

sentencing statutes and is imposed when the court imposes a sentence or places a defendant on probation, *see* Wis. Stat. § 973.046(1r), does not make the surcharge punishment.

Monahan cannot carry his burden of proving beyond a reasonable doubt that the DNA surcharge is punitive. The court should conclude, therefore, that requiring him to pay the surcharge under the amended version of the statute is not an ex post facto violation.

CONCLUSION

For the reasons stated above, the court should reverse the postconviction order vacating the DNA surcharge.

Dated this 5th day of May, 2015.

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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 2,610 words.

_____
Jeffrey J. Kassel
Assistant Attorney General

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I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (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 5th day of May, 2015.

_____
Jeffrey J. Kassel
Assistant Attorney General

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2014AP2187-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross-Appellant,

v.

KYLE LEE MONAHAN,

Defendant-Appellant-Cross-Respondent.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND CROSS-APPEAL FROM AN ORDER GRANTING POSTCONVICTION RELIEF ENTERED IN THE LAFAYETTE COUNTY CIRCUIT COURT, THE HONORABLE WILLIAM D. JOHNSTON, PRESIDING

APPENDIX OF CROSS-APPELLANT

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INDEX TO APPENDIX

APPENDIX CERTIFICATION

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 s. 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 s. 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

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Jeffrey J. Kassel
Assistant Attorney General

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A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 5th day of May, 2015.

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