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

CROSS-APPELLANT'S REPLY BRIEF AND SUPPLEMENTAL APPENDIX

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CROSS-APPELLANT'S REPLY BRIEF

ARGUMENT

After the State filed its cross-appellant's brief, the court of appeals issued a decision in *State v. Radaj*, 2015 WI App 50, __ Wis. 2d __, __ N.W.2d __. The court of appeals held in *Radaj* that the mandatory DNA statute is an unconstitutional ex post facto law as applied to defendants sentenced on multiple convictions committed

before the surcharge's effective date who were required by the statute to pay a separate surcharge for each conviction. *Id*. at ¶¶1, 35-36.[1]

The *Radaj* court did not express any view on the issue presented in this case, which involves a single felony conviction and a single $250 surcharge: "[W]e do not weigh in on whether the result might be different if Radaj had been convicted of a single felony carrying with it a mandatory $250 surcharge, rather than the prior discretionary $250 surcharge." *Id*., ¶36. This case presents that issue squarely.

Before responding to Monahan's argument that the statute is an unconstitutional ex post facto law, the State will address his contention that "ex post facto challenges are decided by reference to the statute on its face, and not 'as applied.'" Monahan's cross-respondent's brief at 2.

I. MONAHAN'S CHALLENGE IS AN AS-APPLIED CHALLENGE.

Monahan argues that this court should, indeed must, analyze his claim as a facial challenge to the new statute rather than as an as-applied challenge. *See id.* at 1-2. That contradicts his postconviction motion, where he claimed that

[1]In another case decided after the State filed its opening brief, the court of appeals held that the DNA surcharge was an unconstitutional ex post facto law as applied to misdemeanor defendants who committed their offense before the January 1, 2014, effective date of the misdemeanor surcharge statute and were convicted before the April 1, 2015, effective date of the new statutory requirement that convicted misdemeanants provide a DNA sample. *State v. Elward*, 2015 WI App 51, ¶2, __ Wis. 2d __, __ N.W.2d __.

the statute is an unconstitutional ex post facto law "as applied to Mr. Monahan" (163:1); *see also* 163:2 (arguing that the surcharge "is unconstitutional as applied to him"). His argument also is inconsistent with the court of appeals' as-applied analysis in *Radaj*. *See Radaj*, 2015 WI App 50, ¶11 ("Radaj does not argue that the DNA surcharge statute is unconstitutional in all of its applications; his is not a facial challenge. Rather, Radaj contends that the new surcharge statute as applied to him is an unconstitutional ex post facto law.").

Monahan cites only one case, *Seling v. Young*, 531 U.S. 250 (2001), to support his contention that this court must analyze his claim as a facial challenge to the statute. Monahan reads *Seling* too broadly.

In *Seling*, the respondent was committed under a Washington statute that authorizes the civil commitment of "sexually violent predators." *See id*. at 253-56. He appealed his commitment on multiple grounds, including a claim that the statute violated the Ex Post Facto Clause. *See id*. at 256. The Washington Supreme Court rejected that argument based on its conclusion that the statute was civil in nature. *See id*. at 256-57.

He then filed a federal habeas petition challenging his commitment on various constitutional grounds, again including the Ex Post Facto Clause. *See id*. at 258. The district court eventually dismissed the petition, holding that because the Washington statute is civil, the ex post facto claim must fail. *Id*. at 259. The Ninth Circuit reversed, reasoning that "actual conditions of confinement could divest a facially valid statute of its civil label upon a showing by the clearest

proof that the statutory scheme is punitive in effect." *Id*.

The Supreme Court reversed the Ninth Circuit. It held that the respondent "cannot obtain release through an 'as-applied' challenge to the Washington Act on double jeopardy and *ex post facto* grounds." *Id*. at 263. The court explained:

> We agree with petitioner that an "as-applied" analysis would prove unworkable. Such an analysis would never conclusively resolve whether a particular scheme is punitive and would thereby prevent a final determination of the scheme's validity under the Double Jeopardy and *Ex Post Facto* Clauses. Unlike a fine, confinement is not a fixed event. As petitioner notes, it extends over time under conditions that are subject to change. The particular features of confinement may affect how a confinement scheme is evaluated to determine whether it is civil rather than punitive, but it remains no less true that the query must be answered definitively. The civil nature of a confinement scheme cannot be altered based merely on vagaries in the implementation of the authorizing statute.

Id.

Seling does not hold that all ex post facto challenges must be analyzed as a facial challenge. Rather, it holds only that an as-applied analysis is "unworkable" in a challenge to a civil commitment because the conditions of confinement change over time.

Monahan does not cite, and the State has not found, any case applying *Seling*'s holding to ex post facto challenges outside of a civil commitment setting. Other courts have observed that "the Supreme Court's holding in *Seling* was limited to

an as-applied challenge to a civil commitment statute on double jeopardy and *ex post facto* grounds" *Karsjens v. Jesson*, 6 F. Supp. 3d 916, 930-31 (D. Minn. 2014) (footnote omitted); *see also State v. Ransdell*, 2001 WI App 202, ¶7, 247 Wis. 2d 613, 634 N.W.2d 871 (citing *Seling* for the proposition that "an 'as-applied analysis' is unworkable in determining whether [a] commitment scheme is civil or criminal for double-jeopardy and *ex post facto* purposes").

Monahan also quotes from a footnote in a law review article. *See* Monahan's brief at 2 (citing Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 Stan. L. Rev. 1005, 1026 n.126 (2011)). A footnote in a law review article is weak support to begin with, made even more so by the fact that the only authority that the author invokes for the proposition that Monahan quotes is another law review article written by that same author. *See id*.

Monahan has not demonstrated that his ex post facto claim must be treated as a facial challenge to the DNA surcharge statute and that the court must disregard the facts of this case when evaluating his challenge. Accordingly, the court should determine whether, as Monahan argued below, the surcharge "is unconstitutional as applied to him" (163:2).

II. MONAHAN HAS NOT SHOWN THAT THE DNA SURCHARGE STATUTE IS UNCONSTITUTIONAL AS APPLIED TO HIM.

In its opening brief, the State argued that there was nothing in the language of the statute or

its legislative history that demonstrated that the legislature had a punitive intent in creating the new mandatory DNA surcharge. *See* State's Cross-Appellant's brief at 5-8. Monahan's brief does not address the punitive intent issue, arguing only that the statute is punitive in effect. *See* Monahan's cross-respondent's brief at 2-4. He therefore has conceded that the legislature's intent was not to impose a punitive scheme. *See Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

In *Radaj*, the court assumed without deciding that the legislature's intent was non-punitive. *See Radaj*, 2015 WI App 50, ¶22. It then held that the new DNA surcharge statute, as applied to Radaj, had a punitive effect. *See id.*, ¶¶22-36. While the court said that it would "not weigh in on whether the result might be different if Radaj had been convicted of a single felony carrying with it a mandatory $250 surcharge," *id.*, ¶36, its punitive-effect analysis provides guidance on the answer to that question.

Addressing the "effects" factors enumerated in *State v. Rachel*, 2002 WI 81, ¶43, 254 Wis. 2d 215, 647 N.W.2d 762, the *Radaj* court said that "[f]or the most part, 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*, ¶23. "For example, 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 "the factors with the clearest relevance here, and those that are most heavily disputed by the parties, are the fourth, sixth, and seventh factors. The fourth factor is whether the DNA surcharge's 'operation will promote the traditional aims of punishment,' the sixth factor is whether the surcharge is 'rationally . . . connected' to some non-punitive purpose, and the seventh factor is whether the surcharge 'appears excessive in relation to' the non-punitive purpose the legislature assigned to it." *Id.*, ¶24 (ellipsis in original). "[T]hese three factors are closely related and of particular importance when, as here, a monetary amount intended to fund specified activities under a non-punitive regulatory scheme is at issue." *Id.*, ¶25.

"When that is the situation," the court said, "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." *Id.* "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.* The determinative question, therefore, was "whether, under Wisconsin's statutory scheme, there is some rational connection between calculating the DNA surcharge *on a per-conviction basis* and the cost of the DNA-analysis-related activities that the surcharge is meant to cover." *Id.*, ¶29.

The court acknowledged that "the connection between a surcharge and the costs it is intended to cover need not be perfect to be rational" and that it "must give the legislature broad leeway to select a surcharge amount." *Id.*,

¶30. But "under the scheme at issue here," the court wrote, "the legislature has imposed a multiplier that corresponds not to costs, but to the number of convictions. For this surcharge scheme to be non-punitive, there must be some reason why the cost of the DNA-analysis-related activities under Wis. Stat. §§ 973.046 and 165.77 increases with the number of convictions." *Id*.

The court noted that the DNA surcharge is used to cover the cost of the DNA analysis of the biological specimen that the defendant provides when the trial court orders the surcharge. *Id*., ¶31. However, the court said, it "fail[ed] to see any link between the initial DNA analysis and the number of convictions." The court also noted that there are "[o]ther costs that may come later under Wis. Stat. § 165.77," including the cost of comparing the defendant's DNA profile to the DNA profile of other biological specimens collected as part of a future investigation. *Id*., ¶32. But, the court said, "we can conceive of no reason why such costs would generally increase in proportion to the number of convictions, let alone in direct proportion to the number of convictions." *Id*.

The court found that the $1,000 DNA surcharge assessed against Radaj was "not rationally connected and is excessive in relation to the surcharge's intended purpose. . . ." *Id*., ¶35. The court concluded that "the surcharge has a punitive effect and, therefore, the statute is an unconstitutional ex post facto law as applied to Radaj." *Id*. The court remanded "for the circuit court to apply the DNA surcharge statute that was

in effect when Radaj committed his crimes." *Id.*, ¶39.[2]

The *Radaj* court's holding that multiple DNA surcharges are punitive rested on its conclusion that DNA-related costs do not increase in proportion to the number of convictions. That concern is not present in this case, however, because Monahan has been convicted of only a

[2]The State noted in its opening brief in this case that the issue raised in this case is also before the court in *State v. Tabitha A. Scruggs*, case no. 2014AP2981-CR. The court of appeals recently issued an order in *Scruggs* stating that it "question[ed] how the State's position seeking imposition of a single mandatory surcharge comports with the State's concession regarding the remedy for an ex post facto violation in *State v. Radaj*" (Reply-Ap. 101). The court ordered the State to file a supplemental brief addressing several questions: "whether the State's concession that upon an ex post facto violation only one discretionary DNA surcharge could be imposed conflicts with its position in this case that a single mandatory DNA surcharge is permissible"; "whether and how this potential different treatment can be explained and sanctioned"; and "whether the concession in cases involving multiple convictions renders the mandatory surcharge in a single conviction case a penalty" (Reply-Ap. 102-03).

Because Monahan has not argued that there is any inconsistency between the State's position in this case and its position in *Radaj*, the State will simply note that it conceded that the remedy in *Radaj* was to apply the prior version of the statute because the Supreme Court has held that if the new statute cannot be applied to a defendant, the remedy is to apply the version of the statute that was in effect when he committed the crime. *See Weaver v. Graham*, 450 U.S. 24, 36 n.22 (1981) ("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.").

single offense (132:1; Cross-A-Ap. 109) and is subject to only a single surcharge.

Monahan argues that there are other features of the surcharge statute that lack a rational connection to the cost of DNA-related activities that the surcharge funds. "For one," he argues, "the surcharge is required whether or not the defendant has already given a sample, meaning that even those who impose *no* additional cost on the state must pay the $250." Monahan's cross-respondent's brief at 2. Even if that would be a valid argument in other cases, it does not help Monahan in his as-applied challenge, because the State incurred DNA analysis costs in this case.[3]

Monahan also argues the fact that the statute imposes a $250 surcharge in felony cases and a $200 surcharge in misdemeanor cases demonstrates that the felony surcharge is punitive. Monahan's cross-respondent's brief at 2. The flaw in that argument is that the surcharge in felony cases was $250 before the statute was amended. *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. That the legislature chose to impose a smaller DNA surcharge in misdemeanor cases while maintaining the felony surcharge at $250 does not make the felony surcharge punitive.

Monahan further argues that the DNA surcharge is punitive because it "is a monetary sum collected from criminal defendants, and only criminal defendants, as opposed to other users of the court system" and because "[i]t is used to

[3]A biological sample was obtained from Monahan and analyzed by the State Crime Lab as part of the investigation in this case (153:149, 153-55).

support the DNA database, which has a primarily law enforcement purpose." Monahan's cross-respondent's brief at 4. The same is true about South Carolina's $250 DNA fee that the Fourth Circuit held not to be punitive. *See In re DNA Ex Post Facto Issues*, 561 F.3d 294, 297, 299-300 (4th Cir. 2009).

When determining whether the DNA surcharge is unconstitutional as applied to Monahan, it is important to remember that "the burden is on [Monahan] 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*, 2015 WI App 50, ¶34. Monahan has not attempted to present any evidence showing that a $250 surcharge has little or no relation to the State's costs under Wis. Stat. § 165.77. *See id*.

In *Radaj*, the court was able to determine that the statute was unconstitutional as applied to that defendant notwithstanding his failure to present any evidence because it was "satisfied that this is a matter that can be resolved by applying the statutory language and common sense." *Id*. But the statutory language and common sense upon which the *Radaj* court relied related to the disconnect between multiple surcharges and the DNA-related costs that the surcharge funds. Neither the statutory language nor common sense demonstrates that there is no rational connection between a single surcharge and DNA-related costs. Monahan's has not met his burden of showing by the "clearest proof" that a single DNA surcharge is punitive.

CONCLUSION

For the reasons stated above and in the State's opening cross-appellant's brief, the court should reverse the postconviction order vacating the DNA surcharge.

Dated this 28th day of July, 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 reply brief produced with a proportional serif font. The length of this brief is 2,801 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.

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Dated this 28th day of July, 2015.

_____
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APPENDIX CERTIFICATION

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