STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2014AP2496-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GREGORY MARK RADAJ,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE LAFAYETTE COUNTY CIRCUIT COURT, THE HONORABLE JAMES R. BEER, PRESIDING

# BRIEF OF PLAINTIFF-RESPONDENT

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## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication of the court's decision is warranted because the constitutionality of applying the mandatory DNA surcharge to individuals convicted of felonies committed before the mandatory surcharge's effective date is of statewide importance and is an issue of first impression in Wisconsin.

## STATEMENT OF THE CASE

Given the nature of the arguments raised in the brief of defendant-appellant Gregory Mark Radaj, 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

Radaj was convicted of four counts of burglary (42:1; A-Ap. 101). When he committed those burglaries on January 28, 2013 (*id.*), the imposition of a DNA surcharge was discretionary for those offenses; 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. 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 Radaj was sentenced on March 26, 2014, a DNA surcharge was imposed for each of his convictions (42:1-2; A-Ap. 101-02).

Radaj argues on appeal, as he did in his postconviction motion (50:2-5), that the mandatory DNA surcharge imposed by Wis. Stat. § 973.046(1r)(a) (2013-14) is unconstitutional as applied to him. He contends that the surcharge

violates the ex post facto clauses of the federal and state constitutions because it imposes punishment that was not applicable when he committed his offense.

The parties agree on one point. If the DNA surcharge is punitive, as Radaj 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, __ Wis. 2d __, 853 N.W.2d 888.

## II. THE MANDATORY DNA SURCHARGE STATUTE IS NOT UNCONSTITUTIONAL AS APPLIED TO RADAJ.

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). Radaj argues that the change in the DNA surcharge makes his punishment more burdensome. *See* Radaj's brief at 7.

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. Contrary to Radaj's argument, therefore, *see* Radaj's brief at 11, Wisconsin's DNA surcharge is related to the collection and storage of DNA profiles – that is the only use for the surcharge.

Moreover, as in South Carolina, the relatively small size of the fee – $200 for a misdemeanor conviction and $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. Even when multiple surcharges are imposed, as is the case here, the amount of the surcharge, $1,000 – a $250 surcharge for each of Radaj's felony convictions (42:1-2; A-Ap. 101-02) – is small in comparison to the fines that could have been imposed as punishment. Radaj faced possible fines of $25,000 on each of his four burglary convictions, for a total potential fine of $100,000 (11:1-3). *See* Wis. Stat. § 939.50(3)(f). The fact that the DNA surcharge is just one percent of the potential fine demonstrates that the surcharge is not punitive in intent or in effect.

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 Radaj'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. Contrary to Radaj's argument, therefore, *see* Radaj's brief at 10-11, the fact that the DNA surcharge is included in chapter 973 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.

Radaj has not carried 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.[1]

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[1]The statutory amendment that made the DNA surcharge mandatory in all felony cases also imposed for the first time a DNA surcharge for misdemeanor convictions. S*ee* 2013 Wis. Act 20, § 9426(1)(am) (creating Wis. Stat. § 973.046(1r)(b)). However, although the effective date for imposing the misdemeanor DNA surcharge is January 1, 2014, the effective date for collecting DNA samples from convicted misdemeanants is April 1, 2015. *See* Wis. Stat. § 165.76(1)(as) (2013-14).

In a case now pending in the court of appeals, the State has conceded that the surcharge is unconstitutional as applied to misdemeanants who committed their offense before the surcharge's January 1, 2014, effective date, and who are convicted before the April 1, 2015, effective date for collecting DNA samples. For that limited class of individuals, the DNA surcharge cannot be justified as a cost-recovery measure. *See* Brief of Plaintiff-Respondent at 2-7, *State v. Garett T. Elward*, no. 2014AP2569-CR.

## CONCLUSION

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

Dated this 13th day of February, 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 2,505 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 13th day of February, 2015.

_____
Jeffrey J. Kassel
Assistant Attorney General