STATE OF WISCONSIN

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

DISTRICT II

Case No. 2014AP2981-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TABITHA A. SCRUGGS,

Defendant-Appellant.

On Appeal From a Judgment of Conviction and Order Denying Postconviction Relief Entered in Racine County Circuit Court, the Honorable Allan B. Torhorst, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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I. The Mandatory $250 DNA Surcharge Is an Unconstitutional Ex Post Facto Law as Applied to the Facts of This Case and Should Be Vacated.

The State concedes that the DNA surcharge is unconstitutional if it cannot be justified as a "cost-recovery measure." (Respondent's Brief at 10 n.2). Yet the State fails to explain how Wisconsin's per-conviction surcharge is aimed only at recovering costs created by the defendant. In fact, the mandatory surcharge is more appropriately characterized as a fine, and is unconstitutional as applied to the facts of this case.

The State argues that the DNA surcharge is not punitive because the proceeds from the surcharge will support the DNA databank, and points to South Carolina for support. (Respondent's Brief at 7-8). However, the State fails to address the critical difference between South Carolina's DNA statute and Wisconsin's surcharge: South Carolina imposed only one surcharge when a defendant provided a sample. ***In re DNA Ex Post Facto Issues***, 561 F.3d 294, 297 (4th Cir. 2009). The Fourth Circuit held that retroactive application of South Carolina's statute did not violate *ex post facto*. ***Id.*** at 299. That surcharge was clearly a cost-recovery measure. When a defendant created a DNA cost, he or she paid a DNA surcharge.

In contrast, Wisconsin's surcharge is completely untethered from DNA cost. If a defendant is convicted of three felonies, he or she pays three surcharges. The statute makes it irrelevant that the defendant may have already provided a DNA sample in the past, or that no DNA analysis

was done while investigating or defending the case. The statute arbitrarily imposes the DNA fine for every conviction.

The State also relies on an Illinois case to support its claim that the DNA surcharge is not punitive. (Respondent's Brief at 6); ***People v. Higgins***, 13 N.E.3d 169 (Ill. App. Ct. 2014). In ***Higgins***, the defendant challenged Illinois' DNA surcharge statute, arguing that the statute violated *ex post facto* because he was required to pay $250 when the surcharge was only $200 at the time of the offense. ***Id.*** at 176. However, just as in South Carolina, defendants in Illinois are only required to pay a DNA surcharge once when they provide a DNA sample. ***Id.***; ***People v. Marshall***, 950 N.E.2d 668, 679 (Ill. 2011). In ***Marshall***, the Illinois Supreme Court held that defendants were only required to provide one DNA sample and pay one DNA fee. ***Id.*** Thus, unlike Wisconsin, the DNA fee was only collected to compensate the State for DNA costs actually created by the defendant. Because Wisconsin's DNA surcharge is imposed without any regard for DNA cost created by the defendant, it is not merely a cost-recovery measure. Instead, it is a $200 or $250 fine.

The State places odd emphasis on the fine-to-DNA surcharge ratio to support its argument that the surcharge must not be punitive. (Respondent's Brief at 8-9). The State argues that because Ms. Scruggs was facing a $25,000 fine, the relatively small surcharge could not be punitive. (Respondent's Brief at 8). But even a $50 fine could be punitive. The fact that the court *could have*, but did not, impose a massive fine does not mean that the DNA surcharge is not punitive.[1]

[1] Moreover, the $250 surcharge is not as small for indigent criminal defendants as the State suggests. Even setting aside the difficulties created by indigence, there are so many court-ordered obligations that defendants quickly become swamped in court fees/fines.

The State suggests that a surcharge for each conviction is justified because there are costs required to maintain the DNA databank. (Respondent's Brief at 11-12). The State offers no evidence as to what those costs are; however, Ms. Scruggs acknowledges that *some* expense exists to maintain the databank. But the amended DNA surcharge statute reflects no connection between those costs and the surcharge paid by the defendant. There is no reasonable relationship between the surcharge and costs actually created by the defendant. And the State offers no explanation as to how every conviction justifies a new surcharge.

If there are other costs associated with maintaining the DNA databank, the legislature should create fees that actually reflect those costs. The State points out that the DNA databank incurs costs analyzing samples for defendants, law enforcement, or private requests for samples. (Respondent's Brief at 12). If there is a cost associated with those services, the legislature can establish a fee to recover the cost. The legislature cannot impose a per-conviction fine, regardless of cost created by the payor, then call the fine a "cost-recovery measure."

The previous version of the DNA surcharge statute struck a more appropriate balance. The surcharge could be imposed after an exercise of discretion, and generally, in exercising its discretion, the court was expected to consider whether the defendant created any DNA cost in the particular case. *See* ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393. The current version of the statute has

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See, 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) (jail surcharge), 757.05 (penalty surcharge); 973.055 ($100 domestic abuse surcharge).

severed any connection between DNA cost created by the defendant and DNA surcharges paid by the defendant.

Ms. Scruggs is being required to pay a mandatory $250 DNA surcharge that did not exist at the time of the offense. Therefore, this surcharge is strictly punitive and is unconstitutional under the *ex post facto* clauses of the state and federal constitutions.

CONCLUSION

For the reasons stated above, and the reasons stated in her initial brief, Ms. Scruggs asks that this Court issue an opinion reversing the decision of the circuit court and vacating the DNA surcharge in this case.

Dated this 13th day of April, 2015.

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 971 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 13th day of April, 2015.

Signed:

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