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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2014AP2981-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TABITHA A. SCRUGGS,

Defendant-Appellant.

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

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SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLANT

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## ARGUMENT

- I. The Mandatory Surcharge Violates Ex Post Facto and This Court Should Remand for the Circuit Court to Decide Whether to Impose a Single Discretionary Surcharge.

The mandatory DNA surcharge violates ex post facto, even when applied to defendants with one felony conviction. Ms. Scruggs was ordered to pay a mandatory \$250 DNA surcharge that did not exist at the time she committed the underlying offense. That surcharge violates ex post facto because of its punitive intent and punitive effect. (Appellant's Brief in Chief at 3-12). The remedy for an ex post facto violation, as the State concedes, is to enforce the statute that existed at the time of the offense. *Weaver v. Graham*, 450 U.S. 24, 36 n.22 (1981); (Respondent's Supplemental Brief at 3). Therefore, this Court should reverse and remand so that the circuit court may decide whether to impose one discretionary surcharge.

This Court has already held that the mandatory DNA surcharge statute violates ex post facto when applied to defendants with multiple convictions for offenses committed before January 1, 2014. *State v. Radaj*, 2015 WI App 50, ¶¶ 35-36. After that ruling, the State conceded that in cases involving multiple convictions, the mandatory surcharges must be vacated, and the case must be remanded for the circuit court to consider whether to impose a single discretionary surcharge. (Respondent's Supplemental Brief at 3-4); *State v. Booker*, 2015AP573-CR (WI App July 2, 2015). But the State argues that Ms. Scruggs is not entitled to that remedy. Instead, she must pay a mandatory surcharge because she happened to be convicted of only one felony.

Ms. Scruggs agrees with the State that its position in this case is not technically at odds with its position in *Radaj* and *Booker*. In those cases, the State conceded that the remedy for an ex post facto violation was to enforce the discretionary surcharge. The State continues to argue that that is the proper remedy for an ex post facto violation. (Respondent's Supplemental Brief at 4). The State's argument in this case is that there is no ex post facto violation in the first place. Thus, the two positions are not completely inconsistent. However, the State is incorrect to argue that there is no ex post facto violation, and the State's differing positions produce bizarre and punitive results that cannot be sanctioned.

As argued in her initial brief, the mandatory DNA surcharge violates ex post facto because it has both a punitive effect and a punitive intent. (Appellant's Brief in Chief at 3-12). Even when applied to a single felony conviction, the surcharge is a flat fine that bears no apparent relationship to actual DNA cost. Every defendant convicted of one felony must pay \$250. A case involving no DNA testing and a case involving considerable DNA testing are treated identically: one \$250 DNA surcharge. A case where the defendant provides a sample and a case where the defendant previously provided a sample are treated identically: one \$250 DNA surcharge. Cases with tremendously different DNA costs are all treated the same. "[O]ne basis for reclassifying a fee as a fine would be that it bore no relation to the cost for which the fee was ostensibly intended to compensate." *Mueller v. Raemisch*, 740 F.3d 1128, 1133 (7th Cir. 2014). That is precisely the case here. The DNA surcharge bears no apparent relationship to DNA cost and is properly categorized as a fine.

The punitive intent of the statute is also apparent from the disparate treatment of felons and misdemeanants. In *Radaj*, this Court observed that this differing treatment may

reflect punitive intent and effect. 2015 WI App 50, ¶ 21 n.6. The State has offered no reason, presumably because none exists, for charging felons more than misdemeanants. This reasoning applies regardless of how many surcharges are imposed. There is no reason to conclude that collecting or testing a felon’s DNA is more costly than doing the same for a misdemeanant. Instead, it appears that the “amount of the fine imposed is correlated to the degree of [offense committed],” which violates ex post facto. *People v. Stead*, 845 P.2d 1156, 1160 (Colo. 1993).

The fact that the court *could have* imposed the surcharge is irrelevant. Laws that make mandatory what was previously discretionary violate ex post facto. *Weaver*, 450 U.S. at 32 n.17. At the time of the offense, Ms. Scruggs was not facing a \$250 DNA surcharge. She was facing the *possibility* of a DNA surcharge if the sentencing court exercised its discretion and imposed the surcharge. *Radaj*, 2015 WI App 50, ¶ 8. Thus, a sentencing court could choose to impose no surcharge at all.<sup>1</sup> Although that option existed at the time Ms. Scruggs committed her offense, it no longer existed at sentencing. The surcharge that had once been discretionary now had to be imposed. This violates ex post facto.

Even if the State’s position in this case is not technically inconsistent with its position in *Radaj* and *Booker*, the differing positions produce bizarre results that cannot be sanctioned. As this Court observed in its order for supplemental briefing, defendants with multiple convictions, like Radaj and Booker, will be subject to the discretionary DNA surcharge; therefore, they may not have to pay any surcharge at all. But a person with a single surcharge would be forced to pay the mandatory surcharge. The State’s only

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<sup>1</sup> In this case, the sentencing court did not explicitly order a DNA surcharge, but one was included on the judgment of conviction. (9; 19:14).

defense to these inconsistent outcomes is to again argue that there is no ex post facto violation. (Respondent's Supplemental Brief at 6). But there is no basis for this differing treatment.

In *Radaj*, the court pointed out the absurdity of connecting the surcharge to the number of convictions. 2015 WI App 50, ¶ 30. Specifically, this Court noted that the amount of the surcharge would fluctuate based on the parties' relative bargaining strength before a plea, rather than actual DNA cost. *Id.* The State's proposed outcome produces the same odd results. A defendant charged in two cases, each charging two offenses could face a series of different outcomes under the DNA surcharge. And those different results would have nothing to do with DNA cost. It would depend entirely on how the parties agreed to resolve the case. If the defendant pled guilty to one count in each case, he would pay two mandatory surcharges. If he pled guilty to both charges in only one case, he would face one discretionary surcharge. If he pled guilty to three of the four charges, he would face a mandatory surcharge in one case, and a discretionary surcharge in the other. These results make absolutely no sense. The cost of the DNA surcharge would have nothing to do with actual DNA cost, and would be related only to the prosecutor's decision to separate counts into multiple cases, and plea bargaining outcomes.

Finally, this Court asks whether the State's concession in *Radaj* and *Booker* "renders the mandatory surcharge in a single conviction case a penalty." It does. Under the State's proposed approach, a defendant convicted of a single felony must pay a surcharge, but a defendant convicted of multiple felonies might pay no surcharge. This disparate treatment is effectively an additional punishment meted out only to those with one felony conviction. There is no rational reason to treat these groups of offenders differently.

Ms. Scruggs is being required to pay a DNA surcharge simply because she was convicted of one felony, not for any particular reason connected to DNA cost. If all offenders had to pay a one-time \$250 DNA surcharge, there may be no ex post facto violation. *In re DNA Ex Post Facto Issues*, 561 F.3d 294 (4th Cir. 2009). But making only a subset of offenders pay the mandatory surcharge, while making all others subject to the discretionary surcharge, results in defendants with only one felony conviction being irrationally punished. Offenders like Ms. Scruggs would be required to bear a burden that was never contemplated by the legislature. The legislature intended for all defendants to pay as many surcharges as they had convictions. Wis. Stat. § 973.046. Under the State's approach Ms. Scruggs would be punished disproportionately by being forced to pay a mandatory surcharge that a person with two convictions would not have to pay. And this disparate treatment would not arise from any legislative intent. Instead, it would arise merely from the State's incompatible positions in this case and *Radaj*.

Imposing the mandatory surcharge in this case violates ex post facto. As the State concedes, the remedy for an ex post facto violation is to enforce the statute that was in effect at the time of the offense. (Respondent's Supplemental Brief at 3-4). Therefore, this court should vacate the mandatory DNA surcharge and remand for the circuit court to enforce the discretionary surcharge that existed at the time of the offense.

## CONCLUSION

For the reasons stated above and in her other briefs, Ms. Scruggs asks that this Court reverse the decision of the circuit court and find that Ms. Scruggs may only be required to pay the DNA surcharge under the discretionary statute that existed at the time of the offense.

Dated August 11, 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 1,536 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 August 11, 2015.

Signed:

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