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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2014AP2981-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TABITHA A. SCRUGGS,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District II, Affirming a Judgment of Conviction Entered in the Racine County Circuit Court, the Honorable Allan Torhorst, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUE PRESENTED

Tabitha Scruggs committed a burglary on December 30, 2013. Two days later, a new law went into effect, requiring sentencing courts to impose a $250 DNA surcharge for every felony conviction and a $200 DNA surcharge for every misdemeanor, regardless of whether any DNA was taken or analyzed in connection with the case. Ms. Scruggs was sentenced on June 9, 2014. Does retroactive application of the mandatory DNA surcharge violate the prohibitions against *ex post facto* laws in the state and federal constitutions?

The circuit court imposed the surcharge and denied Ms. Scruggs' postconviction motion to vacate the surcharge.

The court of appeals affirmed, holding that retroactive imposition of a single mandatory DNA surcharge did not violate *ex post facto*.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case presents an issue of statewide concern, meriting both oral argument and publication.

STATEMENT OF FACTS

On December 30, 2013, the State filed a complaint charging Tabitha Scruggs with one count of burglary as a party to a crime, contrary to Wis. Stat. §§ 943.10(1m)(a) and 939.05. (1). The complaint alleged that on December 30, 2013, Ms. Scruggs drove an accomplice to a residence in Racine where he broke two front windows and stole a TV, a

PlayStation, and a video game. (1). A witness watched the burglary from across the street, and police found a car matching a description of the car used in the burglary. (1:1-2). Police saw Ms. Scruggs and the accomplice take the TV from the car and begin moving it into a residence. (1:2). An officer stopped them and saw the remaining stolen items in the car. (1:2).

On April 1, 2014, Ms. Scruggs pled no contest to one count of burglary as a party to a crime. (18:7). On June 9, 2014, the court sentenced Ms. Scruggs to 18 months in confinement, followed by 18 months of extended supervision. (19:13). The court stayed that sentence and placed Ms. Scruggs on probation for three years. (19:13). The court also stayed six months of condition time. (19:15).

Concerning costs and surcharges, the sentencing court stated: "You'll be obligated to pay the court costs and supervision fees. You will be obligated to provide a DNA sample for genetic testing." (19:14). The court did not specifically impose a DNA surcharge under Wis. Stat. § 973.046. Nevertheless, a $250 DNA surcharge appears on the judgment of conviction. (9:2; App. 113).

On November 20, 2014, Ms. Scruggs filed a postconviction motion asking that the court vacate the DNA surcharge. (12). The motion argued that imposing the mandatory surcharge violated the *ex post facto* law clauses of the United States and Wisconsin constitutions. (12). The motion also argued that the surcharge should be vacated even if the court applied the version of the DNA surcharge statute in place at the time of the offense because the court offered no reason for imposing a discretionary surcharge. (12).

On December 11, 2014, the circuit court entered an order denying the postconviction motion. (13:3; App. 117).

The court ruled that there was no *ex post facto* violation because the act which created the mandatory DNA surcharge was published prior to Ms. Scruggs' offense. (13:3; App. 117). The court ruled that it was "immaterial" that the law did not actually go into effect until two days after the underlying offense was committed. (13:3; App. 117).

On October 21, 2015, the court of appeals affirmed, but on different grounds. ***State v. Scruggs***, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146; (App. 101). The court held that the mandatory DNA surcharge was not punitive in effect or intent when applied to a person sentenced for a single felony; therefore, there was no *ex post facto* violation. ***Id.***, ¶¶ 10-18.

ARGUMENT

I. The Mandatory DNA Surcharge Is an Unconstitutional *Ex Post Facto* Law When Applied Retroactively, So the Mandatory Surcharge Imposed in This Case Should Be Vacated.

Any statute "which makes more burdensome the punishment for a crime, after its commission . . . is prohibited as *ex post facto*." ***Collins v. Youngblood***, 497 U.S. 37, 42 (1990). Both the United States and Wisconsin constitutions prohibit *ex post facto* laws. U.S. Const. art I, § 10; Wis. Const. art. I, § 12.

Here, Ms. Scruggs was convicted for a burglary that occurred on December 30, 2013. When she committed the offense, the mandatory DNA surcharge did not exist. At that time, circuit courts were required to impose a $250 DNA surcharge in certain felony sex offenses, and had discretion to impose the surcharge in any other felony case. Wis. Stat.

§ 973.046; ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393.[1]

Between the time Ms. Scruggs committed the burglary and when she pled guilty, the law changed. On January 1, 2014, a new version of section 973.046 went into effect. 2013 Wis. Act 20, §§ 2355, 9326, 9426. The new version required the circuit court to impose a $250 DNA surcharge for every felony conviction, and a $200 DNA surcharge for every misdemeanor conviction. Wis. Stat. § 973.046(1r).[2]

The act specified that the new surcharge would apply to sentences imposed on or after January 1, 2014, regardless of when the underlying offense occurred. 2013 Wis. Act 20, §§ 9326, 9426. Ms. Scruggs was ordered to pay the mandatory surcharge. (9; App. 113). This court should vacate the surcharge because retroactively applying the mandatory DNA surcharge violates the state and federal prohibitions against *ex post facto* laws.

Whether an amended statute violates *ex post facto* is a question of law that this court reviews *de novo*. ***State v. Haines***, 2003 WI 39, ¶ 7, 261 Wis. 2d 139, 661 N.W.2d 72. The defendant bears the burden of overcoming the court's

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[1] At the time the offense was committed, the relevant portion of section 973.046 read as follows:

"(1g) Except as provided in sub. (1r), if a court imposes a sentence or places a person on probation for a felony conviction, the court may impose a deoxyribonucleic acid analysis surcharge of $250.

(1r) If a court imposes a sentence or places a person on probation for a violation of s. 940.225, 948.02(1) or (2), 948.025, 948.085, the court shall impose a deoxyribonucleic acid analysis surcharge of $250."

[2] "(1r) If a court imposes a sentence or places a person on probation, the court shall impose a deoxyribonucleic acid analysis surcharge, calculated as follows: (a) For each conviction for a felony, $250. (b) For each conviction for a misdemeanor, $200."

presumption that laws are constitutional. ***State v. Radaj***, 2015 WI App 50, ¶ 11, 363 Wis. 2d 633, 866 N.W.2d 758. Wisconsin courts generally construe the *ex post facto* clause of the Wisconsin Constitution consistently with the *ex post facto* clause of the United States Constitution. ***State v. Thiel***, 188 Wis. 2d 695, 699, 524 N.W.2d 641 (1994).

A law violates *ex post facto* when it is: (1) retrospective; and (2) disadvantageous to the defendant. ***Weaver v. Graham***, 450 U.S. 24, 29 (1981).

A. The mandatory surcharge is retrospective when applied to criminal defendants who committed their offense before January 1, 2014.

Here, the statute in question is undoubtedly retrospective, and the State has never disputed that fact. If "the law changes the legal consequences of acts completed before its effective date," it is retrospective, and may violate *ex post facto*. ***Id.*** at 31, 36.

Here, the legal consequences accompanying Ms. Scruggs' conviction changed after she committed the offense. The DNA surcharge was discretionary at the time she completed the offense, but mandatory at the time she was sentenced. Laws that make mandatory what was previously discretionary may violate *ex post facto*. ***Weaver***, 450 U.S. at 32 n.17. Because the amended surcharge statute requires Ms. Scruggs to pay a surcharge that was not required at the time of the offense, the statute is retrospective.

B. The surcharge is punitive because it increases the mandatory punishment for completed crimes.

When deciding whether a law disadvantages a defendant, the court employs a two-step "intent-effects" test, designed to determine whether the statute is punitive. ***State v. Rachel***, 2002 WI 81, ¶¶ 31-33, 254 Wis. 2d 215, 647 N.W.2d 762 (citing ***Hudson v. United States***, 522 U.S. 93, 99 (1997)). First, the court must decide "whether the legislature either expressly or impliedly indicated a preference that the statute in question be considered civil or criminal." ***Id.***, ¶ 32. If the legislature intended the new statute to be punitive, retroactive application violates *ex post facto*. *See* ***id.***, ¶¶ 32, 40.

Second, the court examines the effect of the statute. Even if the legislature did not intend to create a punitive statute, it may still be unconstitutional if it is "so punitive" as to "transform what was clearly intended as a civil remedy into a criminal penalty." ***Id.***, ¶ 33 (quoting ***Hudson***, 522 U.S. at 99). When assessing a statute's effect, a number of factors may "guide the analysis":

> (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as punishment; (3) whether it comes into play only on a finding of *scienter*; (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.

Id.

Importantly, when deciding whether a law violates *ex post facto*, "The inquiry looks to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular individual." ***Weaver***, 450 U.S. at 33. The court must "evaluat[e] the 'statute on its face' to determine whether it provided for what amounted to a criminal sanction." ***Hudson***, 522 U.S. at 101.

Of course, every *ex post facto* challenge is inherently an "as applied" challenge in a certain sense. The challenge only seeks to bar *retroactive* application of the statute. To make a facial challenge, Ms. Scruggs would have to show that "the law cannot be enforced under any circumstances." ***League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker***, 2014 WI 97, ¶ 13, 357 Wis. 2d 360, 851 N.W.2d 302. That is obviously not the case here. When applied prospectively, there is no *ex post facto* problem with the mandatory DNA surcharge. But when examining whether retroactive application violates *ex post facto*, this court must examine the statute on its face, not based on the specific effect the statute had on Ms. Scruggs. ***Hudson***, 522 U.S. at 101-02; ***Rachel***, 2002 WI 81, ¶ 34.

The court of appeals' opinions in this case and ***Radaj*** are squarely at odds with this requirement. Instead of examining the statute on its face, the court of appeals has examined how the statute should apply depending on whether one or multiple surcharges were imposed. ***Scruggs***, 2015 WI App 88; ***Radaj***, 2015 WI App 50. But it does not matter how many surcharges were imposed. *See* ***Hudson***, 522 U.S. at 101-02. The only question is whether the mandatory DNA surcharge statute, on its face, is punitive under the intent-effects test.

1. The mandatory DNA surcharge is intended to impose a new criminal penalty.

The text of the statute, as well as its legislative history, demonstrates that the legislature intended the mandatory DNA surcharge as a criminal penalty. Determining whether the legislature intended the statute to be punitive "is primarily a matter of statutory construction, and we must ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." ***Rachel***, 2002 WI 81, ¶ 40. "[S]tatutory interpretation begins with the language of the statute." ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110.

The plain text of the amended DNA surcharge statute reflects a punitive intent because the surcharge bears no relation to actual DNA cost created by the defendant. *See* ***Radaj***, 2015 WI App 50, ¶¶ 25, 29. If the DNA surcharge were intended as a cost-recovery measure, then it should match (at least roughly) DNA cost. Instead, the surcharge imposes a flat fine: $200 for every misdemeanor and $250 for every felony. It does not matter what DNA cost the defendant or the case produced. A person convicted of one misdemeanor in a case involving considerable DNA analysis pays only $200, while a person convicted of five felonies in a case involving no DNA cost must pay $1250. And the statute contemplates no upper limit to the number of surcharges that could be imposed.

The court of appeals observed that this component of the statute—tying "the amount of the surcharge to the number of convictions,"—is evidence of punitive intent. ***Radaj***, 2015 WI App 50, ¶ 21. The court did not hold that the statute was

intentionally punitive because it found it to have a punitive effect. Nevertheless, the court pointed out that using the number of convictions to decide the number of surcharges, "something seemingly unrelated to the cost of the DNA-analysis-related activities that the surcharge funds, casts doubt on legislative intent." ***Radaj***, 2015 WI App 50, ¶ 21.

By tying the surcharge to the number of convictions, the legislature is deliberately punishing more severe offenders more harshly than those with fewer convictions. There is nothing inherent in multiple convictions that requires multiple surcharges. This is simply a punitive measure that enhances the penalty for each conviction. Even the court of appeals acknowledged that it could not conceive of any reason why DNA costs "would generally increase in proportion to the number of convictions, let alone in *direct* proportion to the number of convictions." ***Id.***, ¶ 32 (emphasis added).

The fact that this penalty is called a "DNA surcharge" does not control the outcome in this case. "A fine is a fine even if called a fee, and 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." ***Mueller v. Raemisch***, 740 F.3d 1128, 1133 (7th Cir. 2014). That is exactly what is happening here: although labeled a "DNA surcharge," the assessment bears no relation to the DNA costs created by any particular defendant. It is simply a per-conviction fine.

Imposing a higher surcharge in felony cases also reflects punitive intent. If the surcharge were actually intended to offset the costs of DNA testing, there would be no reason to impose a higher surcharge in felony cases than misdemeanor cases. Surely it does not cost more to test a felon's DNA than a misdemeanant's. The only rational reason

for this discrepancy is to impose a greater punishment on those defendants whose criminal culpability is greater.

Placement of the DNA surcharge within the criminal sentencing statutes also reflects a legislative intent to punish. As this court has stated: "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Kalal***, 2004 WI 58, ¶ 46. Here, the surcharge is situated squarely within the criminal sentencing statutes, which address criminal penalties and their imposition. In contrast, court costs and other non-punitive surcharges are addressed in Chapter 814. This placement suggests that the legislature intended to impose a criminal penalty.

Even if the statutory text does not unambiguously reflect punitive intent, the limited legislative history of the statute reflects that intent.[3] The amended DNA surcharge was accompanied by a massive expansion of DNA collection in Wisconsin. Instead of taking DNA samples only after a felony conviction, the legislature proposed taking DNA samples after every felony *arrest*, specified misdemeanor arrests, and every misdemeanor conviction. (LFB Memo, 2-4); Wis. Stat. §§ 165.76, 973.047.[4] The Legislative Fiscal

[3] The legislative history consists of a memo from the Legislative Reference Bureau to the Joint Committee on Finance. Legislative Reference Bureau, DNA Collection at Arrest and the DNA Analysis Surcharge, May 23, 2013, *available at* https://docs.legis.wisconsin.gov/misc/lfb/budget/2013_15_biennial_budget/102_budget_papers/410_justice_dna_collection_at_arrest_and_the_dna_analysis_surcharge.pdf (last visited Mar. 31, 2016).

[4] In response to the Supreme Court's decision in ***Maryland v. King***, 133 S. Ct. 1958 (2013), which limited post-arrest DNA collection

Bureau estimated that the mandatory surcharge would provide over $3.5 million in revenue for the 2014-15 fiscal year to pay for the expanded DNA collection. (LFB Memo, 2).

The mandatory surcharge is not non-punitive simply because the proceeds are being used to pay for DNA collection. Court-imposed fines also support government activities, but they are still punitive. *See* ***State v. Ramel***, 2007 WI App 271, ¶ 15, 306 Wis. 2d 654, 743 N.W.2d 502. The problem is that the legislature is not proportionately splitting the bill for the new DNA costs it has created. That makes it punitive. *See* ***Mueller***, 740 F.3d at 1133. Instead of collecting money from those creating a DNA cost, the statute is arbitrarily punishing those convicted of crimes—and tying the amount owed to the number of convictions—without any regard for the DNA cost they did or did not create.

It is not difficult to conceive a surcharge that would have been non-punitive. Requiring a person to pay a surcharge once, after his or her DNA sample is taken, or requiring a surcharge in a case involving DNA testing makes sense as a cost-recovery measure. But requiring convicts to pay as many surcharges as they have convictions, without *any* consideration of whether they created a DNA cost is simply punitive. ***Radaj***, 2015 WI App 50. Therefore, the mandatory DNA surcharge violates *ex post facto* when applied

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to "serious offenses," the legislature scaled back post-arrest DNA collection to "violent crimes." 2013 Wis. Act 214; Wis. Stat. § 165.76(gm). Notably, the DNA surcharge was not correspondingly scaled back. Thus, the State is collecting just as much money, but collecting far fewer DNA samples. Presumably, if the amended surcharge was merely intended to pay for expanded DNA testing, the surcharge should have been scaled back to account for the reduced DNA collection.

retroactively, and this court should vacate the DNA surcharge in this case.

2. The mandatory surcharge is so punitive that even if it was intended as a civil assessment, it has the effect of a criminal penalty.

Even if this court finds that the legislature did not intend the new DNA surcharge to be punitive, it may still violate *ex post facto* if it is "so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." ***Rachel***, 2002 WI 81, ¶ 33. Here, the effect of a $200 or $250 DNA surcharge for every conviction, regardless of DNA cost, is so punitive that it has become a criminal penalty.

The court of appeals in this case erred by completely failing to consider the "effect" portion of the intent-effects test. ***Scruggs***, 2015 WI App 88, ¶ 18. Although similar facts suggest punitive intent and punitive effect, the two prongs of the test require separate analysis. The entire purpose of the "effects" half of the test acknowledges that sometimes statutes that are not intended to be punitive produce results that are so onerous that they violate *ex post facto*. Thus, the court must analyze not only whether the statute is deliberately punitive, but whether the actual outcomes from applying the statute are punitive.

The effect of the mandatory DNA surcharge is punitive because it is not merely intended to compensate for the DNA costs created by a particular defendant. As noted above, the surcharge is completely unrelated to the costs created by the defendant.

First, the surcharge is collected in every case, for every conviction, regardless of whether DNA is collected or analyzed. The amended surcharge imposes a blanket rule to take a surcharge for every conviction.

Take, for example, the defendant from ***Radaj***. He was initially charged with *21* misdemeanors and felonies. 2015 WI App 50, ¶ 2. Had he eventually pled to 21 misdemeanors, he would have been charged $4200 in DNA surcharges.[5] In reality, he pled to four felonies and had to pay "only" $1000 in DNA surcharges. ***Id.***, ¶ 5.

The court of appeals properly recognized that this feature of the amended DNA surcharge—that the cost increased with each conviction—rendered it punitive in effect, even if that was not the legislature's intent. ***Id.***, ¶ 29. The court explained that in cases involving monetary fees,

> 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. 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., ¶ 25. The court was unable to conceive of any reason why DNA cost would increase with the number of convictions, and held that "this per-conviction approach to setting the

[5] Of course, the DNA surcharge is only one of the many fees or surcharges a Wisconsin felon may pay. *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) ($10 jail surcharge); 757.05 (26 percent penalty surcharge); 973.055 ($100 domestic abuse surcharge).

DNA surcharge" rendered it punitive, so retroactive application violated *ex post facto*. ***Id.***, ¶ 29.

The amended surcharge is also punitive in effect because if the surcharge were actually intended to compensate the State for the costs of DNA analysis, there would be no reason to distinguish between felonies and misdemeanors. By correlating the "amount of the fine imposed" to "the degree" of the offense, the surcharge is effectively punitive under *ex post facto*. ***People v. Stead***, 845 P.2d 1156, 1160 (Colo. 1993).

A non-punitive measure would be something like a one-time fee covering the cost of DNA collection and analysis. That was precisely the circumstance in South Carolina, where the Fourth Circuit upheld a DNA surcharge that was imposed *upon defendants who supplied a DNA sample*. ***In re DNA Ex Post Facto Issues***, 561 F.3d 294 (4th Cir. 2009). There, the statute at issue read: "A person who is required to provide a sample pursuant to this article must pay a two hundred and fifty dollar processing fee which may not be waived by the court." ***Id.*** at 297. Thus, a defendant only had to pay a $250 DNA fee if he or she created a DNA cost. The defendants argued that the statute violated *ex post facto* when applied retroactively. ***Id.*** at 298. The appellate court upheld the surcharge, holding that the statute was clearly compensatory in nature because *the DNA surcharge was directly related to actual DNA cost*. ***Id.*** at 299. In contrast, Wisconsin's surcharge bears no relation to DNA cost, and is simply a per-conviction fine of $200 or $250.

It is difficult to find closely analogous statutes in other states because Wisconsin's mandatory DNA surcharge statute is so uniquely severe. Although other states have required convicts to retroactively pay for the costs of DNA testing,

e.g., ***People v. Higgins***, 13 N.E.3d 169 (Ill. App. Ct. 2014), no other state calls upon defendants to keep paying DNA surcharges for every conviction, regardless of DNA cost.

Even under more lenient schemes, however, other jurisdictions have found financial penalties to violate *ex post facto* when applied retroactively. A series of other jurisdictions have concluded that similar financial penalties violate *ex post facto* and cannot be applied retroactively. ***United States v. Jones***, 489 F.3d 243, 254 n.5 (6th Cir. 2007); (*ex post facto* prevented increased "special assessment" on convictions after commission of crime); ***Eichelberger v. State***, 916 S.W.2d 109, 112 (Ark. 1996); (same result for restitution); ***Matter of Appeal in Maricopa Cnty. Juvenile Action No. J-92130***, 677 P.2d 943, 947 (Ariz. Ct. App. 1984) (restitution and "monetary assessment"); ***People v. Batman***, 71 Cal. Rptr. 3d 591, 593-94 (2008) (DNA assessment); ***People v. Stead***, 845 P.2d 1156, 1159 (Colo. 1993) ("drug offender surcharge"); ***Cutwright v. State***, 934 So. 2d 667, 668 (Fla. Dist. Ct. App. 2006) (court costs); ***People v. Rayburn***, 630 N.E.2d 533, 538 (Ill. Ct. App. 1994) (fine for "Family Abuse Fund"); ***State v. Corwin***, 616 N.W.2d 600, 602 (Iowa 2000) (restitution); ***State v. Theriot***, 782 So. 2d 1078, 1085-87 (La. Ct. App. 2001) (change of fine from discretionary to mandatory violated *ex post facto*); ***Spielman v. State***, 471 A.2d 730, 735 (Md. 1984) (restitution); ***People v. Slocum***, 539 N.W.2d 572, 574 (Mich. Ct. App. 1995) (restitution); ***State v. McMann***, 541 N.W.2d 418, 422 (Neb. Ct. App. 1995) (restitution); ***People v. Stephen M.***, 824 N.Y.S.2d 757 (N.Y. Crim. Ct. 2006) (DNA fee); ***Commonwealth v. Wall***, 867 A.2d 578, 580-81 (Pa. Super. Ct. 2005) (OWI assessment); ***State v. Short***, 350 S.E.2d 1, 2-3 (W.Va. 1986) (restitution); ***Loomer v. State***, 768 P.2d 1042, 1049 (Wyo. 1989) (costs).

The court of appeals' approach—reaching different results depending on the number of surcharges—not only contradicts Supreme Court precedent requiring an examination of the face of the statute, but will produce a series of bizarre results, where the DNA surcharge depends more on plea bargaining and good timing than it does on DNA cost. Inexplicably, the court in ***Radaj*** recognized this problem, but still limited its holding to cases involving multiple surcharges. Take, for example, a defendant facing charges in two separate cases, each charging two separate counts. Under the court of appeals' approach, that defendant could face a number of different outcomes when retroactively applying the mandatory surcharge, and *none* of those outcomes would have anything to do with DNA cost. Plea bargaining would play an infinitely bigger role. If the defendant pled guilty to one count in each case, he would pay two mandatory surcharges. ***Scruggs***, 2015 WI App 88. If the defendant pled guilty to both counts in one case, he would face only one *discretionary* surcharge. ***Radaj***, 2015 WI App 50. If he pled guilty to three of the four counts, he would face a mandatory surcharge in one case, and a discretionary surcharge in the other. These results make no sense, and demonstrate that the mandatory DNA surcharge has nothing to do with requiring defendants to pay for the DNA costs they create.

Conveniently, applying *ex post facto* produces a simple rule: the discretionary surcharge applies if the offense occurred before January 1, 2014, and the mandatory surcharge applies if the offense occurred from January 1, 2014 onward. This straightforward rule ends all the confusion resulting from the court of appeals' opinions, and provides a simple rule for future application.

The only remedy for an *ex post facto* violation is to enforce the statute that existed at the time of the offense. ***Weaver***, 450 U.S. at 36 n.22. Therefore, this court should vacate the mandatory DNA surcharge, and remand so the circuit court can decide whether to impose a single discretionary surcharge applying ***Cherry***.

CONCLUSION

For the reasons stated above, Ms. Scruggs asks that this court reverse the court of appeals' decision, hold that retroactive application of the mandatory DNA surcharge violates *ex post facto*, and remand to the circuit court so it may decide whether to impose a single discretionary DNA surcharge under the version of section 973.046 that was in effect at the time of the offense.

Dated this 5th day of April, 2016.

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 4,452 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 5th day of April, 2016.

Signed:

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CERTIFICATION AS TO APPENDIX

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 § 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 § 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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 5th day of April, 2016.

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