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STATE OF WISCONSIN
IN SUPREME COURT

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OF WISCONSIN**

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 AFFIRMING A JUDGMENT OF
CONVICTION AND AN ORDER DENYING
POSTCONVICTION RELIEF ENTERED IN THE
RACINE COUNTY CIRCUIT COURT, THE
HONORABLE ALLAN B. TORHORST, PRESIDING

**BRIEF AND SUPPLEMENTAL APPENDIX OF
PLAINTIFF-RESPONDENT**

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BRIEF OF PLAINTIFF-RESPONDENT

ISSUE PRESENTED

When Tabitha Scruggs committed a burglary in 2013, Wis. Stat. § 973.046 permitted the circuit court to impose, in its discretion, a \$250 DNA surcharge. After the offense, but before sentencing, the statute was amended to make the surcharge mandatory and Scruggs was required to pay a \$250 surcharge. Does the application of the mandatory surcharge statute to Scruggs violate the ex post facto clauses of the United States and Wisconsin Constitutions?

The circuit court held that the mandatory surcharge statute was not an unconstitutional ex post law as applied to Scruggs because the legislation creating the mandatory surcharge was enacted before Scruggs committed her offense.

The court of appeals held that the statute did not violate the prohibition against ex post facto laws because Scruggs failed to demonstrate beyond a reasonable doubt that the \$250 DNA surcharge imposed on her for a single felony constitutes a punishment.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in any case important enough to merit this court's review, oral argument and publication of the court's decision are warranted.

STATEMENT OF THE CASE

Scruggs was convicted of one felony count for a burglary that she committed on December 30, 2013. (9:1, Pet-Ap. 112.) When she committed the crime, the imposition of a DNA surcharge was discretionary for that offense; 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.

Earlier in 2013, the legislature 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)¹; 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). When Scruggs was sentenced on June 9, 2014, the court imposed a \$250 DNA surcharge. (9:1-2, Pet-Ap. 112-13.)

Scruggs filed a postconviction motion asking the court to vacate the DNA surcharge. (12:1-5.) She argued that “the new statute violated *ex post facto* as applied” to her. (12:4.) The circuit court denied the motion, holding that “[t]he fact that the particular DNA surcharge section that applies to her became effective two days after she committed the crime is immaterial” because “[t]he law was in effect when Scruggs committed her crime.” (13:3, Pet-Ap. 117.)

The court of appeals affirmed on different grounds. *State v. Scruggs*, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146; Pet-Ap. 102-11. It noted that the State conceded that the circuit court erred when it held that the 2014 amendment was in effect when Scruggs committed the crime. *See id.* ¶ 5; Pet-Ap. 104. Instead, applying the “intent-effects” test used in *State v. Rachel*, 2002 WI 81, 254 Wis. 2d 215, 647 N.W.2d 762, the court of appeals held that imposing a single mandatory DNA surcharge was an not *ex post facto* violation because Scruggs had not demonstrated that the single surcharge imposed on

¹All subsequent statutory references are to the 2013-14 version of the statute unless otherwise noted.

her constituted a punishment. *See Scruggs*, 365 Wis. 2d 568, ¶¶ 7-19, Pet-Ap. 105-11.

The court first observed that in *State v. Radaj*, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758, it had held that the new mandatory surcharge was an ex post facto violation as applied to a defendant to whom the \$250 surcharge was imposed for each of multiple felony convictions. *See Scruggs*, 365 Wis. 2d 568, ¶ 9, Pet-Ap. 106. It noted that in *Radaj*, it had assumed without deciding that the legislature's intent was nonpunitive, but that it had concluded that the effect of assessing a \$250 DNA surcharge for each felony conviction was to punish a defendant because "there could be no reason why the costs associated with running the DNA data bank would generally increase in proportion to the number of convictions." *Id.*

The court further noted that in *Radaj* it had "left for another day" the issue presented in *Scruggs*, whether the result might be different if *Radaj* had been convicted of a single felony carrying with it a mandatory \$250 surcharge. *Id.* Because *Scruggs*'s appeal "involves only a single felony conviction," the court said, "*Radaj* does not control our decision." *Id.*

Turning to the legislative intent inquiry, the court concluded, based on "the statute and its history, . . . that the legislature was motivated by a desire to expand the State's DNA data bank and to offset the cost of that expansion, rather than a punitive intent." *Id.* ¶ 10, Pet-Ap. 106. It noted that the 2014 amendment "was part of a larger initiative

by the State to expand the collection of DNA samples.” *Id.*, Pet-Ap. 107. The court stated that “to offset the increased burden on the Department of Justice (DOJ) in collecting, analyzing, and maintaining the additional DNA samples, the legislature imposed the \$250 surcharge on felony convictions to be deposited with the DOJ to pay for operating its DNA data bank.” *Id.* ¶ 11, Pet-Ap. 107. “That the DNA surcharge is specifically dedicated to fund the collection and analysis of DNA samples and the storage of DNA profiles—all regulatory activities—evidences a nonpunitive cost-recovery intent.” *Id.* ¶ 12, Pet-Ap. 108.

The court further found that “[t]he relatively small size of the surcharge also indicates that the fee applied here was not intended to be a punishment, but rather an administrative charge to pay for the collection of the sample from Scruggs, along with the expenditures needed to administer the DNA data bank.” *Id.* ¶ 13, Pet-Ap. 108. The amount of the surcharge was rational, the court concluded, noting that it is consistent with the DNA fee charged in other jurisdictions and that “[t]he connection between the fee and the costs it is intended to cover ‘need not be perfect to be rational.’” *Id.*

The court rejected Scruggs’ contention that “the \$250 DNA surcharge for a felony conviction reflects a punitive intent because the surcharge is higher than the \$200 surcharge for a misdemeanor conviction, and is imposed regardless of whether she provided a sample in the past.” *Id.* ¶ 14, Pet-Ap. 108. “[T]his is an ‘as applied’ challenge,” the court noted,

“and as to Scruggs’s single felony conviction, the \$250 surcharge does not evidence a punitive intent.” *Id.*

Moreover, the court said, “Scruggs has pointed to nothing, other than speculation, that the disparity between the surcharges on a conviction for a felony as compared to a misdemeanor reflects that the legislature was motivated by a punitive intent.” *Id.*, Pet-Ap. 108-09. “In any event, the legislature might have reasoned that because DNA evidence is more often used in prosecuting felony cases and, in turn, in subsequent law enforcement investigations, that those offenders should bear more of the cost of operating the DNA data bank.” *Id.*, Pet-Ap. 109. “Additionally,” the court said, “even before the 2014 Amendment, when the imposition of a DNA surcharge for a felony conviction was left to the discretion of the sentencing court, the surcharge was still \$250. Since there has been no change in the amount of the DNA surcharge on a felony conviction, it cannot be said the same surcharge now reflects that the legislature was motivated by a punitive intent.” *Id.*

The court added that its conclusion that the statute “evidences a nonpunitive cost-recovery intent is bolstered by its language expressly denominating the fee assessed against felony offenders such as Scruggs as a ‘surcharge,’ a civil nonpunitive label, rather than as a ‘fine’ or ‘penalty.’” *Id.* ¶ 17, Pet-Ap. 110. “While not dispositive, ‘[w]e give “great deference to such labels.”’” *Id.* (quoting *Radaj*, 363 Wis. 2d 633, ¶ 17).

The court concluded that “Scruggs has failed to carry her burden showing beyond a reasonable doubt that the legislature intended to punish her.” *Id.* ¶ 18, Pet-Ap. 110.

The court further held that Scruggs had not “carried her burden of showing that the effect of the \$250 DNA surcharge is to impose a criminal penalty.” *Id.*, Pet-Ap. 110-11. It observed that “[f]or support, Scruggs relies on many of the same arguments as demonstrative of the punitive effect of the \$250 DNA surcharge, which we have already rejected as lacking in merit.” *Id.*, Pet-Ap. 111.

ARGUMENT

The sole issue before this court is whether requiring Scruggs to pay a single mandatory \$250 DNA surcharge under a statutory amendment to Wis. Stat. § 973.046 that took effect after she committed her crime violates the ex post facto clauses of the United States and Wisconsin Constitutions.² The court of appeals held that the application of the new mandatory surcharge was not an ex post facto violation because Scruggs failed to carry her burden of demonstrating that a single

² Wisconsin Stat. § 973.046 provides in relevant part:

(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.

surcharge has either a punitive intent or a punitive effect. Scruggs argues in this court that the amended statute has both a punitive intent and a punitive effect, precluding its retroactive application in this case.

Before addressing that issue, the State notes that the parties agree on several points. First, even though the bill amending Wis. Stat. § 973.046 was enacted before Scruggs committed her offense, the relevant date for ex post facto purposes is the January 1, 2014, effective date of the statute.³ See *Weaver v. Graham*, 450 U.S. 24, 31 (1981) (“The critical question is whether the law changes the legal consequences of acts completed before its effective date.”). The circuit court erred, therefore, when it held that “[t]he fact that the particular DNA surcharge section that applies to her became effective two days after she committed the crime is immaterial” because “[t]he law was in effect when Scruggs committed her crime” (13:3, Pet-Ap. 117).

Second, if the DNA surcharge is punitive, as Scruggs contends, 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 *Lindsey v. Washington*, 301 U.S. 397, 400 (1937) (ex post facto violation to apply new criminal penalty where “[t]he effect of the

³ See 2013 Wis. Act 20, § 9426(1)(am) (effective date of Wis. Stat. § 973.046(1r)(a)) is the first day of the sixth month after the Act’s July 1, 2013, publication date).

new statute is to make mandatory what was before only the maximum sentence”).

Third, if the court agrees with Scruggs that applying the mandatory DNA surcharge to her is unconstitutional, the remedy is to apply the discretionary DNA surcharge statute that was in effect when she committed the crime. *See Weaver*, 450 U.S. at 36 n.22 (“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.”).

But, for the reasons discussed below, the court of appeals correctly concluded that the application of the amended DNA surcharge to Scruggs is not an *ex post facto* violation. Accordingly, this court should affirm the decision of the court of appeals.

I. THE ONLY ISSUE BEFORE THE COURT IS WHETHER IMPOSITION OF A SINGLE MANDATORY DNA SURCHARGE IS AN EX POST FACTO VIOLATION.

Scruggs argues that the court of appeals erred when it limited its analysis to the imposition of a single DNA surcharge. *See* Scruggs’ brief at 7. She contends that “[t]he only question is whether the mandatory DNA statute, on its face, is punitive” and that “it does not matter how many surcharges were imposed.” *Id.*

Her argument in support of that proposition is terse, consisting of just two sentences. “[W]hen deciding whether a law violates *ex post facto*,” she writes, “[t]he inquiry looks to the challenged provision and not to any special circumstances that may mitigate its effect on the particular individual.” *Id.* (quoting *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.’” *Id.* (quoting *Hudson v. United States*, 522 U.S. 93, 101 (1997)).

Scruggs did not make that argument in the court of appeals. In its court of appeals brief, the State, in response to arguments in Scruggs’ brief-in-chief that were based on the imposition of multiple surcharges, argued that those arguments were not relevant because her claim is an as-applied challenge to the statute. *See* State’s court of appeals brief at 8. The State noted that “in an as-applied challenge, [the court] assess[es] the merits of the challenge by considering the facts of the particular case in front of us, ‘not hypothetical facts in other situations.’” *Id.* at 9 (quoting *State v. Wood*, 2010 WI 17, ¶ 13, 323 Wis. 2d 321, 780 N.W.2d 63). For that reason, the State argued, “Scruggs’s argument must be limited . . . to the facts of her case, which involve a single \$250 surcharge.” *Id.*

Scruggs’ reply brief did not challenge the State’s characterization of her claim; she did not cite *Weaver* or *Hudson*, nor did she argue that the court must evaluate the statute on its face to determine whether it imposes a criminal sanction. *See* Scruggs’

court of appeals reply brief at 1-4. By failing to respond in her reply brief to the State's argument, Scruggs conceded the point. *See Shadley v. Lloyds of London*, 2009 WI App 165, ¶ 26, 322 Wis. 2d 189, 776 N.W.2d 838. The court of appeals can hardly be faulted for conducting an as-applied analysis based on the facts of Scruggs' case.

More importantly, United States Supreme Court precedent does not require this court to examine, when determining whether the statute violates ex post facto as applied to Scruggs, whether the amended surcharge statute is punitive as applied to defendants convicted of multiple offenses.

One of the cases cited in *Weaver* for the proposition that the ex post facto inquiry "looks to the challenged provision and not to any special circumstances that may mitigate its effect on the particular individual" is *Lindsey*. *See Weaver*, 450 U.S. at 33. In *Lindsey*, the maximum sentence for the offense when the defendant committed the crime was fifteen years. *See Lindsey*, 301 U.S. at 398. Before the defendant was sentenced, however, the statute had been amended to impose a mandatory fifteen-year sentence. *See id.* at 400.

In the passage cited in *Weaver*, the *Lindsey* Court held that regardless of the sentence actually imposed, what is relevant for ex post facto purposes is the increase in the possible penalty. The Court held that "the ex post facto clause looks to the standard of punishment prescribed by a statute,

rather than to the sentence actually imposed. *Id.* at 401. “[A]n increase in the possible penalty is ex post facto regardless of the length of the sentence actually imposed, since the measure of punishment prescribed by the later statute is more severe than that of the earlier.” *Id.*, citations omitted.

In another of the cases cited in *Weaver, Dobbert v. Florida*, 432 U.S. 282 (1977), the Court explained what it meant by those statements in *Lindsay*. The defendant in *Dobbert* argued that changes in Florida’s death penalty statute could not be retroactively applied to him. *See Dobbert*, 432 U.S. at 284. One of his challenges was to a portion of the statute that provided that anyone sentenced to life imprisonment must serve at least twenty-five years before becoming eligible for parole; the prior statute contained no such limitation. *See id.* at 298. The Court held that because the defendant had been sentenced to death, he could not bring an ex post facto challenge to a change in the law that had no effect on him. *See id.* at 298-301.

In reaching that conclusion, the Court contrasted *Dobbert*’s case to *Lindsay*. The Court said that “*Lindsey* must be read . . . to mean that one is not barred from challenging a change in the penal code on ex post facto grounds simply because the sentence he received under the new law was not more onerous than that which he might have received under the old.” *Id.* at 300. But, the Court held, “[i]t is one thing to find an ex post facto violation where under the new law a defendant must

receive a sentence which was under the old law only the maximum in a discretionary spectrum of length," the court held. *Id.* "[I]t would be quite another to do so in a case, such as this, where the change has had no effect on the defendant in the proceedings of which he complains." *Id.*

In this case, the amended DNA surcharge statute did not impose multiple DNA surcharges on Scruggs. On its face, the statute requires the imposition of a single \$250 surcharge on a defendant who, like Scruggs, has been convicted of a single felony. *See* Wis. Stat. § 973.046(1r)(a). The change to the statute that imposes multiple surcharges on defendants who are convicted of multiple offenses "had no effect on the defendant in the proceedings of which [s]he complains." *Dobbert*, 432 U.S. at 300. The only question before this court, therefore, is whether imposing a single mandatory DNA surcharge on Scruggs is an ex post facto violation.

II. REQUIRING SCRUGGS TO PAY A SINGLE MANDATORY \$250 DNA SURCHARGE DOES NOT VIOLATE THE FEDERAL OR STATE EX POST FACTO CLAUSES.

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). Scruggs argues that retroactively applying the change in the DNA surcharge statute violates ex post facto because the amended statute “increases the mandatory punishment for completed crimes.” Scruggs’s brief at 6.

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 determine whether a law applied retroactively is punitive. *See id.*, ¶ 22; *Rachel*, 254 Wis. 2d 215, ¶ 38. First, the court looks at the legislature’s intent in creating the law. *See Kester*, 347 Wis. 2d 334, ¶ 21. 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 of appeals correctly concluded that Scruggs has not demonstrated either that the legislature intended the mandatory DNA surcharge to be punishment or that the \$250 surcharge she is required to pay has a punitive effect on her. Accordingly, this court should affirm the court of

appeals' decision rejecting Scruggs' ex post facto claim.⁴

A. 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 party challenging the constitutionality of a statute “bears a heavy burden.” *State v. Smith*, 2010 WI 16, ¶ 8, 323 Wis. 2d 377, 780 N.W.2d 90. “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). “The burden of proof that challengers face, beyond a reasonable doubt, is the same in both facial and as

⁴ Scruggs does not argue that she enjoys greater protection under the Ex Post Facto Clause of the Wisconsin Constitution, Wis. Const. art. I, § 12, than under its federal counterpart. She acknowledges that this court construes the State provision similarly to the federal provision. *See* Scruggs’ brief at 5; *see also Thiel*, 188 Wis. 2d at 699 (“We have long looked to the pronouncements of the United States Supreme Court in construing the Ex Post Facto Clause of the Federal Constitution as a guide to construing the Ex Post Facto Clause of the Wisconsin Constitution.”) (footnote omitted).

applied constitutional challenges.” *Appling v. Walker*, 2014 WI 96, ¶ 17 n.21, 358 Wis. 2d 132, 853 N.W.2d 888.

B. Scruggs has not shown that the legislature intended the DNA surcharge be a punishment.

Scruggs argues that the text of the amended statute and its legislative history demonstrate that the legislature intended the mandatory DNA surcharge as a criminal penalty. *See* Scruggs’ brief at 8. The court of appeals rejected that argument, *see Scruggs*, 365 Wis. 2d 568, ¶¶ 10-18, Pet-Ap. 106-10, and rightly so.

As the court of appeals observed, the 2014 amendment that made the DNA surcharge mandatory “was part of a larger initiative by the State to expand the collection of DNA samples.” *See id.* ¶ 10, Pet-Ap. 107 (citing 2013 Wis. Act 20, §§ 2354, 2355, 2356; Legislative Fiscal Bureau, Paper #410, DNA Collection at Arrest and the DNA Analysis Surcharge 2-8 (May 23, 2013)) (“LFB #410”).⁵ The legislature’s intent in making the statutory changes, the court found, was “a desire to expand the State’s DNA data bank and to offset the cost of that expansion, rather than a punitive intent.” *Id.*, Pet-Ap. 107.

⁵The LFB memorandum is included in the appendix to this brief. (R-Ap. 101-19.)

The court of appeals observed that “[s]ince its introduction into the courtroom, DNA evidence has been a powerful tool in not only identifying criminal perpetrators but also in exonerating innocent persons, and the 2014 Amendment reflects the State’s desire to facilitate those purposes through a larger pool of DNA specimens.” *Id.* ¶ 10; Pet-Ap. 107 (citing LFB #410 at 8). “[T]o offset the increased burden on the Department of Justice (DOJ) in collecting, analyzing, and maintaining the additional DNA samples, the legislature imposed the \$250 surcharge on felony convictions to be deposited with the DOJ to pay for operating its DNA data bank.” *Id.* ¶ 11 (citing Wis. Stat. §§ 165.77, 973.046(3); LFB #410 at 2-3). The court noted that 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,” which is the DNA analysis and data bank statute. *Id.*

The DNA-related functions funded by the surcharge are not limited to those associated with the collection and analysis of a defendant’s DNA sample. As the court of appeals observed, “[i]n addition to the initial collection of defendants’ DNA specimens, the creation of DNA profiles and their entry into the data bank, Wis. Stat. § 165.77 requires DOJ to analyze DNA when requested by law enforcement agencies regarding an investigation; upon request by a defense attorney, pursuant to a

court order, regarding his or her client's specimen; and, subject to DOJ rules, at the request of an individual regarding his or her own specimen." *Id.* ¶ 12 (citing Wis. Stat. § 165.77(2)(a)1.), Pet-Ap. 107. "DOJ may compare the data obtained from a specimen with data obtained from other specimens and provide those results to prosecutors, defense attorneys, or the subject of the data." *Id.* (citing Wis. Stat. § 165.77(2)(a)2.), Pet-Ap. 107-08. In addition, "DOJ is required to maintain a data bank based on data obtained from its analysis of DNA specimens." *Id.* (citing Wis. Stat. § 165.77(3)), Pet-Ap. 108. The DNA surcharge funds all of those activities.

Based on the text of the statute and its legislative history, the court of appeals concluded that the fact that the DNA surcharge "is specifically dedicated to fund the collection and analysis of DNA samples and the storage of DNA profiles—all regulatory activities—evidences a nonpunitive cost-recovery intent." *Id.* ¶ 12, Pet. Ap. 108.

In support of her argument that the legislature intended the surcharge to be a new criminal penalty, Scruggs cites the description in the LFB memorandum of the expansion of the DNA collection program and the memorandum's estimate that the surcharge change would provide about \$3.5 million in revenue during the 2014-15 fiscal year. *See* Scruggs's brief at 10-11. But she does not identify, nor has the State's examination revealed, any language in the LFB memorandum that suggests a punitive intent behind the surcharge. To the

contrary, as the court of appeals correctly observed, the memorandum explains that the increased revenue generated by the surcharge amendments would be used to fund the cost of expanding the DNA databank under other provisions of the new law. *See* LFB #410 at 13 (R-Ap. 113) (“The funding for this proposal would primarily come from an amended and expanded DNA surcharge.”). The LFB memorandum supports the conclusion that the intent of the amendment to the surcharge statute was not punitive but to provide funds for an expanded DNA collection and analysis program and the resulting larger DNA databank.

Scruggs’ claim that the legislature had a punitive intent focuses primarily on the cost of collecting and analyzing an individual defendant’s DNA sample. *See* Scruggs’ brief at 8 (“The plain text of the amended DNA surcharge statute reflects a punitive intent because the surcharge bears no relation to the actual DNA cost created by the defendant.”). That argument overlooks the fact that, as the court of appeals explained, the DNA surcharge funds all of the DNA-related activities of the State Crime Lab, not just those activities related to the collection and analysis of an individual defendant’s DNA.

Scruggs also argues that “[i]mposing a higher surcharge in felony cases also reflects punitive intent.” Scruggs’ brief at 9. “If the surcharge were actually intended to offset the costs of DNA testing,” she contends, “there would be no reason to impose a higher surcharge in felony cases than misdemeanor cases.” *Id.*

The court of appeals rejected that argument, for two reasons. First, it said, “this is an ‘as applied’ challenge, and as to Scruggs’s single felony conviction, the \$250 surcharge does not evidence a punitive intent.” *Scruggs*, 365 Wis. 2d 568, ¶ 14, Pet-Ap. 108.

Second, the court said, “Scruggs has pointed to nothing, other than speculation, that the disparity between the surcharges on a conviction for a felony as compared to a misdemeanor reflects that the legislature was motivated by a punitive intent.” *Id.*, Pet-Ap. 108-09. “In any event, the legislature might have reasoned that because DNA evidence is more often used in prosecuting felony cases and, in turn, in subsequent law enforcement investigations, that those offenders should bear more of the cost of operating the DNA data bank.” *Id.*, Pet-Ap. 109. “Additionally,” the court said, “even before the 2014 Amendment, when the imposition of a DNA surcharge for a felony conviction was left to the discretion of the sentencing court, the surcharge was still \$250. Since there has been no change in the amount of the DNA surcharge on a felony conviction, it cannot be said the same surcharge now reflects that the legislature was motivated by a punitive intent.” *Id.*

As noted in the previous section of this brief, Scruggs has challenged the court of appeals’ treatment of her claim as an as-applied challenge. But she makes no attempt to respond to the remainder of court of appeals’ analysis, which cogently refutes Scruggs’ argument that the

difference between the felony and misdemeanor surcharges demonstrates a punitive intent; she simply ignores it. *See* Scruggs' brief at 9-10.

The court of appeals added that its conclusion "that the statute evidences a nonpunitive cost-recovery intent is bolstered by its language expressly denominating the fee assessed against felony offenders such as Scruggs as a 'surcharge,' a civil nonpunitive label, rather than as a 'fine' or 'penalty.'" *Scruggs*, 365 Wis. 2d 568, ¶ 17, Pet-Ap. 110. Scruggs argues that "[t]he fact that this penalty is called a 'DNA surcharge' does not control the outcome in this case." Scruggs' brief at 9. The court of appeals acknowledged that a nonpunitive label is not dispositive. *See Scruggs*, 365 Wis. 2d 568, ¶ 17, Pet-Ap. 110. But, it added, "[w]hile not dispositive, '[w]e give "great deference to such labels.'" *Id.* (quoting *Radaj*, 363 Wis. 2d 633, ¶ 17). While Scruggs ignores the "great deference" that the court affords a nonpunitive label used by the legislature, this court should not.

Scruggs contends that the court should disregard the nonpunitive "surcharge" label because the surcharge "bears no relation to the DNA costs created by any particular defendant." Scruggs' brief at 9. But again, that argument ignores the fact that the surcharge funds all of the State Crime Lab's DNA-related functions, not just those related to the collection and analysis of an individual defendant's DNA.

The court of appeals further reasoned that “[t]he relatively small size of the surcharge also indicates that the fee applied here was not intended to be a punishment, but rather an administrative charge to pay for the collection of the sample from Scruggs, along with the expenditures needed to administer the DNA data bank.” *Scruggs*, 365 Wis. 2d 568, ¶ 13, Pet-Ap. 108 The amount of the surcharge was rational, the court concluded, noting that it is consistent with the DNA fee charged in other jurisdictions and that “[t]he connection between the fee and the costs it is intended to cover ‘need not be perfect to be rational.’” *Id.* (quoting *Radaj*, 363 Wis.2d 633, ¶ 30).

Scruggs counters that the amended DNA surcharge statute demonstrates a punitive intent because it imposes a separate surcharge for each conviction. *See* Scruggs’ brief at 8-9. But even if the fact that multiple surcharges could be imposed on other defendants were relevant to Scruggs’ challenge to the single surcharge imposed on her, an equally plausible inference about the legislature’s intent is that the legislature was not seeking to punish offenders but to maximize the funding of the State Crime Lab’s DNA operation.

It is Scruggs’ burden to prove beyond a reasonable doubt that the statute is unconstitutional. *See Smith*, 323 Wis. 2d 377, ¶ 8. But Scruggs’ speculation that the legislature intended the DNA surcharge to be punitive is not based on any evidence or facts in the record.

That omission is fatal to Scruggs' claim. In an action challenging on ex post facto grounds the annual fee imposed on registered sex offenders in Wisconsin, the Seventh Circuit held that the plaintiffs could not succeed without evidence that the fee was grossly disproportionate to the annual cost of keeping track of a registrant. *See Mueller v. Raemisch*, 740 F.3d 1128, 1134 (7th Cir. 2014). "The burden of proving that it is a fine is on the plaintiffs," the court said, "and since they have presented no evidence that it was intended as a fine, they cannot get to first base without evidence that it is grossly disproportionate to the annual cost of keeping track of a sex offender registrant—and they have presented no evidence of that either." *Id.*

In this case, the court of appeals concluded that "Scruggs has failed to carry her burden showing beyond a reasonable doubt that the legislature intended to punish her." *Scruggs*, 365 Wis. 2d 568, ¶ 18, Pet-Ap. 110. This court should reach the same conclusion.

- C. Scruggs has not shown that imposing a \$250 DNA surcharge had a punitive effect on her.

Scruggs argues that the mandatory DNA surcharge "is so punitive that even if it was intended to be a civil assessment it is a criminal penalty." Scruggs' brief at 12. But she does not argue that requiring her to pay a single \$250 surcharge is punitive. Instead, she argues that applying the surcharge to individuals convicted of multiple

offenses amounts to a financial penalty. *See* Scruggs' brief at 9.

But in an as-applied challenge, the court assesses the merits of the challenge by considering the facts of the particular case, not hypothetical facts in other situations. *See Wood*, 323 Wis. 2d 321, ¶ 13. And, as discussed above, *see supra* at 12-13, even accepting Scruggs' contention that the punitive effect is evaluated by examining the statute on its face, the DNA surcharge statute, on its face, imposes only a single surcharge on someone like Scruggs who is convicted of a single offense.

Under the "effects" prong of the intent-effects test, the court determines "whether the sanctions imposed by [the statute] are 'so punitive in form and effect as to render them criminal' despite the legislature's intent to the contrary." *Rachel*, 254 Wis. 2d 215, ¶ 42, (quoted sources omitted). "In applying the second part of the test, [the court] afford[s] the legislative preference for the civil label great deference." *Id.* "Only with 'the clearest proof' will [the court] find that what has been denominated a civil remedy is, in actuality, a criminal penalty." *Id.*

In making that determination, a number of factors guide the analysis:

- (1) [w]hether the sanction involves an affirmative disability or restraint;
- (2) whether it has historically been regarded as a 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.

Rachel, 254 Wis. 2d 215, ¶ 33 (quoting *Hudson*, 522 U.S. at 99-100). Those factors provide “useful guideposts,” *Hudson*, 522 U.S. at 99, and no factor is dispositive, see *Kester*, 347 Wis. 2d 334, ¶ 22 (citing *Smith v. Doe*, 538 U.S. 84, 97 (2003)).

In *Radaj*, the court of appeals said with respect to the imposition of multiple DNA surcharges that “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*, 363 Wis. 2d 633, ¶ 23. “For example,” the court noted, “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 in its view, “the factors with the clearest relevance here, and those that are most heavily disputed by the parties, are the fourth, sixth, and seventh factors.” *Id.* ¶ 24.

Although Scruggs quotes the *Rachel* factors in her description of the intent-effects test, see Scruggs’ brief at 6, she does not refer to them when she argues that the surcharge has a punitive effect, see *id.* at 12-17. Instead, she argues that the surcharge has a punitive effect because “it is not merely intended to compensate for the DNA costs created by a particular defendant.” *Id.* at 12. That is so, she

contends, because “the surcharge is collected in every case, for every conviction, regardless of whether DNA is collected or analyzed.” *Id.* at 13.

Scruggs’ logic is flawed. She is arguing that the surcharge has a punitive effect because it has a punitive intent. But she does not explain why a statute enacted with punitive intent necessarily has a punitive effect. Nor does she explain why the fact that the surcharge is collected regardless of whether DNA is collected or analyzed in that case means that the surcharge is punitive. As the State explained in its discussion of the statute’s intent, the surcharge pays for all of the State Crime Lab’s DNA-related activities, not just those associated with a particular defendant.

Scruggs further argues that “[t]he 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.” Scruggs’ brief at 14. Again, Scruggs is arguing that the surcharge has a punitive effect because it has a punitive intent.

When determining whether the DNA surcharge is unconstitutional, “the burden is on [Scruggs] 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*, 363 Wis. 2d 633, ¶ 34. Scruggs has not met that burden because she has not attempted to present any evidence showing that the \$250 surcharge imposed on her is not rationally

related to the State's DNA-related costs under Wis. Stat. § 165.77.

III. CASE LAW FROM OTHER JURISDICTIONS SUPPORTS THE CONCLUSION THAT THE DNA SURCHARGE IS NOT PUNITIVE.

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. Wisconsin’s DNA surcharge is thus related to the collection and analysis of DNA samples and the storage of DNA profiles – that is the only use for the surcharge.

Moreover, as in South Carolina, the relatively small size of the fee – \$250 for a felony conviction, *see* Wis. Stat. § 973.046(1r)(a) – “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. Scruggs faced a possible fine of \$25,000 on the burglary charge pursuant to Wis. Stat. § 939.50(3)(f). (2:1.) The fact that the DNA surcharge is just one percent of the potential fine further demonstrates that the surcharge was not intended to have retributive or deterrent value.

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 Scruggs’s claim that applying Wisconsin’s mandatory DNA surcharge to her 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.

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. *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). But it did so without any analysis and simply accepted the state's concession that the fee should not be applied. *See id.* Moreover, that court subsequently questioned the correctness of that concession based on a later decision by the New York Court of Appeals 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.

Scruggs cites a number of cases from other jurisdictions in which, she says, "similar financial penalties" have been found to be an ex post facto violation. *See* Scruggs' brief at 15. But she does not explain why those "financial penalties" are similar to Wisconsin's DNA surcharge. Many of the cases she cites involve restitution. *See id.* Other courts, including the Seventh Circuit, have held that

restitution is not punishment for ex post facto purposes. See *United States v. Newman*, 144 F.3d 531, 538 (7th Cir. 1998) (“Newman’s ex post facto claim falters on this ground because we do not believe that restitution qualifies as a criminal punishment.”); *United States v. Crawford*, 115 F.3d 1397, 1403 (8th Cir. 1997) (“restitution is not ‘punishment’ within the meaning of the *ex post facto* clause”); *United States v. Hampshire*, 95 F.3d 999, 1006 (10th Cir. 1996) (same).

Some of the cases Scruggs cites are not even arguably comparable to the DNA surcharge, as they involve statutes that expressly impose fines. See *People v. Rayburn*, 630 N.E.2d 533, 538 (1994) (“fine for the Family Abuse Fund”); *State v. Theriot*, 782 So. 2d 1078, 1086 (La. Ct. App. 2001) (“In 1997 the law changed to provide for a mandatory fine as follows, ‘and shall be fined two thousand dollars.’”). It would be difficult to argue that a legislature did not intend something that it labeled as a “fine” to be punitive. And Scruggs’ citation of the Illinois Court of Appeals’ decision in *Rayburn* to support her argument is particularly misplaced, as that court recently held that the retroactive application of an increase in Illinois’ DNA analysis fee was not an ex post facto violation. See *Higgins*, 13 N.E.3d 169, ¶¶ 16-20.

None of these cases is controlling, of course. But of the six jurisdictions that have addressed whether the retroactive application of a DNA surcharge was an ex post facto violation, four have held that it was not. In one of the two jurisdictions that reached the opposite conclusion, California, the statute described the DNA assessment as “an

additional penalty,” which Wisconsin’s statute does not do. And in the other of those two jurisdiction, New York, the intermediate appellate court has said that its conclusion has been called into doubt by a subsequent decision of that state’s highest court. As a majority of other courts have done, this court conclude that applying the mandatory DNA surcharge to Scruggs is not an ex post facto violation.

CONCLUSION

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

Dated this 25th day of April, 2016.

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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 7,382 words.

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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 25th day of April, 2016.

Jeffrey J. Kassel
Assistant Attorney General

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 AFFIRMING A JUDGMENT OF
CONVICTION AND AN ORDER DENYING
POSTCONVICTION RELIEF ENTERED IN THE
RACINE COUNTY CIRCUIT COURT, THE
HONORABLE ALLAN B. TORHORST, PRESIDING

**SUPPLEMENTAL APPENDIX OF
PLAINTIFF-RESPONDENT**

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APPENDIX CERTIFICATION

I hereby certify pursuant to Wis. Stat. § (Rule) 809.19(3)(b) that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials 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.

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I hereby certify that I have submitted an electronic copy of this appendix that complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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Dated this 25th day of April, 2016.

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