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.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

DUSTIN C. HASKELL
Assistant State Public Defender
State Bar No. 1071804

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4105
(414) 227-4805
haskelld@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

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ARGUMENT

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

A. This court must examine the mandatory DNA surcharge statute on its face to determine whether retroactive application violates *ex post facto*.

This court must decide whether the mandatory DNA surcharge is punitive by examining the text of the statute on its face. ***Weaver v. Graham***, 450 U.S. 24, 33 (1981). It does not matter how many surcharges Ms. Scruggs was ordered to pay. The question is simply whether the mandatory DNA surcharge is punitive, regardless of "any special circumstances that may mitigate its effect on a particular individual". ***Id.***

The State claims that Ms. Scruggs has not preserved this argument, and that her argument in the court of appeals was only an "as applied" challenge to the imposition of a single surcharge. (Respondent's Brief at 10). This is plainly not the case. Ms. Scruggs' initial brief to the court of appeals argued that the court "should vacate the DNA surcharge in this case and hold that the surcharge violates ex post facto *when applied to offenses committed before January 1, 2014*." (Appellant's Court of Appeals Brief at 5). Thus, Ms. Scruggs' argument can be characterized as an "as applied" challenge only insofar as it only seeks to bar *retroactive* application of the statute.

Ex post facto challenges are unusual because the phrases "as applied" and "facial" both apply. All *ex post facto* arguments are inherently "as applied" because they only seek to bar *retroactive* application of a statute; the challenge has no effect on *prospective* application of the statute. But an *ex post facto* challenge is also a "facial" challenge because the court must examine the statute on its face. ***Weaver***, 450 U.S. at 33; ***Hudson v. United States***, 522 U.S. 93, 101 (1997). Thus, in this case, the court must decide whether the DNA surcharge statute, when applied retroactively, violates *ex post facto*.

Even if this court believes Ms. Scruggs has not preserved an argument that the DNA surcharge statute must be examined on its face, Supreme Court precedent is clear that this is how an *ex post facto* challenge is resolved. ***Id.*** There is no basis for this court to misapply that precedent, and review this statute on an "as applied" basis.

The State points to one case, ***Dobbert v. Florida***, 432 U.S. 282 (1977), to support its claim that an *ex post facto* challenge can be based on the penalty imposed on a particular defendant. There, the defendant committed a capital felony and was sentenced to death. ***Id.*** at 284-87. While the defendant's case was pending in the trial court, a new statute was enacted, providing that "anyone sentenced to life imprisonment must serve at least 25 years before becoming eligible for parole." ***Id.*** at 298. At the time of the offense, the statute did not include that limitation. ***Id.*** The defendant argued that this change violated *ex post facto*. The Court identified the obvious flaw in the defendant's argument: he had been sentenced to death, so the new parole eligibility statute had no effect on him or his sentence. ***Id.*** Therefore, the Court denied his challenge. ***Id.*** at 299-300.

Dobbert in no way limited the requirement that a reviewing court examine the face of the statute when resolving an *ex post facto* challenge. It simply pointed out the obvious: a defendant cannot raise an *ex post facto* challenge to a penalty that does not apply to him in the first place. ***Dobbert*** might be analogous to this case if Ms. Scruggs were challenging the DNA surcharge in this case, even after the court decided to waive the surcharge. But that is plainly not the case. Ms. Scruggs is challenging a statute that has undeniably been applied to her case retroactively. Therefore, this court should adhere to longstanding precedent and decide whether the mandatory DNA surcharge statute is punitive in intent or effect based on the text of the statute, not based on the number of surcharges imposed.

B. The mandatory DNA surcharge is punitive in intent.

The plain text of the amended DNA surcharge statute reflects a punitive intent because the surcharge bears no relation to the actual DNA costs created by the defendant. A defendant pays as many surcharges as there are convictions, regardless of DNA cost incurred by the State. The State emphasizes that the mandatory surcharge is non-punitive because it will be used to fund many activities related to DNA collection and analysis, not simply collecting DNA from convicts. (Respondent's Brief at 17-18, 19, 21). Ms. Scruggs does not dispute that the surcharge funds a range of DNA-related activities. The problem is how the State has chosen to pay for these activities. Instead of making a person pay a fee proportional to the DNA cost her or she creates, the legislature has tethered DNA cost to whether a person has been convicted of a misdemeanor or felony, and how many convictions there are.

A surcharge that is imposed without a rational relationship to the costs created by the defendant is punitive. *See* ***Mueller v. Raemisch***, 740 F.3d 1128, 1133 (7th Cir. 2014); ***State v. Radaj***, 2015 WI App 50, ¶¶ 25, 29, 363 Wis. 2d 633, 866 N.W.2d 758. And that is precisely what the State has done here. The mandatory DNA surcharge is an unlimited fine, requiring as many surcharges as there are convictions, without any regard for whether any DNA testing was involved in the defendant's case. Two defendants, both convicted of one felony are charged $250, even though one case may involve substantial DNA testing, while the other requires none. The irrational structure of this surcharge reflects punitive intent.

As Ms. Scruggs noted in her initial brief, it is not difficult to imagine a non-punitive scheme, where the government is simply recovering the money it spent on DNA analysis in a particular defendant's case. The government could impose a DNA surcharge when a DNA sample is taken, or in any case involving DNA testing. The government could even require a higher fee in cases involving a certain amount of DNA testing. This would then be supplemented by Wis. Stat. § 974.07(12), which already requires defendants to pay the costs of postconviction DNA testing. Taken together, these provisions would rationally relate the amount a defendant pays in DNA surcharges to the amount of DNA cost he or she creates. The surcharge may not perfectly reflect DNA cost, but it would not need to. ***Radaj***, 2015 WI App 50, ¶ 30 (a surcharge and the costs it is intended to cover need not be perfect to be rational"). Such a scheme would still be non-punitive by rationally connecting the surcharge the defendant pays to the costs the defendant creates.

Instead, the government has created a system that simply punishes more severe offenders more harshly. The

person with more convictions is punished more harshly than the person with fewer convictions, and the felon is punished more severely than the misdemeanant. By correlating the severity of the surcharge to the severity of the convictions in this way, the statute reveals punitive intent. *See* ***People v. Batman***, 71 Cal. Rptr. 3d 591 (2008); ***People v. Stead***, 845 P.2d 1156, 1160 (Colo. 1993).[1]

Requiring convicts to pay as many surcharges as there are convictions, without any consideration of whether they created a DNA cost is simply punitive. The surcharge does not rationally reflect the DNA cost created by any particular defendant. Therefore, retroactive application of the mandatory DNA surcharge violates *ex post facto*.

C. The mandatory DNA surcharge is punitive in effect.

Even if the legislature did not intend the new DNA surcharge to be punitive, it is so punitive in effect that it must be deemed a penalty. As noted above, the court must assess the punitive effect of the statute on its face, not by looking to circumstances "that may mitigate its effect on the particular individual." ***Weaver***, 450 U.S. at 33. Thus, it is irrelevant that Ms. Scruggs has only been ordered to pay one DNA surcharge. The question is whether a per-conviction surcharge of $200 or $250 is punitive in effect.

The court of appeals' opinion in ***Radaj*** convincingly sets forth why the surcharge is punitive. It observed that when assessing punitive effect, the court should examine "whether there is a rational connection between the amount of the fee

[1] The State made no argument refuting Ms. Scruggs' point that placement of the surcharge among the criminal sentencing statutes, rather than the non-punitive costs/surcharge statutes, reflects punitive intent.

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." 2015 WI App 50, ¶ 25. Because there was no rational basis to conclude that DNA cost increases with the number of convictions—let alone in perfect correlation to the number of convictions—the court found the statute unconstitutional. ***Id.***, ¶ 29. For this scheme to be non-punitive, "there must be some reason why the cost of the DNA-analysis related activities . . . increases with the number of convictions." ***Id.***, ¶ 30. The court aptly noted that no such reason exists. The surcharge is simply imposed for every conviction without *any* consideration of what DNA cost the defendant created.

The surcharge is punitive because defendants are required to pay an unlimited number of DNA surcharges, even when they create no DNA cost. A defendant convicted of ten felonies must pay a $2500 surcharge, even in a case involving no DNA testing. This irrational apportionment of DNA cost results in arbitrary punishment of defendants, rather than a legitimate scheme to recoup DNA costs created by a defendant. Therefore, the DNA surcharge is also punitive in effect.

D. The cases cited by the State from other jurisdictions are distinguishable because their DNA fees are much more limited than Wisconsin's new surcharge.

The State suggests that if this court finds the mandatory surcharge to be punitive, it would be going against the trend in other states, finding their own DNA surcharges to be non-punitive. (Respondent's Brief at 27-32). But the State fails to acknowledge that Wisconsin's new DNA surcharge statute is significantly more expansive than those in other

jurisdictions. The breadth of Wisconsin's mandatory surcharge makes it unlike any of the other jurisdictions cited by the State.

In South Carolina, a defendant only pays one DNA surcharge when he or she provides a DNA sample. ***In re DNA Ex Post Facto Issues***, 561 F.3d 194, 297 (4th Cir. 2009). Thus, unlike Wisconsin, a defendant only pays a DNA surcharge when he or she creates a DNA cost. The fee is clearly related to the cost it is supposed to cover, and can rationally be characterized as a cost-recovery measure.

The same is true in Illinois. Defendants there are only required to provide one DNA sample, and then pay one DNA surcharge in connection with that sample. ***People v. Marshall***, 950 N.E.2d 668, 679 (Ill. 2011). Thus, unlike Wisconsin, there is not an endless stream of DNA surcharges. Illinois' surcharge, which only requires payment when a defendant creates a DNA cost, can easily be characterized as non-punitive. ***People v. Higgins***, 13 N.E.3d 169 (Ill. App. Ct. 2014).

Pennsylvania's DNA surcharge statute appears to authorize a $250 DNA surcharge for every case involving a felony conviction. 44 Pa. Cons. Stat. §§ 2303 and 2322. However, like South Carolina and Illinois, the courts seem to interpret the statute to authorize a surcharge only when the defendant provides a DNA sample. *See* ***In re C.M.***, No. 1917 MDA 2013, 2014 WL 10844418, at *1 (Pa. Super. Aug. 19, 2014) (the defendant was required to "submit a buccal sample for DNA testing (and pay the associated cost of $250.00")); ***Commonwealth v. Bucano***, No. 2292 EDA 2015, 2016 WL 1408019, at *6 (Pa. Super. Apr. 11, 2016) (the defendant was required to provide a DNA sample "and pay the $250.00 fee associated with this requirement"). At the very least, the

Pennsylvania courts only require one surcharge per case, rather than one for each conviction. *See* ***Commonwealth v. Everett***, No. 2046 WDA 2014, 2016 WL 1615523 (Pa. Super. Apr. 21, 2016).

Washington is the only other State that clearly allows a surcharge even when a defendant does not provide a DNA sample. ***State v. Thornton***, 353 P.3d 642 (Wash. Ct. App. 2015). But even Washington does not require a surcharge for each *conviction*. ***State v. Stoddard***, 366 P.3d 474 (Wash. Ct. App. 2016) (defendant required to pay one DNA surcharge despite multiple convictions qualifying for the surcharge under Wash. Rev. Code. § 43.43.7541). Moreover, Washington only collects surcharges in felony cases and certain sex-related offenses, and its surcharge is only $100, compared with $200 or $250 in Wisconsin. Wash. Rev. Code. §§ 43.43.7541, 754(1).

The cases cited by the State are unpersuasive because none addressed a DNA surcharge nearly as expansive as Wisconsin's. A more analogous out-of-state comparison comes from Colorado, in ***People v. Stead***, 845 P.2d 1156 (Colo. 1993). There, the defendant was convicted of possession with intent to deliver marijuana, and he was ordered to pay a $1000 drug offender surcharge. ***Id.*** at 1157-58. The surcharge, which was enacted after the offense, was intended to pay costs "associated with substance abuse assessment, testing, education, and treatment in Colorado." ***Id.*** at 1158. The Colorado Supreme Court found that the surcharge was punitive, pointing out that it was part of the criminal code, it was only imposed after a criminal conviction, the amount of the fine was correlated to the degree of the offense (it increased from $500 to $3000 depending on the felony class), and the proceeds were used

for prevention and rehabilitation. ***Id.*** at 1160. Thus, the court held that retroactive application violated *ex post facto*.

This court should reach the same result concerning the DNA surcharge for largely the same reasons identified in ***Stead***. The mandatory DNA surcharge is found among the criminal sentencing statutes, it can only be imposed after a criminal conviction, and the fee imposed is based entirely on the severity of the offense and the number of convictions. The State is not simply trying to recoup the money it spent on DNA analysis in a particular defendant's case. If that was the goal, it could have more carefully tailored the surcharge to match DNA cost. Rather, this per-conviction surcharge is a fine. Therefore, this court should vacate the mandatory surcharge and remand so the circuit court can decide whether to impose a single discretionary surcharge.

CONCLUSION

For the reasons stated above and in her initial brief, 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 to decide whether to impose a discretionary surcharge under the version of Wis. Stat. § 973.046 that was in effect at the time of the offense.

Dated this 10th day of May, 2016.

Respectfully submitted,

DUSTIN C. HASKELL
Assistant State Public Defender
State Bar No. 1071804

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4105
(414) 227-4805
haskelld@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

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 2,499 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 10th day of May, 2016.

Signed:

DUSTIN C. HASKELL
Assistant State Public Defender
State Bar No. 1071804

Office of State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4105
(414) 227-4805
haskelld@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner