STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2015AP374-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GAVIN S. HILL,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND DECISION DENYING POSTCONVICTION RELIEF ENTERED IN VILAS COUNTY CIRCUIT COURT, THE HONORABLE NEAL A. NIELSEN, III, PRESIDING

RESPONSE BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Gavin S. Hill pled no contest to and was sentenced for disorderly conduct/domestic abuse with a domestic abuse repeater enhancer. As the record reveals, he fully understood the charge and the enhancer penalty, and he has never alleged that he was not subject to the enhancer. At sentencing, the

circuit court was presented with two PSI reports, both of which referenced Hill's prior domestic abuse convictions by case number, county, and date. Did the postconviction court err when it determined that the circuit court properly sentenced Hill with the domestic abuse repeater enhancer?

2. This court held in *State v. Radaj,* 2015 WI App 50, ¶¶ 1, 35-36, __ Wis. 2d __, __ N.W.2d __, that the mandatory DNA statute is an unconstitutional ex post facto law as applied to defendants sentenced on multiple convictions committed before the surcharge's effective date who were required by the statute to pay a separate surcharge for each conviction. The *Radaj* court did not "weigh in on whether the result might be different if Radaj had been convicted of a single felony carrying with it a mandatory $250 surcharge, rather than the prior discretionary $250 surcharge." *Id.* ¶36. Hill's case presents that issue: Is the $250 DNA surcharge of a single felony an unconstitutional *ex post facto* law as applied to Hill?[1]

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State agrees with Gavin S. Hill that the briefs will adequately address the issues, but welcomes oral argument should this Court find the issues necessitate further discussion. Publication is not requested.

[1] This issue is also before the court in *State v. Tabitha A. Scruggs*, case no. 2014AP2981-CR, Dist. II, and *State v. Kyle Lee Monahan*, case no. 2014AP2187-CR, Dist. IV.

SUPPLEMENTAL STATEMENT OF THE CASE

The State charged Hill with domestic disorderly conduct with a domestic abuse repeater enhancer, as well as a standard repeater enhancer (1; A-Ap. 114-28). The complaint indicated that the domestic abuse enhancer changed the status of this charge from a misdemeanor to a felony (1:1; A-Ap. 114). The prior domestic abuse cases were not identified by county or case number in the complaint. Rather, the State attached to the complaint copies of a CCAP report indicating the case number and conviction of the prior domestic abuse cases (1; A-Ap. 119-28). The information mirrored the complaint – it contained the repeater enhancer, but it did not have separate, specific references that identified the underlying offenses (2; A-Ap. 129-30).

During the plea colloquy, the court explained to Hill that there were three penalty enhancers charged – one being the domestic abuse repeater (17:7-8; R-Ap. 107-08). Hill personally stated that he understood he had "been convicted on two separate occasions of either a felony or a misdemeanor in which the Court did impose, or could have imposed a domestic abuse surcharge. In other words, two prior domestic abuse incidents during the ten years immediately prior to the commission of this offense" (17:8; R-Ap. 108). Hill also stated that he understood "the repeater enhancer changes the status of the conviction here from a misdemeanor to a felony" *(id.)*. Then, Hill's attorney acknowledged that the prior convictions which formed the basis for the domestic abuse repeater enhancer were valid, unreversed convictions (17:9; R-Ap. 109). The court then inquired of Hill's counsel whether he was going to make the State prove the repeater enhancer:

> Secondly, of course, we have a repeater enhancer in count two. And we understand that the jury[2] is not going to know anything about prior convictions, and that if the conviction applies, then it's for the Court to apply the repeater enhancers, and, specifically, again, looking for the acknowledgement on the record before we begin today that those prior convictions are valid and of record, and I want to know whether there is going to be any requirement on the part of the State to prove that for purposes of conviction.

(17:11; R-Ap. 111) (footnote added). Hill's attorney responded, "I think we would agree – yeah, we're – we're in agreement with that" (*id.*). The court replied, "All right. So it won't be necessary for the Court to receive certified copies of prior convictions or *anything like that*" (*id.*) (emphasis added). Hill's attorney responded, "That's correct" (*id.*).

The court accepted Hill's plea and ordered a presentence investigation (17:16-17; R-Ap. 116-17). Hill also submitted a presentence report (21). Hill's own PSI report contained references to the same prior domestic abuse convictions that were referenced in the complaint by the attached CCAP records (21:3). That PSI report also identified those convictions by dates of conviction, county (Brown and Shawano), and case numbers (21:2-3). Similarly, the court-ordered PSI report referenced Hill's prior domestic abuse convictions by dates of conviction, county, and case numbers (21:2-3).

At sentencing, the State discussed the PSI reports and the felony repeater enhancer, including references to the Brown and Shawano County domestic abuse cases (18:4-5). Hill did not object to the PSI reports. The court ultimately sentenced Hill to two years of initial confinement and one year and three months of extended supervision (18:26; A-Ap.

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[2] The court was referencing the count of criminal damage to property. Hill ultimately did not go to trial on this count; it was dismissed and read in at sentencing (17:14, 16; R-Ap. 114, 116).

101-02). It also ordered that Hill pay a $250 DNA surcharge (18:28; A-Ap. 101).

Hill moved for postconviction relief, requesting that the court vacate the domestic abuse enhancer and to commute his sentence to the maximum allowed without the enhancer (8). He also asked for the court to vacate the DNA surcharge (*id.*). After holding a hearing, the court denied his requests (12)

THE POSTCONVICTION COURT'S DECISION

The postconviction court concluded that Hill was properly sentenced as a repeater (20:9; A-Ap. 109).

> [T]his is not a motion about due process. That is, whether Gavin Hill had knowledge of what he was being charged with, or what the potential penalties were when he entered his plea. This is a motion about whether the State, or this Court, failed to cross a necessary "T", or dot a necessary "I" in order to impose a sentence based on the domestic abuse repeater. Indeed, there is no allegation in Mr. Hill's motion that he is not properly subject to the repeater, only whether the State has properly proven it.

(20:8; A-Ap. 108). The court then noted that it was "not a case where the Defendant denied the allegation and required the State to prove it" (*id.*). Rather, the court noted that what is important in this case is that Hill fully understood the nature of the repeater enhancer, "and this is found from the totality of the record" (20:9; A-Ap. 109). The court found that "[t]he record in this case amply supports a finding that Mr. Hill fully understood and appreciated the charges and penalties, including the domestic abuse repeater enhancer" (*id.*).

The court agreed with Hill that "the CCAP reports attached to the complaint may not be enough to satisfy a burden beyond a reasonable doubt as to the prior qualifying convictions," but the court concluded that "it is clear . . . that

a PSI . . . is an official report of a governmental agency, which constitutes a prima facia evidence of the prior convictions" (*id.*).

The court also denied Hill's motion to vacate the DNA surcharge (20:12-13; A-Ap. 113). The court opined that the presumption of constitutionality attached, it noted that Hill was already required to have his DNA analyzed and maintained in the database, and it assumed that there were costs in maintaining that database (*id.*). The court opined that the DNA surcharge "is more fairly characterized as a fee than an additional penalty," and for the above-stated reasons denied his motion (20:13; A-Ap. 113).

Hill appeals.

STANDARD OF REVIEW

The Wisconsin Supreme Court recently discussed the applicable standard of review in *State v. Bonds*, 2006 WI 83, ¶12, 292 Wis. 2d 344, 717 N.W.2d 133:

> When we review the application of a statute to a set of facts to determine whether a penalty enhancer is valid, we are presented with a question of law that we review independently, without deference to previous court decisions. *State ex rel. Bingen v. Bzdusek,* 2002 WI App 210, ¶8, 257 Wis.2d 193, 650 N.W.2d 894; *see also State v. Koeppen,* 195 Wis.2d 117, 126, 536 N.W.2d 386 (Ct. App. 1995). When we determine whether a defendant has received notice that the State intends to seek increased imprisonment, we independently review the notice that was given to determine whether it satisfies due process. *State v. Stynes,* 2003 WI 65, ¶11, 262 Wis.2d 335, 665 N.W.2d 115.

ARGUMENT

I. Hill admitted his prior domestic abuse convictions, and the State offered a PSI report that confirmed Hill's repeater status beyond a reasonable doubt. The postconviction court did not err when it determined that the sentencing court properly imposed the domestic abuse sentence enhancer.

To prove the repeater status, a defendant "must personally admit to a qualifying prior conviction, or the State must prove the existence of the qualifying prior conviction beyond a reasonable doubt. . . . This proof provides notice to defendants so that they can rebut the evidence of repeater status at sentencing." *State v. Kashney*, 2008 WI App 164, ¶8, 314 Wis. 2d 623, 761 N.W.2d 672 (citing *State v. Saunders*, 2002 WI 107, ¶19, 255 Wis. 2d 589, 649 N.W. 2d 263).

A. Hill personally admitted to the qualifying prior convictions.

Hill argues that he did not personally admit to the convictions underlying the domestic abuse repeater enhancer (Hill Brief at 12). But the plea colloquy suggests otherwise. There, the court explained to Hill that he was being charged with a domestic abuse repeater (17:7-8; R-Ap. 107-08). Hill stated that he understood that he had "been convicted on two separate occasions . . . in which the Court did impose, or could have imposed a domestic abuse surcharge. In other words, two prior domestic abuse incidents during the ten years immediately prior to the commission of this offense" (17:8; R-Ap. 108). Hill also stated that he understood that this "repeater enhancer changes the status of the conviction here from a misdemeanor to a felony" *(id.)*.

Hill also admitted his prior convictions through the submission of his own PSI report. The PSI report noted the repeater allegation and the dates, county, and case numbers

of the relevant prior convictions (21:2-3, 7; 21:3-4, 8). Hill therefore personally admitted to the qualifying prior convictions. Under *Kashney* and *Saunders*, the circuit court properly imposed the domestic abuse repeater enhancer. But even if this Court opines that Hill's admission is not sufficient or specific enough, the State nonetheless proved Hill's prior domestic abuse convictions beyond a reasonable doubt.

B. The State proved the prior convictions through the admission of an "official document," the PSI report.

The State does not disagree with Hill's argument that the State cannot rely on a CCAP report to prove Hill's prior domestic abuse convictions (*see* Hill Brief at 10-11). The State agrees that the law is clear that a CCAP report is not an official document upon which the State can meet its burden of proof (*see* Hill Brief at 11).[3] In this case, however, the State – with no objection from Hill – proved Hill's prior convictions through a PSI report because a PSI report can suffice as an "official document" under Wis. Stat. § 973.12(1).

Wisconsin Stat. § 973.12(1) provides:

> Whenever a person charged with a crime will be a repeater or a persistent repeater under s. 939.62 if convicted, any applicable prior convictions may be alleged in the complaint, indictment or information or amendments so alleging at any time before or at arraignment, and before acceptance of any plea. The court may, upon motion of the district attorney, grant a reasonable time to investigate possible prior convictions before accepting a plea. If the prior convictions are admitted by the defendant or proved by the state, he or

[3] In *State v. Bonds,* the Supreme Court concluded that a CCAP report is insufficient to prove the fact of a previous conviction. 2006 WI 83, ¶¶46, 49, 292 Wis. 2d 344, 717 N.W.2d 133.

> she shall be subject to sentence under s. 939.62 unless he or she establishes that he or she was pardoned on grounds of innocence for any crime necessary to constitute him or her a repeater or a persistent repeater. An official report of the F.B.I. or any other governmental agency of the United States or of this or any other state shall be prima facie evidence of any conviction or sentence therein reported. Any sentence so reported shall be deemed prima facie to have been fully served in actual confinement or to have been served for such period of time as is shown or is consistent with the report. The court shall take judicial notice of the statutes of the United States and foreign states in determining whether the prior conviction was for a felony or a misdemeanor.

Therefore, the statute specifies that an "official report" by a government agency "shall be prima facie evidence of any conviction or sentence therein reported." Wis. Stat. § 973.12(1); *Saunders*, 255 Wis. 2d 589, ¶19.

In *Saunders,* the defendant made no objection to the use of an uncertified copy of the judgment. 255 Wis. 2d 89, ¶62. The Supreme Court concluded that his lack of an objection was significant because it showed Saunders "stipulated to the mode of proof employed by the State."

> [T]he failure of Saunders' counsel to object to the evidence offered by the State in this context is significant. When the court inquired as to the presence of the uncertified copy, the initial response of "No" from Saunders' counsel should be construed as an admission to the copy being in the court file and acceptance of its use as the State's proof of Saunders' prior conviction.
>
> Therefore, by implication, there was a waiver of the defendant's right to object to the use of the uncertified copy as proper proof of a prior conviction. This omission is distinct from any "waiver" of the State's overall proof requirement. A defendant's trial counsel may not, on his or her own, countenance the state's failure to attempt to meet its burden of proof. The colloquy at the end of the jury trial merely shows that Saunders, through his counsel, stipulated to the mode of

> proof employed by the State. This action contributed to the reasonableness of the circuit court's finding that the State had met its burden of proof under § 973.12(1).

Id. ¶¶62-63.

The *Saunders* Court therefore established principles about proof of habitual criminality at sentencing, including that (1) when the State provides an "official report" that constitutes prima facie proof of a conviction pursuant to the requirements of Wis. Stat. § 973.12(1), a defendant's failure to object operates as a stipulation to the mode of proof that the State has chosen to use, *id.*; and (2) a lack of an objection explicitly aimed at the mode of proof offered by the State does not relieve the State of its burden to prove habitual criminality beyond a reasonable doubt. *Id. See also Bonds*, 292 Wis. 2d at 372-73, ¶¶43-44.

Importantly, *Saunders* recognized that a PSI report can suffice as an "official report." *Saunders,* 255 Wis.2d 589, ¶¶19, 23; *see also State v. Goldstein,* 182 Wis. 2d 251, 259, 513 N.W.2d 631 (Ct. App. 1994) ("We conclude that the presentence report in this case satisfied the proof requirements of § 973.12(1)"); *State v. Caldwell,* 154 Wis. 2d 683, 695, 454 N.W.2d 13 (Ct. App. 1990) ("We think it abundantly clear that the [PSI] report satisfies the requirements of *Farr*[4] and constituted prima facie proof of

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[4] As explained in *State v. Caldwell,* 154 Wis. 2d 683, 693-94, 454 N.W.2d 13:

> The *Farr* court did not directly rule on whether a presentence report may satisfy sec. 973.12(1), Stats. *Farr,* 119 Wis. 2d at 657, 350 N.W.2d at 644. However, the *Farr* court set out what must be included in a probation department report so as to render it prima facie evidence of a conviction for purposes of sec. 973.12:
>
> > In gathering information for the report the department should check the court files, if locally located, and in the report should include a brief synopsis of the

(continued on next page)

Caldwell's repeater status.") (footnote added). And, this court explained in *Caldwell,* one of the reasons for accepting the presentence report was the assurance of its accuracy because the investigating agent "expressly contemplated" the complaint's repeater allegation and the agent "verified" both the prior conviction and the date of conviction from sources other than the complaint. *Caldwell,* 154 Wis. 2d at 694.

In this case, Hill does not claim that the PSI report was insufficient proof of his repeater status.[5] Hill could have, of course, challenged the pertinent facts in the report.

> prior conviction relied on in the information for repeater status. The report can reflect the date of commission of the previous offense but what is critical is the date of conviction of the prior offense. To be an official report under sec. 973.12(1), Stats., on which reliance may be placed, the report must contain relevant information regarding the issue of repeater status and must specifically include the date of conviction for the previous offense. The statute refers to an official report of the F.B.I. or any other governmental agency of the United States or of any state; however, such official report must contain critically relevant facts to be acceptable for applying the repeater statute.
>
> [*State v.*] *Farr,* 119 Wis. 2d [651,] 658, 350 N.W.2d [640 (1984)].

[5] *See* n.4, *supra.* The PSI report satisfies the requirements of *Farr* and Wis. Stat. 973.12(1). The repeater allegation was expressly contemplated by the PSI writer (21:7; 21:8), and the dates of the relevant prior convictions were included in the report (21:2-3; 21:3-4). Indeed, Hill has waived his right to challenge the evidence because he did not object to using the PSI reports in the circuit court. *See Bonds*, 292 Wis. 2d 344, ¶50.

He did not do so. The court was therefore free to rely on the report and sentence Hill as a repeater. *See Caldwell*, 154 Wis. 2d at 695.

Nor does Hill claim that the State did not meet its burden by proving his prior domestic abuse convictions with the PSI report. Hill's entire appellate claim is that, under *Bonds*, the CCAP records do not constitute prima facie proof of his prior convictions. The State does not dispute this. But as State has pointed out, and as the postconviction court decided, "it is clear . . . that a PSI . . . is an official report of a governmental agency, which constitutes a prima facia evidence of the prior convictions" (20:9; A-Ap. 109).

Hill is not entitled to relief on this claim. He admitted to his prior domestic abuse convictions with his words and his PSI report, and the State offered evidence sufficient to constitute prima facie proof of his domestic abuse convictions to meet its burden of proof.

II. The circuit court's imposition of the $250 DNA surcharge is not an unconstitutional ex post facto law as applied to Hill.

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) (internal quotation marks and citation omitted). Hill argues that the change in the DNA surcharge from discretionary to mandatory is an ex post facto violation (161:2-3).

"Whether a statute is punitive for ex post facto purposes presents a question of law that we review de novo." *State v. Radaj*, 2015 WI App 50, ¶12, __ Wis. 2d __. __ N.W.2d __. The burden of showing unconstitutionality is on Hill. *Id.* ¶11.

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 answer whether a law applied retroactively is punitive. *See id.* ¶22. First, the court looks at the legislature's intent in creating the law. *See id.* 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 considers a number of non-dispositive factors in this part of the test. *See id.* "Only the 'clearest proof' will convince [the court] that what a legislative body has labeled a civil remedy is, in effect, a criminal penalty." *Id.* (citation omitted).

A. The DNA surcharge as applied in *State v. Radaj*: multiple convictions, multiple surcharges

Hill filed his appellate brief with this court on May 18, 2015. Three days later, this court issued its decision in *Radaj*, 2015 WI App 50. This court held in *Radaj* that the mandatory DNA statute is an unconstitutional ex post facto law as applied to defendants sentenced on multiple convictions committed before the surcharge's effective date who were required by the statute to pay a separate surcharge for each conviction. *Id.* ¶¶1, 35-36.[6]

[6]In another case decided after Hill filed his appellate brief, this court held that the DNA surcharge was an unconstitutional ex post facto law as applied to misdemeanor defendants who committed their offense before the January 1, 2014, effective date of the misdemeanor surcharge statute and were convicted before the April 1, 2015, effective date of the new statutory requirement that convicted misdemeanants provide a DNA sample. *State v. Elward*, 2015 WI App 51, ¶2, __ Wis. 2d __, __ N.W.2d __.

The *Radaj* court did not express any view on the issue presented in this case, which involves a single felony conviction and a single $250 surcharge: "[W]e do not weigh in on whether the result might be different if Radaj had been convicted of a single felony carrying with it a mandatory $250 surcharge, rather than the prior discretionary $250 surcharge." *Id*. ¶36. This case presents that issue squarely.

In *Radaj*, the court assumed without deciding that the legislature's intent was non-punitive. *See Radaj*, 2015 WI App 50, ¶22. It then held that the new DNA surcharge statute, as applied to Radaj, had a punitive effect. *See id*., ¶¶22-36. Addressing the "effects" factors enumerated in *State v. Rachel*, 2002 WI 81, ¶43, 254 Wis. 2d 215, 647 N.W.2d 762, the *Radaj* court said, "[f]or the most part, 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*, 2015 WI App 50, ¶23. "For example, 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 stated that:

> the factors with the clearest relevance here, and those that are most heavily disputed by the parties, are the fourth, sixth, and seventh factors. The fourth factor is whether the DNA surcharge's 'operation will promote the traditional aims of punishment,' the sixth factor is whether the surcharge is 'rationally . . . connected' to some non-punitive purpose, and the seventh factor is whether the surcharge 'appears excessive in relation to' the non-punitive purpose the legislature assigned to it.

Id. ¶24 (ellipsis in original). "[T]hese three factors are closely related and of particular importance when, as here, a monetary amount intended to fund specified activities under a non-punitive regulatory scheme is at issue." *Id*. ¶25.

"When that is the situation," the court said, "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." *Id.* "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.* The determinative question, therefore, was "whether, under Wisconsin's statutory scheme, there is some rational connection between calculating the DNA surcharge *on a per-conviction basis* and the cost of the DNA-analysis-related activities that the surcharge is meant to cover." *Id.* ¶29 (emphasis in original).

The court acknowledged that "the connection between a surcharge and the costs it is intended to cover need not be perfect to be rational" and that it "must give the legislature broad leeway to select a surcharge amount." *Radaj*, 2015 WI App 50, ¶30. But "under the scheme at issue here," the court wrote, "the legislature has imposed a multiplier that corresponds not to costs, but to the number of convictions. For this surcharge scheme to be non-punitive, there must be some reason why the cost of the DNA-analysis-related activities under Wis. Stat. §§ 973.046 and 165.77 increases with the number of convictions." *Id.*

The court noted that the DNA surcharge is used to cover the cost of the DNA analysis of the biological specimen that the defendant provides when the trial court orders the surcharge. *Id.* ¶31. However, the court said, it "fail[ed] to see any link between the initial DNA analysis and the number of convictions." *Id.* The court also noted that there are "[o]ther costs that may come later under Wis. Stat. § 165.77," including the cost of comparing the defendant's DNA profile to the DNA profile of other biological specimens collected as part of a future investigation. *Id.* ¶32. But, the court said, "we can conceive of no reason why such costs would generally increase in proportion to the number of convictions, let alone in direct proportion to the number of convictions." *Id.*

The court found that the $1,000 DNA surcharge assessed against Radaj was "not rationally connected and is excessive in relation to the surcharge's intended purpose[.]" *Id*. ¶35. The court concluded that "the surcharge has a punitive effect and, therefore, the statute is an unconstitutional ex post facto law as applied to Radaj." *Id*. The court remanded "for the circuit court to apply the DNA surcharge statute that was in effect when Radaj committed his crimes." *Id*. ¶39.

B. The DNA surcharge as applied to Hill: single offense, single surcharge.

The *Radaj* court's holding that multiple DNA surcharges are punitive rested on its conclusion that DNA-related costs do not increase in proportion to the number of convictions. That concern is not present in this case, because Hill has been convicted of only a single offense (4; A-Ap. 101-02), and is subject to only a single surcharge. In this case, as applied to Hill, the legislature intended a non-punitive regulatory scheme, and it is not punitive in effect.

1. The mandatory DNA surcharge is not intended to be punitive.

Hill argues that just because the surcharge "is called a 'DNA surcharge' does not control the outcome in this case" (Hill Brief at 20). The State agrees with this statement, but the State also recognizes that in addressing the statute's intent in *Radaj*, this court noted that, "We give 'great deference' to such labels." 2015 WI App 50, ¶17 (quoting *Rachel,* 254 Wis. 2d 215, ¶42). The *Radaj* court also noted that the DNA surcharge is used to cover the cost of the DNA analysis of the biological specimen that the defendant provides when the trial court orders the surcharge. *Id*. ¶31. The court further recognized:

> In addition, the legislature's directive that DNA surcharges be used to defray costs of DNA-analysis-related activities under Wis. Stat. § 165.77 suggests that there was a legislative intent to implement a non-punitive

> regulatory scheme. Although the DNA-analysis-related activities relate to crime investigation, those activities seem distinct from punishment for the crimes underlying the DNA surcharge.

Id. ¶18.

But Hill argues the fact that the statute imposes a $250 surcharge in felony cases and a $200 surcharge in misdemeanor cases demonstrates that the felony surcharge is punitive (Hill Brief at 20-21). The flaw in that argument is that the surcharge in felony cases was $250 before the statute was amended. *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. That the legislature chose to impose a smaller DNA surcharge in misdemeanor cases while maintaining the felony surcharge at $250 does not make the felony surcharge punitive.

Hill also argues that the "[p]lacement of the DNA surcharge statute within criminal sentencing statutes further reflects a legislative intent to impose a penalty" (Hill Brief at 21). But the same is true about South Carolina's $250 DNA fee that the Fourth Circuit held *not* to be punitive. *See In re DNA Ex Post Facto Issues*, 561 F.3d 294, 297, 299-300 (4th Cir. 2009*). See also Radaj*, 2015 WI App 50, ¶19 (discussing *In re DNA Ex Post Facto Issues*). As applied to Hill, he has not shown that the legislature intended a punitive scheme.

2. The mandatory DNA surcharge does not have a punitive effect.

With no evidence to support the argument, Hill claims that the DNA surcharge is punitive because "the surcharge bears no relation to actual DNA expense incurred by the state" (Hill Brief at 20). He argues, "Even if revenue generated from the DNA surcharge goes to the State Crime Laboratory, there is no connection between imposition of the surcharge and whether the defendant created any DNA cost" (*id.*). But when determining whether the DNA surcharge is

unconstitutional as applied to Hill, it is important to remember that "that the burden is on [Hill] 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*, 2015 WI App 50, ¶34. Hill has not attempted to present any *evidence* showing that a $250 surcharge has little or no relation to the State's costs under Wis. Stat. § 165.77. *See id*. Neither the statutory language nor common sense demonstrates that there is no rational connection between a single surcharge and DNA-related costs. And as this Court noted in *Radaj*:

> [T]he legislature's directive that DNA surcharges be used to defray costs of DNA-analysis-related activities under Wis. Stat. § 165.77 suggests that there was a legislative intent to implement a non-punitive regulatory scheme. Although the DNA-analysis-related activities relate to crime investigation, those activities seem distinct from punishment for the crimes underlying the DNA surcharge.

Id. ¶18.

Hill next argues that the mandatory DNA surcharge is punitive in effect because "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" (Hill Brief at 23). But as the State has acknowledged, the *Radaj* holding that multiple DNA surcharges are punitive rested on its conclusion that DNA-related costs do not increase in proportion to the number of convictions. That concern is not present in Hill's case. Hill has been convicted of only a single offense, and is subject to only a single surcharge. Hill has not met his burden of showing by the "clearest proof" that a single DNA surcharge is punitive.

Unlike the situation with multiple surcharges, where the *Radaj* court could conceive of no rational connection between multiple surcharges and the non-punitive activities that the fee funds, it is rational to apply a single $250 DNA surcharge in a case to offset the costs of DNA analysis and

the various DNA data bank activities the surcharge funds. Therefore, as applied to Hill, the circuit court's imposition of the $250 DNA surcharge is not an unconstitutional ex post facto law.

CONCLUSION

The State respectfully requests that this Court affirm the judgment of conviction and order denying postconviction relief.

Dated this 14th day of August, 2015.

Respectfully submitted,

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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 5103 words.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

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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 14th day of August, 2015.

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