STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP883-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JAMAL L. WILLIAMS,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and Order Denying Postconviction Relief, Both Entered in the Milwaukee County Circuit Court, the Honorable Timothy G. Dugan and the Honorable Ellen R. Brostrom Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Is Jamal Williams entitled to resentencing because the circuit court sentenced him based on an improper factor, namely, the fact that Williams refused to stipulate to restitution for which he was not legally responsible?

At the sentencing hearing, the circuit court denied the State's restitution claim after an objection by Williams' attorney. Immediately thereafter, the court stated, "and I think the fact that you're not willing to join in on [the restitution] also reflects your lack of remorse under the circumstances, and I'm certainly considering that." The court denied Williams' postconviction motion for resentencing, concluding that it had not actually relied on his failure to stipulate to the restitution claim in imposing sentence. The court also concluded that, even if it had relied on this improper factor, the error was harmless.

2. Does the retroactive application of the mandatory DNA surcharge statute violate *ex post facto* law when a defendant commits a single offense before the effective date of the statute and has previously provided a DNA sample and been ordered to pay the DNA surcharge?

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

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The briefs will fully address the issues presented, so Williams does not request oral argument. *See* WIS. STAT. § 809.22(2)(b). Publication is appropriate because further development of the law regarding improper sentencing factors would be useful. *See* WIS. STAT. § 809.23(1)1. Also, no previously reported Wisconsin case has addressed whether a court can properly consider a defendant's refusal to stipulate to restitution when imposing sentencing. This case thus involves a factual situation significantly different from other published opinions addressing improper sentencing factors. *See* WIS. STAT. § 809.23(1)2.

Publication may also be appropriate if the *ex post facto* issue in this case has not been resolved prior to the issuance of this court's opinion.[1] In ***State v. Jeffrey J. Wickman***, No. 2015AP1164-CRNM (Jan. 7, 2016) (opinion rejecting a no-merit appeal) (App. 126-33),[2] this court observed that

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[1] In ***State v. Scruggs***, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146, this court held that the retroactive imposition of the mandatory DNA surcharge for a single offense was constitutional where the defendant had not previously provided a DNA sample or paid a surcharge. The Wisconsin Supreme Court has granted Scruggs' petition for review and the case is currently scheduled for oral argument in October 2016. Furthermore, the specific issue presented in this case – whether the DNA surcharge is punitive as applied to a defendant who has previously provided a DNA sample and been assessed a surcharge – is currently being litigated in ***State v. Courtney D. Hodges***, No. 2015AP1121-CR. Briefing has been completed in ***Hodges***; however, that appeal is currently being held in abeyance pending the outcome in ***Scruggs***.

[2] Williams is not citing ***Wickman*** as authority or for its persuasive value, but for the purpose of asserting that publication may be appropriate. *See* WIS. STAT. § 809.23(3).

existing law does not squarely address whether the mandatory DNA surcharge is punitive when applied to a defendant who was convicted of a single crime and previously gave a DNA sample or paid a DNA surcharge. *See* WIS. STAT. § 809.23(1)1.

STATEMENT OF THE CASE AND FACTS

On April 30, 2013, the State filed a criminal complaint charging Jamal Williams with felony murder for allegedly causing the death of R.W. while attempting to commit an act of armed robbery, as party to a crime. (2:1). The complaint alleged that R.W. was found dead in his car on April 25, 2013. Medical personnel later determined that he had died of a gunshot wound. (2:1-2).

According to the complaint, a witness to the shooting, B.P., told police that he had arranged to sell Williams marijuana at a prearranged location. B.P. stated that he drove to that location along with R.W. and R.W.'s three-year old child. When they arrived, Williams got out of his car and began walking toward them. B.P. put a scale on the sidewalk and was about to measure out the marijuana when a man who was with Williams put a gun to his neck and demanded money and marijuana. At that point, B.P. began running away. As he was running away, however, he heard a gunshot and then a collision. When B.P. returned to the scene, he saw that R.W.'s car had collided with other vehicles. (2:2).

The complaint further alleged that following his arrest, Williams gave a statement to police, which was believed to be reliable. In his statement, Williams told police that he and his brother, Tousani Tatum, had arranged to buy marijuana from B.P. He also stated that Tatum had a gun on him when he got in the car they were driving. As they were waiting for B.P. to

arrive, Tatum said he was going to rob B.P. Williams tried to talk Tatum out of robbing B.P.; however, when B.P.'s vehicle pulled up, Tatum got out of the car and walked toward B.P. Williams also got out of the car. (2:2).

At that point, Tatum walked up to B.P. and put a gun to his head. B.P., however, broke loose and began running away. The car in which B.P. had arrived also began to drive away, and Tatum fired at the vehicle. Williams and Tatum then ran back to their car and drove away. Afterwards, Williams asked Tatum why he had fired his gun and Tatum replied, "because [B.P.] ran." (2:2).

On January 31, 2014, Williams pled guilty to an amended charge of attempted armed robbery, as party to a crime. (73:2, 7). Pursuant to the parties' plea agreement, the State agreed to recommend substantial confinement in the state prison system, leaving the exact amount of time up to the court. The agreement also required Williams to pay any restitution he owed. (73:4).

Thereafter, on March 12, 2014, the circuit court, the Honorable Timothy G. Dugan, conducted Williams' sentencing hearing. The State requested a substantial prison sentence, as well as restitution in the amount of $794 for R.W.'s funeral expenses. (74:2, 9-10; *see also* 76). Among other reasons offered in support of its recommendation, the State noted that the PSI writer believed Williams was not remorseful for his actions. (74:6).

Williams' attorney asked the court to impose a sentence of three years of initial confinement and three years of extended supervision. (74:17). Counsel also made a point of strongly disputing the State's and PSI writer's conclusion that Williams lacked remorse:

> I just want to take a minute to disagree strongly with both the prosecutor as well as the conclusion of the PSI writer regarding my client's, as the PSI writer says, atrocious lack of remorse.
>
> I think that is completely wrong in this case. My client throughout this case has expressed to me remorse for everyone involved, and I – I guess I take issue that because he is thinking about his brother has thrown away his adult life, his mother and his son that somehow that does not reflect his remorse also for [R.W.'s fiancée], [R.W.'s] father and for [R.W.'s] daughter, and, in fact, on page four of the PSI the writer states, "He did have remorse thinking about the little girl who saw her father die [and] Wilson's father who no longer has a son."

(74:13-14).

These expressions of remorse were also echoed by Williams personally at the sentencing hearing. During his allocution, Williams stated as follows:

> First of all, I take full responsibility for my actions and what took place April 15th [sic]. I apologize to the family even if they don't want to accept it. I apologize for the little girl, [L.W.], that was her father. I know seeing her father die in front of her at that age did somethin' to her, and I take full responsibility for everything I've done, and then I apologize to the mother and the father for losing their son.
>
> I wish that I just – It was never supposed to happen like that. I ain't – I ain't sugarcoating or taking it off my participation, but I do take full responsibility.
>
> I feel bad. I've been feelin' bad for this whole year. For something over a drug deal, somebody lost their life, somebody lost their father, somebody lost their son and somebody lost their grandson. I ain't trying to make

> myself sound better even though I'm – I'm going to prison, losing my son too, but she lost her father forever. So I just want to apologize to her and her family and the mother and father. I feel remorce [sic] for everything I've done. Thank you.

(74:18-19).

With regard to restitution, Williams' attorney argued that Williams should not be liable for any funeral expenses since he had pled guilty to the attempted armed robbery of B.P., and not to the homicide of R.W. (74:17-18).

After hearing the parties' recommendations, the court made its remarks and then imposed a sentence of ten years of initial confinement and seven-and-a-half years of extended supervision. (74:28; App. 111). The court explained that the offense in this case was very serious, given "the nature of the crime, the outcome in this particular instance and [Williams'] involvement." (70:20; App. 103). The court noted that Williams had set up a drug deal and knew that Tatum had brought a gun along. (74:20; App. 103). But instead of calling the whole thing off, Williams assisted in the robbery. In this regard, the court explained that Williams had "called over to [B.P.]" (74:20; App. 103). The court also noted that after the shooting, Williams did not call for help, but drove away with Tatum. (74:20-21; App. 103-04).

With regard to Williams' character, the court stated that although Williams had accepted responsibility for his actions by pleading guilty, this "was certainly strategic." (74:21; App. 104). The court noted that Williams had numerous prior contacts with the juvenile and criminal justice systems. (74:21-23; App. 104-06). Also, the court observed that the PSI writer believed Williams was not remorseful:

> The agent's assessment – She's somebody who has worked with you, was hopefully thinking that you were turning your life around – notes that you aren't remorseful, that your focus is upon you, your family, your brother.

(74:25; App. 108). On the positive side, the court noted that Williams had a high school diploma, read at a nine-and-a-half grade level, and had even taken some college classes. (74:24; App. 107).

The court reasoned that given all these factors, probation would unduly depreciate the seriousness of the offense. (74:25; App. 108). It also concluded that Williams had rehabilitative needs that could only be addressed in a structured, confined setting. (74:25; App. 108). The court then proceeded to impose conditions of extended supervision and addressed the restitution issue. (74:26-28; App. 109-11). Regarding restitution, the court agreed with defense counsel that Williams should not be liable for funeral expenses. However, the court also concluded that his refusal to stipulate to the restitution claim indicated a lack of remorse. In this regard, the court stated as follows:

> I don't think I have authority to order the restitution. Had you been convicted of the felony murder, party to a crime, certainly yes, but the nature of itself, the nature of the attempt armed robbery doesn't justify the restitution or give me authority, *and I think the fact that you're not willing to join in on that also reflects your lack of remorse under the circumstances, and I'm certainly considering that*.

(74:26; App. 109) (emphasis added).

Shortly after making this comment, the court pronounced sentence, imposing ten years of initial

confinement and seven-and-a-half years of extended supervision. (74:28; App. 111). The court also ordered Williams to pay all mandatory court costs and surcharges, including a DNA surcharge of $250. (74:27; App. 110 *see also* 35:1; App. 113).

Following the entry of the judgment of conviction, Williams filed a timely notice of intent to pursue postconviction relief. (36). He later filed a postconviction motion seeking resentencing on the grounds that the court had sentenced him based on an improper factor – his refusal to stipulate to restitution which he did not legally owe. (47:1, 12-14). In addition, Williams requested an order vacating the DNA surcharge on the grounds that the statute mandating the surcharge, as applied to him, was an unconstitutional *ex post facto* law.[3] (47:1-2, 14-17). As support for this claim, Williams submitted proof that he had previously provided a DNA sample and been assessed a surcharge in a prior felony case. (47:21-23).

On August 4, 2015, the circuit court, the Honorable Ellen R. Brostrom now presiding,[4] issued a written decision and order denying Williams' resentencing claim. In her decision, Judge Brostrom asserted that Judge Dugan's comments at sentencing regarding Williams' refusal to stipulate to the restitution claim simply "reflected the lack of remorse that the court was already considering." (53:7; App. 121). Judge Brostrom thus concluded that "[t]he court did not rely on [Williams'] failure to stipulate to restitution when

[3] Williams' postconviction motion also requested plea withdrawal on multiple grounds. (47:1, 7-12). The circuit court denied these claims as well, and Williams does not challenge those rulings on appeal. (53:1-6; 56; 75:68-71).

[4] The case was reassigned to Judge Brostrom because of Milwaukee County's judicial rotation system.

imposing sentence." (53:7; App. 121). Additionally, Judge Brostrom held that even if Judge Dugan had relied on Williams' failure to stipulate to restitution, any error would be harmless, as "the court had more than an ample basis to conclude that [Williams] was not remorseful." (53:7; App. 121).

Thereafter, on March 28, 2016, the circuit court entered a decision and order denying Williams' motion to vacate the DNA surcharge.[5] The court noted that in ***State v. Scruggs***, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146, this court held that there was no *ex post facto* problem when a court imposes a DNA surcharge for a single felony committed prior to January 1, 2014. (57:1-2; App. 123-24). The court also rejected Williams' argument that his case was distinguishable from ***Scruggs*** because he had previously provided a DNA sample and been assessed a surcharge in a prior felony case. (57:2; App. 124).

This appeal follows. (62).

[5] The circuit court had previously ordered that Williams' motion to vacate the DNA surcharge be held in abeyance pending a decision by this court in ***Scruggs***. (53:8; App. 122).

ARGUMENT

I. Williams' Refusal to Stipulate to Restitution was an Improper and Irrelevant Sentencing Factor; He is Therefore Entitled to Resentencing.

A. General legal principles and standard of review.

A trial court has considerable but not unfettered discretion in choosing an appropriate sentence. ***State v. Schreiber***, 2002 WI App 75, ¶¶ 7-9, 251 Wis. 2d 690, 642 N.W.2d 621. As sentencing is left to the discretion of the trial court, this court reviews the trial court's imposition of sentence to determine whether the circuit court erroneously exercised that discretion. ***State v. Harris***, 2010 WI 79, ¶ 30, 326 Wis. 2d 685, 786 N.W.2d 409.

A sentencing court erroneously exercises its discretion when it imposes its sentence based on or in actual reliance upon clearly improper factors. ***Id.*** An improper sentencing factor is one that is "totally irrelevant or immaterial to the type of decision to be made." ***Elias v. State***, 93 Wis. 2d 278, 282, 286 N.W.2d 559 (1990).

When a defendant claims that a court relied on an improper factor at sentencing, he must prove by clear and convincing evidence that: (1) the factor was improper; and (2) the court actually relied upon the improper factor. ***Harris***, 326 Wis. 2d 685, ¶¶ 32-34 (citing ***State v. Tiepelman***, 2006 WI 66, 291 Wis. 2d 39, 756 N.W.2d 423). Whether the court "actually relied" on an improper factor at sentencing turns on whether the court gave "explicit attention" or "specific consideration" to the improper factor, so that it "formed part of the basis for the sentence." *See* ***Tiepelman***, 291 Wis. 2d 39, ¶ 14 (quoting ***United States ex rel. Welch v. Lane***, 738 F.2d 836, 866 (7th Cir. 1984)).

This court should independently review the record of the sentencing hearing to determine whether the circuit court actually relied on an improper factor. This is the standard used to determine the existence of actual reliance on inaccurate information at sentencing. *See* ***State v. Travis***, 2013 WI 38, ¶ 48, 347 Wis. 2d 142, 832 N.W.2d 491 ("A circuit court's after-the-fact assertion on non-reliance on allegedly inaccurate information is not dispositive of the issue of actual reliance."). The same standard should logically apply to the determination of whether a circuit court actually relied on an improper factor at sentencing.

Independent review is also appropriate here because in this case the postconviction court did not preside over the sentencing proceedings. The postconviction court was thus in no better a position than this court to determine whether the sentencing court actually relied on an improper factor in sentencing Williams. As such, any postconviction assertions of non-reliance should not be entitled to deference. *Cf.* ***State v. Tobatto***, 2016 WI App 28, ¶ 14, 368 Wis. 2d 300, 878 N.W.2d 701 ("Where, as here, the postconviction court did not preside over the trial, however, we review the postconviction court's findings of fact *de novo*.").

Once actual reliance on an improper factor is shown, a defendant is entitled to resentencing unless the State proves the error was harmless. *See* ***Harris***, 326 Wis. 2d 685, ¶¶ 32-33 (citing ***Tiepelman***, 291 Wis. 2d 179, ¶ 26). The focus for the harmless error analysis should be on the "transcript of the sentencing proceeding," and not on "the circuit court's assertions during the hearing on the defendant's postconviction motion or speculation about what a circuit court would do in the future upon resentencing." *See* ***Travis***, 347 Wis. 2d 142, ¶ 73.

B. In sentencing Williams, the circuit court actually relied on an improper factor – Williams' refusal to stipulate to restitution.

In this case, the sentencing record demonstrates that the circuit court not only specifically considered Williams' refusal to stipulate to the restitution claim, it treated this as an aggravating factor. Again, at sentencing the court stated as follows:

> I think the fact that you're not willing to join in on [the restitution] also reflects your lack of remorse under the circumstances, and I'm certainly considering that.

(74:26; App. 109).

This was an improper factor for sentencing purposes.[6] Williams' decision to challenge the restitution claim was totally irrelevant and immaterial to the question of what sentence he should receive. A defendant does not deserve more or less time in prison based on whether he chooses to contest a restitution claim. This is particularly true where, as here, a defendant does not legally owe the restitution.

Furthermore, Williams had a statutory right to contest the State's restitution claim. By statute, courts are required to give the defendant the opportunity to stipulate to the restitution claimed by the victim. If the defendant refuses to stipulate, they are also required to give the defendant the opportunity to present evidence and arguments regarding whether restitution should be ordered and in what amount. WIS. STAT. § 973.20(13)(c), (14)(d).

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[6] Although not dispositive, Williams notes that, at the postconviction stage, neither the State nor the circuit court actually disputed his claim that a defendant's failure to stipulate to restitution is an improper sentencing factor. (49:7-9; 53:6-7).

Williams should not be punished simply because he (successfully) exercised this statutory right. Just as a court cannot impose a more severe punishment because a defendant has exercised his constitutional right to a jury trial, a sentencing court should not treat a defendant's decision to exercise his statutory right to challenge a restitution claim as an aggravating factor. *See* ***Kubart v. State***, 70 Wis. 2d 94, 97, 233 N.W.2d 404 (1975) ("A defendant cannot receive a harsher sentence solely because he has availed himself of the important constitutional right of trial by jury.). To do so would not only punish a defendant for invoking this right, it would have the effect of chilling legitimate restitution challenges. Defendants like Williams should not have to choose between stipulating to restitution that they do not arguably owe and potentially receiving a harsher sentence.

Additionally, the fact that the sentencing court tied Williams' refusal to stipulate to the restitution claim to the level of remorse it perceived in Williams did not make the court's consideration of this factor proper. Although a defendant's level of remorse is a relevant sentencing factor, s*ee* ***State v. Gallion***, 2004 WI 42, ¶ 43 n.11, 270 Wis. 2d 535, 678 N.W.2d 197 (citing ***Harris v. State***, 75 Wis. 2d 513, 519-20, 250 N.W.2d 7 (1977)), there was no logical connection in this case between Williams' refusal to stipulate to a legally deficient restitution claim and his level of remorse. Arguably, a defendant's refusal to stipulate to a restitution claim that he undoubtedly owed *might* be indicative of a lack of remorse. However, that is simply not this case. Here, the court agreed with Williams that he was not liable for restitution. It was thus unreasonable for the court to infer that his refusal to

stipulate to what would have been an erroneous restitution award reflected a lack of remorse.[7]

The postconviction court in this case, however, concluded that the sentencing court did not actually rely on Williams' refusal to stipulate to restitution when imposing sentence. Instead, it concluded that the sentencing court simply "meant that the challenge to the restitution reflected the lack of remorse that the court was already considering." (53:7; App. 121). This after-the-fact assertion of non-reliance is erroneous.

Regardless of whether the sentencing court believed other factors demonstrated a lack of remorse on Williams' part, the court still gave "explicit attention" and "specific consideration" to his refusal to stipulate to the restitution claim. Again, the court stated that Williams' refusal to join in on the restitution claim "reflect[ed] [his] lack of remorse under the circumstances." (74:26; App. 109). It also stated that it was "*certainly considering*" this for sentencing purposes. (74:26; App. 109) (emphasis added). Thus, even if the court believed that other factors suggested a lack of remorse, its own words still reflect that it actually relied on Williams' refusal to stipulate to restitution in imposing sentence. It relied on this factor as a basis (or, at a minimum, an additional basis) for inferring that Williams was not remorseful.

[7] It is also worth noting that the decision to challenge the restitution claim may well have been a strategic decision made by counsel, rather than a personal decision made by Williams himself.

C. The circuit court's reliance on Williams' refusal to stipulate to restitution was not harmless.

Once a defendant satisfies his burden to show that the sentencing court relied on an improper factor, he is entitled to resentencing unless the State can prove that the error was harmless. *See* ***Travis***, 347 Wis. 2d 142, ¶¶ 49, 66. In ***Travis***, the Wisconsin Supreme Court noted three variations of the harmless error test for sentencings: **1.** "Errors that do not affect the substantial rights of the adverse party are harmless. ***Id.***, ¶ 68 (citing WIS. STAT. § 805.18(1)). **2.** "[A] remand [for resentencing] is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, i.e., that the error did not affect the [sentencing] court's selection of the sentence imposed." ***Id.***, ¶ 69 (citing Fed. R. Crim. P. 52(a)). **3.** "[A]n error is harmless if it did not contribute to the sentence, that is, if there is no reasonable probability that the error contributed to the outcome." ***Id.***, ¶ 70.

Regardless of the formulation, the State cannot carry its burden of proof in this case. The sentencing court's reference to Williams' refusal to stipulate to restitution was not a passing one. Rather, the court stated that it was "certainly considering" Williams' refusal to "join in on" the restitution claim, which it believed reflected his "lack of remorse under the circumstances." This statement shows that the court not only considered Williams' refusal to stipulate to the restitution claim as part of its calculation of what sentence to impose, it treated his refusal as an aggravating factor.

Moreover, the sentencing record strongly suggests that the circuit court treated Williams' refusal to stipulate to the restitution claim as a determinative factor in concluding that he lacked remorse. The court directly linked Williams'

refusal to stipulate to the restitution claim to its conclusion that Williams was not remorseful. Also, prior to making this linkage on the record, the court had not independently concluded that Williams lacked remorse.

While the court had noted earlier that the PSI writer believed Williams was not remorseful (74:25; App. 108), this was a third-party opinion that Williams strongly disputed. At sentencing, Williams adamantly expressed remorse for his actions, both personally and through his attorney. (74:13-15, 18-19). And significantly, the sentencing court never rejected Williams' expressions of remorse, or adopted the PSI writer's opinion as its own, until considering Williams' refusal to stipulate to restitution. It thus appears that Williams' refusal to stipulate to restitution was the deciding factor the court relied on to infer that he lacked remorse.

Moreover, even if the sentencing court did believe that other factors demonstrated some degree of remorselessness on Williams' part, the court's reliance on Williams' refusal to stipulate to the restitution claim was still not harmless. Rather, its reliance of this improper factor would likely have caused it to believe that Williams was even less remorseful than the record would otherwise suggest. There is thus a reasonable probability that, even if the court believed that other factors indicated some lack of remorse, Williams' decision to challenge the restitution claim still negatively impacted the sentence he ultimately received.

This is a commonsense conclusion given that the court's comments regarding restitution suggest that it considered Williams' objection to the restitution claim to be an independent act of remorselessness. After all, a factfinder could not logically conclude that an action *reflects* a lack of remorse without also concluding that the action itself is a

remorseless act. It thus is difficult to imagine that the sentencing court in this case would have concluded that Williams had engaged in an additional remorseless and coldhearted act during the sentencing proceeding, and then given that conclusion no weight at all in deciding what sentence to impose.

The record thus reflects that Williams' refusal to stipulate to the State's restitution claim was tied to the sentence the court imposed in this case. This court should therefore vacate Williams' sentence and remand the case to the circuit court for a resentencing hearing.

II. The Retroactive Application of the Mandatory DNA Surcharge Statute Violates *Ex Post Facto* Law in this Case Because Williams Had Previously Been Ordered to Provide a DNA Sample and Pay the Surcharge in a Prior Case.

A. Introduction.

Article I, § 10, of the United States Constitution provides as follows:

> No state shall . . . pass any . . . ex post facto law, ...

Similarly, Article I, § 12, of the Wisconsin Constitution provides:

> No . . . ex post facto law, . . . shall ever be passed, ...

Wisconsin courts generally construe the *Ex Post Facto* Clause of the Wisconsin Constitution consistently with the *Ex Post Facto* Clause of the United States Constitution. ***State v. Thiel***, 188 Wis. 2d 695, 699, 524 N.W.2d 641 (1994).

Any statute "which makes more burdensome the punishment for a crime, after its commission . . . is prohibited as *ex post facto*." ***Collins v. Youngblood***, 497 U.S. 37, 42 (1990); ***Thiel***, 188 Wis. 2d 695, 703. Laws that make mandatory what was previously discretionary also violate *ex post facto*. ***Weaver v. Graham***, 450 U.S. 24, 32 n.17 (1981).

Here, Williams was convicted of attempted armed robbery, a Class C felony, contrary to WIS. STAT. §§ 943.32(2), 939.32.

On April 25, 2013, the day Williams committed this offense, the mandatory DNA surcharge did not exist. At that time, circuit courts were required to impose a $250 DNA surcharge only for a short list of specified sex offenses. WIS. STAT. § 973.046(1r) (2011-12).[8] Apart from this short list, the statute authorized a $250 surcharge at the court's discretion when it sentenced a defendant or placed him on probation for a felony conviction. *Id.* § 973.046(1g) (2011-12). The amount of the surcharge, if imposed, was $250 regardless of the number or nature of the convictions. *Id.*; *see also* ***State v. Radaj***, 2015 WI App 50, ¶ 8, 363 Wis. 2d 633, 866 N.W.2d 758. Thus, under the law as it existed at the time of Williams' offense, the circuit court was required to exercise discretion in deciding whether to impose a $250 DNA surcharge.

Between the time Williams committed his offense and when he was sentenced, however, the law changed. On January 1, 2014, a new version of the DNA surcharge statute went into effect. 2013 WIS. ACT 20, §§ 2355, 9326, 9426. The new version requires circuit courts to impose a DNA

[8] Violations of WIS. STAT. §§ 940.225, 948.02(1) or (2), 948.025 and 948.085 required the court to impose the DNA surcharge. WIS. STAT. § 973.046(1r) (2011-12).

surcharge in the amount of $250 for each felony conviction and $200 for each misdemeanor conviction. WIS. STAT. § 973.046(1r). The act creating the new version of the DNA surcharge statute specifies that the mandatory surcharge applies to any sentences imposed on or after January 1, 2014. 2013 WIS. ACT 20, §§ 9326, 9426.

This court should vacate the $250 DNA surcharge under the state and federal prohibitions against *ex post facto* laws because the surcharge was altered from discretionary to mandatory after the date of the offense in this case.

B. Standard of review.

Whether an amended statute violates *ex post facto* is a question of law that this court reviews *de novo*. ***State v. Haines***, 2003 WI 39, ¶ 7, 261 Wis. 2d 139, 661 N.W.2d 72. The defendant bears the burden of overcoming the presumption that laws are constitutional. ***State ex rel. Singh v. Kemper***, 2014 WI App 43, ¶ 9, 353 Wis. 2d 520, 846 N.W.2d 820.

C. The mandatory DNA surcharge statute is an unconstitutional *ex post facto* law as applied to Williams.

As of the date of the filing of this brief, this court has addressed whether the new mandatory DNA surcharge statute violates the *ex post facto* clauses of the federal and state constitutions in three published cases: ***State v. Elward***, 2015 WI App 51, 363 Wis. 2d 628, 866 N.W.2d 756; ***Radaj***, 363 Wis. 2d 633; and ***Scruggs***, 365 Wis. 2d 568.

In ***Elward***, this court held that the new mandatory DNA surcharge statute was unconstitutional as applied to a class of misdemeanants who committed crimes before

January 1, 2014, but who could not be ordered to provide DNA samples until April 1, 2015. 363 Wis. 2d 628, ¶ 2. ***Elward*** reasoned that, as applied to this class of misdemeanants, the surcharge was dissociated from its purpose of financially supporting the DNA database as no DNA sample was being taken. ***Id.*** Essentially, the "State received money for nothing," which "served only to punish [the defendant]." ***Id.***, ¶ 7. Thus, rather than being a fee to support the financial costs of a DNA database, the surcharge was a fine and an *ex post facto* violation. ***Id.***

Subsequently, in ***Radaj***, this court held that the new mandatory DNA surcharge statute was unconstitutional as applied to a defendant who was convicted of four felonies and thus assessed a DNA surcharge of $1,000 (four felonies x $250). 363 Wis. 2d 633, ¶¶ 1, 35. ***Radaj*** stated that:

> under the scheme at issue here, 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 . . . increases with the number of convictions. We perceive no reason why this might be true.

Id., ¶¶ 30-32 (citations omitted). Thus, ***Radaj*** concluded that the new mandatory DNA surcharge statute's "per-conviction" approach to calculating the DNA surcharge made the surcharge punitive and an unconstitutional *ex post facto* law as applied to the defendant in that case. ***Id.***, ¶¶ 35-36. However, ***Radaj*** left open the question of whether there is an *ex post facto* problem when a defendant is convicted of a single crime. ***Id.***, ¶¶ 7, 36.

Most recently, in ***Scruggs***, this court held that a mandatory DNA surcharge imposed for a single felony

committed before January 1, 2014 does not raise *ex post facto* concerns when the defendant is required to provide a DNA sample to the DNA databank. 365 Wis. 2d 568, ¶¶ 1, 19. ***Scruggs*** explained that "[t]he relatively small size of the surcharge . . . 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. . . . The connection between the fee and the costs it is intended to cover 'need not be perfect to be rational.'" ***Id.***, ¶ 13 (citation omitted).

Unlike in ***Scruggs***, Williams had already been ordered to provide a DNA sample and pay the DNA surcharge prior to the time he was sentenced in this case. In 2009, he was ordered to provide a DNA sample and pay a $250 DNA surcharge in Milwaukee County Case No. 08-CF-4758. (47:21-23). He therefore would not have needed to provide another DNA sample after his conviction in this case. Thus, the mandatory surcharge in this case is not being used to cover the costs of taking a sample from Williams or entering it into the database, so there is no legitimate "fee" reason for Williams to pay another surcharge. ***Scruggs*** is therefore inapplicable. Rather, as in ***Radaj*** and ***Elward***, the additional $250 DNA surcharge imposed in this case is simply punitive, as it is not compensating the State for any additional DNA costs that Williams has created. In essence, the "State received money for nothing," which "served only to punish [Williams]" for another conviction. *See* ***Elward***, 363 Wis. 2d 628, ¶ 7.

Therefore, the mandatory $250 DNA surcharge is an unconstitutional *ex post facto* penalty as applied to Williams in this case. It should be vacated accordingly.

CONCLUSION

For the foregoing reasons, Jamal Williams respectfully requests that this court reverse the circuit court's order denying his postconviction motion for resentencing, vacate his sentence, and remand the case to the circuit court for a new sentencing hearing. Williams also requests that this court vacate the portion of the judgment of conviction that requires him to pay a $250 DNA surcharge.

Dated this 22nd day of September, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5,252 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 22nd day of September, 2016.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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