STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP883-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMAL L. WILLIAMS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE TIMOTHY G. DUGAN AND THE HONORABLE ELLEN R. BROSTROM, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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The State does not request oral argument or publication.

STATEMENT OF THE CASE

Given the nature of the arguments raised in the brief of defendant-appellant Jamal Williams, the State exercises its option not to present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a). The relevant facts and procedural history will be discussed in the argument section of this brief.

ARGUMENT

Williams was charged with felony murder for the shooting death of Rayvon Wilson by Williams' brother, codefendant Tousani Tatum, during an attempted armed robbery. (2:1-2.) Pursuant to a plea agreement, Williams entered a guilty plea to an amended charge of attempted armed robbery as a party to a crime. (27:1; 73:2-7.) The court sentenced Williams to a term of 17 and a half years, consisting of ten years of initial confinement and seven and a half years of extended supervision. (74:28, A-App. 111.)

Williams argues on appeal, as he did in his Wis. Stat. § (Rule) 809.30 postconviction motion (47:1-18), that he is entitled to resentencing because the sentencing court relied on an improper factor. He also argues that imposing the mandatory DNA surcharge is an ex post facto violation because he committed the offense prior to the surcharge's effective date and provided a DNA sample and paid a discretionary surcharge in a prior case. Because Williams is not entitled to relief on either of those claims, this Court

should affirm the judgment of conviction and the order denying postconviction relief.[1]

I. The sentencing court did not rely on an improper factor when it remarked on Williams' refusal to stipulate to restitution, but if it did, the error was harmless.

At the sentencing hearing, the State asked the court to order that Williams pay restitution of $794 for Mr. Wilson's funeral expenses. (74:9; 76:1.) The prosecutor acknowledged that Williams was not convicted of the homicide, but argued that "the homicide was a direct extension of this armed robbery" and that the restitution should be imposed jointly and severally with that imposed on Williams' codefendant. (*Id.*) Williams' lawyer opposed restitution because, he contended, the shooting was not foreseeable by Williams and was a "separate transaction." (74:17.)

When it imposed sentence, the circuit court made the following remarks:

> 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

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[1] The Honorable Timothy G. Dugan presided at Williams' plea and sentencing. The Honorable Ellen R. Brostrom entered the order denying Williams' postconviction motion.

In his motion for postconviction relief, Williams also sought to withdraw his guilty plea, alleging that the plea was not knowingly, voluntarily, and intelligently entered and that he received ineffective assistance from trial counsel. (47:1, 7-12.) Williams does not raise those claims on appeal and has therefore abandoned them. *See A.O. Smith Corp. v. Allstate Ins. Co.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) ("an issue raised in the trial court, but not raised on appeal, is deemed abandoned").

> 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, A-App. 109.)

Williams argues that the sentencing court relied on an improper factor because it said that the fact that he was not willing to agree to restitution "also reflects [his] lack of remorse" and that it was "certainly considering that." (Williams' Br. 12.) This Court should reject that claim because the sentencing court did not rely on an improper factor when it considered Williams' unwillingness to pay restitution as an indication of his lack of remorse. And even if that were an improper consideration, this Court still should affirm the sentence because any such error was harmless.

A. Applicable legal standards.

The analytical framework that applies to a claim that the sentencing court relied on an improper factor is the same as that applied to a claim that the court relied on inaccurate information. *See State v. Alexander*, 2015 WI 6, ¶ 19, 360 Wis. 2d 292, 858 N.W.2d 662. "Review of a sentencing decision is 'limited to determining if discretion was erroneously exercised.'" *State v. Harris*, 2010 WI 79, ¶ 30, 326 Wis. 2d 685, 786 N.W.2d 409 (quoting *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197). "A circuit court erroneously exercises its sentencing discretion when it 'actually relies on clearly irrelevant or improper factors.'" *Alexander*, 360 Wis. 2d 292, ¶ 17 (quoting *Harris*, 326 Wis. 2d 685, ¶ 66). A defendant bears the burden of proving, by clear and convincing evidence, that the sentencing court actually relied on irrelevant or improper factors. *Id.*

B. The sentencing court's determination that Williams' opposition to paying restitution reflected his lack of remorse was not an improper factor to consider at sentencing.

When a defendant claims that the circuit court relied on an improper factor at sentencing, the first inquiry is whether that factor was improper. *See Alexander*, 360 Wis. 2d 292, ¶ 22. Williams argues that consideration of his refusal to pay restitution was improper because "[j]ust 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." (Williams' Br. 13.) He allows that "[a]rguably, a defendant's refusal to stipulate to a restitution claim that he undoubtedly owed *might* be indicative of a lack of remorse." (*Id*.) But, he contends, "that is simply not this case" because the circuit court "agreed with Williams that he was not liable for restitution." (*Id*.)

There are two flaws in that argument.

First, while Williams asserts that he did not "legally owe the restitution" (*id*. at 12), he does not explain why that is so. Instead, he relies solely on the fact that the circuit court agreed with him that he was not liable for restitution. (*Id*. at 13).

Because Williams does not present a developed argument supported by references to relevant legal authority explaining why he was not liable for restitution, this Court could reject his assertion on that basis alone. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). More importantly, Williams is wrong. As this Court has explained, a defendant is liable for restitution for

any damages resulting from the criminal episode in which he took part.

> [A]n order for restitution must be supported by evidence in the record. This requires that damage in the first instance be established and that there be some nexus between the damage and the offender's conduct. An offender cannot escape responsibility for restitution simply because his or her conduct did not directly cause the damage. If damage results from a criminal episode in which the defendant's conduct played only a small and isolated part, the defendant is nonetheless properly held to pay restitution on a joint and several basis. This is so, even if the defendant had no knowledge of, or complicity in, the event that resulted in the damage.

State v. Madlock, 230 Wis. 2d 324, 336-37, 602 N.W.2d 104 (Ct. App. 1999).

In this case, the shooting death of Mr. Wilson resulted from the criminal episode in which Williams played a part. The criminal complaint, which initially charged Williams with felony murder, alleged that Williams' codefendant shot the victim in the course of the attempted armed robbery to which Williams eventually pled guilty. (2:2-3.) As the prosecutor argued at the sentencing hearing when requesting that Williams be required to pay restitution on a joint and several basis, "the homicide was a direct extension of this armed robbery." (74:9.) For that reason, Williams was liable for restitution for damages attributable to the death of the victim.

Second, Williams' argument that "[j]ust 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" (Williams' Br.

13), is based on an incomplete characterization of the law. Williams quotes *Kubart v. State*, 70 Wis. 2d 94, 97, 233 N.W.2d 404 (1975), for the proposition that "[a] defendant cannot receive a harsher sentence solely because he has availed himself of the important constitutional right of trial by jury." (Williams' Br. 13.) But while a circuit court may not impose a harsher sentence based *solely* on a defendant's exercise of his right to a trial, it may consider a defendant's refusal to admit his guilt as an indication of his lack of remorse. *See State v. Fuerst*, 181 Wis. 2d 903, 915-16, 512 N.W.2d 243 (Ct. App. 1994).

In *Fuerst*, the defendant was convicted following a jury trial of first-degree sexual assault of a child. *Id.* at 908. Throughout his trial, Fuerst maintained his innocence. *Id.* Fuerst argued on appeal that he was entitled to resentencing because the circuit court "improperly considered his refusal to admit his guilt." *Id.* at 915.

This Court agreed that a circuit court "is prohibited from imposing a harsher sentence solely because the defendant refused to admit his guilt." *Id.* But, the court held, "a sentencing court does not erroneously exercise its discretion by noting a defendant's lack of remorse as long as the court does not attempt to compel an admission of guilt or punish the defendant for maintaining his innocence." *Id.* The court of appeals held that the sentencing court properly commented on Fuerst's denial "as part of its consideration of whether Fuerst could be successfully rehabilitated and whether Fuerst would be likely to engage in future criminal conduct if placed on probation." *Id.* Additionally, the court of appeals noted, "Fuerst's lack of remorse was only one of many factors the sentencing court considered." *Id.*

The court of appeals observed that "sentencing courts are 'obligat[ed] to consider factors such as the defendant's

demeanor, his need for rehabilitation, and the extent to which the public might be endangered by [the defendant's] being at large" and that "[a] defendant's attitude toward the crime may well be relevant in considering these things.'" *Id.* at 916 (quoting *State v. Baldwin,* 101 Wis. 2d 441, 459, 304 N.W.2d 742 (1981)). The court of appeals concluded that the sentencing court properly considered Fuerst's refusal to admit his guilt as an indication of his lack of remorse. *Id.*

In this case, as in *Fuerst*, the circuit court properly considered Williams' lack of remorse as one of many factors when it sentenced Williams. As discussed in greater detail below, *see infra* at 10-14, the circuit court's sentencing remarks addressed the severity of the offense, how Williams' actions before and after the shooting reflected poorly on his character, his extensive juvenile record, his adult record, his lack of success under supervision, the fact that he committed this offense while under supervision, his high risk of recidivism, his rehabilitative needs, and his supervising agent's belief that Williams was unremorseful. (74:20-25, A-App. 103-08.) Under *Fuerst*, the circuit court properly considered Williams' opposition to paying restitution as one indication of his lack of remorse among the many factors that supported Williams' sentence.

Williams has not shown that it was improper for the circuit court to consider his opposition to paying restitution as an indication of his lack of remorse. Accordingly, this Court should reject his claim that the circuit court relied on an improper factor when it sentenced him.[2]

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[2] In a footnote, Williams says that "[i]t 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." (Williams' Br. 14 n.7.) That is a curious statement, as Williams must know whether he, his

C. The circuit court gave explicit attention to Williams' objection to paying restitution.

If Williams' objection to paying restitution for the homicide was an improper sentencing consideration, the second part of this Court's inquiry is whether the circuit court "actually relied" on that improper factor when it sentenced Williams. *See Alexander*, 360 Wis. 2d 292, ¶ 25. In its analysis of the actual reliance prong, the supreme court appears to have taken two approaches.

Under the first (and well-established) approach, "[w]hether the circuit court 'actually relied' on the incorrect information at sentencing, . . . turns on whether the circuit court gave 'explicit attention' or 'specific consideration' to the inaccurate information, so that the inaccurate information 'formed part of the basis for the sentence.'" *State v. Travis*, 2013 WI 38, ¶ 28, 347 Wis. 2d 142, 832 N.W.2d 491 (quoting *State v. Tiepelman*, 2006 WI 66, ¶ 14, 291 Wis. 2d 179, 717 N.W.2d 1). Under this approach, if the circuit court actually relied on an improper factor, the reviewing court determines whether the error was harmless. *See Travis*, 347 Wis. 2d 142, ¶ 66. "The State can meet its burden to prove harmless error by demonstrating that the sentencing court would have imposed the same sentence absent the error." *Id.* ¶ 73.

However, in its 2015 decision in *Alexander*, the supreme court arguably incorporated the harmless error standard into the actual reliance analysis. *See Alexander*, 360 Wis. 2d 292, ¶¶ 26-27. In *Alexander*, the supreme court agreed with the defendant that it would have been improper for the sentencing court to have relied on compelled

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counsel, or he and his counsel jointly decided to oppose restitution. Williams' postconviction motion does not include any allegations on this point. (47:5, 12-14.)

incriminating statements that the defendant made to his probation agent. *See id.* ¶¶ 11, 30. The remaining question, therefore, is whether the circuit court actually relied on those compelled statements. *See id.* ¶ 30.

The supreme court noted that "[i]n some cases where we have concluded there was no actual reliance, the circuit court has made comments that allegedly constituted explicit attention to an improper factor." *Id.* ¶ 26. In those cases, the court said, it had "reviewed the circuit court's comments in the context of the whole sentencing transcript and concluded that the court actually based its sentence on proper, rather than improper, factors." *Id.*

On the other hand, the supreme court said, "[i]n cases concluding that the circuit court actually relied on inaccurate information or improper factors, the circuit court explicitly considered the inaccurate information and also would not have sentenced the defendant in the same manner without the inaccurate information." *Id.* ¶ 27. The latter consideration—whether the circuit court would have imposed the same sentence without the inaccurate information—is the same as the harmless error standard. *See Travis*, 347 Wis. 2d 142, ¶ 73.

It is unclear whether the *Alexander* court intended to change the law by adding an additional determination—whether the circuit court would not have sentenced the defendant in the same manner with the inaccurate or improper information—to *Tiepelman*'s requirement of "explicit attention" or "specific consideration." The court did not say it was changing the standard. *See Alexander*, 360 Wis. 2d 292, ¶¶ 25-29. And the *Alexander* court did not have to determine whether more was required to establish actual reliance than "explicit attention" or "specific consideration" because it concluded that the circuit court had not given

explicit attention to Alexander's compelled statements to his probation agent. *See id.* ¶ 33.

Because the supreme court did not expressly state in *Alexander* that it was changing the actual reliance standard, the State will assume that a circuit court has "actually relied" on improper information if it gave explicit attention or specific consideration to the improper factor. *See Tiepelman*, 291 Wis. 2d 179, ¶ 14. In this case, the circuit court gave explicit attention to Williams' opposition to paying restitution, as it said in its sentencing remarks, "I think the fact that you're not willing to join in on [restitution] also reflects your lack of remorse under the circumstances, and I'm certainly considering that." (74:26, A-App. 109.)

So if this Court agrees with Williams that his unwillingness to pay restitution was an improper sentencing consideration—and, to reiterate, the State does not believe that it was—Williams has met his burden of showing that the circuit court actually relied on an improper factor when it imposed sentence. The next question, then, is whether that error was harmless.

D. If the sentencing court improperly considered Williams' opposition to paying restitution, the error was harmless.

"The State can meet its burden to prove harmless error by demonstrating that the sentencing court would have imposed the same sentence absent the error." *Travis*, 347 Wis. 2d 142, ¶ 73. In making that determination, this Court looks to the transcript of the sentencing proceeding. *Id.*

In this case, the circuit court discussed a variety of factors that supported the sentence it imposed. The court first discussed the seriousness of the offense. (74:20-21, A-App. 103-04.) The court noted that Williams "set up a drug

deal and [his] brother came along." (74:20:103.) Williams knew that his brother had a gun and that his brother was going to rob someone, "but instead of stopping, saying no, I'm not going to go along with this, get out of my car, I'm not taking you anywhere, you took him to the scene to commit the robbery, and then you assisted." (*Id.*) The court observed that Williams called over to the intended robbery victim, who knew Williams, and that Williams "didn't just tell him to go away, get away because you're going to get robbed, you participated in the entire robbery, and then your brother shoots and kills Mr. Wilson." (*Id.*)

The court then discussed how Williams' actions after the shooting reflected on his character. "[I]nstead of saying what did you do, we can't leave here, we've got to call the police, we've got to address this issue -- You didn't know he had died at this point. You didn't call for help for him." (*Id.*)

The court noted that Williams' brother shot at the car in which the robbery victim and Mr. Wilson had arrived as that car was driving away and that there was a little girl in that car. (74:20-21, A-App. 103-04.) "You drove away," the court told Williams, and "[t]hat reflects upon your character." (74:21, A-App. 104.)

The court said that Williams had "accepted responsibility in accepting a plea in this case." (*Id.*) It described that decision as "strategic." (*Id.*)

The court said that the facts of the case represented an "aggravating circumstance" and that the case further was "aggravated because of your contacts with the juvenile system, your adjudications." (*Id.*) It noted that Williams had been "on juvenile probation for a burglary, the numerous retail thefts, trespass, destroying property, [and] endangering safety" and that he "continued to have contacts

with the juvenile system from 2002 through 2005." (74:21-22, A-App. 104-05.)

The court further noted that as an adult, Williams had "numerous contacts," including an armed robbery case that was dismissed because the witnesses didn't appear. (74:22, A-App. 105.) Williams was convicted of being a prohibited person in possession of a firearm and bail jumping, for which he was sent to prison. (*Id.*) After Williams was released on extended supervision, the court said, he committed "multiple violations," including possession of marijuana, theft, vandalism, a felony shots-fired investigation, and an absconding violation for which he had to serve 45 days. (*Id.*) Williams later violated supervision for assaultive behavior, for which he had to serve 87 days. (*Id.*)

In 2012, Williams was placed in a halfway house as an alternative to revocation and he absconded from there. (74:22-24, A-App. 105-07.) The court noted that Williams committed the offense for which it was sentencing him while he was on supervision. (74:22, A-App. 105.) The court told Williams, "Clearly you're not willing to comply with supervision, and, sadly and unfortunately, you're a risk and a danger to the community because of your continued conduct and your continued criminal violations." (74:24, A-App. 107.)

The court said that "[o]n the positive side," Williams has a high school diploma and had some college classes. (*Id.*) It also said that Williams reported that he did not have a drug history other than sporadic use of marijuana. (*Id.*)

The court noted that "[t]he presentence writer comments that you minimized your behavior in all of your arrests, placed blame on others, that you were proud and seemed fond of how humorous it is the times you're charged and then the cases are dropped, and when asked if you feel

that you got away with a lot of stuff, you said, 'Rights are rights, right?'" (74:22-23, A-App. 105-06.) It told Williams that the assessment of the agent who had worked with him and who had been "hopefully thinking that you were turning your life around" was that "you aren't remorseful, that your focus is upon you, your family, your brother." (74:25, A-App. 108.)

The court discussed the COMPAS analysis, which "reflects that you're high risk for violent recidivism" and "a high risk for general recidivism." (74:24, A-App. 107.) That analysis indicated that Williams has "a high level of criminal personality traits." (*Id.*) "As to your criminogenic needs," the court stated, "you score high or highly probable" on measures including "a history of violence, current violence, criminal associates, [and a] criminal personality." (*Id.*)

The court told Williams that "[t]he crime is extremely serious. It's had a profound impact on the victims, their families, the community, and, as you noted yourself to the presentence writer, you could have stopped this at any time but you didn't." (74:25, A-App. 108.) Probation would unduly depreciate the seriousness of the offense, the court said, and Williams has "rehabilitative needs that have to be addressed in a structured, confined setting." (*Id.*) "You're not willing to address them in supervision in the community," the court told Williams, and "there's a strong need, sadly, to protect the community from your conduct." (74:25-26, A-App. 108-09.)

After discussing conditions of extended supervision, the court addressed restitution. (74:26, A-App. 109.) The court said that it did not think that it had the authority to order restitution because Williams had been convicted of attempted armed robbery rather than a homicide, but said, in the comment that Williams claims is improper, "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." (*Id.*)

The court said that "[c]onsidering all the factors and circumstances and everything that I've already said on the record, the Court is going to find that you're not eligible for the Challenge Incarceration Program nor the Substance Abuse Program." (74:28, A-App. 111.) Considering all of those factors and circumstances, the court said, it was imposing a sentence of 17 and a half years, consisting of ten years of initial confinement and seven and a half years of extended supervision. (*Id.*)

The circuit court's extensive discussion of the many factors that led it to impose that sentence demonstrates that it would have imposed the same sentence even if it had not considered Williams' objection to paying restitution as an indication of his lack of remorse. The court's discussion addressed the severity of the offense, how Williams' actions before and after the shooting reflected poorly on his character, his extensive juvenile record, his adult record, his lack of success under supervision, the fact that he had committed this offense while under adult supervision, and the various factors that indicated that Williams posed a high risk both of general recidivism and violent recidivism. And the court had information other than his opposition to paying restitution that indicated Williams' lack of remorse; it already had noted that the PSI writer, who was Williams' supervising agent, found that Williams was not remorseful. (74:25, A-App. 108.)

The circuit court's thorough explanation of its sentencing decision demonstrates that it would have imposed the same sentence even if it had not considered Williams' objection to paying restitution. Accordingly, this Court should conclude that if the circuit court erred when it

considered Williams' objection to paying restitution as an indication of his lack of remorse, that error was harmless.

II. The retroactive imposition of a single mandatory DNA surcharge is not an ex post facto violation.

Williams committed this offense in 2013. (35:1, A-App. 113.) Afterwards, on January 1, 2014, an amendment to the DNA surcharge statute that made the previously discretionary DNA surcharge mandatory took effect. *See State v. Scruggs*, 2015 WI App 88, ¶ 3, 365 Wis. 2d 568, 872 N.W.2d 146 (review granted). When Williams was sentenced in 2014, the circuit court imposed a single mandatory DNA surcharge of $250. (35:1, A-App. 113; 74:27, A-App. 110.) Williams argues that the retroactive application of the mandatory DNA surcharge statute is an ex post facto violation because he provided a DNA sample and paid a discretionary DNA surcharge in a prior case.[3]

This Court held in *Scruggs* that imposing the mandatory $250 surcharge for a single felony conviction was not an ex post facto violation. *See Scruggs,* 365 Wis. 2d 568, ¶ 14. Williams attempts to distinguish *Scruggs* based on the fact that he, unlike Scruggs, furnished a DNA sample and

[3] Williams asserts that this issue is currently being litigated in *State v. Courtney D. Hodges*, no. 2015AP1121-CR. (Williams' Br. 2 n.1.) In *Hodges*, however, the defendant-appellant did not argue in his opening brief that the fact that he previously provided a sample and paid a discretionary surcharge was relevant to his ex post facto claim; he made that argument only in his reply brief. (*See* Brief of Defendant-Appellant at 4-11, *State v. Courtney D. Hodges*, no. 2015AP1121-CR; Reply Brief of Defendant-Appellant at 7, *State v. Courtney D. Hodges*, no. 2015AP1121-CR.) The issue in Williams' case is properly raised in another appeal pending in the court of appeals, *State v. Daniel R. Perry*, no. 2016AP558-CR.

paid the surcharge in connection with a previous case. (*See* Williams' Br. 21.) Because he does not have to provide a new DNA sample as a result of his conviction in this case, Williams argues, "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." (*Id.*)

But, as this Court explained in *Scruggs*, the DNA surcharge does not simply relate to the collecting of the sample and analysis of an individual defendant's DNA.

> In 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. Sec. 165.77(2)(a) 1. 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. Sec. 165.77(2)(a) 2. DOJ is required to maintain a data bank based on data obtained from its analysis of DNA specimens. Sec. 165.77(3).

Scruggs, 365 Wis. 2d 568, ¶ 12.

Williams has provided no information about the cost of these other DNA-related activities that are funded by the surcharge. That is significant because "the burden is on [Williams] 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." *State v. Radaj,* 2015 WI App 50, ¶ 34, 363 Wis. 2d 633, 866 N.W.2d 758. Because Williams has not carried that burden,

this Court should reject his claim that imposing the mandatory DNA surcharge is an ex post facto violation.

CONCLUSION

For the reasons stated above, this Court should affirm the judgment of conviction and the order denying postconviction relief.

Dated this 8th day of December, 2016.

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), (c) for a brief produced with a proportional serif font. The length of this brief is 4,683 words.

_____
JEFFREY J. KASSEL
Assistant Attorney General

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).

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.

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 8th day of December, 2016.

_____
JEFFREY J. KASSEL
Assistant Attorney General