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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP000883-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JAMAL L. WILLIAMS,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District I, Affirming a Judgment of Conviction Entered in the Milwaukee County Circuit Court, the Honorable Timothy G. Dugan Presiding, and the Order Denying Postconviction Relief, the Honorable Ellen R. Brostrom Presiding.

RESPONSE BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

Wisconsin Statutes

OTHER AUTHORITIES

ISSUE PRESENTED

1. Mr. Williams committed this offense prior to the effective date of the mandatory DNA surcharge statute. Mr. Williams was previously assessed a $250 DNA surcharge in another case, his DNA was already on file, and this case did not involve any DNA costs. The circuit court required him to pay a $250 DNA surcharge. Did the circuit court's order violate the Ex Post Facto Clauses of the state and federal constitution?[1]

   The Court of Appeals answered yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has deemed both oral argument and publication to be appropriate.

STATEMENT OF THE CASE AND FACTS

The facts are not in dispute: At Mr. Williams' sentencing hearing, the circuit court ordered him to pay all mandatory court costs and surcharges, including a DNA surcharge of $250. (73:27). Mr. Williams had previously provided a DNA sample and had also been assessed a surcharge in a prior felony case. (47:21-23). The record in this case does not disclose any DNA-related costs.

Mr. Williams filed a *pro se* motion to vacate his DNA surcharge, which was denied in a written order. (37; 38). Mr. Williams, by counsel, renewed his request to vacate the DNA

[1] Hereinafter "Ex Post Facto."

surcharge in a Rule 809.30 postconviction motion filed on May 29, 2015. (47). The circuit court, the Honorable Ellen R. Brostrom presiding, held the motion in abeyance pending the Court of Appeals' resolution of ***State v. Monahan***, Appeal No. 14AP2187-CR and ***State v. Scruggs***, Appeal No. 14AP2981-CR.[2] (53:8); (App. 141).

After the Court of Appeals decided ***Scruggs***, the circuit court issued a second written order denying the motion to vacate the DNA surcharge. (57); (App. 142-144). While the circuit court recognized that Mr. Williams' case was factually distinguishable from ***Scruggs*** because he had been assessed a DNA surcharge previously, it nevertheless concluded that this was a distinction without a difference. (57:3); (App. 143-144). The court reasoned:

> "Requiring the defendant to pay another DNA surcharge in this case may be punitive, but it is not punitive for *ex post facto* purposes because, as illustrated in ***Radaj*** and ***Scruggs***, there are legitimate non-punitive reasons for requiring the defendant to pay the mandatory surcharge to fund the DNA-related activities of the State Crime Lab that go beyond collecting, analyzing and storing his DNA."

(57:2-3); (App. 143-144). Mr. Williams timely appealed. (62).

[2] ***Monahan*** involved the retroactive application of the DNA surcharge statute to a defendant who had already provided a DNA sample. ***State v. Monahan***, No. 2014AP2187-CR, unpublished slip op., ¶53 (Wis. Ct. App. April 27, 2017); (App. 159-180). This Court has granted the defendant's petition for review which did not include the DNA issue.

The Court of Appeals reversed. ***State v. Williams***, 2017 WI App 46, ¶1, 377 Wis.2d 247, 900 N.W.2d 310. (App. 101-131). The Court of Appeals held that this conclusion was driven by its earlier holdings in ***State v. Elward***, 2015 WI App 51, 363 Wis.2d 628, 866 N.W.2d 756 and ***State v. Radaj***, 2015 WI App 50, 363 Wis.2d 633, 866 N.W.2d 758. ***Williams***, 2017 WI App, ¶23. (App. 115). Because Mr. Williams had previously been assessed a DNA surcharge and the State conceded that no DNA costs were accrued in his case, the Court of Appeals held that the surcharge "bears no relation to the cost of a DNA test because he did not have to submit to a test, has resulted in the State receiving money for nothing, and is not rationally connected ... to the surcharge's intended purpose." ***Id***. ¶26 (citations and formatting omitted). (App. 118).

This Court granted the State's petition for review on this issue.

ARGUMENT

I. The DNA Surcharge is "Punishment," Hence, Its Imposition In This Case Violates Ex Post Facto.

A. Legal principles and standard of review governing Ex Post Facto challenges.

Both parties agree that the controlling legal framework is set forth by this Court in ***State v. Scruggs***, 2017 WI 15, 373 Wis. 2d 312, 891 N.W.2d 786 and the United States Supreme Court in ***Hudson v. United States***, 522 U.S. 93 (1997). Whether a given statute violates Ex Post Facto is a question of law reviewed *de novo*. ***Scruggs***, 2017 WI 15, ¶12. Mr. Williams has the burden of proving, beyond a reasonable

doubt, that the DNA surcharge statute violates Ex Post Facto. ***Id***.

The only disputed legal issue is whether the $250 DNA surcharge, imposed in this case pursuant to Wis. Stat. §973.046, is "punitive." In making that determination, this Court applies the "intent-effects" test. ***Scruggs***, 2017 WI 15, ¶16. First, the Court examines whether the law was passed with a punitive intent. ***Id***. If the law was passed with a punitive intent, "the law is considered punitive" and this Court's inquiry is concluded. ***Id***.

If this Court concludes that the DNA surcharge statute does not evince a punitive intent on the part of the legislature, Mr. Williams can still prevail by proving that the statute is punitive *in effect*. ***Id***. In making that determination, the Court relies on seven factors identified in ***Kennedy v. Mendoza-Martinez***, 372 U.S. 144, 168-169 (1963). As framed in ***Scruggs***:

> The seven factors are whether: (1) the 2014 Amendment involves an affirmative disability or restraint; (2) it has historically been regarded as a punishment; (3) it comes into play only on a finding of scienter; (4) its operation will promote the traditional aims of punishment-retribution and deterrence; (5) the behavior to which the 2014 Amendment applies is already a crime; (6) an alternative purpose to which it may rationally be connected is assignable for it; and (7) it appears excessive in relation to the alternative purpose assigned.

Scruggs, 2017 WI 15, ¶41. While these factors provide "useful guideposts," s*ee* ***Hudson***, 522 U.S. at 99, they are not exhaustive and no one factor is dispositive. ***Scruggs***, 2017 WI 15, ¶41.

Importantly, this Court must analyze the DNA surcharge on its face, and not just with respect to its impact on Mr. Williams. ***Hudson***, 522 U.S. at 100. Consideration of how the statute impacts criminal defendants generally is therefore relevant to this Court's analysis, especially since the State is seeking to overrule case law pertaining to offenders *not* in Mr. William's specific position (***Radaj*** and ***Elward)***). (State's Br. at 13) ("[T]his Court should confirm its holding in ***Scruggs*** and overrule the Court of Appeals' decision here, along with ***Elward*** and ***Radaj***.").

B. State of the law regarding the DNA surcharge.

In 2013, the Wisconsin legislature "dramatically expanded DNA collection in Wisconsin" through passage of 2013 Wis. Act 20. ***Williams***, 2017 WI App 46, ¶29 (Hagedorn, J., *concurring*). (App. 120). The legislature proposed a sweeping new procedure for the collection of DNA samples and, at the same time, determined that the resulting costs should be borne by convicted criminal defendants. ***Id***., ¶30. (App. 120-121). Accordingly, every individual convicted of a misdemeanor in Wisconsin is now charged $200 *per conviction* and every individual convicted of a felony is charged $250 *per conviction*. ***Id***. (App. 120-121). The new per-conviction DNA surcharge is mandatory in all criminal cases. ***Id***.[3] (App. 120-121). Previously, the surcharge was discretionary with respect to most felony cases and applied on a per-case, as opposed to per-conviction, basis. *See* Wis. Stat. § 973.046(1g) (2011-2012).[4] The

[3] *But see* ***State v. Cox***, No. 2016AP001745-CR, pending in this Court, which addresses whether the circuit court retains the ability to waive the DNA surcharge in certain circumstances.

[4] In determining whether or not imposition of a DNA surcharge was warranted, the Court of Appeals held that a circuit court should consider factors such as whether the defendant previously provided a

surcharge was only mandatory with respect to specific felonies and misdemeanors involving sexual assaults. *See* Wis. Stat. § 973.046(1r) (2011-2012).

The statute is retroactive as it governs conduct committed before its effective date. *See* ***Scruggs***, 2018 WI 15, ¶15 ("The State does not dispute Scruggs' contention that if the DNA surcharge is punitive, amending the statute to make mandatory what previously was discretionary is an ex post facto violation with respect to defendants who committed their offense before the effective date of the amendment.").

This new surcharge framework—which can add on hundreds, and in some cases, thousands of dollars of increased financial obligations to a defendant's judgment of conviction—has triggered numerous legal challenges in both the circuit courts and the Court of Appeals. Thus far, the Wisconsin Court of Appeals has granted relief in two specific fact situations.

In ***Elward,*** the defendant was convicted of fourth offense operating while intoxicated (which was at that time a misdemeanor offense) after the effective date of the DNA amendment. ***Elward***, 2015 WI App 51, ¶5. However, his offense predated that effective date. ***Id*** He was assessed a single $200 DNA surcharge at the time of conviction. ***Id.***

No sample was subsequently collected, as under the law, the "multiphase rollout" of the new DNA testing scheme was still ongoing. ***Id***., ¶2. As a result, Mr. Elward paid the surcharge, but was not required to provide a DNA sample. ***Id***. Accordingly, the Court of Appeals concluded that "the timing

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sample or created a DNA cost. ***State v. Cherry***, 2008 WI App 80, ¶10, 312 Wis.2d 203, 752 N.W.2d 393.

of Elward's offense with relation to the rollout of the statutory scheme made the $200 DNA surcharge a fine instead of a fee." ***Id.***, ¶7. He was required to pay a DNA surcharge but "never had to submit to a [DNA] test." ***Id***. "The State received money for nothing." ***Id***. Because the DNA surcharge was disassociated from its regulatory goal, imposition of the mandatory DNA surcharge violated the defendant's rights under Ex Post Facto. ***Id***.

The Court of Appeals also granted relief in ***Radaj***, which involved a defendant who committed numerous property offenses prior to the amendment's effective date. ***Radaj***, 2015 WI App 50, ¶2. He pleaded guilty to four felonies after the effective date of the new surcharge law, and the court imposed a total of $1,000 in DNA surcharges. ***Id***., ¶¶1-3.

The Court of Appeals assumed, but did not hold, "that the legislature's intent was non-punitive." ***Id***., ¶22. As applied to Mr. Radaj, however, the court concluded that the law clearly had a punitive effect. ***Id***. The court found that three of the ***Mendoza-Martinez*** factors (as stated in ***State v. Rachel***, 2002 WI 81, 254 Wis.2d 215, 647 N.W.2d 762) were "closely related and of particular importance": whether the DNA surcharge promoted the traditional aims of punishment, whether it was rationally connected to a non-punitive purpose, and whether the surcharge was excessive in relation to that purpose. ***Id***., ¶24-25. The "critical inquiry is whether there is a rational connection between the amount of the fee and the non-punitive activities the fee is intended to fund, or if instead the amount of the fee is excessive in relation to that purpose." ***Id***., ¶24. "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,*** ¶25.

The Court of Appeals in ***Radaj*** found no apparent 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***., ¶30. Importantly, the court construed the purpose of the surcharge narrowly—"the DNA surcharge is used to cover the cost of the DNA 'analysis' of the biological specimen that the circuit court must order a defendant to provide at the time the court orders the surcharge." ***Id***., ¶31. The Court of Appeals could not understand why that cost would increase with each subsequent conviction. ***Id***. Importantly, even if the "[o]ther costs that may come later" are considered (the broad suite of DNA-related activities related to the databank as a whole), the Court of Appeals could "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***., ¶32.

Thus, under ***Radaj***, defendants convicted of multiple felony offenses stemming from pre-amendment conduct are subject to the circuit court's discretionary determination of whether to impose a single $250 DNA surcharge in those cases, as governed by the discretionary framework set out in the prior version of the statute and discussed in ***Cherry***. ***Id***., ¶38.

Subsequently, this Court issued its first decision relating to the DNA surcharge in ***Scruggs***, which concerned retroactive imposition of a single $250 DNA surcharge. ***Scruggs***, 2017 WI 15, ¶1. Notably, in ***Scruggs***, the State did not seek to overturn ***Elward*** or ***Radaj***. ***Id***., ¶35 n. 8. This Court therefore issued a limited holding that retroactive imposition of a single $250 DNA surcharge when the defendant has not previously been assessed a surcharge is not a violation of Ex Post Facto. ***Id***. ¶50.

This Court determined, as a matter of statutory construction, that the legislature did not have a punitive intent when it drafted the law. ***Id***., ¶¶17-38. In addition, this Court concluded that Ms. Scruggs had failed to prove that the change in the statute from a discretionary to mandatory surcharge for a single felony conviction committed before the effective date of the 2014 amendment had a punitive effect. It found that there was a rational relationship between Ms. Scruggs' $250 DNA surcharge and the "increased burden on the DOJ in collecting, analyzing, and maintaining the additional DNA samples." ***Id***., ¶¶47-49.

In sum, the current law governing DNA surcharges is:

- If a defendant committed a single misdemeanor before the effective date of the DNA amendment and was convicted before the DNA rollout was complete, their $200 DNA surcharge is an Ex Post Facto violation. (***Elward***). [5]

- If a defendant committed a single felony before the effective date of the DNA amendment and was convicted after that effective date, their $250 DNA surcharge is not an Ex Post Facto violation as long as they have not previously been assessed a DNA surcharge. (***Scruggs***).

[5] In an unpublished but citable decision, *see* Wis. Stat. § 809.23(3)(b), the Court of Appeals has also rejected a due process challenge to the imposition of a DNA surcharge for a misdemeanant when no sample was ordered. *See* ***State v. Manteuffel***, No. 2016AP96-CR, unpublished slip op. (Wis. Ct. App. December 6, 2016). (App. 152-158).

- However, if the defendant committed a single felony before the effective date of the DNA amendment and was convicted after that effective date, *but had previously been assessed a surcharge*, their $250 DNA surcharge is an Ex Post Facto violation. (***Williams***).

- If a defendant committed multiple felonies before the effective date of the 2014 amendment but was convicted of multiple felonies after that effective date, the circuit court is required to apply the prior discretionary DNA surcharge statute. (***Radaj***).

The State now seeks to overturn ***Elward*** and ***Radaj*** and also requests reversal of the Court of Appeals' determination in ***Williams***. (State's Br. at 13).

C. The DNA surcharge statute is punitive in effect.

In 2017, this Court analyzed the DNA surcharge statute in ***Scruggs*** and determined that it did not evince a punitive intent. ***Id***., ¶38. The State believes that this Court should refuse to reconsider that decision, invoking the principle of *stare decisis*. (State's Brief at 13). Mr. Williams is aware that this Court is being asked to overrule that precedent in another DNA case, *see* Opening Brief of Defendant-Appellant in ***State of Wisconsin v. Tydis Trinard Odom***, No. 2015AP002525-CR, at 22.

Mr. Williams agrees with the argument in ***Odom*** that this Court should reconsider its determination regarding the DNA surcharge's punitive intent in light of the evidence presented by Mr. Odom. However, Mr. Williams chooses to focus herein on the statute's punitive *effect*, which has not been as rigorously scrutinized by this Court. This issue is ripe

for review in this case because the Court's analysis of the statute's *effect* in ***Scruggs*** is more limited and appears to have rested primarily on a conclusion that Ms. Scruggs failed to carry her burden of proof. ***Id***., ¶49. Mr. Williams is therefore asking this Court to reassess the statute's *effect* in light of the arguments and authorities herein intended to carry his burden of proof with respect to this second prong of the intent-effects inquiry.

Regardless of the legislature's intent, it is very clear that the statute has had an indisputably punitive effect on criminal defendants. Accordingly, this Court should hold that the statute "is so punitive in effect as to transform the $250 DNA surcharge into a criminal penalty." ***Scruggs***, 2017 WI 15, ¶39. That conclusion is supported by a careful analysis of the relevant ***Mendoza-Martinez*** factors:

1. The DNA surcharge imposes an affirmative disability or restraint.

In determining whether the DNA surcharge statute imposes an affirmative disability or restraint, this Court must ask "how the effects of the [statute] are felt by those subject to it." ***Smith v. Doe***, 538 U.S. 84, 100 (2003). In ***Scruggs***, this Court flatly dismissed any argument with respect to the first factor, concluding that, "the surcharge is nonpunitive because it does not impose an affirmative disability or restraint, in contrast to imprisonment." ***Scruggs***, 2017 WI 15, ¶42. The State therefore takes the position that the surcharge is non-punitive in effect because it "imposes a monetary fee only." (State's Brief at 17).

However, the State ignores how the "effects of the [statute] are felt by those subject to it." *See* ***Smith***, 538 U.S. at 100. As Justice Abrahamson pointed out in her dissent in ***Scruggs***:

> The effect of the mandatory DNA surcharge statute should be evaluated in the context of a criminal justice system that exacts a serious toll on criminal defendants. Collateral consequences already burden many aspects of a defendant's daily life, such as limiting employment and housing options. Persons sentenced for a misdemeanor or felony in Wisconsin face up to 238 collateral consequences. And, on top of this, criminal justice debt is stacking up for many defendants at a staggering rate. Collateral consequences and criminal justice debt appear to be leading criminal offenders into a downward spiral of debt and recidivism.

Scruggs, 2017 WI 15, ¶81 (Abrahamson, J., *dissenting*). A conclusion that the imposition of DNA surcharges does not impose a disability or restraint ignores the very real circumstances faced by criminal defendants across this State as a result of the "onerous" DNA surcharge framework. *See* ***Radaj***, 2015 WI 50, ¶4.

In 2015, the legislature passed Act 355, which increased the authority of the Department of Corrections (Department) to determine the percentage of inmate funds utilized to satisfy court-ordered financial obligations. 2015 Wisconsin Act 355.[6] As a result, the Department now collects at least 50%–and sometimes as much as 100%—of an inmate's wages and other financial resources, including money sent by family members. *See* Bill Lueders, *Lock 'em up, take their money*, ISTHMUS, Feb. 16, 2017, *available at* https://isthmus.com/news/news/state-prisons-ramp-up-deductions-from-inmates/.

Inmates depend on those funds to pay for "incidentals like deodorant, shampoo, lotion, writing materials, envelopes, postage, clothing items like gym shoes, and any non-provided

[6] https://docs.legis.wisconsin.gov/2015/related/acts/355

food items or snacks." *Id.*[7] As Judge Hagedorn's concurrence in ***Williams*** makes clear, the DNA surcharge is only one such financial obligation. ***Williams,*** 2017 WI App 46, ¶33 (Hagedorn, J., *concurring*). (App. 122-126). However, the DNA surcharge arguably has one of the most severe effects, as it imposes a hefty per-conviction (as opposed to per-case) financial obligation that must be paid no matter how many times the inmate may have been previously assessed a surcharge.

The high dollar amount, and the potential of multiple surcharges for multiple counts, can result in a debt that will take an inordinate amount of time to pay off. For example, an inmate with a full-time prison job (using the figures in the *Isthmus* article) would have to work for roughly 1,430 hours just to pay off one $250 DNA surcharge. And, with multiple surcharges, the effect is even more extreme: the defendant in ***Radaj***—who was assessed four $250 DNA surcharges—would have to work roughly three years before that particular debt alone would be satisfied. And, had Mr. Radaj instead gone to trial on all 21 charged counts and been convicted, the court would have imposed several thousand dollars in additional DNA surcharges, requiring many more years of prison labor to pay off.

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[7] The Bureau of Prisons recently moved to make feminine hygiene products free for inmates in federal prisons. *See* Michael Alison Chandler, *Federal prisons must now provide free tampons and pads to incarcerated women*, THE WASHINGTON POST, Aug. 24, 2017, available at https://www.washingtonpost.com/local/social-issues/federal-prisons-must-provide-free-tampons-and-pads-to-incarcerated women/2017/08/23/a9e0e928-8694-11e7-961d-2f373b3977ee_story.html?utm_term=.90c9ea5bff04. Undersigned counsel is aware of anecdotal reports that Wisconsin inmates must pay for at least some of their feminine hygiene needs.

During that time, an inmate would be subject to financial deprivation which would make his term of imprisonment that much more difficult. Such excessive surcharge amounts—which lack a rational connection to non-punitive purposes—do not meaningfully further the defendant's rehabilitation. In fact, they hamper it. Inmates who feel that they are the victim of an unfair system will not have the same "buy-in" to the rehabilitative process. For example, prison labor, which can be a means of giving purpose and direction while also affording opportunities for training and education, is divorced from those goals when that labor is primarily used to pay off duplicative DNA surcharges. At the same time, inmates who would normally use those funds to pay for incidentals are deprived of a subtle, but important, rehabilitative opportunity: The chance to gain dignity and self-respect via the legitimate acquisition of goods and services that, in turn, encourage subsidiary values (postage, for example, helps inmates to stay connected to loved ones). Finally, diversion of these funds may also impact an inmate's ability to sufficiently fund their release account in accordance with DOC 309.466, which is designed to help the inmate transition out of prison and back into society.

Meanwhile, those placed on probation would be forced to comply with their financial obligations at the risk of possible revocation of probation or even extension thereof. Imposition of large sums of money via the DNA surcharge statute has the practical effect of transforming the Department of Community Corrections from a rehabilitation and public-safety focused entity, into a debt collection agency. This Court has already expressed skepticism of such a distortion of that agency's purpose in ***State v. Davis***, 127 Wis.2d 486, 499, 381 N.W.2d 333 (1986) and ***Huggett v. State***, 83 Wis.2d 790, 266 N.W.2d 403 (1978).

Thus, the practical result of this "onerous" surcharge scheme is increased immiseration for those individuals convicted of crimes in Wisconsin. While the surcharge does not entail incarceration, it certainly imposes a "disability" for defendants—most of them indigent—forced to comply with these severe financial sanctions. Imposition of DNA surcharges—over and over, for each and every conviction, regardless of whether or not the inmate has previously been assessed the same DNA surcharge—imposes harsh economic hardship on a class of citizens who are already subjected to other punitive sanctions.

It is because of this impact on criminal defendants that the DNA surcharge imposes an "affirmative disability or restraint."

2. The DNA surcharge is analogous to a fine—which is a "punishment."

The State argues that the payment of fixed sums of money is not historically punitive. (State's Br. at 18). They support that assertion with a citation to ***Scruggs***, which concluded that "there is also no evidence under the second factor that the surcharge has historically been considered a punishment." ***Scruggs***, 2017 WI 15, ¶42. ***Hudson*** likewise observes that "neither money penalties nor debarment has historically been viewed as punishment." ***Hudson***, 522 U.S. at 104. Both ***Scruggs*** and ***Hudson*** support this proposition with citation to ***Helvering v. Mitchell***, 303 U.S. 391, 400 (1938).

Helvering concerned "remedial" civil penalties and asserted:

> Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions

> which have been recognized as enforceable by civil proceedings since the original revenue law of 1789. Act of July 31, 1789, c. 5, s 36, 1 Stat. 29, 47. In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions.

Id. ***Helvering***, in turn, cites to a number of cases involving occasionally severe, but essentially non-punitive remedial sanctions: ***Passavant v. United States***, 148 U.S. 214 (1893) (imposing an additional fee when importers of goods appear to have deliberately undervalued imported goods); ***United States v. Zucker***, 161 U.S. 475 (1896) (forfeiture of imported goods upon finding of fraud by importer); ***Hepner v. United States***, 213 U.S. 103 (1909) (requiring payment of financial penalty for inducing an alien to migrate to the United States for the purpose of performing labor); ***Oceanic Stream Nav. Co. v. Stranahan***, 214 U.S. 320 (1909) (imposing a penalty to the master of any vessel who brings to the United States an immigrant afflicted with a loathsome or contagious disease); ***Chicago, B. & Q. Ry. Co. v. United States***, 220 U.S. 559 (1911) (imposing a penalty to railroad company for safety violations); ***United States v. Regan***, 232 U.S. 37 (1914) (penalty for violation of immigrant labor laws); ***Grant Bros. Const. Co. v. United States***, 232 U.S. 647 (1914) (penalty for violation of immigrant labor laws); ***Murphy v. United States***, 272 U.S. 630 (1926) (nuisance laws); ***Waterloo Distilling Corporation v. United States***, 282 U.S. 577 (1931) (forfeiture of property as a result of violation of beverage regulations); ***Lloyd Sabaudo Societa Anonima Per Azioni v. Elting***, 287 U.S. 329 (1932) (immigration regulations). ***Helvering*** relied on these authorities in determining that an additional penalty imposed by the Internal Revenue Service as a result of a taxpayer failing to properly pay his taxes was not a criminal "punishment." ***Helvering***, 303 U.S. at 401.

Such "remedial" sanctions are "provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud." ***Id***. At the end of the day, all such penalties operate to provide "indemnity for loss." ***Id***. The cases discussed in ***Helvering*** show that purely remedial actions—recovering money as a result of customs fraud, immigration violations or other administrative infractions—are therefore not "punishment," but rather regulatory takings designed to reimburse the State for some perceived "loss" owing to the "defendant's" conduct.

While sanctions need not be "solely" remedial in order to qualify as non-punitive, *see* ***Hudson***, 522 U.S. at 102, these cases are nonetheless helpful for delineating the difference between a "fee" and a "fine." A fine is a punishment for an unlawful act that is a "substitute deterrent for prison time" and "a signal of social disapproval of unlawful behavior," while a fee or surcharge is "compensation for a service provided to, or alternatively compensation for a cost incurred by, the person charged the fee." ***Scruggs***, 2017 WI 15 at ¶21.

Fines are a common component of the criminal justice system, and are often described as "punishment." *See* ***State v. Ramel***, 2007 WI App 271, ¶¶12-14, 306 Wis.2d 654, 743 N.W.2d 502. The United States Supreme Court has emphasized the primacy of the fine as punishment in both early American jurisprudence and the modern criminal justice system. ***Southern Union Co. v. United States***, 567 U.S. 343, 350 (2012). Fines therefore pass the "common parlance" test described in ***Hudson***, 522 U.S. at 493.

Thus, the assertion that financial consequences are disconnected from the universe of "punishment" for a criminal conviction ignores the long-standing role of

monetary fines as punishment in the criminal justice system. The claim that non-monetary sanctions are not "punishment" is at odds with a criminal justice system that commonly utilizes such "punishments." With the DNA surcharge, the State imposes a monetary sanction for each conviction, which is analogous to the utilization of fines in criminal cases and, thus, the DNA surcharge operates like a traditional form of "punishment."

Finally, with respect to both factors one and two, the State's suggestion that monetary penalties do not "count" for purposes of an Ex Post Facto issue, (State's Br. at 17-18), is contrary to numerous persuasive cases finding Ex Post Facto violations when the "penalty" at issue was "merely" monetary: ***United States v. Jones***, 489 F.3d 243, 254 n.5 (6th Cir. 2007); (ex post facto prevented increased "special assessment" on convictions after commission of crime); ***Eichelberger v. State***, 916 S.W.2d 109, 112 (Ark. 1996); (same result for restitution); ***Matter of Appeal in Maricopa Cnty. Juvenile Action No. J-92130***, 677 P.2d 943, 947 (Ariz. Ct. App. 1984) (restitution and "monetary assessment"); ***People v. Batman***, 71 Cal. Rptr. 3d 591, 593-94 (Cal. Ct. App. 2008) (DNA assessment); ***People v. Stead***, 845 P.2d 1156, 1159 (Colo. 1993) ("drug offender surcharge"); ***Cutwright v. State***, 934 So. 2d 667, 668 (Fla. Dist. Ct. App. 2006) (court costs); ***People v. Rayburn***, 630 N.E.2d 533, 538 (Ill. App. Ct. 1994) (fine for "Family Abuse Fund"); ***State v. Corwin***, 616 N.W.2d 600, 602 (Iowa 2000) (restitution); ***State v. Theriot***, 782 So. 2d 1078, 1085- 87 (La. Ct. App. 2001) (change of fine from discretionary to mandatory violated ex post facto); ***Spielman v. State***, 471 A.2d 730, 735 (Md. 1984) (restitution); ***People v. Slocum***, 539 N.W.2d 572, 574 (Mich. Ct. App. 1995) (restitution); ***State v. McMann***, 541 N.W.2d 418, 422 (Neb. Ct. App. 1995) (restitution); ***People v. Stephen M.***, 824 N.Y.S.2d 757 (N.Y. Crim. Ct.

2006) (DNA fee); ***Commonwealth v. Wall***, 867 A.2d 578, 580-81 (Pa. Super. Ct. 2005) (OWI assessment); ***State v. Short***, 350 S.E.2d 1, 2-3 (W.Va. 1986) (restitution); ***Loomer v. State***, 768 P.2d 1042, 1049 (Wyo. 1989) (costs).

3. The DNA surcharge does not depend on a finding of scienter.

While the DNA surcharge is only imposed as a result of a criminal conviction, the State is correct that this fact alone is insufficient satisfy the scienter requirement. (State's Br. at 18-19). Accordingly, the third factor is not in dispute.

4. The DNA surcharge promotes traditional punishment goals of retribution and deterrence.

The State correctly asserts, "When analyzing the retributive or deterrent effect of monetary sanctions, courts assess the absolute amount of the fee, and its significance compared with the other elements of the defendant's sentence." (State's Br. at 20) (citations omitted).

Here, the amount of the fee is noteworthy for several reasons. First, it far exceeds the modest fees at issue in the cases relied upon by the State. Both ***Taylor v. Rhode Island***, 101 F.3d 780 (1st Cir. 1996) and ***People v. Alford***, 171 P.3d 32 (Cal. 2007) concern only very small assessments—a $15 monthly fee in ***Taylor***, and a $20 per-conviction fee in ***Alford***. In contrast, the DNA surcharge far exceeds those modest assessments, particularly considering that the $200 or $250 surcharge is imposed for each conviction, with no upper limit. As a result, as noted above for Mr. Radaj, a defendant could potentially face the imposition of thousands of dollars of DNA surcharges in a multi-count case.

For that reason, the DNA surcharge scheme as enacted in the 2014 amendment is uniquely severe. Although other states have required defendants to retroactively pay for the cost of DNA testing, *e.g.*, ***People v. Higgins***, 13 N.E.3d 169 (Ill. App. Ct. 2014), no other state requires payment of a large DNA surcharge for all convictions, regardless of actual DNA cost. That feature distinguishes our statute from South Carolina's, which the State asserts is comparable. (State's Br. at 22). While South Carolina imposes a $250 DNA surcharge, its statute does not appear to permit multiple surcharges in a single case, unlike the Wisconsin statute. *See* ***In re DNA Ex Post Facto Issues***, 561 F.3d 294, 300 (4th Cir. 2009). No other state employs a regime as harsh as Wisconsin.[8]

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[8] Counsel's concededly non-exhaustive review reveals: Alabama imposes only $12 per case. *See* ALA. CODE § 36-18-32(2016). California imposes an additional penalty in proportion to other fines already assessed. *See* CAL. GOV'T CODE § 76104.6 . Colorado appears to request $5 per conviction. *See* Dean Toda, *New Fees will pay for controversial DNA program*, THE GAZETTE, June 26, 2009, available online at http://gazette.com/new-fees-will-pay-for-controversial-dna-program/article/57445. Florida requires that the defendant "reimburse the appropriate agency for the costs of drawing and transmitting" the biological specimen. *See* FLA. STAT. § 948.014 (2017). Hawaii imposes, on an apparent per-case basis, $500 or the actual cost of the analysis. HAW. REV. STAT. § 706-603 (2017). However, the court is also empowered to depart downward in light of an actual inability to pay. Idaho gives the court the discretionary ability to order a convicted person "to pay restitution for DNA analysis in an amount not to exceed five hundred dollars ($500) per DNA sample analysis, or in the aggregate not more than two thousand dollars ($2,000)." IDAHO STAT. § 19-5506 (2017). Illinois imposes a single surcharge of $200 only when the defendant has not previously provided a sample. ***People v. Marshall***, 950 N.E.2d 668, 679 (Ill. 2011). Indiana collects $3 "from anyone convicted of a felony or misdemeanor, found to have committed an infraction or ordinance violation or required to pay a Pretrial Diversion Fee." *See* http://www.in.gov/judiciary/iocs/files/courtmgmt-pubs-trial-court-fee-

Because the DNA surcharge statute in Wisconsin has no limitations—it may be imposed for each criminal conviction, and for any subsequent conviction—there is no limit to the monetary amount the State can collect from a given defendant for this surcharge. Under the statutory scheme, some defendants may potentially incur thousands of dollars in DNA surcharges over time. This excessive amount places the DNA surcharge in the same realm as the costs found to violate Ex Post Facto in both ***Dye v. Frank***, 355 F.3d 1102 (7th Cir. 2004) (drug tax five times the actual worth of

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manual.pdf (The Indiana Trial Court Fee Manual). Kansas imposes a $200 fee "upon conviction or adjudication." KAN. STAT. § 75-724 (2017). Massachusetts assesses the actual costs of "collecting and processing" a DNA sample against the defendant unless that person is indigent. M.G.L. ch.22E §4 (2017). Michigan requires a one-time $60 fee from each prisoner and probationer. MICH. COMP. LAWS. §791.233d (2017). Missouri requires $15, $30, or $60 per case depending on the nature of the underlying case. MO. REV. STAT. § 488.50 (2017). Nebraska requires a defendant who is convicted of a felony or another "specified offense" to bear the expense related to the conviction of his sample only if they have not previously submitted a sample. NEB. REV. STAT. § 29-4106 (2017). Nevada requires a $150 per case fee only so long as specimen is obtained and an analysis conducted. NEV. REV. STAT. §176.0195 (2017). New Jersey funds its DNA database via a $2 surcharge applied to traffic tickets. N.J. STAT. § 39:5-41(g) (2017). New York imposes $50 for specified case types only. N.Y. PENAL CODE § 60.35 (2017). North Dakota requires that a defendant pay for the costs associated with the collection of a sample. N.D. CENT. CODE. § 31-13-03 (2017). Pennsylvania imposes a $250 surcharge on each person convicted of a crime which can be waived by the circuit court. PA. CONS. STAT. § 2322 (2016). Texas imposes between a $34-$250 dollar surcharge depending on the nature of the underlying conviction. TEX. GOV'T. CODE §102.021 (2017). Utah requires some offenders to pay a $150 fee which can be waived as a result of indigency. UTAH CODE § 53-10-404 (2017). Washington requires a single $100 per case DNA surcharge, ***State v. Stoddard***, 366 P.3d 474 (Wash. Ct. App. 2016).

drugs) and ***People v. Stead***, 845 P.2d 1156 (Col. 1993) ($1,000 drug offender surcharge).

Finally, the extreme nature of the DNA surcharge scheme is significant when considered in the context of the other elements of a defendant's sentence. As argued above, the DNA surcharge has a punitive effect because it subjects the defendant to further financial deprivation in prison. The surcharge is also "retributive" in effect because the amount imposed increases with the number of convictions, which subjects defendants to further financial penalties based on the number of convictions.

5. The DNA surcharge is not rationally connected to an alternative purpose.

As the State correctly notes, this Court must "examine the relationship between the use of the funds collected and those who contribute them to determine whether the two are rationally connected." (State's Br. at 21).

The Court of Appeals relied heavily on this factor in its analysis in ***Elward***, ***Radaj*** and ***Williams***. In finding an ex post facto violation in the imposition of the DNA surcharge in ***Elward***, the court was persuaded by ***Mueller v. Raemisch***, 740 F.3d 1128 (7th Cir. 2014), which concerned a $100 annual registration fee to maintain a sex offender database. ***Elward***, 2015 WI App 51, ¶6. In ***Mueller***, the Seventh Circuit noted:

> Labels don't control. A fine is a fine even if called a fee, and one basis for reclassifying a fee as a fine would be that it bore no relation to the cost for which the fee was ostensibly intended to compensate. That is a common basis on which a fee is reclassified as a tax. ***Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc***., 651 F.3d 722, 728–30 (7th Cir. 2011) (en banc); ***Schneider***

> ***Transport, Inc. v. Cattanach***, 657 F.2d 128, 132 (7th Cir.1981). But it seems acknowledged in this case that if the $100 annual fee is not a bona fide fee, it is a fine rather than a tax.

Mueller, 740 F.3d at 1133.

The State argues that there is a rational connection between the current surcharge scheme and the broad suite of DNA-related activities they are alleged to fund. (State's Br. at 24). The State's argument is that those ordered to pay a surcharge have committed a crime and, "[i]f there were no crimes, neither the DNA databank nor its associated expenses would exist." (State's Br. at 24). According to the State, felons therefore pay more than misdemeanants because they are more "accountable" for DNA-related costs. (State's Br. at 24). Likewise, those who commit more felonies generally contribute more to the State's crime problem and thus create a greater demand for the "DNA databank's many functions." (State's Br. at 24).

The State's claims fail for several reasons. First, it is not at all clear that felony defendants are more likely to generate DNA costs. Advances in DNA technology mean that DNA evidence is relevant to all types of cases—not just more serious cases such as sexual assaults or homicides. So-called "touch DNA," for example, is akin to a sophisticated version of fingerprint analysis, allowing testing of objects for residual DNA left by the person's "touch."[9] Such testing can thus be utilized in many types of cases, including drug and gun possession cases, which are often prosecuted as

[9] *See* https://en.wikipedia.org/wiki/Touch_DNA ("Touch DNA is a forensic method for analyzing DNA left at the scene of a crime. It is called 'touch DNA' because it only requires very small samples, for example from the skin cells left on an object after it has been touched or casually handled."

misdemeanors (e.g., carrying a concealed weapon under Wis. Stat. § 941.23, or possession of controlled substances under ch. 961).

And, the State's assertion ignores the fact that the dispositive criterion is the ultimate disposition of the case, which may result in a conviction for a misdemeanor rather than a charged felony. Given our criminal justice system's reliance on plea bargaining, the practical reality is that cases originally charged as felonies—which the state argues entail greater DNA costs—may eventually be amended to misdemeanor offenses as a result of plea bargaining (e.g., the pleading down of felony battery to misdemeanor battery or the amendment from 1st, 2nd, or 3rd degree sexual assault to 4th degree sexual assault). Consequently, defendants in those cases would pay the lesser $200 DNA surcharge for a misdemeanor, rather than the $250 felony DNA surcharge.

The argument also ignores the fact that many felonies—perhaps most—do not entail DNA evidence. There is nothing intrinsic about a felony case that makes it more likely than a misdemeanor to involve DNA evidence. The felony cases generating citable decisions bear this out, as none of them are the type of case to "intuitively" involve DNA evidence: ***Scruggs*** involved a single charge of burglary, ***Scruggs***, 2017 WI 15, ¶1; ***State v. Hill***, 2016 WI App 29, ¶2, 368 Wis.2d 243, 878 N.W.2d 709 involved enhanced charges of disorderly conduct and damage to property; ***Radaj*** involved multiple property crimes, ***Radaj***, 2015 App 50, ¶2; ***Monahan*** involved homicide by intoxicated use of a vehicle, ***Monahan***, No. 2014AP2187-CR, ¶1. Here, Mr. Williams was

involved in an attempted armed robbery that also did not involve DNA evidence.[10]

The argument also ignores the reality of a system whereby many offenders, by virtue of having their DNA collected upon arrest, will now all generate roughly the same "cost" to the system. *See* 2013 Wis. Act 20, §§ 2343, 2356; § 165.84(7); *see generally* ***Maryland v. King***, 569 U.S. 435 (2013).

This Court should therefore endorse the Court of Appeals' conclusion in ***Radaj***—that "common sense" counsels against a finding that there is any "rational connection between the method of calculating the surcharge and the costs the surcharge is intended to fund." ***Radaj***, 2015 WI App 50, ¶34. Basic knowledge of how our criminal justice works defeats any inference that the label attaching to one's conviction—felony versus misdemeanor—necessarily means that the defendant is "rationally" responsible for a 25% increase in their DNA surcharge.

Common sense also does not support the escalating fees attached to multiple convictions. A defendant who commits a single first-degree sexual assault which is indisputably solved via a DNA database "hit" pays a single

[10] So long as we are viewing the databank as a "crime-solving, crime-fighting public safety tool", ***Williams***, 2017 WI App 46, ¶41 (Hagedorn, J., *concurring*) (App. 130), the disparity in how the costs are borne between misdemeanants and felons makes even less sense. The entire point of adding misdemeanants to the database is to improve the general reliability and accuracy of that system, under the assumption that today's misdemeanant might be tomorrow's felon. *See* Cyrus R. Vance, *Taking DNA From All Criminals Should Be Standard Procedure*, N.Y. TIMES, Jan. 23, 2012, available online at http://www.nytimes.com/2012/01/24/opinion/collect-dna-samples-even-when-its-just-a-misdemeanor.html

$250 DNA surcharge. However, a defendant with multiple convictions that incurred minimal or no DNA costs will end up paying substantially more. The State's argument regarding the increase in the number of convictions also ignores the simple fact that a defendant can be charged with multiple counts arising out of a single course of conduct and a single, relatively non-complex, investigation and prosecution.

The State also defends the multiple surcharge scheme, much later in its brief, by invoking the possibility of multiple crime scenes, asserting:

> For instance, testing evidence collected from four different crime scenes takes more work, on average, than testing evidence collected from a single crime scene. Thus, the Legislature could reasonably believe that someone who commits more crimes is, on balance, responsible for more of the State's DNA-related investigative activities and—in a broader sense—should be more accountable for the creation and existence of the State's DNA databank.

(State's Br. at 33). However, the State is using an unrealistic image of the criminal justice system. Most cases involving multiple charges *do not* involve multiple crime scenes each of which would somehow require forensic processing.

6. The DNA surcharge is excessive in relation to its non-punitive aims.

The State is correct that this Court must "compare the amount of the surcharge with the state expense that the charged population caused." (State's Br. at 25). The State argues that there is no evidence that the surcharge is "excessive." (State's Br. at 25).

As illustrated in Joint Committee on Finance, Paper #408: "Crime Laboratory and Drug Law Enforcement Surcharge and DNA Surcharge Overview (Justice) (May 9, 2017) the DNA surcharge is, in fact, punitive in effect. (App.145-151). The LFB Paper explains that the revenue from DNA surcharges has been comingled with the $13 crime laboratory and drug law enforcement (CLDLE) surcharge into a single fund, referred to as the CLDLE and DNA surcharge fund. (App.145). Revenue from the two surcharges is pooled together and is not distinguished for the purpose of making expenditures and transferring funds to other appropriations. (App.146).

The memo explains that the Department of Justice had originally used the fund appropriation in a number of ways: to support the costs of the crime laboratories to provide DNA analysis; to administer the DNA databank; to reimburse local law enforcement agencies, the Department of Corrections, and the Department of Health Services for the costs of submitting biological specimens to the crime laboratories for DNA analysis; to transfer funding to appropriations within DOJ and the District attorney function to support: crime laboratory equipment and supplies; drug law enforcement, crime laboratories, and genetic evidence activities; and a statewide DNA evidence prosecutor position. (App. 145-147).

As described in the LFB memo, the provision passed with the latest budget increases expenditures from the CLDLE and DNA surcharge fund by providing expenditure authority for, among other things: $500,000 program revenues annually on a one-time basis to support drug law enforcement activities of DOJ's Division of Criminal Investigation, and $750,000 program revenues annually on a one-time basis to support law enforcement activities related to Internet crimes against children (ICAC). (App. 145-147). The

LFB memo also explained that due to increases in the surcharges, the combined CLDLE and DNA surcharge fund has been operating with a surplus, and is projected to end fiscal year 2016-17 with a balance of $5,160,800. (App. 147).

Accordingly, it is clear that the mandatory DNA surcharge is both excessive and lacks a reasonable relationship to the costs of collecting and analyzing the DNA samples together with maintaining DNA profiles in a statewide databank. By diverting money to activities within the Department of Justice that are not directly tied to DNA analysis and maintenance, such as the internet crimes against children special prosecutor and operations, and drug law enforcement activities, the DNA surcharge does not bear sufficient relation to the cost for which the fee was ostensibly intended to compensate, and should be reclassified as a fine. In addition, given the $5.2 million surplus, it is clear that the surcharge that the cost of the surcharge is wholly disproportionate to the causes it was expected to fund. Regardless of the legislature's intent, it is clear that in the very short history of the DNA surcharge to date, the State of Wisconsin has been reaping a considerable windfall. Evidence that the legislature has "overshot" the regulatory goal in this case is therefore directly relevant and highly persuasive evidence that the DNA surcharge is excessive in relation to its non-punitive aims.

7. The State has conceded that the DNA surcharge applies to conduct that is already a crime.

As the State forthrightly acknowledges, "the DNA Surcharge Statute applies to 'behavior that is already a crime,' namely, a felony." (State's Br. at 27).

D. The State's remaining arguments are unpersuasive.

As Mr. Williams has shown, the statute is clearly punitive in effect: It imposes harsh economic hardship on convicted defendants, is analogous to a historically recognized form of punishment (a criminal fine), is not rationally related to any non-punitive purpose, is clearly excessive in relation to that purpose, and attaches to conduct that is already criminalized. The majority of the ***Mendoza-Martinez*** factors are therefore in his favor. Mr. Williams will briefly address the State's remaining arguments:

1. Lack of a one-to-one relationship between the surcharge and DNA test.

The State argues that the Court of Appeals reasoning in both ***Elward*** and ***Radaj*** is flawed because the Court of Appeals misconceives *what* the surcharge is actually funding. (State's Br. at 29). Mr. Williams concedes that ***Elward*** does focus too narrowly on whether or not an actual "test" is conducted and does not properly take into account the broader suite of DNA-related activities.

However, it is inaccurate to place ***Radaj*** in the same category. While ***Radaj*** did rely on that understanding of what the DNA surcharge was funding, it also specifically considered and rejected an argument pertaining to these broader purposes. ***Radaj***, 2015 WI App 50, ¶32. Mr. Williams acknowledges that the surcharge should be evaluated in light of how the "DNA databank is continually used, maintained, and curated by law enforcement as an investigative tool." (State's Br. at 29).

Like the Court of Appeals in ***Radaj,*** however, Mr. Williams asserts that even when those broader costs are considered, the effect is impermissibly punitive. The per-conviction DNA surcharge has generated a huge financial boon for the State, which now seeks to raid the DNA surcharge coffers to fund additional, unrelated activities. They have done so in the face of ongoing financial hardships on defendants caused by this surcharge scheme, which is harsher than any other DNA surcharge in the nation.

2. Lack of a one-to-one relationship between defendant's DNA costs and DNA surcharge.

The State also argues that the Court of Appeals has erred by requiring "that the State's surcharge correspond to the actual costs that a particular felon imposed on the State to be rationally connected to a non-punitive purpose." (State's Br. at 30). The State is correct that the surcharge needs to be understood and assessed in context of the category of individuals to which it applies. (State's Br. at 30).

The State argues that it is rational to use the class-based assumptions (people who commit crimes, felons vs. misdemeanants, single offenders vs. multiple offenders) regardless of specific cases in which there will be some lack of fit between a particular defendant and a particular surcharge. (State's Br. at 30). "A rule requiring the State to prove in each case that a fee imposed on a felon is equal to the marginal cost of his *felony* would be unadministrable." (State's Br. at 31).

Mr. Williams does not assert, however, that the State must prove that the DNA surcharge is equal to the cost of his particular felony. Rather, he argues that the class at hand is simply too diverse—and the assumptions about individual

classes too generic and short-sighted—to support a finding that there is any rational connection between a uniquely harsh per-conviction surcharge with no limitations (i.e., a defendant will continue to pay into the system for each new conviction regardless of whether he has previously paid a DNA surcharge) and a broad governmental initiative that is currently operating with a large surplus as a result of the onerous payment structure.

Accordingly, this Court should reject the State's remaining arguments for reversing ***Williams*** and overruling ***Elward*** and ***Radaj***.

CONCLUSION

For the reasons stated above, Mr. Williams ask that this Court affirm the Court of Appeals and remand for further proceedings consistent with that opinion.

Dated this day of January, 2018.

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 8,345 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 day of January, 2018.

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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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I N D E X
T O
A P P E N D I X

Page