No. 16AP883

In the Supreme Court of Wisconsin

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT-PETITIONER,

v.

JAMAL L. WILLIAMS,
DEFENDANT-APPELLANT-PETITIONER

On Appeal From The Milwaukee County Circuit Court, The Honorable Timothy G. Dugan And The Honorable Ellen R. Brostrom, Presiding, Case No. 2013CF002025

REPLY BRIEF OF THE STATE OF WISCONSIN

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ARGUMENT

In its Opening Brief, the State explained that retroactively imposing a $250-per-felony surcharge, under the DNA Surcharge Statute, does not violate the Ex Post Facto Clause. As this Court held in *State v. Scruggs*, 2017 WI 15, 373 Wis. 2d 312, 891 N.W.2d 786, the Legislature did not adopt the Statute with punitive intent. *See* Opening Br. 13–15. Nor does the Statute have punitive effect under the *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), factors: the surcharge does not impose an affirmative restraint, Opening Br. 16–17, does not require a finding of scienter, Opening Br. 18–19, is set at a relatively small amount, Opening Br. 19–20, is rationally connected to an alternative purpose of funding the State's DNA-related activities, Opening Br. 20–24, and is not excessive in relation to that alternative purpose, Opening Br. 25–26. Accordingly, this Court should hold that the surcharge is not punitive, overruling *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. *See* Opening Br. 28–34.

In his Response Brief, Williams does not answer several of the State's central points. He makes no argument as to the Legislature's intent, *see* Williams Resp. 10,[1] and does not

[1] In a single sentence, Williams references an intent argument made by the defendant in *State v. Odom*, No. 15AP2525 (Wis.) (argument scheduled Mar. 16, 2018), Williams Resp. 10, a case that is currently

contend that a one-to-one relationship between the surcharge amount and the DNA-related costs that the felon imposed on the State is necessary, *see* Williams Resp. 30–31, as the Court of Appeals erroneously concluded in *Elward* and *Radaj*. He also concedes that the third *Mendoza-Martinez* factor—whether the surcharge is imposed only upon a finding of scienter—cuts in the State's favor, Williams Resp. 19, and agrees that the fact that the surcharge applies to criminal conduct is of little weight, Williams Resp. 28 (not developing argument as to this factor). Instead, Williams focuses on several of the other *Mendoza-Martinez* factors, but his arguments on each are incorrect.

Imposes Affirmative Disability or Restraint Factor. Administrative charges, such as the DNA surcharge, that do not physically restrain a defendant or bar him from certain activities are less likely to be punitive. Opening Br. 16–17 (citing *Smith v. Doe*, 538 U.S. 84, 100–01 (2003); *Helvering v. Mitchell*, 303 U.S. 391, 400–01 (1938); *In re DNA Ex Post Facto Issues*, 561 F.3d 294, 299–300 (4th Cir. 2009); and *Dye v. Frank*, 355 F.3d 1102, 1105 (7th Cir. 2004)).

Williams argues that this factor favors a finding of punitive effect because the surcharge places additional financial "burden[s]" on defendants. Williams Resp. 12–15

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pending before this Court. But this Court does "not usually address undeveloped arguments," *State v. Gracia*, 2013 WI 15, ¶ 28 n.13, 345 Wis. 2d 488, 826 N.W.2d 87, and *Odom* deals with a different constitutional inquiry involving plea agreements.

(citation omitted). But as the cases the State cited make clear, courts focus their inquiry into this factor on *physical* restrictions, *see supra* p. 2, and Williams provides no case holding to the contrary. His sole citation is to the *dissent* in *Scruggs*, Williams Resp. 12, which did not analyze the question under the first *Mendoza-Martinez* factor.

Williams also asserts that paying a surcharge can be challenging for some, Williams Resp. 12–15, but does not cite any case making the amount of the charge relevant to *this* factor. In any event, Williams makes no factual showing that most defendants would have trouble paying $250 per felony, instead relying upon nonrecord claims of one inmate's alleged per-hour pay referenced in a newspaper article. *See* Williams Resp. 12–13. And while *some* defendants may have difficulty paying the surcharge, courts may not "evaluat[e] the civil nature of an Act by reference to the effect that Act has on a single individual." *Seling v. Young*, 531 U.S. 250, 262 (2001) (citing *Hudson v. United States*, 522 U.S. 93 (1997)). The *Mendoza-Martinez* factors must be considered "in relation to the statute on its face," not based on the claimed hardships that some defendants face. *Hudson*, 522 U.S. at 100 (citation omitted).

Historically Considered Punishment Factor. Because the "payment of fixed or variable sums of money are [ ] sanctions . . . recognized as enforceable by civil proceedings since the original revenue law of 1789," they are "free of the punitive criminal element." Opening Br. 17–18 (quoting

Helvering, 303 U.S. at 399–400) (alterations in original). Thus, the DNA surcharge—the payment of a fixed sum of money per conviction—is less likely to be punitive. Opening Br. 17–18 (citing *Scruggs*, 2017 WI 15, ¶ 42); *accord In re DNA Ex Post Facto Issues*, 561 F.3d at 300.

Williams claims that the State's (and this Court's, *see Scruggs*, 2017 WI 15) reliance on *Helvering* and the cases it cites is misplaced because the monetary sanctions at issue there were different than the DNA surcharge. Williams Resp. 15–16. But *Helvering* involved "an additional penalty imposed by the" IRS for a defendant's failure "to properly pay his taxes." Williams Resp. 16. *Helvering* held that this "penalty" was not a criminal penalty, but instead a "remedial" monetary sanction, "provided primarily" to "protect[ ]" the State's "revenue and to reimburse the Government for the heavy expense of investigation . . . resulting from the taxpayer's fraud." 303 U.S. at 401. Such sanctions, "designed to reimburse the State for some perceived 'loss' owing to the 'defendant's' conduct," are not punitive. Williams Resp. 17. Here, the DNA surcharge is "designed to reimburse the State for," Williams Resp. 17, the "heavy expense of investigat[ing]" felonies, *Helvering*, 303 U.S. at 401—"some perceived 'loss'" "resulting from the" defendant's conduct, Williams Resp. 17.

Williams next argues that fines have historically been recognized as punishments. Williams Resp. 17 (citing *S. Union Co. v. United States*, 567 U.S. 343, 350 (2012)). But Williams overlooks the critical point that many monetary

assessments are not *criminal fines*. In fact, *Helvering* and *South Union* both drew a clear distinction between a criminal fine and a non-criminal monetary sanction, even decades before *Mendoza-Martinez*. *See Helvering*, 303 U.S. at 401; *S. Union*, 567 U.S. at 349. Notably, none of the cases that Williams cites holds that the payment of a fixed or variable sum of money has historically been considered a punishment under *Mendoza-Martinez*. *See* Williams Resp. 18–19; *United States v. Jones*, 489 F.3d 243, 254 n.5 (6th Cir. 2007) (Ex Post Facto Clause prevented retroactive application of an increase in the "special assessment" under 18 U.S.C. § 3013, relying solely on two federal Court of Appeals cases where the government conceded such); *Eichelberger v. Arkansas*, 916 S.W.2d 109, 110–12 (Ark. 1996) (same result for restitution, relying not on *Mendoza-Martinez* but on "[s]everal state and federal courts" using various other tests, including one from *Weaver v. Graham*, 450 U.S. 24 (1981)); *Matter of Appeal in Maricopa Cty. Juvenile Action No. J-92130*, 677 P.2d 943, 946–47 (Ariz. Ct. App. 1984) (relying upon *Weaver*); *California v. Batman*, 71 Cal. Rptr. 3d 591, 593–94 (Cal. Ct. App. 2008) (no analysis of *Mendoza-Martinez* factors); *Colorado v. Stead*, 845 P.2d 1156, 1159 (Colo. 1993) (same); *Cutwright v. Florida*, 934 So. 2d 667, 668 (Fla. Dist. Ct. App. 2006) (same, and Florida conceded an ex post facto violation)); *Illinois v. Rayburn*, 630 N.E.2d 533, 538 (Ill. App. Ct. 1994) (citing *Weaver*, not *Mendoza-Martinez*); *Louisiana v. Theriot*, 782 So. 2d 1078, 1085–87 (La. Ct. App. 2001) (same);

Michigan v. Slocum, 539 N.W.2d 572, 574 (Mich. Ct. App. 1995) (restitution is punishment under a different test); *Nebraska v. McMann*, 541 N.W.2d 418, 422 (Neb. Ct. App. 1995) (same); *New York v. Stephen M.*, 824 N.Y.S.2d 757 (N.Y. Crim. Ct. 2006) (New York conceded ex post facto violation by not appearing before the court); *Pennsylvania v. Wall*, 867 A.2d 578, 580–81 (Pa. Super. Ct. 2005) (applying "*Artway/Verniero* test," not *Mendoza-Martinez*); *West Virginia v. Short*, 350 S.E.2d 1, 2–3 (W. Va. 1986) (restitution, citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), not *Mendoza-Martinez*); *Loomer v. Wyoming*, 768 P.2d 1042, 1049 (Wyo. 1989) (asking whether costs were a "procedural or substantive detriment," not applying *Mendoza-Martinez*). Many cases, in addition to using a different test, relied upon legislative intent to conclude that the statute violated the Ex Post Facto Clause. *See Iowa v. Corwin*, 616 N.W.2d 600, 602 (Iowa 2000) (statutory restitution of $150,000 to a victim's estate was punitive, not citing *Mendoza-Martinez*); *Spielman v. Maryland*, 471 A.2d 730, 734 (Md. 1984) ("clear indication in the language of the statute" that "restitution constitutes a form of punishment").

Promotes Traditional Aims of Retribution and Deterrence Factor. Because punishment's traditional aims are retribution and deterrence, a statute that serves these goals is more likely to be punitive in effect. Opening Br. 19 (citing *Hudson*, 522 U.S. at 101; *Dye*, 355 F.3d at 1104; and *California v. Alford*, 171 P.3d 32, 38 (Cal. 2007)). The

"relatively small" amount of the DNA surcharge—$250 per felony conviction—when compared with the components of the sentence is unlikely to add a deterrent effect. Opening Br. 19–20 (quoting *Scruggs*, 2017 WI 15, ¶ 45).

While Williams is correct that some States have lower DNA surcharge amounts, Williams Resp. 20, Hawaii allows the imposition of $500 per case, Haw. Rev. Stat. § 706-603(1), and Idaho contemplates a maximum of $2,000, Idaho Code § 19-5506(7).

Williams claims that the DNA surcharge is as "excessive" as one that the Seventh Circuit found violated the Ex Post Facto Clause in *Dye*, Williams Resp. 21–22, but this argument is wrong. *Dye* held that Wisconsin's tax on drugs was punitive "in purpose and effect" largely because the tax promoted retribution and deterrence. 355 F.3d at 1104–05. The court also noted that a tax valued at five times the market value of the good being taxed was "more consistent with punishing ownership of the item than with raising revenue from ownership of the good." *Id.* at 1105. In contrast, the DNA surcharge does not deter criminal conduct, but serves a revenue-generating purpose: to compensate the State for its DNA-related activities. *See infra* pp. 8–10. Moreover, Williams fails to show that the surcharge of $250 is higher than the market value of conducting DNA-related activities in general, or, put differently, that the surcharge is "more

consistent with" punishment than "raising revenue." *See Dye*, 355 F.3d at 1105.[2]

Rationally Connected to an Alternative Purpose Factor. The surcharge is rationally connected to the non-punitive purpose of funding the State's DNA-related activities, including (1) collecting, analyzing, and maintaining DNA profiles lifted from crime-scene evidence and matching them with DNA samples from "known" individuals in the databank; (2) collecting, analyzing, and matching DNA profiles from suspects in criminal investigations with the DNA profiles lifted from evidence; and (3) entering DNA samples from felons and misdemeanants into the databank. Opening Br. 20–24 (citing numerous cases, including *Scruggs* and *In re DNA Ex Post Facto Issues*).

Williams argues at length that the $50 difference between the surcharge for misdemeanors and felonies "makes [no] sense." Williams Resp. 23–25 & n.10. But this modest, $50 difference does not make a meaningful impact on the *Mendoza-Martinez* analysis. It "may readily be admitted" that "a felony" is "more serious" than a "misdemeanor."

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[2] Williams' reliance on the Colorado Supreme Court's decision in *Stead*, 845 P.2d 1156, does not support his position because that case misunderstood the *Mendoza-Martinez* analysis. *Stead* held that a monetary sanction violated the Ex Post Facto Clause not because of the dollar amount but because the sanctions increased in proportion to the defendant's culpability or the severity of his offense. *See* 845 P.2d at 1160. *Stead* erroneously believed that this rendered the statute punitive. Under the *Mendoza-Martinez* analysis, however, a surcharge is not punitive merely because it "appears to be measured by the extent of the wrongdoing." *Smith*, 538 U.S. at 102 (citation omitted).

Baldwin v. New York, 399 U.S. 66, 70 (1970); *see State v. Grayson*, 172 Wis. 2d 156, 165, 493 N.W.2d 23 (1992). It is thus rational for the Legislature to enact a law on the general assumption that the State would spend more time and money investigating the average felony than the average misdemeanor. *See generally* Wis. Dep't of Justice, DNA Analysis, https://goo.gl/1v442a (last visited Jan. 16, 2018) (discussing DNA work on "sexual assaults, homicides, and crimes against children"). That DNA-related work for a particular felony might not cost exactly 25% more than DNA-related work for a particular misdemeanor, Williams Resp. 23–24, "does not undercut the general rationality of the attribution of accountability" that "animated the Legislature," *Myrie v. Comm'r, N.J. Dep't of Corr.*, 267 F.3d 251, 259 (3d Cir. 2001). As even Williams concedes, the Ex Post Facto Clause does not require a one-to-one connection between the mandatory surcharge payment and the amount of DNA-related costs that the specific criminal imposed upon the State. Williams Resp. 30.

Williams also argues that it is not "rational" to charge felons additional fees for multiple convictions, discussing hypothetical situations where an individual may commit multiple felonies but cause no additional DNA-related work. Williams Resp. 25 (citation omitted). But again, this factor does not require a one-to-one relationship between the administrative surcharge and the DNA-related costs a particular defendant imposes on the State. For example, the

statute does not charge those *arrested but not convicted* for the cost of testing their DNA samples. Opening Br. 4. That is because the Legislature understood that the cost of the crime to the State should be borne by the individual who committed it, not an innocent person. Thus, the per-conviction surcharge encompasses the cost to the State of doing investigative work—including testing individuals' DNA "for free"—related to the commission of a felony or misdemeanor, not just the cost of one DNA test.

Excessive in Relation to Alternative Purpose Factor. A $250 DNA surcharge for each felony conviction is not "excessive" in relation to the surcharge's assigned non-punitive purpose. *See* Opening Br. 25–26 (citing *Mueller v. Raemisch*, 740 F.3d 1128, 1134–35 (7th Cir. 2014); *Myrie*, 267 F.3d at 258; and *Taylor v. Rhode Island*, 101 F.3d 780, 784 n.7 (1st Cir. 1996)).

The Legislative Fiscal Bureau report that Williams discusses, *see* Williams Resp. 28, does not show that the $250 per-conviction surcharge is "excessive." According to this report, a fund containing revenue from the DNA surcharges and another "crime laboratory and drug law enforcement" ("CLDLE") surcharge (the "combined fund") was projected to end fiscal year 2016–17 with a balance of $5,160,800. Williams Resp. 28 (citing Williams App. 147). Williams claims that this surplus shows that the DNA surcharge is "wholly disproportionate" to the State's costs. Williams Br. 28. But because the fund also contains revenue from the

CLDLE surcharge, it is unclear what portion of the surplus is attributable to the DNA surcharge. Indeed, the CLDLE surcharge contributed more revenue to the fund than the DNA surcharge did in 2015–16. Williams App. 146–47. In addition, the $5.16 million figure represents a surplus accumulated over multiple years. Williams App. 147. And that surplus is projected to decrease to $2.32 million by fiscal year 2018–19. Williams App. 148.

In fact, another LFB paper suggests that the State's DNA-related expenses may well exceed revenue from the DNA surcharges. The State collected $5 million in revenue from the surcharge in 2015–16. Williams App. 147. But DNA-analysis kits alone cost the State about $2.3 million annually. *See* Legislative Fiscal Bureau, *Paper #409*, *Crime Laboratory DNA Analysis Kits (Justice)* 4–5 (2017), https://goo.gl/7hzwG1 (180 kits at "approximately $13,000" per kit). In addition, the Department of Justice pays the salaries of "almost sixty analyst[s] and technician[s]" who perform DNA analysis, *see* Wis. Dep't of Justice, DNA Analysis, *supra*, and "fourteen analyst[s] and technician[s]" who maintain the DNA databank, *see* Wis. Dep't of Justice, DNA Databank, https://goo.gl/2Mn3Bo (last visited Jan. 16, 2018), as well as the miscellaneous expenses associated with maintaining "facilities," "software," *id*., and the "statewide databank," *Scruggs*, 2017 WI 15, ¶ 48.

In any event, discrepancies between projections and actual revenue are a common part of legislating. As the U.S.

Supreme Court explained, "[t]he excessiveness inquiry" is "not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy," but "whether the regulatory means chosen are reasonable." *Smith*, 538 U.S. at 105; *see also* State's App. 31 (Hagedorn, J., concurring) ("Legislating is not marksmanship.").

Williams claims that a "provision passed with the latest budget" allows the combined fund to pay for non-DNA-related activities, and thus the surcharge "does not bear sufficient relation to the cost" the "fee was ostensibly intended to compensate" or is "excessive." Williams Resp. 27–28. But it is possible that revenue from the CLDLE surcharge, which makes up the majority of the combined fund—not the DNA surcharge—will fund those non-DNA-related activities. And Williams concedes that the vast majority of the activities that the combined fund pays for are DNA-related: "support[ing] the costs of the crime laboratories to provide DNA analysis [and] to administer the DNA databank;" reimbursing local law enforcement, the Department of Corrections, and the Department of Health Services for submitting biological specimens to the crime labs for analysis; and funding the DOJ and district attorneys to support crime lab equipment and supplies, genetic evidence activities, and a "statewide DNA evidence prosecutor position." Williams Resp. 27 (citing Williams App. 145–47).

* * *

The DNA Surcharge Statute is neither punitive in intent nor in effect under *Scruggs* and *Mendoza-Martinez*.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Dated: January 19, 2018.

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 2,968 words.

Dated: January 19, 2018.

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CERTIFICATE OF COMPLIANCE
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Dated: January 19, 2018.

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