No. 2016AP1745

In the Supreme Court of Wisconsin

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

v.

MICHAEL L. COX,
DEFENDANT-APPELLANT

On Appeal From The Milwaukee County Circuit Court, The Honorable William W. Brash and The Honorable T.C. Dee, Presiding, Case No. 2015CF1187

RESPONSE BRIEF OF THE STATE OF WISCONSIN

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ISSUE PRESENTED

Section 973.046(1r) of the Wisconsin Statutes provides: "If a court imposes a sentence . . . the court *shall* impose a deoxyribonucleic acid [DNA] analysis surcharge." Wis. Stat. § 973.046(1r) (emphasis added). Does a sentencing court have discretion to waive the DNA surcharge, despite this command?

The circuit court answered no, and the Court of Appeals certified the question to this Court.

INTRODUCTION

In 2013, the Legislature amended Wis. Stat. § 973.046(1r) (hereinafter "DNA Surcharge Statute"), changing the statute from permissively providing that a circuit court "may" impose a DNA surcharge on certain convicted defendants, to now mandating that the circuit court "shall" do so for all convicted defendants. This Court well understood the import of that change in *State v. Scruggs*, 2017 WI 15, 373 Wis. 2d 312, 891 N.W.2d 786, where it explained that the post-2013 version of the statute involved "the *mandatory* imposition of [the] DNA surcharge," *id.* ¶ 3 (emphasis added). Defendant Michael L. Cox now urges this Court to abandon this interpretation, arguing that the "shall impose" clause provides only a mere presumption, which each circuit court is free to override at its option. Cox's argument is meritless because the DNA Surcharge Statute means what it says: a circuit court shall impose the DNA surcharge.

ORAL ARGUMENT AND PUBLICATION

By granting the Court of Appeals' certification, this Court has indicated that the case is appropriate for oral argument and publication.

STATEMENT OF THE CASE

A. Statutory Background

In order to fund criminal investigations, crime-victim services, DNA-related activities, and other important programs, Chapter 973 imposes a variety of surcharges on

convicted criminals. For example, Chapter 973 imposes a victim-and-witness surcharge on all defendants convicted of a crime, which funds "general services" for those affected by crimes. Wis. Stat. §§ 20.455(5)(g); 973.045(1)–(2). Chapter 973 also imposes a child-pornography surcharge on defendants convicted of sexually exploiting children or possessing child pornography, which furthers investigations into these crimes. *Id.* §§ 20.455(5)(gj); 165.93(2a); 973.042(2), (5). And Chapter 973 imposes a domestic-abuse surcharge on defendants convicted of crimes against family members, which supports "domestic abuse services organizations." *Id.* §§ 20.437(1)(hh); 973.055(1)(a)2. *See also id.* §§ 973.043 (drug-offender-diversion surcharge); 973.0455 (crime-prevention funding board surcharge).

The surcharge at issue in the present case is the DNA analysis surcharge, which funds the Department of Justice's DNA-related activities. *See id.* § 973.046(2)–(3); *see generally Scruggs*, 2017 WI 15, ¶¶ 24–26; State's Opening Brief 4–5, *State v. Williams*, No. 2016AP883 (Wis. Dec. 11, 2017) (hereinafter "*Williams* Br."). These activities include collecting DNA from crime-scene evidence, testing that DNA against known individuals' profiles in the data bank and suspects' samples, and entering and maintaining new individuals' DNA profiles in the data bank. *See* Wis. Stat. § 165.77(2)(a); *Scruggs*, 2017 WI 15, ¶¶ 24–26; *Williams* Br. 4–5, 23–24.

Before 2014, the DNA Surcharge Statute provided that "the court *may* impose a [DNA] analysis surcharge" if it "imposes a sentence" on a defendant in a felony case, but "shall impose" the surcharge on defendants sentenced for sexual assault. Wis. Stat. § 973.046(1g) & (1r) (2011–12) (emphasis added); *Williams* Br. 3–4. The surcharge was $250. Wis. Stat. § 973.046(1g) (2011–12). Under these provisions, courts had discretion to impose the surcharge for all felony-defendants not falling within the "shall" sexual-assault clause. *See Scruggs*, 2017 WI 15, ¶ 3.

The Legislature amended the DNA Surcharge Statute with 2013 Wisconsin Act 20, *both* expanding the scope of the State's DNA-related operations *and* often increasing the amount of DNA surcharge that would be collected. *See Williams* Br. 4. In particular, in order to fund the increased level of DNA-related activity under the post–Act 20 regime, the Legislature modified the circumstances triggering the mandatory surcharge to encompass a larger subset of defendants. *See Williams* Br. 3–4. Specifically, the Act repealed the "may impose" clause and the limitation on the "shall impose" clause to sexual-assault convictions. 2013 Wis. Act 20, §§ 2353–54; *compare* Wis. Stat. § 973.046(1g) & (1r) (2011–12), *with* Wis. Stat. § 973.046(1r) (2015–16). Post–Act 20, the statute now simply states "the court *shall* impose a [DNA] analysis surcharge" "[i]f [it] imposes a sentence" on a defendant. Wis. Stat. § 973.046(1r) (emphasis added); *compare infra* pp. 20–22 (discussing Act 20's changes to the

victim-and-witness surcharge statute). The current statute (like the previous version, Wis. Stat. § 973.046(2) (2011–12)) also provides that "the clerk of court . . . shall" "determine[ ] the amount [of the surcharge] due" and "collect [it]." Wis. Stat. § 973.046(2). But the clerk now "calculate[s]" the amount as follows: "$250" "[f]or each conviction for a felony," plus "$200" "[f]or each conviction for a misdemeanor." *Id.* § 973.046(1r)(a)–(b), (2). Act 20's charges are applicable to all sentences imposed on or after January 1, 2014. *See* 2013 Wis. Act 20, § 9426(1)(am); *Scruggs*, 2017 WI 15, ¶ 8.

Act 20's amendments to the DNA Surcharge Statute generally align this statute with the vast majority of the other surcharge statutes in Chapter 973, each of which contains its own "shall impose" clause. The drug-offender-diversion-surcharge provision, for example, provides that "the court *shall* impose [a $10] surcharge" on those who commit certain property crimes, and "the clerk *shall*" "determin[e] the amount due" and "collect [it]." Wis. Stat. § 973.043(1)–(2) (emphases added). The same "shall impose" language appears in the child-pornography surcharge, *id.* § 973.042(2), (4), the crime-prevention funding board surcharge, *id.* § 973.0455(1), (2), and the victim-and-witness surcharge, *id.* § 973.045(1). Two Chapter 973 surcharge provisions, however, have somewhat different language. While the domestic-abuse surcharge also provides that the court "shall impose" a surcharge on those committing certain crimes, *id.* § 973.055(1), it further states that the "court may waive part

or all of the domestic abuse surcharge under this section if it determines that the imposition of the full surcharge would have a negative impact on the offender's family," *id.* § 973.045(4). Further, although the victim-and-witness surcharge provision provides that the court "shall impose" a surcharge in certain circumstances, as just noted, it specifically states that the "surcharge imposed under this subsection may not be waived, reduced, or forgiven for any reason." *Id.* § 973.045(1).

B. Factual And Procedural Background

1. At 3:00 a.m. on March 14, 2015, Cox drove the wrong way down an interstate in Milwaukee with a blood alcohol level of .192. R.1:1–2 (criminal complaint); R.23:4–5, 18; *see generally* R.23:21–23 (Cox admitting to facts in criminal complaint). An officer traveling in a marked squad car with its emergency lights activated spotted Cox's headlights coming toward him. R.23:19. The officer attempted to stop Cox, but Cox "drove directly at the squad car at a slow rate of speed," "swerv[ed] into the median and distress lanes," and "pass[ed] the marked squad car." R.23:19. Cox eventually stopped only after another officer intervened. R.23:19. He then "attempted to exit the vehicle" and "hand a large amount of cash to the [officer]." R.23:20. He "had a strong odor of alcohol on [his] breath, bloodshot glassy eyes, [and] a hard time maintaining [his] balance." R.23:20. The officers took him to the hospital. R.23:20.

After this ordeal, the police obtained video footage of Cox's wrong-way driving from the Department of Transportation. R.23:20. This footage revealed that Cox drove the wrong way for about three miles, R.23:20, and passed "numerous other vehicles traveling the right way which [were] endangered by [his] driving," R.1:2.

2. The State charged Cox with second-degree recklessly endangering safety, in violation of Wis. Stat. § 941.30(2). R.1:1.[1] He pleaded guilty in July 2015, R.23:21–23, and the court imposed a sentence of 18 months' confinement and 30 months' extended supervision, App. 107.

At the sentencing hearing, the circuit court, Judge William W. Brash, III, presiding, discussed Cox's responsibility to pay the surcharge in the DNA Surcharge Statute. *See* App. 125–26. The court "assum[ed]" that Cox had "previously submitted a DNA sample" to the State due to a prior conviction, and therefore it concluded that he would not "have to repeat that process." App. 125; *see* Wis. Admin. Code § Jus. 9.04(3)(c). But the court then stated that, if its assumption were correct, it would "waive the imposition of a DNA surcharge with regards to this matter," App. 125,

[1] The State also charged Cox with possession of marijuana based on one officer's search of Cox incident to his arrest, *see* R.1:1–2; the State ultimately dismissed this charge, but read it in at sentencing, App. 108. The State also charged Cox with a variety of civil traffic-related offenses, R.23:3; Cox pleaded guilty to one of these, operating a vehicle while intoxicated, and the State dismissed the rest, R.23:4.

believing it possessed such discretionary authority. Finally, the court "impose[d] the balance of the mandatory costs, surcharges, and assessments." App. 125.[2]

The court entered its written judgment of conviction and sentence the day after the sentencing hearing. App. 107; R.24:1. The written judgment orders Cox to "[p]ay [the] DNA surcharge" of "[$]250.00," thus correcting the court's waiver of this surcharge. App. 107–08. The written judgment also orders Cox to pay court costs and the "mandatory victim/wit[ness] surcharge" of "[$]92.00." App. 108 (capitalization altered).

3. Cox filed a postconviction motion, asking the circuit court, Judge T. Christopher Dee now presiding, to amend the written judgment in order to reflect the oral pronouncement's waiver of the mandatory DNA surcharge. R.18:1. The circuit court denied that motion, explaining that it is "required to impose a DNA surcharge" under Section 973.046(1r), notwithstanding Judge Brash's "apparent[ ] belie[f]" to the contrary at the sentencing hearing. App. 109–10.

Cox appealed that denial of the surcharge waiver to the Court of Appeals, which certified the appeal to this Court. *See*

[2] Given that the circuit court initially signaled that it would waive the DNA surcharge only because Cox had previously submitted a DNA sample to the State, the court also seemed to believe that the DNA surcharge's sole purpose is to offset the cost of DNA collection. *But see Williams* Br. 23–24 (explaining that the DNA surcharge also funds non-collection activities like "analyzing," "maintaining," and "matching" "DNA profiles").

App. 101. The Court of Appeals explained that the Legislature had amended the DNA Surcharge Statute with Act 20 to replace its "may impose" clause with a universal "shall impose" mandate. App. 102. The Court of Appeals recognized that "shall" is "presumed mandatory," and that this Court "described" this statute as mandatory in *Scruggs*, 2017 WI 15. App. 102–03. Yet, the Court of Appeals wondered whether Act 20 rebutted the presumption that "shall" is mandatory because the Act also added "a provision to the victim and witness surcharge," which emphasized that it "may not be waived, reduced, or forgiven for any reason." App. 103–04. In the Court of Appeals' view, if Act 20's use of "shall" in the DNA Surcharge Statute "was meant to remove all discretion," then the added sentence to the victim-and-witness surcharge "would be mere surplusage." App. 104. Rather than decide the question itself, the Court of Appeals concluded that certification to this Court was appropriate. App. 105–06. This Court accepted that certification. Dkt. Entries 8-29-2017 & 10-17-2017, *State v. Cox*, No. 2016AP1745 (Wis.).

STANDARD OF REVIEW

This case presents an issue of statutory interpretation, which is a question of law that this Court reviews de novo. *Bank of N.Y. Mellon v. Carson*, 2015 WI 15, ¶ 14, 361 Wis. 2d 23, 859 N.W.2d 422.

SUMMARY OF ARGUMENT

I. This Court in *Scruggs* already concluded that the post-2013 version of the DNA Surcharge Statute involved "the *mandatory* imposition of [the] DNA surcharge." 2017 WI 15, ¶ 3 (emphasis added). Cox does not attempt to make the substantial showing necessary to overrule a decision of this Court, and that is reason enough to affirm the circuit court's decision here.

II. Even putting *Scruggs* aside, the statutory text, context, and history all support the State's mandatory interpretation of the DNA Surcharge Statute. The statutory text here could not be clearer: the circuit court "shall" impose the surcharge, which is a mandatory command. *See Bank of N.Y.*, 2015 WI 15, ¶¶ 18–27. The statutory context similarly supports the State's mandatory interpretation, as the very next subsection also uses the word "shall" in a way that all agree is mandatory. Wis. Stat. § 973.046(2). And while Cox argues that the mandatory interpretation of the phrase "shall impose" throughout Chapter 973 creates some surplusage in the victim-and-witness surcharge statute, his interpretation is just as problematic on this same score, rendering language in the domestic-abuse surcharge statute superfluous. The surplusage canon thus does not support either interpretation. Finally, the statutory history plainly provides that the Legislature changed the Statute from "may" to "shall" precisely to make the surcharge mandatory.

ARGUMENT

I. This Court In *Scruggs* Already Held That The DNA Surcharge Statute Is Mandatory, And Cox Does Not Attempt To Carry His Burden For Overruling A Decision Of This Court

This Court in *Scruggs*, 2017 WI 15, held that the DNA Surcharge Statute, as amended in 2013, is mandatory. Scruggs had committed his crime before 2013, when all agree that the DNA Surcharge Statute was discretionary, *id.* ¶ 50, but the circuit court imposed the surcharge after January 1, 2014, when the current version of the DNA Surcharge Statute applied, *id.* ¶¶ 7–8. In deciding that imposing the surcharge did not violate the Ex Post Facto Clause, this Court *repeatedly* explained that the post-2013 version of the statute involved "the *mandatory* imposition of [the] DNA surcharge." *Id.* ¶ 3 (emphasis added); *see also id.* ¶¶ 1–2, 8–10, 14–15, 25–27, 33, 37–38. Numerous Court of Appeals decisions have adopted the same understanding. *See State v. Hill*, 2016 WI App 29, ¶ 27, 368 Wis. 2d 243, 878 N.W.2d 709 ("the circuit court was required under the new law to impose a $250 DNA surcharge")*; State v. Elward*, 2015 WI App 51, ¶ 2, 363 Wis. 2d 628, 866 N.W.2d 756 ("circuit courts [are] mandated to impose the surcharge"); *State v. Radaj*, 2015 WI App 50, ¶ 1, 363 Wis. 2d 633, 866 N.W.2d 758 ("the revised statute provides for a mandatory surcharge").

Scruggs is entitled to respect as a decision of this Court, and Cox has not even attempted to make the robust showing

necessary for overruling that decision. The State understands, of course, that the issue in dispute between the parties in the present case—whether the DNA Surcharge Statute is, in fact, mandatory—was not "full[y] brief[ed] or argu[ed]" in *Scruggs*. *Hohn v. United States*, 524 U.S. 236, 251 (1998). This Court is thus "*less* constrained to follow" *Scruggs*' statutory conclusion than it would be if the statutory issue had been fully briefed and argued in that case. *Id.* (emphasis added). Nevertheless, *Scruggs* is still a precedent of this Court and entitled to respect as such. *See Johnson Controls, Inc. v. Emp'rs Ins. of Wausau*, 2003 WI 108, ¶ 94, 264 Wis. 2d 60, 665 N.W.2d 257 ("This court follows the doctrine of stare decisis scrupulously because of our abiding respect for the rule of law."). Cox does not even attempt to argue that his statutory arguments are sufficiently compelling to justify overruling a decision of this Court. That is reason enough to affirm the circuit court's ruling, as it is consistent with this Court's understanding of the meaning of the DNA Surcharge Statute in *Scruggs*.

Indeed, rather than arguing that his statutory argument is sufficiently powerful to overcome stare decisis, Cox attempts to change the subject, asserting that the Ex Post Facto Clause argument that *Scruggs* rejected still could have been raised against Cox's understanding of the DNA Surcharge Statute (because, according to Cox, the current version of the statute creates a *default* of a surcharge, whereas the prior version contained no such default). *See*

Opening Br. 16–18. This Ex Post Facto Clause argument is beside the point. This Court in *Scruggs clearly* concluded that the DNA Surcharge Statute was "*mandatory*," 2017 WI 15, ¶ 3 (emphasis added); *see also id.* ¶¶ 1–3, 8–10, 14–15, 25–27, 33, 37–38, a position that Cox urges this Court to now reject. Whether the same (or similar) ex post facto argument still could have been raised against Cox's preferred version of the statute does not change the fact that *Scruggs* adopted the State's understanding of the statute.

II. Even If One Were To Put *Scruggs* Aside, The DNA Surcharge Statute Is Clearly Mandatory

This Court interprets statutes according to "the text and structure of the statute itself" in order "to faithfully give effect to the laws enacted by the legislature." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶¶ 44–48, 271 Wis. 2d 633, 681 N.W.2d 110. The Court reads the text "in the context in which it is used[,] not in isolation but as part of a whole." *Id.* ¶ 46. The Court interprets a statute "in relation to the language of surrounding or closely-related statutes," and "where possible give[s] reasonable effect to every word, in order to avoid [both] surplusage" and "absurd" results. *Id.* ¶ 46. The Court may also consult statutory history, the "previously enacted and repealed provisions of a statute," as part of its textual analysis. *Richards v. Badger Mut. Ins. Co.*, 2008 WI 52, ¶ 22, 309 Wis. 2d 541, 749 N.W.2d 581. Here, the DNA Surcharge Statute's text, context, and statutory history

all lead to the inescapable conclusion that the statute imposes a mandatory duty on courts to impose the surcharge.

A. Statutory Text—"Shall Impose"—Requires The Mandatory Interpretation

The text of the DNA Surcharge Statute provides: "If a court imposes a sentence . . . the court *shall* impose a [DNA] analysis surcharge." Wis. Stat. § 973.046(1r) (emphasis added). This text has a simple, unambiguous meaning: the surcharge is mandatory.

When a statute uses the word "shall," courts, including this Court, "[g]enerally . . . presume[ ]" that the word denotes a mandatory command, not a grant of discretionary authority. *Bank of N.Y.*, 2015 WI 15, ¶ 21 (citations omitted); *see also, e.g.*, *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 27 (1998) ("'shall' [ ] normally creates an obligation impervious to judicial discretion"); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 112–15 (1st ed. 2012); 3 *Sutherland Statutory Construction* § 57:2 (7th ed.). This Court will interpret "shall" as directory only if the "legislative intent"—which must be expressed in the text, *Kalal*, 2004 WI 58, ¶ 44—so provides. *State ex rel. Marberry v. Macht*, 2003 WI 79, ¶ 15, 262 Wis. 2d 720, 665 N.W.2d 155.

This Court and the United States Supreme Court have regularly applied the presumption that "shall" is mandatory unless other statutory text makes clear that the term is directory. For example, in *Bank of New York*, this Court

considered Wis. Stat. § 846.102(1), which governs the sale of certain foreclosed property. 2015 WI 15, ¶¶ 1–2, 18. The statute provided: "if the court [finds the foreclosed property] abandoned . . . the sale of such [abandoned] premises *shall* be made." *Id.* ¶ 18 (citation omitted). This Court held that the plain meaning of "shall" was mandatory: the statute identifies a specific actor—the court—and imposes a specific duty—ordering the sale of the foreclosed premises, even if a foreclosing bank happened to object. *See id.* ¶¶ 18, 27. *See also State v. Hemp*, 2014 WI 129, ¶¶ 31–32, 359 Wis. 2d 320, 856 N.W.2d 811 (same analysis for expungement statute). Similarly, in *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969 (2016), the U.S. Supreme Court interpreted 38 U.S.C. § 8127(d), which states that the Department of Veterans Affairs "'shall award' contracts to veteran-owned small businesses when there is a 'reasonable expectation' that two or more such businesses will bid for the contract." *Id.* at 1973 (quoting § 8127(d)). Just as with *Bank of New York*, the statute identifies a specific actor—the VA—and a clear duty—awarding a contract—thus the plain text supports a "mandatory, not discretionary" interpretation. *See id.* at 1976–77. When two qualifying businesses bid on a contract, the "text requires the Department . . . to award [the] contract[ ] to" one of those qualifying businesses. *Id.*

In the present case, the DNA Surcharge Statute provides in unambiguous terms: "[i]f a court imposes a sentence . . . the court shall impose a [DNA] analysis

surcharge." Wis. Stat. § 973.046(1r). The statute's use of "shall" is identical in all relevant respects to that of the statutes at issue in cases such as *Bank of New York* and *Kingdomware*: the statute identifies an actor—the court—and gives a clear duty—imposition of a surcharge whenever the court "imposes a sentence." Thus the plain text requires a mandatory, not directory, interpretation.

Cox responds that the DNA Surcharge Statute's text creates only a default rule for whether the surcharge applies. Opening Br. 9–10, 16. That is, "a defendant will by default . . . be assessed a DNA Surcharge," "without any affirmative exercise of discretion from the court," but the circuit court can put aside that default at its option. Opening Br. 10. No statutory text supports Cox's default-rule interpretation, as Cox simply reads into the law concepts that are not there. The DNA Surcharge Statute provides that the circuit court "shall impose" the surcharge; and it does not say, as Cox would have it, that "the default is that the surcharge will be imposed, but the circuit court can choose not to impose it." Courts may not "read extra words into a statute" or "supply something that is not provided in a statute." *Lang v. Lang*, 161 Wis. 2d 210, 224, 467 N.W.2d 772 (1991).

Cox also argues that the "broad discretion and authority generally afforded sentencing courts" favors his default-rule reading of the statutory text. Opening Br. 13. But as Cox recognizes, a "sentencing court's authority is controlled by statute." Opening Br. 7 (citing *State v. Maron*,

214 Wis. 2d 384, 388, 571 N.W.2d 454 (Ct. App. 1997)); *accord Donaldson v. State*, 93 Wis. 2d 306, 310, 286 N.W.2d 817 (1980) ("A court's authority in sentencing . . . is controlled by statute."). And the DNA Surcharge Statute provides that the court "shall" impose the surcharge, which is a classic way of limiting discretion. *See Bank of N.Y.*, 2015 WI 15, ¶ 18.

B. Statutory Context Supports The State's Mandatory Interpretation

This Court has looked to text related to the statute at hand to confirm whether the use of "shall" is mandatory or permissive. For example, in *Bank of New York*, this Court explained that the duty in Section 846.102(1)—that courts "shall" order the sale of some foreclosed properties, despite the foreclosing bank's preferences—is mandatory because the Legislature used "may" elsewhere in the "same statutory section." 2015 WI 15, ¶ 23. Interpreting "shall" as "may" would therefore fail to give these two words "distinct meanings." *Id.*; *see State ex rel. Krueger v. Appleton Area Sch. Dist. Bd. of Educ.*, 2017 WI 70, ¶ 42, 376 Wis. 2d 239, 898 N.W.2d 35 (this Court "presum[es] that the legislature chose its terms carefully and precisely to express its meaning" (citation omitted)). This Court has also looked to "neighboring statutes" of Section 846.102, noting they did incorporate the "preference[s]" of foreclosing banks, further emphasizing that Section 846.102 used "shall" as a mandatory command that was insensitive to banks' preferences. *Bank of N.Y.*, 2015 WI 15, ¶¶ 24, 26 (rejecting losing party's statutory-context

argument because the statutes it identified were "significantly different"); *accord Kingdomware*, 136 S. Ct. at 1977 ("[w]hen a statute distinguishes between 'may' and 'shall,'" shall "imposes a mandatory duty").

The most immediate statutory context supports the State's mandatory interpretation of the "shall impose" clause. Subsection 973.046(2)—the subsection immediately following the "shall impose" clause—provides that "the clerk" "shall" "determine[ ] the [surcharge] amount due" and then "collect and transmit the amount to the county treasurer." Wis. Stat. § 973.046(2). There can be no dispute that *this* "shall" clause is mandatory: it would have been absurd for the Legislature to grant the clerk of the court the discretionary power to collect or not collect the DNA surcharge once the court itself has imposed it on a convicted defendant. *See Kalal*, 2004 WI 58, ¶ 46. Since this "shall" is mandatory, the "shall" directed at the court in the immediately prior subsection should also be interpreted as mandatory. *See Coutts v. Wis. Ret. Bd.*, 209 Wis. 2d 655, 668–69, 562 N.W.2d 917 (1997) ("When the same term is used repeatedly in a single statutory section . . . the legislature intended that the term possess an identical meaning each time it appears.").

The centerpiece of Cox's argument in this case is a different contextual argument, related to a different provision in Chapter 973. In particular, the victim-and-witness surcharge provision, Wis. Stat. § 973.045(1), contains both a "shall impose" clause similar to the one found in the DNA

Surcharge Statute and a specific clause providing that "[a] surcharge imposed under this subsection may not be waived, reduced, or forgiven for any reason." *Id.* Cox argues that this means that the "shall impose" clauses in both the victim-and-witness surcharge provision and the DNA Surcharge Statute cannot be mandatory because a mandatory interpretation would render the "may not be waived, reduced, or forgiven for any reason" clause in the victim-and-witness surcharge provision surplusage. *See* Opening Br. 8, 10–13.

The victim-and-witness surcharge provision and the surplusage canon do not save Cox's argument. Under that canon, a court should attempt to "give *reasonable* effect to every word," to "*avoid* surplusage" "where *possible*." *Kalal*, 2004 WI 58, ¶ 46 (emphases added). Cox may perhaps be right that, under the State's interpretation of the "shall impose" clause (and assuming the "shall impose" clauses have the same meaning across all of the Chapter 973 surcharges), the "may not be waived, reduced, or forgiven for any reason" clause has no legal effect beyond a belt-and-suspenders reinforcement of the "shall" command. *See infra* pp. 20–22. Yet Cox's interpretation creates its own surplusage in a different provision of Chapter 973. In particular, the domestic-abuse surcharge provision, Wis. Stat. § 973.055, contains a "shall impose" clause just like the victim-and-witness surcharge provision and the DNA Surcharge Statute. The domestic-abuse surcharge provision, however, *also* contains a clause specifically providing that the court "may

waive part or all of the domestic abuse surcharge . . . if it determines that the imposition of the full surcharge would have a negative impact on the offender's family." *Id.* § 973.055(4). If Cox were correct that a "shall impose" clause simply creates a default rule from which the circuit court can deviate, and that the "shall impose" clauses must have the same meaning throughout Chapter 973, this exit ramp would be entirely unnecessary. Put another way, interpreting the "shall impose" clauses consistently throughout all of Chapter 973 would cause surplusage in *either* the victim-and-witness surcharge provision (under the State's reading) or the domestic-abuse surcharge provision (under Cox's reading), meaning that this aspect of the statutory context of the *Kalal* factors is in equipoise. Given that the remaining considerations strongly favor the State's reading, that reading should prevail. This is especially the case because this Court already adopted the State's interpretation in *Scruggs*. *See supra* pp. 11–13.

Having said that, the legislative history offers some indication that the "may not be waived, reduced, or forgiven for any reason" clause was aimed at solving a real-world problem, specific to the victim-and-witness surcharge provision, by serving "a 'belt-and-suspenders function.'" *N. Highland Inc. v. Jefferson Mach. & Tool Inc.*, 2017 WI 75, ¶ 137, 377 Wis. 2d 496, 898 N.W.2d 741 (R.G. Bradley, J., dissenting) (quoting Scalia & Garner, *supra*, at 204). The Legislature added this provision to Chapter 973 with Act 20

in 2013, and a 2012 report from the Legislative Audit Bureau, submitted to the Joint Legislative Audit Committee, explains the likely reason for this addition. *See* Legislative Audit Bureau, *Crime Victim and Witness Assistance Surcharge Revenue* (Aug. 2012) (hereinafter "the Audit Report").[3] The Audit Report detailed the Bureau's investigation into why the victim-and-witness "surcharge['s] revenue [had] declined . . . despite" a previous statutory "increase in the [value of the] surcharge." *Id.* at 1. The report found that "[a]fter sentencing occur[ed], [some] judges [had been] reduc[ing] the amount owed but not yet paid on [the] assessed surcharges" of some defendants, to the value of over $400,000. *Id.* at 12. The Audit Report also included a comment from the Wisconsin Department of Justice, recommending that the Legislature "consider legislation to prohibit [such] post-sentence surcharge reductions" in order to mitigate the "depressing [of] the current surcharge revenue." *Id.* at 21 n.3.

In light of the legislative history, the Legislature's addition of the "may not be waived, reduced, or forgiven for any reason" clause in Act 20 is entirely sensible, even if technically legally unnecessary. Contrary to some of the suggestions in the Audit Report, the State is not aware of any "case law" that would have permitted circuit courts before Act

[3] Available at https://legis.wisconsin.gov/lab/reports/12-13full.pdf. This Court may take judicial notice of Legislative Audit Bureau reports. *See Wisconsin Med. Soc'y, Inc. v. Morgan*, 2010 WI 94, ¶¶ 18–28 & n.7, 328 Wis. 2d 469, 787 N.W.2d 22.

20 to waive, reduce, or forgive a victim-and-witness surcharge, Audit Report at 12, in light of the victim-and-witness surcharge provision's preexisting "shall impose" clause, *cf. State v. Ninham*, 2011 WI 33, ¶ 88, 333 Wis. 2d 335, 797 N.W.2d 451 (explaining that while circuit courts have "inherent authority to modify a sentence" "to prevent the continuation of unjust sentences," that authority can only be "exercised within defined parameters" (citation omitted)), and the other limits on post-sentence modifications, *see State v. Nickel*, 2010 WI App 161, ¶¶ 1, 5–8, 330 Wis. 2d 750, 794 N.W.2d 765 (denying defendant's motion to "eliminate or waive" DNA surcharge under pre-2013 statute because motion was an untimely motion for "sentence modification" under Wis. Stat. § 973.19, and "[n]o other authority exists" for court to reduce the surcharge). Nevertheless, the Legislature may well have wanted to make absolutely clear that circuit courts do not have such authority, given the prior problems that the Audit Report uncovered. Put another way, the "may not be waived, reduced, or forgiven for any reason" clause that Act 20 added merely "serves a belt-and-suspenders function in the statutory text," *N. Highland*, 2017 WI 75, ¶ 137 (R.G. Bradley, J., dissenting) (citation omitted), reinforcing the mandatory command of the "shall impose" clause, in the context of a provision where circuit courts had acted problematically.

C. Statutory History Manifests A Legislative Intent For A Mandatory DNA Surcharge

The DNA Surcharge Statute's history demonstrates an unmistakable legislative intent to make the surcharge mandatory. A statute's "history," "the statutes repealed or amended by the statute under consideration," "form[s] part of the context of the statute" and so is a legitimate interpretative source. Scalia & Garner, *supra*, at 256; *e.g.*, *Richards*, 2008 WI 52, ¶ 22 (same). "[A] change in the language of a prior statute presumably connotes a change in meaning," Scalia & Garner, *supra*, at 256, and, most relevant here, a "shift" in language from "may" to "shall" "is clear manifestation of intent that the statute be" mandatory, *Sutherland Statutory Construction*, *supra*, § 57:3; *see Heritage Farms, Inc. v. Markel Ins. Co.*, 2012 WI 26, ¶ 84, 339 Wis. 2d 125, 810 N.W.2d 465 (A.W. Bradley, J., dissenting).

The pre-2014 DNA Surcharge Statute provided that the court "may impose" the surcharge on defendants convicted of most crimes, but "shall impose" the surcharge on defendants convicted of sexual assault. Wis. Stat. § 973.046(1g) & (1r) (2011–12). Act 20 replaced this framework with a simple, universally applicable "shall impose" clause. 2013 Wis. Act 20, §§ 2353–54. That is, Act 20 repealed the "may impose" clause and the limitations on the "shall impose" clause, thus the court "shall impose" the surcharge on all convicted defendants, no matter their crimes. The Legislative Reference Bureau's analysis is in accord with this plain-text

interpretation. *See* Legislative Reference Bureau Analysis of 2013 Assembly Bill 40 at 7–8, https://docs.legis.wisconsin.gov/2013/related/proposals/ab40.pdf. The LRB analysis of the bill that became Act 20 states that "[u]nder this bill, if a court imposes a sentence . . . the court *must* impose a [ ] DNA surcharge." *Id.* at 8 (emphasis added).

D. Additional Factors Applicable To Statutory Time Limits Favor The Mandatory Interpretation

"In addition to the [ ] general rules" of statutory interpretation, this Court has looked to several factors in deciding whether "a statutory *time limit*" that uses the term "shall" "is mandatory or directory": "the existence of penalties for failure to comply with the limitation, the statute's nature, the legislative objective for the statute, and the potential consequences to the parties, such as injuries or wrongs." *Marberry*, 2003 WI 79, ¶ 16 (emphasis added, citation omitted).

The present case does not involve a statutory time limit, so this additional, multi-factor analysis does not appear to apply directly. But to the extent this Court were to find these factors relevant to the present dispute, the factors would lead to the same conclusion as discussed above: the term "shall" in the DNA Surcharge Statute is mandatory. The "nature" of the statute is regulatory, not punitive. *See Scruggs*, 2017 WI 15, ¶¶ 21, 23; *Williams* Br. 13–15. Indeed, the Legislature intended to create a "civil regulatory scheme." *See Scruggs*,

2017 WI 15, ¶¶ 16, 27, 31; *Williams* Br. 13–15. The statute denotes the $250 as a "surcharge," not a "fine," explicitly drawing a distinction between the surcharge and fines imposed in a criminal action, and it accompanied a "larger statutory initiative to expand the [S]tate's DNA databank." *See Scruggs*, 2017 WI 15, ¶¶ 21, 23–26; *Williams* Br. 13–14. The "legislative objective" of the surcharge is to "offset the increased costs" of the State's DNA-related activities, including greater use of the DNA data bank during criminal investigations. *See Scruggs*, 2017 WI 15, ¶¶ 24–27; *Williams* Br. 13–14. The "potential consequence[ ]" of a directory interpretation is a significant shortfall of funding for the DNA data bank's essential functions, *see Scruggs*, 2017 WI 15, ¶ 27; *Williams* Br. 25–26, and the State's DNA-related activities, which include identifying perpetrators from DNA collected from crime scene evidence during criminal investigations, *see* Wis. Stat. §§ 973.046(3); 165.77; *Williams* Br. 4–5, 23–24. While "[t]he statute does not provide a penalty for [the sentencing court's] failure to comply," the "absence of a penalty" alone does not support a directory interpretation. *Marberry*, 2003 WI 79, ¶ 18.

* * *

In all, this Court should affirm the circuit court's written judgment imposing the $250 DNA surcharge. The circuit court first issued an erroneous decision waiving the surcharge, App. 125–26, but then recognized its error and issued the mandatory surcharge, App. 109–10. This was an

appropriate exercise of the circuit court's duty to "correct" its prior error. *State v. Machner*, 101 Wis. 2d 79, 82–83, 303 N.W.2d 633 (1981).[4]

CONCLUSION

The circuit court's denial of the post-conviction motion should be affirmed.

[4] While Cox quotes the principle that a "circuit court's unambiguous oral pronouncement of sentence trumps the written judgment of conviction," Opening Br. 18–19 (quoting *State v. Prihoda*, 2000 WI 123, ¶ 15, 239 Wis. 2d 244, 618 N.W.2d 857), he does not (and cannot possibly) argue that the oral order in this case should be given any effect if this Court agrees with the State that the DNA Surcharge Statute is mandatory, *see* Opening Br. 19 (basing request for reversal on the erroneous legal premise that "the circuit court had the authority to waive the DNA surcharge"); *see generally Donaldson*, 93 Wis. 2d at 310 ("A court's authority in sentencing . . . is controlled by statute.").

Dated: January 3, 2018.

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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 5,957 words.

Dated: January 3, 2018.

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Dated: January 3, 2018.

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