STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP001745-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL L. COX,

Defendant-Appellant.

On Certification from the Court of Appeals, Reviewing a Judgment of Conviction Entered in the Milwaukee County Circuit Court, the Honorable William W. Brash, III, Presiding, and an Order Denying Postconviction Relief, Entered in the Milwaukee County Circuit Court, the Honorable T. Christopher Dee, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The Circuit Court Had the Authority to Waive the $250 DNA Surcharge.

The State asserts that (1) statutory interpretation and legislative history support its statutory reading and (2) this Court already found the DNA Surcharge to be "mandatory" in ***State v. Scruggs***, 2017 WI 15, 373 Wis. 2d 312, 891 N.W.2d 786. Mr. Cox replies to each argument.

A. Fundamental rules of statutory construction — consistent with the broad authority generally afforded sentencing courts—demonstrate that the Legislature intended courts to have authority to waive the automatically-imposed DNA Surcharge.

The State argues that the language change between the old and new DNA Surcharge statute demonstrates that the Legislature intended to leave circuit courts without authority to waive DNA Surcharges. (Response Brief at 23-24).

The language and breadth of the DNA Surcharge statute did change. But that does not mean that sentencing courts lack any authority to waive the surcharge.

Instead, the change marked a shift from a default of (in most cases) no surcharge absent an affirmative exercise of discretion to a now automatically-imposed surcharge on every conviction without any need for discretion. Wis. Stat. § 973.046 (2011-12) *with* Wis. Stat. § 973.046 (2015-16) (App.134). This intention is apparent because the Legislature in the same Act also revised the similar Victim Witness

Surcharge statute, and chose to include language prohibiting waiver of that surcharge but not the DNA surcharge. 2013 Wis. Act 20, §§ 2348, 2354, 2355, 9326, 9426.

The State asserts that Mr. Cox "reads into the law concepts that are not there." (Response Brief at 16).

On the contrary, Mr. Cox reads the statute considering (a) the "context" in which it is used related to the "language of surrounding or closely-related statutes," (b) the need to consider language reasonably to "avoid surplusage," and (c) the omission of the provision prohibiting waiver from the revised DNA Surcharge statute despite its inclusion in the Victim Witness Surcharge statute.

All of these rules demonstrate that a sentencing court has authority to waive the DNA Surcharge. The Court of Appeals appears to agree. (Certification at 4;Initial Brief App.104).

The State, however, asks this Court to ignore these rules and read language *out* of the Victim Witness Surcharge statute. (Response Brief at 19-22).

It argues that the Legislature's addition of language prohibiting waiver of the Victim Witness Surcharge was "legally unnecessary." (Response Brief at 21).

It asserts that this Court should consider that provision as serving a "belt-and-suspenders function"—unnecessary but added to reemphasize what has already been stated. (Response Brief at 20). As support, the State references a dissent authored by Justice Rebecca Bradley, which cites the term from Justice Scalia and Bryan Garner's book, READING LAW. (Response Brief at 20).

The cited dissent, however, dealt with the use of a statutory definition of a term providing specific examples included with a broad definition ("[t]rade secret" means information, including a formula, pattern, compilation…."). ***North Highland Inc. v. Jefferson Machine & Tool Inc.***, 2017 WI 75, ¶ 38, 377 Wis. 2d 496, 898 N.W.2d 741. Thus, Justice R. Bradley's dissent cited READING LAW for the proposition that following a "general term with specifics" makes "doubly sure" that the specifics are included in the broad definition—a "belt-and-suspenders-function[.]." ***Id.***, ¶137 (R.G. Bradley, J., dissenting).

The State here, however, asks this Court to read out an entire—newly added—statutory provision. Consider what Justice Scalia and Bryan Garner explain about avoiding surplusage: "words with no meaning—language with no substantive effect—should be regarded as the exception rather than the rule." Antonin Scalia & Bryan Garner, READING LAW, 178 (2012).

They note that attorneys "rarely argue that an entire provision should be ignored," and reject the idea that the surplusage cannon is "fundamentally wrong": "[s]tatutes *should* be carefully drafted, and encouraging courts to ignore sloppily inserted words results in legislative free-riding and increasingly slipshod drafting." ***Id.*** at 175-179 (emphasis in original). This Court should reject the State's suggestion to ignore an entire statutory provision.

The State also cites case law holding that the use of "shall" and "may" in the same statutory section reflects that the Legislature intended two different meanings. (Response Brief at 17). This does not help the State because the new DNA Surcharge statute does not contain the word "may." *See* Wis. Stat. § 973.046.

The Victim Witness Surcharge statute does contain both a "shall" and a "may," but this too does not help the State: first, the "may" is followed by "not" (in the provision prohibiting waiver), so it does not demonstrate different levels of affirmative authority. *See* Wis. Stat. § 973.045. Instead, the juxtaposition of this language supports Mr. Cox's argument: if "shall" meant that a court lacked all authority to waive the Victim Witness Surcharge—a closely-related statute to the DNA Surcharge—the "may not" waive language would be unnecessary.

The Legislative Audit Bureau report concerning the addition of the no-waiver language to the Victim Witness Surcharge also shows that the Legislature recognizes that courts have authority to waive or reduce surcharges unless prohibited. *See* (Response Brief at 21); *see also* Legislative Audit Bureau, Crime Victim and Witness Assistance Surcharge Revenue (Aug. 2012).

The State disagrees with the Legislature that courts should have had authority to waive or reduce the Victim Witness Surcharge prior to the statutory change. The focus, however, is on *legislative* intent, not what the State believes. *See* ***State ex rel. Kalal v. Circuit Ct. for Dane Cty.***, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. The Audit Bureau report reflects that the Legislature was aware that sentencing courts could reduce a surcharge, and that—to prevent courts from so doing—it needed to add language prohibiting it. It did not do so with the DNA Surcharge statute.

It makes sense that the Legislature respects the authority and discretion of criminal sentencing courts. Under our system of individualized sentencing, sentencing courts are best suited to how to achieve the sentencing objectives. ***State v. Gallion***, 2004 WI 42, ¶ 18, 270 Wis. 2d 535, 678 N.W.2d 197 (quoted source omitted).

Consider a defendant convicted of ten counts of misdemeanor bail jumping. If the court says nothing, that defendant will be assessed $2,000 in DNA Surcharges. Wis. Stat. § 973.046. But suppose the defendant is a single working-mother raising children; the court puts her on probation so that she can provide for her children. It makes sense that the Legislature would respect that the court is in the best position to assess whether this woman should have to pay $2,000 in DNA Surcharges. Under the State's interpretation, however, courts would lack any such authority.

The court's authority is also where the State's argument concerning the language adressing the clerk of court's responsibilities falls short. The State argues that because the DNA Surcharge statute also provides that the "clerk *shall*" determine the "amount due" and "collect and transmit" the amount to the county treasurer—and because this "shall" cannot be discretionary—this must mean that the Legislature also intended the word "shall" to impose a mandatory requirement on the court. (Response Brief at 18).

This overlooks the different roles of the sentencing court and the clerk. The clerk serves an administrative function to effectuate judicial authority. Clerks have no discretion at sentencing; courts do. *See e.g.,* ***State v. Dickson***, 53 Wis. 2d 532, 540-541, 193 N.W.2d 17 (1972)("[T]he acts of the clerk of court are ministerial and clerical, and he may not exercise judicial power except in accordance with the strict language of a statute conferring such power upon him") (quoted source omitted).

The State argues that if Mr. Cox's interpretation of the DNA Surcharge statute is correct, then the following language from the Domestic Abuse Surcharge would be surplusage: "A 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." Wis. Stat. § 973.055(4). This argument fails for multiple reasons:

First, this language is just as easily read to explain that a sentencing court must make a particular finding to waive that particular surcharge. *See* Wis. Stat. § 973.055(4).

Second, the Domestic Abuse Surcharge statute is structured and functions differently than the Victim Witness and DNA Surcharge statutes. The Domestic Abuse Surcharge does not apply to all criminal convictions. *Compare* Wis. Stat. § 973.055 *with* Wis. Stat. § 973.045 *and* Wis. Stat. § 973.046. Unless a court sentences a defendant for violating a restraining order or domestic abuse injunction, before imposing the Domestic Abuse Surcharge, the court must make particular findings about the nature of the relationship between the defendant and victim. Wis. Stat. § 973.055(1)(a)2. No such affirmative findings must be made prior to the imposition of the Victim Witness and DNA Surcharges.

Thus, the Victim Witness and DNA Surcharge statutes are much more "closely-related" statutes than the Domestic Abuse Surcharge statute for purposes of statutory interpretation. *See* ***Kalal***, 271 Wis. 2d 633, ¶ 46.

Third, the waiver language in the Domestic Abuse Surcharge statute was enacted in 1987. 1987 Wisconsin Act 27, § 2208x (published July 31, 1987). On the other hand, in one single 2013 Act, the Legislature revised the DNA Surcharge statute to parallel the Victim Witness Surcharge statute's scheme for imposition. 2013 Wis. Act 20, §§ 2348, 2354, 2355, 9326, 9426. As such, the Legislature could have added the same language it added to the Victim Witness Surcharge statute to the DNA Surcharge statute. It did not.

The State also cites case law dealing with discerning whether a statutory time limit using the word "shall" is mandatory or directory. (Response Brief at 24). As the State acknowledges, the DNA Surcharge Statute is not a time limit, so that law does not assist here. *See* (Response Brief at 24).[1]

Lastly, the State expresses concern that if this Court agrees with Mr. Cox, the result could be a "significant shortfall of funding for the DNA data bank's essential functions." (Response Brief at 25). The State cites this Court's discussion in ***Scruggs*** of a 2014 Legislative Fiscal Bureau memorandum which stated that the DNA Surcharges "would provide funding for the collection and analysis of DNA samples together with the maintenance of the DNA databank." ***Scruggs***, 373 Wis. 2d 312, ¶ 27.

Given the State's concern, it is worth noting that—when deciding ***Scruggs***—this Court did not have before it the 2017 Legislative Fiscal Bureau memorandum or 2017 Wisconsin Act 59 (the 2017 Budget Bill).[2] Legis. Fiscal Bureau, Crime Laboratory and Drug Law Enforcement Surcharge and DNA Surcharge Overview (Justice), Paper #408 to J. Comm. On Fin. (May 9, 2017), *available online at*: https://docs.legis.wisconsin.gov/misc/lfb/budget/2017_19_bie

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[1] The State asserts that this Court has considered the "nature" of the statute when considering the meaning of "shall" time limits; citing ***Scruggs***, it then argues that the "nature" of the DNA Surcharge statute is regulatory, not punitive. (State's Response Brief at 24). This statement is not entirely accurate. At least in the ex *post facto* context (which is what the State cites for support), Wisconsin law currently holds that the imposition of *one* DNA Surcharge is not punitive, but the imposition of multiple DNA Surcharges *is* punitive. *Cf.* ***Scruggs***, 373 Wis. 2d 312 *with* ***State v. Radaj***, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758.

[2] This Court decided ***Scruggs*** on February 23, 2017, the 2017 Legislative Fiscal Bureau Memorandum is dated May 9, 2017, and the 2017 Wis. Act 59 was published September 22, 2017.

nnal_budget/050_budget_papers/408_justice_crime_laboratory_and_drug_law_enforcement_surcharge_and_dna_surcharge_overview.pdf (hereinafter "2017 LFB Memo"); 2017 Wisconsin Act 59, §§ 408c-v, § 1673v, § 2255p; *see also* Wis. Stat. § 973.046(3) and § 20.455(2)(Lp) (15-16 Wis. Stats. updated Jan. 1, 2018).

The 2017 LFB Memo reflects that the change in DNA Surcharge statute resulted in a 444% increase in revenue—from $927,700 in the 2012-13 fiscal year to $5,043,200 in the 2015-16 fiscal year. 2017 LFB Memo at 3.

The revenue from the DNA Surcharge has been comingled with the revenue from the $13 Crime Laboratory and Drug Law Enforcement (CLDLE) Surcharge. ***Id.*** at 1. Importantly, the revenue from these surcharges is *not* distinguished for transferring funds to other appropriations. ***Id.*** at 2. Due to the surcharges increase, the fund has been operating with a surplus. ***Id.*** at 3.

Given the surplus, as part of the 2017 Budget Bill, the Legislature passed a provision allowing the money collected from the DNA Surcharge to also be used to fund matters *unrelated* to DNA.

One example: revenue from the DNA Surcharges is now used to fund "activities relating to drug law enforcement" and "drug law violation prosecution assistance." ***Id.*** at 2; 2017 Wis. Act. 59, §§408t-v; 20.455(2)(Lp)(15-16 Wis. Stats. Updated Jan. 1, 2018) (reflecting that revenue from is appropriated to the account under Wis. Stat. § 20.455(2)(kd) providing for drug law enforcement activities).

As the State has received so much money from the new DNA Surcharge statute that it is appropriating money to matters unrelated to DNA, the State's fears are unwarranted.

B. Recognizing the Legislature's decision to provide courts with the power to waive the DNA surcharge statute does not conflict with this Court's and the Court of Appeals' decisions concerning *ex post facto* challenges to the DNA surcharge statute.

The State asserts that ***Scruggs*** controls because this Court repeatedly described the new DNA surcharge as "mandatory[.]" (Response Brief at 11-13). ***Scruggs*** does not control because the question at issue here was not at issue there.

The State itself recognizes this: "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 fully briefed or argued in ***Scruggs***." (Response Brief at 12)(internal quotation omitted).

The State nevertheless asserts that Mr. Cox's arguments fail because he "does not even attempt to argue" that his arguments "justify overruling a decision of the Court." (Response Brief at 12). The reason is simple: this Court need not overrule ***Scruggs*** to agree with Mr. Cox.

"Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having be so decided as to constitute precedents." ***In re Refusal of Anagnos***, 2012 WI 64, ¶ 39, n. 10, 341 Wis. 2d 576, 815 N.W.2d 675 (quoting ***Webster v. Fall***, 266 U.S. 507, 511 (1925)).

Indeed, in ***Anagnos***, the State similarly argued that earlier decisions controlled even though the question presented was not at issue. ***Id.***, ¶¶ 33-39. The question in ***Anagnos*** related to what, per statute, a defendant may

challenge at an OWI refusal hearing. ***Id.*** The State pointed to earlier decisions addressing refusal hearings. ***Id.*** The State asserted that the absence of the particular argument the defendant now raised in this Court's discussions of what may be raised at a refusal hearing in its earlier cases showed that the defendant could not make the present argument. ***Id.***

This Court disagreed. ***Id.*** It explained that the present question had not been at issue. ***Id.*** Instead, it "zeroed in" on the portions of the statute "relevant to the arguments raised" in the earlier cases. ***Id.***, ¶ 33.

This Court acknowledged that in so doing, it used "shorthand to summarize" the issues enumerated in the refusal statute. ***Id.***, ¶ 38. It nevertheless explained that it was just "attempt[ing] to simplify complicated statutory language" by "focus[ing] on the portion of the refusal hearing statute that was directly implicated by the arguments advanced in each case." ***Id.***, ¶ 39.

This Court concluded that its "attempts to focus its inquiry" on the matters "relevant to the resolution of the cases before it should not be misunderstood" as precedent on a question not raised in those earlier cases. ***Id.***

The same is true here. ***Scruggs*** did not address whether a circuit court retains any authority to waive the otherwise now automatically-imposed DNA surcharge. *See* 373 Wis. 2d 312.

This Court's use of the word "mandatory" in ***Scruggs*** reflected the description relevant to the *ex post facto* challenge at issue—the change from no surcharge in most cases absent affirmative discretion to a default surcharge on every conviction without a required exercise of discretion.

Thus, the use of the term "mandatory" was shorthand to distinguish the new statute from the old "discretionary" statute. *See* ***id.***

The State also fails to address the fact that a sentencing authority retaining "some measure of discretion" does not "defeat an *ex post facto* claim." ***Peugh v. United States***, 569 U.S. 530, 133 S.Ct. 2072, 2081 (2013); *see also* (Cox Initial Brief at 17-18). The State's only response: that is "beside the point." (Response Brief at 13).

Yet, the State (not Mr. Cox) argues that ***Scruggs*** controls; the State (not Mr. Cox) asserts that recognizing that courts have authority to waive the DNA surcharge would be inconsistent with the *ex post facto* case law.

U.S. Supreme Court case law holds otherwise: it demonstrates that recognizing a court's authority to waive the DNA surcharge would neither be inconsistent with nor alter the *ex post facto* case law. *See* ***Peugh***, 133 S.Ct. at 2082 (the question for *ex post facto* purposes is whether the change in the law presented a "sufficient risk of increasing the measure of punishment"). As such, the State's concerns about this case either affecting or being affected by the *ex post facto* case law ring hollow.

CONCLUSION

For these reasons and those set forth in his Initial Brief, Mr. Cox respectfully requests that this Court enter an order reversing the circuit court's decision denying his motion for postconviction relief and remanding this matter to the circuit court with an order to amend the judgment of conviction to vacate the $250 DNA surcharge.

Dated this 16th 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 2,948 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 16th day of January, 2018.

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