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

OPENING BRIEF AND APPENDIX OF THE STATE OF WISCONSIN

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ISSUE PRESENTED

1. Did the circuit court's imposition of a $250 DNA surcharge on Jamal Williams for his felony conviction violate the Ex Post Facto Clauses of the federal and Wisconsin Constitutions (hereinafter, collectively, "Ex Post Facto Clause")?

The Court of Appeals answered yes.

INTRODUCTION

States routinely impose statutory fees on criminal defendants to offset burdens related to the administration of the criminal justice system. One such example is 2013 Wis. Act 20, which imposes a mandatory $250 surcharge for each felony that an individual is convicted of, in order to fund the State's DNA-related activities in criminal investigations and criminal proceedings. Those activities include processing crime scene evidence for DNA, analyzing that DNA to create individual profiles, matching those profiles to the DNA of known individuals in the DNA database, collecting and analyzing suspects' DNA, matching suspects' DNA profiles to profiles obtained from crime scene evidence, and entering new DNA samples into the database.

Retroactively applying the $250-per-felony conviction surcharge does not violate the Ex Post Facto Clause because the Legislature did not enact the surcharge with punitive intent, and the surcharge does not have punitive effect. *See State v. Scruggs*, 2017 WI 15, 373 Wis. 2d 312, 891 N.W.2d 786. The intended purpose of the surcharge is to fund the State's DNA-related activities, not to test any one individual's DNA or to punish anyone. And there is a rational, non-punitive connection between the surcharge and the State's purpose: the State would not have to use DNA in criminal investigations and proceedings without crimes, and those who commit more felonies contribute a greater share to Wisconsin's crime problem. The Court of Appeals' decision to

the contrary—and the two prior Court of Appeals decisions on which it relies—should be reversed.

ORAL ARGUMENT AND PUBLICATION

By granting the State's petition for review, this Court has indicated that the case is appropriate for oral argument and publication.

STATEMENT OF THE CASE

A. Wisconsin's DNA Surcharge Statute

Wisconsin, like many States, maintains a database with the DNA of various offenders in the State, known as a DNA databank. Some States require payments from those convicted to maintain and use the databank. *See, e.g.*, N.Y. Penal Law § 60.35(1)(a); Kan. Stat. § 75-724(a); Ala. Code § 36-18-32(h)(1).

Before 2014, Wisconsin law required those convicted of felonies and some misdemeanors to provide DNA samples for the databank, and only some felons were required to pay a $250 surcharge to upkeep the databank and related operations. Under this pre-2014 regime, at sentencing, a court would order any individual convicted of a felony or certain misdemeanors to provide a DNA sample for the databank. *See* Wis. Stat. § 973.047(1f) (2011–12). The $250 surcharge was mandatory only for certain sex offenders; otherwise, a court had discretion to order the individual convicted of a felony to pay a single $250 surcharge. *See id.*

§ 973.046(1g) (2011–12). The circuit court could not impose a surcharge on someone convicted of a misdemeanor.

In July 2013, Wisconsin expanded both the operation of the DNA databank and the circumstances triggering the mandatory surcharge. Under the updated regime, which the statute provided would apply to all sentences imposed on or after January 1, 2014, 2013 Wis. Act 20, § 9426(1)(am), DNA collection would include all those *arrested* for violent felonies *and* those convicted of *any* misdemeanor, *see* 2013 Wis. Act 20, §§ 2343, 2356; Wis. Stat. § 973.047(1f); *id.* § 970.02(8); *id.* § 165.84(7); *see generally Maryland v. King*, 133 S. Ct. 1958, 1968 (2013). Individuals convicted of all felonies now pay a nondiscretionary $250 surcharge for each felony conviction and all individuals convicted of misdemeanors must pay a $200 surcharge for each misdemeanor conviction. *See* 2013 Wis. Act 20, §§ 2354–55; Wis. Stat. § 973.046(1r)(a) (2013–14) (hereinafter "DNA Surcharge Statute").

The State uses the surcharges to fund the Department of Justice's DNA-related activities delineated under Wis. Stat. § 165.77. *See id.* § 973.046(3). Section 165.77 requires DOJ to conduct DNA analyses pursuant to "request[s] from [ ] law enforcement agenc[ies] regarding an investigation," "request[s]" from defense attorneys "pursuant to a court order" "regarding his or her client's specimen," and—subject to DOJ's rules—a request "from an individual regarding his or her own specimen," *see id.* § 165.77(2)(a)1.a–c. Section 165.77 also mandates that DOJ "maintain a data

bank" with the DNA samples it collects from felons and misdemeanants—subject to various restrictions—and DOJ may use the DNA samples and the databank "in connection with criminal . . . investigations" and "criminal . . . proceedings." *Id.* § 165.77(2)(a)2, (3). The State's DNA laboratories provide information to "law enforcement agencies," "prosecutor[s]," "defense attorney[s]," and "subjects" who provided their DNA. *Id.* § 165.77(2)(a)2. Subjects "may request expungement" of their DNA from the databank if they meet certain criteria. *Id.* § 165.77(4)(am).

B. Background

Jamal Williams pleaded guilty to felony attempted armed robbery as a party to a crime, committed in April 2013, contrary to Wis. Stat. § 943.32(2). R.35.[1] The circuit court sentenced Williams to ten years in prison and seven and a half years of extended supervision in March 2014. R.35. When Williams committed the crime in April 2013, the $250 DNA surcharge for his felony conviction was discretionary, not mandatory, because the pre-July 2013 regime discussed above still governed. *See* Wis. Stat. § 973.046(1g) (2011–12). When Williams was sentenced, however, the surcharge was mandatory because the current law was in effect. *Id.* § 973.046(1r). Thus, the court ordered him to submit a DNA

[1] Williams has cross-appealed another issue in this case. *See* Order Granting Petitions for Review, *State v. Williams*, No. 16AP883 (Oct. 10, 2017). The State will lay out the facts relevant to that issue in its Response Brief in that cross-appeal.

sample and pay the mandatory DNA surcharge of $250. R.1:7 ("[The] Court ordered defendant to provide DNA sample" and pay surcharge.); R.35. Williams did not have to provide a new DNA sample, however, because he provided such a sample in 2009, under the pre–July 2013 regime. *See* App. 9, 13; *see also* Wis. Stat. § 165.76(4)(b); Wis. Admin. Code § Jus. 9.04(3)(c). Williams had been charged a $250 surcharge for that 2009 sample, under the circuit court's pre–July 2013 discretionary authority. R.47:102.

Williams filed a postconviction motion requesting, as relevant to this appeal, that the court vacate the $250 DNA surcharge because he had already provided a DNA sample and "been assessed a DNA surcharge" based on the 2009 felony conviction. R.47:16. The circuit court denied the motion, relying on the Court of Appeals' decision in *State v. Scruggs*, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146, *aff'd*, 2017 WI 15. App. 33. The court reasoned that "there are legitimate non-punitive reasons for requiring" Williams to pay the surcharge even if he did not need to provide a new sample. App. 34–35.

The Court of Appeals reversed the circuit court and held that retroactively applying the $250 surcharge to Williams violated the Ex Post Facto Clause because he did not have to provide a new DNA sample, relying on two prior Court of Appeals opinions: *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. App. 3, 15. *Elward* held

that the retroactive imposition of a $200 DNA surcharge for a misdemeanor conviction violated the Ex Post Facto Clause because the court did not order the defendant to submit to a DNA test, 2015 WI App 51; and *Radaj* held that a total DNA surcharge of $1,000 for four felony convictions ($250 each) was an ex post facto violation because the State had to test the defendant's DNA sample only once, 2015 WI App 50, ¶¶ 1, 31–32. In this case, the Court of Appeals concluded that because Williams did not have to provide a new DNA sample, under *Elward* and *Radaj*, the State received money "for nothing." App. 18 (citation omitted). Thus, in the Court of Appeals' view, bound by *Elward* and *Radaj*, the $250 surcharge "served only to punish [Williams] without pursuing any type of regulatory goal." App. 15 (citation omitted). Notably, the Court of Appeals believed that *Elward* and *Radaj* were wrongly decided but pointed out that the court was bound by those decisions. App. 18 n.10.

Judge Hagedorn wrote a concurring opinion, agreeing that *Elward* and *Radaj* required ruling for Williams here, but specifically urging this Court to overturn those cases. App. 20 (Hagedorn, J., concurring). The State's purpose in imposing a $250 surcharge for each felony conviction went beyond paying for the collection of a DNA sample from the particular convict. App. 22. Instead, the surcharge funded *all* of the State's DNA-related activities, including "solv[ing] old crimes, exonerat[ing] the innocent, and" identifying perpetrators in criminal investigations. App. 22. This funding structure was

rational, and not punitive, because the State's DNA-related activities would not exist but for crimes and those who commit them. Judge Hagedorn noted that "significant components of the state justice system . . . are funded by [the same kind of] surcharge[s]." App. 22–26 (listing examples). For instance, a surcharge of $10 per count funds county jails, Wis. Stat. § 302.46(1); a surcharge of $500 per image of child pornography funds investigation of sexual assaults against children and grants for sexual-assault victim services, *id.* § 973.042; a surcharge of $50 per OWI-related case funds the safe-ride program, *id.* § 346.657(1); a $67 per-misdemeanor and $92 per-felony surcharge funds DOJ victim and witness services, *id.* § 973.045(1)(a)–(b); and a crime- and drug-law enforcement surcharge of $13 per count funds drug-law enforcement, DOJ crime labs, and other services, *id.* § 165.755(1)(a). App. 22–26. He also noted that this Court already decided—under the proper framework outlined in *Hudson v. United States*, 522 U.S. 93 (1997), and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)—that the $250 surcharge was not punitive in intent or effect and that this conclusion should apply here. App. 28 (citing *Scruggs*, 2017 WI 15).

STANDARD OF REVIEW

This Court reviews de novo whether a statute violates the Ex Post Facto Clauses of the federal and Wisconsin Constitutions. *Scruggs*, 2017 WI 15, ¶ 12. The party

challenging the constitutionality of the statute has the "burden of establishing beyond a reasonable doubt that the [statute] is unconstitutional." *Id.* ¶¶ 12, 50.

SUMMARY OF ARGUMENT

I. To determine whether a statute is punitive for ex post facto purposes, this Court applies the well-settled "intent-effects" test from *Hudson*, 522 U.S. 93. First, the Court examines whether the Legislature passed the statute at issue with punitive intent. If the Legislature had no punitive intent, the Court analyzes whether the effects of the statute are so obviously punitive that they transform the intended civil regulatory scheme into a criminal penalty.

A. The intent analysis is an exercise in statutory construction. This Court looks to the statute's plain language, context, and legislative history to discern the Legislature's intent. Using this method, the Court determined in *Scruggs*, 2017 WI 15, that this very statute did not have punitive intent. There is no reason to disturb that conclusion here.

B. To determine the statute's effects, this Court looks to seven factors drawn from *Mendoza-Martinez*, 372 U.S. 144: whether (1) it imposes an affirmative disability or restraint; (2) it has historically been regarded as punishment; (3) it comes into play only on a finding of scienter; (4) it promotes the traditional aims of punishment, retribution and deterrence; (5) the behavior to which it applies is already a crime; (6) it is rationally connected to an alternative purpose;

and (7) it appears excessive in relation to the alternative purpose. This Court determined in *Scruggs* that six of the seven factors cut in the State's favor, rendering the statute non-punitive in effect. That a particular defendant does not need to submit to a DNA test—or does not need to submit to multiple DNA tests for multiple felony convictions—should not alter that conclusion for the issues in the present case.

As in *Scruggs*, the *only* factor that cuts in Williams' favor is that the surcharge applies to behavior that is already a crime. A surcharge is not an affirmative disability or restraint, such as imprisonment, and has not historically been regarded as punishment. The DNA surcharge does not come into play only on a finding of scienter; it is imposed on everyone convicted without regard to their state of mind. The $250 charge is unlikely to promote the aims of retribution and deterrence: the sum is too modest to have changed most any felon's behavior.

And the DNA surcharge is rationally connected to an alternative, non-punitive purpose: funding *all* of the State's DNA-related activities during criminal investigations and proceedings. As discussed in *Scruggs*, State DNA analysts test crime scene evidence, analyze suspects' DNA, match suspects' profiles with crime scene evidence, and match DNA profiles from evidence with profiles of known individuals in the DNA databank. Those activities would not exist but for crimes and those who commit them. And those who commit more crimes are, as a general matter, more responsible for

those activities. Thus, the Legislature reasonably chose to offset the State's expense by charging those who committed crimes, per conviction. Moreover, there is no evidence that the $250 per-conviction surcharge is excessive to fund the State's DNA-related activities. Thus, the DNA Surcharge Statute is not punitive in effect.

C. The Court of Appeals, relying on its prior decisions in *Elward* and *Radaj*, was wrong to require a one-to-one relationship between the DNA surcharge and the cost of a single DNA test. That fact is not dispositive under the proper *Mendoza-Martinez* analysis, nor does it alter the six factors that cut in the State's favor. As discussed in *Scruggs*, the State's purpose in imposing the surcharge is not merely to conduct one DNA test but rather to defray all the DNA-related costs of solving crimes. Because more crimes are, as a general matter, more expensive to solve, charging an individual on a per-conviction basis is rationally connected to the State's compensatory purpose. Moreover, courts have never required that a surcharge offset the exact costs that a particular individual imposed on the State to hold that it is rationally connected to its compensatory purpose. Therefore, *Elward*, *Radaj*, and the Court of Appeals' decision here should be overturned.

ARGUMENT

I. Imposing A $250 DNA Surcharge For Each Felony Conviction Does Not Violate The Ex Post Facto Clause Because The Surcharge Is Not "Punitive"

Increasing the punishment for a crime after its commission violates the Ex Post Facto Clauses of the federal and Wisconsin Constitutions. *See* U.S. Const. art. I, § 9, cl. 3; Wis. Const. art. I, § 12; *see Scruggs*, 2017 WI 15, ¶ 14.[2]

To determine whether a "statute is punitive for ex post facto purposes," this Court applies the "intent-effects" test from *Hudson*, 522 U.S. at 99, a Double Jeopardy Clause case. *Scruggs*, 2017 WI 15, ¶ 16. First, the Court asks whether the "legislative intent" of the new statute, which was not in place when the defendant committed the crime, was to "impose punishment" or a "civil and nonpunitive regulatory scheme." *Id.* If the intent is to punish, the inquiry ends and the retroactive imposition of the punishment violates the Ex Post Facto Clause. *Id.* If the intent is non-punitive, the Court examines whether the effects of the new statute are so punitive as to transform the intended civil scheme into an impermissible retroactive criminal penalty, using as "guideposts" seven factors set forth in *Mendoza-Martinez*, 372 U.S. at 168–69, and discussed below. *Scruggs*, 2017 WI 15, ¶¶ 16, 41; *see infra* pp. 17–18.

[2] This Court looks to United States Supreme Court decisions construing the federal clause as a guide for construing Wisconsin's clause. *Scruggs*, 2017 WI 15, ¶ 4 n.4.

As explained below, the DNA Surcharge Statute is not punitive in either intent or effect and the Court of Appeals' contrary conclusion is wrong. Accordingly, this Court should confirm its holding in *Scruggs* and overrule the Court of Appeals' decision here, along with *Elward* and *Radaj*.

A. The DNA Surcharge Statute Is Not Punitive In "Intent"

This Court in *Scruggs* held that the Legislature did not enact the DNA Surcharge Statute with punitive intent, and there is no reason to reconsider that decision here. *See Johnson Controls, Inc. v. Emp'rs Ins. of Wausau*, 2003 WI 108, ¶ 94, 264 Wis. 2d 60, 665 N.W.2d 257.

In *Scruggs*, a defendant convicted of a felony challenged the $250 surcharge, arguing that its imposition violated the Ex Post Facto Clause because the surcharge was discretionary at the time she committed the offense. *See* 2017 WI 15, ¶¶ 50–51. Because the intent inquiry "is primarily a matter of statutory construction," *id.* ¶ 17 (citation omitted), this Court noted that the statute (1) termed the $250 a "surcharge," not a "fine," *id.* ¶ 21; (2) drew a "distinction between a fine imposed in a criminal action and a surcharge imposed in that action," *id.* ¶ 23 (citing Wis. Stat. § 814.76(5) (2013–14)); and (3) accompanied a "larger statutory initiative to expand the [S]tate's DNA databank" and "offset the increased costs" of collecting, analyzing, storing, and maintaining DNA samples in the database. *Id.* ¶¶ 24–26 (citation omitted); *see also* Wis. Stat. § 973.046(3) (DNA

Surcharge Statute cross-referencing Section 165.77, which specifically states that DOJ may use the DNA databank and associated laboratories in criminal *investigations* and criminal proceedings, *id.* § 165.77(2)(a)2 (emphasis added)). "[L]egislative history" confirmed that "DNA databanks are an important tool in criminal investigations," used both to exonerate the wrongfully accused and rapidly identify offenders. *Scruggs*, 2017 WI 15, ¶ 27. Finally, this Court was unpersuaded by Scruggs' "speculation" that the Legislature "had a punitive intent in enacting" the law because the statute charged $250 for *each* felony conviction. *See id.* ¶¶ 31, 36, 38.

Scruggs was correctly decided and its reasoning applies in full here because it analyzed the legislative intent of the *very same statute*. "[R]espect for prior decisions is fundamental to the rule of law," *Johnson Controls,* 2003 WI 108, ¶ 94, because it "promotes evenhanded, predictable, and consistent development of legal principles" and "contributes to the . . . integrity of the judicial process," *id.* ¶ 95 (citation omitted). To determine whether to overrule a prior precedent, this Court looks to whether: "changes or developments in the law have undermined the rationale behind a decision;" "there is a need to make a decision correspond to newly ascertained facts;" and "there is a showing that the precedent has become detrimental to coherence and consistency in the law." *Id.* ¶ 98. No such circumstances justify departing from precedent here. No

"changes or developments" in the law have undermined *Scruggs* since it was decided in February 2017. Nor are the facts of this case "newly ascertained." Indeed, the statute's very design contemplates a situation like this one where the surcharge is imposed on an individual without requiring an additional DNA test. *See* Wis. Stat. § 973.046(1); *see also* Wis. Stat. § 165.76(4)(b); Wis. Admin. Code § Jus. 9.04(3)(c). Finally, there is no showing that *Scruggs* has become "detrimental to coherence and consistency in the law." Rather it is the Court of Appeals' inapposite decision here—along with *Elward* and *Radaj*—that is "detrimental to coherence and consistency in the law." "*Scruggs*, *Radaj*, and *Elward* sit in uneasy, unsettled tension." App. 31 (Hagedorn, J., concurring). Thus, this Court should reaffirm *Scruggs* and overrule the decisions of the Court of Appeals to the contrary. *See infra* Part I.C.

B. The DNA Surcharge Statute Is Not Punitive In "Effect"

To determine whether an intended non-punitive statute is punitive in effect, this Court looks to seven factors drawn from *Mendoza-Martinez*, 372 U.S. at 168–69: "whether (1) the [statute] 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 [it] 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. "[T]hese factors must be considered in relation to the statute on its face," *Hudson*, 522 U.S. at 100 (citation omitted), and they "are not exhaustive nor is any one dispositive," *Scruggs*, 2017 WI 15, ¶ 41. To overcome the "great deference" that this Court gives legislative labels, a defendant must offer the "clearest proof" that what the Legislature intended as a civil remedy is, in effect, a criminal penalty. *Id.* ¶ 20.

The DNA Surcharge Statute is not punitive in effect. This Court held in *Scruggs* that six of the seven *Mendoza-Martinez* factors favor a conclusion that the DNA Surcharge Statute is not punitive in effect. *See id.* ¶ 43. Concededly, *Scruggs* declined to address directly a situation where—as here—a defendant must pay a DNA surcharge for a felony conviction but not submit to a new DNA test. *See id.* ¶ 35 n.8. But, for the reasons described below, that factual distinction does not change the analysis guided by the *Mendoza-Martinez* factors. Indeed, here, as in *Scruggs*, all but one factor cut in the favor of a finding of no punitive effect.

1. *Imposes Affirmative Disability or Restraint.* This Court analyzes the first factor—whether the statute imposes an "affirmative disability or restraint," *id.* ¶ 42—to determine how similar the sanction is to imprisonment, the "paradigmatic" punishment, *see Smith v. Doe*, 538 U.S. 84, 100 (2003); *see also Cox v. Commodity Futures*

Trading Comm'n, 138 F.3d 268, 273 (7th Cir. 1998). Courts examine "how the effects of the [statute] are felt by those subject to it." *Smith*, 538 U.S. at 100–01. Important considerations include the extent to which defendants are "physical[ly] restrained," barred from certain "activities," or compelled to make "in-person appearance[s]." *Id.*; *see also Hudson*, 522 U.S. at 104. Monetary fees "intended to be [ ] administrative charges" are "not punitive in nature." *In re DNA Ex Post Facto Issues*, 561 F.3d 294, 299–300 (4th Cir. 2009) (considering South Carolina's $250 DNA surcharge); *see Helvering v. Mitchell*, 303 U.S. 391, 400–01 (1938); *see also Dye v. Frank*, 355 F.3d 1102, 1105 (7th Cir. 2004).

The statute at issue here imposes a monetary fee only—a $250 surcharge per felony. *See* Wis. Stat. § 973.046. Thus, the statute does not impose an affirmative disability or restraint. *Scruggs*, 2017 WI 15, ¶ 42.

2. *Historically Considered Punishment*. This Court also considers whether a sanction imposed by the statute has historically been considered punishment. *See id.* This "historical survey" is "useful because a State that decides to punish an individual is likely to select a means deemed punitive in our tradition, so that the public will recognize it as such." *Smith*, 538 U.S. at 97. To determine whether a sanction was considered punishment, courts examine whether it could have been imposed as a result of non-criminal proceedings. *See Helvering*, 303 U.S. at 399–400; *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997). "[T]he

payment of fixed or variable sums of money are [ ] sanctions . . . recognized as enforceable by civil proceedings since the original revenue law of 1789" and thus are "free of the punitive criminal element." *Helvering*, 303 U.S. at 399–400; *accord In re DNA Ex Post Facto Issues*, 561 F.3d at 300.

Here, the DNA Surcharge Statute imposes the "payment of fixed . . . sums of money," *Helvering*, 303 U.S. at 400: $250 per conviction. Therefore, it was not historically viewed as punishment. *See id.*; *Scruggs*, 2017 WI 15, ¶ 42.

3. *Requires A Finding of Scienter.* Courts also analyze whether the sanction is justified only upon a finding of scienter to determine whether it is punitive in effect. *Scruggs*, 2017 WI 15, ¶ 42. The "absence of such a [scienter] requirement [ ] is evidence that . . . the statute is not intended to be retributive." *Hendricks*, 521 U.S. at 362. This Court looks to the text of the statute, *see State v. Luedtke*, 2015 WI 42, ¶ 66, 362 Wis. 2d 1, 863 N.W.2d 592; *accord Hudson*, 522 U.S. at 104, to determine whether the sanction is "imposed . . . without regard to the defendant's state of mind," *Scruggs*, 2017 WI 15, ¶ 42; *see In re Commitment of Rachel*, 2002 WI 81, ¶ 51, 254 Wis. 2d 215, 647 N.W.2d 762. The element must appear in the text of the statute at issue itself; a statute triggered by a criminal conviction or underlying conduct that might be criminal, for example, is insufficient to meet the scienter requirement. *Scruggs*, 2017 WI 15, ¶ 42; *see Hudson*, 522 U.S. at 104; *Dye*, 355 F.3d at 1105 (finding this factor not met with respect to Wisconsin's "strict liability" tax on illegal

drugs); *see also Students for Sensible Drug Policy Found. v. Spellings*, 523 F.3d 896, 901 (8th Cir. 2008) (statute prohibiting all students convicted for the possession or sale of controlled substances from receiving federal student aid did not "come into play only on a finding of scienter").

Here, the "language of the" DNA Surcharge Statute "does not contain scienter," *i.e.*, it does not "reference" "intent" or "mental state," *Luedtke*, 2015 WI 42, ¶ 66. *Scruggs*, 2017 WI 15, ¶ 42. The statute requires a sentencing court to impose a DNA surcharge on all individuals convicted of a felony[3] "without regard to the defendant's state of mind." *Scruggs*, 2017 WI 15, ¶ 42. Stated differently, it imposes "strict liability" upon those convicted of felonies. *Dye*, 355 F.3d at 1105. Thus, no scienter element is present in the relevant provisions of Act 20.

4. *Promotes Traditional Aims of Retribution and Deterrence*. This Court also examines whether the sanction serves the purposes of retribution and deterrence. *Scruggs*, 2017 WI 15, ¶ 45. Because punishment's traditional aims are retribution and deterrence, a statute that serves these dual goals is more likely to be punitive. *See Hudson*, 522 U.S. at 101; *see also Dye*, 355 F.3d at 1104. When analyzing the retributive or deterrent effect of monetary sanctions, courts

[3] Some felonies in Wisconsin do not contain scienter requirements. *See Stern v. Meisner*, 812 F.3d 606, 608 (7th Cir. 2016); *State v. Weidner*, 2000 WI 52, ¶ 35, 235 Wis. 2d 306, 611 N.W.2d 684 ("The legislature may permissibly dispense with scienter for various strict liability offenses.").

assess the absolute amount of the fee, *Taylor v. Rhode Island*, 101 F.3d 780, 781, 783–84 (1st Cir. 1996) ($15 monthly fee "so modest" that "any conceivable retributive or deterrent effect" was "inconsequential"); *see generally Dye*, 355 F.3d at 1104–05, *and* its significance compared with the other elements of the defendant's sentence, *see Scruggs*, 2017 WI 15, ¶ 45 (citing *In re DNA Ex Post Facto Issues*, 561 F.3d at 300) ("relatively small size" of the "surcharge indicates" that it "does not serve the traditional aims of punishment"); *California v. Alford*, 171 P.3d 32, 38 (Cal. 2007). For example, this Court in *Scruggs* held that a $250 DNA surcharge is "relatively small," 2017 WI 15, ¶ 45, as did the Fourth Circuit, *see In re DNA Ex Post Facto Issues*, 561 F.3d at 300. Nominal fees—especially when added to a prison sentence of many years—are unlikely to add deterrent effect. *Alford*, 171 P.3d at 38.

Here, of course, the $250 DNA surcharge is identical to the one in *Scruggs* and the same amount as the $250 surcharge imposed in South Carolina. Moreover, Williams was sentenced to ten years' imprisonment and seven and a half years of supervised release. "It is inconceivable" that he would have decided "not to commit" the felony attempted armed robbery "had he known in advance that this [$250] fee would be imposed in addition to his [ten-year] sentence." *See Alford*, 171 P.3d at 38. Thus, the deterrent or retributive effect of the DNA Surcharge Statute is minimal.

5. *Rationally Connected to an Alternative Purpose.* A "most significant" consideration is whether the surcharge is

rationally connected to an alternative, non-punitive purpose, *Smith*, 538 U.S. at 102. *Scruggs*, 2017 WI 15, ¶ 44. In conducting this inquiry, courts look to the text of the statute, *see Hudson*, 522 U.S. at 100, and legislative history to identify the alternative purpose, *see Scruggs*, 2017 WI 15, ¶¶ 24, 47; *Mueller v. Raemisch*, 740 F.3d 1128, 1134 (7th Cir. 2014); *see also Dye*, 355 F.3d at 1104 (stating that the "legislature never expected [ ] to raise revenue" from the drug tax (citation omitted)). Then courts examine the relationship between the use of the funds collected and those who contribute them to determine whether the two are rationally connected. *See Smith*, 538 U.S. at 104; *Mueller*, 740 F.3d at 1135 (citing *In re DNA Ex Post Facto Issues*, 561 F.3d at 299–300, and *Taylor*, 101 F.3d at 782–84); *Myrie v. Comm'r, N.J. Dep't of Corr.*, 267 F.3d 251, 259, 261 (3d Cir. 2001); *see also Roark v. Graves*, 936 P.2d 245, 247 (Kan. 1997). Courts have repeatedly upheld statutes imposing fees on individuals who are responsible for some state expense.

For example, the Seventh Circuit held that a $100 annual registration fee imposed on sex offenders to "defray" the expense of the registration database did not violate the Ex Post Facto Clause. *Mueller*, 740 F.3d at 1134–35. Because the offenders were "responsible for the expense," "there [was] nothing punitive about requiring them to defray" the costs of the database. *Id.* at 1135. As the court stated, "[i]f there were no passports, there would be no passport office, and no expenses of operating such an office." *Id.*

Similarly, the Third Circuit upheld a ten percent surcharge on prison commissary items to fund New Jersey's compensation account for victims of violent crime. *Myrie*, 267 F.3d at 257, 262. Since it was eminently reasonable for the Legislature to infer that the population charged is a "cohort whose members were *in large measure accountable* for the [services] for which adequate compensation" was necessary, the surcharge was rationally connected to its alternative purpose. *Id.* at 258, 261 (emphasis added).

The First Circuit determined that retroactively imposing a $15 monthly fee on probationers and parolees to "reimburse[ ] the Department [of Corrections] for its costs" was "rationally designed to promote its legislative objective" because the probationers caused the expense. *See Taylor*, 101 F.3d at 782, 784. Thus, it did not violate the Ex Post Facto Clause. *Id.*; *see generally Tillman v. Lebanon Cty. Corr. Facility*, 221 F.3d 410, 420 (3d Cir. 2000) (a surcharge is a non-punitive fee when it "represent[s] partial reimbursement of . . . something [the charged prisoner] would be expected to pay on the outside"); *accord Roark*, 936 P.2d at 246–48 (holding that a similar monthly dollar charge on inmates as a fee for administering their trust accounts was not punitive).

And most closely on point, the Fourth Circuit held that there was nothing punitive about a $250 DNA surcharge imposed on individuals convicted of felonies in South Carolina because it "credited" the State Law Enforcement Division "to offset the expenses" it incurred "by developing DNA profiles

. . . for *law enforcement purposes*." *In re DNA Ex Post Facto Issues*, 561 F.3d at 299–300 (citations omitted, emphasis added).

In the present case, the DNA Surcharge Statute has an alternative purpose and is rationally connected to that purpose because it merely offsets the State's expenses caused by those who are charged.

First, the DNA Surcharge Statute "on its face," *see Hudson*, 522 U.S. at 100 (citation omitted), explicitly ties the $250 surcharge to an alternative purpose: the State's DNA-related activities, *see LaCrosse v. Commodity Futures Trading Comm'n*, 137 F.3d 925, 932 (7th Cir. 1998). Section 973.046(3) states that the surcharges fund the State's DNA-related activities in Section 165.77, which include (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. *See Scruggs*, 2017 WI 15, ¶¶ 24, 47 (citing *Mueller*, 740 F.3d at 1134). For example, if the police recover a gun from the scene of a felony attempted armed robbery, the State's DNA analysts will swab the gun and attempt to obtain a DNA profile from it. Once they have collected the DNA and analyzed the profile, they will check the profile against known samples in the DNA

databank. As the armed-robbery investigation proceeds, police may collect buccal swabs from potential suspects. Again, the State's DNA analysts will create DNA profiles from the buccal swabs and compare those profiles to that recovered from the gun. When the perpetrator is identified and convicted, the analysts will enter his profile into the databank for use in future investigations and criminal proceedings. These activities "are not punitive." *In re DNA Ex Post Facto Issues*, 561 F.3d at 299; *see Scruggs*, 2017 WI 15, ¶¶ 24, 47. The DNA databank is primarily a crime-solving—not punishment—tool.

Second, the Legislature rationally connected the cost of solving crimes to the commission of crimes—and to those who commit them. If there were no crimes, neither the DNA databank nor its associated expenses would exist. *See Mueller*, 740 F.3d at 1135. The Legislature reasonably regarded those convicted of felonies as the cohort "whose members were *in large measure*"—if not entirely—"*accountable*" for the State's DNA-related activities. *Myrie*, 267 F.3d at 258 (emphases added); *see also Taylor*, 101 F.3d at 782, 784; *In re DNA Ex Post Facto Issues*, 561 F.3d at 299. And the Legislature reasonably determined that those who commit more felonies contribute, in general, more to the State's crime problem and thus a greater demand for the DNA databank's many functions. Thus, the DNA Surcharge Statute is rationally connected to its non-punitive purpose.

6. *Excessive in Relation to Alternative Purpose.* If a sanction is "excessive in relation to the alternative purpose assigned," it is more likely to be punitive. *Scruggs*, 2017 WI 15, ¶ 44; *see Mueller*, 740 F.3d at 1134. To determine whether a monetary sanction is excessive, courts compare the amount of the surcharge with the state expense that the charged population caused. *See Mueller*, 740 F.3d at 1134–35; *Myrie*, 267 F.3d at 258; *Taylor*, 101 F.3d at 784 n.7; *see generally Dye*, 355 F.3d at 1104–05 ("high tax rate" of "five times the [market] value of the item taxed" is "more consistent with punishing ownership of the item than raising revenue"). Those challenging the surcharge "cannot get to first base without evidence that [the amount] is grossly disproportionate to the annual cost[s]." *Mueller*, 740 F.3d at 1134; *see also Myrie*, 267 F.3d at 261. "The 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* App. 31 (Hagedorn, J., concurring) ("Legislating is not marksmanship.").

Here, there is no evidence that a $250 DNA surcharge for each felony is "excessive" in relation to its intended non-punitive purpose. *Scruggs*, 2017 WI 15, ¶ 48. As discussed above, the DNA surcharges fund the State's DNA-related activities, including the databank. Using and maintaining a statewide database is expensive, *see id.* ¶ 47; *see also Mueller*,

740 F.3d at 1134, to say nothing of the State's other related DNA work. In 2016 alone, the State's DNA Analysis Unit received DNA evidence from 4,675 cases to investigate—some complex, and nearly half with a "public safety concern" (*e.g.*, "sexual assaults, homicides, and crimes against children"). *See* Wis. Dept. of Justice, DNA Analysis, https://goo.gl/1v442a (last visited Dec. 8, 2017). There is "no evidence" that the annual revenue from the DNA surcharges is "grossly disproportionate" to the costs of the State's DNA-related activities. *Mueller*, 740 F.3d at 1134. Accordingly, the $250 surcharge for each felony violation is not "excessive" when compared with the State's alternative purpose.[4]

7. *Applies to Behavior That Is Already a Crime.* The Ex Post Facto Clause "forbids the application of any new punitive measure to a crime already consummated." *Hendricks*, 521 U.S. at 370 (citation omitted). This factor considers whether the measure applies to a "crime" "already" consummated, *Smith*, 538 U.S. at 105, or "behavior that is already a crime,"

[4] Any argument that the surcharge could be "excessive" in an outlier case, where the number of convictions for one individual is extremely high, does not impact the Ex Post Facto Clause analysis. The United States Supreme Court has "expressly disapproved of evaluating 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*, 522 U.S. 93). Because the analysis must "begin with reference to [the statute's] text and legislative history," and the *Mendoza-Martinez* factors must be "considered in relation to the statute *on its face*," *id.* at 262 (citation omitted, emphasis added), "[a]n Act, found to be civil, cannot be deemed punitive 'as applied' to a single individual in violation of the . . . Ex Post Facto Clause[ ]," *id.* at 267.

Scruggs, 2017 WI 15, ¶ 43, to determine whether an inference that the measure is punitive is more permissible. Perhaps this is because of the "historic link between crime and punishment," *Alleyne v. United States*, 133 S. Ct. 2151, 2157 (2013); *see generally* Fyodor Dostoyevsky, *Crime and Punishment* (Random House ed. 1993), but as the *Hendricks* language itself suggests, the presence of this factor alone is insufficient to make the "measure" "punitive" in effect, 521 U.S. at 370 (citation omitted) (Ex Post Facto Clause does not forbid application of new *non-punitive* measures to crimes already committed); *see Scruggs*, 2017 WI 15, ¶ 43 (citing *Hudson*, 522 U.S. at 105). Indeed, this factor is "of little weight in" cases where the "crime" is a "necessary beginning point" for the regulatory scheme. *Smith*, 538 U.S. at 105. Courts—including this one—have repeatedly held that the mere fact that a statute charges a convicted criminal does not make it punitive in effect. *See Scruggs*, 2017 WI 15, ¶ 43; *Hudson*, 522 U.S. 93; *Mueller*, 740 F.3d 1128; *In re DNA Ex Post Facto Issues*, 561 F.3d 294; *Taylor*, 101 F.3d 780; *Myrie*, 267 F.3d 251; *Roark*, 936 P.2d 245.

Here, the DNA Surcharge Statute applies to "behavior that is already a crime," namely, a felony. *Scruggs*, 2017 WI 15, ¶ 43. But it would be unfair to impose administrative costs of criminal activity on an individual who did not commit a crime. As a result, the "crime," or conviction, is a "necessary beginning point" for the DNA surcharge because the "statutory concern" is offsetting the administrative costs of

criminal activity on the State. *Smith*, 538 U.S. at 105. Thus, the factor is "of little weight" in this case, *id.*, and cannot alone make the surcharge punitive in effect, *see Scruggs*, 2017 WI 15, ¶ 43; *see also Smith*, 538 U.S. at 105; *Hudson*, 522 U.S. at 105; *accord Hendricks*, 521 U.S. at 370.

C. That The DNA Surcharge Statute Does Not Directly Tie The Surcharge To A Particular DNA Test Does Not Render The Statute Punitive In Either Intent Or Effect

Under its own prior decisions in *Elward*, 2015 WI App 51, and *Radaj*, 2015 WI App 50, the Court of Appeals improperly focused its Ex Post Facto Clause inquiry on the lack of a one-to-one-relationship between the DNA surcharge and the cost of a single DNA test and held that this fact was dispositive for Ex Post Facto Clause purposes. App. 15, 17. With this myopic focus, the Court of Appeals failed to contextualize that fact within the "well[-]settled" framework of the *Mendoza-Martinez* factors. App. 27 (Hagedorn, J., concurring). Specifically, the lack of a one-to-one relationship between the surcharge and one DNA test does not alter the six *Mendoza-Martinez* factors that fall in the State's favor. The DNA Surcharge Statute does not impose an affirmative disability or restraint, has not historically been considered punishment, does not come into play only upon a finding of scienter, does not promote the aims of deterrence and retribution, and is rationally connected to an alternative, non-punitive purpose. *See* App. 28–31 & n.6 (Hagedorn, J.,

concurring). Thus, *Elward* and *Radaj* were incorrectly decided and should be overruled.

The Court of Appeals conceived too narrowly the State's purposes when attempting to examine whether the surcharge was rationally connected to an alternative, non-punitive purpose, as part of the sixth *Mendoza-Martinez* factor (discussed fifth *supra* Part I.B.5). App. 15; App. 31 (Hagedorn, J., concurring). The court determined that the *only* purpose for the DNA surcharge is to add Williams' individual DNA sample to the databank. App. 15 (citing *Elward* and *Radaj*). Because the State did not add Williams' DNA sample to the databank as a result of the felony conviction in this case, the court reasoned, the State received "money for nothing." App. 15 (citation omitted). But, as this Court explained in *Scruggs*, the State's purpose is far broader. 2017 WI 15, ¶¶ 43, 47; *see also* App. 31 (Hagedorn, J., concurring). The DNA Surcharge Statute *explicitly* states that the charge funds the State's DNA-related activities, not the collection of a sole individual's DNA sample to enter into the database. *See* Wis. Stat. § 973.046(3). Entering a new DNA sample into the database is but one task associated with the statute's broad purpose. If collecting and entering a new sample were the sole purpose for the surcharge, the DNA databank would be static and entirely useless. Rather, the DNA databank is continually used, maintained, and curated by law enforcement as an investigative tool.

The Court of Appeals also erroneously required 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, again under the sixth *Mendoza-Martinez* factor (discussed fifth *supra* Part I.B.5). App. 16. But no such requirement exists under that *Mendoza-Martinez* factor. The State may "legislate with respect to convict[s] . . . as a class" without undermining the rational connection between a charge and its non-punitive purpose. *Smith*, 538 U.S. at 104. The "lack of one-to-one correspondence between a particular" amount charged and an "identifiable and precisely quantifiable dollar obligation to [the State]" does "not undercut the general rationality of the attribution of accountability" that animated the state legislature. *Myrie*, 267 F.3d at 258–59. For example, in *Smith*, the United States Supreme Court upheld an Alaska statute requiring sex offenders to register for long periods of time without any individual determination of future dangerousness. *See* 538 U.S. at 103. Various courts have upheld statutes charging those under correctional supervision flat fees without regard to how expensive it was to supervise any given individual. *See Taylor*, 101 F.3d at 782, 784 & n.8; *see generally Roark*, 936 P.2d 245; *Taylor v. Sebelius*, 189 F. App'x 752, 755, 757 (10th Cir. 2006) (unpublished) ($25 monthly supervisory fee imposed on Kansas parolees). In fact, even the presence of some individuals not responsible for any State expense in the pool

of those charged is insufficient to push this factor in the defendant's favor. For example, a New Jersey law adding a surcharge to prison commissary items to fund state compensation for victims of violent crime was rationally connected to that purpose even though it might charge people convicted of non-violent crimes or those awaiting trial. *See Myrie*, 267 F.3d at 258–59.

Here, the Legislature chose to offset the costs of the DNA databank by charging those responsible for its creation and on-going use: people convicted of crimes. Even if Williams' felony attempted armed robbery might have not caused any DNA-related activity, that does not undercut the "general rationality of the attribution of accountability" that animated the Legislature. *Myrie*, 267 F.3d at 259. 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. *See Smith*, 538 U.S. at 104.

And while the Court of Appeals was correct that *Elward*, 2015 WI App 51, and *Radaj*, 2015 WI App 50, supported its one-to-one ratio approach to the Ex Post Facto Clause, that only shows that those cases should be overruled.

In *Elward*, the Court of Appeals held that the imposition of a $200 DNA surcharge on a misdemeanant violated the Ex Post Facto Clause because the statute prohibited the State from collecting a DNA sample from

Elward at that time.[5] 2015 WI App 51, ¶ 7. *Elward* erred in requiring a one-to-one relationship between the surcharge and a specific DNA test to get one individual's sample and failing to conduct the analysis guided by the *Mendoza-Martinez* factors. As discussed above, the State does not collect the DNA surcharge from offenders to process their individual DNA tests. The State collects the DNA surcharge to fund *all* of the State's DNA-related activities. Entering a new sample into the databank is but one small part of the State's DNA-related activities. Thus, the surcharge is "a fee to support the financial cost of a DNA database," *id.* ¶ 2, even if a particular individual's sample is not collected, *see* App. 30 (Hagedorn, J., concurring).

Radaj, in turn, held that a $1,000 DNA surcharge for four felony convictions violated the Ex Post Facto Clause because the defendant submitted only one DNA sample. 2015 WI App 50, ¶¶ 31, 35. *Radaj* is wrong because it failed to identify how the surcharge was rationally connected to its intended purpose under the same *Mendoza-Martinez* factor. In that case, the Court of Appeals determined that the retroactive imposition of a $250 DNA surcharge for each of the defendant's four felony convictions violated the ex post facto clause because he would need to provide only one DNA sample. The *Radaj* court could not think of a "rational" reason

[5] The statute required circuit courts to impose the charge beginning January 1, 2014, but courts could not order the DNA sample until April 1, 2015. *Elward*, 2015 WI App 51, ¶ 2.

for "calculating the DNA surcharge on a per-conviction basis." *Id.* ¶ 29. Thus, it held, the surcharge was punitive. *Id.* ¶ 35. However, given the State's purpose for the DNA Surcharge Statute, there is a rational reason why the DNA surcharge would increase with the number of felony convictions: the number of convictions is directly related to the number of crimes an individual committed. And investigating multiple crimes is, as a general matter, more expensive than investigating a single crime from a DNA databank point of view. In other words, "it is perfectly reasonable to say that someone who has committed four felonies should be assessed" at a higher level than someone who committed one. *See* App. 30 (Hagedorn, J., concurring). 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. *See, e.g.*, *Mueller*, 740 F.3d at 1135; *In re DNA Ex Post Facto Issues*, 561 F.3d at 299–300; *Taylor*, 101 F.3d at 784; *Myrie*, 267 F.3d at 258.[6]

[6] The only two out-of-state cases that *Radaj* cited to support its conclusion similarly failed to conduct properly the required *Mendoza-Martinez* analysis. *See* 2015 WI App 50, ¶ 28 (citing *Colorado v. Stead*, 845 P.2d 1156 (Colo. 1993) and *California v. Batman*, 71 Cal. Rptr. 3d

CONCLUSION

The decision of the Court of Appeals should be reversed.

591 (Cal. Ct. App. 2008)). *Stead* and *Batman* held that, because the monetary sanctions at issue increased in proportion to the defendant's culpability or the severity of his offense, their imposition violated the Ex Post Facto Clause. *Batman*, 71 Cal. Rptr. 3d at 593–94; *Stead*, 845 P.2d at 1160. 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). If the surcharge is *also* "reasonably related to" the State's non-punitive purpose, it survives an ex post facto challenge. *Id.* Here, the amount of the DNA surcharge is "reasonably related to" the cost of the State's DNA-related activities. Simply put, investigating four crimes is more expensive than investigating one. Thus, the imposition of the DNA surcharge on a per-conviction basis is insufficient to make the statute punitive in effect. *See id.*

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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 8,181 words.

Dated: December 11, 2017.

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