Appeal No. 2015AP2525-CR **Cir. Ct. No. 2014CF950**

WISCONSIN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TYDIS TRINARD ODOM,

DEFENDANT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2015-16),[1] this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUES

In determining whether the imposition of multiple DNA surcharges constitutes "potential punishment" under WIS. STAT. § 971.08(1)(a) so that a court must advise a defendant about the surcharges before a valid plea may be taken, is the "intent-effects" test, as applied in ***State v. Radaj***, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758, and ***State v. Scruggs***, 2017 WI 15, 373 Wis. 2d

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

312, 891 N.W.2d 786, to ex post facto claims, the same analysis that was applied in ***State v. Bollig***, 2000 WI 6, ¶16, 232 Wis. 2d 561, 605 N.W.2d 199, to a plea withdrawal claim?

If the analysis is the same, should ***Radaj*** be overruled in light of the supreme court's recent decision in ***Scruggs***?

We note that we previously certified the issue of whether multiple DNA surcharges constituted "potential punishment" under WIS. STAT. § 971.08(1)(a), such that a court's failure to advise a defendant about them before taking his or her plea establishes a prima facie showing that the defendant's plea was unknowing, involuntary, and unintelligent. The supreme court declined to accept certification.

We certify again because, as explained below, the supreme court's recent decision in ***Scruggs*** now suggests that the ex post facto analysis of ***Radaj***, holding that multiple DNR surcharges are "punishment," was incorrect.

BACKGROUND

Odom was charged with two counts of second-degree sexual assault, kidnapping, and substantial battery based on allegations that, on March 11, 2014, he had beaten A.S.F., driven her to his uncle's house, and then had sexual contact with her without her consent.

On the day of trial, A.S.F. did not appear. The State made a new plea offer to Odom.[2] The State would amend the complaint to charge false

[2] At the final pretrial conference, Odom had rejected the State's plea offer.

imprisonment instead of kidnapping and two counts of fourth-degree sexual assault instead of second-degree sexual assault. Odom could plead guilty to substantial battery and false imprisonment and plead no contest to the two counts of fourth-degree sexual assault. The State would not file a charge of felony intimidation of a witness by a person charged with a felony. The State would recommend a sentence at the court's discretion.

The court advised Odom of the maximum penalties he was facing if he was convicted after trial versus if he accepted the plea offer. On the former, Odom was facing twenty-five years of initial confinement and fifteen years of extended supervision on each count of second-degree sexual assault and the count of kidnapping, along with fines of $100,000 for each count, and one-and-one-half years of initial confinement and two years of extended supervision, and a fine of $10,000 on the count of substantial battery. On the latter, Odom was facing nine months in jail and a $10,000 fine on each count of fourth-degree sexual assault; three years of initial confinement and three years of extended supervision, and a $10,000 fine on the count of false imprisonment; and one-and-one-half years of initial confinement and two years of extended supervision, and a fine of $10,000 on the count of substantial battery. In addition, the court noted, if Odom accepted the plea offer he would not have to register as a sex offender and he would not be subject to possible confinement, following his release from prison, as a sexually violent person. Thus, the plea offer reduced Odom's exposure from one hundred twenty-three-and-one-half years of confinement and $310,000 in fines to eleven years of confinement and $40,000 in fines.

Odom asked if "people in sexual assault cases [were] … eligible for boot camp or anything like that?" The court answered, "[y]ou could be eligible for boot camp and I believe for substance abuse … [the] Court would have to look

at all the factors. And I also have to have a substance abuse issue need to be addressed for both of those programs."

After further discussion, Odom accepted the State's plea offer. Following a colloquy, the court accepted Odom's pleas of guilty and no contest.

At sentencing, the following day, defense counsel requested four years of probation. In arguing for that sentence, counsel said that Odom was exposed to "a lot of drug usage in the family" and that "he smoked marijuana a lot … as a teenager."[3] The court imposed aggregate concurrent and consecutive sentences totaling five years and three months of initial confinement, followed by five years of extended supervision. The court imposed the DNA surcharge on all four counts, totaling $900. It also imposed the applicable penalty assessment, surcharges, and costs on each count. The court found that Odom was not eligible for the Challenge Incarceration Program or the Substance Abuse Program.

Subsequently, Odom moved to vacate his conviction, arguing that his plea was not entered knowingly, voluntarily, and intelligently because the circuit court misinformed him that he was statutorily eligible for the Challenge Incarceration Program and the Substance Abuse Program. Odom was statutorily ineligible for those programs because all of his convictions involved violations of WIS. STAT. ch. 940. Had he been accurately informed, Odom asserted, he would not have agreed to plead guilty/no contest.

The circuit court denied Odom's motion. Reviewing the transcript from the plea, the court noted that all Odom was told was that he could be eligible

[3] Odom was eighteen years old when he committed these offenses.

for these programs, which denoted a possibility, not an automatic given, and Odom's claimed reliance on a possibility was not enough to warrant the withdrawal of his plea.

Following this court's decision in ***Radaj***, 363 Wis. 2d 633, Odom supplemented his prior motion to vacate his plea by arguing that the imposition of a DNA surcharge for each conviction constituted a punishment, that the circuit court never informed him of that punishment before accepting his plea and, therefore, his plea was not entered knowingly, voluntarily, and intelligently.

The circuit court denied Odom's supplemental motion. The circuit court distinguished ***Radaj*** and concluded that the $900 surcharge was not a punishment. Therefore, the circuit court did not have to inform Odom about the surcharge, and he was not entitled to withdraw his plea. Odom appeals from the judgments of conviction and the orders denying his motions for postconviction relief.[4]

Odom contends that his plea was not entered knowingly, voluntarily, and intelligently on two grounds. First, the court neglected to advise him at the plea hearing that when he was sentenced the court would impose four DNA surcharges, in violation of the court's mandatory duty to ensure the defendant was aware of the "potential punishment" under WIS. STAT. § 971.08(1)(a).[5] Second, Odom contends the court misinformed him at the plea hearing that he could be

[4] The court entered two judgments and then amended them.

[5] WISCONSIN STAT. § 971.08(1)(a) provides that before the court accepts a plea of guilty or no contest, it shall "[a]ddress the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted."

eligible for the Challenge Incarceration Program and the Substance Abuse Program. We first discuss the general law regarding plea withdrawal common to both of Odom's claims and then the law on plea withdrawal specific to Odom's two challenges.

The Law on Withdrawing a Guilty Plea Common to Both of Odom's Claims

"When a defendant seeks to withdraw a guilty plea after sentencing, he must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in 'manifest injustice.'" ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906 (citation omitted). "A manifest injustice occurs when there has been a 'serious flaw in the fundamental integrity of the plea.'" ***State v. Cross***, 2010 WI 70, ¶42, 326 Wis. 2d 492, 786 N.W.2d 64 (citation omitted). One way to show a manifest injustice is to establish that a guilty or no contest plea was not entered knowingly, voluntarily, and intelligently. ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 635-36, 579 N.W.2d 698 (1998). "When a guilty plea is not knowing, intelligent, and voluntary, a defendant is entitled to withdraw the plea as a matter of right because such a plea 'violates fundamental due process.'" ***State v. Finley***, 2016 WI 63, ¶13, 370 Wis. 2d 402, 882 N.W.2d 761 (citations omitted).[6]

[6] In order to be entitled to withdraw a guilty plea, a defendant must establish a prima facie case showing that the circuit court violated WIS. STAT. § 971.08 or other court-mandated duties and allege that the defendant did not know or understand the information that the circuit court should have provided at the plea hearing. *See* ***State v. Taylor***, 2013 WI 34, ¶32, 347 Wis. 2d 30, 829 N.W.2d 482. Once that showing is made, the defendant is entitled to an evidentiary hearing where the burden is on the State to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered despite the inadequacy of the record at the plea hearing. ***Id.*** If the State fails to meet its burden at the evidentiary hearing, the defendant is entitled to withdraw his plea as a matter of right. ***State v. Finley***, 2016 WI 63, ¶92, 370 Wis. 2d 402, 882 N.W.2d 761.

Whether a plea was entered knowingly, voluntarily, and intelligently presents a question of constitutional fact. ***State v. Bangert***, 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986). The circuit court's findings of historical fact will not be disturbed unless clearly erroneous. ***State v. Byrge***, 2000 WI 101, ¶55, 237 Wis. 2d 197, 614 N.W.2d 477. However, the application of the law to the historical facts is reviewed de novo. ***Id.*** Since both of Odom's claims involve alleged ***Bangert*** violations, both of which were denied without a hearing, the question of whether he has pointed to a deficiency in the plea colloquy so as to establish a prima facie ***Bangert*** violation is a question of law, which, on appeal, is reviewed de novo. ***Brown***, 293 Wis. 2d 594, ¶21.

The Law on Withdrawing a Guilty Plea Specific to the Failure to Advise of a Potential Punishment

Prior to January 1, 2014, outside certain specified felony violations, the imposition of a $250 DNA surcharge for a felony conviction was discretionary. *See* WIS. STAT. § 973.046(1g) (2011-12). Effective January 1, 2014, however, the law changed to require imposition of the DNA surcharge "[f]or each conviction for a felony, $250," and "[f]or each conviction for a misdemeanor, $200." Sec. 973.046(1r). Thus, in this instance, where Odom was convicted of two felonies and two misdemeanors, which were committed after January 1, 2014, the court imposed $900 in DNA surcharges.

Odom argues that the imposition of multiple DNA surcharges constitutes "potential punishment" under WIS. STAT. § 971.08(1)(a). He contends that the court's failure to advise him about the multiple surcharges before taking his plea establishes a prima facie showing that his plea was unknowing, involuntary, and unintelligent.

A knowing, voluntary, and intelligent plea requires, among other things, that the defendant be made aware of the "potential punishment" before entering a guilty or no contest plea. WIS. STAT. § 971.08(1)(a); ***State v. Bollig***, 2000 WI 6, ¶16, 232 Wis. 2d 561, 605 N.W.2d 199. Thus, the threshold question here is "whether [the imposition of a DNA surcharge for each conviction] constitutes *punishment*." ***Bollig***, 232 Wis. 2d 561, ¶16 (emphasis added); *see* ***State v. Dugan***, 193 Wis. 2d 610, 618, 534 N.W.2d 897 (Ct. App. 1995) ("The threshold question is whether restitution is *punishment.*"). In addition, the consequence must be direct: "definite, immediate, and largely automatic." *See* ***Bollig***, 232 Wis. 2d 561, ¶16. Stated succinctly, the test for a direct consequence, as compared to collateral, is "whether the result represents a definite, immediate, and largely automatic effect on the … defendant's [potential] *punishment*." ***Dugan***, 193 Wis. 2d at 618 & n.4 (citation omitted) ("[E]ven if restitution is 'definite, immediate, and largely automatic' … it is not a mandatory component of a valid plea colloquy … if it is not punishment." (citation omitted)); *see* ***Byrge***, 237 Wis. 2d 197, ¶68 ("Parole eligibility in this discrete situation implicates punishment *and* constitutes a direct consequence of the plea." (emphasis added)).

In ***Dugan***, 193 Wis. 2d at 618-19, we addressed whether restitution is punishment. We rejected the defendant's notion that the answer turned on whether the restitution worked a rehabilitative or punitive effect. ***Id.*** at 619-20. Such a distinction was too simplistic since sentencing provisions such as incarceration, inpatient drug treatment, and restitution have components of both rehabilitation and punishment. ***Id.*** at 620. Thus, even though restitution could have a punitive effect, appropriating the offender's money or property to pay the victim, this only begged the question. ***Id.*** "[T]he fundamental purpose of the sentencing provision at issue" is what is dispositive. ***Id.*** In concluding "that the

primary and fundamental goal of restitution is the rehabilitation of the offender," we found persuasive the fact that the legislature did not list restitution as a potential penalty for any classification of crime or forfeiture, the plain meaning of the word restitution, and the purpose behind restitution, that being to strengthen the offender's sense of responsibility and to compensate the victim for the loss suffered. ***Id.*** at 620-23.

In ***Bollig***, 232 Wis. 2d 561, ¶16, the supreme court was asked to "determine whether the [sex offender] registration requirement constitutes punishment." The supreme court said that the question turned on whether the requirement was "one that has a definite, immediate, and largely automatic effect on the range of defendant's punishment." ***Id.***, ¶16. In making that assessment, the court looked primarily to the underlying intent of the registration requirement, along with considerations of the punitive effects. ***Id.***, ¶¶20-26. The intent of the legislature, the court said, was "to protect the public and assist law enforcement," not "to punish sex offenders." ***Id.***, ¶21. While the registration requirement, which, for example, results in the release of an offender's information and the offense committed, "can work a punitive effect" such as vandalism, loss of employment, and community harassment, this did not "override[]" or "obviate" "the primary and remedial goal" of the registration requirement "to protect the public." ***Id.***, ¶26; *see* ***id.***, ¶20 (noting that other "[c]ourts have concluded that the remedial goal of protecting the public outweighs any punitive effect of registration"). Thus, the supreme court concluded, the duty to register was not punishment and thus, it did not represent a direct consequence of the defendant's no contest plea. Rather, it was a collateral consequence as it did not affect the potential punishment, and Bollig did not have a due process right to be informed of collateral consequences prior to entering his plea. ***Id.***, ¶27.

Bollig and ***Dugan*** both look to identify the primary and fundamental purpose of the provision at issue. These cases counsel that a law can have punitive effects, but still not be a "potential punishment" under WIS. STAT. § 971.08(1)(a). Simply because a surcharge has punitive effects does not necessarily mean that it constitutes a criminal penalty.

Radaj *and* ***Scruggs****—The Ex Post Facto Analysis*

Odom relies on two recent cases, ***Radaj*** and ***Scruggs***, which addressed whether the imposition of the DNA surcharge constitutes punishment for ex post facto purposes—given the change from a discretionary surcharge to a mandatory surcharge on a per conviction basis for felonies. ***Scruggs***, 373 Wis. 2d 312, ¶¶14-15. Both cases addressed the intent and effect of the DNA surcharge.

In ***Radaj***, the defendant challenged the imposition of a $1000 DNA surcharge—$250 for each of his four felony convictions—as a violation of the constitutional prohibition against ex post facto laws because he committed the crimes that led to his conviction prior to when the new law took effect. ***Radaj***, 363 Wis. 2d 633, ¶¶3, 11, 12 ("[A]n ex post facto violation occurs if a law 'inflicts a greater punishment than the law annexed to the crime at the time it was committed." (citation omitted)).

In resolving that question, we outlined the two-part intent-effects test for an ex post facto violation: first, whether the legislature's intent was to punish or to impose a civil nonpunitive regulatory scheme. ***Id.***, ¶¶13-14. If the latter, a court must next determine whether the sanctions imposed by the law are so punitive either in purpose or effect so as to transform what was clearly intended as a civil remedy into a criminal penalty. ***Id.*** at ¶14 "[O]nly the 'clearest proof' will convince [a court] that what a legislative body has labeled a civil remedy is, in

effect, a criminal penalty." ***Radaj***, 363 Wis. 2d 633, ¶14 (quoting ***City of South Milwaukee v. Kester***, 2013 WI App 50, ¶22, 347 Wis. 2d 334, 830 N.W.2d 710).

In ***Radaj***, we did not decide the legislature's intent behind the new law. Instead, we assumed without deciding that the legislature's intent was to impose a civil nonpunitive regulatory scheme. ***Id.***, ¶22. We did not need to decide this question because we concluded that the new law as applied to the defendant had a punitive effect. ***Id.***

In coming to that conclusion, we listed seven nonexhaustive factors:

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

Id., ¶14, (alteration in original) (quoting ***State v. Rachel***, 2002 WI 81, ¶43, 254 Wis. 2d 215, 647 N.W.2d 762).

Although we discussed some of the factors briefly and focused on the fourth, sixth, and seventh factors, ultimately, we decided the case on the sixth and seventh factors, holding that multiple surcharges were "not rationally connected and [were] excessive in relation to the surcharge's intended purpose." ***Radaj***, 363 Wis. 2d 633, ¶35. We could perceive of no reason why the DNA surcharge should be based on the number of convictions. ***Id.***, ¶¶29-30. "As is clear from the statutes," we said, "the DNA surcharge is used to cover the cost of the DNA '*analysis'* of the biological specimen that the circuit court must order a defendant to provide at the time the court orders the surcharge," but we did not

"see any link between the initial DNA analysis and the number of convictions." ***Id.***, ¶31 (emphasis added).

We noted that other costs might arise later, such as "the cost of comparing the defendant's DNA profile to the DNA profile of other biological specimens collected as part of a future investigation," but, again, we could "conceive of no reason why such costs would generally increase in proportion to the number of convictions, let alone in direct proportion to the number of convictions." ***Id.***, ¶32.

We acknowledged that the burden was on the defendant "to show by the 'clearest proof' that there [was] no rational connection between the method of calculating the surcharge and the costs the surcharge is intended to fund." ***Id.***, ¶34 (citation omitted). We further acknowledged that the defendant "did not attempt to present affirmative evidence" so as to meet his burden. ***Id.*** But, we thought this of no moment since the State had provided us with nothing and we had the benefit of "the statutory language and common sense." ***Id.*** Thus, we concluded that "the new DNA surcharge statute is not rationally connected and is excessive in relation to the surcharge's intended purpose, and that its effect is to serve traditionally punitive aims," giving it a "punitive effect" as applied to the defendant. ***Id.***, ¶35.

Shortly thereafter, we were presented with a question left unanswered by ***Radaj***: is a single mandatory $250 DNA surcharge for a felony conviction for a crime committed before the change in the law an ex post facto violation? ***State v. Scruggs***, 2015 WI App 88, ¶¶7, 9, 365 Wis. 2d 568, 872 N.W.2d 146. Applying the intent-effects test, we held that Scruggs had failed to demonstrate beyond a reasonable doubt that the $250 DNA surcharge for a single

felony conviction constitutes punishment and thus, violates the ex post facto clauses in the United States and Wisconsin Constitutions. ***Id.***, ¶19.

The supreme court granted review and affirmed our decision in ***Scruggs***. ***Scruggs***, 373 Wis. 2d 312, ¶3. It held that the legislature did not intend to punish, pointing to the legislature's use of the term "surcharge"; the placement of the DNA surcharge in WIS. STAT. ch. 814; the legislature's dedication of the funds collected as a result of the DNA surcharge law to the collection, analysis, and storage of DNA profiles; legislative history indicating that the DNA surcharge would provide funding for the collection and analysis of DNA samples together with the maintenance of the DNA databank; and the lack of proof from Scruggs showing that the $250 surcharge was "grossly disproportionate to the cost of collecting, analyzing, and maintaining DNA specimens." ***Scruggs***, 373 Wis. 2d 312, ¶¶21-27, 38.

Further, the form and effect of the law was not so punitive so as to transform the $250 DNA surcharge into punishment despite the legislature's contrary intent. ***Id.***, ¶¶39, 49. The only factor that cut in Scruggs' favor was that the surcharge already applied to behavior that was a crime, but "this fact is insufficient to render a monetary penalty criminally punitive." ***Id.***, ¶43. Otherwise, the DNA surcharge does not impose an affirmative disability or restraint, has not historically been considered a punishment, does not have a scienter requirement, does not serve the traditional aims of punishment, and there was nothing to suggest that the single DNA surcharge was excessive or bore no relation to the costs it was intended to compensate. ***Id.***, ¶¶42, 45, 48.

In reaching that conclusion, the supreme court, like we did, stressed many times that the surcharging of defendants was designed not only to fund the

collecting and analyzing of DNA samples but also to maintaining them. ***Id.***, ¶¶24-27, 30, 47-48.

Are We Bound to Apply the Intent-Effects Test in Determining Whether Multiple DNA Surcharges are Punishment?

While Odom concedes there is no ex post facto violation here, he nevertheless argues that "***Radaj***'s conclusion that the surcharge is a punishment still applies." The circuit court's reliance on ***Scruggs***, Odom argues, was misplaced because Scruggs had only one conviction and, thus, only one surcharge of $250, whereas Odom has multiple convictions, making his case "like ***Radaj***." Since the multiple surcharges are punishment, Odom argues, he had to be informed that they would be imposed before he could knowingly, voluntarily, and intelligently enter a guilty/no contest plea.

The State argues that ***Radaj*** is not controlling, implicitly suggesting that ***Bollig*** and ***Dugan*** set forth a different analysis than the ex post facto intent-effects test.

As we have outlined above, as is the case in the ex post facto "effects" analysis, ***Bollig*** and ***Dugan*** considered both the intent and effects of a law in determining whether the law was a "potential punishment" for purposes of a plea. ***Bollig***, 232 Wis. 2d 561, ¶¶26-27; ***Dugan***, 193 Wis. 2d at 619-20. There are aspects of ***Bollig*** and ***Dugan*** that are both similar and different from the intent-effects test used in ***Radaj*** and ***Scruggs***.

The intent-effects test appears to have its origin in ***Kennedy v. Mendoza-Martinez***, 372 U.S. 144, 168, 180 (1963). Over time, the United States Supreme Court has continued to refine this test, applying it to different contexts outside claims of violations of the prohibition against ex post facto laws. *See*

Hudson v. United States, 522 U.S. 93, 98-100 (1997) (claim that criminal prosecution, following administrative proceedings, involving essentially the same misconduct violated Fifth Amendment prohibition against double jeopardy); ***Kansas v. Hendricks***, 521 U.S. 346, 350, 368-71 (1997) (claim that civil commitment statute violated constitutional prohibitions against ex post facto laws and double jeopardy); ***United States v. Ward***, 448 U.S. 242, 244, 248-50 (1980) (claim that penalty was a criminal punishment, implicating Fifth Amendment protection against compulsory self-incrimination in a criminal case); ***Bell v. Wolfish***, 441 U.S. 520, 537-538 (1979) (considering whether pretrial detention is "punishment" for purposes of constitutional due process analysis). Indeed, the United States Supreme Court has said that the punitive effects factors outlined in ***Mendoza-Martinez*** "are designed to apply in various constitutional contexts." ***Smith v. Doe***, 538 U.S. 84, 97 (2003). But, because the ***Mendoza-Martinez*** factors are applied in various constitutional contexts, those factors are only "useful guideposts;" "they are neither exhaustive nor dispositive." ***Smith***, 538 U.S. at 97 (citations omitted).

Bollig cited to ***State v. McMaster***, 206 Wis. 2d 30, 46-47, 556 N.W.2d 673 (1996), a double jeopardy case that cited to ***United States v. Ward***, and can be construed as applying a version of the intent-effects test—whether the punitive effects negate the intent. But, ***Bollig***, like ***McMaster***, did not list the ***Mendoza-Martinez*** factors. ***Bollig*** also noted and cited to cases from other jurisdictions looking at the sex offender registration requirement under ex post facto, double jeopardy, and bill of attainder analyses. ***Bollig***, 232 Wis. 2d 561, ¶¶17, 20 (citing ***Ray v. State***, 982 P.2d 931, 935-36 (Idaho 1999)); ***State v. Ward***, 869 P.2d 1062 (Wash. 1994) (discussed below).

As we have said, ***Bollig*** and ***Dugan*** (sex offender registration and restitution) considered both the intent of the law and the punitive effects it had on the defendant in determining the primary or fundamental goal of the law. The intent-effects analysis asks whether the punitive effect transforms the law into a punishment despite the legislature's contrary intent. Both analyses consider the intent and the effects of the law. ***Bollig***, which cited favorably to ***Dugan***, incorporated some of the language of the ex post facto intent-effects analysis, such as that the effects must "override" the intent or goal of the law, which may suggest that the courts in ***Bollig*** and ***Dugan*** were applying the ex post facto intent-effects analysis.

In any event, the nonexhaustive and nondispositive factors of ***Mendoza-Martinez*** are arguably equally relevant and useful to determine whether a law with a punitive effect is a "punishment" in any constitutional context. Ultimately, all the factors aim to discern the purpose of the law—and whether the punitive effects override the legislative intent: (1) whether the law imposes an affirmative disability or restraint, (2) has historically been considered a punishment, (3) has a scienter requirement, (4) serves the traditional aims of punishment, (5) whether the behavior to which it applies is already a crime, (6) has an alternative purpose, and (7) is excessive in relation to the alternative purpose? *See* ***Rachel***, 254 Wis. 2d 215, ¶43.

Indeed, although the court in ***Bollig*** did not explicitly discuss the "effects" factors of the intent-effects analysis, one could argue that the "guidepost" information can be found in the court's decision. There, the court noted that (5) the behavior to which the sexual offender registration requirement applied was already a crime—convicted sex offenders. The discussion of the statute made clear that registration (3) did not have a scienter requirement and (2) there was

nothing to indicate that it had historically been considered a punishment. The court acknowledged (1) the affirmative restraints (the requirement to register). The court explicitly found registration (4) did not operate to promote the aims of punishment (retribution and deterrence), but rather, served the (6) nonpunitive alternative purpose of protecting the public (remedial). And, ultimately, (7) the impact on the defendant, in harassment, loss of employment and humiliation, retaliation and ostracism, was not excessive in relation to the purpose of protecting the public.

Similarly, in ***Dugan***, the court explicitly found that (1) restitution imposed an affirmative disability—appropriating the offender's money or property to pay the victim. After extensively considering the restitution statute, its history and case law, the court concluded that restitution (2) has not historically been considered a punishment. The court found that restitution's (4) operation does not promote the traditional aims of punishment (retribution and deterrence). Rather, the operation is to engender a sense of responsibility for the defendant (rehabilitation) and to compensate the victim (compensation). Similarly, the court thoroughly considered the purpose of restitution, and concluded that (6) purpose rationally connected with restitution is nonpunitive. Victim reimbursement for damages is (7) not excessive in relation to the nonpunitive purpose to compensate. The court noted that a sentencing court should order restitution "in addition to any other penalty," establishing that (5) the behavior to which restitution applied was already a crime. Finally, the court's discussion of restitution made it clear that (3) it does not have a scienter requirement.

Arguably, in both cases, the courts effectively concluded that the defendant failed to show by "the clearest proof"' that the factors indicating a punitive effect overrode the legislative intent so as to "transform what has been

denominated a civil remedy into a criminal penalty." ***Hudson***, 522 U.S. at 100 (citation omitted).

In short, both ***Bollig*** and ***Dugan*** emphasized the purpose of the law and touched on the punitive effects of the law. By omitting any mention of the ***Mendoza-Martinez*** factors, and focusing on the "primary" goal of the law, were these courts including or excluding an analysis looking at all of these factors?

Reasonable arguments on both sides can be made regarding the proper test. It may be that the differing constitutional provisions should dictate differing analyses. Plea withdrawal rests on a defendant understanding what "range of punishments" he or she might be facing—with eyes wide open—in order to knowingly waive his or her constitutional rights. This, as explained above, is based on the Due Process Clause of the Fourteenth Amendment. And due process does not require that a defendant be informed of every consequence of his or her plea; such prescience is not required of circuit courts. *See* ***Byrge***, 237 Wis. 2d 197, ¶61. The Ex Post Facto Clause, however, ensures that defendants are not punished for something that was not a crime when they did it, or punished more severely than one would have been when the alleged crime was committed. ***Weaver v. Graham***, 450 U.S. 24, 28 (1981). It may be that in light of the constitutional prohibition against "any ex post facto law," it makes sense to view as more suspect any measure with either a punitive purpose or substantial, overriding punitive effects. Moreover, courts sometimes fall into doctrinal disarray by appropriating an analytical framework from one body of law into another without the requisite scholarly scrutiny. On the other hand, as noted above, the United States Supreme Court has applied the same intent-effects test and its various factors "in various constitutional contexts." ***Smith v. Doe***, 538 U.S. 84, 97 (2003) (explaining that the intent-effects test "migrated into our ex

post facto case law from double jeopardy jurisprudence" and has its "origins in cases under the Sixth and Eighth Amendments, as well as the Bill of Attainder").

One might surmise that analogous cases in other jurisdictions would reveal a consistent approach to this basic constitutional question—one that occurs in courts around the country every day. Not so. This court's review reveals a hodgepodge of analyses that run the gamut.

Some courts explicitly incorporate the intent-effects analysis into the plea withdrawal context.[7] ***Ward***, a Washington case cited by many other courts, made no bones about adopting the intent-effects test and using it to conclude that a sex offender registry is not punitive, and therefore not a direct consequence of the plea. ***Ward***, 869 P.2d at 1075-76.[8] One case from Pennsylvania discussed the rationale for adopting this approach with some specificity. It noted:

> Pennsylvania case law has developed through a succession of cases setting guideposts to determine whether a newly-enacted provision provides civil or penal consequences. These guideposts have been used predominantly to determine ex post facto consequences.

[7] Along with the myriad of state approaches to the issue, we note that the Federal Rules of Criminal Procedure add another layer of analysis. The Rules dictate that there are certain consequences of the plea that "the court must inform the defendant of." Fed. R. Crim. P. 11(b)(1). Among other things, the court must inform the defendant of the maximum penalty, including prison, fines, and supervised release, any mandatory minimum penalty, any forfeiture, the ability of the court to order restitution, and the court's obligation to impose a special assessment. Fed. R. Crim. P. 11(b)(1)(H), (I), (J), (K), (L). The Rules additionally contain a "harmless error" rule. Fed. R. Crim. P. 11(h). Thus, a court's variance from the plea colloquy requirements of Rule 11 does not warrant vacating the plea if the error does not affect the defendant's "substantial rights." ***Id.***

[8] *See also, e.g.*, ***Kaiser v. State***, 641 N.W.2d 900, 905 (Minn. 2002) (relying on the ***Mendoza-Martinez*** factors and concluding that the sex offender registry was a collateral consequence of the plea because it was not punitive); ***Commonwealth. v. Leidig***, 850 A.2d 743, 747 (Pa. 2004) (applying the intent-effects test to conclude that sex offender registration was not punishment).

> Determination of ex post facto consequences and constitutionally effective counsel both address due process concerns, and as such, there is no reason why an analysis used in one situation cannot be used in the other. Specifically, a consequence that is punitive in nature implicates ex post facto applications and punitive consequence is also a determining factor when considering [in ineffectiveness of counsel for failing to inform of the consequences of a guilty plea].

Commonwealth v. Abraham, 996 A.2d 1090, ¶11, (Pa. Sup. Ct. 2010), *rev'd*, 62 A.3d 343 (Pa. 2012).

A number of other courts touch on both the intent and effects in varying degrees, but do not explicitly incorporate an ex post facto-type analysis. The Idaho Supreme Court took this approach in finding its sex offender registry nonpunitive by discussing the sex offender registry's purpose and effect generally, but not citing ***Mendoza*** factors or otherwise indicating it was applying the intent-effects test. ***Ray***, 982 P.2d at 936.[9] The Wisconsin Supreme Court's decision in ***Bollig*** could be described as fitting into this category.

Other courts seem to employ a test that is more intent focused, with only a tip-of-the-cap at best to any punitive effects. The Colorado Court of Appeals followed this approach holding the sex offender registration requirement nonpunitive by examining its purpose as a public safety measure. ***People v. Montaine***, 7 P.3d 1065, 1067 (Colo. App. 1999) (sex offender registry did not have a direct effect on punishment because "the General Assembly's stated intent

[9] *See also, e.g.*, ***State v. Moore***, 86 P.3d 635, 643 (N.M. Ct. App. 2004) (concluding that New Mexico's sex offender registration act was "primarily remedial in purpose and effect," relying on ***State v. Druktenis***, 86 P.3d 1050, 1059 (N.M. Ct. App. 2004), an intent-effects case); ***Nollette v. State***, 46 P.3d 87, 91 & n.20 (Nev. 2002) (concluding that the sex offender registry was not a punishment and citing ***Mendoza-Martinez*** as helpful factors for examining the punitive effects).

is to afford the public with 'limited access to information concerning persons convicted of offenses involving sexual behavior' as a public safety measure" (citation omitted)). This court's decision in ***Dugan*** follows similar logic.

Though difficult to categorize, the Missouri Court of Appeals explicitly rejected the application of the intent-effects ex post facto analysis in determining its sex offender registry was a collateral consequence, and not a direct consequence. ***Ramsey v. State***, 182 S.W.3d 655, 661 (Mo. Ct. App. 2005). Instead, it found the intent-effects analysis to be instructive, but not identical or determinative. ***Id.*** at 659-661. It said the test for whether a consequence was direct or collateral was "more restrictive." ***Id.*** at 661.[10]

Some courts have a much different sense of what the "punishment" inquiry is all about. These courts appear to define the "range of punishments" attendant to a plea as referring only to the sentence itself or other clearly criminal penalties imposed by the court. For example, in ***State v. Schneider***, 640 N.W.2d 8, 13 (Neb. 2002), the Nebraska Supreme Court expressly declined an invitation to apply the intent-effects test to analyze whether the sex offender registry was punishment for purposes of plea withdrawal. ***Id.*** at 12. Instead, it held that the sex offender registry was not a direct consequence, which it limited to consequences that "affect the range of possible sentences or periods of incarceration for each charge and the amount of any fine to be imposed as a part of a sentence." ***Id.***

[10] A number of other cases, without undertaking independent analysis, hold that because a prior case found a law was not punitive in violation of the Ex Post Facto Clause, it also was not a direct consequence or punishment for purposes of a knowing plea. *See, e.g.*, ***Johnson v. State***, 922 P.2d 1384, 1387 (Wyo. 1996) (citing ***Snyder v. State***, 912 P.2d 1127, 1131 (Wyo. 1996)); ***Doe v. Poritz***, 662 A.2d 367, 406 n.18 (N.J. 1995) *modified by* ***Riley v. New Jersey State Parole Bd.***, 98 A.3d 544, 553 n.5 (N.J. 2014).

Thus, these courts have already defined punishment as a much more narrow category of obviously criminal penalties.

Then there are jurisdictions that appear to define a direct consequence as punishment only if it is within the power of the court itself to impose, no matter how serious the burdens a given consequence might be for the defendant. Florida is an example of this view. In ***Bolware v. State***, 995 So. 2d 268, 274-275 (Fla. 2008), the Florida Supreme Court held that mandatory driver's license revocation is not punishment because it cannot be imposed by the court itself, but was rather up to a state agency. ***Id.*** at 275. Further, the court made clear, "Our prior cases demonstrate that neither the seriousness of the sanction nor its burden on the defendant affects the inquiry."[11] ***Id.*** at 274.

In light of this diversity of approaches, it will surprise no one that a whole block of additional cases are colored with shades and combinations of various approaches, or whose rationale is otherwise difficult to categorize.[12]

[11] ***United States v. Nicholson***, 676 F.3d 376, 381-82 (4th Cir. 2012) (finding that the failure to be warned about the loss of federal pension benefits was a collateral consequence, and noting that collateral consequences are those that are "beyond the direct control of the court"); ***Patterson v. State***, 985 P.2d 1007, 1019 (Alaska Ct. App. 1999) (holding that sex offender registration is a collateral, not direct, consequence because it is not a part of a defendant's sentence and is a consequence outside of the circuit court) *overruled on other grounds by* ***Doe v. State, Dept. of Public Safety***, 92 P.3d 398 (Alaska 2004); ***People v. Gravino***, 928 N.E.2d 1048, 1053-54 (N.Y. 2010) ("Unquestionably, [the sex offender registry] imposes significant burdens on a registrant, … [b]ut we have consistently held that [sex offender registry] requirements … are not part of the punishment imposed by the judge," but "are nonpenal consequences that result from the fact of conviction for certain crimes."); s*ee also, e.g.*, ***State v. Trotter***, 330 P.3d 1267, ¶¶29-30 (Utah 2014) (holding that the sex offender registry is collateral because it is beyond the control of the circuit court and "unrelated to the length and nature of the sentence").

[12] *See, e.g.*, ***Magyar v. State***, 18 So. 3d 807 (Miss. 2009) (concluding with little analysis that sex offender registration is a collateral, not direct, consequence, and not discussing legislative purpose or effects).

In light of the importance of this issue to the bench, bar and public, and the scant authority in Wisconsin on this issue, we certify this issue to the supreme court.

That said, if the analysis of whether a law is a "punishment" is essentially the same in any constitutional context, Odom's argument that the holding in ***Radaj*** is controlling requires review of ***Radaj***.

*Should The Supreme Court Review the **Radaj** Holding that Multiple DNA Surcharges Constitute Punishment?*

Whether the effects analysis of ***Radaj*** is applicable or not, we believe the logic of ***Scruggs*** supports overruling ***Radaj***.

First, as we have mentioned, ***Scruggs*** emphasized it is the defendant's burden to provide the "clearest proof" that what a legislature intended as a civil remedy is, in effect, a criminal penalty. Scruggs' failure to meet this burden beyond a reasonable doubt was critical to the court's holding. ***Scruggs***, 373 Wis. 2d 312, ¶¶1, 49. ***Radaj*** noted the absence of proof from the defendant as to whether or not there was a rational connection between the method of calculating the surcharge and the costs the surcharge is intended to fund, and yet still found that the effect of the multiple surcharges was punitive. ***Radaj***, 363 Wis. 2d 633, ¶34.

Second, the ***Scruggs*** court repeatedly emphasized the fact that the DNA surcharge law is designed not only to fund the collection and analysis of the DNA sample, but also to maintain the DNA databank. The ***Radaj*** court's failure to account for maintenance of the DNA databank calls into question its conclusion that there was no rational connection between the method of calculating the

surcharge and the costs the surcharge is intended to fund—particularly given the absence of factual proof. ***Radaj***, 363 Wis. 2d 633, ¶¶31-32.

Third, as to the "no rational connection" conclusion, one could argue that the surcharge is comparable to a user fee, used to support the databank's justice-related functions, and a defendant's additional convictions represent a greater "use" of the criminal justice system.

Fourth, ***Scruggs*** held that the legislature did not intend for the DNA surcharge to be a punishment—a question that was left unanswered by the ***Radaj*** court. The ***Scruggs*** court also concluded that the DNA surcharge does not impose an affirmative disability or restraint, has not historically been considered a punishment, does not have a scienter requirement, and does not serve the traditional aims of punishment. These were factors that were touched upon by the ***Radaj*** court, but have now been conclusively decided.

Ultimately, one questions whether a $250 surcharge per conviction is so punitive in effect that it transforms the surcharge into a punishment despite the legislature's contrary intent—which our supreme court has now clarified is not punitive. Does ***Scruggs*** compel a review of the ***Radaj*** court's focus on the sixth and seventh factors in light of the legislature's intent and that most factors favored the State? ***Radaj***, 363 Wis. 2d 633, ¶¶14, 23-25.

As ***Scruggs*** made clear, the effect of a defendant having to pay one DNA surcharge does not override the salutary purposes of funding an expanded DNA databank for "more certain and rapid identification of offenders as well as the exoneration of those wrongfully suspected[,] accused" or convicted. ***Scruggs***, 373 Wis. 2d 312, ¶27. The interest the State has in funding the DNA databank for these purposes is compelling, while any punitive, retributive, or deterrent effect on

a defendant is arguably minimal, even as to multiple surcharges.[13] *See* ***McMaster***, 206 Wis. 2d at 47 (where the defendant claimed that the Double Jeopardy Clause barred criminal prosecution of him for operating a motor vehicle while under the influence because his driving privileges had already been suspended for six months, the court held that "[g]iven the nature of the problem addressed by WIS. STAT. § 343.305, drunk driving, the interest the government has in removing the driver from the road is compelling," and, while administrative suspension of the defendant's driver license might inconvenience him and act as a deterrent, such "is inconsequential to the overall purpose of public safety"). This is particularly so when the intent-effects test specifies that a nonpunitive intent is only overridden by the punitive effects with the "clearest proof." ***Hudson***, 522 U.S. at 100. In other words, the test is not a 50-50 balancing. Rather, the intent predominates and is only overridden in the clearest circumstances.

For these reasons, if the analysis in ***Bollig*** is the same as that applied in ***Radaj*** and we are bound by ***Radaj***, we believe the supreme court should consider whether ***Radaj*** remains good law.

Lastly, we highlight the recurring nature of these issues and the importance of guidance from the supreme court. Given the 2014 change in the law, there are likely already hundreds of criminal cases involving multiple DNA

[13] As noted in footnote 8, unlike Wisconsin, the federal rules, specifically Federal Rules of Criminal Procedure 11(h), has a "harmless error" rule for pleas. So a court's variance from the plea colloquy requirements of Rule 11 does not warrant vacating the plea if the error does not affect "substantial rights." One of the obligations a federal court has is to inform a defendant of the court's obligation to "impose a special assessment." Rule 11(b)(1)(L). The failure to do so is harmless error. ***United States v. Laws***, 420 F. App'x 611, 612 (7th Cir. 2011) (failure to advise of $100 special assessment did not affect substantial rights); ***United States v. Lutz***, 204 F. App'x. 291, 292 (4th Cir. 2006) (same).

surcharges. There are a host of other surcharges that are imposed upon a conviction and, like with the DNA surcharge, on a per-conviction basis. For example, WIS. STAT. § 973.045 imposes a crime victim and witness assistance surcharge if a sentence or probation is imposed and for each felony and misdemeanor conviction. Odom does not challenge § 973.045 on this same basis, and we are unaware of any other challenge to it on this basis.

In making this request, we do so mindful that we have previously requested the supreme court to accept certification of this appeal. At the same time, we believe the supreme court's recent decision in ***Scruggs*** calls into question the continued viability of ***Radaj***. "[O]verruling an earlier court of appeals decision is not an option" because we are powerless to "overrule, modify or withdraw language from a previously published decision of the court of appeals." ***Marks v. Houston Cas. Co.***, 2016 WI 53, ¶79, 369 Wis. 2d 547, 881 N.W.2d 309 (citations omitted). Under these circumstances, the supreme court has told us to certify the case for its resolution. ***Id.***, ¶80. We certify this case to the supreme court a second time because we think the state of the law we are to apply in the context of this case is unclear and because a case of ours that may potentially bind us has been called into question by ***Scruggs***.

Plea Withdrawal Based on the Circuit Court's Misinformation

For purposes of presenting this case in its entirety, we address whether the circuit court erred in denying Odom's plea withdrawal based on the circuit court's misinformation.

As Odom correctly notes in his brief, he was ineligible for placement in either the Substance Abuse Program or the Challenge Incarceration Program as a matter of law because he was convicted of an offense contained within WIS.

STAT. ch. 940. *See* WIS. STAT. § 973.01(3g), (3m). Nevertheless, he argues, he is entitled to the withdrawal of his plea because the court told him, "You could be eligible for boot camp and I believe for substance abuse … [but the] Court would have to look at all the factors. And I also have to have a substance abuse issue need to be addressed for both of those programs."

Odom concedes that what the court said involved a collateral consequence of his guilty plea. Nevertheless, Odom argues, the court's misinformation rendered his plea unknowing, involuntary, and unintelligent. The cases Odom cites in support, however, are distinguishable, as they involved misinformation from defense counsel and the prosecutor with the acquiescence of the court. *See* ***State v. Riekkoff***, 112 Wis. 2d 119, 121-22, 128, 332 N.W.2d 744 (1983); ***State v. Brown***, 2004 WI App 179, ¶¶8, 13-14, 276 Wis. 2d 559, 687 N.W.2d 543. Odom did not allege in his motion that counsel misinformed him about his eligibility for these programs.

In any event, the circuit court properly determined that this advice about his potential eligibility for these programs does not rise to a "manifest injustice," that is, "a *serious* flaw in the fundamental integrity of the plea." *See, e.g.*, ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836 (emphasis added; citations omitted). The court told Odom that he "could be eligible for boot camp" and he "believe[d]" for a substance abuse program, but the court would have to look at all the factors. Even the court's misinformation clearly shows that placement was only a possibility, not a certainty. *See* ***State v. Steele***, 2001 WI App 160, ¶8, 246 Wis. 2d 744, 632 N.W.2d 112 (stating that even if the offender meets all the eligibility requirements, the circuit court still has the discretion to declare an offender ineligible for the Challenge Incarceration Program).

The mere chance of placement is unlike the situations in ***Riekkoff*** and ***Brown***. In ***Riekkoff***, the State promised that appellate review would be available despite the defendant's guilty plea, but that agreement was legally ineffective. ***Riekkoff***, 112 Wis. 2d at 121. This "error undermined an important part of the 'inducement' that motivated the defendant to plead guilty." ***State v. Lichty***, 2012 WI App 126, ¶19, 344 Wis. 2d 733, 823 N.W.2d 830 (quoting ***Riekkoff***, 112 Wis. 2d at 129). Similarly, in ***Brown***, the plea was "*structured*" or "*purposefully crafted*" so that the defendant would avoid having to register as a sex offender and the possibility of postincarceration commitment. ***Brown***, 276 Wis. 2d 559, ¶¶2, 13 (emphasis added).

The plea here was not structured or purposefully crafted so that Odom could participate in one of these programs. Even if Odom was eligible for these programs, the Department of Corrections would have been entitled to make its own determination of eligibility. WIS. STAT. §§ 302.045(2)(d), 302.05; ***Steele***, 246 Wis. 2d 744, ¶7. Given the uncertain and collateral nature of these programs, the circuit court properly determined that a manifest injustice was lacking.

We respectfully request the Wisconsin Supreme Court to grant certification and provide guidance to our courts.