STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP2355

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM F. KUEHN,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in the Milwaukee County Circuit Court,
the Honorable Ellen R. Brostrom, Presiding,
and from the Orders Denying Postconviction Relief,
the Honorable Jeffrey A. Wagner, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

I. Was Mr. Kuehn deprived of the effective assistance of counsel when his trial attorney failed to pursue his third-party perpetrator defense?

The postconviction court denied Mr. Kuehn's postconviction claim of ineffective assistance of counsel. (95:1).

II. Did the circuit court properly impose child pornography surcharges on Mr. Kuehn's dismissed and read-in charges, under WIS. STAT. § 973.042(1)?

The postconviction court said yes. (87:3).

III. Did the sentencing court erroneously exercise its discretion by imposing an arbitrary and unreasonable condition of extended supervision reflecting only the court's "own idiosyncrasies"?

The postconviction court said no. (87:3-4).

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Kuehn welcomes oral argument if it would be helpful to the court. As this case involves facts applied to settled law, publication is likely not warranted.

STATEMENT OF THE CASE AND FACTS

Mr. Kuehn was charged by criminal complaint with ten counts of possession of child pornography, in violation of WIS. STAT. §§ 948.12(1m), (3)(a), 939.50(3)(d). (1:1-8). By an amended Information, the state added five additional counts of possession of child pornography. (34:1-3).

The probable cause portion of the complaint alleged that Milwaukee police reviewed reports generated by the National Center of Missing and Exploited Children ("NCMEC"), indicating a subscriber had uploaded an image of suspected child pornography, using the email address of bigwill00778@gmail.com. (1:2). Milwaukee police reviewed the suspected child pornography image and confirmed the nature of the image. (1:2). The police were provided with a transaction log of IP addresses for that email address between July 27, 2014 and August 24, 2014. (1:2). Police traced subscriber information subpoenaed from Time Warner for one of the IP addresses to Walter Szymanski at 3903 E. Armour Ave., Cudahy, WI 53110. (1:3). The NCMEC reports showed that the email address of bigwill00778@gmail.com was accessed using the Internet connection at Szymanski's address on fourteen dates between July 27, 2014 and August 20, 2014. (1:3). In addition, police determined that the bigwill00778@gmail.com email account accessed child pornography on the free Wi-Fi at the Cudahy Public Library and at an Aurora Health Care branch. (1:2-3).

Milwaukee police surveilled Szymanski's residence and identified three vehicles registered to Szymanski, including a white 2004 Ford F250 pickup truck. (1:3). The police procured a search warrant for records from the bigwill00778 email address, and reviewed records corresponding to the bigwill00778 email address which expressed interest in trading pictures and videos, emailed an image of child pornography, and responded to a Craigslist ad with a picture of a white male wearing glasses and a blue shirt. (1:3-4). Police searched Facebook and Twitter and one of the search results was for a Facebook account belonging to William Kuehn, date of birth 9/10/78, which appeared to resemble the image emailed to the Craigslist poster. (1:4). Police also compared a Department of Transportation photo of William F. Kuehn, date of birth 9/10/78. (1:4). Detective Sean Lips conducted surveillance at 3903 E. Armour Ave, and observed two men identified as Walter Szymanski and William Kuehn inside the 2004 Ford F250 pickup truck, with Mr. Kuehn driving. (1:4).

On November 21, 2014, Mr. Kuehn was observed operating the 2004 Ford F250 pickup truck. (1:5). A traffic stop was conducted and Mr. Kuehn was arrested. (1:5). Detective Lips searched a black Alcatel smartphone pursuant to a search warrant, but no images or videos of child pornography were located. (1:5). Pursuant to additional search warrants, police searched the residences of both Mr. Kuehn and Szymanski. (1:5). Laptops, computers,

cellphones, cameras, compact discs, and a flash drive were seized. (1:5).

In addition, a Samsung Galaxy cellphone was recovered from a storage compartment in the driver's door of Szymanski's 2004 Ford F250 pickup truck. (1:5). From the Samsung Galaxy, Detective Lips recovered ten child pornography movies. (1:6-7). The complaint asserted that additional analysis revealed the phone belonged to Mr. Kuehn. (1:6).

The Honorable Ellen R. Brostrom presided over a final pretrial hearing. (107). The court confirmed the defense had received the amended Information, which added five counts of possession of child pornography to the ten counts of possession of child pornography originally charged in the criminal complaint, based on the evidence discovered in the Samsung Galaxy cellphone. (107:3). Mr. Kuehn's trial attorney confirmed the case remained in trial posture. (107:3-4). The parties discussed trial logistics, including number of witnesses the parties planned to call, and the number of convictions relevant to credibility if Mr. Kuehn should choose to testify. (107:4-6). The state then motioned "for an order excluding—or preventing the Defendant from pointing the finger at—from arguing and inferring that Walter Szymanski possessed the 'dirty phone' on the absence of any pretrial motion because he lacks a good faith basis to do so." (107:6). The court clarified, "Okay. So basically you're making a motion in limine

that there can't be a *Denny*[1] defense?" (107:6). The prosecutor said yes. Trial counsel responded, "My investigation indicates that we're not going to pursue that." (107:6). The court granted the state's motion, barring any *Denny* evidence. (107:7). The prosecutor mused aloud, "Which then kind of leads us into a curious place, I guess, which is what is the defense?" (107:7).

On the day of the trial, the parties informed the court that the case would resolve in a plea. (108:3). The state explained the terms of the plea agreement: if Mr. Kuehn pled guilty to Counts 1, 11, 12, 14, and 15 from the amended Information, the state would dismiss but read in the remaining ten counts and be free to argue at sentencing. (108:6). The circuit court accepted Mr. Kuehn's guilty pleas. (108:12-13).

The circuit court sentenced Mr. Kuehn to four years of initial confinement and four years of extended supervision on each count, consecutive, for a total of twenty years of initial confinement and twenty years of extended supervision. (52:1-3; 103:47-

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[1] "When a defendant seeks to present evidence that a third party committed the crime for which the defendant is being tried, the defendant must show 'a legitimate tendency' that the third party committed the crime; in other words, that the third party had motive, opportunity, and a direct connection to the crime." *State v. Wilson*, 2015 WI 48, ¶3, 362 Wis. 2d 193, 864 N.W.2d 52 (quoting *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984)). This is commonly referred to as "*Denny* evidence" because it adheres to the test set forth in *Denny*. *See Wilson*, 362 Wis. 2d 193, ¶ 56.

48; App.108-109, 112-114). In addition, the court imposed a $500 child pornography surcharge on all fifteen counts, for a total of $7,500. (52:1-2; 103:49; App.110, 112-113). The court also imposed a no-contact order with Jessica S., Mr. Kuehn's girlfriend. (52:2; 103:46; App.107, 113).

Postconviction hearing and decisions

Mr. Kuehn filed a postconviction motion raising four issues. (71). He moved to withdraw his pleas, arguing they were entered as a result of the ineffective assistance of counsel because trial counsel failed to file his third-party perpetrator *Denny* defense and because counsel guaranteed he would be sentenced to the mandatory minimum sentence.[2] (71:1). In addition, Mr. Kuehn asked the postconviction court to vacate the child pornography surcharges that were assessed on the counts that were dismissed and read-in. (71:1). Last, Mr. Kuehn requested the postconviction court vacate the no-contact order with Jessica S. (71:1).

The Honorable Jeffrey A. Wagner ordered postconviction briefing. (72). After briefing was completed, the court issued a decision and order partially denying the motion for postconviction relief. (87:1-4; App.115-118). The postconviction court denied Mr. Kuehn's requests to vacate the child pornography surcharges and the no-contact order,

[2] Mr. Kuehn does not renew his argument regarding trial counsel's improper guarantee in this appeal.

but it ordered an evidentiary hearing on Mr. Kuehn's plea withdrawal claims. (87:1-4; App.115-118).

The postconviction court concluded that the plain language of the child pornography surcharge statute did not limit the court's authority to impose the surcharge to the counts of conviction, and that it appropriately exercised its discretion in imposing the surcharge on the dismissed and read-in counts. (87:3; App.117). Regarding the no-contact order, the postconviction court explained it was reasonable and necessary to restrict Mr. Kuehn's contact with Jessica S. so that he could devote "100% of his attention to his rehabilitation. Unless the defendant addresses his deviant sexual behavior, he has virtually no chance of successful rehabilitation and no chance of being a suitable companion for Jessica S. or a stepfather for her children." (87:4; App.118).

At the postconviction hearing, Mr. Kuehn testified that he told his trial attorney that Szymanski picked him up from his appointment at the Aurora Health Care facility where child pornography was accessed, and that Szymanski was working with him at the Cudahy Public Library on the occasion that investigators took a picture of him. (111:12; App.121). Mr. Kuehn also testified that he told his attorney that the Samsung Galaxy "dirty phone" was a deactivated phone that he had previously used. (111:12; App.121). Mr. Kuehn testified that if his attorney had filed the motion alleging that Szymanski was the true perpetrator, he would have "absolutely" gone to trial rather than

plead, even though he was facing fifteen charges of possession of child pornography. (111:8-9; App.120-21). Mr. Kuehn testified that he would have gone to trial because he was innocent. (111:9; App.121).

Trial counsel testified he had reviewed the discovery materials provided by the state and was aware of Walter Szymanski, Mr. Kuehn's boss. (111:21; App.124). Trial counsel testified that he was aware that Szymanski was a registered sex offender due to his conviction for the sexual assault of a child. (111:22; App.124). Trial counsel further testified that he was aware that one of the locations at which child pornography was accessed was at Szymanski's house, and that the "dirty phone" containing child pornography was found in a vehicle belonging to Szymanski. (111:22; App.124). Trial counsel testified that he was generally aware of the law on third-party perpetrator defenses, and was looking into whether it was viable to present a defense that Szymanski "was the guy[.]" (111:22; App.124).

Trial counsel explained that he did not file a *Denny* motion for two reasons: because child pornography was accessed outside a library, and Mr. Kuehn was seen and photographed in a truck, "apparently looking at a phone. It's unclear. But it was being accessed at that point. It's not Mr. Szymanski." (111:23; App.124). Second, trial counsel noted that child pornography was accessed at the time Mr. Kuehn was at a health care facility for an appointment. (111:23; App.124). He testified that "those two instances in particular led me to believe

that we would not be able to prevail. And, you know, such a defense would put Mr. Kuehn in a bad light if he went to trial and then presented that type of defense." (111:23-24; App.124).

However, trial counsel also testified that he was not familiar with United States Supreme Court case law holding that a third-party perpetrator defense cannot be excluded simply because the state presents strong evidence of guilt. (111:24-26; App.124-125). He testified, "I wasn't familiar with that, not that I know of. I read it in here [the postconviction motion] and – but it didn't cross my mind. …It didn't cross my mind in my analysis." (111:25-26; App.125). The court interjected and asked trial counsel whether his decision would have been the same had he known of the relevant Supreme Court case law, and trial counsel answered, "It would be the same. That it would—for Mr. Kuehn to present Mr. Szymanski when there's clear evidence that on at least two occasions that he was there when pornography was being downloaded, it seemed foolish to me, and it would be an untenable defense." (111:26; App.125).

At the conclusion of the postconviction hearing, the court ordered the parties to submit proposed findings of fact and conclusion of law. (111:39; App.128). On November 20, 2018, the court denied Mr. Kuehn's remaining postconviction arguments. (95:1). The court adopted the state's proposed findings of fact and conclusions in full. (95:1; App.134). Specifically, the state's proposed findings of

fact, adopted by the postconviction court are as follows:

> - Mr. Kuehn provided trial counsel with information about Walter Szymanski and his belief that Szymanski was the person who possessed child pornography at the times the state alleged Mr. Kuehn did.
>
> - Trial counsel reviewed discovery material with information about Szymanski and discussed filing a *Denny* motion with Mr. Kuehn.
>
> - Trial counsel obtained additional information regarding Szymanski's possible culpability from Mr. Kuehn.
>
> - Trial counsel "ultimately found that a *Denny* motion would not be successful based on the particular facts of the case and that it would be a 'foolish' and 'untenable defense.'"

(93:2; App.130). The postconviction court adopted the state's proposed conclusions of law:

> The Defendant failed to meet his burden to demonstrate that [trial counsel] rendered ineffective assistance in regards to pursuing a *Denny* defense because he fails to show deficient performance. The prior record in this case and the testimony received at the *Machner*[3] hearing demonstrates that [trial counsel] did conduct a

[3] *State v. Machner,* 92 Wis. 2d 797, 285 N.W. 2d 905 (Ct. App. 1979)

> reasonable investigation regarding a *Denny* defense but ultimately concluded such a defense lacked merit and would be a poor trial strategy. Trial counsel cannot be deemed deficient for failing to file what would be a [sic] unmeritorious motion, and his decision to forgo such a defense was a strategic one.

(93:3-4; App.131-132). The postconviction order denying the plea withdrawal arguments explained, "Trial counsel's assessment that a *Denny* defense would not be successful and could actually reflect poorly on his client was a reasonable conclusion based on the evidence, and therefore, the defendant has not demonstrated that counsel was deficient for failing to pursue this defense." (95:1; App.134).

This appeal follows. Additional facts will be discussed as necessary below.

ARGUMENT

I. Mr. Kuehn was denied his Sixth Amendment right to the effective representation of counsel when his trial attorney failed to pursue his third-party perpetrator defense motion.

A. Standard of review and relevant law

In this case, Mr. Kuehn's trial attorney did not file a third-party perpetrator motion, and by failing to do so, he rendered ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687

(1984). "The law is well established that a defendant has due process rights under the United States and Wisconsin Constitutions to present a theory of defense to the jury." *State v. Wilson*, 2015 WI 48, ¶3, 362 Wis. 2d 193, 864 N.W.2d 52; *Holmes v. South Carolina*, 547 U.S. 319 (2006). Had trial counsel filed a third-party perpetrator motion, Mr. Kuehn would not have pled guilty to the charges but would have gone to trial. (111:8-9; App.120-121).

This Court should permit Mr. Kuehn to withdraw his pleas. A defendant is entitled to plea withdrawal upon showing that "a refusal to allow withdrawal of the plea would result in a manifest injustice." *State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. One way of showing a manifest injustice is by establishing Mr. Kuehn was deprived the effective assistance of counsel. *See State v. Dillard*, 2014 WI 123, ¶84, 358 Wis. 2d 543, 859 N.W.2d 44; *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).

To establish deficient performance, the defendant must show "facts from which a court could conclude that counsel's representation was below the objective standard of reasonableness." *State v. Wesley*, 2009 WI App 118, ¶ 23, 321 Wis. 2d 151, 772 N.W.2d 232. "To establish prejudice, the defendant must show facts from which a court could conclude that its confidence in a fair result is undermined." *Id.* In plea withdrawal cases, "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for

counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

On appeal, the standard of review is two-fold. This Court accepts the circuit court's findings of fact unless clearly erroneous; however, it reviews the circuit court's application of constitutional principles to those facts de novo. *State v. Harvey*, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). Therefore, the "legal conclusions of whether the performance was deficient and prejudicial based on [the postconviction] factual findings…are questions of law independently reviewed by this court." *State v. Delgado*, 194 Wis. 2d 737, 750, 535 N.W.2d 450 (Ct. App. 1995).

B. Trial counsel should have pursued Mr. Kuehn's third-party perpetrator defense.

Mr. Kuehn's trial attorney's performance was constitutionally deficient because he failed to pursue a *Denny* defense arguing that Walter Szymanski was the true perpetrator. Mr. Kuehn had a constitutional right to present a defense, *see Crane v. Kentucky*, 476 U.S. 683, 690 (1986), and Szymanski's direct connection to, opportunity, and motive to access child pornography should have been presented at a trial. *See also State v. St. George*, 2002 WI 50, ¶14, 252 Wis. 2d 499, 643 N.W.2d 777; *Chambers v. Mississippi*, 410 U.S. 284 (1973); *see also* U.S. CONST. Amends. VI, XIV; WIS. CONST. art. I, § 7.

In order to argue that a third-party was responsible for the crime for which Mr. Kuehn was

charged, he needed to establish motive, opportunity, and direct connection: did the alleged third-party perpetrator have a plausible reason to commit the crime? Could the alleged third-party perpetrator have committed the crime, directly or indirectly? Is there evidence that the alleged third-party perpetrator actually committed the crime, directly or indirectly? *See Wilson*, 362 Wis. 2d at ¶¶56-59. In other words, "[w]hen a defendant seeks to present evidence that a third party committed the crime for which the defendant is being tried, the defendant must show 'a legitimate tendency' that the third party committed the crime[.]" *Id.*, ¶3 (citing *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984)).

Importantly, in *Holmes*, the United States Supreme Court examined South Carolina's third-party perpetrator rule that "where there is strong evidence of [a defendant's] guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt may (or perhaps must) be excluded." 547 U.S. at 329. The United States Supreme Court held that this rule "violates a criminal defendant's right to have a meaningful opportunity to present a complete defense." *Id.* at 331. The Court explained, "Just because the prosecution's evidence, *if credited*, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case." *Id.* at 330-31 (emphasis in original).

Therefore, for purposes of analyzing the viability of a *Denny* defense, the Wisconsin Supreme Court has cautioned lower courts that they must conduct this inquiry without reference to the state's evidence supporting the conviction, explaining, "it is unconstitutional to refuse to allow a defendant to present a [*Denny*] defense simply because the evidence against him is overwhelming." *Wilson*, 362 Wis. 2d at ¶61; *see also Holmes*, 547 U.S. at 330-331.

In this case, trial counsel should have pursued Mr. Kuehn's *Denny* defense, because despite the evidence against him, Mr. Kuehn can satisfy each prong of *Denny*'s test, as described as follows:

Motive:
Did the alleged third-party perpetrator
have a plausible reason to commit the crime?

Walter Szymanksi had a plausible reason to commit the crimes here. According to the Wisconsin Department of Corrections sex offender registry, since 1986, Szymanski has been on lifetime sex offender registration for second-degree sexual assault in Milwaukee County case no. 1985CF3609, involving a 14-year-old child. (*See* 71:25 at ¶21.)

Child pornography presents an unusual crime for purposes of the *Denny* test, because motive, as it relates to child pornography, is seemingly different than motive to commit a homicide would be. *See Wilson*, 362 Wis. 2d at ¶¶62, 74. However, a defendant is never required to prove motive with "substantial certainty," instead, "relevant evidence of

motive is generally admissible." *Id.*, ¶63. Here, Szymanski was a registered sex offender previously convicted for an offense involving a child. Thus, his prior criminal history indicating an attraction to children provides a plausible reason for him to possess child pornography.

Opportunity:
Could the alleged third-party perpetrator
have committed the crime, directly or indirectly?

Evidence of opportunity "often, but not always, amounts to a showing that the defendant was at the crime scene or known to be in the vicinity when the crime was committed." *Wilson*, ¶65. In examining the police reports in this case, it is apparent that much of the evidence used against Mr. Kuehn immediately bears the same ties to Szymanski. For example, one of the IP addresses linked to the child pornography listed Szymanski as the subscriber. (*See* 71:25 at ¶18). In addition, the search warrant included Szymanski's home address as a place where police reasonably believed evidence would be discovered. (*See* 71:29 at ¶42). And, the "dirty phone" was found in a vehicle belonging to Szymanski. (*See* 71:26 at ¶26; 1:5).

Then, there is some evidence that at first glance appears tied only to Mr. Kuehn: child pornography was accessed at Mr. Kuehn's parents' home in Door County, and at an Aurora Health Care facility at the same time Mr. Kuehn was being treated there. (9:3). Police took a picture of Mr.

Kuehn in the Ford truck at the Cudahy Library on an occasion that child pornography was accessed there. (9:4-5). In addition, the "dirty phone," which did not have a phone number or active cellular service, was determined to have belonged, at one point, to Mr. Kuehn. (9:9-10).

However, at the postconviction hearing, Mr. Kuehn testified that Szymanski, his boss and friend, spent a substantial amount of time with him, including at Mr. Kuehn's parents' home. (111:7; App.120; *See also* 71:27-28 at ¶¶32-34, 36-38, noting occasions on which Szymanksi and Mr. Kuehn were observed together, and noting Szymanski was a co-signer on Mr. Kuehn's lease, evidencing a close relationship between the two men). He further testified that he told his trial attorney that Szymanski had picked him up from an Aurora Health Care facility, and that Szymanski was present at the Cudahy Public Library on the occasion that police took a picture of Mr. Kuehn in the Ford truck. (111:12; App.121). Thus, Szymanski had the same opportunities to directly commit the crime of accessing child pornography at the locations the state alleged Mr. Kuehn accessed child pornography, including Mr. Kuehn's parents' home, the Aurora Health Care facility, and the Cudahy Public Library.

Further, trial counsel testified that he was aware that the Samsung "dirty phone" did not have an active phone number or active cellular service. (111:37; App.127). He testified that he was aware that cellphones that are not password protected can

be accessed by persons other than the owner. (111:37; App.127). He conceded that he was not aware of the fact that cellphones can access the internet through Wi-Fi even if they are not activated. (111:37; App.127). When a cellphone is not secured by a passcode, anyone can use it and access any email accounts already set up; notably, a phone not currently activated through a cell phone company can still access Wi-Fi, much like an iPod. *See https://joyofandroid.com/use-old-android-phone-as-wifi-only-device/* (explaining one can connect to Wi-Fi to use an old phone as a Wi-Fi-only device for downloading and using apps, browsing the internet, and "whatever else you can use Wi-Fi for."). Therefore, there is a "practical possibility" that Szymanski committed this offense.

Direct Connection:
Is there evidence that the alleged third-party perpetrator actually committed the crime, directly or indirectly?

The direct connection prong, also known as the "'legitimate tendency' test[,] asks whether the proffered evidence is so remote in time, place or circumstances that a direct connection cannot be made between the third person and the crime." *Denny*, 120 Wis. 2d at 624 (citation omitted). This Court "must assess the proffered evidence in conjunction with all other evidence to determine whether, under the totality of the circumstances, the evidence suggests that a third-party perpetrator

actually committed the crime." *Wilson*, 362 Wis. 2d at ¶71.

The investigation in this case attempted to trace the user responsible for accessing child pornography on a number of occasions in a number of locations. (1:1-8; 71:20-32). Mr. Kuehn's postconviction testimony placed Szymanski in the places where child pornography was accessed, as did the police's own investigation. (1:1-8; 111:12; App.121). There is evidence suggesting that Szymanski actually committed the crime of possessing child pornography, as child pornography was accessed from Szymanski's home address, and the "dirty phone" was seized from Szymanski's vehicle. (1:1-8). Accordingly, Mr. Kuehn is able to establish a direct connection by connecting Szymanski with the places where child pornography was accessed.

The evidence in this case is not so remote in time, place, or circumstances that a direct connection cannot be made between Szymanski and the crime. Szymanski had access, opportunity, and moreover—a legitimate reason to shield himself behind evidence ostensibly pointing to Mr. Kuehn. Specifically, Mr. Kuehn has prior convictions involving sex offenses; Szymanski, his boss, would have been aware of this. (*See* 103:16-19). Thus, by using the name "Will" in email addresses, using a photograph of Mr. Kuehn in an email exchange, accessing child pornography in locations both men were, and by using an old device belonging to Mr. Kuehn, Szymanski would have put

in place a savvy and effective safeguard against being charged himself in the event the child pornography was discovered by law enforcement. As a convicted sex offender himself, Szymanski is subject to the lifetime sex offender registry. This status alone provides reason to commit the crime as described in the complaint: to frame a "fall person" or scapegoat because of the extremely serious legal consequences risked by accessing child pornography.

C. Trial counsel's conclusion that Mr. Kuehn's third-party perpetrator defense was "untenable" constitutes deficient performance because counsel failed to reasonably investigate the law.

"Counsel must either reasonably investigate the law and facts or make a reasonable strategic decision that makes any further investigation unnecessary." *State v. Domke*, 2011 WI 95, ¶41, 337 Wis. 2d 268, 805 N.W.2d 364. At the postconviction hearing, trial counsel provided two reasons why he did not pursue a *Denny* defense in Mr. Kuehn's case. He indicated that child pornography had been accessed outside a library, and Mr. Kuehn was seen and photographed in a truck, "apparently looking at a phone. It's unclear. But it was being accessed at that point. It's not Mr. Szymanski." (111:23; App.124). Second, trial counsel pointed to the fact that child pornography was accessed at the time Mr. Kuehn was at a health care facility for an appointment. (111:23; App.124). He testified that "those two instances in particular led me to believe that we

would not be able to prevail. And, you know, such a defense would put Mr. Kuehn in a bad light if he went to trial and then presented that type of defense." (111:23-24; App.124).

However, this apparent strategy is unreasonable, because Mr. Kuehn had a constitutional right to present a defense, regardless of the strength of the state's case. *See Holmes*, 547 U.S. at 330-331; *see also Crane*, 476 U.S. 683. When asked about the United States Supreme Court case law holding that strong evidence of guilt does not foreclose a third-party perpetrator defense, trial counsel admitted that he "didn't know that. I wasn't familiar with that, not that I know of. I read it in [the postconviction motion] and – but it didn't cross my mind." (111:25-26; App.125). Trial counsel further testified that, "It didn't cross my mind in making my analysis of whether we would pursue that or not."(111:26; App.125). "A strategy based on an erroneous view of the law is deficient performance as a matter of law." *State v. Coleman*, 2015 WI App 38, ¶43, 362 Wis. 2d 447, 865 N.W.2d 190.

"The object of an ineffectiveness claim is not to grade counsel's performance. *Strickland*, 466 U.S. at 697. Instead, "the ultimate focus of [an ineffectiveness] inquiry must be on the fundamental fairness of the proceeding." *Id.* at 696. While the law excuses reasonable strategic decisions, *id.* at 689-90, it does not excuse erroneous legal conclusions. *See, e.g., Jones v. United States*, 224 F.3d 1251, 1258 (11th

Cir. 2000) (counsel failed to argue for suppression on a "clear" ground).

Trial counsel testified that his decision not to pursue Mr. Kuehn's third-party perpetrator defense would have been the same even if he had been aware of this controlling case law because of his opinion that there was "clear evidence that on at least two occasions that [Mr. Kuehn] was there when pornography was being downloaded." (111:26; App.125). This conclusion flatly ignores *Holmes*' holding, and thus is unreasonable and constitutes deficient performance. *See State v. Felton*, 110 Wis. 2d 485, 502-03, 329 N.W.2d 161 (1983) ("Trial counsel's decisions must be based upon facts and law upon which an ordinarily prudent lawyer would have then relied.").

The deficiency prong of the *Strickland* test is met when counsel's performance was the result of oversight rather than a reasoned defense strategy. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003); *Dixon v. Snyder*, 266 F.3d 693, 703 (7th Cir. 2001); *State v. Thiel*, 2003 WI 111, ¶51, 264 Wis.2d 571, 665 N.W.2d 305; *State v. Moffett*, 147 Wis.2d 343, 353, 433 N.W.2d 572 (1989). Moreover, even an attorney's intentional decisions must meet the standard of reasonableness based upon the information at hand. *E.g., Kellogg v. Scurr*, 741 F.2d 1099, 1102 (8th Cir. 1984) (even tactics "must stand the scrutiny of common sense"); *see Felton*, 110 Wis.2d at 502-03 (a reviewing court "will in fact second-guess a lawyer if the initial guess is one that demonstrates an

irrational trial tactic or if it is the exercise of professional authority based upon caprice rather than judgment").

This Court should conclude that Mr. Kuehn established deficient performance based on the unreasonableness of trial counsel's decision not to present Mr. Kuehn's third-party perpetrator defense, because that decision was not based upon relevant, applicable law upon which an ordinarily prudent lawyer would have relied. Trial counsel's ignorance of United States Supreme Court case law directly corresponding to his concerns about the viability of Mr. Kuehn's *Denny* defense constitutes deficient performance.

D. Mr. Kuehn was prejudiced by trial counsel's deficient performance, because there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty but would have insisted on going to trial.

Trial counsel's failure to present Mr. Kuehn's third-party perpetrator defense prejudiced Mr. Kuehn because there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill*, 474 U.S. at 59. At the *Machner* hearing, Mr. Kuehn specifically testified that if his trial attorney had filed a motion alleging that Szymanski was the true perpetrator, he would have taken his case to trial. (111:8-9; App.120-121). Mr. Kuehn explained that he

would have gone to trial because he was innocent of the child pornography charges. (111:9; App.121). Mr. Kuehn testified that he told his trial attorney that he wanted to go to trial on this case and that he was innocent. (111:7, 9; App.120-121).

Indeed, this testimony is bolstered by the fact that Mr. Kuehn's case remained in trial posture up until he entered his pleas on the date of his scheduled trial. (107:3-4; 108:3). By remaining in trial posture, Mr. Kuehn forfeited the opportunity to take advantage of a far more favorable plea offer than the one he accepted on the day of his scheduled trial, in which the state had previously offered to recommend nine years of initial confinement and ten years of extended supervision. (*See* 108:4-6). Mr. Kuehn did not accept that plea offer, but remained in trial posture. (108:6).

However, because his attorney did not pursue his third-party perpetrator defense, Mr. Kuehn was placed in an impossible situation of proceeding to trial without a defense, or pleading guilty. (*See* 107:6-7). Based on Mr. Kuehn's postconviction hearing testimony, "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59.

II. The ten child pornography surcharges assessed for Mr. Kuehn's dismissed and read-in charges should be vacated.

A. Standard of review and relevant law

Whether the circuit court properly assessed the child pornography surcharges in this case requires interpretation of WIS. STAT. § 973.042(2), the child pornography surcharge statute. This statute provides that "[i]f a court imposes a sentence or places a person on probation for a crime under s. 948.05 or 948.12...the court shall impose a child pornography surcharge of $500 for each image or each copy of an image associated with the crime. The court shall determine the number of images or copies of images associated with the crime by a preponderance of the evidence and without a jury." The term "image" is defined in subsection (1) and includes a video recording. WIS. STAT. § 973.042(1).

Statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, a reviewing court stops the inquiry there. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶¶44-45, 271 Wis. 2d 633, 681 N.W.2d 110.

B. Under the plain language of WIS. STAT. § 973.042(2), child pornography surcharges were improperly assessed for Mr. Kuehn's dismissed and read-in charges.

The plain language of the child pornography surcharge statute specifies that a child pornography surcharge shall be imposed for each image associated with the crime if a court *imposes a sentence or places a person on probation for a crime* under s. 948.05 or

948.12. WIS. STAT. § 973.042(1). Here, the court only imposed a sentence on five counts, and accordingly, only five child pornography surcharges could be ordered. The remaining ten surcharges imposed on Mr. Kuehn's dismissed and read-in counts, for which he was not sentenced or placed on probation, should be vacated.

During the sentencing hearing, the circuit court inquired whether it was allowed to order the child pornography surcharge for "more than just the five [Mr. Kuehn] was convicted on[.]" (103:6; App.102). The state explained it believed the court could order the child pornography surcharges on even more than the dismissed and read-in counts, arguing:

> [T]he language of the statute, under 973.042, which is, 'The child pornography surcharge is a $500 surcharge for each image, or copy of an image, associated with the crime as the Court determines by a preponderance of the evidence.' And here the five counts that the State had the defendant plead to are connected to the—what we've been calling the dirty phone in the other acts motion as well as the four email accounts linked to the defendant, and so all of those images were of images found on the email accounts that he's pled guilty to and the device.

(103:6-7; App.102-103). The court asked, "But you think that that law allows, not only convicted and dismissed but read in, but basically, any child pornography image associated with the defendant?" (103:7; App.103). The state answered affirmatively:

> Yes. Well, not associated with the defendant, but associated with the crime. So since each crime is connected to the different email accounts, that the crime—that these are all images, all contraband, that is—and the background, that is part and parcel of his collection. I think that that would be—The intent would be to—to recoup the surcharge and- recoup some costs for possessing more than just the one or two or three counts the defendant is convicted of. I think that's my reading of the language. I don't have case law on it. I—I imagine that it's not been litigated, but 'associated' is a very broad term.

(103:7-8; App.103-104). The Court asked defense counsel to respond, and defense counsel explained he believed the court could only assess the child pornography surcharge on crimes for which the defendant was convicted. (103:8; App.104). The court noted, "This isn't restitution. ...I guess I feel like I can obviously order the surcharge for the convicted images, but—I would think that images associated with the crime would also be the dismissed and read in, but I'm not going to be comfortable with every possible image." (103:8-9; App.104-105). Ultimately, the court imposed the $500 child pornography surcharge on all fifteen charged counts, for a total of $7,500. (52:1-2; 103:49; App.110, 113-114).

While the circuit court focused on the statutory language "for each image…associated with the crime" in concluding it could order the child pornography surcharge for the dismissed and read-in counts, its interpretation ignores the language of the statute

that specifically provides that a surcharge shall be imposed "*if* a court *imposes a sentence or places a person on probation for a crime* under s.948.05 or 948.12…." Wis. Stat. § 973.042(2) (emphasis added). That language would be rendered superfluous if the surcharge can be ordered on dismissed and read-in counts for which no sentence or probation was imposed. *See Lake City Corp. v. City of Mequon*, 207 Wis. 2d 155, 162, 558 N.W.2d 100 (1997) ("[I]t is a basic rule of statutory construction that effect is to be given to every word of a statute if possible, so that no portion of the statute is rendered superfluous."). In this particular case, the five crimes for which Mr. Kuehn was sentenced correspond to five specified, individual images, as defined in Wis. Stat. § 973.042(1). (1:1; 34:2).

An examination of the restitution statute is useful in this case, because the language of the child pornography surcharge statute differs in an important way from that in the restitution statute. WISCONSIN STAT. § 973.20(2) allows for a restitution order "[i]f a crime considered at sentencing resulted in damage to or loss or destruction of property[.]" WISCONSIN STAT. § 973.20(lg)(a) defines "crime considered at sentencing" as "any crime for which the defendant was convicted and any read-in crime." Subsection (b), in turn, defines "read-in crime."

Equivalent language does not exist in the child pornography surcharge statute. *See* WIS. STAT. § 973.042(2). Instead, the legislature only authorized the imposition of child pornography surcharges on

those counts on which a sentence was imposed. Under the plain language of the statute, the circuit court could only impose the child pornography surcharge for the five images associated with the five counts of which Mr. Kuehn was convicted and on which a sentence was imposed. *See Kalal*, 271 Wis. 2d 633, ¶¶44-5.

Like it did in the restitution statute, here, the legislature could have chosen to define "associated with the crime" to specify that a surcharge could be assessed on dismissed and read-in counts, but it did not. *See Graziano v. Town of Long Lake*, 191 Wis. 2d 812, 822, 530 N.W.2d 55 (Ct. App. 1995) ("When interpreting the language of a statute, '[i]t is reasonable to presume that the legislature chose its terms carefully and precisely to express its meaning.'"). Therefore, because "a sentence" was only imposed on five counts, assessing the child pornography surcharge for each of Mr. Kuehn's dismissed and read-in counts was improper. Accordingly, this Court should vacate the ten child pornography image surcharges for the ten dismissed and read-in counts.

III. The circuit court's requirement that Mr. Kuehn have no contact with his girlfriend is unreasonable and should be vacated.

A. Standard of review and relevant law

WISCONSIN STAT. § 973.01(5) provides that "[w]henever the court imposes a bifurcated sentence

under sub. (1), the court may impose conditions upon the term of extended supervision." The statute grants circuit courts "broad, undefined discretion" in imposing conditions of extended supervision, as long as the conditions are "reasonable and appropriate." *State v. Larson*, 2003 WI App 235, ¶6, 268 Wis. 2d 162, 672 N.W.2d 322; *State v. Koenig*, 2003 WI App 12, ¶7, 259 Wis. 2d 833, 656 N.W.2d 499.

In imposing conditions of extended supervision, circuit courts must consider both the rehabilitative needs of the defendant and the protection of the public. *State v. Oakley*, 2001 WI 103, ¶¶16-21, 245 Wis. 2d 447, 629 N.W.2d 200; *State v. (Brad) Miller*, 2005 WI App 114, ¶13 n.3, 283 Wis. 2d 465, 701 N.W.2d 47 ("Case law relating to the propriety of conditions of probation is applicable to conditions of supervision.").

When a defendant challenges a condition of extended supervision as unreasonable on appeal, the reviewing court must determine whether the circuit court erroneously exercised its discretion in ordering the condition. *State v. (Eugene) Miller*, 175 Wis. 2d 204, 208, 499 N.W.2d 215 (Ct. App. 1993). Circuit courts erroneously exercise their discretion when they impose supervision conditions on convicted individuals that "reflect only their own idiosyncrasies." *Oakley*, 245 Wis. 2d 447, ¶13.

Further, "[t]here is no doubt but that members of our society have a constitutional right to associate with family and friends without undue restriction."

City of Milwaukee v. Burnette, 2001 WI App 258, ¶17, 248 Wis. 2d 820, 637 N.W.2d 447. This Court does not apply a strict scrutiny analysis to conditions of extended supervision that impinge upon constitutional rights because "it is well established that convicted individuals do not enjoy the same degree of liberty as those individuals who have not violated the law." *Oakley*, 245 Wis. 2d at ¶16-21.

Instead, conditions of supervision "may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person's rehabilitation." *Edwards v. State*, 74 Wis. 2d 79, 84-85, 246 N.W.2d 109 (1976). The test as to whether a condition of extended supervision is overly broad is comparable to the test for overbreadth challenges to statutes—when "its language, given its normal meaning, is so sweeping that its sanctions may be applied to constitutionally protected conduct which the state is not permitted to regulate. The essential vice of an overbroad law is that by sweeping protected activity within its reach it deters citizens from exercising their protected constitutional freedoms." *State v. Lo*, 228 Wis. 2d 531, 538, 599 N.W.2d 659 (Ct. App. 1999)(citation omitted).

B. This Court should reverse the circuit court's unreasonable requirement that Mr. Kuehn have no contact with his girlfriend.

The circuit court's order that Mr. Kuehn have no contact with Jessica S. while serving extended

supervision is overly broad, is unreasonable and unjustly impinges on Mr. Kuehn's constitutional freedom of association.

Here, the sentencing court ordered no contact with Jessica S., in addition to no-contact with a specific child, and a general restriction on contact with children under the age of 18. (103:45-46; App.106-107). The sentencing court did not explain why it imposed the no-contact restriction with Jessica S., Mr. Kuehn's adult girlfriend, and there was no readily-discernible explanation why this restriction is connected with Mr. Kuehn and his offenses. (See 103:46; 1:1-8; App.107). Postconviction, Judge Wagner explained that:

> The no contact order with Jessica S. is not about her. *It's about him.* The State told the court that the defendant had exhibited a lifetime of antisocial behavior, that he had refused treatment in the past and that he presented a danger to children *and adults*. (Tr. 5/16/16, pp.9-10). Moreover, the defendant was evaluated to be a high risk for committing another sexual offense. Defense counsel told the court that the defendant wanted to have a relationship with Jessica S. in the future, but acknowledged that 'he needs to go through treatment, which is going to take sometime before that can happen.' (Id. at p.33). The need for treatment was an important consideration in Judge Brostrom's sentencing decision. The court stated that the defendant was in need of the highest level of sex offender treatment. (Id. at p.45). Simply stated, the defendant cannot have any meaningful

> rehabilitation unless he gets the treatment he needs. Under this circumstance, the court finds that it is both reasonable and necessary to restrict the defendant's contact with Jessica S. so that he can devote 100% of his attention to his rehabilitation. Unless the defendant addresses his deviant sexual behavior, he has virtually no chance of successful rehabilitation and no chance of being a suitable companion for Jessica S. or a stepfather for her children.

(87:3-4; App.117-118).

In *State v. Stewart*, 2006 WI App 67, 291 Wis. 2d 480, 713 N.W.2d 165, this Court held that a condition of probation and extended supervision was overbroad and unduly restrictive of the defendant's constitutional liberties. In that case, the defendant was convicted of felony bail jumping and felony fleeing, and the circuit court imposed the condition that Mr. Stewart could not enter the Richmond township in Walworth County. *Id.* at ¶¶1-2. The circuit court relied on facts underlying charges in other cases in order to impose this condition and explained its condition was designed to protect the community. *Id.* at ¶¶14-15. However, this Court disagreed, concluding that "[w]hile the geographical limitation certainly promotes the purposes of protecting the victims in this case and rehabilitating Stewart, it is broader than necessary to accomplish those purposes." *Id.* at ¶16. This Court determined the condition was unduly restrictive and ordered the circuit court to issue an amended judgment of condition vacating the condition. *Id.* at ¶21.

Similarly, here, the condition restricting Mr. Kuehn's contact with his girlfriend is overly broad and unduly restrictive. Mr. Kuehn was sentenced to twenty years of initial confinement and twenty years of extended supervision. Prohibiting him from contact with his girlfriend while serving *twenty* years of extended supervision for his convictions for the possession of child pornography is unreasonable and unduly restrictive. This condition of extended supervision is "broader than necessary to accomplish [its] purpose[]. *State v. Stewart*, 2006 WI App 67, ¶16, 291 Wis. 2d 480, 713 N.W.2d 165.

Because the circuit court erred by imposing a condition of supervision that is overly broad, Mr. Kuehn respectfully requests that this Court issue an order vacating the condition that he have no-contact with his girlfriend while serving his extended supervision.

CONCLUSION

For the reasons stated above, Mr. Kuehn respectfully requests that this Court enter an order allowing him to withdraw his pleas. If this Court does not grant Mr. Kuehn plea withdrawal, he respectfully requests that this Court enter an order vacating the child pornography surcharges assessed on his dismissed and read-in charges, as well as the no-contact order with Jessica S.

Dated this 25th day of April, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,586 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 25th day of April, 2019.

Signed:

_____

CARLY M. CUSACK
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 25th day of April, 2019.

Signed:

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Assistant State Public Defender

APPENDIX

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TO
APPENDIX