STATE OF WISCONSIN

IN SUPREME COURT

Case Nos. 2018AP2355-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM F. KUEHN,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES PRESENTED

1. Was William Kuehn denied his right to effective assistance of counsel because his trial attorney decided not to pursue a third-party perpetrator defense, which was the only defense available to Kuehn in this case?

The circuit court and court of appeals answered no.

2. Does Wis. Stat. § 973.042 authorize the imposition of child pornography surcharges for images which form the basis for dismissed and read-in charges?

The circuit court and the court of appeals answered yes.

3. Is the condition barring Kuehn from having contact with his adult girlfriend during his term of extended supervision arbitrary and unreasonable?

The circuit court and the court of appeals answered no.

CRITERIA FOR REVIEW

The Court should grant review of all the issues presented in this case. The first issue involves a real and significant question of constitutional law concerning a defendant's right to effective assistance

of counsel—whether an attorney performs deficiently by failing to pursue a defense because he believe the defense is weak and thus unlikely to succeed, when the defendant has no other plausible defense at trial. Here, the court of appeals held that trial counsel's conclusion that Kuehn's third-party perpetrator defense was unlikely to succeed was a reasonable strategic basis for counsel not to pursue the defense. According to the court of appeals, it was also reasonable for counsel to conclude that pursuing this defense "would put Kuehn in an even more negative light with the trial court for purposes of sentencing as opposed to pleading guilty." (COA Op. ¶30; App. 114).

The court of appeals' decision begs an obvious question, however: how can it be a reasonable trial strategy to forgo a "weak" defense in favor of *no* defense at all? Kuehn submits that doing so is objectively unreasonable and deficient. This is especially true in this case because Kuehn's third-party perpetrator defense was not actually weak; it was sufficient to raise a reasonable doubt as to Kuehn's guilt.

Moreover, the court of appeals' decision blurs the line between trial strategy decisions—which belong to the attorney—and decisions regarding the objectives of representation—which belong to the client. By concluding that it was a reasonable trial strategy for counsel to fail to pursue the only available defense because he believed Kuehn would be better off pleading guilty, the court of appeals effectively gave counsel the power to determine the

objectives of representation—i.e., whether Kuehn should plead guilty or go to trial. Counsel's "strategic" choice forced Kuehn into the impossible position of having to choose between pleading guilty or proceeding to trial with no defense. That type of Hobbesian choice is no real choice at all.

This Court should therefore grant review to clarify whether it is reasonable for an attorney to fail to pursue the only available defense because he believes the defense is unlikely to succeed and, thus, the defendant would be better off pleading guilty. This is a novel legal issue, one that is likely to recur in other cases. Resolving this issue will therefore have statewide impact by clarifying whether an attorney can effectively determine the objectives of representation by choosing not to pursue the only defense a client has. *See* Wis. Stat. § 809.62(1r)(a), (c)2, 3.

The second issue presented—whether Wis. Stat. § 973.042 authorizes the imposition of child pornography surcharges for read-in charges—also warrants review. This is an important question of statutory interpretation that is likely to recur unless resolved by this Court. *See* Wis. Stat. § 809.62(1r)(c)3.

Finally, this Court should grant review to determine whether the condition that Kuehn have no contact with his adult girlfriend during his twenty-year term of extended supervision is arbitrary and unreasonable. This is an important constitutional question involving the right of association that this

Court should address. Doing so will provide clarity and guidance to circuit courts in determining what conditions of extended supervision are reasonable and appropriate. *See* Wis. Stat. § 809.62(1r)(a), (c)2.

STATEMENT OF FACTS

1. *Charges and allegations of the criminal complaint*. On November 26, 2014, the State filed a criminal complaint charging Kuehn with ten counts of possession of child pornography, contrary to Wis. Stat. § 948.12 (1m), (3)(a). (1:1-8). The State later added five additional counts of possession of child pornography by way of an amended information. (34:1-3). Each of fifteen charges corresponded with a specified, individual images of child pornography. (*See* 1:6-7; 29; 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 W.S.'s his residence located at 3903 East Armour Avenue, in Cudahy, Wisconsin.

(1:3). The NCMEC reports showed that the email address of bigwill00778@gmail.com was accessed using the Internet connection at W.S.'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 W.S.'s residence and identified three vehicles registered to him, 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 revealed a Facebook account belonging to Kuehn, whose picture appeared to resemble the image emailed to the Craigslist poster. (1:4). Police also compared a Department of Transportation photo of Kuehn. (1:4). Detective Sean Lips conducted surveillance at 3903 East Armour Avenue, and observed two men identified as W.S. and Kuehn inside the 2004 Ford F250 pickup truck, with Kuehn driving. (1:4).

On November 21, 2014, Kuehn was observed operating the 2004 Ford F250 pickup truck. (1:5). A

traffic stop was conducted and Kuehn was arrested. (1:5). Detective Lips located and 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 Kuehn and W.S. (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 W.S.'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 Kuehn. (1:6).

2. *Trial-level proceedings*. The Honorable Ellen R. Brostrom presided over a final pretrial hearing held on October 6, 2015. (107). At the hearing, Kuehn's trial attorney confirmed the case remained in trial posture. (107:3-4). The parties discussed trial logistics, including the number of witnesses the parties planned to call, and the number of convictions relevant to credibility if 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 [W.S.] 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* defense?"[1] (107:6). The prosecutor said yes. Trial counsel responded, "[m]y investigation indicates that we're not going to pursue that." (107:6). The court accordingly granted the State's motion barring any *Denny* evidence. (107:7). The prosecutor mused aloud, "[w]hich then kind of leads us into a curious place, I guess, which is what is the defense?" (107:7).

On the day of trial on October 26, 2015, 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 Kuehn pled guilty to Counts 1, 11, 12, 14, and 15 from the amended information, the state would dismiss and read in the remaining ten counts and be free to argue at sentencing. (108:6). The circuit court accepted Kuehn's guilty pleas. (108:12-13).

The circuit court sentenced 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

[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.

of extended supervision. (103:47-48; App. 132-33). In addition, the court imposed a $500 child pornography surcharge on all fifteen counts, for a total of $7,500. (103:49; App. 134). The court also imposed a no-contact order with J.S., Kuehn's adult girlfriend. (103:46; App. 131).

3. *The postconviction proceedings*. Kuehn filed a postconviction motion raising four issues. (71). He moved to withdraw his pleas, arguing they were entered as a result of ineffective assistance of counsel because trial counsel failed to file his third-party perpetrator *Denny* defense and because counsel guaranteed Kuehn he would be sentenced to the mandatory minimum sentence.[2] (71:1). In addition, 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). In this respect, Kuehn argued that the read-in offenses were not "associated with the crime" as that phrase is used in Wis. Stat. § 973.042. (71:13-15). Lastly, Kuehn requested the postconviction court vacate the no-contact order with J.S., arguing that this condition impermissibly infringed on his constitutional right of association. (71:1, 15-17).

The Honorable Jeffrey A. Wagner ordered postconviction briefing. (72). After briefing was completed, the court issued a decision and order partially denying the postconviction motion. (87:1-4;

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

App. 139-42). The postconviction court denied Kuehn's requests to vacate the child pornography surcharges and the no-contact order, but it ordered an evidentiary hearing on his plea withdrawal claims. (87:1-4; App. 139-42).

At the postconviction hearing, Kuehn testified that he told his trial attorney that W.S. picked him up from his appointment at the Aurora Health Care facility where child pornography was accessed, and that W.S. was working with him at the Cudahy Public Library on the occasion that investigators took a picture of him there. (111:12; App. 145). 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. 145). Kuehn testified that if his attorney had filed the motion alleging that W.S. was the true perpetrator, he would have "absolutely" gone to trial rather than pleading guilty, even though he was facing fifteen charges of possession of child pornography. (111:8-9; App. 144-45). Kuehn testified that he would have gone to trial because he is innocent. (111:9; App. 145).

Trial counsel testified he had reviewed the discovery materials provided by the State and was aware of W.S., Kuehn's boss. (111:21; App. 148). Trial counsel testified that he was aware that W.S. was a registered sex offender due to his conviction for the sexual assault of a child. (111:22; App. 148). Trial counsel further testified that he was aware that one of the locations at which child pornography was accessed was at W.S.'s house, and that the "dirty

phone" containing child pornography was found in a vehicle belonging to W.S. (111:22; App. 148). Trial counsel testified that he was generally aware of the law on third-party perpetrator defenses, and that he was looking into whether it was viable to present a defense that W.S. "was the guy." (111:22; App. 148).

Trial counsel explained he discussed the possibility of filing a *Denny* motion related to W.S. with Kuehn (111:22-23; App. 148), but ultimately did not do so for two reasons: because child pornography was accessed outside a library, and 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 [W.S.]." (111:23; App. 148). Second, trial counsel noted that child pornography was accessed at the time Kuehn was at a health care facility for an appointment. (111:23; App. 148). 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. 148).

Counsel also testified that he was not familiar with the 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. 148-49). He stated, "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 . . . in my analysis." (111:25-26; App. 149). 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 [W.S.] 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. 149).

The court later denied Kuehn's remaining postconviction claims in a written order. (95:1; App. 158). The order 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. 158).

4. *The court of appeals*. The court of appeals upheld the trial court's decision in an unpublished opinion. The court first held that trial counsel was not ineffective for failing to pursue a third-party perpetrator defense with respect to W.S. According to the court of appeals, trial counsel determined that "the *Denny* evidence was so weak relative to the evidence of Kuehn's guilt that going to trial based on a weak theory of the case . . . was bad strategy." (COA Op. ¶24; App. 110). The court of appeals concluded that the evidence against Kuehn was strong, specifically evidence which showed apparent links between Kuehn to the Samsung phone, as well as links to email and other accounts associated with

the phone. The email accounts included the name "will" in the email address and were used to send and received hundreds of images of child pornography. Based on electronic information associated with the Samsung phone, a Milwaukee police detective also determined that the phone was used to surf a website used to share child pornography. That website was accessed through the Cudahy Public Library's website at the same time that the detective saw Kuehn parked outside the library. (*Id.* ¶28; App. 111-13). On the other hand, the evidence also showed that the Samsung phone was last used as a cellphone in 2013. (9:9; 106:12-13).

The court of appeals characterized the evidence against W.S. as "tenuous." (*Id.* ¶30; App. 114). This included the fact that W.S. had a prior conviction for sexually assaulting a fourteen-year-old girl, thereby indicating he had an sexual attraction to children and, thus, a motive to possess child pornography; W.S. was the subscriber for one of the IP addresses used to access child pornography; W.S. was allegedly present at the locations where the phone was used to download child pornography; and W.S. had access to the Samsung phone, which was found in his vehicle. (*Id.* ¶29; App. 113-14).

Based on the evidence in this case, the court of appeals determined that it was reasonable for trial counsel to conclude that, if Kuehn took his case to trial and presented *Denny* evidence implicating W.S., it was likely Kuehn would be convicted of all the charged offenses. This would leave Kuehn in a

situation where he would have not taken responsibility for his alleged actions, but instead tried to blame the crimes on someone else. (*Id.* ¶30; App. 114). Trial counsel, the court stated, could therefore "reasonably conclude that those facts would put Kuehn in an even more negative light with the trial court for purposes of sentencing as opposed to pleading guilty to the five counts of possession of child pornography and accepting responsibility for his actions." (*Id.*)

The court noted that, because of its determination on the deficient performance prong, it did not need to reach the prejudice prong of the ineffective assistance of counsel analysis. The court also chose not to reach a separate argument raised by the State in which it asserted Kuehn's guilty pleas waived his ineffectiveness claim. (*Id.* ¶31 n.13; App. 115).

Next, the court of appeals rejected Kuehn's claim that the circuit court erred in imposing the child pornography surcharge for the ten images which formed the basis for the read-in offenses. In this respect, the court noted that Wis. Stat. § 973.042 requires circuit courts to "impose a child pornography surcharge of $500 for each image or each copy of an image associated with the crime." (*Id.* ¶33; App. 115 (quoting Wis. Stat. § 973.042(2))). In construing the phrase "associated with the crime," the court noted that the word "associated" is defined as "[c]onnected in thought, mentally related." (*Id.* ¶40; App. 118 (quoting Oxford English Dictionary)). Based on this

definition, the court determined that the ten read-in images were "associated with the crime." First, the court pointed out that Wis. Stat. § 973.042 does not require that, for the surcharge to be imposed, the image must be the basis for a conviction. (*Id.* ¶42; App. 118). Second, the court determined that, from a factual standpoint, the ten images were "[c]onnected in thought" and "mentally related" to the crime. In this respect, the court stated that the ten images which formed the basis for the read-in offenses were received on the same email accounts, and with the same device, as the images associated with the five counts for which Kuehn was convicted. (*Id.* ¶43; App. 118-19).

Finally, the court of appeals held that the order barring Kuehn from contacting J.S. while on extended supervision was not overly broad or unreasonable. The court acknowledged that the trial court did not provide any reasoning for this no-contact order, which would have been preferable. The court of appeals therefore searched the record to determine whether to uphold the no-contact order as a reasonable exercise of discretion. (*Id.* ¶54; App. 122).

In doing so, the court of appeals noted that Kuehn had three minor children, one with J.S. and the two others with his ex-wife. According to the complaint, Kuehn asked an unnamed individual, in an email exchange, if he was interested in "boys or girls[.] I have three sons." Later, Mr. Kuehn told that other individual, "[Y]ou can have my boys[,] how

much will you pay[?]" The unnamed person replied, "400 for both?" (*Id.* ¶55; App. 122).

Because J.S. appeared to want a continuing relationship with Kuehn despite these allegations and Kuehn's convictions, the court determined that it was reasonable to conclude that "J.S. does not appreciate the gravity of Kuehn's actions, and J.S. will not protect minors from Kuehn while Kuehn is on extended supervision." (*Id.* ¶57; App. 123). The court therefore decided that the no-contact order was not overbroad or unreasonable. (*Id.* ¶¶58-59; App. 123).

ARGUMENT

I. This Court should grant review to clarify whether defense counsel was ineffective for failing to pursue a third-party perpetrator defense when no other defenses existed in the case.

The first issue presented—whether trial counsel was ineffective for failing to pursue the third-party perpetrator defense, which was the only defense available in this case—is an important and novel constitutional issue, one that is likely to arise again in other cases.

Both the United States and Wisconsin Constitutions guarantee a criminal defendant the right to counsel. U.S. Const. amends. VI, XIV; Wis. Const. art. 1, § 7. "This right includes the right to

effective assistance of counsel." *State v. Roberson*, 2006 WI 80, ¶23, 292 Wis. 2d 280, 717 N.W.2d 111.

In this case, 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). To establish ineffective assistance of counsel warranting plea withdrawal, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficiency. *Id.* at 687 (1984); *see also 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. 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).

Here, the court of appeals determined that trial counsel did not perform deficiently by failing to pursue a third-party perpetrator defense implicating W.S. According to the court of appeals, the evidence against Kuehn was strong, so it was reasonable for counsel to conclude that this defense was unlikely to succeed. It was further reasonable, according to the court of appeals, for counsel to conclude that

pursuing this defense "would put Kuehn in an even more negative light with the trial court for purposes of sentencing as opposed to pleading guilty." (COA Op. ¶30; App. 114).

This purported strategy, however, was objectively unreasonable. In point of fact, it was not an actual *trial* strategy at all. Trial counsel merely believed that the third-party perpetrator defense was unlikely to succeed because the case against Kuehn was strong. He therefore believed Kuehn should simply confess his alleged crimes and plead guilty. Because of those beliefs, counsel decided not to pursue the only available defense in the case.

It is not a reasonable trial strategy to forgo a "weak" defense in favor of no defense at all. Doing so is completely irrational. A reviewing court should not ratify a lawyer's decision simply because it is labeled "trial strategy" by the trial court. *See State v. Felton*, 110 Wis. 2d 485, 502, 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." *Id.* at 503. This standard "implies deliberateness, caution, and circumspection" and the decision "must evince reasonableness under the circumstances." *Id.* at 502. For these reasons, 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." *Id.* at 502-03.

In this case, trial counsel did not testify that he decided not to pursue the third-party perpetrator defense against W.S. in favor of a different defense that was stronger. In fact, the record is devoid of any indication that Kuehn had any defense other than the third-party perpetrator defense against W.S. As the prosecutor mused when trial counsel stated that he would not be pursuing the third-party perpetrator defense, that "kind of leads us into a curious place, I guess, which is what is the defense?" (107:7).

Given that the third-party perpetrator defense was the only plausible trial defense available to Kuehn in this case, it was not a reasonable trial strategy to discard that defense and proceed to trial with no defense. This is true even if the third-party perpetrator defense really was "weak," as counsel believed. While it may make sense to forgo a weak defense in favor of a stronger defense, it is nonsensical to abandon the only available defense—weak or not—in favor of no defense at all. Some defense is better than no defense. That is just common sense. *See Kellogg v. Scurr*, 741 F.2d 1099, 1102 (8th Cir. 1984) (even tactics "must stand the scrutiny of common sense").

At bottom, what the court of appeals characterized as a "reasonable trial strategy" was actually the lack of a trial strategy. Defense counsel failed to pursue the only available defense in this case because he believed Kuehn should plead guilty instead of going to trial. (*See* COA Op. ¶30; App. 114). That is not a "strategic" choice that a lawyer is

authorized to make. It is one that effectively goes to the objectives of representation, i.e., whether Kuehn should have pled guilty or gone to trial. That was a choice that clearly belonged to Kuehn, not his attorney. SCR 20:1:2. Kuehn also had a right to present a defense at trial. "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).

By concluding it was a reasonable strategic choice for trial counsel to fail to pursue the only available defense in this case, the court of appeals effectively gave counsel the power to determine the objectives of representation. Counsel's "strategic" choice forced Kuehn to choose between pleading guilty or going to trial with no defense. That is no real choice at all.

It was therefore objectively unreasonable and deficient for trial counsel to fail to pursue a third-party perpetrator defense in this case. That failure was also prejudicial. Kuehn specifically testified that he would have gone to trial had his attorney filed a *Denny* motion to permit a third-party perpetrator defense alleging that W.S. was the person who actually possessed the child pornography. He explained he would have gone to trial because he was innocent of the child pornography charges. (111:9; App. 145). 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. 144-45).

This testimony is bolstered by the fact that 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, 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).

Moreover, contrary to the court of appeals' conclusion, the third-party perpetrator defense in this case was not weak; it was sufficient to raise a reasonable doubt regarding Kuehn's guilt. To argue that a third-party was responsible for the crimes for which Kuehn was charged, he needed to establish motive, opportunity, and direct connection. *See Wilson*, 362 Wis. 2d 193, ¶¶56-59. However, for purposes of analyzing the viability of a *Denny* defense, this 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." *Id.*, ¶61; *see also Holmes*, 547 U.S. at 330-331.

In this case, despite the evidence against him, Kuehn could have satisfied each prong of *Denny*'s

test, and also presented a plausible theory of defense to a jury at a trial.

1. *Motive*. W.S. had a plausible reason to commit the crimes here. According to the Wisconsin Department of Corrections sex offender registry, since 1986, W.S. has been on lifetime sex offender registration for second-degree sexual assault in Milwaukee County Case No. 1985CF3609, involving a fourteen-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 193, ¶¶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, W.S. 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.

2. *Opportunity*. 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." *Id.*, ¶65. In examining the police reports in this case, it is apparent that much of the evidence used against Kuehn immediately bears the same ties to W.S. For example, one of the IP addresses linked to the child

pornography listed W.S. as the subscriber. (*See* 71:25 at ¶18). In addition, the search warrant included W.S.'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 W.S. (*See* 71:26 at ¶26; 1:5).

Then, there is some evidence that at first glance appears tied only to Kuehn: child pornography was accessed at parents' home in Door County, and at an Aurora Health Care facility at the same time Kuehn was being treated there. (9:3). Police took a picture of 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 Kuehn. (9:9-10).

However, at the postconviction hearing, Kuehn testified that W.S., his boss and friend, spent a substantial amount of time with him, including at Kuehn's parents' home. (111:7; App. 144). He further testified that he told his trial attorney that W.S. had picked him up from an Aurora Health Care facility, and that W.S. was present at the Cudahy Public Library on the occasion that police took a picture of Kuehn in the Ford truck. (111:12; App. 145). W.S. thus had the same opportunities to directly commit the crime of accessing child pornography at the locations the state alleged Kuehn accessed child pornography.

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. 152). He testified that he was aware that cellphones that are not password protected can be accessed by people other than the owner. (111:37; App. 152). 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. 152). 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/. Therefore, there is a "practical possibility" that Szymanski committed this offense.

3. *Direct connection*. 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. 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 193, ¶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). Kuehn's postconviction testimony placed W.S. in the places where child pornography was accessed, as did the police's own investigation. (1:1-8; 111:12; App. 145). There is evidence suggesting that W.S. actually committed the crime of possessing child pornography, as child pornography was accessed from his home address, and the "dirty phone" was seized from his vehicle. (1:1-8). Accordingly, Kuehn is able to establish a direct connection by connecting W.S. 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 W.S. and the crime. W.S. had access, opportunity, and moreover—a legitimate reason to shield himself behind evidence ostensibly pointing to Kuehn. By using the name "will" in email addresses and by using an old device belonging to Kuehn, W.S. 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, W.S. 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.

Accordingly, this Court should grant review to determine whether trial counsel was, in fact, ineffective in failing to pursue the third-party

perpetrator defense simply because he believed the defense was unlikely to succeed. Whether it was a reasonable for counsel to fail to pursue this defense when it was only available defense is a novel and important constitutional issue. Resolving this question will clarify whether an attorney can effectively determine the objectives of representation by choosing not to pursue the only available defense.

II. Review is warranted to clarify whether Wis. Stat. § 973.042 authorizes the imposition of child pornography surcharges for read-in offenses.

The second issue in this case—whether Wis. Stat. § 973.042(1) authorizes the imposition of child pornography surcharges for read-in charges—is an important question of statutory interpretation, one that is likely to recur in other cases. This Court should use this case as a vehicle to resolve this issue.

Section 973.042 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 copy of an image associated with the crime." Wis. Stat. § 973.042(2). The statute further provides that "[t]he 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." *Id.*

But Wis. Stat. § 973.042 does not itself define the phrase "image associated with the crime." In this

case, the court of appeals held that this phrase means any image that is "connected in thought" or "mentally related" to the image or images that form the bases for the crimes for which a defendant is convicted. (COA Op. ¶40; App. 118). This includes, according to the court of appeals, all images that are stored on the same device or received on the same email accounts as the images that form the bases for the counts for which the defendant is convicted. (*Id.* ¶ 43; App. 118-19). For all practical purposes, this will likely include all images of child pornography that a defendant has in his possession.

Kuehn submits that this interpretation is overly broad and incorrect. The plain language of the statute specifies that a child pornography surcharge shall be imposed for each "image associated with the crime" of possession of child pornography if the court "imposes of sentence or places a person on probation for" that crime. *See* Wis. Stat. § 948.12.

The phrase "image associated with the crime" is better read in this context to mean the image or images that are *directly* associated with the crime—that is, those images that form the basis for the charge of possession of child pornography to which a defendant is actually convicted and sentenced. Under this construction, images which form the bases for read-in charges or other uncharged conduct would not be considered "associated with the crime" for which the defendant is sentenced. Instead, they would properly be considered associated with other

crimes—crimes that did not result in a conviction or sentence, but other crimes nonetheless.

This is the more sensible and commonsense interpretation of the statute. The phrase "associated with the crime" cannot reasonably be read to include a defendant's entire "course of conduct" or all of the "crime[s] considered at sentencing." *See* Wis. Stat. § 973.155(1)(a) (the sentence credit statute) and Wis. Stat. § 973.20(1g) (the criminal restitution statute). The contrasting statutory frameworks utilized by the legislature in the sentence credit and restitution contexts, which were both in existence and previously interpreted by multiple courts prior to the enactment of Wis. Stat. § 973.042,[3] shows that the legislature understands how to write a more broadly encompassing framework that would have or could have included all of the "crimes" the State mentioned in the criminal complaint. *See Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶103, 327 Wis. 2d 572, 786 N.W.2d 177 ("The legislature is presumed to be aware of existing laws and the courts' interpretations of those laws when it enacts a statute.").

The legislature is therefore at least presumed to be aware of the sentence credit statute within the "Sentencing" Chapter of the Wisconsin Statutes which utilizes the phrase "course of conduct." The phrase "course of conduct for which sentence was

[3] Wis. Stat. § 973.042 was created pursuant to 2005 Wis. Act 433, § 26. Wis. Stat. § 973.155 was created in 1978 and Wis. Stat § 973.20 was created in 1988.

imposed" has been used for decades in Wis. Stat. § 973.155(1)(a) and courts have long interpreted the phrase to cover "the specific offense or acts embodied in the charge for which the defendant is being sentenced." *State v. Zahurones*, 2019 WI App 57, ¶14, 389 Wis. 2d 69, 934 N.W.2d 905. The phrase "course of conduct" has even been interpreted to cover conduct that was "dismissed and read-in at sentencing." *See State v. Floyd*, 2000 WI 14, ¶2, 232 Wis. 2d 767, 606 N.W.2d 155 *abrogated on other grounds by State v. Strazkowski*, 2008 WI 65, 310 Wis. 2d 259, 750 N.W.2d 835. If Wis. Stat. § 973.042(2) utilized the phrase "course of conduct for which sentence was imposed" rather than "associated with the crime," then the statute could be read to include all of the images the State alleged Kuehn possessed because that phrase would encompass his full "course of conduct for which sentence was imposed." However, only five images were associated with Kuehn's crimes for which sentences were actually imposed. *See* Wis. Stat. § 973.042.

Second, the restitution statute, which also falls within Chapter 973, utilizes the phrase "crime considered at sentencing" to explicitly cover "any crime for which the defendant was convicted and any read-in crime." Wis. Stat. § 973.20(1g)(a). Clearly, had the legislature utilized the phrase "crime considered at sentencing" or cross-referenced the restitution statute, the court would have been tasked with determining the number of images associated with any "crime considered at sentencing," which would have included fifteen images.

However, the legislature did no such thing in Wis. Stat. § 973.042(2), and there is no such corollary statutory definition or precedent concerning the phrase "associated with the crime." Rather, the plain and commonsense meaning of that phrase, as used in Wis. Stat. § 973.042(2), simply covers any images "associated with the crime" of conviction and for which the defendant is sentenced.

Before the court of appeals, the State pointed out that the second sentence of Wis. Stat. § 973.02(2) requires the court to "determine the number of images" "associated with the crime by a preponderance of the evidence." According to the State, "Kuehn's suggestion that the court may only impose a surcharge for each conviction would render this second sentence superfluous." (State's COA Resp. Br. at 23). Not so.

While the unit of prosecution intended by the legislature may have been one count per image or recording, *see State v. Multaler*, 2002 WI 35, ¶67, 252 Wis. 2d 54, 643 N.W.2d 437, it is permissible for the State to choose to prosecute by a larger or more inclusive unit of prosecution. For example, the State could charge one count of possession of child pornography for each disc or hard drive or device that contained relevant images. *See id.*, ¶62 n.8 (citing *State v. Whistleman*, 2001 WI App 189, ¶1, 247 Wis. 2d 337, 633 N.W.2d 249 for the proposition that the medium on which child pornography is stored or viewed is not the "only" unit of permissible prosecution).

In such a case, if a defendant's conviction and sentence for one charge/crime of possessing child pornography was factually and legally "associated with" multiple images or the total number of images on a specified medium, then Wis. Stat. § 973.042(2) would require the court to find that the total number of images or recordings "associated with the crime" for which the defendant was convicted. That could include hundreds if not thousands of images even from a single conviction.

As noted above, however, the court of appeals disagreed with this plain-meaning interpretation, instead giving a much broader and expansive reading to the phrase "image associated with the crime." This Court should grant review to clarify which interpretation is correct.

III. The Court should grant review to determine whether the condition that Kuehn have no contact with his adult girlfriend is overbroad and unreasonable.

Finally, this Court should grant review to determine whether the no-contact provision in this case is unreasonable. This is an important constitutional issue, and the court of appeals decision is wrong.

Sentencing courts have "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. 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. 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." *State v. Oakley*, 2001 WI 103, ¶13, 245 Wis. 2d 447, 629 N.W.2d 200.

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 447, ¶¶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 circuit court's order that Kuehn have no contact with J.S. while serving extended supervision is overly broad, unreasonable, and unjustly impinges

on his constitutional freedom of association. Here, the sentencing court ordered no contact with J.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.130-31). The sentencing court also did not explain why it imposed the no-contact restriction with J.S., Kuehn's adult girlfriend.

Because the circuit court did not explain its basis for imposing the no-contact order between Kuehn and his girlfriend, the court of appeals constructed its own reasons supporting the order. It emphasized Kuehn's danger to J.S.'s children as the underlying basis for the no-contact order with *her*. But this makes no sense. Kuehn's term of confinement is twenty years, so by the time he begins his extended supervision, J.S.'s children will be adults. Using J.S.'s children as justification for preventing Kuehn from having contact with his adult girlfriend twenty years later during his twenty-year term of extended supervision is therefore plainly unreasonable and impinges on his constitutional right to freedom of association. *See Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 545 (1987) ("the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights.").

Moreover, even in a case where the term of extended supervision was shorter, this type of order would be overly broad and unreasonable. J.S.'s children are already accounted for by virtue of the no-

contact order with E.K. or with anyone under the age of eighteen without the presence of a DOC-approved chaperone and prior approval of the agent. (103:45-46; App. 130-31). The order preventing Kuehn from having any contact with J.S. is thus redundant and unnecessary.

Additionally, the simple fact that J.S. wants to have a continuing relationship with Kuehn is not a reasonable basis for concluding that she or Kuehn will violate the no-contact order pertaining to J.S.'s children, or that J.S. will not protect her minor children.

This case is thus analogous to *State v. Stewart*, 2006 WI App 67, 291 Wis. 2d 480, 713 N.W.2d 165. In that case, this Court held that a condition of probation and extended supervision was overbroad and unduly restrictive of the defendant's constitutional liberties. The defendant in *Stewart* was convicted of felony bail jumping and felony fleeing, and the circuit court imposed the condition that he 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. This Court disagreed, however, 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 Kuehn's contact with his girlfriend is overly broad and unduly restrictive. Kuehn was sentenced to twenty years of initial confinement and twenty years of extended supervision. Prohibiting him from having 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[]. *See id.*, ¶16.

CONCLUSION

For these reasons, the petition for review should be granted.

Dated this 25th day of August 2020.

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 7,988 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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

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

Dated this 25th day of August 2020.

Signed:

LEON W. TODD
Assistant State Public Defender

APPENDIX

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TO
APPENDIX