



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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July 2, 2021

Sheila T. Reiff
Clerk, Wisconsin Supreme Court
110 East Main Street
Post Office Box 1688
Madison, Wisconsin 53701-1688

Re: *State of Wisconsin v. William Francis Kuehn*
Case No. 2018AP2355-CR

Dear Ms. Reiff:

On June 21, 2021, this Court ordered the parties to file simultaneous letter briefs by July 6, 2021, discussing the impact of *State v. Schmidt*, 2021 WI 65, 2021 WL 2483909 (decided June 18, 2021), on the issues raised in Mr. Kuehn's petition for review.

Schmidt relates to the second issue that Kuehn presented in his petition for review: "Does Wis. Stat. § 973.042 authorize the imposition of child pornography surcharges for images which form the basis for dismissed and read-in charges?" (Kuehn's Pet. 1, 25–30.) *Schmidt* answers this question affirmatively, and it reinforces the court of appeals' decision upholding the circuit court's imposition of surcharges on Kuehn for read-in offenses associated with his crimes. *State v. William Francis Kuehn*, No. 2018AP2355-CR, 2020 WL 4333793 (Ct. App. July 28, 2020) (unpublished).

The procedural history in *Schmidt* and *Kuehn* are remarkably similar. The State charged Schmidt with 14 counts of possession of child pornography. *Schmidt*, 2021 WI 65, ¶ 5. Schmidt pled guilty to six counts of possession of child pornography while the remaining counts were dismissed and read in. *Id.* ¶ 6. The circuit court

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assessed the child pornography surcharge for the six offenses of conviction and for the eight read-in offenses. *Id.* ¶ 8.

Schmidt moved to withdraw his plea, asserting that the circuit court was required to inform him of the surcharge during his plea because the surcharge constituted punishment. *Schmidt*, 2021 WI 65, ¶ 9. Schmidt also asked the court to vacate the surcharges on the eight read-in offenses because section 973.042 did not allow the circuit court to assess the child pornography surcharges for read-in offenses. *Id.* The circuit court denied Schmidt's plea withdrawal motion. *Id.* ¶ 10.

As in *Schmidt*, the State and Kuehn entered a plea agreement in which Kuehn agreed to plead to five of the charged offenses while the ten other charged offenses were dismissed and read in. *Kuehn*, 2020 WL 4333793, ¶ 4. As in *Schmidt*, the circuit court assessed the child pornography surcharge on Kuehn for both the charged offenses and the dismissed but read-in offenses. *Id.* ¶ 5. As in *Schmidt*, Kuehn sought to vacate the surcharges associated with the dismissed but read-in offenses, claiming that they were not associated with the images of his conviction as required under section 973.042. *Id.* ¶ 7. As in *Schmidt*, the circuit court denied Kuehn's motion. *Id.*

This Court in *Schmidt* and the court of appeals in *Kuehn* applied similar reasoning to conclude that a circuit court has the authority to impose a surcharge under section 973.042 for images related to dismissed but read-in offenses that were associated with the crime of possession of child pornography. In *Schmidt*, this Court held that “the child pornography surcharge applies to images of child pornography that form the basis of read-in charges of sexual exploitation of a child or possession of child pornography, so long as those images of child pornography are connected to and brought into relation with the convicted individual's offense of sexual exploitation of a child or possession of child pornography.” *Schmidt*, 2021 WI 65, ¶ 61.

Just as this Court did in *Schmidt*, 2021 WI 65, ¶ 57, the court of appeals looked to section 973.042's plain language when it determined that the legislature did not intend to tie “the imposition of a surcharge to only a conviction.” *Kuehn*, 2020 WL 4333793, ¶ 42. As in *Schmidt*, the court of appeals upheld the circuit court's decision to assess the surcharge for the ten images that formed the basis for Kuehn's dismissed and read-in charges because those images were “associated with the crime” as provided under section 973.042. *Kuehn*, 2020 WL 4333793, ¶¶ 41–44.

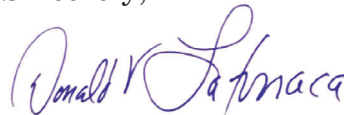
Both this Court in *Schmidt* and the court of appeals in *Kuehn* recognized potential limits on the assessment of surcharges for uncharged images. In *Schmidt*,

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this Court indicated that the assessment of surcharges related to images for uncharged offenses must be “connected to and brought into relation with the convicted individual’s offense of sexual exploitation of a child or possession of child pornography.” *Schmidt*, 2021 WI 65, ¶ 61. The court of appeals applied a similar standard in *Kuehn*, asking if “the ten images were ‘[c]onnected in thought’ and ‘mentally related’ to the crime.” *Kuehn*, 2020 WL 4333793, ¶ 43. The court of appeals concluded that the ten images related to Kuehn’s read-in offenses were “associated with the crime” because those images “were received on the same email accounts, and with the same device, as the images associated with the five counts of possession of child pornography for which Kuehn was convicted.” *Id.* In other words, the images for the uncharged offenses in Kuehn’s case were “connected to and brought into relation with” his convictions for possession of child pornography. *See Schmidt*, 2021 WI 65, ¶ 61.

Schmidt answers the question that Kuehn presented in his petition for review. Section 973.042 authorizes the circuit court to impose a surcharge for images that form the basis for charges that were dismissed and read in when they are associated with the crime of conviction. Therefore, this Court should decline review to answer this question again.

Sincerely,



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Assistant Attorney General

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