STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2020AP605-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM C. MACDONALD,

Defendant-Appellant.

ON APPEAL FROM AN AMENDED JUDGMENT OF CONVICTION AND ORDER DENYING IN PART DEFENDANT'S POSTCONVICTION MOTION, ENTERED IN THE MARQUETTE COUNTY CIRCUIT COURT, THE HONORABLE MARK T. SLATE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Wisconsin Stat. § 973.042(2) requires the circuit court to impose a child pornography surcharge for each image "associated with the crime." Did the circuit court err when it ordered MacDonald to pay a surcharge for the images associated with nine counts that were dismissed but read in and 89 uncharged images that were read in for sentencing?

The circuit court answered: No.

This Court should answer: No.

2. Did the $500 surcharge assessed against MacDonald pursuant to Wis. Stat. § 973.042(2) for each of the 100 child pornography images associated with his crime of possession of child pornography violate the Eight Amendment's Excessive Fines Clause?

The circuit court answered: No.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT

Oral argument is unnecessary because the facts are undisputed and the statutory and constitutional issues presented will be adequately addressed in the briefs. Publication would be appropriate, however. There are very few Wisconsin cases interpreting the Excessive Fines Clause and no Wisconsin cases addressing whether the surcharge required by Wis. Stat. § 973.042(2) violates the Excessive Fines Clause.

INTRODUCTION

States routinely impose statutory fees or surcharges on criminal defendants to offset burdens related to the administration of the criminal justice system. One example is the child pornography surcharge, Wis. Stat. § 973.042, which requires courts to impose a $500 surcharge on each image

associated with the crimes of possession of child pornography (section 948.12) and sexual exploitation of a child (section 948.05[1]). The proceeds from the surcharge go toward funding criminal investigations of child-pornography possession and sexual exploitation of a child, and toward providing treatment, educational, and advocacy services for sexual-assault victims.

MacDonald was convicted of one count of possession of child pornography and sentenced to a seven-year bifurcated sentence, with four years of incarceration and three years of extended supervision. (R. 40:1.) Pursuant to section 973.042, the court found that a total of 100 images were associated with MacDonald's crime. Thus, the court imposed a $500 surcharge on each image, totaling $50,000.

On appeal, MacDonald argues that section 973.042 allows the surcharge to be imposed only on the image or images that actually form the basis of the conviction. Because MacDonald's conviction was based on a single image, he argues that the surcharge should be reduced to $500. In the alternative, MacDonald argues that, if section 973.042 does allow the surcharge to be imposed on all 100 images, the surcharge, as applied to him, violates the Excessive Fines Clause of the Eighth Amendment.

MacDonald is wrong. The circuit court properly ordered the surcharge for all 100 images. Each of those images was—in accordance with the surcharge statute—associated with his crime of possession of child pornography.

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[1] Sexual exploitation of a child addresses the creation and dissemination of child pornography. It prohibits, *inter alia*, recording a child engaged in sexually explicit conduct as well as distributing, or possessing with intent to sell or distribute, any recording of a child engaging in sexually explicit conduct. Wis. Stat. § 948.05(1)(b), 948.05(1m).

The child pornography surcharge is purely remedial and, thus, does not qualify as a "fine" for purposes of the Excessive Fines Clause. Imposing the surcharge on each associated image requires those that are most responsible for the increased costs associated with combating child pornography and treating sexual assault victims to contribute a more substantial share towards offsetting those costs.

Even if the surcharge is punitive in part and, thus, qualifies as a fine, it is not excessive. A fine violates the Excessive Fines Clause only if it is grossly disproportional to the gravity of a defendant's offense. Applying that test here, this Court should conclude that the surcharges are constitutional. Possession of child pornography is a serious offense and MacDonald admitted to seeking out and distributing hundreds of images of child pornography. Significantly, MacDonald faced a maximum statutory fine of $100,000, double the aggregate amount of the surcharges imposed on him.

STATEMENT OF THE CASE

The Investigation. According to the criminal complaint, on June 28, 2018, officers from the Marquette County Sheriff's Office, the Westfield Police Department, and the Wisconsin Division of Criminal Investigation Digital Forensic Unit ("DFU"), executed a search warrant on MacDonald's residence. During the search, DFU examined one of defendant's cellular telephones where they discovered numerous images of prepubescent girls engaging in actual sexual acts and in sexually explicit poses. (R. 7:5.). When officers asked MacDonald how many images of child pornography he possessed, MacDonald replied, "let's say 200 just to be safe." (R. 16:7, 7:5.) MacDonald also admitted to sending "maybe 120" of the images to others via the internet. (R. 16:7.). Officers seized nine phones, two computer hard drives, and a tablet from MacDonald. (R. 9:1-3.) An extraction

report pertaining to two of the seized phones indicated that one phone contained 85 images consistent with child pornography and the other contained 15 images consistent with child pornography. (R. 48:6.)

The charges. MacDonald was charged with 10 counts of possession of child pornography in violation of Wis. Stat. § 948.12(1m). (R. 7:1–5; 14:1–5.) Possession of child pornography is a Class D felony, which includes a maximum fine of $100,000. Wis. Stat. § 939.50(3)(d).

The plea agreement. MacDonald agreed to plead no contest to one count of possession of child pornography. (R. 51:6.) In exchange, the State agreed to dismiss the remaining nine counts of possession of child pornography. However, at sentencing the State would read in the nine dismissed counts, as well as any uncharged images that were seized during the investigation. (R. 51:4–5, 10.)

The child pornography surcharge. At sentencing, the State requested that the circuit court assess the $500 child pornography surcharge on each of the 100 images seized during the criminal investigation that led to MacDonald's conviction. (R. 48:6.) MacDonald argued that, based on his ability to pay, the court should limit the surcharge to the image that formed the basis of his guilty plea, as well as the nine images that formed the basis of the dismissed but read-in charges, for a total of $5,000. (R. 48:8–9.) The circuit court concluded that, based on the "directive of the legislature," it was required to assess the $500 surcharge for each of the images of child pornography that MacDonald possessed, regardless of his ability to pay the surcharge. (R. 48:14–15.) Thus, the court agreed with the State's request and assessed the $500 child pornography surcharge based on the seizure of 100 images, for a total of $50,000. (*Id.*)

MacDonald's postconviction motion. MacDonald moved to reduce the surcharge arguing that, under Wis. Stat.

§ 973.042, a single $500 surcharge is authorized because only one image of child pornography formed the basis of his conviction. He also argued that, even if section 973.042 authorized the surcharge on all 100 images, the $50,000 surcharge violated the Excessive Fines Clause. (R. 30:4–7.) The circuit court denied the motion. (R. 55:7.) It noted that, "if it was one image per crime there would be no need for the judge to determine how many ultimate images there were." (R. 55:6.) The court concluded that, "it is the requirement of the sentencing judge to determine the total number of images that were possessed by the defendant, not necessarily how many they were convicted of." (*Id*.) The court also concluded that the surcharge did not violate the Excessive Fines Clause. (R. 55:7.)

MacDonald appeals.

ARGUMENT

I. Section 973.042(2) permitted the circuit court to assess a $500 child pornography surcharge for both the dismissed and read-in counts, as well as uncharged and read-in images, because those images were "associated with the crime."

A. Standard of review.

Whether section 973.042(2) allowed the circuit court to assess a surcharge for each image related to both dismissed counts and uncharged images presents a question of statutory interpretation that this Court reviews independently. *State v. Hinkle*, 2019 WI 96, ¶14, 389 Wis. 2d 1, 935 N.W.2d 271.

B. Applicable legal principles.

"[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681

N.W.2d 110. Thus, courts must avoid a construction that results in rendering statutory language superfluous. *Meyer v. Meyer*, 2000 WI 132, ¶ 22, 239 Wis. 2d 731, 620 N.W.2d 382. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Kalal*, 271 Wis. 2d 633, ¶ 45. The common, ordinary and accepted meaning can be ascertained from the dictionary definition. *Id*. ¶ 53. Both a statute's context and the structure "in which [its] operative language appears" is important to its meaning. *Id*. ¶ 46. "Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id*.

Wisconsin Stat. § 973.042(2) provides in relevant part, "If a court imposes a sentence . . . for a crime under . . . [s.] 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 circuit 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*. Section 973.042(1) defines an image to include "a video recording, a visual representation, a positive or negative image on exposed film, and data representing a visual image."

C. Section 973.042(2) authorized the circuit court to order a surcharge for each dismissed charge and each uncharged image associated with MacDonald's crime.

Section 973.042(2)'s plain language expressly contemplates that the aggregate surcharge will be based on the number of associated images, not convictions. This is clear in the first sentence of the subsection. By requiring a surcharge "for each image *associated* with the crime," the

Legislature expressly directed courts to assess the surcharge based on the total number of associated images, not convictions. The only issue is whether a particular image is "associated with the crime." Importantly, "crime" does not refer to just any crime under the code. Rather, it refers to the crimes referenced in section 973.042(2): sexual exploitation of a child (section 948.05) and possession of child pornography (section 948.12).

Section 973.042(2)'s second sentence confirms the interpretation that the surcharge assessment is based on images, not convictions. It requires the court to "determine the number of images" "associated with the crime by a preponderance of the evidence." *Id*. The crime MacDonald was convicted of was possession of child pornography under section 948.12. As MacDonald acknowledges (MacDonald's Br. 9), the Legislature intended that a separate charge under section 948.12 be levied for *each* distinct pornographic image possessed. *State v. Multaler*, 252 Wis. 2d 54, ¶ 64, 643 N.W.2d 437 (2002).[2] But, regardless of how the prosecutor charges a child pornography case, the fact is that section 973.042(2) does not limit the surcharge assessment to charged images or convictions. If the assessed surcharge were based on the number of *convictions*, there would be no reason for a court to conduct a hearing "to determine the number of *images*." MacDonald's suggestion that the court may only impose a surcharge for each conviction would render the second sentence of section 973.042(2) superfluous. *See Meyer*, 239 Wis. 2d 731, ¶ 22.

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[2] At issue in *Multaler* was whether charging a defendant for each distinct image constituted a multiplicity violation. In both *Multaler* and in this case, however, the prosecutor's decision to charge possession of child pornography based on each distinct image versus the medium the images are kept is irrelevant.

Had the Legislature intended to limit the court's authority to impose a surcharge on a per conviction basis as MacDonald advocates, it would have drafted section 973.042(2) differently. It would have tracked the language of other surcharge statutes in Chapter 973 that do direct circuit courts to assess a surcharge on a per conviction or per count basis.[3] The Legislature's deliberate choice of different language when it drafted section 973.042(2) demonstrates that it did not intend to limit the court's authority to impose a surcharge on a per conviction basis. Instead, it intended to authorize courts to order surcharges based on the number of images "*associated*" with a defendant's conviction for possession of child pornography. For this reason, MacDonald's argument obviously fails. *See Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 36, 341 Wis. 2d 607, 815 N.W.2d 367 ("[I]f the legislature had intended to accomplish what a party is urging on the court . . . the legislature knew how to draft the language and could have done so had it wished.")

Nonetheless, MacDonald contends that the surcharge only applies to multiple images when the State charges possession of child pornography based upon the medium on which it is stored rather than upon each image possessed. (MacDonald's Br. 10–11) He appears to have in mind a single CD or hard drive storing multiple images. There is no textual support for this argument in the statute itself, so he looks to

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[3] *See*, *e.g.*, Wis. Stat. § 973.043(1) (drug offender diversion surcharge imposed "for each conviction"); Wis. Stat. § 973.045(1)(a) (victim/witness surcharge imposed for "each misdemeanor count on which a conviction occurred"); Wis. Stat. § 973.045(1)(b) (victim/witness surcharge imposed for "each felony count on which a conviction occurred"); Wis. Stat. § 973.0455(1) (crime prevention funding board surcharge calculated by "adding up, for each misdemeanor or felony count on which a conviction occurred"); and Wis. Stat. § 973.046(1r)(a)–(b) (DNA surcharge imposed for "each conviction for a felony" and "each conviction for a misdemeanor").

unrelated statutes for support. He asserts that, if the Legislature had intended to allow a surcharge for dismissed but read-in counts and for uncharged but read-in images, it would have drafted the statute like the restitution statute, Wis. Stat. § 973.20, or like the sentence credit statute, Wis. Stat. § 973.155. (MacDonald's Br. 12–14.) This argument runs contrary to legislative intent.

As noted above, the Legislature intended that a separate charge under section 948.12 be levied for each distinct pornographic image possessed. So if, for example, a defendant had 10 CDs each storing 10 images, he would be charged with 100 counts (for each image) not 10 counts (for each CD). Section 948.12 was deliberately based on the images possessed, not the method used to store those images. Yet MacDonald argues that section 948.12 should be based on the storage method. But it is unreasonable to conclude that the Legislature intended the section 973.042 surcharge to apply to multiple images only in cases where the State charges possession of child pornography according to how the defendant stored his collection. Such a charging method runs contrary to the Legislature's intent in section 948.12. It is irrational to interpret section 973.042 in a way that directly conflicts with the legislative intent of section 948.12.

MacDonald's argument that the Legislature did not intend to include dismissed but read-in counts and uncharged but read-in images as evidenced by its decision not to draft the surcharge statute like section 973.20 or like section 973.155, also ignores legislative intent. Wisconsin's sentence credit statute, section 973.155, is intended to ensure that a person does not serve more time in custody than a lawfully imposed sentence allows. *State v. Johnson*, 2009 WI 57, ¶ 31, 318 Wis. 2d 21, 767 N.W.2d 207. Thus, credit is granted for each day in custody regardless of the basis for the confinement so long as it is connected to the "course of conduct" for which sentence was imposed. Wis. Stat.

§ 973.155(1)(a). Section 973.155 was narrowly crafted to accomplish that specific purpose. And, given the unique purpose of the statute, courts have been refining the phrase "in connection with the course of conduct" for years to flesh out exactly when an offense is sufficiently related to the course of conduct to justify credit.[4] Thus, the phrase has almost become a term of art associated solely with the sentence credit statute. As such, the Legislator's failure to utilize that phrase in the child pornography surcharge statute is not helpful in determining its intent with respect to that statute.

Under section 973.20, a court is required to order restitution for a "crime considered at sentencing." The primary purpose of section 973.20 is to compensate the victim for actual losses suffered as a result of the crime. *State v. Gibson*, 2012 WI App 103, ¶¶ 10–11, 344 Wis. 2d 220, 822 N.W.2d 500. The policy behind the restitution statute is that victims should not have to shoulder the losses caused by the crime if the defendant is capable of making restitution. *State v. Wiskerchen*, 2019 WI 1, ¶ 25, 385 Wis.2d 120, 921 N.W.2d 730. However, defendants are protected insofar as restitution awards must not exceed the damages or losses to the victim for which the defendant is actually responsible. *See* Wis. Stat. § 973.20(14)(a) (the victim has the burden of proving the amount of loss she sustained as a result of a crime considered at sentencing.). Thus, the victim must show that the defendant's criminal activity was a "'substantial factor in causing pecuniary' injury to the victim." *Gibson*, 344 Wis. 2d 220, ¶ 11 (citation omitted). In other words, the restitution

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[4] *See, e.g.*, *State v. Carter*, 2010 WI 77, ¶ 132, 327 Wis. 2d 1, 785 N.W.2d 516 (citation omitted) ('The sentence credit statute carries a heavy burden because it must be applied in an 'almost endless variety' of factual circumstances. As a result, courts have often determined that the statute is ambiguous as to specific facts.").

statute is intended to compensate only those victims that can show that they suffered pecuniary loss as a result of the defendant's crime. Consideration must then be given to, *inter alia*, the defendant's financial resources and earning ability, which can justify reducing the amount of restitution owed by the defendant. Wis. Stat. § 973.20(13)(a).

In contrast, the purpose of section 973.042 is to defray the State's costs of combating child pornography and treating sexual abuse victims. It is not intended to compensate actual victims because the victims of child pornography include both the children and society as a whole. *New York v. Ferber*, 458 U.S. 747, 758 n.9 (1982) ("[T]he use of children as ... subjects of pornographic materials is very harmful to both the children and the society as a whole."). The market for child pornography is "intrinsically related" to the sexual abuse of children. *United States v. Stevens*, 559 U.S. 460, 471 (2010). And, the harm caused by child pornography involves injury that is not readily ascertainable in pecuniary terms. *Ferber*, 458 U.S. at 758 ("[T]he use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child."). Thus, the goals of the restitution statute and the child pornography statute are fundamentally different.

And, unlike the restitution statute, the defendant's financial resources and ability to pay are not required considerations when imposing the child pornography surcharge. Instead, the surcharge is only limited by the number of images that are associated with the crime, i.e., how much harm the defendant has caused. As explained more fully on page nine of this argument, assessing the surcharge on each image associated with the crime reflects the increased costs associated with multiple images of child pornography. As the number of victims and incidents of harm increase, the investigation costs, as well as the cost for treating sexual assault, similarly increase.

Rather than focusing on language the Legislature chose not to use, it is helpful to analyze the language that the Legislature chose to include in the statute. As noted in footnote 3 above, the Legislature knew how to limit the child pornography surcharge to a per conviction or per count basis. It chose not to. And, the Legislature could have tracked the language contained in the sentence credit or restitution statutes. Again, it chose not to. Instead, section 973.042 requires that the surcharge be imposed on each image "associated" with the crime. Merriam-Webster defines "associated" as, "related, connected, or combined together." *Associated*, Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/associated (last visited Jul. 6, 2020). The choice of a word with this very broad definition makes clear that the Legislature intended that the surcharge be imposed regardless of whether the images were "connected to the course of conduct" (section 973.155) or read in at sentencing (section 973.20). The only requirement is that the images be "associated" with the crime of possession of child pornography or sexual exploitation of a child. Wis. Stat. § 973.042(2).

Here, the record demonstrates that the court ordered surcharges for the images associated with MacDonald's crime of possession of child pornography. MacDonald pleaded guilty to Count 1 of the information. (R. 40:1–2; 51:6.) Counts 2 through 10 were dismissed and read-in at sentencing. All the uncharged images that were seized as part of the criminal investigation were also read in. (R. 51:10.) At sentencing, the court determined that the images associated with the nine

dismissed counts and 89[5] uncharged images were associated with MacDonald's crime. (R. 48:14–15.)

The record supports the circuit court's determination that 100 images were associated with MacDonald's crime. Based on MacDonald's own admissions contained in the criminal complaint and the pre-sentence investigation report, the circuit court could reasonably determine that 100 images of child pornography were recovered while executing the June 2018 search warrant. Specifically, when officers asked MacDonald how many pornographic images containing children he possessed, MacDonald responded, "let's say 200 just to be safe." (R. 16:7; 7:5.) When officers asked how many of those images he had sent to others via the internet, MacDonald replied, "quite a bit honestly" adding, "maybe 120." (R. 16:7.) Moreover, a supplemental extraction report pertaining to just two of the nine phones seized from MacDonald noted that one phone contained 85 images consistent with child pornography and the other contained 15 such images. (R. 48:6.) The simultaneous storage of these images on a pair of devices that led to MacDonald's conviction certainly suffices as being "associated with" MacDonald's conviction for possession of child pornography.

The circuit court did not err when it ordered MacDonald to pay a $500 surcharge for each image identified in the complaint and information, as well as the 89 uncharged images that were seized during the criminal investigation that constituted child pornography. The assessment of the surcharge on all 100 images is consistent with statutory intent.

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[5] MacDonald does not dispute that there were "at least 100" uncharged images potentially consistent with child pornography. (MacDonald's Br. 14.)

II. The child pornography surcharge does not violate the Excessive Fines Clause of the Eighth Amendment.

A. Standard of review.

Whether section 973.042 violates the Eight Amendment against excessive fines is a constitutional issue that appellate courts review *de novo*. *State v. Boyd*, 2000 WI App 208, ¶ 7, 238 Wis. 2d 693, 618 N.W.2d 251.

"[L]egislative enactments are entitled to a presumption of constitutionality." *State v. Cole*, 2003 WI 112, ¶ 11, 264 Wis. 2d 520, 665 N.W.2d 328. It falls to the party challenging the constitutionality of a statute to prove that the statute is unconstitutional beyond a reasonable doubt. *Id*.

B. Applicable legal principles.

The Eighth Amendment to the United States Constitution prohibits "excessive fines." U.S. Const. amend VIII. The Supreme Court has explained that "the word 'fine' . . . mean[s] a payment to a sovereign as punishment for some offense." *Browning–Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989). Thus, the determination of whether a sanction violates the Excessive Fines Clause requires a two-step analysis: First, is the sanction punitive within the meaning of the Eighth Amendment? And, second, if the sanction is punitive, is it "excessive"? *Austin v. United States*, 509 U.S. 602, 622–23 (1993); *State v. Hammad*, 212 Wis. 2d 343, 350–51, 569 N.W.2d 68 (Ct. App. 1997). Only if the first question is answered in the affirmative is the Eighth Amendment even implicated.

C. The child pornography surcharge is not punitive.

A sanction is not punitive within the meaning of the Eighth Amendment unless it "can *only* be explained as serving in part to punish." *Austin*, 509 U.S. at 610 (emphasis added). That is, it must serve either retributive or deterrence purposes. *Id*. If a sanction can fairly be said solely to serve a remedial purpose, it is not punitive. *Id*.

Section 973.042 imposes a surcharge on defendants convicted of either the crime of possession of child pornography or the sexual exploitation of a child. The number of surcharges imposed depends on the number of images the court determines to be associated with the crime. Wis. Stat. § 973.042(2). Once the number of images associated with the crime is determined, a surcharge of $500 per image is imposed. *Id*.

By statute, *all* of the money received from the surcharge is used to fund two things: 1) investigations of possession of child pornography and sexual exploitation of a child offenses; and 2) grants to eligible public agencies or nonprofits that provide counseling services to victims of sexual assault. Wis. Stat. §§ 20.455(5)(gj), 165.93(2)(a). Thus, the surcharge serves the purely remedial purposes of reimbursing the State for funds expended to combat child pornography, and of funding the treatment of sexual assault victims.

As further evidence that the surcharge lacks a punitive purpose, the Legislature termed the payment a "surcharge" not a "fine." *See State v. Scruggs*, 2017 WI 15, ¶ 20, 373 Wis. 2d 312, 891 N.W.2d 786 (noting this distinction in concluding that the DNA surcharge is not punitive). Significantly, like the DNA surcharge, the child pornography surcharge is explicitly set forth in Wis. Stat. § 814.76(1j). That provision sets out a list of 26 "[s]urcharges in criminal actions." Section 814.76 makes a clear distinction between "a

fine imposed in a criminal action" and a surcharge imposed in that action. *See id.*

MacDonald argues that the surcharge is punitive. To meet his burden, MacDonald must show that the surcharge can *only* be explained, at least in part, as serving either retributive or deterrent purposes. *Austin*, 509 U.S. at 610. "We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however, must determine that it can only be explained as serving in part to punish." *Id.* MacDonald attempts to meet his burden by relying on two factors: 1) the surcharge is "tied directly to the commission of a specific and serious felony offense"; and 2) "the scope of the penalty increases . . . based on the nature or scope of the criminal offense(s) for which the sentence is imposed." (MacDonald's Br. 16–17.) MacDonald's arguments fail.

MacDonald first argues that, because the surcharge is "tied directly" to the offenses of possession of child pornography and sexual exploitation of a child, it is designed to punish people who commit those crimes. But, linking a surcharge to one or more criminal offenses does not make the surcharge punitive. If that were so, every surcharge listed in Wis. Stat. § 814.76 would be punitive since they are all linked to criminal actions. However, as noted above, the Wisconsin Supreme Court in *Scruggs* has already found that the DNA surcharge is not punitive for multiplicity purposes. It is the purpose of the surcharge that matters. As previously noted, the purpose of the child pornography surcharge is to fund costs associated with combatting child pornography and treating victims of sexual assault. Thus, by linking the surcharge to the two offenses that involve child pornography, the State is merely placing the cost on those who are responsible for those expenses. The case of *Mueller v. Raemisch*, 740 F.3d 1128 (7th Cir. 2014) is instructive.

In *Mueller*, two convicted sex offenders challenged Wisconsin's $100 annual registration fee for convicted sex offenders as being an ex post facto law. The *Mueller* court first noted that the district judge found the fee to be a fine. In reaching that conclusion, the district judge noted that, although the fee was intended to offset the cost of monitoring sex offenders, "to single out only individuals who have prior convictions for sexual assaults as the sole source of such funds can only be seen as punitive." *Mueller*, 740 F.3d at 1135. The court of appeals disagreed noting that, because the offenders are responsible for the expense, "there is nothing 'punitive' about making them pay for it, any more than it is 'punitive' to charge a fee for a passport. If there were no passports, there would be no passport office, and no expenses of operating such an office." *Id*.

Tying the child pornography surcharge to the crimes of possession of child pornography and sexual exploitation of a child does not make the surcharge punitive. If child pornography did not exist, there would be no need to investigate the offenses of possession of child pornography or sexual exploitation of a child.

MacDonald also argues that the surcharge is punitive because it "punish[es] defendants convicted of possessing child pornography on an escalating basis as the scope or gravity of the offense increases." (MacDonald's Br.17.) However, contrary to MacDonald's contention, the surcharge does not escalate. Instead, it remains at a fixed rate of $500 per image associated with the crime regardless of the scope or gravity of that crime. And, while it is true that the surcharge is imposed for each image associated with the crime, the purpose is not retribution or deterrence. Instead, the purpose is to cover the increased costs associated with multiple images of child pornography. As the number of victims and incidents of harm increase, the investigation costs, as well as the cost for treating sexual assault, similarly increase. As such, there

is a clear correlation between the surcharge and the cost of combating child pornography and helping victims of sexual assault.

Moreover, the surcharge is not tethered to the seriousness of the criminal conduct. For example, to be convicted of possession of child pornography, the State must prove, *inter alia*, that the possessed image contains a child engaged in sexually explicit conduct. Sexually explicit conduct includes conduct that ranges in severity from lewd exhibition of intimate parts (section 948.01(7)(e)) to beastiality (section 948.01(7)(b)). But, regardless of the character of the sexually explicit conduct involved, the surcharge is fixed at $500 for each image associated with the crime. That more than a single surcharge can be imposed is not due to the gravity of the crime but reflects the correlation between the number of incidents of harm and the increased costs associated with treatment and investigations.

It is also worth noting that possession of child pornography is a Class D felony. Wis. Stat. § 948.12(3)(a). As such, the maximum penalty for a possession of child pornography conviction is a fine up to $100,000 and up to 25 years imprisonment, or both. Wis. Stat. § 939.50(3)(d). Thus, the relatively small surcharge of $500 is further evidence that it is not retributive or a deterrent. *See Scruggs*, 373 Wis. 2d 312, ¶ 45 (citation omitted) ("relatively small size" of the "surcharge indicates" that it "does not serve the traditional aims of punishment.").

D. Even if the surcharge is partly punitive, it was not excessive as applied to MacDonald.

As noted above, the mere fact that a sanction is punitive does not mean the punishment is excessive. Instead, a sanction violates the Excessive Fines Clause only if it is "grossly disproportional to the gravity of a defendant's offense."' *State v. One 2013, Toyota Corolla*, 2015 WI App 84,

¶ 14, 365 Wis. 2d 582, 872 N.W.2d 98. In making this determination, courts use the proportionality test, which was first articulated by the Supreme Court in *United States v. Bajakajian*, 524 U.S. 321, 336–40 (1998). The proportionality test considers the following four factors: 1) "the nature of the offense"; 2) "the purpose of the statute"; 3) "the maximum potential fine for the offense"; and 4) "the harm that actually resulted from the defendant's conduct." *One 2013*, 365 Wis. 2d 582, ¶ 16 (citing *Boyd*, 238 Wis. 2d 693, ¶¶ 11–17). All four factors weigh in favor of finding that the surcharge, as applied to MacDonald, was not excessive.

As an initial matter, the Wisconsin Supreme Court has long cautioned that, in order to set aside a judgment for a fine authorized by statute, the fine imposed must be "so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *Hammad*, 212 Wis. 2d at 355–56, 347–48 (quoting *State v. Seraphine*, 266 Wis. 118, 121–22, 62 N.W.2d 403 (1954)). A $500 surcharge for possessing child pornography does not meet that threshold. Even the $50,000 aggregate surcharge, as applied to MacDonald, does not meet that threshold.

Nature of the offense. MacDonald was convicted of possession of child pornography. That is, he was convicted of possessing an image of a real child engaging in non-consensual sexually explicit conduct. *State v. Van Buren*, 2008 WI App 26, 307 Wis. 2d 447, 746 N.W.2d 545 (Subsection (1m) of the possession of child pornography statute forbids only depictions of real children engaged in sexually explicit activity.). That image is a permanent record of the sexual abuse suffered by the child. And, although MacDonald did not personally sexually assault the children contained in the images he possessed, his act of seeking them out perpetuates the child pornography market. *Osborne v. Ohio*, 495 U.S. 103,

110 (1990) (eliminating child pornography requires attacking "all levels in the distribution chain," including possession, which increases the demand for child pornography.). Thus, while MacDonald may not have sexually assaulted the children, he is partially responsible for children being sexually abused. As such, MacDonald's crime affected more than himself and the government. MacDonald himself acknowledges that possession of child pornography is a serious offense. (MacDonald's Br. 17.)

Purpose of the statute. MacDonald fits squarely into the class of persons for whom the crime of possession of child pornography was principally designed. The plain language of the possession of a child pornography statute evidences an intent to punish individuals who, like MacDonald, knowingly possess images containing children engaging in sexually explicit conduct. MacDonald admitted to both possessing and distributing hundreds of images of children engaged in sexually explicit activity. (R. 16:7; 7:5.) Those images included prepubescent girls engaging both in actual sexual acts and in sexually explicit poses. (R. 7:5.)

Maximum potential fine. When applying the third factor, a court compares the amount of the forfeiture (or, in this case, the surcharge) in relation to the maximum fine that could have been imposed for the underlying offense. *One 2013*, 365 Wis. 2d 582, ¶ 16 & n.6. Section 948.12 is a Class D felony. Wis. Stat. § 948.12(3)(a). As such, the maximum fine that MacDonald could have received was $100,000. Wis. Stat. § 939.50(3)(d). Thus, the third factor strongly supports the conclusion that even the aggregate $50,000 surcharge imposed on MacDonald for the 100 images that were associated with his crime was not grossly disproportional to the offense.

Resulting harm. The harm child pornography has on both the child and society is clear. Sexual exploitation of children can cause lifelong physical and emotional harm.

Osborne, 495 U.S. at 109 ("the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child."). By seeking out and possessing images of child pornography, MacDonald not only perpetuated the market for child pornography, he exacerbating the harm done to the children contained in the images. *Ferber*, 458 U.S. at 759 ("distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children.").

The surcharge as applied to MacDonald is not grossly disproportional to the gravity of his offense. Even in the aggregate, the surcharge is not so disproportionate to the offense committed as to shock public sentiment.

CONCLUSION

This Court should affirm the circuit court's order denying postconviction relief.

Dated this 4th day of August 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,880 words.

Dated this 4th day of August 2020.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 4th day of August 2020.

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