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STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2020AP000605-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

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

In response to Mr. MacDonald's case-specific arguments, the state responds with unpersuasive arguments that do not apply to this case. First, the state misconstrues Mr. MacDonald's unit of prosecution argument and ignores the precedent upon which it is based. In doing so, the state fails to rebut Mr. MacDonald's argument that, in this case, only a single image of child pornography was associated with Mr. MacDonald's crime. Second, building off of its flawed statutory argument, the state attempts to validate the $50,000 surcharge assessed on Mr. MacDonald's single conviction, which was based upon a single image, by arguing that a $500 surcharge for each of the 100 images the state alleged that Mr. MacDonald possessed, is neither punitive nor excessive. This Court should reject the state's attempt to disconnect the facts of this case from the issues presented.

I. In this case, the circuit court was authorized to impose a single $500 child pornography surcharge against Mr. MacDonald because the crime to which he pled was "associated with" a single image of child pornography.

The state does not dispute that each charge in this case was associated with a single and distinct image of child pornography Mr. MacDonald allegedly possessed. Further, the state misconstrues the holding of *State v. Multaler*, 2002 WI 35, ¶62, 252 Wis. 2d 54, 643 N.W. 2d 437, to *mandate* child

pornography cases to be prosecuted one count per one image. The state is wrong.

Multaler merely *permits* the unit of prosecution at issue in that case and at issue here: one count for each image allegedly possessed. The state ignores, and thus effectively concedes, that in *State v. Whistleman*, 2001 WI App 189, ¶1, 247 Wis. 2d 337, 633 N.W.2d 249, this Court upheld a unit of prosecution theory for possession of child pornography cases based on the medium of storage. *See also Mutaler*, 252 Wis. 2d 54, ¶62 (disagreeing with Multaler's argument that the statute allows for prosecution based *only* upon the medium rather than upon the image). While the *Multaler* court upheld the state's prosecution under an one image per count theory, nothing in *Multaler* or *Whistleman* restrict prosecutorial discretion to charge one count per medium of storage, and thereby allow for multiple images to be "associated with" a single count of conviction.

Thus, under controlling precedent, the state had the option to prosecute Mr. MacDonald under either unit of prosecution. For example, the state could have lawfully charged Mr. MacDonald with one count of possession of child pornography for each hard drive or device or account on which he possessed child pornography. Such a prosecution would have been perfectly lawful under both *Whistleman* and *Multaler*. Had the state done so in this case, and had 100 images of child pornography been "associated with the crime" of conviction, then Wis. Stat. § 973.042(2) would have authorized the circuit court's order in this case.

However, that is not this case. Rather, the state charged Mr. MacDonald with 10 counts of possession of child pornography and merely "read-in" any uncharged images. When Mr. MacDonald pled no contest to count one in this case he pled to the crime of possessing a single image of child pornography. While the state may have alleged that Mr. MacDonald possessed at least 100 images of child pornography, based on the unit of prosecution permitted by *Whistleman* and utilized here, the circuit court was not authorized to impose 100 surcharges under Wis. Stat. § 973.042(2) because those images were not associated with Mr. MacDonald's crime.

Understood in this proper context, and not in the state's imagined scenario where the state is always required to prosecute child pornography cases image by image, Wis. Stat. § 973.042(2)'s requirement that circuit court's determine how many images are "associated with the crime" is consistent with Mr. MacDonald's statutory argument. If the state chooses to prosecute using a unit of prosecution theory that is not image by image, then it will generally be the case that any count of conviction will be "associated with" multiple, even hundreds or thousands, of images per count. However, where the state chooses to prosecute an individual one count for every image allegedly possessed, then each charge is legally associated with a single image. Nothing in the statute expands the scope of "associated with" beyond the image or images upon which each of the defendant's "crime(s)" are based. *See* Wis. Stat. § 973.042.

The state cannot have its cake and eat it too. It cannot prosecute the case under the theory that each

individual image is the basis for a separate charge, conviction, and sentence, while also theorizing that Mr. MacDonald's single conviction, based on a single image is also "associated with" every image the state alleged he possessed. Here, the state chose to charge Mr. MacDonald with 10 counts of possession of child pornography, which the state asserts are necessarily based on 10 separate images of child pornography. When Mr. MacDonald pled to count one, a single image of child pornography is lawfully associated with that crime.

II. If statutorily authorized, the $50,000 child pornography surcharge imposed in this case is excessive under the Eight Amendment's Excessive Fines Clause.

In response to Mr. MacDonald's constitutional argument, the state argues that the $50,000 surcharge imposed in this case is neither punitive nor excessive. This Court should reject the state's argument because the child pornography surcharge imposed is at least "in part" designed to punish Mr. MacDonald and is "grossly disproportionate" to Mr. MacDonald's single offense.

First, in this criminal case, and in defending the child pornography surcharge imposed on Mr. MacDonald's judgment of conviction, the state unconvincingly argues that the $50,000 child pornography surcharge imposed upon Mr. MacDonald is exclusively remedial and in no way designed to punish Mr. MacDonald for his criminal conduct. As noted in his brief-in-chief, Mr. MacDonald acknowledges the various remedial purposes the child pornography surcharge serves. However, merely because the state makes remedial

use out of funds collected in a criminal case does not negate that the financial penalty is at least in part designed to punish. *See Austin v. United States*, 509 U.S. 602, 610 ("we are mindful of the fact that sanctions frequently serve more than one purpose. 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."). Further, because the surcharge is tied directly to the commission of a criminal offense, the child pornography surcharge is objectively intended to punish Mr. MacDonald. *See State v. Hammad*, 212 Wis. 2d 343, 351, 569 N.W.2d 68 (Ct. App. 1997) (citing *Austin v. United States*, 509 U.S. at 620).

Second, the state next argues that even if the $50,000 surcharge is punitive it is not excessive because it amounts to only $500 for each image Mr. MacDonald allegedly possessed. However, the question is whether the surcharge assessed here, $50,000 is "grossly disproportionate to the *offense* in question." *United States v. Bajakajian*, 524 U.S. 321 (1998) (emphasis added). As argued above, the offense in question is Mr. MacDonald's single conviction for possessing a single image of child pornography. Mr. MacDonald was not convicted on 100 counts for possessing 100 images. He was convicted and sentenced for a single criminal offense. A $50,000 surcharge, which is the product of multiplying the $500 statutory surcharge by 100, based on the number of images the state alleged Mr. MacDonald possessed, but did not charge him with, is grossly disproportionate to Mr. MacDonald's offense.

Moreover, the fact that Mr. MacDonald faced a maximum statutory fine of $100,000 is irrelevant

because to lawfully impose such a fine the court would have had to exercise discretion to determine whether *any* fine was necessary to accomplish its sentencing goals. *See State v. Kuechler*, 2003 WI App 245, ¶11, 268 Wis. 2d 192, 199–200, 673 N.W.2d 335.

CONCLUSION

For the reasons argued above, and as set forth in his brief-in-chief, Mr. MacDonald respectfully asks this Court to reverse the circuit court's order denying his postconviction motion and remand this case to the circuit court with directions to reduce the child pornography surcharge from $50,000 to $500.

Dated and filed by U.S. Mail this 25th day of August, 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,372 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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

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

Dated and filed by U.S. Mail this 25th day of August, 2020.

Signed:

JEREMY A. NEWMAN
Assistant State Public Defender