STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP000616-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY M. SCHMIDT,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief Entered in Walworth County Circuit Court, the Honorable Phillip A. Koss Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

OTHER AUTHORITIES CITED

ARGUMENT

I. The child pornography surcharge functions like a punishment, not a regulatory taking.

Both parties agree that, as written, the child pornography surcharge does not clearly evince a punitive intent. (State's Br. at 9).

As the State acknowledges, however, this does not end this Court's inquiry. (State's Br. at 9). Although this Court gives deference to the legislature's chosen "label," *State v. Muldrow*, 2018 WI 52, ¶ 49, 381 Wis. 2d 492, 912 N.W.2d 74, a regulatory scheme should be classed as a "punishment" when it practically functions like one. *Id*. Importantly, investigation into the statute's functional character obviously depends on how the statute is interpreted and applied. Thus, while the State urges this Court to analyze the surcharge as a discrete $500 imposition (State's Br. at 9), that position is at odds with their embrace, elsewhere in the brief, of the Court of Appeals' broad reading of the statute in *State v. Kuehn,* Appeal No. 2018AP2355-CR, unpublished slip op., (Wis. Ct. App. July 28, 2020).[1] (Supp. App. 110).

[1] Wis. Stat. § 809.23(3)(b). *Kuehn* was still pending when the initial brief was filed in this case.

In *Kuehn*, the Court of Appeals addressed the statutory language triggering application of the surcharge—whether an "image is associated with the crime" for which the defendant is being sentenced. *Kuehn*, Appeal No. 2018AP2355-CR, ¶ 33. (Supp. App. 124). The Court of Appeals then rejected a more conservative reading of the statute and instead endorsed an open-ended interpretation permitting circuit courts to consider images that are "mentally related" to the underlying conviction. *Id*., ¶ 43. (Supp. App. 118). Under this reading, the child pornography surcharge is markedly different from any other surcharge in the criminal justice system. For example, the DNA surcharge—recently upheld by this Court—can impose multiple $250 surcharges in each *case* but still only permits one surcharge per *conviction*. *See State v. Williams*, 2018 WI 59, ¶ 29, 381 Wis. 2d 661, 912 N.W.2d 373.[2]

[2] A review of the authoritative table published by the Wisconsin Court System shows that, in almost every other case, the surcharge is calculated on a per-case, per conviction, basis, or as a fixed percentage rate in relation to some other monetary assessment (such as a fixed percentage of restitution). Other surcharges are calibrated in relationship to actual costs incurred (such as the blood withdrawal surcharge under 973.06(1)(j) or the sheriff's surcharge under 973.06(1)(a)) or have fixed amounts depending on the nature of the underlying offense, such as the wild animal protection surcharge under 29.983(1)(a). *See* https://www.wicourts.gov/courts/circuit/docs/fees.pdf.

While *Kuehn*—like this case—concerns only the imposition of surcharges for read-in offenses, the Court of Appeals' reading of the statute arguably allows the sentencing court to go even further and to consider a broad swath of other conduct in determining the number of images "mentally related" to the conviction at issue.

Here, for example, the presentence investigation informed the sentencing court that Mr. Schmidt possessed up to 8,500 child pornography images. (22:5). If those images are "mentally related" to the underlying conviction(s) for child pornography possession—and this appears to be a fair reading of the broad standard utilized in *Kuehn*—then the sentencing court would be empowered to impose up to $4,250,000 in child pornography surcharges. At the very least, the criminal complaint—which Mr. Schmidt stipulated to as part of the plea colloquy (39:11)—contains reference to 4,500 images, supporting potential financial liability of up to $2,250,000. (11:5).

And, even if this Court limits the application of the statute to specific read-in offenses, this does not eliminate the possibility of massive financial penalties. Here, for example, the State could have charged a separate offense of child pornography possession for each image recovered and then, as part of the plea negotiations, required that those offenses be read-in, thereby causing the same result. Moreover, the prosecutor could have asked that

uncharged conduct also be read-in and, once again, this would also cause the same result.[3]

Thus, when the scope of the surcharge's potential application is considered, many of the enumerated factors are in Mr. Schmidt's favor. The State, however, disagrees. Mr. Schmidt will address each factor in turn:

Affirmative Disability or Restraint

The State skirts Mr. Schmidt's argument as to the extreme level of financial immiseration entailed by the statute by erroneously focusing on a single $500 surcharge. (State's Br. at 9). As noted above, however, the child pornography surcharge, at least under the rubric set forth in *Kuehn*, allows a court to impose a much more extreme state of financial hardship. The State also disagrees that a financial penalty can be an affirmative disability or a restraint because: (1) it does not involve a physical restraint and (2) it does not "restrict employment opportunities, housing opportunities, or travel." (State's Br. at 9-10). Yet, as Justice Abrahamson pointed out in a dissent concerning the DNA

[3] This is the scenario at issue in *State v. McDonald*, Appeal No. 2020AP605-CR, which is pending in the Court of Appeals. In that case, the defendant agreed to read-in both specific dismissed charges of child pornography possession as well as "uncharged" conduct. (Brief of Defendant-Appellant at 3). He was then assessed 100 child pornography surcharges. (Br. at 11).

surcharge, this Court needs to assess the surcharge's effect in context of a criminal justice system in which "collateral consequences and criminal justice debt appear to be leading criminal offenders into a downward spiral of debt and recidivism." *State v. Scruggs*, 2017 WI 15, ¶ 81, 373 Wis. 2d 312, 891 N.W.2d 786 (Abrahamson, J., dissenting).

And as then-Judge Hagedorn of the Court of Appeals noted in a concurrence with respect to the DNA surcharge, convicted offenders are now responsible for a staggering array of financial obligations. *State v. Williams*, 2017 WI App 46, ¶ 34, 377 Wis. 2d 247, 900 N.W.2d 310 (Hagedorn, J., concurring). A statute that is capable of imposing millions of dollars of financial liability—in a criminal justice system already dedicated to impoverishing convicted defendants—therefore imposes an affirmative restraint, in that it creates a debt that can never be repaid and, contrary to the State's dismissive position, will in fact impact employment, housing, and travel.

Historically Regarded as Punishment

The State does not engage with "history" as such and instead merely reiterates that the legislature has divided "fines" and "surcharges" within a broader framework. (State's Br. at 10). Because the legislature labeled this financial penalty as a "surcharge," the State argues, in a somewhat circular fashion, there is historical "proof" that the label fits. (State's Br. at 10). These arguments miss

the mark. First, it does not matter what label the legislature chose or what its intent was in drafting the surcharge statute, at least with respect to the "effects" part of the intent-effects test. Second, in distinguishing between fines and surcharges, the State impliedly concedes—correctly—that monetary takings can be punishment. *See State v. Ramel*, 2007 WI App 271, ¶¶ 12-14, 306 Wis. 2d 654, 743 N.W.2d 502. Here, the statute goes well beyond a mere remedial taking and instead—by virtue of the high dollar amounts involved—authorizes the imposition of crippling financial penalties in conjunction with proof that the offender has committed a morally blameworthy act. This is not merely a regulatory taking meant to reimburse some other criminal justice system expenses but a fine that punishes the offender.

Scienter

The State argues that this factor is in its favor. (State's Br. at 10). Mr. Schmidt does not dispute the State's argument on this point.

Applies to Behavior that is Already a Crime

The State concedes that this factor is in Mr. Schmidt's favor. (State's Br. at 11).

Promotion of Traditional Punitive Aims

The State argues that, given the "relatively small" amount of the surcharge, there is no way that the traditional goals of punishment and deterrence

are being served. (State's Br. at 11). As set forth above, however, the State is wrong to focus solely on a single $500 surcharge given the potential scope of the statute. Simply put, imposing massive financial liabilities that will cripple an offender's ability to ever reintegrate fully into society clearly serves classically punitive aims.

Rational Connection to Non-Punitive Aims and Whether the Surcharge is Excessive in Relation to those Aims

Both parties agree that monies from the surcharge are directed toward a superficially rational end—funding investigation of child pornography offenses and providing grants to those aiding victims. In the abstract, it may be "rational" for convicted possessors of child pornography to pay into such a fund. However, the "per image" assessment is an inapt fit, as it makes little sense to assume that the costs of a child pornography investigation will increase at a rate of $500 per individual JPEG. And, as set forth in the brief-in-chief, the surcharge is plainly excessive. A statute which imposes millions of dollars in financial responsibility and which then reallocates this largesse to vague criminal justice objectives does not pass muster under the governing legal framework.

The State alleges Mr. Schmidt failed to provide mathematical proof that the financial burden is excessive. (State's Br. at 12). That argument places an impossible burden on Mr. Schmidt, one that no

criminal defendant can reasonably satisfy. More to the point, it is plainly apparent, based on a rational consideration of the expansive reading of the surcharge statute, that Mr. Schmidt's actions could not have plausibly created millions of dollars in law enforcement costs. Requiring a defendant in his position to face such an excessive monetary burden fosters an arbitrary system in which indigent defendants pay in excess of any rational cost that is *actually* being borne by child pornography investigations. Utilizing the expansive reading from *Kuehn,* the prosecution of just a handful of defendants like Mr. Schmidt could potentially contribute millions of dollars to law enforcement budgets. On its face, this is an irrational and excessive statutory scheme.

Second, the State claims that the costs of investigating child pornography—and of addressing the needs of victims—represent a bottomless well, a massive societal problem which threatens to swallow infinite resources. (State's Br. at 12). In support, the State cites generic assertions of the harm caused to children because of child pornography. (State's Br. at 12). Mr. Schmidt does not dispute the high "costs" of child pornography to both individual victims and to society at large. The production and possession of child pornography is a morally blameworthy act rationally prohibited and harshly punished by our legislature. But the State's assertion that Mr. Schmidt's crime caused harm does not rationally establish that a surcharge imposing potentially millions of dollars in financial liability is something

other than a punishment. In fact, by resorting to such arguments, the State proves Mr. Schmidt's point—that to the extent the surcharge furthers the goal of holding an individual defendant responsible for the globalized harms caused by child pornography, generally, it serves punitive, and not merely regulatory, aims.

Accordingly, this Court should find that the child pornography surcharge is a punishment that must be communicated during the plea colloquy.

II. Mr. Schmidt was entitled to a hearing on his motion for plea withdrawal.

The State asserts that Mr. Schmidt was not entitled to a hearing on his motion for plea withdrawal because the plea colloquy defect was harmless. (State's Br. at 15). Here, the circuit court informed Mr. Schmidt he was facing a fine of up to $100,000. (39:6). It did not, however, inform him that child pornography surcharges could be imposed.

The State argues that, because the $7,000 in surcharges Mr. Schmidt was not warned about is less than the potential $100,000 fine he was warned about in the colloquy, the error simply does not matter. (State's Br. at 15). However, the statutory fine is a different financial penalty from the surcharge. While the court warned Mr. Schmidt about the fine, it failed to warn him of the surcharge. Moreover, the court did not impose any fine, but it did impose $7,000 in surcharges. Simply because a court advises an offender of a potential fine that was

not imposed does not render harmless its failure to separately advise of a potential surcharge penalty that was, in fact, imposed.

Accordingly, Mr. Schmidt was entitled to a hearing.

III. It was improper for the circuit court to impose surcharges for read-in offenses.

Wis. Stat. § 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*.

The State fully endorses the Court of Appeals' reading of the statute in *Kuehn*, permitting imposition of a surcharge for any image "mentally related" to the crime for which the defendant is being sentenced. (State's Br. at 21).

However, 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 a sentence or places a person on probation for" that crime. *See* Wis. Stat. § 948.12. The phrase "image associated with the crime" is therefore better read in

this context to mean the image or images that are directly associated with the crime—those images that form the basis for the charge of possession of child pornography for which a defendant is convicted and sentenced. Under this construction, images which form the basis 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 associated with other crimes—crimes that did not result in a conviction or sentence. Thus, in most cases, the circuit court will end up imposing one surcharge per conviction, as each separate conviction will have, as a factual basis, a separate image associated with it. *See State v. Multaler*, 2002 WI 35, ¶ 67, 252 Wis. 2d 54, 643 N.W.2d 437.

The State's broader reading would render the triggering language—"if a court imposes a sentence or places a person on probation"—superfluous. Notably, the legislature also did not utilize broad language referencing a "course of conduct" (as it did elsewhere in the sentencing statute, *see* Wis. Stat. § 973.155(1)(a)) nor did it utilize more specific language like that appearing in the restitution statute.

The State argues that Mr. Schmidt's reading would render the language requiring a circuit court to determine how many images are associated with the crime superfluous. (State's Br. at 17). While the unit of prosecution intended by the legislature may have been one count per image or recording, *see*

Multaler, 2002 WI 35, ¶ 67, 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). Thus, there are some scenarios where a court would have to then make a specific finding, meaning that this language is not surplusage.

In addition, the State argues that if the legislature had intended a per-conviction surcharge, it would have said so explicitly, like it has with other surcharges. (State's Br. at 17). However, as *Multaler* shows, the number of surcharges will usually—although not always—be one per conviction. A rational reading of the statute, one that avoids the overly broad implications of the "mentally related" standard, is that it is intended to flexibly respond to different charging theories, not to open the door to the open-ended imposition of thousands of surcharges.

The State also asserts that the statute must be read broadly to serve a vital policy interest, which it views as combatting the global scourge of child pornography and its ancillary effects. (State's Br. at 20). The plain language of the statute fails to support this ambitious reading and, in any case, these are

policy judgments which should play no role in a plain language analysis.

Finally, the State defends the Court of Appeals' decision to define "associated," as meaning "[c]onnected in thought, mentally related." *Kuehn*, Appeal No. 2018AP2355-CR, ¶ 40. (Supp. App. 127). This is not the only possible definition, however. The Oxford English Dictionary also defines "associated" as "combined locally, circumstantially, or in classification (*with*)."[4] And, Merriam Webster's Online Dictionary defines "associated" as either "joined together" or as "related" or "connected."[5] Here, the most logical reading is that the "images" in question are "classed with," "connected to," or "joined together" with the conviction because they provide a factual and legal basis for it. Other uncharged criminality or dismissed and read-in allegations do not have this "connection."

Accordingly, the plain reading of the statute discloses that it was not permissible to impose a surcharge for read-in offenses. This Court should therefore vacate those surcharges on remand.

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[4] As counsel does not have a subscription to the OED service utilized by the Court of Appeals in *Kuehn*, he is attaching a copy of the relevant entry as provided to him by a reference librarian at the Wisconsin State Law Library in his appendix. (Supp. App. 134).

[5] Available at https://www.merriam-webster.com/dictionary/associated.

CONCLUSION

Mr. Schmidt respectfully requests that this Court reverse and remand for an evidentiary hearing on his plea withdrawal claim. In addition and in the alternative, he asks the Court to vacate the child pornography surcharges imposed for the read-in charges.

Dated this 11th day of January, 2021.

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 2,987 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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

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

Dated this 11th day of January, 2021.

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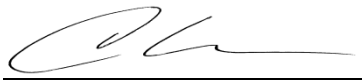

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CERTIFICATION AS TO APPENDIX

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

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

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SUPPLEMENTAL APPENDIX

INDEX
TO
SUPPLEMENTAL APPENDIX

Page