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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP875-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

RYAN M. MUTH,

Defendant-Appellant-Cross-Petitioner.

ON APPEAL FROM A RESTITUTION ORDER ENTERED IN WASHINGTON COUNTY CIRCUIT COURT, THE HONORABLE TODD K. MARTENS, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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ISSUE PRESENTED[1]

Did the circuit court properly exercise its discretion in determining that Muth failed to prove that his criminal restitution order should be set off by a civil settlement agreement entered between the victims and Muth's insurance company?

The circuit court held, "Yes."

The Court of Appeals held, "Yes."

This Court should hold, "Yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court's decision to grant review demonstrates that argument and publication are warranted.

INTRODUCTION

Our restitution statute requires a court to impose criminal restitution unless the court finds substantial reason not to impose it. Our restitution statute serves primarily to compensate victims; it also, however, serves to punish and rehabilitate the defendant.

Accordingly, existing case law holds that where victims entered a civil insurance settlement agreement prior to the imposition of criminal restitution, the criminal court

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[1] This Court granted both the State's petition for review and Muth's petition for cross-review. Muth sought review of the issue presented above. The State sought review of the Court of Appeals' holding that the deceased victim's adult daughters could not recover lost marital income as restitution. Pursuant to this Court's order granting the petitions, the State addresses the issue for which it sought review in its initial brief, and will respond to Muth's arguments on that issue in its reply brief.

must impose the restitution unless the defendant proves what portion, if any, of the insurance settlement payout covered the specific special damages sought as restitution.

The Court of Appeals reached this precise holding in a thorough, well-reasoned decision in *State v. Walters*, 224 Wis. 2d 897, 519 N.W.2d 874 (Ct. App. 1999). This Court and the Court of Appeals have since reaffirmed *Walters*. And under *Walters*, Muth's claim fails.

Without support in existing case law, Muth asks this Court to reevaluate *Walters* and upend existing case law. Muth offers no good reason for this Court to make such a dramatic change in the law. He overlooks the fundamental differences in purpose between *criminal* restitution and other *civil* agreements, misunderstands *Walters*, and advances policy arguments that would hurt crime victims and help criminal defendants evade financial responsibility.

This Court should instead reaffirm *Walters*, and affirm the Court of Appeals' decision holding that the circuit court properly exercised its discretion in concluding that Muth failed to prove he was entitled to a setoff.

SUPPLEMENTAL STATEMENT OF THE CASE

In its initial brief to this Court, the State set forth all facts relevant for this Court's review of the issues presented in both the State's petition for review, and in Muth's petition for cross-review. (State's Initial SCOW Br. 2–9.)

The State does not repeat all of those facts here. Should it aid this Court, the State provides a brief summary of those facts relevant to the claim addressed in this brief, and offers further recitation of the Court of Appeals' holding on this claim.

Summary of facts relevant to Muth's setoff argument. Before the circuit court, Muth objected to paying restitution

to Kempf's children because of a $100,000 settlement payment by Muth's insurance company. (R. 46:1–2; 77:8, Pet-App. 136.)[2]

Muth filed a document which stated that, in exchange for the consideration of the $100,000, Kempf's children agreed to "forever discharge Ryan Muth and Progressive Artisan & Truckers Casualty Insurance Company" "from any and all claims, actions, causes of actions, demands, rights, damages, costs, loss of wages, expenses, hospital and medical expenses, accrued or unaccrued claims for loss of consortium, loss of support or affection, loss of society and companionship" resulting from the car crash. (R. 46:4; *see also* R. 81:2.)

At the restitution hearing, in addition to testifying to specific expenses and losses they faced, Kempf's children explained that they each received one-third of the $100,000 settlement. (R. 77:27–28, 31, 33, Pet-App. 155–56, 159, 161.) Kempf's daughter H.M. believed the Progressive Insurance settlement "was towards [her mother's] life." (R. 77:24, Pet-App. 152.) Her husband was the main contact with Muth's insurance company, and believed the settlement "was towards any civil suit," not "the state criminal case." (R. 77:34, Pet-App. 162.)

The court imposed the requested restitution. (R. 77:39, Pet-App. 167.) It noted that restitution ordered by a criminal court does not limit a victim's right to sue in a civil action and that any restitution imposed may be set off against the amount recoverable in a civil judgment. (R. 77:41–43, Pet-App. 169–71.)

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[2] To avoid any confusion given the cross-petitions, the appendix citations in this brief refer to the Appendix to the State's Initial Brief to this Court.

It also allowed the defense time to finalize its position on whether it was "required to hold a separate hearing" concerning the "setoff provision" of the restitution statute. (R. 77:44–45, Pet-App. 172–73.)

Muth filed a written objection to the restitution order, arguing that the insurance settlement agreement precluded the restitution ordered, because its language was "clear and unambiguous." (R. 49:3–6.)

The State asserted that the restitution order had to stand unless Muth proved restitution would result in a double recovery. (R. 56:1–2.) H.M. submitted her receipt of payment for the insurance settlement, noting that the insurance company described it as a "[f]ull and [f]inal [s]ettlement of all [b]odily [i]njury [c]laims." (R. 52:2.)

The circuit court upheld its restitution order, rejecting Muth's setoff argument. (R. 78:5–12, Pet-App. 117–26.) It found the insurance agreement to be a "quite broad" release "for both special damages and general damages." (R. 78:5, Pet-App. 117.) It explained the restitution statute only allows for special damages. (R. 78:5, Pet-App. 117.) It acknowledged crime victims cannot recover the same damages twice, but stressed that the restitution statute serves to both "make victims of crimes whole" and to advance the "punishment and rehabilitation" of the defendant. (R. 78:6–7, Pet-App. 118–19.)

The court found that the victims sustained "both special and general damages" and that Muth did not present any evidence "that particular amounts" of the $100,000 settlement "were for general damages and other specific amounts were for special damages." (R. 78:12, Pet-App. 124.) The court accordingly concluded that Muth failed to meet his burden to prove a setoff: "although the Defendant did articulate his legal theories, the Defendant did not point to

any specific facts from which the Court could have exercised its discretion to adjust the amount downward." (R. 78:11, Pet-App. 123.)

Court of Appeals' holding relating to a setoff defense. The Court of Appeals agreed with the circuit court that Muth failed to meet his burden to prove that restitution should be set off by the insurance settlement agreement. *State v. Muth*, No. 2018AP875-CR, 2019 WL 2377271, ¶¶ 13–22 (Wis. Ct. App. June 6, 2019) (unpublished) (per curiam). (Pet-App. 102–03.)

Relying on its earlier decision in *State v. Walters*, 224 Wis. 2d 897, 591 N.W.2d 874 (Ct. App. 1999), the Court of Appeals explained that Muth had to provide, but failed to provide, specific facts "to avoid mixing the 'apples' of special damages with the 'oranges' of general damages." *Muth*, 2019 WL 2377271, ¶ 18 (citation omitted). (Pet-App. 103.) The Court noted that Muth "does not challenge the circuit court's factual findings" that the victims presented civil claims for both general and special damages "or that Muth failed to present evidence on which the court could have reasonably differentiated between general and specific damages in the payout under the settlement agreement." *Id.*

Because Muth failed to meet his burden to show what portion of the settlement agreement payout compensated Kempf's children for special damages, as opposed to general damages, the Court of Appeals held that the circuit court properly exercised its discretion in determining that Muth failed to prove a setoff against restitution. *Muth*, 2019 WL 2377271, ¶¶ 17–22. (Pet-App. 103.)

STANDARD OF REVIEW

This Court reviews restitution ordered by a circuit court under a two-part standard of appellate review. First, it independently determines whether the circuit court had

authority to order restitution, given a particular set of facts. *State v. Walters*, 224 Wis. 2d 897, 901, 591 N.W.2d 874 (Ct. App. 1999).

Second, if the circuit court had authority to order restitution, this Court review the terms of the restitution order for an erroneous exercise of discretion. *Walters*, 224 Wis. 2d at 901. Thus, the determination of the amount of restitution, including "whether a victim's claim should be offset or reduced for any reason," is reviewed "under the erroneous exercise of discretion standard." *State v. Longmire*, 2004 WI App 90, ¶ 16, 272 Wis. 2d 759, 681 N.W.2d 534.

SUMMARY OF ARGUMENT

In accordance with our restitution statute and prior case law from this Court, the Court of Appeals in *Walters* answered the very question at issue here. In a thorough, well-reasoned analysis, it held that where a crime victim enters a civil settlement agreement with the defendant's insurance company prior to the imposition of restitution, the criminal circuit court may not reduce restitution unless the defendant proves what portion of the civil agreement covered the special damages covered as restitution. Both this Court and the Court of Appeals have since endorsed *Walters*.

Muth's argument fails under *Walters*. As the Court of Appeals recognized, his attempts to distinguish *Walters* fall short. Just as in *Walters*, he failed to show what portion of the civil agreement payout covered the particular special damages sought as criminal restitution.

Muth advances no compelling reason for this Court to reassess or overturn *Walters* and subsequent case law. First, this Court could altogether decline to entertain his arguments about the validity of *Walters*, as Muth made no mention of *Walters* in his petition for cross-review to this

Court. Second, Muth's misunderstanding of *Walters*, and his minimization of the punitive and rehabilitative components of criminal restitution, are not good reasons for this Court to upend existing law. Third, Muth's position would force crime victims into having to make unfair decisions, while helping criminal defendants evade financial responsibility.

This Court should instead reaffirm *Walters*, and in turn affirm the Court of Appeals' holding applying *Walters* here.

ARGUMENT

Under well-established case law, the circuit court properly concluded that Muth failed to prove that restitution should be set off by the insurance settlement agreement.

A. Relevant legal principles

1. The restitution statute creates a default that a circuit court impose restitution, but gives the defendant the opportunity to present applicable defenses to the amount.

Wisconsin's restitution statute, Wis. Stat. § 973.20, requires a circuit court to impose restitution where feasible. Wisconsin Stat. § 973.20(1r) provides, in relevant part, that when sentencing a criminal defendant, a circuit court "*shall* order the defendant to make full or partial restitution under this section to any victim of a crime considered at sentencing or, if the victim is deceased, to his or her estate, unless the court finds substantial reason not to do so" and states that reason on the record. Wis. Stat. § 973.20(1r) (emphasis added).

The primary purpose of our restitution statute is to compensate the victim. *State v. Wiskerchen*, 2019 WI 1, ¶ 22, 385 Wis. 2d 120, 921 N.W.2d 730. Our courts have therefore

"repeatedly held that 'restitution is the rule and not the exception.'" *Id.* (citation omitted).

Beyond its primary purpose, the restitution statute also serves to punish and rehabilitate the defendant as part of his criminal sentence. *Walters*, 224 Wis. 2d at 904; *State v. Sweat*, 208 Wis. 2d 409, 428–29, 561 N.W.2d 695 (1997). "A restitution hearing in a criminal proceeding is part of the criminal sentencing process, and serves the goals of the criminal justice system." *Sweat*, 208 Wis. 2d at 422.

A criminal court may require the defendant to pay restitution for "all special damages, but not general damages, substantiated by evidence in the record, which could be recovered in a civil action against the defendant for his or her conduct in the commission of a crime considered at sentencing." Wis. Stat. § 973.20(5)(a).

Special damages "represent the victim's actual pecuniary losses." *State v. Holmgren*, 229 Wis. 2d 358, 365, 599 N.W.2d 876 (Ct. App. 1999). "[L]ost earnings," for example, are a type of special damage. *Walters*, 224 Wis. 2d at 906. General damages, not permitted as restitution, are those that "compensate the victim for [damages such] as pain and suffering, anguish or humiliation." *Walters*, 224 Wis. 2d at 905–06.

Wisconsin Stat. § 973.20(8) addresses how a civil judgment may affect a criminal restitution order. First, it provides that "[r]estitution ordered under this section does not limit or impair the right of a victim to sue and recover damages from the defendant in a civil action." Wis. Stat. § 973.20(8). It explains that "the facts that restitution was required or paid are not admissible as evidence in a civil action and have no legal effect on the merits of a civil action." *Id.*

Second, the restitution statute provides that restitution paid in a criminal proceeding may be a setoff against a civil judgment: "Any restitution made by payment or community service shall be set off against any judgment in favor of the victim in a civil action arising out of the facts or events which were the basis for the restitution." Wis. Stat. § 973.20(8).

Third, the restitution statute provides that the *civil* court should hold a hearing to determine the applicability of any asserted setoff: "The court trying the civil action shall hold a separate hearing to determine the validity and amount of any setoff asserted by the defendant." Wis. Stat. § 973.20(8).

The restitution statute also addresses the respective burdens of proof at a criminal restitution hearing. Wis. Stat. § 973.20(14). The victims have the burden to prove by a preponderance of the evidence the amount of loss sustained as a result of the crime. Wis. Stat. § 973.20(14)(a). The defendant has the burden to prove by a preponderance of the evidence his financial resources and earning ability. Wis. Stat. § 973.20(14)(b). In that same subdivision, the statute provides that the "defendant may assert any defense that he or she could raise in a civil action for the loss sought to be compensated." *Id.*

So, to summarize, our restitution statute establishes that: (1) a criminal court *should* impose restitution if applicable, but may not order restitution for general damages; (2) the defendant has the burden to show his financial resources and may assert "any defense" he could raise in a civil action for the loss sought to be compensated; and (3) restitution paid may be a setoff against a judgment in a civil action, and the *civil* court should hold a hearing to make this determination.

2. Case law holds that unless the defendant proves a setoff, a circuit court should not reduce a criminal restitution order.

a. In *Walters*, the Court of Appeals explained why accord and satisfaction is not a complete bar to restitution, and why the defendant has the burden to prove a setoff defense.

In *Walters*, the Court of Appeals addressed the application of these provisions of our restitution statute to a circumstance where—*before* the criminal restitution hearing—a victim enters into a civil settlement agreement with the defendant's insurance company. 224 Wis. 2d at 899–902.

The circuit court in *Walters* ordered the defendant to pay restitution to the victim for injuries she caused by driving drunk. *Walters*, 224 Wis. 2d at 899. Before the restitution hearing, the victim accepted a $25,000 payment from the defendant's insurance company in exchange for a release of "all claims and damages" resulting from the crash. *Id.* at 899–900.

At the restitution hearing, the circuit court found that the victim incurred roughly $40,000 in special damages comprised of lost wages and medical expenses, and also sustained general damages in an "indeterminate amount." *Walters*, 224 Wis. 2d at 900. The circuit court concluded that the defendant was not entitled to a setoff of the insurance payment against the restitution. *Id.* at 900–01. The Court of Appeals agreed. *Id.* at 901–09.

The Court of Appeals first addressed and rejected the defendant's arguments that the defense of accord and

satisfaction wholly barred imposition of *any* restitution. *Walters*, 224 Wis. 2d at 904–05.

The Court in *Walters* acknowledged that accord and satisfaction is a complete defense to an action to enforce a civil claim. 224 Wis. 2d at 904. "Accord and satisfaction" means an "agreement to substitute for an existing debt some alternative form of discharging that debt, coupled with the actual discharge of the debt by the substituted performance." *Accord and Satisfaction, Black's Law Dictionary* (11th ed. 2019). The Court acknowledged that settlements of civil claims "promote the public interest of resolving claims informally and without litigation." *Walters*, 224 Wis. 2d at 904.

But, the Court explained, "the efficient resolution of civil disputes is not the policy on which restitution in a criminal proceeding is based. Rather, restitution serves the purposes of punishment and rehabilitation of the defendant, while seeking to make the victim of criminal acts whole in regard to the special damages sustained." *Walters*, 224 Wis. 2d at 904.

The Court addressed why the defense of accord and satisfaction to wholly preclude any restitution did not fall within the "any defense [a defendant] could raise in a civil action for the loss sought to be compensated" language of the restitution statute. *Walters*, 224 Wis. 2d at 903–04 (citing Wis. Stat. § 973.20(14)(b)). To do so, the Court discussed this Court's earlier opinion in *Sweat*, 208 Wis. 2d 409. *Walters*, 224 Wis. 2d at 903–05.

In *Sweat*, this Court concluded that the "any defense" language in Wis. Stat. § 973.20(14)(b) did not allow a criminal defendant to assert the civil statute of limitations to wholly bar the victims' restitution requests. *Sweat*, 208 Wis. 2d at 411–12; *see also Walters*, 224 Wis. 2d at 903.

"Based on the placement of the phrase, 'any defense,' in the statute, the overall purpose of restitution, and the directive, if not mandatory, nature of ordering restitution, the [C]ourt concluded that § 973.20(14)(b) does not permit a defendant to 'raise, after conviction, civil defenses to liability for financial loss.'" *Walters*, 224 Wis. 2d at 903 (discussing and quoting *Sweat*, 208 Wis. 2d at 427).[3] "[R]ather, the defenses relate solely to the *amount* of restitution that can be ordered." *Id.* (emphasis added).

In *Sweat*, this Court concluded that the "any defense" language in Wis. Stat. § 973.20(14)(b), when read in the context of the "remainder of the statute," is ambiguous. *Sweat*, 208 Wis. 2d at 417. So, this Court looked to considerations beyond plain language to determine legislative intent. *Id.* at 417–29. In discerning that intent, this Court noted that if it concluded that "any defense" permitted application of the civil statute of limitations, some crime victims would be able to recover while others would not, despite the "goals of restitution to make all victims of a crime whole." *Id.* at 423.

This Court therefore concluded that the "any defense" language did not include a defense based on civil statutes of limitations. *Sweat*, 208 Wis. 2d at 424. This Court continued on to note that, in a restitution hearing, a defendant "should be able to raise substantive defenses, such as mitigation, set-off, or accord and satisfaction, which go to the measure or amount of total restitution," but "other civil defenses available in a civil action, such as contributory negligence,

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[3] This Court has since confirmed that "full or partial restitution is *mandatory* under the statute 'unless the court finds substantial reason not to do so and states the reason on the record.'" *State v. Fernandez*, 2009 WI 29, ¶ 21, 316 Wis. 2d 598, 764 N.W.2d 509 (citing Wis. Stat. § 973.20(1r)) (emphasis added).

lack of jurisdiction, or lack of capacity to sue or be sued simply do not make sense in a restitution hearing." *Id.*

Turning back to *Walters*, the Court of Appeals recognized this Court's "*obiter dictum*" in *Sweat* mentioning accord and satisfaction as a defense that could be raised in restitution proceedings. *Walters*, 224 Wis. 2d at 903–04 (discussing *Sweat*, 208 Wis. 2d at 424). The Court of Appeals explained, however, that "when applying that statement, we must understand the [C]ourt's reasoning and the context in which the statement was made." *Walters*, 224 Wis. 2d at 904 (discussing *Sweat*, 208 Wis. 2d at 424).

"The basic premise that drives the decision in *Sweat* is that restitution in criminal cases is not a claim which a defendant owns, as a civil claim is. It is a remedy that belongs to the State." *Walters*, 224 Wis. 2d at 904 (discussing *Sweat*, 208 Wis. 2d 409).

"Because of that difference, civil defenses which could be used as a complete bar to a subsequent civil action do not preclude a restitution order in a criminal proceeding." *Walters*, 224 Wis. 2d at 904–05. The Court of Appeals explained that this Court in *Sweat* "grounded its decision on the State's penal goals that affect the defendant, such as rehabilitation, punishment and deterrence." *Id.* (discussing *Sweat*, 208 Wis. 2d 409).

The Court of Appeals in *Walters* concluded that "[b]ecause a victim has no independent claim to restitution which he or she can release and because civil defense cannot be raised in a way which will prevent a court from considering whether restitution should be ordered," "the "defense of accord and satisfaction does not prevent the circuit court from ordering restitution." *Walters*, 224 Wis. 2d at 905.

Importantly, though, the Court of Appeals recognized that "payments made pursuant to a civil case may have a role in the court's consideration of how much, if any, restitution is appropriate in a companion criminal proceeding." *Walters*, 224 Wis. 2d at 905.

The Court of Appeals ultimately held that where the victim suffers both general and special damages, the defendant's burden requires him to prove "what part, if any," of the civil insurance settlement agreement payment to the victim "was paid for special damages." *Walters*, 224 Wis. 2d at 908.

In reaching this conclusion, the Court reasoned that the "legislative objectives" of the restitution statute would be "best served by applying any setoff which a circuit court determines is appropriate to the total amount of special damages which the victim has sustained." *Walters*, 224 Wis. 2d at 906. The Court of Appeals considered decisions interpreting related provisions because no prior published opinion had addressed the burden of proof concerning payments made in a companion civil matter. *Id.* at 907–08. As an example, it noted that the Fifth Circuit concluded that the defendant should have the burden to prove setoff because "the defendant had the strongest incentive to litigate whether a setoff should be afforded." *Id.* at 907 (discussing *United States v. Sheinbaum*, 136 F.3d 443, 448 (5th Cir. 1998)).

Because the victim in *Walters* suffered both general and special damages, and because the defendant provided "no such proof" as to what portion, if any, of the civil settlement was payment for the special damages sought as restitution, the Court of Appeals concluded that the defendant failed to meet his burden, and it affirmed the restitution order. *Walters*, 224 Wis. 2d at 908–09.

In short, *Walters* holds that a previously entered insurance settlement agreement does not wholly bar a criminal court from imposing restitution, but it may affect the appropriate amount of restitution for a court to impose, and the defendant has the burden to establish the set-off amount.

b. Subsequent case law has reinforced *Walters*.

Since *Walters*, subsequent appellate decisions have reaffirmed its holdings. First, in *State v. Knoll*, 2000 WI App 135, 237 Wis. 2d 384, 614 N.W.2d 20, the Court of Appeals—relying in part on *Walters*—concluded that a criminal defendant could not raise contributory negligence as a defense to restitution. *Id.* ¶¶ 13–17.

Next, in *State v. Longmire*, 2004 WI App 90, 272 Wis. 2d 759, 681 N.W.2d 534, the Court of Appeals held that the circuit court erred in concluding the defendant did not prove he was entitled to an offset of his criminal restitution order. The defendant pled guilty to and was sentenced for charges related to theft by contractor; the court ordered him to pay restitution to the homeowners. *Id.* ¶¶ 4–5. The criminal court denied his postconviction motion, which asked the court to set off the restitution by an amount he paid to a subcontractor for work the subcontractor performed. *Id.* ¶¶ 4–8. As relevant here, the Court of Appeals, citing *Walters*, concluded that the circuit court erred in declining to grant the defendant "any offset whatsoever for [his] undisputed expenditure of a portion of the deposit money in compliance with his contractual obligations." *Id.* ¶ 18.

In *Herr v. Lanaghan*, 2006 WI App 29, 289 Wis. 2d 440, 710 N.W.2d 496, the Court of Appeals confronted a situation where a defendant in a party-to-a-crime homicide agreed to pay criminal restitution, and then—in civil court—

sought offset of the entire civil judgment against the restitution order. *Herr*, 289 Wis. 2d 440, ¶¶ 2, 6. As the civil judgment had been "entered and paid in full" before restitution was determined, the Court pointed to *Walters*. *Herr*, 289 Wis. 2d 440, ¶¶ 14–15 (discussing *Walters*, 224 Wis. 2d at 900–06). The Court of Appeals concluded that the *civil* court did not err in reopening the civil case, but held that it needed to hold a full hearing to determine whether the special damages "covered by the civil judgment were, in whole or in part, the same special damages covered by the criminal restitution order." *Id.* ¶¶ 16–20.

Lastly, in *Huml v. Vlazny*, 2006 WI 87, ¶¶ 35–44, 293 Wis. 2d 169, 716 N.W.2d 807, this Court addressed the distinctly different question of whether a civil settlement agreement may preclude enforcement of a restitution order once the defendant completes a probationary sentence and the criminal restitution order converts into a *civil* judgment. Relying on *Sweat* and *Walters*, this Court articulated the important principle that a criminal court cannot allow a civil settlement agreement to affect its restitution order unless the court first finds that enforcement of the restitution order would result in a double recovery:

> The availability of accord and satisfaction and setoff as defenses to the amount of restitution a circuit court can order supports the idea that a victim can give up her right to enforce a judgment derived from a restitution order. Of course, a settlement agreement does not necessarily prevent the circuit court from ordering restitution, *Walters*, 224 Wis. 2d at 905, 591 N.W.2d 874, nor does it necessarily prevent enforcement of a restitution order during the term of probation. Only if a circuit court first finds that enforcement of the restitution order would result in double recovery for the victim can a settlement agreement affect a circuit court's authority to enter or enforce a restitution order while a defendant remains on probation.

Huml, 293 Wis. 2d 169, ¶ 37. This Court noted that, "[s]ignificantly, in *Walters*, the defendant made no attempt to prove that enforcement of the restitution order would result in a double recovery for the victim." *Huml*, 293 Wis. 2d 169, ¶ 39.

This Court then made clear that reliance on *Walters* to resolve the question at hand was "misplaced," given the critical difference between restitution as part of the criminal sentence versus the interplay of a civil agreement with a *civil* judgment. *Id.* ¶ 42. This Court recognized that "restitution in a criminal case is a remedy that belongs to the state, not to the victim," but explained that termination of probation (and the corresponding transformation of a restitution order into a civil judgment), "signals the state's disavowal of any penal or rehabilitative interests." *Id.* ¶ 44.

B. Muth failed to meet his burden to prove that his criminal restitution should be set off by the civil insurance settlement agreement.[4]

1. The circuit court properly recognized that Muth failed to show that imposing the requested restitution would result in a double recovery.

Muth's claim fails under existing case law. Muth has not challenged the circuit court's fact-findings that Kempf's

[4] At the end of his initial brief, Muth advances arguments against the State's position that Kempf's daughters should be able to recover their lost marital income as restitution. (Muth's Br. 21–23.) Based on this Court's order granting the petitions for review and cross-review, the State does not reply to those arguments here. Instead, it will do so in its reply brief. The State makes this point simply to make clear that it is not conceding any of Muth's arguments on that issue.

children sustained both special and general damages. (*See* R. 78:5–12, Pet-App. 117–24) (circuit court's fact-findings); *see also Muth*, 2019 WL 2377271, ¶ 18 (noting that Muth has not challenged these fact-findings). Muth also has not challenged the circuit court's fact-finding that he failed to present any evidence from which the court could have differentiated between general and specific damages in the settlement agreement payout. (*See* R. 78:12–13, Pet-App. 124–25) (circuit court's fact-findings); *see also Muth*, 2019 WL 2377271, ¶ 18 (noting that Muth also has not challenged this fact-finding).

In short, the undisputed facts as found by the circuit court establish that Muth failed to prove that restitution would result in double recovery. So, his claim plainly fails under *Walters* and its progeny.

As in *Walters*, here the victims entered into a settlement agreement with Muth's insurance company before the final restitution determination. *Compare Walters*, 224 Wis. 2d at 899–900 *with* (R. 46:4; 52:2.) As in *Walters*, here the circuit court found that the victims suffered both special and general damages. *Compare Walters*, 224 Wis. 2d at 900 *with* (R. 78:5–12, Pet-App. 117–24.) And, as in *Walters*, because Muth failed to prove what *portion* of the civil settlement agreement constituted payment for the particular special damages sought as restitution, Muth failed to meet his burden to warrant a setoff. *Compare Walters*, 224 Wis. 2d at 906 *with* (R. 78:12–13, Pet-App. 124–25.)

The circuit court reasonably recognized that the insurance release was "quite broad." (R. 78:5, Pet-App. 117.) What portion of the $100,000 was meant to cover pain and suffering (general damages)? We do not know. What portion was meant to cover funeral expenses? Lost wages? We do not know.

Where (1) "restitution is the rule and not the exception," *Wiskerchen*, 385 Wis. 2d 120, ¶ 22 (citation omitted), (2) our statute creates a default requiring a circuit to order restitution where applicable, Wis. Stat. § 973.20(1r), and (3) this Court has accordingly held that a circuit court may permit a settlement agreement to affect a restitution order *only if* it first finds that the restitution order would result in a double recovery, *Huml*, 293 Wis. 2d 169, ¶ 37, the circuit court here properly exercised its discretion to conclude that Muth failed to show that he is entitled to a setoff of the insurance agreement payment against his restitution.

2. Muth's arguments to the contrary fall short.

Muth advances two arguments as to why, under existing case law, the circuit court nevertheless erroneously exercised its discretion. First, he argues *Walters* is distinguishable because the settlement agreement there was "vague," whereas the agreement here "identified the two items of special damages that were also the subject to the restitution order: lost wages and expenses." (Muth's Initial Br. 16.) Second, he argues that, under this Court's decision in *Huml*, the circuit court should have looked solely at the "plain meaning of the civil settlement agreement." (Muth's Initial Br. 13–17.) As the Court of Appeals here recognized, both arguments fail. The State addresses each in turn.

First, Muth draws a distinction without a difference by contrasting the language of the settlement agreement here to that in *Walters*. Muth asserts that unlike in *Walters*, where the settlement agreement covered "all claims and damages," here the release also specifically stated that it covered lost wages and expenses. (Muth's Initial Br. 16); *see also* (R. 46:4) (". . . from any and all claims. . . loss of wages,

expenses . . ."). But the mention of those two broad terms does not change that Muth still failed to prove "what *portion*" of the civil settlement applied to the special damages sought as restitution. *Walters*, 224 Wis. 2d at 908–09 (emphasis added).

As the Court of Appeals here explained, Muth did not show "what proportion of the payout" compensated the victims for "special damages categories as opposed to any general damages categories." *Muth*, 2019 WL 2377271, ¶ 20. (Pet-App. 103.) Indeed, the settlement agreement here also provided a release for claims of "accrued or unaccrued claims for loss of consortium, loss of support or affection, [and] loss of society and companionship," (R. 46:4)—i.e., general damages not recoverable as restitution. Was $99,000 of the $100,000 agreement meant to cover *those* claims? We do not know.

Moreover, Muth's logic, if correct, could apply with equal force to the settlement agreement in *Walters*. That agreement plainly covered "all claims and damages." *Walters*, 224 Wis. 2d at 900. So, under Muth's rationale, that "unambiguous settlement agreement" would cover *any* special damages, because its plain language covers *all* damages. (Muth's Initial Br. 16.) Yet, the Court of Appeals there affirmed the imposition of restitution because the defendant failed to prove "what portion" of the settlement "was made for special damages." *Walters*, 224 Wis. 2d at 908–09. This Court should do the same here.

Second, Muth's reliance on *Huml* overlooks the critical difference between *Huml* and this case: this Court's decision in *Huml* concerned whether a civil settlement agreement precluded enforcement of a *civil* judgment. *See Huml*, 293 Wis. 2d 169, ¶ 22. Muth argues that, pursuant to *Huml*, "[t]he lodestar of contract interpretation is the intent of the parties," and argues that contracts should be given their

plain and ordinary meaning. (Muth's Initial Br. 14) (quoting *Huml*, 293 Wis. 2d 169, ¶ 52).

As the Court of Appeals here explained, "In *Huml*, the court's acceptance of the defendant's restitution-related argument explicitly turns on the fact that the restitution order there had been converted into a civil judgment as a result of the defendant completing probation." *Muth*, 2019 WL 2377271, ¶ 21 (discussing *Huml*, 293 Wis. 2d 169, ¶¶ 39, 42, 50, 53–55). (Pet-App. 103.)

Thus, whereas a "civil settlement agreement can have no effect upon a restitution order while the defendant is on probation unless the circuit court first finds that continued enforcement of the restitution order would result in a double recovery," "[a]fter a defendant is released from probation" and restitution becomes a civil judgment, a "settlement agreement between the victim and the defendant may preclude the victim from enforcing the judgment." *Huml*, 293 Wis. 2d 169, ¶ 50.

And—importantly—it was only after "[h]aving determined that a settlement agreement can preclude the enforcement of a judgment derived from a restitution order" that this Court in *Huml* discussed the principles of contract interpretation upon which Muth relies, and concluded that the agreement there was clear. *Huml*, 293 Wis. 2d 169, ¶¶ 51–55.

Try as he might, Muth cannot escape that his case—unlike *Huml*—involves the interplay of a civil settlement agreement and a *criminal* restitution order entered as part of his 26-year criminal sentence. (R. 48; 63.) With a criminal order comes punitive and rehabilitative concerns that mandate restitution unless the defendant has proven that restitution would result in a double recovery. *Huml*, 293 Wis. 2d 169, ¶¶ 37, 50; *Walters*, 224 Wis. 2d at 904.

In that same vein, Muth faults the circuit court for not limiting itself to the "clear and unambiguous" terms of the insurance settlement, and argues that because of that clarity, extrinsic evidence as to the intent of the parties was inadmissible. (Muth's Initial Br. 14–17.) Here too, Muth does not account for the civil nature of the restitution order in *Huml*, overlooks *Walters*, and ultimately misunderstands the circuit court's conclusions here. The circuit court did not conclude that Muth failed to prove the "intent" of the parties; the court concluded that Muth failed to prove *what portion* of the civil settlement covered the specific special damages sought as restitution, as opposed to general damages. (R. 78:5–12, Pet-App. 117–24); *Walters*, 224 Wis. 2d at 908–09.

Well-established, well-reasoned case law shows that the circuit court did not erroneously exercise its discretion by concluding that Muth had not met his burden to offset his restitution order. The Court of Appeals reached this conclusion, and this Court should do the same.

C. This Court should reject Muth's request to reassess and, in effect, overturn *Walters*. It should instead reaffirm *Walters*.

Without support in current case law, Muth asks this Court to reassess *Walters* and, consequently, overturn it and upend the subsequent case law reinforcing it. He offers no compelling reason for this Court to take this dramatic step. This Court should instead reaffirm *Walters*.

1. In his petition for cross-review, Muth did not ask this Court to accept review to reassess *Walters*.

To start, it bears mention that in his petition for cross-review, Muth did not ask this Court to accept review to re-assess or overturn *Walters*. He did not even cite or mention

Walters in his petition for cross-review. (*See generally* Muth Combined Response and Petition for Cross-Review). This Court could therefore decline to even consider his arguments to overturn *Walters*. *State v. Sulla*, 2016 WI 46, ¶ 7 n.5, 369 Wis. 2d 225, 880 N.W.2d 659 (citation omitted) ("If an issue is not raised in the petition for review or in a cross petition, 'the issue is not before [this Court].'"). And, as argued in Section B, *supra*, without this Court overturning *Walters*, Muth's argument cannot prevail.

2. Muth misunderstands *Walters* and asks this Court to ignore the punitive and rehabilitative components of criminal restitution.

But if this Court wishes to consider his arguments to reassess and effectively overturn *Walters*, Muth offers no good reason for this Court to change the law. Muth asserts that the Court of Appeals in *Walters* was "mistaken" for "abrogating the defense of accord and satisfaction in restitution proceedings." (Muth's Initial Br. 11.) He claims that the "plain meaning of [Wis. Stat. § 973.20(14)(b)] allows the accord and satisfaction defense, and the policy considerations relied on by *Walters* do not mandate abrogation of the defense." (Muth's Initial Br. 11.) His argument (1) misunderstand *Walters*, (2) overlooks *Sweat* and *Knoll*, and (3) minimizes the significant differences between criminal restitution and civil agreements.

First, the Court of Appeals in *Walters* did not "abrogat[e]" accord and satisfaction altogether as a possible defense to particular restitution amounts. Instead, the Court explained that—because of the important, additional punitive and rehabilitative goals of criminal restitution—accord and satisfaction could not be a "complete bar" to the imposition of restitution in a particular case. *Walters*, 224 Wis. 2d at 904–05.

Put differently, whereas a claim in a civil action is the individual victim's claim to release, a restitution order in a criminal case is part of the criminal sentence. Restitution is therefore part of the State's action against the defendant and is accordingly the obligation of the criminal court to enforce. *See Walters*, 224 Wis. 2d at 904–05. Thus, though a civil settlement agreement may be relevant to a criminal court's assessment of *how much* restitution to impose, such an agreement cannot bargain away the criminal court's ability to even consider restitution.

Muth misses this distinction between accord and satisfaction as a *complete bar* to a restitution order and accord and satisfaction as informative to the *amount* of restitution. He asserts that a victim could enter an agreement that, under *Walters*, "by its terms alone would bar a restitution order as a double recovery." (Muth's Initial Br. 15.) Muth makes this assertion as though it shows a flaw in the reasoning of *Walters*, but he is incorrect. Under *Walters*, if a victim entered an agreement to cover *particular* special damages in specific amounts, and the defendant can prove that the victims are then also seeking those specific damages in the same amounts as restitution, that could indeed prevent a circuit court from ordering restitution for those same special damages.

In missing the distinction between a complete bar to restitution and consideration as to the amount of restitution, Muth also argues that "*Huml* contradicted the court of appeals in *Walters* as to the applicability of an accord and satisfaction to criminal restitution." (Muth's Initial Br. 13.) But this Court understood *Walters* in *Huml*—it specifically cited *Walters* upon acknowledging the "availability of accord and satisfaction and setoff as defenses to the *amount* of restitution," and that a settlement agreement "does not necessarily prevent the circuit court from ordering

restitution." *Huml*, 293 Wis. 2d 169, ¶ 37 (emphasis added) (citing *Walters*, 224 Wis. 2d at 905).

And again, *Huml* itself did not concern *criminal* restitution. *Huml* is not in tension with *Walters*; instead, this Court endorsed the reasoning of *Walters* in *Huml*, and it should do the same here.

Further, though his argument on this point is not entirely clear, Muth appears to fault the Court of Appeals in *Walters* for relying on the Fifth Circuit's decision in *Scheinbaum*, 136 F.3d 443. (Muth's Initial Br. 10–11.) He appears to argue that *Scheinbaum* is distinguishable because the defendants there "offered neither the terms of the agreement, nor the amount of consideration." (Muth's Initial Br. 10.) But Muth fails to show how this distinction matters, given that *Walters* primarily discussed *Scheinbaum* (among other cases) in reaching its conclusion that the defendant has the burden to prove setoff. *See Walters*, 224 Wis. 2d at 907–08 (discussing *Schienbaum*, 136 F.3d at 448). Muth has not disputed that he has the burden to prove a defense to restitution. (*See generally* Muth's Initial Br.); *see also* Wis. Stat. § 973.20(14)(b).

Second, Muth's argument also overlooks *Sweat* and *Knoll*. He asserts that accord and satisfaction should be able to be a complete bar to any restitution because Wis. Stat. § 973.20(14)(b) says that a "defendant may assert any defense that he or she could raise in a civil action for the loss sought to be compensated." (Muth's Initial Br. 11.) But this Court in *Sweat* (before *Walters*), and the Court of Appeals then again in *Knoll* (after *Walters*), held that other defenses that would be civil defenses to liability were not encompassed by Wis. Stat. § 973.20(14)(b). *Sweat*, 208 Wis. 2d at 427; *Knoll*, 237 Wis. 2d 384, ¶¶ 13–17. Thus, adopting his reasoning would effectively require this Court to overturn those cases, too.

Third, Muth asks this Court to disregard the critical differences in purpose between civil agreements and criminal restitution. He asserts that the "nature of accord and satisfaction is that the agreement resolves any potential dispute as to the itemization of damages. When a restitution order replicates a claim that was explicitly identified and paid pursuant to a settlement agreement, that is a double recovery." (Muth's Initial Br. 16.)

If Muth's case involved the effect of a civil settlement agreement on a *civil* judgment, as was the case in *Huml*, for example, Muth's argument might hold water. But, as this Court and the Court of Appeals have already explained, the rehabilitative and punitive purposes of our criminal restitution statute alter the equation. *Sweat*, 208 Wis. 2d at 409, 422; *Walters*, 224 Wis. 2d at 904–05; *Knoll*, 237 Wis. 2d 384; *see also Huml*, 293 Wis. 2d 169, ¶ 44.

Play Muth's argument out further: Victims could, for example, enter a civil settlement agreement to resolve a wrongful death action, because that is a claim that belongs to the victim. Does that mean victims could enter a civil monetary settlement to completely bar a homicide prosecution? Of course not, because a homicide prosecution is not a claim that belongs solely to the victims.

3. Adopting Muth's position would hurt crime victims and help criminal defendants evade financial responsibility.

Muth advances policy arguments, claiming that overturning *Walters* and adopting his position would help crime victims. On the contrary, adopting Muth's position would hurt crime victims, and instead only help Muth and other criminal defendants.

Muth argues that the "victims received substantial benefit from the settlement"—quick payment "without litigation." (Muth's Initial Br. 17.) He argues that the Court of Appeals' decision here, relying squarely on *Walters*, creates a "disincentive for settlement." (Muth's Initial Br. 17–18.) He also asserts that a "tortfeasor will now be compelled to instruct his or her insurer to decline any civil claim, until after a criminal restitution order has been entered, so that the civil settlement may encompass the same special damages." (Muth's Initial Br. 18.)

Muth's speculative concern for crime victims rings hollow. First, Muth's argument—that, under current law, criminal defendants will strategically wish to delay resolution of companion civil matters—ignores that it behooves criminal defendants to pursue swift civil resolution under the law as it stands. Though Muth's sentencing transcript is not included in the appellate record, Muth—like most criminal defendants—was presumably concerned about the length of sentence he would receive. It would have benefited him, as it would benefit any criminal defendant facing years in prison, to show that his victims are being financial compensated through a civil settlement agreement.

Indeed, if a criminal defendant refuses to agree to restitution, and the sentencing court views that as demonstrative of the defendant's lack of remorse, a sentencing may consider that as an aggravating sentencing factor when assessing the defendant's character. *State v. Williams*, 2018 WI 59, ¶ 51, 381 Wis. 2d 661, 912 N.W.2d 373 ("[W]hen the restitution factor is inextricably intertwined with a defendant's character and lack of remorse, its consideration is proper.").

Second, current law better protects the interests of crime victims. Consider the dilemma crime victims would be left in under Muth's position:

On the one hand, victims could choose to enter into a prompt settlement agreement with the defendant's insurance company. This may be an agreement for far less money than the amount of restitution to which the victims are entitled, but it would be a guaranteed, prompt payment. But it would also foreclose even the possibility of restitution.

So, if the victims were concerned about the amount of the settlement agreement, they could choose to decline the agreement, knowing that to accept it would mean foreclosing the possibility of restitution. Then, however, they would have to wait and hope that the criminal defendant ultimately pays the restitution ordered. That is, of course, assuming that the circuit court determines that the defendant is able to pay the restitution to order it in the first place. *See* Wis. Stat. § 973.20(13)(a) (in determining how much restitution to impose, the court shall consider the financial resources and earning ability of the defendant).

Where the primary purpose of the restitution statute is to compensate crime victims, crime victims should not be forced to make such a difficult choice.

And herein lies another problem with Muth's argument. A civil insurance settlement agreement is paid by the insurer, not by the criminal defendant. How does it benefit the punitive and rehabilitative purposes of criminal restitution for a defendant to be able to preclude a restitution order based on a civil agreement entered by his insurance company?

Though Muth did not present the terms of his policy with his insurer into the record, his arguments also rest on the questionable premise that defendants like him have the authority to order their respective insurance providers *not* to enter into release agreements with victims. Other than his counsel's vague reference to matters outside the record—

that he "now routinely sends such written demands to insurance carriers," (Muth's Initial Br. 18 n.5)—Muth provides no support for this premise. Notably, his premise runs contrary to general legal principles relating to the relationship between the insurer and the insured. *Bosco v. Labor & Industry Review Com'n*, 2004 WI 77, ¶ 61, 272 Wis. 2d 586, 681 N.W.2d 157 ("Generally, an insurer maintains the right to control the defense of the insured, settle a claim on its behalf, and pay a claim within the policy limits.").

Moreover, though not ordered here, the restitution statute specifically permits a circuit court to order restitution to "reimburse any insurer" "who has compensated a victim for a loss" otherwise compensable as restitution. Wis. Stat. § 973.20(5)(d). Though unclear, under Muth's position, either (a) criminal defendants would not have to pay any restitution to anyone because a civil settlement agreement would preclude *any* restitution, or (b) the insurer could offer a settlement to the victims for less money than the restitution the victims are owed, and the defendant in turn could be ordered to pay the lesser amount back to the insurer.

Further, as support for his policy arguments, Muth again points to this Court's discussion of policy considerations concerning the interplay between a civil settlement agreement and a (converted) *civil* restitution order. (Muth's Initial Br. 18) (quoting *Huml*, 293 Wis. 2d 169, ¶¶ 47–50.) Those arguments are inapposite here.

Lastly, Muth creates a straw man argument to knock it down. He argues that the Court of Appeals here (and, accordingly, in *Walters*) has "essentially crafted a 'made whole rule,'" analogous to *Rimes v. State Farm Mut. Auto. Ins. Co.*, 106 Wis. 2d 263, 316 N.W.2d 348 (1982). (Muth's Initial Br. 19.) The *Rimes* "made whole rule" provides that in a personal injury case, a subrogated insurer will not be

reimbursed unless the injured insured has been "made whole." *Rimes*, 106 Wis. 2d at 271–77. After drawing the comparison, Muth then asserts that the issue here is different because the "made whole rule" "involves the rights of third parties," and he argues that our restitution statute does not contemplate such a rule. (Muth's Br. 19.)

Our restitution statute contemplates compensating crime victims and punishing and rehabilitating the defendant. *Wiskerchen*, 385 Wis. 2d 128, ¶ 22; *Walters*, 224 Wis. 2d at 904. It contemplates that a criminal court *should* impose restitution unless the defendant proves an applicable defense to a restitution amount. Wis. Stat. §§ 973.20(1r), 973.20(14)(b). It contemplates that where a defendant believes that restitution he has *actually paid* results in a double recovery, he may seek a setoff in civil court. Wis. Stat. § 973.20(8); *Herr*, 289 Wis. 2d 440, ¶ 13.

Our restitution statute does not, however, contemplate putting crime victims in the precarious position of having to preemptively decide whether to bargain away an ability to recover restitution for the convenience and benefit of criminal defendants who caused their harm. This Court should reject Muth's request to overturn well-established law. It should instead reaffirm the sound reasoning of *Walters*, and in turn the Court of Appeals' decision here.

CONCLUSION

This Court should affirm the Court of Appeals' decision that Muth failed to meet his necessary burden to prove a setoff defense and affirming the circuit court's order imposing restitution.

Dated this 2nd day of March 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 8341 words.

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I hereby certify that:

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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 2nd day of March 2020.

_____
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