STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2020AP1394

VICTOR ORTIZ, JR.,

Petitioner-Respondent,

v.

KEVIN A. CARR,

Respondent-Appellant.

APPEAL FROM A FINAL ORDER OF
THE DANE COUNTY CIRCUIT COURT,
THE HONORABLE PETER ANDERSON, PRESIDING

SUBSTITUTE REPLY BRIEF OF RESPONDENT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

I. The Department of Corrections has exclusive authority to deduct Ortiz's trust account funds at a 50 percent rate to pay his restitution obligation.

Ortiz contends that the Department's authority to determine the rate at which it deducts his wages and other funds to pay his restitution debt is not exclusive. (Ortiz's Sub. Br. 16; R. 27:3.) He is incorrect.[1]

Ortiz begins by contending that the statutes cited by the Secretary do not support his position. For instance, he argues that Wis. Stat. § 301.32(1) does not specifically grant exclusive authority to the Department to set the rate at which it may deduct a prisoner's funds to pay restitution. (Ortiz's Sub. Br. 14.) That is correct, as far as it goes.[2] But there is more to the story. That statute grants the Department general authority to control inmate trust account funds; they can be used "only under the direction and with the approval of the . . . warden" for payment of certain surcharges and "the benefit of the prisoner." Wis. Stat. § 301.32(1). (*See* Appellant's Br. 7–9.) That statute is relevant for context: it outlines the general authority.

On top of that general authority, Wis. Stat. § 301.31 specifically grants authority to the Department to set *the rates* at which it deducts inmate wages to pay court-ordered

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[1] Ortiz's position mirrors that of the Dane County Circuit Court below. In the opening brief, the Secretary inadvertently referenced the Milwaukee County Circuit Court. (Appellant's Br. 5.)

[2] Ortiz makes a similar argument about Wis. Stat. § 303.06(2), (*see* Ortiz's Sub. Br. 16), but the Secretary did not raise that specific law. Relatedly, Ortiz contends that Wis. Stat. § 303.01(8)(a) does not support the Secretary's position, (*see* Ortiz's Sub. Br. 15–16, 18), but the Secretary did not reference that specific statutory provision, either.

obligations. (Appellant's Br. 8; Ortiz's Sub. Br. 15.) Under that law, the Department "may provide . . . for the payment, *either in full or ratably*, of [prisoners'] obligations acknowledged by them in writing or which have been reduced to judgment by the allowance of moderate wages . . . ." Wis. Stat. § 301.31. Ortiz has no response to the Secretary's argument that this provision indeed specifically grants to the Department the authority to set the rate at which it may deduct Ortiz's trust account funds to ensure that his crime victim is made whole through restitution payments.

Instead, Ortiz points to language in Wis. Stat. § 973.20(10)(a) permitting a sentencing court to order that restitution be "paid immediately, within a specified period or in specified installments." He asserts that if courts have the authority to direct that restitution be paid in specified installments, "it would seem that the court necessarily has the authority to specify the amount and timing of each installment." (Ortiz's Sub. Br. 20 (quoting R. 27:5).) This assumption is incorrect.

As explained in the Secretary's opening brief, the sentencing court's general authority to order restitution payments in specified installments applies to all criminal defendants, while only the Department has specific authority "to take restitution from an *inmate's* account at 'an amount *or a percentage the department determines is reasonable* for payment to victims.'" *State v. Williams*, 2018 WI App 20, ¶ 2, 380 Wis. 2d 440, 909 N.W.2d 177 (emphasis added); (Appellant's Br. 8 n.3, 10, 15.) The *Williams* decision explicitly references the Department's specific power to set reasonable percentage rates in restitution collection for defendant *prisoners*. That specific power applies here—what is at issue are percentage rates from prisoner accounts—not a circuit court's general power to order "specified installments" for criminal defendants. There is no conflict between the two: the rate set by the Department is not an "installment" (in the

sense that a set dollar amount is paid at set intervals), but rather is a *percentage* applied to a given pool of inmate funds, whatever that pool of funds happens to be. That is not an "installment" payment.[3] Indeed, at the time of sentencing, the criminal court would not know whether the defendant being ordered to prison will even receive prison wages or have any funds in his inmate trust account to properly order him to make regular "installment"—set dollar amount is paid at set intervals—payments. On the other hand, the Department will know when the prisoner has wages and some inmate trust account funds to enable it to set a percentage rate to pay the restitution debt.

Further, even if there is a tension between Wis. Stat. § 301.31 (specifically addressing "ratably" and prisoners) and Wis. Stat. § 973.20(10)(a) (generally addressing "installments" and all criminal defendants), the more specific statute—Wis. Stat. § 301.31—would apply. *See Clean Wis., Inc. v. Pub. Serv. Comm'n of Wis.*, 2005 WI 93, ¶ 175, 282 Wis. 2d 250, 700 N.W.2d 768 ("Where two statutes apply to the same subject, the more specific controls . . . ."). So, while Ortiz points to Wis. Stat. § 973.20(10)(a), this general circuit court authority is not the same as the specific authority of the Department to set *the rate* at which it must collect funds from a *prisoner's* trust account to pay his restitution obligation.

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Contrary to the circuit court's and Ortiz's position, a criminal sentencing court has no authority to limit the Department's exclusive authority—based on statutes and

[3] *See Installment*, Merriam-Webster, https://www.merriam-webster.com/dictionary/installment (last visited Feb. 3, 2022) ("one of the parts into which a debt is divided when payment is made at intervals").

case law—to deduct Ortiz's trust account funds at a reasonable rate of 50 percent to pay his restitution obligation.

II. The Department's deduction does not conflict with Ortiz's amended judgment of conviction.

Ortiz claims that his amended judgment of conviction and the Department's action are in conflict (and the judgment wins). (Ortiz Sub. Br. 12.) As explained in the Secretary's opening brief, he is incorrect—there is no conflict.

The amended judgment of conviction places a floor,[4] not a ceiling, on the Department's ability to set the deduction rate from Ortiz's inmate trust account to pay his approximate $43,000 restitution obligation. It simply states: "Court ordered restitution to be paid from 25% of prison wages." (A.-App. 108.) By deducting at a rate of 50 percent, the Department complies with the amended judgment of conviction's directive to deduct 25 percent; it simply also exercises its authority to deduct *more*. The language of the amended judgment of conviction referencing 25 percent does not include limiting phrases, such as "no more than" or "up to." (Appellant's Br. 12–13.) Ortiz criticizes the Department's argument, but the Legislature uses such limiting language in Wis. Stat. § 973.05(4)(b), governing the situation where a circuit court can issue an order assigning "*not more than* 25 percent of the defendant's . . . wages . . . to the clerk of circuit court for payment of the unpaid fine, surcharge, costs, or fees." Wis. Stat. § 973.05(4)(b). The circuit court did not use

[4] The Secretary need not take a position in this appeal, and the Court need not decide, whether the sentencing court may properly set that floor (i.e., directing the Department to deduct a *minimum* amount of inmate trust account funds to pay a restitution obligation). That is because, here, the Department's deduction exceeded the floor set by the circuit court's amended judgment of conviction.

this or any other limiting language, and so there was no cap on the rate of deduction.

Contrary to this, Ortiz asserts that the amended judgment of conviction ordered the Department to pay Ortiz's restitution obligation "using *no more than* 25% of his wages," (Ortiz's Sub. Br. 12 (emphasis added)), but that is Ortiz's invention. The text of the amended judgment of conviction includes no such language. And neither does it contain the limiting word "only" preceding 25%; rather, Ortiz simply points to the word "from," which connotes no limit on quantity, but rather just refers to the source of the funds.[5] (Ortiz's Sub. Br. 13.) Consequently, the 25 percent rate in the amended judgment of conviction is the floor not the ceiling.

Relatedly, Ortiz argues that the language of the amended judgment of conviction also states that the *exclusive* source of the funds is prison wages. (Ortiz's Sub. Br. 13.) But, again, this language merely directs that the Department deduct, at a minimum, 25 percent from Ortiz's prison wages. This language does not expressly *prohibit* the Department from exercising its authority to deduct from other sources of funds, such as monetary gifts Ortiz receives. In fact, Ortiz's reading conflicts with this Court's holding that the Department has long had authority "to take restitution *from an inmate's account* at 'an amount or a percentage the department determines is reasonable for payment to victims.'" *Williams*, 380 Wis. 2d 440, ¶ 2 (emphasis added). The "account" includes everything in the standard inmate trust account—not just wages but also funds from gifts. Ortiz provides no persuasive reason why the sentencing court would (or could) place a limit on the source of Ortiz's funds from which his victim could be made whole when case

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[5] *See From*, https://www.merriamwebster.com/dictionary/from (last visited Feb. 3, 2022) (the word "from" indicates "the source").

law and statutes applicable to the Department squarely permit it. (*See also* Appellant's Br. 9–11, 13.)

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Ortiz's assertion that the Department's deducting funds conflicts with his amended judgment of conviction is unpersuasive. The Department complies with the amended judgment of conviction's directive to deduct 25 percent of his prison wages; it simply exercises its longstanding authority to deduct at a higher, yet reasonable, percentage rate from all his funds, to pay restitution to his victims at a faster pace. Wisconsin statutes and case law support the Department's action.

III. Ortiz's remaining arguments are without merit.

A. Whether certain language in the amended judgment of conviction is void is irrelevant.

Ortiz argues that the order in his amended judgment of conviction using language similar to Wis. Stat. § 973.20(11)(c),[6] which Act 355 created,[7] is "void." (Ortiz's Sub. Br. 11.) He contends that this language was added by a clerk, not a judge, and therefore, under *State v. Prihoda*, 2000 WI 123, ¶ 22, 239 Wis. 2d 244, 618 N.W.2d 857, that order is not a "judicial decision." Consequently, he claims, the Secretary was wrong to rely on that language in the amended

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[6] This language states: "If a defendant who is in a state prison or who is sentenced to a state prison is ordered to pay restitution, the court order shall require the defendant to authorize the department to collect, from the defendant's wages and from other moneys held in the defendant's prisoner's account, an amount or a percentage the department determines is reasonable for payment to victims." Wis. Stat. § 973.20(11)(c).

[7] Ortiz concedes that Secretary's decision did not rely on 2015 Wisconsin Act 355. (Ortiz's Sub. Br. 6, 7.)

judgment of conviction. (Ortiz's Sub. Br. 10–11.) This argument fails for three reasons.

First, Ortiz is not challenging the amended judgment of conviction. This is an appeal of a certiorari action of an agency official's decision. Unsurprisingly, Ortiz cites no legal authority for the proposition that a certiorari court can hold a criminal sentencing court order void.

Second, Oritz cites for persuasive authority an unpublished opinion, *State v. Justin R. White*, No. 2018AP0154-CR (Dec. 26, 2018) (per curiam), (Ortiz's Sub. Brief 9–10 & 9 n.7; Ortiz Suppl. App. 101–107.) This is not proper. *White* is a per curiam, unpublished opinion of this Court, so it cannot be cited as authority (absent exceptions not relevant here). *See* Wis. Stat. § 809.23(3)(b). For this reason, the Secretary will not discuss it.[8]

Third, and regardless, this language in the amended judgment of conviction is irrelevant. As discussed, the source of the Department's authority is statutory and confirmed by case law: it could already "collect, from the defendant's wages and from other monies held in the defendant's inmate account, an amount or a percentage which the department determines is reasonable for restitution of victims." (R. 9:14 (amended judgment of conviction), A.-App. 109.) *See Williams*, 380 Wis. 2d 440, ¶ 2. So, inclusion of this section 973.20(11)(c)-type language in the amended judgment of conviction–and in the Secretary's decision (Ortiz's Sub.

[8] Ortiz's mistake may have resulted from his belief that *White* is "a one-judge opinion under Wis. Stat. § 752.31(2)." (Ortiz's Sub. Br. 9 n.9.) None of the four types of cases under that subsection apply, and Ortiz does not specify which one he believes does. *State v. Justin R. White*, No. 2018AP0154-CR (Dec. 26, 2018) (per curiam), is *a per curiam decision*, which Ortiz even acknowledges. (Ortiz's Sub. Br. 9; Ortiz's Suppl. App. 101.)

Br. 11)–does not matter.[9] The Department had authority to begin deducting Ortiz's inmate trust account funds at a 50 percent rate, irrespective of that language in the amended judgment of conviction.

B. Ortiz's due process and arbitrariness arguments fail.

Ortiz makes two underdeveloped contentions at the end of his brief. Ortiz argues that, because the Secretary's decision did not address the conflicting order in the amended judgment of conviction, this is a due process violation. (Ortiz's Sub. Br. 21–22.) Also, Ortiz contends that the Secretary's decision is arbitrary because "[he] disregarded the circuit court's clear directive to limit the diversion of Ortiz's funds base on the boilerplate language in Form CR-212 (05/2016)." (Ortiz's Sub. Br. 22 (citing R. 9:80, A.-App. 110).) These arguments go nowhere for two reasons.

First, the arguments cite no legal authority and are little more than statements. They are undeveloped arguments and, thus, this Court may disregard them. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("We may decline to review issues inadequately briefed.") ("Arguments unsupported by references to legal authority will not be considered.").

Second, as to the due process argument, as explained above, there is no conflict between the Department's 50 percent rate deduction and the amended judgment of conviction's reference to a 25 percent rate deduction. Further,

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[9] To the extent the Secretary relied on that language, he did not solely rely on it. He incorporated a recommendation: "The attached Corrections Complaint Examiner's recommendation to DISMISS this appeal is accepted as the decision of the Secretary." (A.-App. 110.) Moreover, the Secretary's ultimate order—*dismissing* Ortiz's appeal of his inmate complaint about the Department's deduction—was correct.

Ortiz's disagreement with that result is legal; it has nothing to do with due process-type proceedings. Likewise, as to the arbitrariness argument, it adds nothing to what is already discussed above—it is merely a relabeling of Ortiz's disagreement with the outcome.

IV. This Court should disregard Ortiz's argument that DAI Policy 309.45.02 is an unpromulgated rule because it is not raised in his substitute brief and he did not commence a proper challenge against it.

In his original brief,[10] Ortiz asserted that the Department could not deduct his funds at a rate of 50 percent because that policy is an unpromulgated rule under ch. 227. (Ortiz's Br. 12–15.) Not only is this argument not raised in his substitute brief—and so it is not properly before the Court—but also it would clearly fail if it was. Ortiz did not properly commence such a challenge, as required by statute.

With a few enumerated exceptions, a Wis. Stat. § 227.40(1) declaratory judgment proceeding is the exclusive way to challenge an agency rule or an alleged unpromulgated rule. *See Mata v. DCF*, 2014 WI App 69, ¶ 13, 354 Wis. 2d 486, 849 N.W.2d 908 (requirements of Wis. Stat. § 227.40 apply to challenges that a policy is an unpromulgated rule). Apart from a declaratory judgment action under Wis. Stat. § 227.40(1) itself, the validity of a rule may be challenged in

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[10] Ortiz purports to incorporate the arguments made in his original brief. (*See* Ortiz Sub. Br. 23.) However, because the Court ordered that Ortiz file a "substitute" response brief, that would appear to be procedurally improper. Further, the Secretary does not understand Ortiz to be incorporating *all* arguments made in his original brief, especially those that may be in tension with arguments now in his substitute brief. But for the sake of completeness, the above text responds to Ortiz's original brief's argument about rulemaking, (Ortiz Br. 12–15.)

other limited "judicial proceedings when material therein." Wis. Stat. § 227.40(2). The Legislature provided a list of permissible judicial proceedings, but certiorari is not one of them. *See* Wis. Stat. § 227.40(2)(a)–(f). When the type of judicial proceeding is not listed in the statute, the validity of a rule still may be challenged, but only according to the statutory procedure in Wis. Stat. § 227.40(3).

To challenge the validity of a rule in any proceeding not listed in Wis. Stat. § 227.40(2), like this one, Wis. Stat. § 227.40(3) requires the challenger to seek "an order suspending the . . . proceeding until after a determination of the validity of the rule . . . in an action for declaratory judgment under sub. (1)." Wis. Stat. § 227.40(3)(ag). Then, if the circuit court is satisfied that the validity of the rule is material to the issues of the case, "an order shall be entered staying the . . . proceeding until the rendition of a final declaratory judgment in proceedings to be instituted forthwith by the party asserting the invalidity." Wis. Stat. § 227.40(3)(ag). Further, "[u]pon entry of a final order in the declaratory judgment action, it shall be the duty of the party who asserts the invalidity of the rule . . . to formally advise the court of the outcome of the declaratory judgment action." Wis. Stat. § 227.40(3)(b). "After the final disposition of the declaratory judgment action the court shall be bound by and apply the judgment so entered in the trial of the proceeding in which the invalidity of the rule or guidance document is asserted." Wis. Stat. § 227.40(3)(b).

Importantly, "[f]ailure to . . . prosecute the declaratory judgment action without undue delay *shall preclude the party from asserting or maintaining that the rule . . . is invalid*." Wis. Stat. § 227.40(3)(c).

Here, the record is completely devoid of any showing that Ortiz prosecuted a Wis. Stat. § 227.40 rule challenge before the circuit court. Ortiz's certiorari petition contains no allegation that the policy is invalid as an unpromulgated rule.

(R. 7:1–7.) Unsurprisingly, then, there is nothing in the circuit court record showing that Ortiz applied for an order suspending the certiorari action to allow him to commence a separate declaratory judgment challenge, that the circuit court suspended the certiorari action, or that any such judgment exists or was applied, as required under Wis. Stat. § 227.40(3)(a). Thus, since Ortiz failed to prosecute a challenge to Department policy at the circuit court level, he is statutorily "preclude[ed] . . . from asserting or maintaining" that the policy is an unpromulgated rule on appeal. Wis. Stat. § 227.40(3)(c).

Further, the claim would not be proper for another reason—it was not preserved administratively. Ortiz's inmate complaint filed with the Department does not raise a challenge to Department policy.[11] (R. 9:24–25.) As a result, his argument is not preserved. *See Bunker v. LIRC*, 2002 WI App 216, ¶ 15, 257 Wis. 2d 255, 650 N.W.2d 864 ("It is settled law that to preserve an issue for judicial review, a party must raise it before the administrative agency."),

This Court should disregard the rulemaking argument.

[11] Although Ortiz's original brief did not explicitly reference what "policy" he attempts to challenge, the Secretary understands DAI Policy 309.45.02 (R. 9:30–46) to be his focus.

CONCLUSION

Respondent-Appellant respectfully asks this Court to reverse the final order of the circuit court and thereby affirm the decision dismissing Petitioner-Respondent's inmate complaint.

Dated this 4th day of February 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,776 words.

Dated this 4th day of February 2022.

Steven C. Kilpatrick
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12) (2019-20)

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. § (Rule) 809.19(12) (2019-20).

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 February 2022.

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