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**WISCONSIN COURT OF APPEALS  
DISTRICT II**

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STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 23-AP-1023

v.

Waukesha County  
Case No. 18-CF-5

ERIC J. JOLING,

Defendant-Appellant.

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**BRIEF OF DEFENDANT-APPELLANT ERIC J. JOLING**

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**CIRCUIT COURT FOR WAUKESHA COUNTY  
HONORABLE PAUL F. REILLY, PRESIDING  
HONORABLE LAURA LAU, PRESIDING  
HONORABLE FREDERICK J. STRAMPE, PRESIDING  
Circuit Court Case No. 18-CF-5**

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## INTRODUCTION

This appeal asks the Court to consider whether courts can force disabled Wisconsinites to divert and deplete their monthly Social Security Disability Insurance (SSDI) payments to satisfy a criminal restitution obligation.

Mr. Joling is a 44-year-old Marine Corps veteran who suffers from Crohn's disease. In the early morning of January 1, 2018, he drove drunk and struck another vehicle, injuring its occupants. After agreeing to plead no contest to two OWI-related offense, Mr. Joling was sentenced in June 2018 to four years of initial confinement, with more years of prison time stayed in favor of probation.

The Circuit Court then held restitution proceedings over a 21-month period beginning in August 2018. During that time, his insurer compensated the injured parties, more than covering their losses in exchange for broad, global releases. Finally, in April 2020—having earned his release through the substance abuse program, but with neither a job nor any assets, having to rely on his parents' goodwill for housing, food, and other essentials—Mr. Joling was ordered to pay \$500 each month towards restitution for a ten-year period.

Mr. Joling sought postconviction relief based in part on the new factor test. The Circuit Court denied the motion. In summarily reversing this ruling, the Court recounted his new factor claim:

Joling filed a motion for postconviction relief under WIS. STAT. § 809.30(2)(h). One of Joling's arguments was that there were new factors in the four months since his last hearing that warranted modification of the restitution order. Specifically, Joling asserted that his Crohn's disease had worsened significantly, adversely affecting his ability to get a job and pay restitution. In an attempt to combat the

disease, he was receiving monthly injections, taking additional medication, and eating only one meal per day. In fact, the Social Security Administration had determined that Joling was partially disabled and was eligible for monthly disability payments of \$1,153 per month because of the severity of his illness. These payments were Joling's sole source of income, and he argued that they could not be used for restitution payments under 42 U.S.C. § 407(a). *See Washington State Dep't of Soc. & Health Servs. v. Guardianship Est. of Keffeler*, 537 U.S. 371, 383-85 (2003).

*State v. Joling*, No. 21-AP-1488, unpublished summ. disp. order, at 3 (Wis. Ct. App. Nov. 16, 2022) (footnote omitted).

The Court concluded that, because the Circuit Court failed to address these new factors or the new factor test, its ruling did not constitute an exercise of discretion at all. Accordingly, it reversed.

On remand, the Circuit Court ordered Mr. Joling to submit updated evidence of his circumstances. As part of his supplemental filings, he again argued that, under federal law, disabled individuals cannot be compelled to use their SSDI benefits to pay restitution.

After a hearing, the Circuit Court ordered Mr. Joling to pay \$250 each month towards restitution until the total amount—\$59,808.47—was paid in full. In doing so, it rejected his argument that it could not, consistent with 42 U.S.C. § 407(a), include Mr. Joling's SSDI payments as income in calculating restitution and, instead, entered an order with which it knew he could not comply without diverting and depleting a significant portion of his SSDI benefits.

Because the restitution order violates federal law designed to aid and protect disabled Americans, and because it was a product of an erroneous exercise of discretion, the Court should reverse.

### **STATEMENT OF THE ISSUES**

1. In determining a disabled defendant's ability to pay criminal restitution, does a circuit court violate 42 U.S.C. § 407(a) by including his SSDI payments as income and by entering a restitution order that transfers his right to a significant portion of his SSDI payments?

ANSWERED BY THE CIRCUIT COURT: Implicitly, no.

DEFENDANT-APPELLANT'S POSITION: Yes.

2. Does a circuit court erroneously exercise its discretion under Wis. Stat. § 973.20 if it enters a restitution order with which it knows a disabled defendant cannot comply without diverting and depleting a significant portion of his SSDI benefits?

ANSWERED BY THE CIRCUIT COURT: Implicitly, no.

DEFENDANT-APPELLANT'S POSITION: Yes.



### **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

Publication is warranted because protecting the welfare of disabled Wisconsinites is a matter of profound public importance. This appeal presents unique issues, the resolution of which will likely define Wisconsin's role in vindicating the federal rights of this vulnerable minority population. For them, nothing in law could send a clearer message than a published opinion, a guiding precedent to which the lower courts are, thereafter, bound.

Oral arguments are unnecessary. The parties can fully and fairly address the issues in writing.

## STATEMENT OF THE CASE

The Court is familiar with much of the background of this case. As such, this section will focus primarily on more recent events, beginning with the Court's November 16, 2022 summary disposition order. Addressed below are the following: (A) the nature of the case; (B) the Court's summary disposition order; (C) post-remand supplemental submissions; and (D) the hearing and decision.

### **A. Nature of the Case**

Mr. Joling drove intoxicated and struck a limousine, injuring its occupants. After he pleaded no contest to two OWI-related offenses, the Circuit Court sentenced him to five years of imprisonment on one count, stayed in favor of three years of probation, consecutive to eight years of imprisonment on the other count. Three of the injured occupants sought restitution, all of whom had signed broad releases in exchange for ample compensation. Mr. Joling did not dispute that their losses totaled \$59,808.47, (see R.88; A-App 001-002), but insisted that he had a diminished ability to pay that amount. Despite hearing undisputed testimony and other evidence from Mr. Joling and his vocational expert, the Circuit Court rejected his position and ordered him to pay the full \$59,808.47 in monthly installments of \$500 over 10 years. (R.92; A-App 003-007.) He sought postconviction relief, arguing, *inter alia*, that his worsened Crohn's disease and corresponding receipt of SSDI benefits were new factors which justified a restitution modification. His request was denied. (R.129; A-App 008-009.)

The Court reversed, finding that the Circuit Court's cursory new factor analysis did not suffice to constitute an exercise of discretion. (R.140; A-App 016-020.) On remand, Mr. Joling provided,

at the Circuit Court's request, updated evidence regarding his life circumstances as well as supplemental briefing. (R.158-R.160; A-App 021-061.) Like Mr. Joling's original postconviction briefing, his supplemental brief contended that 42 U.S.C. § 407(a) protects SSDI recipient like himself from being compelled to use their benefits to satisfy a restitution order. The Circuit Court disagreed. It ordered Mr. Joling to pay monthly installments of \$250 until the total loss was fully paid, (R.163; A-App 088), despite knowing that he could not comply without using a significant portion of his SSDI payments.

This appeal follows.

#### **B. The Court's Summary Disposition Order**

On November 16, 2022, the Court issued a summary disposition order which reversed the Circuit Court's denial of Mr. Joling's postconviction motion. *State v. Joling*, No. 21-AP-1488 slip summ. disp. order, at 3-4 (Wis. Ct. App. Nov. 16, 2022); (found at A-App 016-020.) It explained that his postconviction briefing described two sets of facts that had developed in the months since the restitution decision and that, as potential new factors, may entitle him to a restitution modification: (1) "that his Crohn's disease had worsened significantly," requiring him to "receiv[e] monthly injections, tak[e] additional medication, and eat[] only one meal per day," thereby "adversely affecting his ability to get a job and pay restitution," and (2) that, "because of the severity of his illness," "the Social Security Administration had determined that Joling was partially disabled and was eligible for monthly disability payments of \$1,153 per month," Mr. "Joling's sole source of income" at the time. (A-App 018.)

The Court noted that, in postconviction briefing, Mr. Joling also "argued that [his SSDI payments] could not be used for restitution

payments under 42 U.S.C. § 407(a),” citing *Washington State Dep’t of Soc. & Health Servs. v. Guardianship Est. of Keffeler*, 537 U.S. 371, 383-85 (2003). (Id.)

The Court concluded that the Circuit Court failed to exercise its discretion with respect to Mr. Joling’s new factor claim. Specifically, the Circuit Court’s August 20, 2021 order declined to consider either of the aforementioned factual development because, “[i]f the court reconsidered its Decision based upon alleged new facts, there would be no finality to the Order.” (A-App 018-019.) The Court held that this was a proper basis on which to deny a new factor claim given binding cases like *State v. Harbor*, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828. (A-App 019.) It explained that, by improperly declining to address Mr. Joling’s proposed new factors, the Circuit Court “provided neither reasoning nor explanation in its decision” and, therefore, “did not, in fact, exercise its discretion in denying [his] postconviction motion on the basis of alleged new factors[.]” (Id.)

For these reasons, the Court “reverse[d] with instructions to conduct an analysis of [Mr. Joling’s] asserted new factors under *Harbor*.” (Id.)

### **C. Post-Remand Supplemental Submissions**

On remand, the Circuit Court ordered Mr. Joling to file a supplemental submission, including a new affidavit with updated information covering his current life circumstances.<sup>1</sup> (R.151.) He

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<sup>1</sup> The Circuit Court reasoned that, if it agreed to modify restitution, it should be based on current circumstances. Mr. Joling disagreed and requested, based on his other postconviction arguments, that the Circuit Court grant his motion, vacate the restitution decision, and redetermine restitution based on the existing record and briefs. Mr. Joling explained that, not only was the existing evidentiary record robust and the briefing complete, but basing a restitution modification on a full

complied on April 13, 2023, filing new affidavits from himself and undersigned counsel and a supplemental brief. (A-App 021-061.)

i. *Developments Between the April 15, 2020 Decision and the May 7, 2021 Postconviction Filings*

As the supplemental brief explained, at the time of the Circuit Court's April 15, 2020 restitution decision, the available information about Mr. Joling's circumstances—including his current and future income and expenses—came from his testimony, the report and testimony of his vocational expert, and his letter brief. (See R.80, R.100.) This reflected only that he suffered from Crohn's disease and that it may affect the kind of jobs or vocations he could pursue.

Between the April 15, 2020 decision and the May 7, 2021 postconviction filings, the severity of Mr. Joling's illness progressed dramatically. (See R.116-R.119.) His affidavit and medical records described the troubling symptoms that emerged during this period: 10 to 30 bowel movements a day, severe abdominal pain, sleep disruption and deprivation, and disordered eating. As the condition of his health declined, his providers attempted multiple interventions—including infusions and injections of steroids and other medications to try to suppress his immune system—with varying degrees of success. Indeed, as a result, the Social Security Administration determined that Mr. Joling was disabled and

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submission of new evidence and argument was analogous to a resentencing as opposed to a sentence modification. It would be no different from, and would be tantamount to, completely redoing the restitution proceedings *except*, unlike in a resentencing, this approach would use the original restitution amount as a starting point or baseline, serving only to unduly influence the extent of the "modification." Mr. Joling's oral and written objections were overruled and his request denied. This argument proved prophetic as the Circuit Court ultimately ordered him to pay \$250 monthly—exactly 50% of the original, baseline amount.

qualified for SSDI payments. These developments were all disclosed as part of his May 7, 2021 postconviction submissions.

ii. *Developments Between the May 7, 2021 Postconviction Filings and the April 13, 2023 Updated Submissions*

These aspects of Mr. Joling's life evolved somewhat between May 7, 2021 and April 13, 2023 but remained *drastically* different than they were at time of the April 15, 2020 restitution decision. His April 13, 2023 submissions included the following updates on his life circumstances:

1. Mr. Joling moved from veteran housing in Milwaukee back to Marathon County—the Wausau metropolitan area, specifically—where he was raised. (A-App 041, ¶ 3.) He now lived in an apartment located in the Town of Weston, Wisconsin. (Id.)

2. He now paid \$1,005.00/month in rent for the apartment. (Id. ¶ 4.)

3. Mr. Joling was now self-employed. He started his own process service company. (Id. ¶ 5.) His average monthly revenue in the first quarter of 2023 (i.e., January, February, and March) was \$1,039.33. (Id.) He paid income taxes which he approximated to constitute no less than 12% of his gross income (not including SSDI payments). (A-App 042, ¶ 8.) Therefore, his post-tax, net monthly income likely averaged under \$1,000.00.

4. He continued to receive monthly SSDI payments, now in the amount of \$1,187.00. (Id. ¶ 6.)

5. Excluding restitution payments, Mr. Joling now incurred monthly itemized expenses totaling \$914.61. (Id. ¶ 7.) His itemization was by no means exhaustive as it omitted certain regular and variable expenses like groceries, clothes, vehicle maintenance/repair and depreciation, and vehicle registration fees. Therefore, fully itemized, his monthly expenses likely averaged over \$1,000.00.

6. According to the payment history record Mr. Joling obtained from his probation agent, as of April 12, 2023, he had paid \$1,460.00 towards restitution. (Id. ¶ 9, Ex. 1.)

7. According to Mr. Joling, his health—including, specifically, his Crohn's disease—remained in a deteriorated state. (Id. ¶ 10.) Although his symptoms manifested in a variable manner, his condition overall was essentially static. (Id.)

His updated medical records from the U.S. Department of Veteran Affairs (VA) corroborated his observations. (A-App 046, 048-061.) According to the most recent follow-up note from his January 30, 2023 GI appointment, (A-App 049-057), Mr. Joling only partially responded to the medication infusions of Stelara (ustekinumab) onto which he was fully titrated by February 2021, (A-App 050). Believing that increasing the frequency of these infusions would not increase blood serum levels of the drug, an additional medication, methotrexate, was started and stopped twice—once in September 2021 and again in March 2022—without benefit. (Id.) The note continued: “He still had evidence of biochemical (Monitr 63) and clinically active disease but he also has a component of IBS [irritable bowel syndrome] since his symptoms significantly worsen with stressors. . . . He continues to be symptomatic (diarrhea, abdominal pain improved) with biochemical evidence of active disease (FC 989

1/14/23).” (Id.) Because his providers believed that the failure to attain remission on Stelara was probably less about how the medication worked and more about achieving sufficiently high blood serum levels of the drug, his providers recommended that Mr. Joling switch from Stelara to Skyrizi (risankizumab), a medication with a similar mechanism of action. (Id.) Although initially reluctant, Mr. Joling had agreed to try a switch to Skyrizi. (Id.)

Regarding Mr. Joling’s symptoms, the January 30, 2023 note reflected that Mr. Joling continued to experience “[n]ausea and reflux” and other symptoms as follows:

Abdominal pain/cramping a little better. If he eats too fast or depending on what he eats. trying to eat smaller portions. Trying to slow down also. He is still making 10-12 trips to the bathroom that are watery stools (associated with cramping and pain). Solid stools on occasion- 1-2X per month. Usually diarrhea. He denies bloody stools. feels "the touch of the flu" sometimes. His weight is fluctuating.

(A-App 051.) Other follow-up GI appointments noted similar symptoms. For example, he reported on January 6, 2023 that he was experiencing nausea and reflux; that he “mostly only eats once daily, between 6-7pm”; that, “[i]f he doesn’t take evening dose of omeprazole, will wake up with reflux”; and that he

[h]as good days/bad days. Abdominal pain, cramping hasn’t been as bad. Sometimes increased at night.

Typically will still have several BMs after eating. He reports 20-25 trips to the bathroom in a day with mucous, sometimes small amount of “watery substance”. Actual number of BMs is 7-8 per day.

(A-App 058.) As another example, he reported the following symptomology at his September 16, 2022 GI follow-up appointment:



Feels he is continuing to see improvement very gradually. flares (diarrhea, cramping) improved from 1-2X per week to once every 1.5 weeks. Also depends on what and how much he eats. Notices that if he eats too quickly or more than usual has more pain and symptoms- diarrhea, cramping, increased frequency. No persistent pain which is an improvement for him. BMs are always post-prandial. Still only eats one meal around 6-7pm. Has 1 BM in the AM, 1-2 during the day. 4-5 BMs after dinner.

(A-App 059.) As a final example, at his March 10, 2022 follow-up appointment, he reported that, on good days, he had 5 BMs and, on bad days, 10 BMs; that he had “generalized abdominal pain – worse at night before bed – lies flat”; that he has nausea if he eats too much; that he has reflux 3-4 times per week; and that he “eats once daily to avoid pain.” (A-App 060-061.)

iii. *Supplemental Arguments*

Aside from objecting to the Circuit Court’s approach to addressing his postconviction motion, (A-App 028-029), Mr. Joling’s supplemental brief raised several arguments on the merits of his new factor claim, (A-App 030-038). He argued that the two previously-identified new factors—his worsened health and receipt of SSDI payments—continued to constitute sets of facts highly relevant to determining restitution but had developed since, and were unknowable at the time of, the original restitution decision.

Specifically, Mr. Joling argued that, had the Circuit Court known that these circumstances would arise in Mr. Joling’s future at the time of its April 15, 2020 restitution determination, then it would have—or at least should have, to properly exercise its discretion—found this knowledge to be highly relevant to its determination. The new facts need only be “highly relevant to the imposition of”

restitution. *Harbor*, 333 Wis. 2d 53, ¶ 40. The new facts need not, however, frustrate the purpose of the original sentence. *Id.* ¶ 41.

Generally, new facts are “relevant” if they tend to make the existence of any fact that is of consequence to the matter more probable or less probable than it would be without the new facts. *Cf.* Wis. Stat. § 904.01. New facts may be relevant even if they are only a link in the chain of facts that must be shown to make a given proposition appear more or less probable. *State v. Pharr*, 115 Wis. 2d 334, 46, 340 N.W.2d 498 (1983). No matter how one defines “highly relevant,” these developments in Mr. Joling’s life *clearly* meet this standard.

Mr. Joling contended that his worsening health and disability designation were highly relevant because they make it much less probable that he would be able to pay a substantial restitution amount like \$500 per month. First, his Crohn’s disease was exceedingly burdensome on his daily functioning. He had bowel movements with remarkable frequency which, at its worst, was up to 30 times a day. He continued to suffer abdominal pain for long stretches of time, disrupting his ability to get a good night’s rest. He ate one meal daily. And he received infusions or injections of medications just to feel well enough *to have these symptoms*. Clearly (and, according to the SSA, officially), his condition constituted a disability that was not going to resolve anytime soon. Becoming disabled for the indefinite future is a factual development that is “highly relevant” to a determination of an individual’s earning capacity. By affecting his ability to work, Mr. Joling’ Crohn’s disease had compromised his ability to pay restitution.

Second, the fact that Mr. Joling now relied on SSDI payments as a substantial source of income was highly relevant to restitution. SSDI payments are intended to make up for the shortfall in income that occurs when an individual's disability compromises his or her employment capacity. Thus, Mr. Joling was entitled to rely on SSDI payments to cover expenses and to displace the need for income that would otherwise have to come from employment.

He further noted that, before becoming disabled, he aspired to be an addiction counsellor. He took classes in pursuit of that career, stopping because of COVID-19. Now, his health had forced him to rely on the government for income.

He asserted that the SSDI payments constituted a new, separate factor because of the legal protections they are afforded. As he had done in prior briefing, he argued that, although SSDI payments were a source of income for Mr. Joling, courts were prohibited from forcing disabled individuals to pay criminal restitution out of their SSDI disability proceeds. (A-App 036-038.) To support this proposition, he cited 42 U.S.C. § 407(a) and a number of cases, including *Washington State Dep't of Social & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371 (2003), *State v. Kenyon*, 225 Wis. 2d 657, 593 N.W.2d 491 (Ct. App. 1999), *State v. Eaton*, 99 P.3d 661 (Mont. 2004), and *In re Lampart*, 856 N.W.2d 192 (Mich. Ct. App. 2014). (A-App 037.)

This argument, and these citations, will be explored at greater length below. Mr. Joling mentions them here to demonstrate that his supplemental brief sufficiently argued to the Circuit Court that SSDI payments are protected from the reach of restitution orders. Because his SSDI payments lay beyond the reach of restitution orders, he also

had a lower future earning capacity than an individual who was not disabled, a factor important to one's ability to pay restitution.

Mr. Joling asked the Circuit Court to conclude that these two developments—individually and collectively—constituted new factors under *Harbor*. Had they been in existence at the time of the original restitution determination, defense counsel would undoubtedly have used them as the backbone of any argument on Mr. Joling's ability to pay restitution. More than just "highly relevant," it is difficult to conceive of a set of facts more essential to a person's earning capacity than a disability and compensatory SSDI payments.

iv. *Proposed Modification*

Mr. Joling concluded his brief with a specific modification request. (A-App 038-039.) He explained that, because Mr. Joling's SSDI payments cannot be included as income, his monthly expenses exceed his monthly income. As such, his ability to pay restitution was \$0, meaning that it would be reasonable for him to request that the Circuit Court order his monthly restitution payments be reduced to \$0. Given the circumstances, however, Mr. Joling offered a compromise: even though the law did not require it, he offered to voluntarily acquiesce to an order that he make monthly restitution payments of \$100.00 for a period of 10 years. Under his request, he would pay a total of \$12,000.00, in addition to the \$1,460.00 he previously paid.

**D. The Hearing and Decision**

On May 9, 2023, the Circuit Court convened a hearing to hear arguments and rule on Mr. Joling's postconviction motion. (R.171; A-App 062-086.) Mr. Joling presented his proposed modification to the

Circuit Court as set forth above. (A-App 070-071.) The Circuit Court questioned undersigned counsel about his interpretation of 42 U.S.C. § 407. (A-App 071-074.) Counsel responded repeated that SSDI payments cannot be considered income for purposes of calculating restitution:

THE COURT: Right. So I've got a question for you about the SSDI payments. I see the statute to the United States code that you have. I read that in your brief.

As I read that statute, it's that the Court can't attach, garnish, somehow put some sort of legal encumbrance onto the SSDI payments; correct?

MR. SIMERSON: That is correct.

THE COURT: But do you take that to mean that I can't even acknowledge that he's receiving that payment when I determine what restitution is?

MR. SIMERSON: I would say that you cannot consider it income. You can't consider it income for purposes of restitution.

THE COURT: So even if I'm not attaching, garnishing, or doing anything directly to affect that, I can't even acknowledge that it exists when determining what the amount of restitution should be?

MR. SIMERSON: Well, you can acknowledge it. I'm saying you can't use it as a basis for income. So you can't include whatever amount he's receiving in SSDI payments in determining how much he owes and a payment schedule and so forth. That would be making him pay, out of his SSDI benefits, restitution. That would be ordering him to do it.

(A-App 071-072.) Likewise, after indicating that it was not "receptive" of counsel's argument, the Circuit Court continued to press him on this position:

THE COURT: . . . [S]ince he's making an average of \$1,039 a month separate from the SSDI, your position is that unless he can cover all of his living expenses out of that amount, then his restitution should be ordered at zero?

MR. SIMERSON: Yes.

THE COURT: Okay. So the State did math in their brief. They added up the SSDI and the earnings, subtracting the 12 percent of taxes, and came up with a total amount per month of about \$2,100, with total expenses listed of about \$1,719 with a 300 and some dollar difference there.

You're telling me that what I should do is be taking \$914 of income, subtract 1,719 and find out that there's no way he can make any payments?

MR. SIMERSON: I would.

THE COURT: And the reason why you disagree with the State is because of that statute you cite in your brief that talks about not being able to garnish or levy against the SSDI payments?

MR. SIMERSON: The statute, the case law, and the undisputed nature of the argument.

(A-App 073-074.)

The Circuit Court rejected Mr. Joling's position, instead following the State's calculation of income versus expenses. This included SSDI payments as income.

Ultimately, the Circuit Court granted the motion in part and denied it in part. (A-App 088; see also A-App 082-085.) While it agreed that these developments in Mr. Joling's life constituted new factors warranting a restitution modification, and while it lowered his monthly obligation from \$500 to \$250, it rejected his position that he could not be forced to use his SSDI payments to pay his restitution obligation and denied his proposed modification. (Id.)

**PRIMER ON U.S. SOCIAL SECURITY ADMINISTRATION'S  
DISABILITY INSURANCE PROGRAM**

Since 1956, the U.S. Social Security Administration's Disability Insurance ("SSDI") program has been a lifeline for the disabled American worker. Its impact has been profound, especially among society's most perilous occupations, like our soldiers, firefighters, and factory workers. Sustaining a disability is a lifechanging event, not only for them but for their families, too. Together, they rely on monthly SSDI payments as an essential source of financial stability.

Disabled workers receive monthly SSDI payments if they qualify for coverage. To be covered, workers must have worked at least a minimum number of years and made at least a minimum amount of earnings. Workers must also obtain a medical determination that they have a qualifying disability preventing them from performing substantial gainful activity. If covered, then those workers are entitled to receive monthly SSDI payments commensurate with their lifetime earnings, a percentage of which they had paid towards Social Security taxes to fund the program. SSDI benefits are also paid to family dependents of disabled workers who qualify for coverage.

In 2021, roughly 8.7 million disabled workers and their families relied on monthly SSDI benefits to sustain their livelihoods. Nearly 10% of those disabled workers—about 882,000 Americans—were disabled veterans of the armed forces.

On average, Social Security paid disabled male workers between the ages of 40 and 44 a monthly SSDI payment of \$1,189.45, an annual total of \$14,273.40. Although modest, more than 58% of

disabled male workers received at least half of their income from SSDI benefits, and about 32% relied on them as their sole source of income.

Disabled workers depend on SSDI payments simply to subsist. 47.8% of disabled workers had a total yearly household income of less than \$30,000, with 21.6% of them having less than \$15,000. In 2021, the federal poverty guideline for a single-person family was \$12,996. Sadly, around 20% of disabled workers, veterans included, live in poverty despite receiving SSDI benefits.

The closing portion of the separately-filed appendix presents three articles made available by the U.S. Social Security Administration (SSA) concerning the characteristics of Americans with disabilities, including veterans of the armed forces, and disability welfare programs like SSDI. (See A-App 089-141.) The foregoing information and statistics are derived from these resources.

### **STANDARDS OF REVIEW**

The Court reviews restitution orders for an erroneous exercise of discretion. *State v. Madlock*, 230 Wis. 2d 324, 329, 602 N.W.2d 104 (Ct. App. 1999) (citation omitted). “[W]hen a court exercises discretion under an erroneous view of the law, a misuse of discretion has occurred.” *Id.* (citation omitted).

The interpretation of the state restitution statute, Wis. Stat. § 973.20, and the federal SSDI statute, 42 U.S.C. § 407, as well as their application to the facts of the case, are questions of law that the Court reviews de novo. *Lakewood Credit Union v. Goodrich*, 2016 WI App 77, ¶ 12, 372 Wis. 2d 84, 887 N.W.2d 342 (SSDI statute); *State v. Fernandez*, 2009 WI 29, ¶ 20, 316 Wis. 2d 598, 764 N.W.2d 509 (restitution statute).



“[W]hether federal preemption applies is a question of federal law that [the Court] review[s] independently.” *Partenfelder v. Rohde*, 2014 WI 80, ¶ 25, 356 Wis. 2d 492, 850 N.W.2d 896 (quoting *Blunt v. Medtronic, Inc.*, 2009 WI 16, ¶ 13, 315 Wis. 2d 612, 760 N.W.2d 396). Federal preemption is an issue of statutory construction; accordingly, the Court need not defer to the lower court’s decision. *State v. Wisconsin Central Transp. Corp.*, 200 Wis. 2d 450, 456, 546 N.W.2d 206 (Ct. App. 1996), *aff’d*, 209 Wis. 2d 278, 562 N.W.2d 152 (1997).

Finally, whether a fact or set of facts constitutes a new factor is a question of law that the Court reviews independently. *State v. Harbor*, 2011 WI 28, ¶ 33, 333 Wis. 2d 53, 797 N.W.2d 828 (citing *State v. Hegwood*, 113 Wis. 2d 544, 547, 335 N.W.2d 399 (1983)). The Court reviews whether a new factor justifies a sentence modification for an erroneous exercise of discretion. *Id.* (*Hegwood*, 113 Wis. 2d at 546).

### ARGUMENT

The Court violated federal law and erroneously exercised its discretion when it fashioned a restitution order that violated federal law and with which Mr. Joling could not comply without having to divert and deplete his monthly SSDI benefits. The federal SSDI program is governed by statutes 42 U.S.C. §§ 401 *et seq.* Among them is 42 U.S.C. § 407, titled “Assignment of benefit,” subsection (a) of which states:

**(a) In general.** The right of any person to any future payment under this title [42 U.S.C. §§ 401 *et seq.*] shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title [42 U.S.C. §§ 401 *et seq.*] shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

42 U.S.C. § 407(a) (emphases added). Subsection (b) then instructs that “[n]o other provision of law, enacted before, on, or after the date of the enactment of this section [April 20, 1983], may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.”

The Circuit Court erred in two ways. First, in modifying his monthly restitution obligation, the Circuit Court violated 42 U.S.C. § 407(a) by including Mr. Joling’s SSDI benefits as income and by transferring his right to such benefits in the future. Second, it erroneously exercised its discretion under Wis. Stat. § 973.20 when it entered a restitution order with which it knew Mr. Joling could not comply without diverting and depleting his SSDI benefits. For either or both reasons, the Court should reverse.

**I. IN MODIFYING HIS MONTHLY RESTITUTION OBLIGATION, THE CIRCUIT COURT VIOLATED 42 U.S.C. § 407(a) BY INCLUDING MR. JOLING’S SSDI BENEFITS AS INCOME AND BY TRANSFERRING HIS RIGHT TO SUCH BENEFITS IN THE FUTURE.**

The Circuit Court erred when it violated 42 U.S.C. § 407(a). When determining restitution in Wisconsin, the circuit court must “consider[] a defendant’s ability to pay” and, accordingly, “the defendant’s financial situation,” including “the financial resources of the defendant, the present and future earning ability of the defendant, and the needs and earning ability of the defendant's dependents.” *Fernandez*, 316 Wis. 2d 598, ¶¶ 22-23.

However, when dealing with SSDI payments, the powers of state courts are limited, indeed *preempted*, by the language of 42 U.S.C. § 407(a), quoted above. *See Bennett v. Arkansas*, 485 U.S. 395, 397 (1988) (holding that, if a State attempts to attach Social Security benefits,

contrary to 42 U.S.C. § 407(a), then “this amounts to a ‘conflict’ under the Supremacy Clause—a conflict that the State cannot win”).

Accordingly, the Circuit Court here was beholden to the limitations of 42 U.S.C. § 407(a). It lacked the authority to consider any of Mr. Joling’s SSDI funds as income, financial resources, or earnings subject to its restitution order, or to have any of his future SSDI payments transferred to satisfy restitution. The practical result of these limitations was that Mr. Joling’s SSDI benefits should have been ignored or removed from the Circuit Court’s determination of his ability to pay restitution.

Here’s why. This Court has had occasion to describe the components of 42 U.S.C. § 407(a), two of which are relevant to this case: (A) the “general exemption provision,” and (B) the “anti-assignment provision.” *Lakewood Credit Union v. Goodrich*, 2016 WI App 77, ¶¶ 17, 19, 372 Wis. 2d 84, 887 N.W.2d 342 (citing *In re Franklin*, 506 B.R. 765, 769-70 (Bankr. C.D. Ill. 2014)). The Circuit Court violated both provisions. Each will be addressed in turn below.

**A. The Circuit Court Violated the General Exemption Provision of 42 U.S.C. § 407(a) When It Subjected Any SSDI Funds That Were Paid or Are Payable to Mr. Joling to a Criminal Restitution Order.**

42 U.S.C. § 407(a) states in part that “none of the moneys paid or payable or rights existing under this title [42 U.S.C. §§ 401 *et seq.*] shall be subject to execution, levy, attachment, garnishment, or other legal process . . . .” “This [*general exemption*] provision ‘protects social security benefits paid or payable from [certain] creditor collection rights’ . . . [.] stat[ing] in relevant part that ‘none of the moneys paid or payable or rights existing under this subchapter shall be subject to

execution, levy, attachment, garnishment or other legal process.” *Goodrich*, 372 Wis. 2d 84, ¶ 19 (citations omitted, emphasis added). This provision protects SSDI funds both before and after the benefits are received, i.e., both past and future SSDI payments. *Philpott v. Essex Co. Welfare Bd.*, 409 U.S. 413, 415–17 (1973).

Wisconsin’s criminal restitution procedure set forth in Wis. Stat. § 973.20 constitutes an “other legal process” because, like execution, levy, attachment, and garnishment, it is a judicial mechanism by which control over an individual’s property may be passed to another in order to discharge an alleged liability. *See Washington State Dep’t of Social & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 383–85 (2003) (hereafter cited as “*Keffeler*”).

Accordingly, the general exemption provision of 42 U.S.C. § 407(a) applies to a circuit court’s determination of criminal restitution under Wis. Stat. § 973.20. The circuit court must, therefore, protect a disabled defendant’s past and future SSDI payments from being subject to its criminal restitution order. Otherwise, it violates 42 U.S.C. § 407(a).

The Circuit Court failed to protect Mr. Joling’s SSDI payments in this case. Despite his timely notice and invocation of his rights and protections under 42 U.S.C. § 407(a) – both orally and in writing – the Circuit Court rejected his argument that his SSDI payments should be omitted from its calculation of income and earnings. Instead, it expressly chose to follow the State’s position and include them. In doing so, it subjected Mr. Joling’s SSDI payments to criminal restitution, a legal process from which his benefits are supposed to be protected. Consequently, the Circuit Court’s restitution order violated 42 U.S.C. § 407(a).

This conclusion is supported by the case law, both federal and state, including Wisconsin. In *Keffeler*, the U.S. Supreme Court interpreted the phrase “other legal process” in 42 U.S.C. § 407(a). 537 U.S. at 383-85. It refers to any

process much like the processes of execution, levy, attachment, and garnishment, and at a minimum, would seem to require utilization of some judicial or quasi-judicial mechanism, though not necessarily an elaborate one, by which control over property passes from one person to another in order to discharge or secure discharge of an allegedly existing or anticipated liability.

*Id.* at 385. This interpretation, it found, was consistent with the SSA’s own interpretation, which “define[d] ‘legal process’ as used in § 407(a) as ‘the means by which a court (or agency or official authorized by law) compels compliance with its demand; generally, it is a court order[.]’” including, but not limited to, “any writ, order, summons or other similar process in the nature of garnishment[.]” or “an attachment, writ of execution, income execution order or wage assignment that is issued by . . . [a] court of competent jurisdiction[.]” *Id.* (citations omitted).

Criminal restitution under Wis. Stat. § 973.20 fits comfortably within *Keffeler*’s definition of “other legal process.” Like execution, levy, attachment, and garnishment, restitution is a judicial mechanism by which control over an individual’s property may be passed to another in order to discharge an alleged liability.

This conclusion is further supported by this Court’s opinion in *Lakewood Credit Union v. Goodrich*, 2016 WI App 77, 372 Wis. 2d 84, 887 N.W.2d 342. There, this Court interpreted the phrase “other legal process” in 42 U.S.C. § 407(a), albeit under vastly different

circumstances. A borrower in *Goodrich* argued that a private bank's seizure and liquidation of his depository account that, based on a private agreement, he pledged as security for a loan qualified as an "other legal process" under 42 U.S.C. § 407(a) because he had previously deposited SSDI payments into it. *Id.* ¶¶ 1, 5-6, 19-22.

This Court disagreed. *Id.* ¶¶ 22-25. Describing the *Keffeler* opinion, it stated that execution, levy, attachment, and garnishment were "formal procedures by which one person gains a degree of control over property otherwise subject to the control of another, and generally involve some form of judicial authorization." *Id.* ¶ 23 (quoting 537 U.S. at 383). An "other legal process" is one that, "at a minimum, would seem to require utilization of some judicial or quasi-judicial mechanism, though not necessarily an elaborate one, by which control over property passes from one person to another in order to discharge or secure discharge of an allegedly existing or anticipated liability." *Id.* ¶ 24 (quoting *Keffeler*, 537 U.S. at 384-85). An "other legal process" could not be one that "operate[d] on funds already in the [creditor's] possession and control, held on terms that allow the reimbursement." *Id.* (quoting *Keffeler*, 537 U.S. at 386).

The Court explained that, according to *Keffeler*, "[t]hree essential characteristics define an impermissible 'legal process': (1) the process is 'judicial or quasi-judicial'; (2) the process transfers 'control of property . . . from one person to another'; and (3) the process is applied 'in order to discharge or secure discharge of an allegedly existing or anticipated liability.'" *Id.* ¶ 24 (quoting *Wojchowski v. Daines*, 498 F.3d 99, 108-09 (2d Cir. 2007) (quoting *Keffeler*)).

Like the children in *Keffeler*, the borrower in *Goodrich* could not avail himself of the rights and protections of 42 U.S.C. § 407(a). Neither involved an “other legal process.” It was not enough in *Keffeler* that the State of Washington “use[d] a sort of ‘legal process’ by being appointed representative payee for the children [receiving foster care] and ma[de] claims against the children’s accounts kept by the state treasurer [to recoup the cost of providing them foster care].” *Id.* ¶¶ 23-24. This Court reasoned that, “[i]f the ‘abstract’ legal process in *Keffeler*” did not implicate the limitations of 42 U.S.C. § 407(a), then “the present circumstances – i.e., [a bank]’s exercise of its contractual right to liquidate [a borrower]’s already received and pledged social security benefits in the event of default” – did not, either.

Nevertheless, the borrower insisted that, “[w]hen the Wisconsin Legislature enacted Chapter 186, it created the legal basis for the existence of a Wisconsin Credit Union[,] the regulatory scheme under which they operate[,]” and “the ‘legal process’ by which a Wisconsin credit union may validly employ a setoff of money held in a customer’s account.” *Id.* ¶ 27. Unimpressed, the Court explained that this process ignored the first essential characteristic, i.e., “that the ‘other legal process’ have some judicial or quasi-judicial component.” *Id.* ¶ 28. A judicial or quasi-judicial process does not arise when “the legislature simply enact[s] a regulatory scheme that generically establishes a credit union’s right to setoff depository accounts of its members” or when, like here, “[the bank]’s conduct [] was based on a contract—including [the borrower]’s affirmative decision to pledge the depository accounts at issue as security in order to obtain the loan on which he later defaulted—not [the bank]’s invocation of any statutory rights.” *Id.*



Wisconsin's criminal restitution process – far from resembling the processes involved in *Keffeler* and *Goodrich* – is a legal process in the same vein as execution, levy, attachment, and garnishment. It bears the hallmarks of a legal process: court orders, judicial oversight, findings of liabilities/remedies, evidentiary hearings, burdens of proof, statutory procedure, etc. There are no contract terms or private agreements. Neither the victims nor intermediaries (e.g., DOC's community corrections, probation) already have control over Mr. Joling's funds. Here, criminal restitution serves as a mechanism for the court-ordered transfer of funds from one person to another based on court-determined liability. The creditor may even be entitled to a civil judgment against the debtor under certain circumstances. Without a doubt, this constitutes an "other legal process."

Finally, other states have agreed that criminal restitution proceedings constitute an "other legal process" under 42 U.S.C. § 407(a). *See, e.g., State v. Eaton*, 99 P.3d 661 (Mont. 2004); *In re Lampart*, 856 N.W.2d 192 (Mich. Ct. App. 2014). In *Eaton*, the trial court ordered that the defendant pay 20% of his net income towards criminal restitution, knowing such income would include social security or retirement benefits. 99 P.3d 661, ¶ 20.

The Montana Supreme Court found that this violated 42 U.S.C. § 407(a). *Id.* ¶¶ 21-23. It held that the restitution "order is an improper attempt to subject Eaton's social security benefits to 'other legal process[.]'" citing *Keffeler*. *Id.* ¶¶ 21-22. Consequently, it concluded that "the judgment's inclusion of Eaton's social security income conflicts with the provisions of § 407(a), and we reverse the inclusion thereof." *Id.* ¶ 23.



In *Lampart*, the Michigan Court of Appeals arrived at a similar conclusion following a thorough analysis. 856 N.W.2d at 196-203. It held that the circuit court erred by considering the defendant's SSDI benefits as income from which it could order him to pay restitution because enforcement of such an order (through the court's contempt powers, for example) would require an "other legal process" under 42 U.S.C. § 407(a) and *Keffeler*. *Id.* at 199-201.

For these reasons, the Court should hold that Wisconsin's criminal restitution process constitutes an "other legal process." It should also conclude that, by including Mr. Joling's SSDI payments as income in determining restitution, the Circuit Court subjected his benefits to an "other legal process" and, therefore, violated the general exemption provision of 42 U.S.C. § 407(a).

**B. The Circuit Court Violated the Anti-Assignment Provision of 42 U.S.C. § 407(a) When It Transferred Mr. Joling's Right to Future SSDI Payments.**

42 U.S.C. § 407(a) states in part that "[t]he right of any person to any future payment under this title [42 U.S.C. §§ 401 *et seq.*] shall not be transferable or assignable, at law or in equity . . . ." "[T]h[is] *anti-assignment provision* . . . prevents a recipient from assigning or otherwise transferring the right to future payments" of SSDI benefits. *Franklin*, 506 B.R. at 769 (emphasis added); *see also Goodrich*, 372 Wis. 2d 84, ¶ 17 (It "bars the assignment or transfer of '[t]he right of any person to any future payment' of social security benefits."). It applies solely to an assignment or transfer "of future benefits, not to benefits that have already been received." *Goodrich, supra*, ¶ 17 (citing, e.g., *Ponath ex rel. Outagamie Cty. Dep't of Public Welfare v. Hedrick*, 22 Wis. 2d 382, 387, 126 N.W.2d 28 (1964)).

Here, the practical effect of the Circuit Court's restitution order was to involuntarily transfer Mr. Joling's right to a portion of his future SSDI payments to the victims, in satisfaction of his restitution obligation.

Consider this Court's opinion involving a similarly-worded federal law in *State v. Kenyon*, 225 Wis. 2d 657, 593 N.W.2d 491 (Ct. App. 1999). There, the State moved to modify the conditions of defendant's probation, asking the court to order him to allow his employer to apply his ERISA pension benefits to pay towards his restitution obligation. *Id.* at 661. During the restitution hearing, defense counsel cited ERISA's anti-alienation and diversion prohibition language from the plan documents. *Id.* at 662-63. The circuit court granted the motion, "acknowledge[ing] that the plan 'prohibits somebody from mortgaging or pledging those items, or from a normal creditor to perhaps even attack those amounts[.]'" *Id.* at 663. However, it "concluded that Kenyon could voluntarily withdraw the funds and therefore the court could order him to do so and order that they be transferred to the victims as a condition of Kenyon's probation." *Id.*

This Court reversed. It explained that ERISA, which preempted state laws and court orders relating to pension funds, required "that 'each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.'" *Id.* at 664 (quoting 29 U.S.C. § 1056(d)(1)). Important here, the Court relied on 26 CFR § 1.401(a)-13(b)(1), a related regulation bearing strikingly similar language to that of 42 U.S.C. § 407(a): "[B]enefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process." *Id.*

The Court rejected the circuit court's belief that "the anti-alienation clause did not prohibit the court from ordering Kenyon to withdraw and transfer funds that Kenyon could otherwise withdraw voluntarily." *Id.* at 665. It also declined to endorse the circuit court's explanation that it did nothing more than order Kenyon to voluntarily withdraw the pension funds himself and was not ordering a direct garnishment. *Id.* at 666. The Court replied that "the practical result is the same—an involuntary transfer of money from Kenyon's pension fund." *Id.* It concluded that, "[b]ecause the trial court erred in ordering Kenyon to withdraw and transfer funds from his retirement plan and insurance policy, we reverse and remand to the trial court to vacate that part of the order . . . ." *Id.* at 670.

Mr. Joling's SSDI payments are no different than Kenyon's ERISA pension funds. Federal law employs nearly-identical language to prohibit Wisconsin circuit courts from ordering a defendant to involuntarily transfer either type of funds to satisfy criminal restitution. Because of the similarities between *Kenyon* and the present case, including nearly-identical language shared by the federal regulation in *Kenyon* and 42 U.S.C. § 407(a) here, the Court should follow its *Kenyon* analysis and hold by extension that, like with ERISA pension funds, a circuit court cannot order the involuntary transfer of Mr. Joling's future SSDI payments to satisfy a criminal restitution obligation.

For these reasons, the Court should find that the Circuit Court violated the anti-assignment provision of 42 U.S.C. § 407(a).

**II. THE CIRCUIT COURT ERREOUSLY EXERCISED ITS DISCRETION UNDER WIS. STAT. § 973.20 WHEN IT ENTERED A RESTITUTION ORDER WITH WHICH IT KNEW MR. JOLING COULD NOT COMPLY WITHOUT DIVERTING AND DEPLETING HIS SSDI BENEFITS.**

As already mentioned, “orders of restitution are within the discretion of the circuit court[.]” *Fernandez*, 316 Wis. 2d 598, ¶ 50. With every discretionary decision, its “process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards.” *State v. Gayton*, 2016 WI 58, ¶ 18, 370 Wis. 2d 264, 882 N.W.2d 459 (quoting *State v. Taylor*, 2006 WI 22, ¶ 17, 289 Wis. 2d 34, 710 N.W.2d 466). Accordingly, a circuit court *erroneously* exercises its discretion “if it fails to examine the relevant facts, applies an improper standard of law[,] fails to use a demonstrated rational process to reach a conclusion that a reasonable judge could reach,” *Dane Cnty. DHS v. Mable K.*, 2013 WI 28, ¶ 39, 346 Wis. 2d 396, 828 N.W.2d 198, or renders a decision “without the underpinnings of an explained judicial reasoning process,” *State v. Loomis*, 2016 WI 68, ¶ 30, 371 Wis. 2d 235, 881 N.W.2d 749 (quoting *McCleary v. State*, 49 Wis. 2d 263, 278, 182 N.W.2d 512 (1971)).

Here, the Circuit Court erroneously exercised its discretion in determining restitution for three reasons. First, as explained in the preceding section, it misconstrued and misapplied the legal standard provided in 42 U.S.C. § 407(a). In other words, the Circuit Court’s exercise of discretion in fashioning the restitution order was improperly premised on a mistaken understanding of the statute and was, therefore, erroneous.

Second, the language and purpose of 42 U.S.C. § 407(a) demonstrate that Mr. Joling has a compelling interest in his SSDI

payments and that he risks suffering financial hardship without them. The Circuit Court should have exercised its discretion in a manner that treated disability benefits not as an obstacle but as a safety net deserving of protection. It should have—and, given Mr. Joling’s proposed modification, certainly could have—better tailored its order to avoid undermining his reliance on those benefits or, at the very least, to minimize its impact to the greatest extent possible.

Lastly, the Circuit Court’s exercise of discretion neither accounted for nor advanced the dual purposes of criminal restitution. “Restitution serves a dual purpose, making the victim whole and rehabilitating the defendant.” *Fernandez*, 316 Wis. 2d 598, ¶ 25 (quoting *State v. Sweat*, 208 Wis. 2d 409, 422, 561 N.W.2d 695 (1997)). According to the case law, to properly exercise its discretion, a circuit court is expected to apply “a logical rationale,” “a demonstrated rational process,” and “an explained judicial reasoning process.” If it was, in fact, logical and rational for the Circuit Court to jeopardize the financial security conferred by Mr. Joling’s SSDI payments, then one would reasonably expect there to be a substantial nexus between that decision and the dual purposes of restitution.

The Circuit Court’s decision bears no such nexus. If the victims were suffering ongoing financial difficulties due to Mr. Joling’s actions, then perhaps it would be more logical and rational to go after his SSDI benefits. But they had all accepted sizeable insurance payouts from Mr. Joling’s insurer and signed broad releases. They were made whole prior to 2020. Consequently, the victims did not have--and, in the ensuing years, have never expressed—any pressing financial needs that might rationalize the Circuit Court’s decision.

Likewise, raiding Mr. Joling's SSDI benefits does not serve any rehabilitative purpose. The Wisconsin Supreme Court explained in *Fernandez* that a restitution order that imposes unrealistic requirements, such as exceeding the defendant's ability to pay, carries less rehabilitative significance because "the satisfaction of requirements which are beyond the [defendant's] control undermines [his] sense of responsibility." See 316 Wis. 2d 598, ¶¶ 24-25 (quoting *Huggett v. State*, 83 Wis. 2d 790, 798-800, 266 N.W.2d 403 (1978)).

Here, the Circuit Court knew that its restitution order was unrealistic unless Mr. Joling diverted a significant portion of his future SSDI payments away from his own financial wellbeing and towards his restitution obligation. Granted, compliance with its order is *financially feasible*. However, that, alone, does not mean that the order serves a rehabilitative purpose. To the contrary, a judge's order that knowingly depletes the financial safety net of a disabled worker is far more likely to *demoralize* than rehabilitate. Without question, Mr. Joling feels demoralized by it.

Therefore, not only did the Circuit Court's decision violate federal law, but its exercise of discretion was deficient.

### CONCLUSION

For the foregoing reasons, Mr. Joling respectfully requests that the Court reverse the Circuit Court's order denying in part his motion for postconviction relief and vacate that portion of its restitution determination.

As for remand instructions, Mr. Joling respectfully asks the Court to instruct the Circuit Court to order restitution in the amount of \$100 per month for a ten-year period, retroactive to May 22, 2023.

Alternatively, he respectfully asks the Court to order a new restitution determination based on the existing record and submissions.

Dated this 11th day of December, 2023.

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*Electronically signed by Brent A. Simerson*

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**CERTIFICATE OF COMPLIANCE**  
**WITH WIS. STAT. § 809.19(8g)(a)**

I hereby certify that this brief meets the form and length requirements of Wis. Stat. § 809.19(8)(b), (bm), and (c) as modified by the Court's order. It is in proportional serif font, minimum printing resolution of 200 dots per inch, 13-point body text, 11-point quotes and footnotes, leading of minimum 2-point and maximum 60-character lines. The length of this brief is **8,822** words.

Dated this 11th day of December, 2023.

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**CERTIFICATE OF COMPLIANCE**  
**WITH WIS. STAT. § 809.19(8g)(b)**

I hereby certify that separately filed with this brief is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains:

- (1) A table of contents;
- (2) The findings or opinion of the circuit court;
- (3) A copy of any unpublished opinion; and
- (4) Portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial 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.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 11th day of December, 2023.

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