STATE OF WISCONSIN

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

DISTRICT II

Case No. 2023AP1023-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERIC J. JOLING,

Defendant-Appellant.

ON APPEAL FROM AN ORDER GRANTING IN PART AND DENYING IN PART SENTENCE MODIFICATION ENTERED IN WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE FREDERICK J. STRAMPE AND THE HONORABLE PAUL F. REILLY, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

KARA L. JANSON
Assistant Attorney General
State Bar #1081358

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-5809
(608) 294-2907 (Fax)
jansonkl@doj.state.wi.us

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INTRODUCTION

This is the second time this case has been before this Court. During his first appeal, Defendant-Appellant Eric J. Joling attacked the circuit court's restitution order on various grounds and sought to reduce his restitution obligation via new-factor sentence modification. After concluding that the circuit court didn't correctly address his new-factor arguments, this Court reversed and remanded with instructions to again entertain the sentence modification claim.

On remand, the circuit court granted sentence modification in part and denied it in part. It determined that Joling had proved two new factors. After considering Joling's updated financial picture, it modified his restitution obligation by cutting his monthly payments in half, from $500 to $250. However, this was more than what Joling believed he could pay.

Joling appeals again, primarily contending that the circuit court misapplied the law in handling his motion. Specifically, he argues that the court violated 42 U.S.C. § 407(a) when it considered his Social Security Disability Insurance (SSDI) in determining his ability to pay restitution. He further appears to contend that the court's decision modifying his restitution obligation is unreasonable given the facts of this case.

This Court should affirm. The weight of persuasive authority shows that courts can consider SSDI benefits in determining a defendant's ability to pay restitution without violating § 407(a). At bottom, Joling's arguments rely on the flawed premise that the circuit court ordered him to pay restitution out of his SSDI benefits, but the court expressly didn't—it simply acknowledged the benefits in deciding his ability to pay. As the State will show, that distinction matters.

Further, the court's modification of Joling's restitution obligation is reasonable.

ISSUE PRESENTED[1]

Did the circuit court erroneously exercise its discretion in deciding Joling's new-factor motion for sentence modification?

This Court should answer, "no."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication is warranted to make Wisconsin law clear that a circuit court can consider SSDI benefits in determining a defendant's ability to pay restitution. Wis. Stat. § (Rule) 809.23(1)(a)1.

STATEMENT OF THE CASE

A. Joling drove drunk and struck a limo full of passengers on New Year's Day.

On January 1, 2018, around 5:25 a.m., police responded to a head-on collision between a jeep and a limo in the Village of Menominee Falls. (R. 3:4.) The investigation revealed that Joling drove drunk and crashed into the limo, which was driving four people home from their celebrations on New Year's Eve. (R. 3:4–6.) Everyone involved in the crash—Joling, the limo driver, and the limo's passengers—went to the hospital with injuries. (R. 3:4.)

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[1] The State reframes Joling's issues presented to reflect the correct procedural posture of this case. The circuit court granted in part and denied in part Joling's motion for sentence modification based on new factors. Properly viewed in that context, Joling's claim is that the court erroneously exercised its discretion on the second step of the new-factor test, both by misapplying the law and reaching an unreasonable decision. (Joling's Br. 25–38.)

A Second Amended Information charged Joling with 12 crimes, including operating while intoxicated (OWI) as a fifth offense, and OWI causing injury as a second and subsequent offense. (R. 24:1–7.)

B. Joling pleaded no contest and was sentenced to prison.

In June 2018, Joling pleaded no contest to OWI, fifth offense, and OWI causing injury as a second and subsequent offense. (R. 41:1, 4; 103:2–8.) On the OWI, the circuit court sentenced him to four years' initial confinement and four years' extended supervision. (R. 41:4.) For the OWI causing injury, the court imposed and stayed two-and-one-half years' initial confinement and two-and-one-half years' extended supervision, consecutive to the OWI sentence. (R. 41:1.) It placed Joling on probation for three years consecutive to the OWI sentence. (R. 41:1.)

C. Joling claimed an inability to pay full restitution.

Two of the passengers in the limo sought restitution for their losses related to the accident. (R. 44; 45.) Joling stipulated to those claims, totaling just shy of $11,000. (R. 88:1; 98:3–4.)

The driver of the limo also sought restitution for medical expenses ($20,107.99), lost wages ($9,620), and care during his recovery from a significant leg injury ($9,700). (R. 43; 98:8–18.) He testified to his losses at an evidentiary hearing. (R. 98:8–18.) The circuit court found that he proved his losses by a preponderance of the evidence. (R. 98:40.) The court considered the victim's claims for lost wages and home care "modest" under the circumstances. (R. 98:39–40.) The victim's medical expenses were later updated to $29,514.16. (R. 68.) Joling didn't object to that figure. (R. 99:13.) The total amount of the limo driver's loss was $48,834.16. (R. 88:2.)

When combined with the limo passengers' losses, the total amount of loss sustained as a result of Joling's crimes was $59,808.47. (R. 88:2.) Joling claimed an inability to pay that amount. (R. 88:2.)

In April 2020, following an ability-to-pay hearing, the circuit court ordered Joling to pay the total amount of loss sustained as a result of his criminal conduct. (R. 92:4.) It required specific installments of $500 per month. (R. 92:5.) The court further ordered the payments to "increase annually, commensurate with a modest cost of living increase of 2%." (R. 92:5.)

D. Joling sought to reduce his restitution obligation via new-factor sentence modification.

In May 2021, Joling filed a postconviction motion attacking the restitution order, arguing that it was "beset with problems." (R. 118:17; 119:1.) Relevant here, he also claimed three new factors warranting modification of the restitution order: (1) COVID-19, (2) a worsening of his Crohn's disease, and (3) SSDI as his only source of income. (R. 118:23–25.) Specifically, Joling asked to pay "$50 per month for 40 years," totaling "$24,000" of the $59,102.26 remaining in unpaid restitution.[2] (R. 118:27.) The circuit court denied Joling's motion in a written decision. (R. 129.)

[2] Although he offered to pay restitution for 40 years, Joling has consistently maintained the position that once he's off extended supervision and probation, "[t]he restitution claimants are unable to enforce a judgment for any remaining restitution amounts." (R. 118:27; 160:2 n.1.)

E. On appeal, this Court reversed and remanded on the sentence modification claims.

In November 2022, this Court reversed the circuit court's order denying postconviction relief. (R. 140.) It concluded that "the circuit court did not exercise discretion by setting forth proper reasoning and explanation in denying Joling's postconviction motion seeking modification of his restitution order on the basis of alleged new factors." (R. 140:2.) This Court remanded to the circuit court with "instructions to conduct an analysis of [Joling's] asserted new factors under *Harbor*." (R. 140:4.) This Court did not address Joling's other arguments concerning the restitution order. (R. 140:3 n.4.)

F. On remand, the circuit court partially granted sentence modification, reducing Joling's monthly restitution payments by half.

On remand, given the passage of time since Joling initially sought sentence modification, the circuit court ordered him to provide updated information concerning his ability to pay restitution. (R. 170:13–15, 22–23.)

Joling provided the following update. For income, he runs his own process service company averaging "8 to 12 services each month" at "$75 per service" plus "an additional $0.625 per mile for any service that is outside of Marathon County." (R. 159:1.) From this self-employment, Joling reported making roughly $1,000 per month: "$976 for January 2023, $1,056 for February 2023, and $1,086 for March 2023." (R. 159:1.) Joling also receives monthly SSDI payments of $1,187 because of his partial disability from Crohn's disease. (R. 159:2.)

Taking the average of Joling's self-employment income, he reported gross monthly income of $2,226.33 ($1,039.33 in

self-employment plus $1,187 in SSDI). (R. 161:4.) Factoring taxes on his self-employment income at 12%, Joling claimed net monthly income of $2,101.61 ($914.62 in self-employment plus $1,187 in SSDI). (R. 161:4.)

Joling also detailed his monthly expenses. (R. 159:2.) He claimed a total of $1,719 in monthly expenses:

- $1,005 for rent
- $200 for gas
- $95 for ignition interlock device
- $78 for auto insurance
- $69 for internet
- $45 for utilities
- $80 for cell phone
- $40 for pet fish
- $107 for new furniture

(R. 159.)

Based on the above figures, Joling argued that he had "no ability to pay anything towards restitution, meaning that the Court should, in theory, modify the restitution amount to $0." (R. 160:19.) His position assumed that the circuit court couldn't factor his SSDI payments in determining his net monthly income. (R. 160:18–19.) In that scenario, his monthly expenses exceed his net income. (R. 160:18–19.) But because Joling believes that he has a "moral duty to" pay restitution, he offered to pay "$100/month . . . for a period of ten (10) years—a total of $12,000.00, in addition to the $1,460.00 previously paid."[3] (R. 160:19.)

[3] Again, though, Joling's position is that his obligation to pay restitution ends when his extended supervision and probation end. (R. 160:2 n.1.)

Following Joling's submissions, the circuit court held a hearing on his new factor claims. (R. 171.) Joling again argued that the court couldn't "include whatever amount he's receiving in SSDI payments in determining how much he owes [in restitution] and a payment schedule and so forth," reasoning that "[t]hat would be making him pay, out of his SSDI benefits, restitution." (R. 171:10.) The court responded that it wasn't going to order Joling to pay restitution out of his SSDI: "I'm making him pay the restitution out of earnings that he has from his process serving business. If he has to use the SSDI payments to pay rent or utilities or something like that, that's why he's getting that money anyways; right?" (R. 171:11.) Continuing to question the logic of Joling's position that ordering any restitution "would be exactly the same as ordering him to pay out of his benefits," the court asked defense counsel,

> [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 . . . that there's no way he can make any payments?
>
> [Defense counsel]: I would.

(R. 171:11–13.)

The circuit court concluded that Joling proved the existence of new factors, namely the worsening of his Crohn's disease and his receipt of SSDI. (R. 171:22.) After subtracting Joling's monthly expenses from his net monthly income (including SSDI), the court determined that Joling had roughly $382 leftover from which to pay restitution. (R. 171:23.) Accounting for other expenses that Joling didn't itemize, the court decided that Joling had the ability to pay

$250 a month in restitution "until the total restitution is paid." (R. 171:24.)

Joling appeals.

STANDARD OF REVIEW

Once a new factor is established, this Court reviews the circuit court's decision whether to modify the sentence only for an erroneous exercise of discretion. *State v. Harbor*, 2011 WI 28, ¶¶ 36–37, 333 Wis. 2d 53, 797 N.W.2d 828.

ARGUMENT

The circuit court properly exercised its discretion in deciding Joling's motion for sentence modification.

Joling sought to reduce his restitution obligation via new-factor sentence modification. The circuit court decided that Joling proved two new factors—the worsening of his Crohn's disease and his receipt of SSDI—and that determination isn't at issue on appeal. Rather, the only issue is whether the court erroneously exercised its discretion on the second step of the new-factor test.[4] It granted Joling sentence modification in part, cutting in half his monthly restitution payments based on his ability to pay. Joling contends that the court misapplied the law in reaching this decision. (Joling's Br. 26–35.) He also appears to argue that the court's decision is irrational given the facts. (Joling's Br. 36–38.) Both arguments fail.

A. Circuit courts have discretion to modify a sentence if a new factor exists.

Wisconsin circuit courts have inherent authority to modify sentences, within certain constraints. *Harbor*, 333

[4] Joling has abandoned all other claims regarding restitution. (Joling's Br. 25–38.)

Wis. 2d 53, ¶ 35. While a court cannot modify a sentence based on reflection or second thoughts alone, it may modify a sentence based on a new factor. *Id*.

"Deciding a motion for sentence modification based on a new factor is a two-step inquiry." *Harbor*, 333 Wis. 2d 53, ¶ 36. First, the "defendant has the burden to demonstrate by clear and convincing evidence the existence of a new factor." *Id.* If the defendant proves a new factor by clear and convincing evidence, the second step requires the circuit court to decide "whether that new factor justifies modification of the sentence." *Id.* ¶ 37. "In making that determination, the circuit court exercises its discretion." *Id.* "A circuit court properly exercises its discretion when it has examined the relevant facts, applied the proper legal standards, and engaged in a rational decision-making process." *State v. Sulla*, 2016 WI 46, ¶ 23, 369 Wis. 2d 225, 880 N.W.2d 659 (citation omitted).

B. The circuit court correctly applied the law to the facts and reached a rational decision on Joling's motion.

Properly understood, Joling's arguments on appeal relate to the second step of the new-factor test. He argues that the circuit court erroneously exercised its discretion in two ways: (1) it misapplied the law when it acknowledged his SSDI in determining his ability to pay restitution, and (2) it reached an irrational decision based on the facts. (Joling's Br. 25–38.) The State addresses each argument in turn.

1. The circuit court correctly considered Joling's SSDI in determining his ability to pay restitution.

As discussed, the circuit court considered Joling's SSDI in calculating his net monthly income for purposes of determining his ability to pay restitution. (R. 171:23.) Citing to 42 U.S.C. § 407(a), Joling first argues that his "SSDI benefits should have been ignored or removed from the

Circuit Court's determination of his ability to pay restitution." (Joling's Br. 27.) The weight of persuasive authority refutes this claim.

Section 407(a) is a provision of the Social Security Act that protects benefits. It provides,

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and 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.

42 U.S.C. § 407(a). This Court has observed that § 407(a) contains two prohibitions: the "anti-assignment provision" and the "general exemption provision." *Lakewood Credit Union v. Goodrich*, 2016 WI App 77, ¶¶ 17, 19, 372 Wis. 2d 84, 887 N.W.2d 342. "The anti-assignment provision bars the assignment or transfer of '[t]he right of any person to any future payment' of social security benefits." *Id.* ¶ 17 (citation omitted). The general exemption "provision 'protects social security benefits paid or payable from [certain] creditor collection rights.'" *Id.* ¶ 19 (citation omitted).

Joling contends that the circuit court violated both above provisions in modifying his monthly restitution obligation. (Joling's Br. 26–27.) Specifically, he believes that the court violated the general exemption provision by "subject[ing] any SSDI funds that were paid or payable to Mr. Joling to a criminal restitution order." (Joling's Br. 27.) And he submits that the court violated the anti-assignment provision by "transfer[ing] Mr. Joling's right to a portion of his future SSDI payments to the victims, in satisfaction of his restitution obligation." (Joling's Br. 34.)

Joling's arguments rely on a flawed premise, namely that the circuit court ordered him to use his SSDI to satisfy his restitution obligation. (Joling's Br. 26–35.) The court expressly said that it wasn't doing that: "I'm making him pay

the restitution out of earnings that he has from his process serving business." (R. 171:11.) Breaking it down, the court figured that Joling could apply his $1,187 in monthly SSDI to his $1,719 in monthly expenses, which would leave $532 in monthly expenses. Applying Joling's post-tax, monthly self-employment income of $914.62 to the remaining monthly expenses, Joling would have roughly $382 leftover from his self-employment income from which to pay restitution. (R. 171:11–13, 15, 21–24.)

In short, it was entirely possible for the circuit court to fashion a restitution order that didn't require Joling to use his SSDI to satisfy the legal obligation, and that's exactly what it did. That the court acknowledged his SSDI in deciding his ability to pay restitution but didn't order him to pay restitution from those funds is a distinction that matters under the weight of persuasive authority on this issue.

For example, in *J.G.*, the Supreme Court of California addressed whether a juvenile court violated § 407(a) by considering the juvenile's Supplemental Security Income (SSI) in deciding his ability to pay restitution. *In re J.G.*, 434 P.3d 1108, 1109–10, 1116–20 (Cal. 2019). The juvenile court didn't specifically order the juvenile to pay restitution out of his SSI. *Id.* at 1116, 1119–20. Nevertheless, like Joling here, the juvenile argued that the juvenile court violated § 407(a)'s general exemption provision by subjecting his SSI to "other legal process" within the meaning of the federal statute. (Joling's Br. 27–33); *J.G.*, 434 P.3d at 1116. The government disagreed, arguing that a court's "[c]onsideration of SSI . . . benefits to determine how much total financial support a minor has is not the same as requiring the minor to use those benefits to satisfy 'legal process.'" *Id.*

Relying on *Keffeler*'s[5] interpretation of "other legal process" in § 407(a), the *J.G.* court sided with the government: "Under *Keffeler*, 42 U.S.C. section 407(a) does not preclude a court from considering SSI benefits in determining the ability to pay restitution." *J.G.*, 434 P.3d at 1116–18. It reasoned that merely considering SSI payments in determining the juvenile's complete financial picture isn't the same as exercising "judicial authority 'to gain control over' those benefits, which is the characteristic of the processes 42 U.S.C. section 407(a) specifies—execution, levy, attachment, and garnishment—and on which *Keffeler* focused." *Id.* at 1118. The court also noted that its conclusion was "consistent with a number of decisions holding—sometimes based on *Keffeler*—that 42 U.S.C. section 407(a) or a similar anti-attachment provision does not preclude consideration of benefits in determining the recipient's ability to pay restitution or some other financial obligation." *Id.* (collecting cases).

Among those cases is *Kays v. State*, where the Supreme Court of Indiana likewise concluded that "social security benefits may be considered by a trial court in determining a defendant's ability to pay restitution." *Kays v. State*, 963 N.E.2d 507, 510 (Ind. 2012). The court reasoned that "ignoring a defendant's social security income may paint a distorted picture of her ability to pay restitution." *Id.* It explained,

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[5] *Washington State Dep't of Social & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384–85 (2003) (holding that "other legal process" means a "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 . . . 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").

> [A] debt-free defendant who lives with a family member and receives room and board at no charge may very well have the ability to pay restitution even if her only income is from social security. This does not mean that the State could levy against that income to collect the restitution, but it does reflect an important part of the person's total financial picture that a trial court may consider in determining ability to pay.

Id. at 510–11. And like the Supreme Court of California, the *Kays* court noted numerous decisions "that have permitted consideration of income or other assets that cannot be levied against in assessing a defendant's overall ability to pay fines or restitution." *Id.* at 511 (collecting cases).

The Michigan Court of Appeals has similarly found "no error merely in the trial court's consideration of [the defendant's] SSDI benefits as income" in determining the ability to pay restitution. *In re Lampart*, 856 N.W.2d 192, 200 (Mich. Ct. App. 2014). That's "because 42 U.S.C. § 407(a) does not directly proscribe such consideration." *Id.* It would only be problematic, the *Lampart* court reasoned, if "the trial court's consideration of those benefits result[ed] in an order of restitution that *could only be satisfied from those benefits*." *Id.* (emphasis added). And even then, the court said that it wouldn't be the restitution order that subjected the SSDI benefits to an "other legal process" within the meaning of § 407(a)—it would be the court's use of contempt powers "so as to cause [the defendant] to satisfy her restitution obligations from her SSDI benefits" that would cause a violation. *Id.* at 199.

The Court of Criminal Appeals of Tennessee followed *Lampart*'s lead in *State v. Saffles*, holding that "a trial court may consider a defendant's Social Security benefits when making an ability to pay [restitution] determination because consideration of these benefits helps provide a clear picture of a defendant's complete financial status." *State v. Saffles*, No.

E2020-01116-CCA-R3-CD, 2021 WL 4075030, at *17 (Tenn. Crim. App. Sept. 8, 2021) (unpublished). It reasoned, "Section 407(a) does not prevent a trial court from considering Social Security benefits in determining whether to impose a restitution obligation but does preclude a trial court from using legal process to reach a person's Social Security benefits in order to satisfy a restitution obligation." *Id.* Like in *Lampart*, the *Saffles* court noted that the offending "legal process" wouldn't be the restitution order itself—it would be the revocation of the defendant's probation for failing to pay restitution: "the probation revocation, like a finding of contempt, compels satisfaction of the restitution obligation from the Defendant's Social Security benefits and therefore qualifies as 'other legal process' under 42 U.S.C. § 407(a)."[6] *Id.*

Though not restitution cases, several other cases are persuasive on this topic. In *State v. Ingram*, the Supreme Court of Montana held that the lower court didn't violate § 407(a) by imposing a mandatory fine as part of sentencing. *State v. Ingram*, 478 P.3d 799, 802–04 (Mont. 2020). The *Ingram* court reasoned that the defendant wasn't ordered to use his SSDI to pay the fine: "[t]he District Court simply imposed the mandatory fine, referenced no source [of] income or assets, and did not attempt to capture, directly or indirectly, Ingram's SSDI benefit and thereby violate the Social Security Act." *Id.* at 803.

In *Phipps v. Phipps*, the Supreme Court of Idaho similarly held that a divorce agreement didn't violate § 407(a) because there was no requirement that the defendant use his social security benefits for purposes of equalization. *Phipps v. Phipps*, 864 P.2d 613, 616–17 (Idaho 1993). The *Phipps* court

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[6] Notably, like *Lampart* and *Saffles*, the Supreme Court of Indiana also rejected the notion that a restitution order itself constitutes "an 'other legal process' pursuant to 42 U.S.C. § 407(a)." *Kays v. State*, 963 N.E.2d 507, 509 (Ind. 2012).

observed, "the only importance of Mr. Phipps' Social Security receivable benefits is that they serve as a guide for his monthly payments to Mrs. Phipps." *Id.* at 617.

Finally—though by no means exhaustive on the subject—is a decision from the Court of Civil Appeals of Alabama. There, the court held "that the juvenile court's order requiring the father to pay his child-support arrearage from his SSI benefits under threat of contempt violates § 407(a)." *J.W.J. v. Alabama Dept. of Human Resources ex rel. B.C.*, 218 So.3d 355, 358–60 (Ala. Civ. App. 2016). It relied on *Lampart* for the proposition that "[o]rders requiring payment of a recipient's SSI benefits under pain of contempt have been construed as 'other legal process.'" *Id.* at 358. However, the court observed that "the juvenile court is not prevented from entering a judgment on the arrearage or from enforcing its order that the father make payments toward the arrearage provided that the father is ordered to satisfy his obligations from assets or sources of income other than the father's SSI benefits." *Id.* at 359.

The takeaway here is that an abundance of persuasive authority refutes Joling's claim that the circuit court misapplied the law by considering his SSDI benefits in determining his ability to pay restitution. Because Joling was not ordered to pay restitution out of his SSDI benefits, the benefits aren't subject to "legal process" in violation of § 407(a)'s general exemption provision, nor have they been transferred to the victims contrary to § 407(a)'s anti-assignment provision.[7]

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[7] Even if the circuit court had ordered restitution understanding that Joling's only source of income was his SSDI benefits, it's debatable whether such an order would violate the general exemption provision of 42 U.S.C. § 407(a). As discussed above, several courts have concluded that a restitution order alone

Joling offers three restitution cases in support of his position, none of which help him. Because he *can* satisfy his monthly restitution obligation from something other than his SSDI benefits, he's wrong to rely on *Lampart*. (Joling's Br. 32–33); *Lampart*, 856 N.W.2d at 200 ("[W]e hold that, to the extent that the trial court's consideration of those benefits results in an order of restitution that could only be satisfied from those benefits, the use of the court's contempt powers then would violate 42 U.S.C. § 407(a).").

Joling's reliance on *State v. Eaton* is similarly misplaced. (Joling's Br. 32.) There, the Montana Supreme Court held that the lower court violated § 407(a) "when it ordered [the defendant] to make restitution payments equal to the amount of 20 percent of his net income, including income from his social security benefits." *State v. Eaton*, 99 P.3d 661, 665 (Mont. 2004). As later clarified in *Ingram*, the "error" was that "the District Court imposed restitution and explicitly ordered that Eaton pay 20% of his social security income toward the restitution obligation." *Ingram*, 478 P.3d at 803 (distinguishing *Eaton*). By contrast, the circuit court here didn't order Joling to use his SSDI to pay restitution.

Along similar lines, this Court's decision in *State v. Kenyon* doesn't help Joling, either. (Joling's Br. 34–35.) There, this Court was asked to decide whether the circuit court violated the anti-alienation clause of the Employee

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isn't the type of legal process contemplated by § 407(a)'s general exemption provision. Rather, some type of enforcement mechanism is required. And if that's the case, it's difficult to see how a restitution order alone would violate § 407(a)'s anti-assignment provision, either. But this Court need not reach this issue because the circuit court ordered Joling to pay restitution out of his self-employment income. *See Maryland Arms Ltd. P'ship v. Connell*, 2010 WI 64, ¶ 48, 326 Wis. 2d 300, 786 N.W.2d 15 ("Typically, an appellate court should decide cases on the narrowest possible grounds.").

Retirement Income Security Act (ERISA) when it ordered the defendant to withdraw funds from his pension plan to pay for restitution.[8] *State v. Kenyon*, 225 Wis. 2d 657, 659–664, 593 N.W.2d 491 (Ct. App. 1999). This Court found error because while the "trial court's order did not directly garnishee the pension fund . . . the practical result [was] the same—an involuntary transfer of money from Kenyon's pension fund." *Id.* at 666. Here, given Joling's self-employment income and the circuit court's explicit ruling, it cannot be said that the restitution order amounts to an involuntary transfer of Joling's SSDI benefits, making *Kenyon* inapposite.

In short, the circuit court correctly applied the law when considering Joling's SSDI in determining his ability to pay restitution. It follows that the court properly exercised its discretion on the second step of the new-factor test. *See Sulla*, 369 Wis. 2d 225, ¶ 23.

2. The circuit court's decision is reasonable.

Aside from arguing that the circuit court misapplied § 407(a) in handling his motion for sentence modification, Joling appears to contend that the court's order reducing his monthly restitution payments by half is unreasonable given the facts. (Joling's Br. 36–38.) He's wrong.

It's undisputed that Joling caused nearly $60,000 in damages as a result of his decision to drink and drive for the fifth time. In Wisconsin, restitution is the rule, not the exception. Crime victims have a constitutional right to "full restitution from any person who has been ordered to pay restitution to the victim and to be provided with assistance collecting restitution." Wis. Const. art. I, § 9m(2)(m)

[8] As Joling notes, ERISA benefits are protected in a manner like SSDI benefits. (Joling's Br. 34); *State v. Kenyon*, 225 Wis. 2d 657, 664, 593 N.W.2d 491 (Ct. App. 1999).

(2021–22). The restitution right shall be "protected by law in a manner no less vigorous than the protections afforded to the accused." Wis. Const. art. I, § 9m(2).

Our supreme court has "emphasized that the 'primary purpose of Wis. Stat. § 973.20 is to compensate the victim' and the restitution statute 'reflects a strong equitable public policy that victims should not have to bear the burden of losses if the defendant is capable of making restitution.'" *State v. Stone*, 2021 WI App 84, ¶ 10, 400 Wis. 2d 197, 968 N.W.2d 761 (citing *State v. Wiskerchen*, 2019 WI 1, ¶ 22, 385 Wis. 2d 120, 921 N.W.2d 730). "It further explained that 'courts should "construe the restitution statute broadly and liberally in order to allow victims to recover their losses as a result of a defendant's criminal conduct."'" *Id.*

Aside from making the victims whole, restitution "tends to promote rehabilitation by 'strengthening the individual's sense of responsibility.'" *Huml v. Vlazny*, 2006 WI 87, ¶ 20, 293 Wis. 2d 169, 716 N.W.2d 807 (citation omitted). "Restitution makes at least some of the injury inflicted upon the victim tangible to the defendant." *Id.*

No doubt a circuit court must consider a defendant's ability to pay restitution before ordering it. *See* Wis. Stat. § 973.20(13)(a). Here, Joling presented evidence about his ability to pay. (R. 159.) The circuit court "looked at [Joling's] monthly income, his expenses, and the income he had left after paying" his expenses. *Stone*, 400 Wis. 2d 197, ¶ 23. Based on Joling's figures, the court determined that he had the ability to pay restitution out of his leftover self-employment income. (R. 171:11, 23–24.) Joling admits that the order "is *financially feasible*." (Joling's Br. 38.) Because Joling has "extra money . . . after all his monthly bills [are] paid," the circuit court's modification of his restitution

obligation is reasonable.[9] *See Stone*, 400 Wis. 2d 197, ¶¶ 9, 23. This is especially true considering Wisconsin's "strong equitable public policy that victims should not have to bear the burden of losses if the defendant is capable of making restitution." *Wiskerchen*, 385 Wis. 2d 120, ¶ 22 (citation omitted).

Joling's counterarguments are unpersuasive. He claims that the circuit court "raid[ed]" or "[went] after" his SSDI benefits for purposes of restitution but that's simply untrue. (Joling's Br. 37–38.) Again, he was ordered to pay restitution out of his self-employment income. (R. 171:11.) If Joling argues that it's unreasonable that he must apply his monthly SSDI to his monthly expenses, he doesn't explain why. (Joling's Br. 37–38.) In fact, at the evidentiary hearing, he acknowledged that that's what his SSDI payments are for:

> [The court]: I'm making him pay restitution out of earnings that he has from his process service business. If he has to use the SSDI payments to pay rent or utilities or something like that, that's why he's getting that money anyways; right?
>
> [Defense counsel]: It is used -- yes, to make up for lost income because of he's only partially employable. Correct.

(R. 171:11.)

Joling also suggests that the circuit court's decision is unreasonable because the victims "all accepted sizeable insurance payouts from Mr. Joling's insurer and signed broad releases." (Joling's Br. 37.) To the State's knowledge, he's never argued that enforcing the restitution order would amount to a double recovery for the victims. *See Huml*, 293 Wis. 2d 169, ¶ 22. He didn't make this argument in support of

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[9] Notably, in *Stone*, this Court upheld the circuit court's decision that Stone had the ability to pay restitution from his leftover SSDI. *See State v. Stone*, 2021 WI App 84, ¶¶ 7, 23, 400 Wis. 2d 197, 968 N.W.2d 761.

his new-factor sentence modification request. (R. 118; 160; 171.) Rather, he's consistently maintained that "after Mr. Joling's obligation to pay restitution during his period of extended supervision and probation ends, the releases should preclude the restitution claimants from enforcing a judgment for the remaining restitution amounts." (R. 118:11, 27; 160:2 n.1.) Never having claimed that enforcing the restitution order would amount to a double recovery for the victims, this isn't a basis on which to attack the reasonableness of the circuit court's decision here.

Finally, the State strongly disagrees with Joling's suggestion that the circuit court's order serves no rehabilitative purpose. (Joling's Br. 37–38.) Requiring Joling to pay restitution out of a portion of his disposable income holds him accountable for his actions and "makes at least some of the injury inflicted upon the victim tangible to the defendant." *Huml*, 293 Wis. 2d 169, ¶ 20. By contrast, allowing Joling to evade paying restitution that he can afford to pay while he enjoys new furniture and spends $40 a month on a pet fish doesn't "strengthen[ ] the individual's sense of responsibility." *Id.* (citation omitted).

For the above reasons, the circuit court's decision modifying Joling's restitution obligation is reasonable.

CONCLUSION

This Court should affirm the circuit court's decision on Joling's new-factor motion for sentence modification.

Dated this 11th day of March 2024.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Kara L. Janson
KARA L. JANSON
Assistant Attorney General
State Bar #1081358

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-5809
(608) 294-2907 (Fax)
jansonkl@doj.state.wi.us

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 5,462 words.

Dated this 11th day of March 2024.

Electronically signed by:

Kara L. Janson
KARA L. JANSON

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 11th day of March 2024.

Electronically signed by:

Kara L. Janson
KARA L. JANSON