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STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT III

APPEAL NOS. 2023AP001592 CR AND 2023AP001593 CR, CONSOLIDATED  
CIRCUIT COURT CASE NOS. 2018CF000925 AND 2019CF000236

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STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

DAVID T. WAITS,

Defendant-Appellant.

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**REPLY BRIEF OF DEFENDANT-APPELLANT**

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On Appeal from a Judgment of Conviction, the Honorable LaMont K. Jacobson,  
presiding, and a Judgment Denying Postconviction Relief, the Honorable  
LaMont K. Jacobson presiding, Marathon County Circuit Court  
Case Nos. 2018CF000925 and 2019CF000236.

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## ARGUMENT

### **I. The Court's Refusal to Allow Defendant to Introduce Evidence of Contributory Negligence and Evidence of the Failure of the Victim to Have Medical Liability Insurance Violates Wis. Stat. Section 973.20(14)(b) and the Court Should Hold a New Hearing on the Amount of Restitution**

Respondent fails to discuss Wis. Stat. § 895.045(1), which provides that, “Any damages allowed shall be diminished in the proportion to the amount of negligence attributed to the person recovering.”

Although Wisconsin courts have hand-selected defenses which are allowed under Wis. Stat. § 973.20(14)(b), they have not reconciled their choices with Wis. Stat. § 895.045(1). Negligence is statutorily required to be considered but the courts have said the statute requiring this does not apply. There is no language in Wis. Stat. § 973.20(14)(b) saying which defenses apply and which do not apply; it says, “The defendant may assert **any defense** that he or she could raise in a civil action for the loss sought to be compensated” (emphasis added).

### **II. The Amount of Restitution Awarded is Beyond Defendant's Capacity to Pay and Amounts to an Excessive Fine in Violation of the 8<sup>th</sup> Amendment to the United States Constitution and Article I, Sections 1 and 6 of the Wisconsin Constitution**

Respondent argues that because Wis. Stat. § 973.20(12) specifies that if the court orders restitution in addition to the payment of fines, the statute, by its plain language, clearly delineates that restitution is something separate from a fine (Resp. Br. 8).

However, the Wisconsin statute cannot prevail over the 8<sup>th</sup> Amendment. “Dicta in the Court's *Austin* and *Bajakajian* decisions suggest that the Court would consider restitution to be a fine. See *Bajakajian*, 524 U.S. at 332; *Austin v. United States*, 509 U.S. 602, 610 (1993).” Nathaniel Amann, *Restitution and the Excessive Fines Clause*, Vol. 58, Am. Crim. L. Rev. 205, 210 (2020).

The current test for whether the Excessive Fines Clause has been violated is the disproportionality test: “If the amount of the forfeiture is grossly disproportional to the gravity of the defendant’s offense, it is unconstitutional.” *United States v. Bajakajian*, 524 U.S. 321, 337 (1998). The Iowa Supreme Court has discussed the issue and determined that because restitution is punitive it makes the 8<sup>th</sup> Amendment applicable. *State v. Izzolena*, 609 N.W.2d 541, 549 (Iowa 2000). Here too, the restitution is punitive. Furthermore, the amount of \$40,000 is disproportionate to the gravity of Mr. Waits’ offense.

Respondent’s claim that fines are only payable to the government is incorrect (Resp. Br. 8). “Early American statutes show that a fine could now be made payable to a third party rather than the government. With this broadening of who was an acceptable payee of a ‘fine,’ restitution payments were now much more identifiable as a fine” (Amann, *Id.* at 217).

Mr. Waits should not have received such an excessive amount of restitution owed as a sentence, as the large amount violates the Excessive Fines clauses of the U.S. and Wisconsin Constitutions.

**III. The Circuit Court Erroneously its Discretion in Sentencing by Including in the Award of Restitution Recovery for Certain Medical Expenses and Certain Lost Wages in Violation of Wis. Stat. § 973.20(3) because the Bodily Injuries for which Victim Claimed Compensation and Lost Wages were Not All a Result of the Crime Considered at Sentencing in Violation of Wis. Stat. Section 973.20(3)**

The Court’s finding that the records “do indicate that the victim was involved in a motor vehicle accident,” is not enough of a causal connection to all of the injuries claimed by the victim, when the victim has such a history of prior medical conditions and when the victim admitted one clinic made her worse (112:3; A124). The records need to indicate that the treatments Mr. Waits has to pay for were required as a result of Mr. Waits’ actions and they do not do so.

Defendant should not be required to pay for any of the victim's medical expenses as she was required to have insurance but did not. In addition, the only medical expenses that might arise from the hit and run would be the victim's initial visit to the doctor on the date of the incident.

It is absurd to make Mr. Waits pay for lost wages for a full 29 weeks of lost time when: 1) the car crash was so minor that the other passengers in both vehicles walked away with no injuries; 2) the airbags did not deploy; 3) the victim had a plethora of pre-existing conditions; 4) the victim admitted to being poorly treated and made worse at a Clinic over which Mr. Waits had no control.

*Behnke* is distinguishable from this case because in this case, Mr. Waits pointed to specific facts "from which the trial court could have grounded the downward adjustment he desired his case," and in *Behnke*, the defendant could not do this. *State v. Behnke*, 203 Wis.2d 43, 58, 553 N.W.2d 265 (WI App. 1996).

All of these factors show that the wages lost are not a result of the "crime considered at sentencing," but are a result of the victim's other problems. This violates Wis. Stat. § 973.20(3) and most of the lost wages award should be removed from the restitution order.

**IV. The Circuit Court Erroneously its Discretion in Sentencing by Failing to Consider Mr. Waits' Ability to Pay in violation of Wis. Stat. § 973.20(13) and this Court Should Reverse the Court Below and Order a New Hearing on the Restitution**

Wis. Stat. § 973.20(13) requires a court when determining whether to order restitution and the amount of it to consider: "2. The financial resources of the defendant," "3. The present and future earning ability of the defendant," and "4. The needs and earning ability of the defendant's dependents." The Court and District Attorney's blind repetition of the words that Mr. Waits, living in a community where he experiences racism, will be able to find a job that pays enough for him to support himself and his daughter, and make restitution

payments, do not reflect reality. It is a cruel burden to impose such a massive amount of restitution on an indigent defendant.

### **CONCLUSION**

Wherefore, Mr. Waits respectfully requests this Court to reverse the Circuit Court, and remand the matter to the Circuit Court and order it to either hold a new hearing on the amount of restitution owed, or to decrease the amount of restitution owed.

Dated this 14<sup>th</sup> day of December, 2023.

Respectfully submitted,

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### **CERTIFICATION AS TO FORM AND LENGTH**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 1,066 words.

Dated this 14<sup>th</sup> day of December, 2023.

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