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STATE OF WISCONSIN

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IN SUPREME COURT

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OF WISCONSIN**

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No. 2018AP875-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

RYAN M. MUTH,

Defendant-Appellant.

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**PETITION FOR REVIEW AND APPENDIX**

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## **ISSUE PRESENTED**

Wisconsin's marital property statutes provide that income accrued during marriage belongs to both spouses. Wisconsin's restitution statute permits crime victims to recover "income lost" from the "filing of charges or cooperating in the investigation and prosecution of the crime." Where a crime involves death, a "victim" for restitution purposes includes the deceased's family members.

Is marital income lost by a deceased victim's family member "income lost," such that the family member may recover it as restitution?

The circuit court held, "Yes."

The Court of Appeals held, "No."

## **CRITERIA FOR GRANTING REVIEW**

Muth drove drunk and killed Tammy Kempf. Kempf's adult daughters sought restitution for, among other things, income lost by their husbands for obligations related to Kempf's death. The circuit court ordered Muth to pay restitution to Kempf's daughters for that lost income; the Court of Appeals reversed.

The Court of Appeals' holding here stands in tension with the intent of both our marital property and restitution laws. Marital property laws stand for the important principle that income earned by each spouse belongs equally to both. Restitution serves to make crime victims—and the victim's family in the case of the deceased victim—whole, including through lost income. The Court of Appeals' holding serves neither purpose.

The Court of Appeals concluded it was bound by its own prior decision in *State v. Johnson*, 2002 WI App 166, 256 Wis. 2d 871, 694 N.W.2d 284. *State v. Muth*, No. 2018AP875-CR, 2019 WL 2377271, ¶¶ 25–28 (Wis. Ct. App. June 6, 2019) (unpublished), (Pet-App. 104). Importantly, in *Johnson*, the Court of Appeals explained that the State mentioned, “but [did] not develop,” the marital property argument it rejected. *Johnson*, 256 Wis. 2d 871, ¶ 23. Aside from noting that the State’s argument was undeveloped, the Court offered only one other sentence addressing the argument. *See id.*

As the Court of Appeals has determined that it is constrained by its cursory analysis in *Johnson*, and as its holding conflicts with the important purposes behind our marital property and restitution laws on an issue affecting victims of the most serious crimes, this important legal question is likely to recur absent clarification from this Court.

On top of that, this case presents an excellent vehicle to address the question. Consider what the Court of Appeals’ holding means for Kempf’s daughter, K.M., whose husband is the only spouse who works outside the home. Despite the facts that (1) Muth killed her mother and her husband lost income as a result, and (2) under our marital property laws, his income belongs to K.M. as much as it belongs to him, K.M. cannot recover restitution under the Court of Appeals’ holding. If, on the other hand, K.M. were the breadwinner in her family, she *would* be able to recover restitution. The issue would be squarely before this Court.

Pursuant to Wis. Stat. § 809.62(1r)(c)3, this Court should therefore grant review.

## STATEMENT OF THE CASE

Muth pled no contest to homicide by intoxicated use of a vehicle after he struck and killed Kempf. *Muth*, 2019 WL 2377271, ¶ 2, (Pet-App. 101). Kempf’s adult children sought restitution; at a hearing, they testified and provided documentation showing they had incurred a variety of costs following their mother’s death, including for lost wages.<sup>1</sup> *Id.* ¶ 4, (Pet-App. 101.)

Kempf’s daughters sought restitution for their husbands’ lost wages. *Muth*, 2019 WL 2377271, ¶ 4, (Pet-App. 101). First, daughter H.M. sought \$2600 for her husband’s lost wages “to be taking care of things with the funeral or court hearings.”<sup>2</sup> (R. 77:25–27.) Second, K.M. sought \$6480 for her husband’s lost wages. (R. 77:29–30.) She does not work outside the home. (R. 77:11.)

The circuit court imposed all of the requested restitution—a total of roughly \$43,000—including restitution for lost wages. *Muth*, 2019 WL 2377271, ¶ 5, (Pet-App. 101). Muth filed a written objection to the restitution order, arguing that: (1) a civil settlement Kempf’s children entered with Muth’s insurance company before sentencing precluded the restitution order; and (2) Kempf’s sons-in-law are not “victims” for purposes of restitution. (R. 49:6–7.)

The circuit court issued an oral ruling upholding its restitution order. (R. 78, Pet-App. 110–25.) First, it found that the insurance settlement release signed by Kempf’s children was “quite broad” and concluded Muth failed to

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<sup>1</sup> Kempf’s brother also sought restitution. But restitution to her brother is not at issue in this petition.

<sup>2</sup> H.M. also sought \$1600 for her own lost wages. Her lost wages are not at issue.

prove that the restitution should be offset because of the civil settlement. (R. 78:5–12, Pet-App. 114–21.)

Second, it concluded that Muth interpreted the “statutory definition of ‘victim’ too narrowly.” (R. 78:13, Pet-App. 122.) It noted that “Wisconsin is a marital property state” and held that “[l]oss of wages to the husband is a loss of a marital asset. If it damages him, it damages her.” (R. 78:13, Pet-App. 122.)

Muth appealed, renewing the same arguments. *Muth*, 2019 WL 2377271, ¶¶ 10–11, (Pet-App. 102). As to his first claim, the State argued Muth failed to prove sufficient facts to show a setoff defense to restitution. (State’s Br. 8–14.) Second, the State argued that while Muth framed the question as whether Kempf’s sons-in-law are “victims,” the proper question was instead “whether the lost wages of the victims’ husbands constitutes ‘income lost’ by the victims.” (State’s Br. 15–21.) The State acknowledged that the Court had rejected an undeveloped marital property argument in *Johnson* and developed it. (State’s Br. 15–21.)

District IV of the Court of Appeals, in an unpublished per curiam opinion, affirmed the circuit court’s ruling on Muth’s first challenge (that the restitution should be offset by the civil settlement) but reversed and remanded on his second challenge (that the court lacked authority to impose restitution to Kempf’s daughters for their husbands lost wages). *Muth*, 2019 WL 2377271, ¶¶ 10–28, (Pet-App. 102–04).<sup>3</sup>

The Court concluded that it was bound by its prior opinion in *Johnson*. *Muth*, 2019 WL 2377271, ¶¶ 26–27,

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<sup>3</sup> Though Muth’s appeal in this Washington County case would normally be decided by District II, the Court of Appeals, by an October 11, 2018, order, transferred the matter to District IV for caseload equalization.

(Pet-App. 104). It noted that in *Johnson*, it stated that “there is no language in the restitution statute . . . suggesting that restitution be permitted through such an indirect route.” *Muth*, 2019 WL 2377271, ¶ 26, (Pet-App. 104).

It also rejected the State’s argument that *Johnson* should not control because the Court premised its ruling there on an undeveloped argument: “the State contends that *Johnson* does not control because the court’s statement [in *Johnson*] is explicitly framed as addressing a topic on which the State provided only an undeveloped argument . . . . However, we ‘[a]dditionally’ addressed, albeit briefly, the merits of that argument.” *Muth*, 2019 WL 2377271, ¶ 27, (Pet-App. 104). It concluded that it “must apply” that language. *Id.*

Importantly, the Court expressed “no opinion as to whether, in the absence of *Johnson*, the State’s policy and legislative intent arguments, or any other argument, would have merit.” *Muth*, 2019 WL 2377271, ¶ 27, n.4, (Pet-App. 104–05).

The State seeks review of the Court of Appeals’ conclusion that the circuit court lacked authority to order restitution to Kempf’s daughters for their husbands’ lost income.

## ARGUMENT

### **I. Review is Warranted Because the Court of Appeals’ Holding Contravenes the Intent of Our Marital Property and Restitution Laws.**

Importantly, no dispute exists here that Kempf’s daughters are “victims” under the restitution statute. There is also no dispute here that, as victims, Kempf’s daughters may recover lost income. The question is whether income lost to their husbands is “income lost” to them under the restitution statutes, given our marital property laws.

**A. Wisconsin’s marital property statutes reflect a strong public policy determination that marital income belongs equally to both spouses.**

Wisconsin Stat. § 766.31 specifically addresses the classification of income under Wisconsin’s marital property laws: with certain limited exceptions, “income earned or accrued by a spouse or attributable to property of a spouse during the marriage and after the determination date is marital property.” Wis. Stat. § 766.31(4). Marital property means that “[e]ach spouse has a present undivided one-half interest in each item of marital property.” Wis. Stat. § 766.31(3). Our marital property laws also establish a presumption that all property of spouses is marital property. Wis. Stat. § 766.31(2).

Wisconsin’s marital property laws took effect in 1986. 1983 Wis. Act 186; 1985 Wis. Act 29; 1985 Wis. Act 37.

**B. Wisconsin’s restitution statutes reflect a strong public policy determination that crime victims should not have suffer losses caused by the defendant—including lost income.**

*One* year after our marital property laws took effect, the Legislature created section 973.20’s statutory scheme for restitution in criminal cases—including the provision permitting a court to order restitution for “income lost” by a victim. 1987 Wis. Act 398, § 43.

Wisconsin Stat. § 973.20 provides that a court “shall order the defendant to make full or partial restitution under this section to any victim of a crime considered at sentencing or, if the victim is deceased, to his or her estate, unless the court finds substantial reason not to do so and states the reason on the record.” Wis. Stat. § 973.20(1r).

In addition to “all special damages” recoverable in a civil action, Wis. Stat. § 973.20(5)(a), a court may also order the defendant to pay “an amount equal to the *income lost* . . . by the person against whom a crime considered at sentencing was committed resulting from the filing of charges or cooperating in the investigation and prosecution of the crime.” Wis. Stat. § 973.20(5)(b) (emphasis added).

Notably, the restitution statute does not define the term “victim.” See Wis. Stat. § 973.20. The Court of Appeals has thus looked elsewhere for answers. In *State v. Gribble*, 2001 WI App 227, 248 Wis. 2d 409, 636 N.W.2d 488, the defendant argued that a deceased infant’s mother and aunt were not “victims” under the restitution statute. *Id.* ¶ 67. This Court concluded the infant’s mother was a “victim,” but the aunt was not. *Id.* ¶¶ 75–76.

In so doing, this Court noted that “victim” could reasonably be interpreted to be only the infant, any person who suffers psychological harm, or the definition provided in the “related statute” of section 950.02(4)(a). *Gribble*, 248 Wis. 2d 409, ¶ 70. This Court concluded “victim” is “most reasonably interpreted” using the definition set forth in section 950.02(4)(a). *Id.* ¶ 71. Chapter 950 addresses the rights of crime victims.

Wisconsin Stat. § 950.02(4)(a) explains that if the person against whom the crime was committed is deceased, “[v]ictim” means “any of the following”: (a) “A family member of the person who is deceased,” or; (b) “A person who resided with the person who is deceased.” The statute defines “[f]amily member” as a “spouse, minor child, adult child, sibling, parent, or legal guardian.” Wis. Stat. § 950.02(3).

The Court considered legislative history when adopting this definition in *Gribble*. 248 Wis. 2d 409, ¶ 71. It explained that the Legislature in the late 1990s expanded the definition of “victim,” and the court reasoned that its

doing so, “at the same time that it added the reference [in the victim’s rights statute] to restitution under § 973.20,” indicated it intended everyone included as a “victim” under section 950.02(4)(a) would have the right to restitution. *Id.*

Since *Gribble*, this Court and the Court of Appeals have explained time and again that 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. Wiskerchen*, 2019 WI 1, ¶ 22, 385 Wis. 2d 120, 921 N.W.2d 730 (citation omitted); *State v. Queever*, 2016 WI App 87, ¶ 20, 372 Wis. 2d 388, 887 N.W.2d 912 (citation omitted).

Accordingly, “Wisconsin courts have repeatedly held that ‘restitution is the rule and not the exception.’” *Wiskerchen*, 385 Wis. 2d 120, ¶ 22 (citation omitted). Moreover, 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.* (citation omitted).

Thus, contrary to the Court of Appeals’ holding, the intent behind both our marital property and restitution laws supports the imposition of restitution for marital income lost by a deceased victim’s family member, resulting from charges against the defendant.

## **II. This Important Legal Question is Worthy of More Consideration than the Court of Appeals' Cursory Rejection of an Undeveloped Argument in 2002.**

To be clear, the State does not fault the Court of Appeals for its summary rejection of an undeveloped argument in *Johnson*. But the Court of Appeals has now made clear that it is constrained by *Johnson*, and *Johnson* conflicts with the purposes of both our marital property and restitution laws. Accordingly, this Court's review is the only means available to address this important question. If this Court does grant review and conclude that the court in *Johnson* issued a definitive holding rejecting a marital property argument, the State may ask this Court to overrule this holding.

*Johnson* followed shortly after *Gribble*. *Johnson* was convicted of false imprisonment of teenage girls. *Johnson*, 256 Wis. 2d 871, ¶ 2. The court ordered *Johnson* to pay restitution to one girl's stepfather for his lost wages. *Id.* ¶ 6. *Johnson* argued the victim's stepfather was not a "victim" under the restitution statute "because he is not a natural parent, a guardian or legal custodian of J.M.K." *Johnson*, 256 Wis. 2d 871, ¶¶ 15, 18.

The Court of Appeals concluded that the Legislature did not intend to include stepparents in the definition of "victim" set forth in section 950.02(4)(a)2. *Johnson*, 256 Wis. 2d 871, ¶¶ 15, 18.; *see also* Wis. Stat. § 950.02(4)(a)2. (if the person against whom the crime was committed is a child, a "victim" includes "a parent, guardian or legal custodian of the child").

The Court also rejected the circuit court's conclusion that the stepfather's lost wages "were tantamount" to the victim's mother's, "due to the operation of Wisconsin's

marital property laws.” *Johnson*, 256 Wis. 2d 871, ¶ 23. The Court explained:

The State mentions, but does not develop this argument on appeal. Additionally, because there is no language in the restitution statute or in [Wis. Stat.] § 950.02(4)(a) suggesting that restitution be permitted through such an indirect route, we conclude that the restitution statute intended to limit the recovery of lost wages for attending court proceedings to the persons identified in [Wis. Stat.] § 973.20(5)(b).

*Johnson*, 256 Wis. 2d 871, ¶ 23. The Court offered no further discussion of the marital property argument.

Simply put, the significant question at issue here warrants further consideration.

Moreover, at least one critical difference exists between this case and *Johnson*: the circuit court in *Johnson* ordered the restitution to be paid to the stepfather; here the court ordered the restitution to the victim’s daughters—who are unquestionably “victims” for restitution purposes. See *Muth*, 2019 WL 2377271, ¶ 25, (Pet-App. 104) (noting that Kempf’s daughters satisfy the definition of “victims” for restitution purposes under section 950.02 and *Gribble*).

Thus, it makes sense that the Court of Appeals’ analysis in *Johnson* focused so heavily on whether the stepfather was a “victim” under the statute. Here, though, the question is whether marital income is “income lost” for restitution, pursuant to Wis. Stat. § 973.20(5)(b). *Johnson* does not offer an adequate answer to this question, and this Court should grant review.

**III. This Case Presents an Excellent Vehicle to Address this Important Question.**

Muth has not disputed that Kempf's daughters are "victims" for restitution purposes. *Muth*, 2019 WL 2377271, ¶ 25, (Pet-App. 104). Additionally, beyond his argument about the insurance settlement, Muth has not otherwise argued that the lost wages sought were somehow not recoverable as restitution or disputed the amounts sought. Thus, the question—whether the marital income is income lost to Kempf's daughters for restitution purposes—would be squarely before this Court.

**CONCLUSION**

This Court should grant the State's petition for review.

Dated this 8th day of July 2019.

Respectfully submitted,

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## **CERTIFICATION**

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § 809.62(4) for a petition for review produced with a proportional serif font. The length of this petition is 2607 words.

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HANNAH S. JURSS  
Assistant Attorney General

## **CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.62(4)(b)**

I hereby certify that:

I have submitted an electronic copy of this petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(12).

I further certify that:

This electronic petition for review is identical in content and format to the printed form of the petition for review filed as of this date.

A copy of this certificate has been served with the paper copies of this petition for review filed with the court and served on all opposing parties.

Dated this 8th day of July 2019.

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Assistant Attorney General