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CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

No. 2023AP1464-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KORDELL L. GRADY,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

ANNE C. MURPHY
Assistant Attorney General
State Bar #1031600

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9224
(608) 294-2907 (Fax)
murphyac@doj.state.wi.us

The State of Wisconsin opposes the Petition for Review filed by Kordell L. Grady on July 31, 2024. Grady requests review of the court of appeals' unpublished, summary disposition affirming the circuit court's restitution award and the order denying his postconviction motion seeking reversal of the restitution award, remand for a new restitution hearing on his ability to pay, and an evidentiary hearing on his claim that his trial counsel was ineffective for stipulating to the restitution amount. *State v. Grady*, No. 2023AP1464-CR, 2024 WL 3440033, at *1 (Wis. Ct. App. July 17, 2024) (unpublished). This Court should deny the petition because Grady has not shown "special and important reasons" that support review, such as a "real and significant" issue of constitutional law or an issue on which a decision by this Court would help "develop, clarify or harmonize the law" and that is "novel" with "statewide impact" or "not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by" this Court. Wis. Stat. § (Rule) 809.62(1r). The petition does not contain a "concise statement" of the criteria supporting review or "of other substantial and compelling reasons for review." Wis. Stat. § (Rule) 809.62(2)(c).

Background. After a high-speed pursuit that resulted in extensive damage to a police car, Grady was convicted after his plea to three counts: fleeing an officer, first-degree recklessly endangering safety, and operating a vehicle without consent. *Grady*, 2024 WL 3440033, at *1. At the plea and sentencing hearing, the court ordered Grady to pay restitution to the City of Muskego's insurance company for \$19,071.28, comprised of \$18,071.28 for the insurance payment for the damages to the police car caused by Grady's criminal conduct and \$1,000 for the City of Muskego's deductible. *Id.* Grady's counsel stipulated to the restitution amount and requested a hearing on Grady's ability to pay. *Id.*

The State and Grady's counsel appeared in person at the restitution hearing, and Grady appeared remotely from prison by Zoom. *Id.* Grady's counsel argued that Grady could not pay the restitution amount, either while he was in prison or when he got out on extended supervision, and explained that he was eligible for public defender representation, did not have any assets or income, and had a six-month-old child to financially support. *Id.* During this argument, Grady told the court he needed to speak with his counsel, and the court went off the record. *Id.* After the off-the-record discussion between Grady and his counsel, and during the State's argument, the prosecutor asked the court to order the full amount of restitution that Grady had "acknowledged that he's responsible for," noting that "it sounds like there's some ability to pay. . . . To his credit, it sounds like Mr. Grady is saying that he can work while out on extended supervision" and "if I heard him correctly, he's paid over \$3,000 in tickets in his past." *Id.* The court explained that "what [the State] was referring to" was "not going to show up in the transcript" because Grady spoke to his counsel off the record and the court had "warned" Grady "or told him that everybody could hear him obviously." *Id.* at *2. In a further argument, Grady's counsel contended that Grady would not have the ability to pay after he was released to extended supervision because of his "financial responsibilities" and that "to kind of saddle him with this stuff that may seem insurmountable, may actually be a detriment to his success" and his ability to make money to live "on his own." *Id.* At the conclusion of the arguments on Grady's ability to pay from both Grady's counsel and the State, the court granted the full amount of restitution requested by the insurance company. *Id.*

Grady, by his counsel, filed a postconviction motion, alleging that his trial counsel provided ineffective assistance by stipulating to the \$19,071.28 in restitution to the insurance company because, he claimed, it could only request

\$18,071.28 on its own behalf, not the \$1,000 deductible on behalf of the City of Muskego. *Id.* at *2. Grady also argued that he was entitled to a new restitution hearing on his ability to pay because at the restitution hearing, “he was not given a meaningful opportunity to consult with counsel” and his “privileged communications” were “used against him.” *Id.* The circuit court denied Grady’s ineffective assistance claim without a hearing, holding that he failed to establish that he was prejudiced by his counsel stipulating to the full amount of restitution that included the deductible because, based on the contractual relationship between the insurer and the insured, the restitution request “contemplated” that the insurance company would pay it back to the insured, the City of Muskego. *Id.* The court also denied Grady’s request for a new restitution hearing, holding that under the specific facts and circumstances at the hearing, the information Grady told his counsel “off the record but while in open court with all parties present was not intended to be confidential because the court warned Grady that everybody could hear.” *Id.*

Court of appeals’ majority decision. In its summary disposition order, the majority of the court of appeals affirmed both the circuit court’s restitution award and denial of his request for a new restitution hearing on his ability to pay, and the order denying his claim that his counsel was ineffective for stipulating to the restitution amount without an evidentiary hearing. *Grady*, 2024 WL 3440033, at *1. First, the court rejected Grady’s argument that his due process rights were violated by a “fundamentally unfair” restitution hearing, based on his claim that while appearing remotely on video, he had to choose between consulting with his counsel while everyone could hear, or not consulting with his counsel. *Id.* at *2. There was “[n]othing to record [that] suggests that Grady asked to speak privately with his attorney” and, after the court warned him that everybody could hear their conversation, neither Grady nor his counsel asked for a

private conference or to delay the hearing so they could confer. *Id.* Because Grady's communication with his attorney occurred in open court, after the court told him that everyone in the courtroom could hear them, the State did not "improperly rel[y] on his privileged attorney-client communication in its argument at the restitution hearing," because the communication was not intended to be confidential and therefore, it was not protected by attorney-client privilege under Wis. Stat. § 905.03(2). *Id.*

Second, the court of appeals affirmed the circuit court's decision denying Grady's claim that his counsel was ineffective for stipulating to the \$19,071.28 restitution amount, which included the amount the insurance company paid to the City of Muskego for the damage to the police car and the City's \$1,000 deductible, without a hearing. *Id.* at *2. Based on the record, the court concluded that Grady was not prejudiced by his counsel's stipulation to restitution to the insurance company that included the \$1,000 deductible because it was undisputed that the full amount of damage to the police car caused by Grady's crimes was \$19,071.28, and the circuit court's finding that the insurance company had a contractual obligation to reimburse the City, making its affidavit requesting reimbursement for the deductible appropriate, was not clearly erroneous. *Id.* at *3. Accordingly, the court affirmed the circuit court's order denying Grady's ineffective assistance claim without a hearing because he failed to sufficiently allege that he was prejudiced by his counsel's stipulation to the \$19,071.28 restitution amount that included the City's deductible.

Concurrence in part and dissent in part. Although concurring with the summary affirmance of the circuit court's denial of Grady's ineffective assistance claim without a hearing, the dissent disagreed with the majority's conclusion that Grady's due process rights were not violated at the restitution hearing because, in the dissent's view, the

majority did not consider whether the court “appropriately facilitated” private communication between Grady and his counsel. *Grady*, 2024 WL 3440033, at *4 (Lazar J., concurring in part; dissenting in part). The dissent was “from the portion of the majority’s opinion that rejected Grady’s arguments ‘that the restitution hearing was fundamentally unfair because he was unable to have a private communication with his attorney’” and “that the State improperly relied on his privileged attorney-client communication in its argument at the restitution hearing.” *Id.* The dissent noted that Zoom hearings allowed for options to facilitate a private conversation between counsel and client, but rather than “using these procedures, the circuit court in this case apparently told Grady (off the record) that ‘everybody could hear him’ when he was speaking with his attorney.” *Id.* at *5. The dissent disagreed with the majority’s conclusion that this “warning” demonstrated that Grady did not intend his communication with his counsel in open court to be confidential. *Id.* Relying on opinions from other jurisdictions, the dissent opined that the circuit court should have provided a means for Grady and his counsel to communicate confidentially during the Zoom hearing and taken “safety precautions” to ensure private communications, and found it “troubling” that the court did not “ensure that any waiver of confidentiality between [Grady] and his attorney was knowing and intentional.” *Id.* at *5–6. According to the dissent, after Grady’s “request” to speak to his counsel, the court had an “obligation to ensure that Grady could communicate pursuant to his attorney-client privilege” and “[c]autioning him that he could be heard was insufficient.” *Id.* at *7. Thus, the dissent “would have reversed the circuit court’s finding and conclusions that Grady was not deprived of his rights to privately and confidentially communicate with his attorney” and “remanded for a new hearing on Grady’s ability to pay restitution.” *Id.*

Issues presented for review by the supreme court. Grady seeks review by this Court of two issues.

First, Grady asks the court to review whether remand for a new restitution hearing is required, based on his claim that the circuit court’s “hybrid” restitution hearing procedure, with Grady appearing by Zoom and his counsel and the State appearing in person, violated his rights under the specific circumstances of this case: when Grady asked to speak to his counsel, the court went “off the record” but “made no attempt to ensure a confidential line of communication” and the State used Grady’s comments to his counsel to argue had the ability to pay restitution. (Pet. 3.) The circuit court concluded, and the court of appeals affirmed, that because Grady was informed that his conversation with his counsel was not private, he did not intend it to be confidential, and thus, his attorney-client privilege rights were not violated. (Pet. 3.)

Second, Grady asks this Court to review whether “an insurance company [may] be awarded restitution equivalent to the deductible paid by an insured when that insured has not filed a request for restitution.” (Pet. 3.) The circuit court found that it could, based on the contractual relationship between the insurance company and its insured, and the court of appeals affirmed, concluding that was a “reasonable factual inference.” (Pet. 3–4.)

For both issues, Grady fails to meet the statutory criteria for review by this Court. The issues in this case are fact-specific to his restitution hearing and do not implicate significant constitutional issues or a need to clarify or develop the law on an issue that is not highly factual, but rather an issue of law that is likely to recur. Wis. Stat. § (Rule) 809.62(1r). Because the issues Grady presents in his petition do not meet the statutory criteria for supreme court review, this Court should deny the petition for review.

Reasons review is unwarranted. Review by this Court of court of appeals” summary disposition affirming the circuit court’s restitution order and denial of Grady’s ineffective assistance claim without a hearing is unwarranted. Importantly, the unpublished, summary disposition order has no precedential value and cannot be cited for persuasive value in the courts of this state. Wis. Stat. § (Rule) 809.23(3). In the petition, Grady relies heavily on the dissenting opinion in the Court of Appeals’ summary affirmance. (Pet. 5, 12–14.) The dissent “would have reversed the circuit court’s finding and conclusions that Grady was not deprived of his rights to privately and confidentially communicate with his attorney” and “remanded for a new hearing on Grady’s ability to pay restitution.” *Grady*, 2024 WL 3440033, at *7. In his statement of the Criteria for Review, Grady describes that it is “regrettable” that the dissent is in “an uncitable summary disposition” so that it “will have little impact on statewide practice.” (Pet. 5.) But Grady’s agreement with the dissent’s view that it would have remanded for a new restitution hearing, and his desire to have a published opinion containing the dissent’s view, does not show that the petition meets the statutory criteria for supreme court review of the summary disposition affirming the restitution order.

Indeed, the petition does not present a “concise statement of the criteria” for review or “substantial and compelling reasons for review.” Wis. Stat. § (Rule) 809.62(2)(c). In his statement of the criteria for review, Grady contends that the issue of whether his restitution hearing was fundamentally unfair because he was not provided with an opportunity to have a private conversation with his counsel about his ability to pay restitution has “state-wide impact” and “important due process implications” related to the use of Zoom hearings in court proceedings and the court’s obligation to “scrupulously ensure” that “convenience” does not “override important due process protections afforded to litigants.”

(Pet. 4.) He argues that “[h]ere, the way in which videoconferencing technology was used made Mr. Grady’s restitution hearing fundamentally unfair” because he was not “given a meaningful opportunity have a truly confidential line of communication” with his counsel and “the State was permitted to use his comments to his lawyer against him.” (Pet. 4.) Because there is no “Wisconsin authority directly on point” addressing this specific issue of the method of facilitating private conversations during Zoom hearings, Grady claims that supreme court review of this case “will illuminate the ways in which Zoom hearings must be conducted in order to honor constitutional rights.” (Pet. 4–5.) Thus, he contends that the petition meets the criteria under Wis. Stat. § (Rule) 809.62(1r)(a) and (c)(2–3) that the issue is a “real and significant” constitutional question and presents a need to “develop, clarify or harmonize the law” on a “novel” issue with “statewide impact” or that is “not factual in nature” but a question of law that are “likely to recur unless resolved by” this Court. (Pet. 5.) Grady also contends that review of the summary affirmance of the order denying his ineffective assistance claim is warranted “to consider” whether his counsel’s “failure to object” to the insurance company’s restitution request for the deductible on behalf of the insured was ineffective, because it is “an issue that will doubtless recur in future restitution cases.” (Pet. 5–6.)

On both issues, Grady fails to concisely state the criteria for review or show substantial and compelling reasons for supreme court review. He has not shown that this highly-fact specific case involving the restitution hearing procedures in this case merits review by this Court. The circuit court denied his request for new restitution hearing after finding that, after Grady asked to speak to his counsel, the court went off the record, told Grady his conversation was not in private, and warned him that “everybody could hear him”; based on these specific facts, the court concluded that Grady did not

intend to have a confidential communication with his counsel and therefore, his attorney-client privilege rights were not violated and he was not entitled to a new hearing. *Grady*, 2024 WL 3440033, at *2. The circuit court also his assistance claim without a hearing based on its conclusion that he insufficiently alleged prejudice, based on his specific factual finding, which was not clearly erroneous, that the insurance company and the City of Muskego had a contractual relationship that “contemplated” that the restitution request of the \$1,000 deductible would be paid back to the City. *Id.* Because of the unique facts and circumstances of this case and the court’s conclusions based on those factual findings, the issues in Grady’s petition do not present substantial or compelling reasons for review.

Moreover, Grady fails to show “special and important reasons” for review such as a significant constitutional issue. Wis. Stat. § (Rule) 809.62(1r)(a). In his petition, Grady contends that the circuit court violated his due process rights, citing to the dissent to argue that the restitution “hearing was fundamentally unfair” because its “hybrid” nature did not allow him to “reap the benefits of being represented [by] counsel” or have “a truly confidential line of communication with that advocate,” but instead “forced” him “to choose between either speaking to his lawyer with the judge and prosecutor listening in, or, in the alternative, foregoing the opportunity to consult with counsel.” (Pet. 12–13.) Again relying on the dissent, Grady contends that the circuit court should have given him “alternative means of communication” with his counsel and provided “options” to “safeguard” his attorney-client privilege, rather than warning him after it went off the record that his conversation with his counsel was not confidential. (Pet. 13–14.) He contends that review is warranted because the majority summary affirmance failed to “protect the due process rights of Wisconsinites appearing via Zoom in courtrooms across our state,” and asks this court

to provide citable authority by accepting review, reversing, and remanding for another restitution hearing. (Pet. 13–14.)

However, merely stating that the issue of whether his due process and attorney-client privilege rights were violated by the procedures during his Zoom restitution hearing is a “significant constitutional issue” does not make it so. A restitution hearing is an informal proceeding to allow parties to present evidence and argument about whether the criminal defendant can pay the restitution ordered as part of the judgement of conviction. *See State v. Pope*, 107 Wis. 2d 726, 729–30, 321 N.W.2d 359 (Ct. App. 1982). Here, the circuit court made specific findings about the restitution hearing procedures: when Grady said he wanted to speak to his counsel, the court went off the record and made sure Grady knew that they were in open court and that the conversation was audible to everyone in the courtroom. *Grady*, 2024 WL 3440033, at *2. Based on the circuit court’s findings of fact, the court of appeals affirmed, concluding that “[n]othing in the record suggests that Grady asked to speak privately with his attorney” and, after the court warned him that everybody could hear their conversation, neither Grady nor his counsel asked for a private conference or to delay the hearing so they could confer. *Id.* Therefore, because Grady did not intend his conversation with his counsel to be confidential, it was not protected by Wis. Stat. § 905.03(2) and the State did not improperly rely on a privileged communication in its argument when it referred to the conversation. *Id.* Grady fails to show that, under these particular facts, the issue the confidentiality of communications with counsel during a Zoom proceeding is an important constitutional issue warranting review.

Grady also fails to show a need to “develop, clarify or harmonize the law” on an issue with statewide impact or that that is not factual in nature, but rather is a question of law likely to recur. Wis. Stat. § (Rule) 809.62(1r)(a) and (c). Grady

argues that the majority summary disposition conflicts with *State v. Meeks*, 2003 WI 104, ¶ 59, 263 Wis. 2d 794, 666 N.W.2d 859, which held that where “there has been an improper admission of privileged communications, the remedy must be a re-do of the underlying proceeding” and that *Meeks* requires reversal and remand for a new restitution hearing. (Pet. 14–15.) He contends that the court of appeals “skirted the holding of *Meeks*” by concluding that Grady’s communications to his counsel off the record “were not intended to be confidential” because the court warned him that his conversation could be heard in open court, and insists that his right to attorney-client privilege was violated when “the State improperly incorporated communications made to counsel into its argument” that Grady had ability to pay restitution. (Pet. 15.) But under *Meeks*, the attorney client privilege must be strictly and narrowly interpreted, and a “mere showing that the communication was from a client to his attorney is insufficient to warrant a finding that the communication is privileged.” *Meeks*, 263 Wis. 2d 794, ¶ 20 (citation omitted). *Meeks* actually supports that review of the court’s conclusion that the communication was not intended to be confidential and therefore was not privileged is unwarranted. Under these specific facts and circumstances, the circuit court concluded that Grady did not invoke the attorney-client privilege because he did not intend his conversation with his counsel to be confidential. *Grady*, 2024 WL 3440033, at *2.¹ Based on those facts, the court of appeals affirmed, concluding that Grady had not met his burden to establish a violation of the attorney-client privilege under

¹ Specifically, the circuit court made findings that the conversation between Grady and his counsel off the record in open court was not “a meeting in private,” Grady was aware that he was on a Zoom hearing that “was being broadcast into the courtroom,” and Grady and counsel both knew that the prosecutor and the judge were present in the “open courtroom.” (R. 111:19–21.)

Wis. Stat. § 905.03(2) because he was aware that his communication in open court over video conference could be heard by everyone in the court room and thus, his conversation with his counsel was not intended to be confidential. *Id.* Grady seeks review of the court of appeals' summary affirmance for error correction related to the highly specific, factual issue of whether, under these circumstances, his conversation in open court with his counsel was intended to be confidential. This is not a proper basis for review. *See Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78, ¶ 49, 326 Wis. 2d 729, 786 N.W.2d 78.

Grady also fails to show that the issue of whether he was entitled to an evidentiary hearing on his ineffective assistance claim meets the criteria that he claims supports review: a need to clarify Wisconsin restitution law. Grady contends that the court of appeals' summary affirmance conflicts with existing law in *State v. Holmgren*, 229 Wis. 2d 358, 365, 599 N.W.2d 876 (Ct. App. 1999) that "individuals may seek to recoup their 'actual pecuniary losses,'" and that review by this Court is necessary to clarify whether an insurance company may recover restitution for an insured's deductible. (Pet. 16.) He claims that here, the \$1,000 deductible awarded to the insurance company was not "a loss that it actually incurred" and that this Court should grant review to clarify that *Holmgren* applies in this context to prevent an insurance company from recovering restitution for deductibles on behalf of the insured, based on the contractual relationship between the insurer and insured. (Pet. 16.) Grady has not shown that this issue demonstrates a need to "develop, clarify or harmonize the law" related to a "novel" restitution law issue with "statewide impact" that "is not factual in nature but rather is a question of law of the type that is likely to recur." Wis. Stat. § (Rule) 809.62(1r)(c)2. and 3. Rather, Grady's claim that the court of appeals erred when it affirmed the order denying his ineffective assistance claim

without a hearing because there was “scant proof of that relationship” between the City of Muskego and its insurance company in this record and that Grady is “at a loss as to why he is now required to forward \$1,000 to corporate entity that, in fact, did not lose \$1,000” (Pet. 16), simply rehashes his arguments on appeal. Grady asks this Court to review this factual issue to conclude that on this record, he is entitled to an evidentiary hearing on his ineffective assistance claim. At bottom, Grady’s contention that review is needed to clarify restitution law and hold that insurers cannot received restitution for the insured’s deductible seeks error correction, which is not a proper basis for review by this Court.

In sum, the petition fails to satisfy the statutory criteria for review of the court of appeals' summary affirmance of the order affirming the restitution award and denying a new restitution hearing, and its order denying Grady's ineffective assistance claim without a hearing. Grady has not shown an important and significant constitutional issue or that review by this Court will "develop, clarify, or harmonize the law" on an issue that is not factual in nature or a "novel" issue with statewide impact. Wis. Stat. § (Rule) 809.62(1r)(a) and (c). Moreover, the court of appeals' decision was a correct interpretation and application of well-established law. This Court should deny the petition for review.

Dated this 14th day of August 2024.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Anne C. Murphy
ANNE C. MURPHY
Assistant Attorney General
State Bar #1031600

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9224
(608) 294-2907 (Fax)
murphyac@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 4,149 words.

Dated this 14th day of August 2024.

Electronically signed by:

Anne C. Murphy
ANNE C. MURPHY
Assistant Attorney General

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 14th day of August 2024.

Electronically signed by:

Anne C. Murphy
ANNE C. MURPHY
Assistant Attorney General