STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2023AP1464-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KORDELL L. GRADY,

Defendant-Appellant-Petitioner.

Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief Entered in the Waukesha County Circuit Court, the Honorable Paul Bugenhagen, Jr., Presiding.

BRIEF OF DEFENDANT-APPELLANT-PETITIONER

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

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ISSUES PRESENTED

1. Mr. Grady, a mentally ill person found incompetent to proceed during postconviction proceedings, appeared via video for a restitution hearing as to his ability to pay restitution.

   During the hearing, Mr. Grady asked to consult with his lawyer, who was personally appearing in court. Their conference occurred in an open courtroom, without any attempt to ensure attorney-client confidentiality. The State listened in on Mr. Grady's conversation with his lawyer and used his statements against him in its legal argument on his ability to pay restitution.

   Was this procedure fundamentally unfair such that Mr. Grady is entitled to a new hearing on his ability to pay restitution?

   The circuit court and the court of appeals answered no. This Court should answer yes.

2. It is settled law that when privileged statements are relied upon in a judicial proceeding, the strong public policy interests behind that privilege mandate reversal.

   Is a new restitution hearing required due to the State's reliance on Mr. Grady's privileged statements to his lawyer?

The circuit court and the court of appeals answered no. This Court should answer yes.

3. Mr. Grady has consistently asserted that it was improper for an insurance company to be reimbursed for a loss it did not incur. Did Mr. Grady's postconviction motion raising this issue through the lens of ineffective assistance of counsel merit a hearing?

The circuit court and the court of appeals answered no. This Court should answer yes.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Because this Court accepted review, publication and oral argument are appropriate.

STATEMENT OF THE CASE AND FACTS

I. Mr. Grady's mental health crisis results in criminal charges.

Mr. Grady, a homeless young man with "some pretty substantial mental health issues" was facing a crisis: he was without a home, without a job, and without a means of supporting his infant daughter. (50:22). Uncertain of what to do next, he called the police and asked for their assistance in getting into a group home. (50:22). There was "no response to that." (50:22).

The very next day, Mr. Grady—still in the throes of a mental health crisis—saw an opportunity when he chanced across a running and unlocked car. (50:22). He took the car with the intention of attempting suicide. (50:22). Mr. Grady then engaged in a series of car chases, resulting in a crash and his eventual arrest. (5:1-7).

After delays related to multiple competency evaluations, Mr. Grady resolved his case with a plea agreement. (41). The circuit court, the Honorable Paul Bugenhagen, Jr., believed that incarceration could provide Mr. Grady with needed treatment and stability, and therefore imposed a prison sentence. (50:29; 57:1); (App. 21).

As a result of Mr. Grady's conduct, one of the victims was requesting $500 in restitution. (50:16). An insurance company, Statewide Services Inc., was also requesting $19,071.28 in restitution as a result of damage to a squad car owned by their insured, the City of Muskego. (36:3); (App. 68). The insurance company asked to be reimbursed not only for the amount that it paid for repairs, but also for the City of Muskego's payment of a $1,000 deductible. (36:3); (App. 68). Counsel for Mr. Grady requested a hearing as to Mr. Grady's ability to pay pursuant to Wis. Stat. § 973.20(13). (50:16).

II. The circuit court conducts a hybrid hearing, at which time Mr. Grady is the only video participant.

Following Mr. Grady's transfer to Dodge Correctional Institution, (65:2); (App. 25), the circuit court held an in-person restitution hearing. (65:2); (App. 25). Mr. Grady, however, appeared by video and was not personally produced for that hearing. (65:2); (App. 25).

Defense counsel stipulated to the amount of proposed restitution. (65:3); (App. 26). She informed the court she would not be presenting any evidence in support of her position that Mr. Grady was unable to pay restitution. (65:3); (App. 26). Instead, she told the court she would just be "making arguments[.]" (65:3); (App. 26).

Counsel averred that Mr. Grady was presently serving a prison sentence and was determined to be indigent by the State Public Defender. (65:3); (App. 26). She informed the court that Mr. Grady had no "assets or an income" and that he was the father of a six-month old child who would need Mr. Grady's support. (65:3); (App. 26).

During counsel's remarks, Mr. Grady interjected by stating, "Wait, what --." (65:4); (App. 27). Before Mr. Grady could complete the thought, the circuit court asked whether Mr. Grady needed to consult with his attorney. (65:4); (App. 27). Mr. Grady answered "yes." (65:4); (App. 27). Accordingly, the court went "[o]ff the

record" to facilitate Mr. Grady's request. (65:4); (App. 27).

Mr. Grady's conversation with his attorney occurred in an "open courtroom" with the judge and the district attorney present. (111:20); (App. 52). Mr. Grady's voice was therefore "broadcast into the courtroom and everybody that was on cameras." (111:20); (App. 52). The court later indicated it had "warned" Mr. Grady, at some point while off the record, that "everybody could hear him obviously." (65:5); (App. 28).

When the proceedings resumed on the record, counsel for Mr. Grady informed the court she had nothing further to add. (65:4); (App. 27). The prosecutor then began his argument by referencing Mr. Grady's off-the-record comments, informing the court, "I mean, it sounds like there's some ability to pay." (65:4); (App. 27). Based on Mr. Grady's statements, the prosecutor believed Mr. Grady had expressed an ability to work while on extended supervision. (65:5); (App. 28). The prosecutor also referenced another remark made by Mr. Grady about repaying parking tickets as proof of his ability to pay. (65:5); (App. 28). The court then clarified that the prosecutor's comments were, in fact, based on Mr. Grady's off-the-record remarks to his attorney, and subsequently granted the requested restitution amount in full. (65:5-7); (App. 28-29).

III. The circuit court denies Mr. Grady's postconviction motion.

Mr. Grady ultimately filed an § 809.30 postconviction motion. (74). Mr. Grady argued that the restitution hearing was fundamentally unfair given the court's failure to provide a confidential means of communication with his attorney and that it was improper for the State to rely on his statements during that conversation in support of its restitution argument. (74:9). He also argued that trial counsel was ineffective for a number of reasons. (74:7). Relevant to this appeal, he argued that the stipulation to the request by Statewide Services was improper, as it asked for more money than the insurance could legally recover. (74:7). Specifically, he objected to the insurance company being reimbursed for money that was actually expended by the City of Muskego in the form of a deductible. (74:7).

While that motion was pending, Mr. Grady was found incompetent to proceed. (110:26). The examiner noted Mr. Grady's severe mental illness, which resulted in his transfer to the Wisconsin Resource Center. (86:7).

Following the finding of incompetency, the circuit court ruled on the postconviction motion. With respect to the way in which the hearing was conducted, the court expressed its opinion that "it is always best for parties, all parties, to be in person." (111:18); (App. 50). It focused on whether Mr. Grady's communications to his lawyer were intended to be

confidential and, based on the way in which the hearing was structured, concluded it could not make that finding. (111:20); (App. 52). In the court's view, Mr. Grady could have invoked his attorney-client privilege but chose to conduct the conversation in such a way that others could overhear him. (111:20); (App. 52).

As to the propriety of the restitution request, the court concluded Mr. Grady was not prejudiced by the insurance company requesting money owed to the City of Muskego. (111:25-26); (App. 57-58). It also believed the insurance company was impliedly authorized to request the restitution on the city's behalf. (111:26); (App. 58).

IV. The court of appeals affirms and Judge Maria Lazar dissents.

On appeal, Mr. Grady renewed his claims. The court of appeals affirmed in a summary disposition order. All three judges on the panel agreed there was nothing improper about the insurance company's request for restitution. (Order at 6); (App. 8). It was "undisputed" that the total damage to the squad car corresponded to the amount of restitution ordered. (*Id.*); (App. 8). Accordingly, in the court of appeals' view, there could be no prejudice. (*Id.*); (App. 8). As a second rationale for affirmance, the court of appeals also agreed with the circuit court's finding that the request from the insurance company "contemplated" the existence of a contractual relationship under

which the company was empowered to request restitution on the City's behalf. (*Id.*); (App. 8).

With respect to Mr. Grady's arguments as to how the hearing was conducted, the court faulted Mr. Grady for not explicitly requesting to speak *privately* with his attorney, noted that Mr. Grady had been warned that he could be overheard, and observed that "neither Grady nor trial counsel asked for a private conference or to delay the restitution hearing so that they could privately confer." (*Id.* at 4); (App. 6).

Judge Maria Lazar dissented from the summary disposition order with respect to the latter claim. She concluded that Mr. Grady's due process rights were violated when he was denied a meaningful opportunity to confidentially consult with his lawyer during the hearing. (*Id.* at 7); (App. 9). In her view, the majority opinion fails to recognize the structural problems with the restitution hearing, which placed Mr. Grady "in the untenable position of not being able to communicate confidentially with his attorney at any point […]." (*Id.* at 9); (App. 11).

While the circuit court had a number of options available which could have facilitated a truly private line of communication between lawyer and client, Judge Lazar faulted the circuit court for instead relying on an ineffectual solution—going off the record and then simply warning Mr. Grady that he could be heard, without any alternative solution proffered. (*Id.*); (App. 11). Based on this due process violation,

Judge Lazar found reversal was warranted. (*Id.* at 15.); (App. 17).

ARGUMENT

I. The restitution hearing was fundamentally unfair and violated Mr. Grady's right to due process of law.

A. Legal principles and standard of review.

Mr. Grady has a constitutionally-protected right to due process of law. U.S. Const. Amend. V, XIV; Wis. Const. § 8. Restitution hearings must be conducted in conformity with those due process guarantees. *State v. Pope*, 107 Wis. 2d 726, 730, 321 N.W.2d 359 (Ct. App. 1982). This Court applies *de novo* review in determining whether a person's due process rights have been violated. *State v. Tiepelman*, 2006 WI 66, ¶ 9, 291 Wis. 2d 179, 717 N.W.2d 1.

B. The due process guarantee of fundamental fairness requires that a criminal defendant in a restitution proceeding be allowed a meaningful opportunity to consult with counsel.

"Fundamental fairness" is the "touchstone of due process." *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973). Importantly, the requirement of fundamental fairness is not to be applied in a "mechanistic" fashion.

State v. Disch, 119 Wis. 2d 461, 469, 351 N.W.2d 492 (1984).

Our law also recognizes the importance of the attorney-client relationship in an adversarial legal system and, as a result, recognizes a robust attorney-client privilege. Wis. Stat. § 905.03. That privilege—which is intended to ensure "full and frank" communication between lawyer and client—serves important policy goals, including "the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The United States Supreme Court has therefore recognized that, without this important channel for communication between lawyer and client, our justice system ceases to function as intended. *Id*.

Accordingly, the ability to confidentially consult with counsel is intertwined with "meaningful access" to our legal system, and deprivation of that important procedural safeguard can therefore constitute a violation of due process. *Guajardo-Palma v. Martinson*, 622 F.3d 801, 802 (7th Cir. 2010). This is because failure to vindicate the meaningful access to counsel negatively impacts the "fair administration of justice" as well as the overall "integrity" of the ensuing proceedings. *Doe v. District of Columbia*, 697 F.2d 1115, 1119 (D.C. Cir. 1983); *In re Ti.B.*, 762 A.2d 20, 30 (D.C. 2000). And, as this Court has concluded, "Indeed, the confidence and trust underlying the attorney-client relationship are foundational to the practice of law and deeply rooted in our law and

Professional Rules." *Sands v. Menard, Inc.*, 2010 WI 96, ¶ 53, 328 Wis. 2d 647, 787 N.W.2d 384.

C. The procedure utilized by the circuit court failed to respect Mr. Grady's right to confidentially consult with his attorney and therefore violated his due process rights.

Here, Mr. Grady—an incarcerated person whose movement was entirely controlled by agents of the State—was at an inherent disadvantage when this hearing began. Unlike the judge, the assistant district attorney, and his lawyer, he was not physically present in court. Instead, Mr. Grady—a severely mentally ill person whose demeanor had raised concerns that he was incompetent to proceed—was the only party appearing via video.

Although Mr. Grady was represented by a lawyer and, at least in theory, had the protection of the attorney-client privilege, the procedure utilized in this case failed to allow him to meaningfully realize the benefits of this important component of the lawyer-client relationship. Specifically, although Mr. Grady made an unambiguous request to confer with his lawyer—and the court appeared to defer to that request by pausing the proceedings and going "off the record"—the court then failed to structure the hearing in such a way that Mr. Grady could actually consult *confidentially* with counsel.

Notably, as Judge Maria Lazar recognized in her dissenting opinion, the circuit court had at least two

easily-accessible options available at this juncture. (Order at 9); (App. 11). First, the court could have asked counsel to step out of the hearing and to enter a conference room, where counsel could have used her phone or computer to enter a confidential "break-out room" facilitated by the circuit court over the Zoom platform. *Id*. (App. 11). In the alternative, the court could have cleared the courtroom and permitted counsel to use the existing video call to speak briefly with her client. *Id*. (App. 11). And, of course, the other option would have been to adjourn the proceedings so that Mr. Grady could be produced in-person—the scenario that the circuit court later recognized as "always best." (111:18); (App. 50).

Despite these easily-implemented alternatives, the circuit court took a different tack. Although it impliedly recognized the protected nature of Mr. Grady's communication to his attorney by instructing the court reporter not to transcribe it, it took no further action which would have made Mr. Grady's line of communication with his lawyer truly confidential. Rather than clearing the courtroom or using the Zoom technology as described by Judge Lazar, the circuit court allowed Mr. Grady's comments to his lawyer to be "broadcast" over the audiovisual system into an open courtroom where opposing counsel was easily able to listen in. (111:20); (App. 52).

Given these structural deficits, it is immaterial that the the circuit court—at some unknown point in the exchange—"warned" Mr. Grady that others could hear him. That warning, because it was not

accompanied by proffered alternatives, could not remedy the structural defects of this hearing. As the court was the one controlling the courtroom dynamic, the warning only highlights what Judge Lazar aptly labels as Mr. Grady's constitutionally "untenable" position—to choose between speaking with his attorney and being overheard or choosing not to speak with counsel at all. (Order at 9); (App. 11).

It also makes little sense to fault Mr. Grady or his lawyer for the court's decision. Mr. Grady, after all, is a legally uneducated and severely mentally ill criminal defendant. Requiring him to understand the availability of a "break out room" on Zoom—and to insist that he advocate for that option—is unrealistic and only further demonstrates the unfairness of his position. And, while appointed counsel may be justly criticized for not speaking up on behalf of her client, a lawyer's acquiescence to a patently unconstitutional and obviously unfair procedure should not insulate that procedure from review.

Moreover, there is a broader problem with reliance on the court's "warning." Here, the circuit court's decision to go "off the record" means that the adequacy and timing of that "warning"—which the court of appeals viewed as legally dispositive—is actually immune from judicial examination and review. Affirmance, under these circumstances, creates a problematic incentive structure under which a lower court can seemingly protect itself from reversal, in part, because it has used its authority to ensure that its erroneous conduct is not fully recorded.

That is a troubling outcome, especially given that the circuit court was under an obligation to ensure that its courtroom functioned in such a way that fundamental fairness was afforded to litigants appearing before it.

Finally, as Judge Lazar's dissent recognizes, a holding that this procedure violates due process is in line with the analysis of other courts which have assessed similar scenarios. For example, the mechanics of this hybrid hearing resemble the kind of "structural" impediment to meaningful access to counsel that was condemned by the Washington Supreme Court in *State v. Luthi*, 549 P.3d 712 (Wash. 2024) (en banc).

There, the defendant was placed in an in-court holding cell along with a correctional officer. *Id.* at 714. The Washington Supreme Court was troubled by this procedure, which "imposed significant limitations on Luthi's ability to communicate with her defense counsel." *Id.* at 719. This structural feature of the hearing therefore implicated Luthi's due process rights, as "it would discourage any defendant from discussing confidential matters relevant to their case with counsel." *Id.*

While Mr. Grady was not physically constrained as such, the court's structuring of his restitution hearing had the same effect. Like the defendant in *Luthi*, Mr. Grady was confined to a box—in this case, a television screen. He was also unable to pass notes, whisper to his attorney, or otherwise communicate with counsel. Any communication that did occur would

be overheard by others and, as a result, he was actively discouraged from fully realizing the benefits of the attorney-client relationship.

As this case demonstrates, special care is warranted in cases involving appearances via Zoom video. Thus, while Zoom has obvious advantages—and proved invaluable to our court system during the recent COVID-19 pandemic—courts must ensure that this technology of convenience does not undermine the integrity of courtroom proceedings. As the Massachusetts Supreme Court has observed, "Attorney-client communication during a Zoom hearing is more restrictive than during an in-person hearing [..]." *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 842 (Mass. 2021). Accordingly, circuit courts must be on notice and take pains to "ensure that [defendants have] the opportunity to consult with counsel." *Id*. In essence, while reliance on Zoom may do much to improve the efficient functioning of busy courtrooms, circuit courts must remain vigilant that these technologies of convenience do not trample upon important constitutional rights.

Here, the circuit court made no attempt to meaningfully vindicate Mr. Grady's ability to consult with counsel. Because the process used was inadequate to protect his rights, the integrity and fairness of the ensuing procedure was imperiled. This Court should therefore reverse and remand for a new hearing on Mr. Grady's ability to pay restitution.

II. The prosecutor's reliance on Mr. Grady's confidential communications is an additional basis for reversal.

A. The strong public policy rationale motivating the attorney-client privilege requires reversal when that privilege is violated in the course of judicial proceedings.

In *State v. Meeks*, 2003 WI 104, ¶ 59, 263 Wis. 2d 794, 666 N.W.2d 859, this Court vindicated the importance of the attorney-client privilege, which "provides sanctuary to protect a relationship based upon trust and confidence." Accordingly, the Court unambiguously held that an improper breach of that privilege results in reversal for a "hearing nunc pro tunc" without consideration of the privileged material. *Id.*, ¶ 61. It was irrelevant to this Court that the error was not objected to during the hearing below. *See id.*, ¶ 62 (Sykes, J., dissenting) (asserting majority erred by not considering whether error had been preserved).

While the party asserting the privilege has the burden of proving its applicability, this Court applies *de novo* review in determining the scope and interpretation of the underlying evidentiary rule. *Id.*, ¶¶ 19-20.

B. Mr. Grady's communications to his lawyer were privileged and the State should not have been permitted to rely on them.

While this case concerns a restitution hearing regarding Mr. Grady's ability to pay, the result should be the same as in *Meeks*. Thus, even though Wisconsin law recognizes that restitution hearings do not require "strict adherence to the rules of evidence," *State v. Johnson*, 2005 WI App 201, ¶ 14, 287 Wis. 2d 381, 704 N.W.2d 625, the attorney-client privilege is not strictly an evidentiary rule. It also derives from fundamental rules governing the ethical conduct of lawyers, SCR 20:1.6, and—as articulated by this Court in *Meeks*—plays an important role in assuring the integrity and overall functioning of adversary proceedings in our legal system.

Here, Mr. Grady manifested his desire to consult confidentially with his attorney and the circuit court appeared to accede to that request by going "off the record." Yet, as demonstrated above, the court did not take further actions to protect Mr. Grady's line of communication with his lawyer and, as a result, the State was permitted to not only listen in, but also to incorporate his statements to his lawyer into its legal argument.

This is therefore a straightforward violation of the *Meeks* rule. Mr. Grady's statements to his lawyer during an off-the-record conference are clearly within the scope of the rule, as they were plainly not intended to be disclosed to third parties. *See* Wis. Stat. §

905.03(1)(d). While both the circuit court and the court of appeals concluded otherwise, that conclusion is erroneous and relies on a disavowal of the structural impediments discussed above.

Here, the evidence discloses that Mr. Grady: (1) manifested a desire to speak with his attorney; (2) accepted the court's invitation to pause the hearing and consult with counsel; and (3) went "off the record" in order to do so. Under these circumstances, it strains credulity to assert that his statements were not intended to confidential.

The circuit court's "warning" should not change this analysis for two reasons. First, given that Mr. Grady was never afforded a truly confidential line of communication, his forced disclosure to third parties was "reasonably necessary for the transmission of the communication" under § 905.03(1)(d). If Mr. Grady wanted to speak to his attorney, he needed to accept that his comments could be overheard. As noted above, the circuit court's structuring of the hearing gave Mr. Grady no other option.

Second, as argued above, if this Court were to rely solely on the court's unrecorded warning, it would be permitting the court to insulate its error from review by choosing *not* to memorialize its interaction with Mr. Grady. Under these circumstances, it is fundamentally impossible to assess the adequacy or timing of the warning. These structural defects—caused by the circuit court—should not overpower Mr.

Grady's clearly expressed intention to go "off the record" to consult confidentially with his attorney.

Accordingly, this Court should hold that the State's reliance on Mr. Grady's statements to his attorney in arguing his ability to pay restitution necessitates a remand for a new hearing.

III. Mr. Grady was entitled to an evidentiary hearing on his ineffective assistance of counsel claim.

A. Legal principles and standard of review.

Both the state and federal constitutions guarantee criminal defendants a right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970); *State v. Felton*, 110 Wis. 2d 485, 499, 329 N.W.2d 161 (1983). This right is significant, as it is the defendant's access to an effective lawyer which functions to ensure the overall fairness of the criminal justice system. *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

A defendant claiming his constitutional right to the effective assistance of counsel has been violated must first prove that counsel performed "deficiently." *Strickland*, 466 U.S. at 688. This requires the reviewing court to independently examine whether counsel's conduct fell below "an objective standard of reasonableness." *Id.*

Counsel's deficient performance entitles the defendant to a new hearing when he can prove "there

is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Smith*, 207 Wis. 2d 259, 276, 558 N.W.2d 379 (1997) (quoting *Strickland*, 466 U.S. at 694).

Importantly, in assessing prejudice, the reviewing court must do more than simply inquire as to whether there was sufficient evidence to uphold the result below. "The focus of this inquiry is not on the outcome[…], but on the 'reliability of the proceedings.'" *State v. Thiel*, 2003 WI 111, ¶ 20, 267 Wis. 2d 571, 665 N.W.2d 305 (quoting *State v. Pitsch*, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985)).

In Wisconsin, a defendant can only prevail on an ineffective assistance of counsel claim after presenting the testimony of defense counsel at a postconviction hearing. *State v. Machner*, 92 Wis. 2d 797, 803, 285 N.W.2d 905 (Ct. App. 1979). In order to obtain such a hearing, the postconviction motion must allege, on its face, "sufficient material facts that, if true, would entitle the defendant to relief." *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433.

Whether the defendant's motion is sufficient to obtain a hearing is a question of law, which this Court reviews *de novo*. *Id.* "However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not

entitled to relief, the circuit court has the discretion to grant or deny a hearing," which this Court reviews under the deferential erroneous exercise of discretion standard. *Id*.

B. The insurance company could not receive restitution for a loss that it did not incur. Accordingly, reasonably competent counsel should not have stipulated.

1. The insurance company cut a check for $18,071.28 and its restitution is cabined to that amount.

In this case, the insurance company— Statewide Services Inc.—requested $19,071.28 in restitution as a result of damage to a squad car during the police chase. (36:2); (App. 67). That total includes both the amount that Statewide paid out to the City of Muskego for repairs, (36:16); (App. 81), as well as the City of Muskego's insurance deductible. (36:2); (App. 67).

Thus, it would appear that the Insurance Company was "out" $18,071.28 and the City lost $1,000 as a result of Mr. Grady's conduct. Yet, the ultimate restitution order stipulated to by counsel provides that the entire repair cost—$19,071.28—is to be paid as restitution to the insurance company, despite the insurance company's actual losses only being $18,071.28. (57:2); (App. 22).

Our restitution statute places important limits on what a claimant can request in a proceeding under § 973.20. Specifically, "a court may require a

defendant to pay only special damages the victim sustains which evidence in the record substantiates." *State v. Holmgren*, 229 Wis. 2d 358, 365, 599 N.W.2d 876 (Ct. App. 1999). The restitution request must relate to the claimant's "actual pecuniary losses" or a "readily ascertainable pecuniary expenditure paid out because of the crime […]." *Id*.

Here, however, the insurance company obviously did not "lose" the money paid out by an entirely different entity, the City of Muskego, as an insurance deductible. Instead, the evidence submitted by the insurance company shows that they issued a check for $18,071.28 to cover the claimed damages. (36:16); (App. 81). Under these circumstances, awarding the insurance company an additional $1,000 to cover a loss sustained by some other actor is, in fact, unjust enrichment. That $1,000 was not "paid out" by the insurance company nor was it sustained as a loss by that entity. There was no legal basis for the insurance company to receive this additional $1,000 and, as a result, trial counsel had a clear basis to object.

2. Any reliance on an alleged contractual relationship is unsupported by the record and irrelevant under the law.

The court of appeals partially rested its affirmance on a holding that the circuit court did not make an erroneous finding of fact—that the insurance company was empowered to recover this $1,000

payment based on its contractual relationship with the City. (Order at 6); (App. 8). However, the circuit court's factual finding is unsupported by the record.

To support its claim of a contractual relationship, the circuit court relied on language in the insurance company's affidavit that stated, "Once our insurance deductible has been reimbursed, please make any additional restitution checks payable to Legal Wisconsin Municipalities Mutual Insurance Company." (111:26); (App. 58). Under the circuit court's reading of that language, the restitution was "not even going through the insurance company initially, but insurance companies have contractual relationships with their insures [sic] that after they're going to be reimbursed their deductible, if the insurance company does collect it." (111:26); (App. 58).

The circuit court's reading is mistaken. The insurance company's request for restitution unambiguously asks that the entire amount be ordered in its name; that is what is reflected on the judgment of conviction. (57:2); (App. 22). Under the plain terms of the restitution order, there is no existing legal authority to transmit $1,000 to the City of Muskego, as they were not a claimant and have not been awarded any restitution.

This points to the broader legal issue. Even if the insurance company somehow intended (via a contractual relationship which is not substantiated in the record) to collect the $1,000 on the City's behalf, the restitution statute and the binding language of

Holmgren do not allow surrogate claimants. Victims must claim their own losses; there is no statutory authority for third-parties to claim those losses instead.

Accordingly, the unambiguous record establishes that the insurance company received $1,000 more than it actually paid out. Victims are entitled to restitution for their losses, however, not the losses of other parties. Simply put, if the City wished to recover its $1,000 deductible, it needed to submit a claim for that loss. It did not. Accordingly, the insurance company's request for an additional $1,000 payment to which it was not entitled was improper, and reasonably competent counsel should not have stipulated.

C. Failure to object to the $1,000 deductible prejudiced Mr. Grady.

Here, both the circuit court and court of appeals have concluded there was no prejudice because there is no dispute that the total value of the loss was $19,071.28. (Order at 6); (App. 8).

This, however, ignores the legal realities of the restitution process. That procedure, like any other legal process, is built upon substantive and procedural rules. If a request is not properly submitted in accordance with those rules, the person cannot be held liable for that cost.

Thus, it is simply irrelevant that the City *could* have submitted its own request and obtained the

$1,000. They did not. Under the rules of our legal system, Mr. Grady could not be required to pay the additional $1,000. Had counsel objected, his total restitution would have been decreased. Rather than relying on a hypothetical scenario that did not occur, this Court must focus on the facts of the underlying hearing. Under those facts, an objection would have saved Mr. Grady $1,000.

Accordingly, this Court should reverse and remand for an evidentiary hearing on his claim of ineffective assistance of counsel.

CONCLUSION

For the reasons set forth herein, Mr. Grady asks this Court to reverse the decision of the court of appeals.

Dated this 13th day of February, 2024.

Respectfully submitted,

Electronically signed by Christopher P. August
CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 5,057 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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

Dated this 13th day of February, 2025.

Signed:

Electronically signed by
Christopher P. August
Christopher P. August
Assistant State Public Defender