STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2023AP1464-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KORDELL L. GRADY,

Defendant-Appellant-Petitioner.

REVIEW OF A COURT OF APPEALS DECISION AFFIRMING A RESTITUTION ORDER AND AN ORDER DENYING A POSTCONVICTION MOTION, ENTERED IN WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE PAUL BUGENHAGEN, JR., PRESIDING

# PLAINTIFF-RESPONDENT'S BRIEF

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## ISSUES PRESENTED

Kordell L. Grady was convicted after his plea to three counts: fleeing an officer, first-degree recklessly endangering safety, and operating a vehicle without consent. The court ordered restitution for damages caused by his crimes, involving crashing a stolen vehicle into a citizen's car and a police car, to both the citizen and the city's insurance company. Grady's counsel stipulated to the amount requested. At the restitution hearing on Grady's ability to pay, the prosecutor referenced Grady's comments to his counsel when he spoke to her off the record, after he asked to speak to counsel and the court informed Grady that because he was on Zoom, his conversation was audible to others in the courtroom. The court awarded the full amount of restitution requested by the insurance company for damages to the police car of $19,071.28, which included the city's $1,000 deductible. Postconviction, the court denied Grady's motion to reverse the restitution award and remand for a new restitution hearing, and his claim that his counsel was ineffective for stipulating to the restitution amount, without an evidentiary hearing.

1. Is Grady entitled to reversal of the restitution award and remand based on his claim that his procedural due process right to a fair restitution hearing and his right to attorney-client privilege were violated?

The circuit court and the court of appeals answered: No.

This Court should affirm the restitution award and deny a new restitution hearing.

2. Is Grady entitled to a hearing on his claim that his counsel was ineffective for stipulating to restitution to the insurance company that included the city's deductible?

The circuit court and the court of appeals answered: No.

This Court should affirm the decision denying Grady's ineffective assistance claim without a hearing.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Because this Court granted review, oral argument and publication of its opinion are appropriate.

## INTRODUCTION

Grady stole a vehicle, fled from police, and intentionally crashed into a citizen vehicle and a City of Muskego police car, causing extensive damage. After Grady was found competent, he pled no contest to three of the ten charges. As part of his sentence, the court ordered restitution to the citizen and the city's insurance company and Grady's counsel stipulated to the amounts. At a restitution hearing on Grady's ability to pay, at which he chose to appear by Zoom, Grady interrupted counsel's argument and responded "yes" to the court when it asked if he wished to speak to her. The court went off the record and informed Grady that their conversation was audible to others in the courtroom. Subsequently, the prosecutor observed that it "sound[ed] like" Grady had "some ability to pay," to his "credit," he said he would be able to work while on extended supervision, and had paid $3,000 in parking tickets in the past. The court concluded Grady had the ability to pay and awarded the full amount of the insurer's restitution request for $19,071.28, which included the city's $1,000 deductible.

Grady seeks reversal of the restitution award and a new restitution hearing, claiming that the court violated his due process rights by its procedure of cautioning him that his conversation with his counsel could be heard by others in the courtroom and that the prosecutor did not honor his attorney-client privilege rights. The court's procedure and prosecutor's comments did not violate Grady's rights or make the restitution hearing fundamentally unfair. Based on the facts of this case, the court was not required facilitate privacy because Grady did not intend to have a confidential

communication with counsel. Because their conversation was not confidential, the prosecutor did not refer to privileged communications.

Grady also seeks a *Machner*[1] hearing on his claim that counsel was ineffective for stipulating to restitution that included the city's $1,000 deductible. Grady is not entitled to a hearing. He failed to sufficiently allege deficient performance or prejudice, and the record conclusively demonstrates counsel did not perform deficiently and Grady was not prejudiced. The circuit court correctly found that restitution including the deductible was supported by the insurance company's affidavit and contractual relationship with the city, and therefore Grady cannot show counsel was deficient for stipulating to that amount. Grady also fails to show prejudice because indisputably, he was responsible for the full amount of the damages his crimes caused to the city's police vehicle. This Court should affirm.

## SUPPLEMENTAL STATEMENT OF THE CASE

### Criminal charges.

After a high-speed pursuit of a stolen police Jeep and several unsuccessful attempts to stop the Jeep, an officer located it parked at a gas station in the City of Muskego, and saw a man, later identified as Grady, come out the gas station and get into the Jeep. (R. 5:4–5.) Attempting to prevent Grady from again fleeing, the officer activated his emergency lights and placed his squad car in a position to block the Jeep. (R. 5:5.) Grady accelerated, hit the front of the squad car, fled from the police, and hit a Subaru with two occupants. (R. 5:5.) The officer pursued Grady, used a maneuver to force him to stop, and the Jeep again hit the police car. (R. 5:5–6.) Grady,

[1] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

who did not have a valid driver's license and was out on bail, was taken into custody. (R. 5:6.) The police car and the Subaru were both extensively damaged and had to be towed. (R. 5:6.)

The State charged Grady with 10 counts: two counts of attempting to flee an officer; two counts of hit and run of an attended vehicle; misdemeanor bail jumping; obstructing an officer; three counts of first-degree recklessly endangering safety; and operating a motor vehicle without the owner's consent. (R. 5:1–3; 34.)

**Competency, plea, and sentencing hearings.**

At a review hearing on December 16, 2021, the State and Grady's counsel, Attorney Jessica Klein, asked the court to rely on a doctor's report concluding that Grady was competent and Grady told the court that he was "competent." (R. 62:2–3.) The circuit court determined that Grady was competent to proceed in this case. (R. 62:3.)

Grady agreed to plead no-contest to three counts—fleeing an officer, first-degree recklessly endangering safety, and operating a vehicle without consent—and the State agreed to dismissal and read-in of the remaining seven counts. (R. 41.) On March 10, 2022, Grady appeared in person at the plea and sentencing hearing. (R. 50:2.) The State recommended three years of initial confinement and three years of extended supervision, "with standard conditions to include payment of all restitution requested." (R. 50:2–3.) The court explained and Grady said he understood the three charges and the potential maximum imprisonment of 22 years, and Grady entered his pleas. (R. 50:3–6.) The court noted that Grady had been found competent in this case, and Klein agreed that Grady understood his pleas. (R. 50:11–15.)

The State described two restitution requests, one from the citizen victim for $500 and one from the city's insurer Statewide Services for $19,071.28. (R. 50:15–16.) Statewide's affidavit requested restitution for the "total subrogation

amount" of $19,071.28 for damages to the police including the city's $1,000 deductible. (R. 36:1–3; A-App. 66–68.)[2] The affidavit described that "[o]nce our insured's deductible has been reimbursed," the "additional restitution checks" should be made "payable to: League of Wisconsin Municipalities Mutual Insurance Company (LWMMI)." (R. 36:3; A-App. 68.) Klein did not object and asked for a restitution hearing "just to discuss ability to pay"; the court set a hearing date and confirmed that Grady was not objecting to "the dollar amount," but only to his "ability to pay." (R. 50:16–17.)

The court accepted Grady's pleas, found him guilty of the three counts, and dismissed and read-in the remaining seven counts. (R. 50:17–18.) In imposing sentence, the court found that Grady's crimes were "very serious," involving "very dangerous conduct" and actions that could have "harmed or killed somebody else," which is "about as serious of an offense as you can have." (R. 50:27.) The court found that Grady's crimes had a "mental health component," Grady needed "proper treatment" to "help" himself and ensure he did not put "people in this sort of position again," and there was an "incredibly high" and "ongoing need to protect the public." (R. 50:27–28.) Probation was not an option because it would "not have the resources" necessary for treatment and protection of the community, making a prison sentence essential for rehabilitation and to reflect the "gravity of the offense" and "utter disregard of human life." (R. 50:28–30.) The court imposed significantly less than the 22-year maximum: three concurrent sentences totaling three years of

[2] Statewide's affidavit for restitution is sealed in the appellate record. (R. 36.) The circuit court's order sealing restitution information provided that "[p]arties to the case are permitted access." (R. 38:2.) Grady cites to the affidavit and includes it in his appendix. (A-App. 66–81.) As plaintiff/respondent in this case, the State also cites to the sealed affidavit based on the court order.

initial confinement and three years of extended supervision and conditions, including payment of restitution. (R. 50:30–31.)

**Restitution hearing and award.**

At the restitution hearing on May 5, 2022, Grady chose to appear remotely by Zoom, represented by Klein who appeared in person. (R. 65:2; 80:7.) The State recited the stipulated restitution: "$500 on behalf of Victim B, personally," the citizen victim, and "Statewide Services, Incorporated, is seeking $19,071.28." (R. 65:2.) Klein agreed that these amounts were "uncontested." (R. 65:2–3.)

In arguing that Grady did not have ability to pay, Klein described that Grady "was eligible for public defender representation," his six-year sentence included a "substantial amount of custody credit," he had "a six-month-old child, who he will ultimately be responsible for helping to financially support," and he "did not have any assets or an income." (R. 65:3.) Klein contended that Grady was "not in a position financially to make restitution," and neither had "the ability to pay such a large amount and nor will he have the ability to pay while he's on extended supervision." (R. 65:3–4.)

At that point, Grady interrupted Klein, saying "Wait, what–"? (R. 65:4.) Klein stated, "I believe Mr. Grady is trying to talk" and the court asked Grady if he needed to speak to Klein. (R. 65:4.) Grady responded, "Yes" and the court went off the record. (R. 65:4.) Back on the record, Klein told the court that she had nothing further to add to her argument. (R. 65:4.)

During the State's argument, the prosecutor observed that "it sounds like there's some ability to pay" and described that while Grady was in the prison system, he would have "work opportunities" that offered "an extremely small wage," but could "be allocated to restitution. So there are means to collect restitution here." (R. 64:4–5.) The prosecutor

commented that, "[t]o his credit, it sounds like Mr. Grady is saying that he can work while out on extended supervision." (R. 65:4–5.) The prosecutor noted that if the court did not order the entire amount of Statewide's claim, Statewide would "have means of going through subrogation and things like that to try and get all of it back, if they so choose." (R. 65:5.) The prosecutor stated, if he had "heard him correctly," Grady had "paid over $3,000 in tickets in his past" and "acknowledged that he's responsible for these amounts." (R. 65:5.) In addition to the court "certainly order[ing] the $500 to the citizen victim," the prosecutor asked the court to order "all" of Statewide's claim, and "if not the entire claim," to order "some percentage of the insurance's claim." (R. 65:5.)

After the prosecutor's argument, the court clarified that while Grady spoke to Klein, the court went off the record and "warned him—or told him that everybody could hear him obviously." (R. 65:5.) The court described that Grady's off-the-record statements that the prosecutor referred to were "not going to show up in the transcript." (R. 65:5.)

Responding to the prosecutor's argument, Klein stated that when "Grady is eventually released, he will have a lot of financial responsibilities, so to kind of saddle him with this stuff that may seem insurmountable, may actually be a detriment to his success." (R. 65:5–6.)

In its decision, the court described that when determining if Grady had the ability to pay "restitution under 973.20(13)," the court considered the "amount of the loss," which was "not disputed," Grady's "financial resources" that were "essentially nothing right now," Grady's "needs and future earning ability," and "any other factors which the Court deems appropriate." (R. 65:6.) The court noted that Grady's "period of incarceration" was three years followed by three years of extended supervision, and the restitution request was "just over $19,000," which was "a good amount of money, but breaking it down into smaller chunks at least over

three years" was "by no means an insurmountable amount." (R. 65:6.) The court determined that although Grady would "have other costs and expenses" during his supervision, "these are damages that are part of his case." (R. 65:6.) The court described that it had "already made the record as to the circumstances of the case," it understood "what Mr. Grady was going through" at the time of the incident, and hoped that things were "stabilizing" for Grady and he was able to get resources he needed. (R. 65:6–7.) The court found that Grady had "substantial family support" and that "if he puts his mind to it," he could "take care of this [restitution payment] without too much difficulty." (R. 65:7.) The court ordered "the amounts of restitution" requested by the citizen victim and Statewide in full, "payable as part of his sentence and over the course of the extended supervision period." (R. 65:7.)

The amended judgment of conviction, dated May 9, 2022, reflected restitution of "$500 for Victim B, and for Statewide Services, Inc. in the amount of $19,071.28," which was "[t]o be paid from prison wages and as a Condition of Extended Supervision." (R. 57:2.)

**Postconviction motion and appeal**.

Grady filed a Wis. Stat. § (Rule) 809.30 postconviction motion requesting a hearing. (R. 74.)

Two of his claims are relevant to the issues on review. First, Grady sought a *Machner* hearing on his claim that Klein performed deficiently and he was prejudiced by her stipulation to restitution to Statewide of $19,071.28 for the damage to the police car, which included the $18,071.28 that "Statewide paid out to the City of Muskego for repairs" and the city's "insurance deductible" of $1,000, claiming that the $1,000 amount was "clearly erroneous" because the "insurance company's actual losses" were $18,071.28. (R. 74:5–7.) Grady contended that "[r]easonably competent

counsel should have spotted this error and should not have stipulated." (R. 74:7.)

Second, Grady sought an order vacating the restitution award and remanding for a new restitution hearing, claiming that the court and the prosecutor did not "honor[ ]" his right to the attorney-client privilege. (R. 74:9.) He contended that, after he "expressed his desire to speak with his lawyer regarding his ability to pay argument," the court "did not ensure that [he] had a meaningful opportunity to exercise the privilege" when it went off the record so the "conversation would not be transcribed" and "the Court and the prosecutor could both overhear the conversation, presumably because Mr. Grady (who appeared by Zoom) was conversing with" Klein, who appeared "in-person." (R. 74:9.) Grady argued that the court "did nothing to prevent the State from using the contents of that attorney-client conversation to argue" that Grady had ability to pay and "appears to have implicitly credited whatever was referenced while 'off the record' in then determining that Mr. Grady had an ability to pay." (R. 74:9.) Grady contended that he "was entitled to have his conversation with his lawyer protected under Wis. Stat. § 905.03," the court's procedure violated due process, the hearing "was rendered fundamentally unfair" by "depriv[ing] him of his ability to meaningfully consult with counsel," and his conversation with counsel was "used against him." (R. 74:9–10.)

At a non-evidentiary hearing, the court orally denied Grady's postconviction motion. (R. 111.) The court "recognize[d] that there is a privilege under 905.03" for "confidential communications" between attorneys and clients, but based "on this record," could not "make a determination that this is a confidential communication." (R. 111:18.) The court made multiple factual findings:

- When all parties to appear "in person," which was "best," a "whisper[ed]" conversation between lawyer

and client indicates that the conversation is "not to be shared with third parties," in contrast to a conversation "out loud" so that others can hear, "whether we're on the record or off the record," which is not "a meeting in private";

- In a "hybrid" hearing, if the client indicates a conversation with counsel is "intended to be confidential," the court can "take steps to make sure that it's confidential," such as Zoom "break-out rooms," which is "something that we do at times";
- The issue of confidentiality of a conversation with counsel "can arise whether the person's here in court or [appearing] by video conferencing, simply by raising their voice in a hearing when . . . in court off the record";
- Here, there was "nothing" to indicate that during the Zoom hearing, the off-the-record conversation between Grady and Klein "was intended to be confidential";
- Grady "certainly" realized that he did not have any "control of lowering his voice when it was being broadcast into the courtroom and everybody that was on cameras";
- "Grady holds the privilege" and was "the one that can invoke it";
- During his off-the-record, non-confidential conversation with Klein, Grady made "disclosures out loud that other people [could] hear" and the prosecutor "heard some information that he believed was something he [could] address with the court."

(R. 111:18–21.) The court concluded that because Grady's conversation with Klein was not "intended to be confidential," the attorney-client privilege did not apply to Grady's statements heard by the prosecutor, because the privilege is "restrict[ed] . . . to confidential communications," and the

information the prosecutor heard during their conversation "was something he [could] address with the Court." (R. 111:21.)

Second, the court denied Grady's request for a hearing on his claim that Klein was ineffective for stipulating to restitution to Statewide that included the city's $1,000 deductible. (R. 111:25–27.) Klein did not perform deficiently by stipulating to Statewide's request for $19,071.28, including the $1,000 deductible that was "going to the city," because the request was appropriate for two reasons: Statewide's affidavit that after reimbursement of the city's deductible, additional restitution checks were payable to Statewide, and Statewide's contractual relationship as insurer with its insured that obligated Statewide, if it "collects" the deductible, to ensure "that 1,000 has to go back" to the city under principles of "subrogation law." (R. 111:25–26.) Additionally, Grady was not prejudiced because "in the end," he was "not out anything extra" as a result of the restitution award. (R. 111:25–26.) There was "no question that $19,071.28 was the loss" and the correct amount of restitution for the damage to the police car to make the city "whole." (R. 111:26–27.) The court denied Grady's motion without a hearing both because Grady failed to sufficiently allege that Klein's decision that "it was simply best to stipulate to that amount" was deficient, and the record conclusively demonstrated it was not, based on the affidavit and the "contractual relationship" for Statewide "to try to gain that reimbursement," and Grady could not show he was prejudiced because $19,071.28 was the "correct dollar amount of the loss." (R. 111:27.) On August 3, 2023, the court entered a written order denying Grady's motion. (R. 96.)

Grady appealed from the judgment of conviction and restitution award, the order denying his motion to vacate the restitution award and to remand for a new restitution

hearing, and the order denying his ineffective assistance claim without a hearing. (R. 97.)

**Court of Appeals decision.**

In a summary disposition order, the court of appeals affirmed the circuit court's order upholding the restitution award, denying Grady's request for a new restitution hearing on his ability to pay, and denying his claim that Klein was ineffective without an evidentiary hearing. *State v. Grady*, No. 2023AP1464-CR, 2024 WL 3440033, at *1 (Wis. Ct. App. July 17, 2024) (unpublished).

The court's majority opinion rejected Grady's argument that he was entitled to a new restitution hearing because he was deprived of the opportunity to meaningfully consult with counsel at the restitution hearing and his privileged communications with counsel were used against him. *Id.* at *2. The majority disagreed with Grady's argument that his due process rights were violated by a "fundamentally unfair" restitution hearing because "while appearing remotely via video he had to make the unfair choice of consulting with his counsel while everyone could hear or not consulting with counsel because everyone could hear." *Id.* Based on the facts, Grady's due process rights were not violated because "[n]othing in the record suggests that Grady asked to speak privately with his attorney," the court told Grady that "everybody could hear him obviously," and neither Grady nor Klein asked for a private conference or to delay the hearing so they could confer; therefore, the "hearing was [not] fundamentally unfair because he was unable to have a private communication with his attorney." *Id.*

The majority also rejected Grady's argument that the prosecutor improperly referenced Grady's attorney-client communications, determining that the privilege only "protects against disclosure of confidential communications

with counsel" and the statute defines "confidential" as a communication that is "not intended to be disclosed to 3rd persons." *Id.* Here, Grady spoke to Klein on Zoom, after the court told him that everyone in the courtroom could hear; therefore, the majority held that the privilege did not apply because "Grady never intended his communication with his attorney in open court to be a confidential communication with counsel." *Id.*

Next, the court affirmed the circuit court's order denying Grady's ineffective assistance claim without a hearing. *Id.* at *2. The court rejected Grady's claim that he was entitled to a *Machner* hearing on his claim that Klein was ineffective for stipulating to $19,071.28 restitution to Statewide that included the city's $1,000 deductible. *Id.* at *2–3. The court agreed with the circuit court that "the record demonstrates Grady was not prejudiced by [Klein's] stipulation," because the record was "undisputed that the full amount of damages to the police car caused by Grady's criminal conduct was $19,071.28." *Id.* *3. The court accepted the circuit court's finding that "Statewide's restitution request 'contemplated' that the $1,000 deductible would be paid back to Muskego based on the parties' contractual relationship" and as such, "there would be no unjust enrichment for Statewide." *Id.* Therefore, the court concluded that Statewide's "contractual obligation to reimburse Muskego made its affidavit requesting reimbursement of the deductible appropriate and made the circuit court's restitution award not clearly erroneous." *Id.*

While concurring with the majority opinion that the circuit court properly denied 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. *Grady*, 2024 WL 3440033, at *4 (Lazar J., concurring in part; dissenting in part). In the dissent's view, the majority did not consider whether the court

"appropriately facilitated" private communication between Grady and his counsel. *Id.* The dissent believed that the majority incorrectly rejected Grady's claims "'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.*

After describing options available on Zoom to facilitate a private conversation, the dissent noted that 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 that this "warning" demonstrated that Grady did not intend his communication with his counsel in open court to be confidential. *Id.* Instead, the dissent opined that the court should have provided Grady a means to communicate confidentially with Klein during the Zoom hearing after Grady's "request" to speak to his counsel, because the court had an "obligation to ensure that Grady could communicate pursuant to his attorney-client privilege." *Id.* at *5–7. The dissent found it "troubling" that the court did not "ensure that any waiver of confidentiality between [Grady] and his attorney was knowing and intentional" and determined that "[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.*

## STANDARDS OF REVIEW

This Court reviews a circuit court's restitution order for an erroneous exercise of discretion, which includes calculation of the amount. *State v. Fernandez*, 2009 WI 29, ¶ 50, 316

Wis. 2d 598, 764 N.W.2d 509. The circuit court's restitution award "will only be disturbed when there has been an erroneous exercise of that discretion." *State v. Gibson*, 2012 WI App 103, ¶ 8, 344 Wis. 2d 220, 822 N.W.2d 500. Whether the defendant has the ability to pay and whether justice requires reimbursement to an insurance company is also left to the circuit court's discretion. *State v. Queever*, 2016 WI App 87, ¶ 12, 372 Wis. 2d 388, 887 N.W.2d 912; *Fernandez*, 316 Wis. 2d 598, ¶¶ 61–62. A circuit court's fact-findings at a restitution hearing will not be overturned unless clearly erroneous. *Queever*, 372 Wis. 2d 388, ¶ 13. This Court will not reverse a discretionary restitution order unless "the circuit court applied the wrong legal standard or did not ground its decision on a logical interpretation of the facts." *Fernandez*, 316 Wis. 2d 598, ¶50 (citation omitted.)

Whether the circuit court violated the defendant's right to due process presents a question of law that this Court decides de novo. *State v. Counihan*, 2020 WI 12, ¶ 23, 390 Wis. 2d 172, 938 N.W.2d 530.

This Court reviews an ineffective assistance of counsel claim and whether the defendant is entitled to a hearing under a mixed standard of review. *State v. Breitzman*, 2017 WI 100, ¶ 37, 378 Wis. 2d 431, 904 N.W.2d 93; *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433. This Court independently "determine[s] whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief." *State v. Ruffin*, 2022 WI 34, ¶ 27, 401 Wis. 2d 619, 974 N.W.2d 432. "If the [postconviction] motion does not raise facts sufficient to entitle the defendant to relief, or if it 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 "for an erroneous exercise of discretion." *Id.* ¶ 28. When a circuit court denies a motion without a hearing, the only question on review is

whether a remand for a *Machner* hearing is necessary; the merits of the ineffective-assistance claim are not before this Court. *See State v. Sholar*, 2018 WI 53, ¶ 53, 381 Wis. 2d 560, 912 N.W.2d 89

## SUMMARY OF ARGUMENT

Grady seeks review of two claims related to the procedural fairness of his restitution hearing, which the circuit court and the court of appeals properly rejected. First, Grady failed to show that during his Zoom restitution hearing, after the court asked if he wanted to speak to Klein and he responded, "yes," the court violated his procedural due process rights when it went off the record and ensured that Grady understood that their conversation was audible to others in the courtroom. Grady's claim that his hearing was fundamentally unfair because the court did not facilitate a private conversation fails because nothing in the record indicates Grady's intent to have a confidential conversation with Klein. Second, and relatedly, Grady failed to show that the prosecutor violated his attorney-client privilege rights by referencing Grady's comments during his off-the-record conversation with Klein because their conversation was not confidential. Under these facts, the privilege statute and ethical rules regarding confidential lawyer-client communications were inapplicable. Grady is not entitled to reversal and a new restitution hearing.

Grady is also not entitled to a *Machner* hearing on his claim that Klein was ineffective for stipulating to Statewide's restitution request for damages to the city's police car of $19,071.28, including the city's $1,000 deductible. He failed to sufficiently allege that Klein performed deficiently and the record conclusively shows that stipulating was not deficient performance. Based on Statewide's affidavit and its contractual relationship with the city, the circuit court found that Statewide was subrogated to the city's deductible claim,

allowing it to request restitution for the deductible to reimburse the city. Grady merely speculates that restitution to Statewide for the deductible was inappropriate and the court's factual findings that Statewide could request restitution for the deductible are not clearly erroneous. Moreover, Grady insufficiently alleged prejudice, and the record conclusively demonstrates that he was not prejudiced, because he was admittedly and indisputably responsible for the damage to the police car that included the $1,000 deductible. His contention that if Klein had objected, it would have "saved" him $1,000, is meritless. This Court should affirm.

## ARGUMENT

### I. Grady's due process and attorney-client privilege rights were not violated and he received a fair hearing on his ability to pay restitution.

#### A. A defendant has a due process right to a procedurally fair restitution hearing, although the hearing is informal and the rules of evidence do not apply.

"The Fourteenth Amendment to the United States Constitution and art. I, § 1 of the Wisconsin Constitution prohibit government actions that deprive any person of life, liberty, or property without due process of law." *Aicher ex rel. LaBarge v. Wis. Patients Comp. Fund*, 2000 WI 98, ¶ 80, 237 Wis. 2d 99, 613 N.W.2d 849. Due process requires the opportunity to be heard "at a meaningful time and in a meaningful manner," and "is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 333–34 (1976) (citations omitted).

As a part of a sentence, the court "shall order the defendant to make full or partial restitution under this section to any victim of a crime considered at sentencing."

Wis. Stat. § 973.20(1r). "If justice so requires," a "restitution order may require that the defendant" pay restitution to "reimburse any insurer . . . who has compensated a victim for a loss otherwise compensable under this section." Wis. Stat. § 973.20(5)(d). At sentencing, the circuit court must "inquire of the district attorney regarding the amount of restitution, if any, that the victim claims" and the defendant may "stipulate" to that amount. Wis. Stat. § 973.20(13)(c). This stipulation need not be formal or written; a summary the restitution amount is "sufficient to meet the statutory requirement." *State v. Szarkowitz*, 157 Wis. 2d 740, 748, 460 N.W.2d 819 (Ct. App. 1990). At a hearing on ability to pay, the defendant has an opportunity to present evidence and arguments on "financial resources," any "present and future earning ability," and "needs and earning ability" of dependents, and has the burden of demonstrating inability to pay by the preponderance of the evidence. Wis. Stat. §§ 973.20(13)(a) and (14)(b).[3]

The circuit court "shall conduct" the hearing "so as to do substantial justice between the parties according to the rules of substantive law," the court "may waive the rules of practice, procedure, pleading or evidence," and "[a]ll parties interested" shall have the "opportunity to be heard, personally or through counsel, to present evidence and to cross-examine witnesses called by other parties." Wis. Stat. § 973.20(14)(d). A defendant's procedural due process right to a fair restitution hearing requires that the defendant receive "notice of the hearing with an opportunity to confront the victim's claim for

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[3] *See State v. Boffer*, 158 Wis. 2d 655, 663, 462 N.W. 2d 906 (Ct. App. 1990) (defendant could not meet burden to prove inability to pay relying on counsel's arguments and PSI without further evidence and "cannot now complain" on appeal that the court "failed to consider his financial circumstances") (citing *State v. Szarkowitz*, 157 Wis. 2d 740, 750, 460 N.W.2d 819 (Ct. App. 1990).

pecuniary loss and also an opportunity to be heard." *State v. Pope*, 107 Wis. 2d 726, 729–30, 321 N.W.2d 359 (Ct. App. 1982). Restitution hearings are an informal process, comparable to probation hearings, and because they are "not a civil action requiring adherence to the strict rules of evidence and burden of proof," procedural "[d]ue process does not require that the rules of evidence and civil burden of proof apply[.]" *Id.*

### B. A communication between counsel and client is protected by the attorney-client privilege if it is intended to be confidential.

The statutory attorney-client privilege protects against disclosure of *confidential* communications with counsel: "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing *confidential communications* made for the purpose of facilitating the rendition of professional legal services to the client[.]" Wis. Stat. § 905.03(2) (emphasis added). Importantly, section 905.03(1)(d) defines "confidential" as only communications between attorney and client that were "*not intended to be disclosed to 3rd persons* other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." (emphasis added). The attorney-client privilege is held and may be claimed by the client or on behalf of the client by counsel at the time of the communication. Wis. Stat. § 905.03(3).

This Court's ethical rule on confidentiality of lawyer-client communications, "Supreme Court Rule 20:1.6, titled 'Confidentiality,' prohibits a lawyer from revealing information relating to the representation of a client unless the client gives informed consent, or the disclosures are impliedly authorized to carry out the representation, or the disclosures are authorized by SCR 20:1.6(b) or (c)." *Matter of*

*Disciplinary Proceedings Against Merry*, 2024 WI 16, ¶ 23, 411 Wis. 2d 319, 5 N.W.3d 285. The rule applies to the lawyer-client relationship, describes when a lawyer may or must reveal confidential information relating to the representation of a client, and provides that the "lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." SCR 20:1.6(d).

The party asserting the privilege bears the burden to prove it applies, and the privilege is "strictly and narrowly interpreted"; a "mere showing that the communication was from a client to his attorney is insufficient to warrant a finding that the communication is privileged." *State v. Meeks*, 2003 WI 104, ¶ 20, 263 Wis. 2d 794, 666 N.W.2d 859 (citations omitted). "When determining whether a privilege exists, the trial court must inquire into the existence of the relationship upon which the privilege is based *and* the nature of the information sought." *Id.* (citation omitted).

### C. The court's procedure did not violate Grady's due process rights because he did not intend to have a confidential conversation with Klein.

The crux of Grady's claim that he is entitled to reversal of the restitution order and a new restitution hearing is that his due process rights were violated by the circuit court's "procedure" at the restitution hearing where he appeared by Zoom with Klein who was in-person. (Grady's Br. 17.) Specifically, after the court asked him if he wanted to speak Klein and he said, "yes," (R. 65:4), Grady contends that the court's procedure of going "off the record" but "fail[ing] to structure the hearing in such a way that Mr. Grady could actually consult *confidentially* with counsel" violated his due process right to a fair restitution hearing. (Grady's Br. 17.) Grady assumes that after the court asked Grady if he needed to speak with Klein and Grady responded yes, the court had

an obligation to provide an option for confidentiality, regardless of whether Grady intended to have a confidential conversation with Klein. This assumption is unsupported by the law and the particular facts of this case. Rather, based on the law and the record, Grady's communication with Klein was not intended to be confidential, his attorney-client privilege was not invoked, and the court was not required to provide a means for a private conversation. Grady fails to demonstrate that his restitution hearing was procedurally unfair and violated due process.

For the privilege to apply, the client must intend that the communication with counsel is *confidential*. *See* Wis. Stat. § 905.03(2) ("client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications" with counsel) and Wis. Stat. § 905.03(1)(d) (attorney-client communication defined as "confidential" "only" if it was "not intended to be disclosed to 3rd persons"). The client holds the privilege and may invoke it. Wis. Stat. § 905.03(3). Nothing in this record supports that Grady intended to have a confidential conversation with Klein or invoked the privilege. After Grady interrupted Klein's argument and the court asked him if he wanted to speak to her, the court went off the record and told or "warned" Grady that their conversation could be heard in the courtroom. (R. 65:4–5.) Although this is not on the record, the circuit court made factual findings that it was obvious to Grady his voice was audible to others so Grady knew his conversation with Klein was not private because both the prosecutor and the judge were present in the "open courtroom." (R. 111:18–20.) These findings, which were not clearly erroneous, supported the court's conclusion that Grady's communication with Klein was not "intended" to be "a confidential communication." (R. 111:20–21.) These facts do not support that Grady intended to have confidential communication with Klein and therefore, the court was not

required to provide options for confidentiality or adjourn the restitution hearing.

Grady argues that his "request to confer with his lawyer" was "unambiguous," he "was at an inherent disadvantage" at the hearing because he chose to appear by Zoom and "was the only party appearing via video," and the court "could have" offered one of several "easily-accessible options" during the Zoom hearing to accommodate confidentiality. (Grady's Br. 17–18.) Relying on the dissent below, he describes these options: "a confidential 'break-out room'" on Zoom; "clear[ing] the courtroom" so Klein could "use the existing video call to speak briefly with her client"; or adjourning the proceedings "so that Mr. Grady could be produced in-person." (Grady's Br. 18.) Grady seemingly contends that his affirmative response when the court asked him if he wanted to talk to Klein automatically demonstrated intent to have a confidential conversation so the court had an obligation had to provide these "options." (Grady's Br. 18.)

Grady provides no support, other than the dissenting opinion, for his claim that because the circuit court "could have" provided options for privacy on Zoom, it was required to, even though this record shows and he does not dispute that the court ensured that he knew his conversation with Klein was not confidential because he could be heard by others in the courtroom. (Grady's Br. 17–18.) Grady contends that he is "severely mentally ill" and there were "concerns that he was incompetent to proceed," (Grady's Br. 17), but omits that he was found competent to proceed in December 2021, before the plea and sentencing hearing in March 2022 and restitution hearing in May 2022. (R. 50:15; 62:3.) Moreover, Grady fails to explain why confidentiality during the Zoom hearing differs from an in-person hearing, because as the circuit court explained, if the defendant demonstrated intent to have a confidential conversation with his counsel, the court would accommodate confidentiality, but if a defendant speaks "out

loud" to his counsel, the defendant demonstrates that he does not intend the conversation to be confidential. (R. 111:18–20.) The fact that this hearing was on Zoom and not in person does not change this analysis. Grady's attempt to distinguish the hybrid from the in-person scenario, by implying that the court was required to provide options for privacy because this hearing occurred on Zoom, is unavailing.

Grady's further arguments to support that his restitution hearing was fundamentally unfair are similarly unsupported. First, Grady contends that his rights were violated by the "structural deficit[ ]" of the court "allow[ing] 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," and that it was "immaterial" that the court "warned" him that others could hear him because this warning was "not accompanied by proffered alternatives." (Grady's Br. 18–19.) He claims by not offering options for confidentiality, the court put him in an "untenable" position of having "to choose between speaking with his attorney and being overheard or choosing not to speak with counsel at all." (Grady's Br. 19.) Grady's claim that the circuit court was required to offer a means of private conversation but forced him to make this choice is unsupported by this record. The court explained that if Grady had demonstrated intent to speak with Klein privately, as in other cases where a defendant was "looking to have something be confidential," the court would have facilitated confidentiality, but here "nothing on this record" indicated "that this is a communication that was intended to be confidential between Mr. Grady and Attorney Klein." (R. 111:19–20.) The court of appeals majority agreed, rejecting Grady's contention that while on Zoom, "he had to make the unfair choice of consulting with his counsel while everyone could hear or not consulting counsel because everyone could hear," where "[n]othing in the record suggests that Grady

asked to speak privately with" Klein or requested to adjourn or delay the restitution hearing. *Grady*, 2024 WL 3440033, at *2. The record refutes Grady's contention that his restitution hearing was fundamentally unfair because the court did not facilitate privacy and he was forced to choose between speaking to Klein out loud or not speaking to her.

Second, Grady argues that the court of appeals erred by requiring him "to understand the availability of a 'break out room' on Zoom—and [ ] insist that he advocate for that option," and that Klein's "acquiescence" to this "unrealistic" and "patently unconstitutional and obviously unfair procedure should not insulate that procedure from review." (Grady's Br. 19.) Grady misconstrues the decision and does not point to where in that decision the court held that Grady was required to understand the technology or Klein had to object to the court's procedure in order for it to be reviewable. That is because the court of appeals did *not* so hold. Rather, it held that the circuit court's procedure did not violate Grady's due process rights, based on its findings that Grady's communication with Klein was not "intended to be confidential" because it occurred in the "open courtroom" with Grady knowing that it could be heard by others, and that if Grady had shown intent to have a confidential communication, the court would have facilitated privacy and had done so in the past. (R. 111:19–21.) Based on the record, the court of appeals concluded that Grady did not intend to have a private conversation with Klein and the court's procedure did not violate his due process right to a fair restitution hearing. *Grady*, 2024 WL 3440033, at *2. Grady's claim that the court of appeals erred by requiring him to understand the technology or requiring Klein to object to the court's procedure is meritless.

Third, Grady argues that the court's "warning" to him that his conversation was audible to everyone in the courtroom occurred "off the record," making "the adequacy

and timing of that 'warning' . . . actually immune from judicial examination and review." (Grady's Br. 19.) Grady accuses the circuit court of trying to "protect itself from reversal" by "us[ing] its authority to ensure that its erroneous conduct [was] not fully recorded." (Grady's Br. 19.) And he faults the court of appeals, describing its decision as "troubling" because it created an "incentive structure" for the circuit court to go off the record before warning a defendant of the obvious fact that a conversation while on Zoom can be heard by others in the courtroom. (Grady's Br. 19–20.) Grady's suggestion that the circuit court went off the record to avoid judicial review of what he claims was "erroneous conduct" and that the court of appeals' decision incentivizes this procedure is hyperbolic and baseless. The record does not support his claim of egregious conduct by the circuit court or the court of appeals.

Finally, in support of his argument that this Court should hold that the circuit court's "procedure violates due process," Grady relies on the Washington Supreme Court decision in *State v. Luthi*, 549 P.3d 712 (Wash. 2024) (en banc). (Grady's Br. 20.) In *Luthi*, the court concluded that a physical constraint of the defendant in an "in-court holding cell"—a caged area—during a hearing violated her due process rights to communicate with her counsel because this physical separation "imposed significant limitations on [the defendant's] ability to communicate with her defense counsel" and made it "almost impossible" to have a confidential discussion. *Luthi*, 549 P.3d at 719.

*Luthi* is both non-binding and readily distinguishable. Grady admits that he "was not physically constrained as such," and provides no support for his claim that appearing by Zoom at a restitution hearing is comparable to a physical restraint in a cage. Grady makes the interesting analogy that as in *Luthi*, at the restitution hearing he "was confined to a box"—the "television screen" on Zoom—which prevented him from communicating with counsel without it being

"overheard" and resulted in him being "actively discouraged from fully realizing the benefits of the attorney-client relationship." (Grady's Br. 20–21.) He contends that because Zoom appearances are "more restrictive" than communications during an in-person hearing, the circuit court must "take pains to 'ensure that [defendants have] the opportunity to consult with counsel." (Grady's Br. 21.) Grady faults the circuit court for making "no attempt to meaningfully vindicate [his] ability to consult with counsel," contends that the court's procedure "was inadequate to protect his rights," and asks this Court to "reverse and remand for a new hearing on [his] ability to pay restitution. (Grady's Br. 21.) Grady fails to show that the court violated his due process rights because it was required to take additional steps beyond ensuring that he knew that his conversation with Klein could be heard by others in the courtroom.

In sum, the record does not support Grady's claim that his due process rights were violated by the court's procedure during the restitution hearing. Nothing in the record indicates that Grady intended to speak to Klein privately, and he demonstrated that he did not have such intent when he spoke to her out loud after he was informed that their conversation could be heard by others. Grady's contention that appearing by Zoom is analogous to being caged during a hearing is completely unfounded. There was nothing inherently unfair about Grady's appearance by Zoom or the court's procedure of ensuring he had notice that his conversation with Klein could be heard in open court, giving him an opportunity to show his intent to have a private conversation. The court's procedure of notifying Grady that his off-record conversation with Klein could be heard by others, just as if he were appearing in person and spoke out loud to his counsel so others in the courtroom could hear, did not violate Grady's rights. The court of appeals correctly

rejected Grady's argument that his "restitution hearing was fundamentally unfair because he was unable to have a private communication with his attorney." *Grady*, 2024 WL 3440033, at *2. Because this record does not support a due process violation, Grady is not entitled to a reversal of the restitution award and remand for a new restitution hearing.

### D. The prosecutor's reference to Grady's non-confidential statements to Klein did not violate his attorney-client privilege rights.

As "an additional basis for reversal" of the restitution award, Grady argues that the prosecutor violated his attorney-client privilege rights when he referred to Grady's statements, during his off-the-record conversation with Klein, that he could work while he was on extended supervision and that in the past, he had paid $3,000 in tickets. (Grady's Br. 22–25.) Grady is not entitled to reversal and remand for a new restitution hearing because in this case, the attorney-client privilege under Wis. Stat. § 905.03(2) does not apply to his communication with Klein that was not intended to be confidential. Wis. Stat. § 905.03 requires that for the privilege to apply, the communication must be intended to be confidential. Moreover, Grady's communication with Klein does not implicate this Court's ethical rule SCR 20:1.6, which is entitled "Confidentiality" and applies to disclosure by a lawyer of a client's confidential information, within the lawyer-client relationship. This evidentiary statute and ethical rule related to confidentiality do not apply to Grady's non-confidential conversation with Klein that the prosecutor referenced. Grady's conversation with Klein was not intended to be confidential, there was no disclosure of alleged confidential information by Klein, and therefore, the prosecutor's reference to Grady's non-confidential statements did not violate Grady's right to attorney-client privilege.

Grady relies on this Court's decision in *Meeks*, 263 Wis. 2d 794, which he argues "vindicated the importance of the attorney-client privilege" under Wis. Stat. § 905.03 by holding that "an improper breach of that privilege results in reversal" and remand for a new hearing "without consideration of the privileged material." (Grady's Br. 22.) Grady acknowledges that "Wisconsin law recognizes that restitution hearings do not require 'strict adherence to the rules of evidence,'" but contends that "the attorney-client privilege is not strictly an evidentiary rule" but "also derives" from SCR 20:1.6, this Court's ethical rule for confidentiality between lawyers and clients, and "plays an important role in assuring the integrity and overall functioning of adversary proceedings in our legal system." (Grady's Br. 23.)

Grady's reliance on *Meeks* is misplaced because it is entirely distinguishable from this case. In *Meeks*, this Court addressed the specific issue of whether an attorney's testimony about "opinions, perceptions and impressions of a former clients competency to proceed" were "confidential communications" as defined by Wis. Stat. § 905.03(2) and SCR 20:1.6. *Meeks*, 263 Wis. 2d 794, ¶ 18. This Court determined that 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). Based on its conclusion that counsel's opinions about a former client's competency were confidential, this Court concluded that Meeks' former lawyer should not have testified at his competency hearing without his consent, and on that basis, reversed and remanded to the circuit court for a new competency hearing, without considering former counsel's testimony. *Id.* ¶¶ 60–61.

In this case, Grady has not shown anything more to support that his conversation with Klein fell within the

statutory definition of a confidential communication, other than it was a conversation between him and his counsel. Grady claims that he "manifested his desire to consult confidentially with his attorney," the circuit court "appeared to accede to that request," and the prosecutor "was permitted to not only to listen in, but also to incorporate his statements to his lawyer into its legal argument." (Grady's Br. 23.) He argues this was "straightforward violation of the *Meeks* rule" because his statements to Klein were "clearly within the scope of the rule, as they were plainly not intended to be disclosed to third parties" (Grady's Br. 23.) Grady's conclusory arguments are not supported by the facts or by the law. He fails to meet his burden to show that he had a "desire" that his statements in open court, with knowledge they were audible, were intended to confidential. Moreover, unlike in *Meeks*, this case does not present an issue involving testimony by Grady's counsel. Rather, the issue is whether the prosecutor's statement at Grady's restitution hearing related to what Grady told Klein violated his right to attorney-client privileged communications. Grady has not shown that the prosecutor violated his attorney-client privilege right by referencing Grady's non-confidential statements to Klein at the restitution hearing.

Grady insists that the prosecutor violated his right to privileged communications, that he had "no other option" but to speak out loud to Klein, and that the "unrecorded warning" permitted the "court to insulate its error for review by choosing not to memorialize its interaction with Mr. Grady." (Grady's Br. 24.) As explained previously, Grady's allegation that he had no option other than to speak out loud to Klein in front of the prosecutor is unfounded, because if Grady had intended to speak privately with Klein, the court would have provided an option such as a Zoom "break-out room[ ]," which is something the court had done previously. (R. 111:19.) Moreover, Grady's persistent contention that the court

deliberately warned him off the record to avoid review of this purported "error" is entirely unsupported. Grady fails to show that the circuit court or the court of appeals erred in concluding that because Grady did not intend to have a confidential conversation, the attorney-client privilege did not apply and the prosecutor could properly reference his statements at the restitution hearing.

The circuit court's findings that Grady knew communication in open court over Zoom could be heard by others, spoke out loud to Klein, and therefore did not intend that his conversation with Klein was confidential were not clearly erroneous, and support its decision that Grady's conversation with Klein was not protected by the attorney-client privilege and the prosecutor properly addressed it with the court. (R. 111:20–21.) Affirming the circuit court, the court of appeals rejected Grady's argument that the prosecutor "improperly relied on privileged attorney-client communications in [his] argument at the restitution hearing," concluding that when Grady spoke with Klein over Zoom after the court told him that "everybody" could hear, Grady "never intended his communication with [Klein] in open court to be a confidential communication." *Grady*, 2024 WL 3440033, at *2. The court was correct. Grady failed to prove that the attorney-client privilege applied to his non-confidential statements to Klein. Accordingly, the prosecutor did not violate his right to the privilege at the restitution hearing. Grady is not entitled to reversal of the restitution order and remand for a new restitution hearing.

## II. The circuit court properly denied Grady's ineffective assistance of counsel claim without a *Machner* hearing.

### A. A hearing on an ineffective assistance claim is not required if the allegations of deficient performance and prejudice are insufficient or the record conclusively shows counsel was not ineffective.

A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If the court concludes that the defendant has not proven one prong of this test, it need not address the other. *Id.* at 697.

To show deficient performance, "the defendant must show that [his] counsel's representation fell below an objective standard of reasonableness" considering all the circumstances. *Id.* at 688. The defendant must demonstrate that counsel's actions were "outside the wide range of professionally competent assistance"; this Court "strongly presume[s]" that counsel has rendered adequate assistance. *Id.* at 690. To demonstrate prejudice, the defendant must affirmatively prove that the alleged deficient performance prejudiced him. *Id.* at 693. "[T]he defendant must show that 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. Pitsch*, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985) (quoting *Strickland*, 466 U.S. at 694). Establishing prejudice is difficult. "*Strickland* asks whether it is 'reasonably likely' the result would have been different," and this "likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111–12 (2011).

A defendant is entitled to an evidentiary hearing on an ineffective assistance claim if the motion alleges sufficient material facts that, if true, would entitle the defendant to relief. *Allen*, 274 Wis. 2d 568, ¶ 9. But if "the motion does not raise facts sufficient to entitle the [defendant] to relief, or presents only cursory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court" may deny the motion without a hearing within its discretion. *Id.*

### B. Grady insufficiently alleged that Klein performed deficiently by stipulating to Statewide's restitution request and the record demonstrates stipulating was not deficient.

In Wisconsin, the primary purpose of the restitution statute is to compensate victims; therefore, the statute is broadly interpreted. Wis. Stat. § 973.20(1r). The statute makes "restitution . . . the rule and not the exception" and restitution "should be ordered whenever warranted." *State v. Wiskerchen*, 2019 WI 1, ¶ 22, 385 Wis. 2d 120, 921 N.W.2d 730 (citation omitted). A restitution order may reimburse insurance companies that have provided funds that "compensated a victim for a loss otherwise compensable under this section," when justice requires. Wis. Stat. § 973.20(5)(d); s*ee Fernandez*, 316 Wis. 2d 598, ¶¶ 61–62 (it is within the circuit court's discretion to determine whether justice requires reimbursement to insurance companies); *Gibson*, 344 Wis. 2d 220, ¶ 16 (circuit court reasonably determined that insurer was entitled to compensation for losses incurred in fulfilling obligation to insured in manner consistent with its business practice).

Grady does not claim that Statewide was not entitled to restitution for damages to the police car of $19,071.28 caused by his crimes, as outlined in Statewide's affidavit. (R. 36:1–2; A-App. 66–67.) But Grady claims that Statewide could not

request restitution for $1,000 of that amount to reimburse the city's deductible and Klein should not have "stipulated" to that request because, he contends, Statewide paid $18,071.28 for repairs to the police car but did pay the $1,000 deductible, so there was "no legal basis" for it to request restitution for the deductible, and the circuit court's finding that Statewide's contractual relationship with the city allowed it to request restitution for the deductible and then reimburse the city was clearly "erroneous." (Grady's Br. 27–29.) Grady's arguments are meritless and refuted by the record.

Grady contends that "it would appear that" Statewide "was 'out' $18,071.28 and the City lost $1,000 as a result of Mr. Grady's conduct," and the restitution statute limits "what a claimant can request" to "actual pecuniary losses" or a "readily ascertainable pecuniary expenditure paid out because of the crime," citing *State v. Holmgren*, 229 Wis. 2d 358, 365, 599 N.W.2d 876 (Ct. App. 1999). (Grady's Br. 27–28.) Because he claims Statewide "did not 'lose' the money paid" by the city for the deductible, he argues that restitution to Statewide for the deductible was "unjust enrichment," and Klein had "a clear basis to object." (Grady's Br. 28.) Grady further argues that the court's finding that Statewide and the city had a "contractual relationship" supporting restitution to Statewide to reimburse the city's $1,000 deductible was "an erroneous finding of fact" and "unsupported by the record." (Grady's Br. 28–29.) He concedes that Statewide's affidavit stated that "once our insurance deductible has been reimbursed, please make any additional restitution checks payable to Legal Wisconsin Muncipalities Mutual Insurance Company," but contends that the court's finding that the affidavit supported restitution to Statewide for the deductible was "mistaken" and unsupported by "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." (Gradys' Br. 29.) Grady claims that

if Statewide "intended . . . to collect the $1,000 on the City's behalf, the restitution statute and the binding language of *Holmgren* do not allow surrogate claimants," so the city was required to file its own "claim for that loss" of the deductible. (Grady's Br. 29–30.) Therefore, he contends that Klein performed deficiently because "reasonably competent counsel should not have stipulated" to Statewide's restitution request for the deductible. (Grady's Br. 30.)

Grady fails to sufficiently allege that Klein performed deficiently by stipulating to Statewide's request for restitution for the $1,000 deductible and the record conclusively refutes his deficient performance claim. Grady merely speculates that Statewide was not entitled to request restitution for the deductible, and fails to show that the circuit court's factual finding that Statewide's affidavit supported its restitution request for the deductible of its insured was clearly erroneous. He broadly asserts that the circuit court's reading of the affidavit was "mistaken" (Grady's Br. 29), without explaining why Statewide's subrogation rights as the insurer and its contractual relationship to reimburse its insured did not allow Statewide to request the deductible. Grady fails to meaningfully challenge the circuit court's findings that Statewide was contractually obligated to reimburse the city for the $1,000 deductible if Statewide recovered it. Moreover, if Klein had not stipulated and had objected to the request, the objection was meritless and Klein could not perform deficiently by not making a meritless objection. *See State v. Wheat*, 2002 WI App 153, ¶ 14, 256 Wis. 2d 270, 647 N.W.2d 441. Therefore, Grady fails to sufficiently allege that Klein's stipulation to restitution including the $1,000 deductible was deficient performance that fell "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. Moreover, the record demonstrates that Klein's stipulation was reasonable based on the affidavit in support

and the court's finding that Statewide could request the deductible and reimburse the city.

The circuit court properly found that Statewide's affidavit described its request for restitution for "the thousand dollars that's going to be going to the city" for the deductible and that the request "contemplated" that the $1,000 deductible would go back to the City of Muskego, based on its contractual relationship with the City, as the insured, and "subrogation law." (R. 111:25.) Therefore, pursuant to Statewide's subrogation rights and contractual relationship, the city would "be reimbursed their deductible, if the insurance company does collect it." (R. 111:25–26.) Grady fails to show that the circuit court's finding that Statewide was contractually bound to reimburse the city for amounts it recovered on the city's behalf was clearly erroneous. The court of appeals adopted the circuit court's factual findings, agreeing that the restitution request "'contemplated' that the $1,000 deductible would be paid back to Muskego based on the parties' contractual relationship," there was "no unjust enrichment for Statewide," and the "affidavit requesting reimbursement of the deductible [was] appropriate." *Grady*, 2024 WL 3440033, at *3. Therefore, the court of appeals concluded that the "restitution award [was] not clearly erroneous." *Id.* The court of appeals was correct and Grady fails to show otherwise.

In sum, Grady has not sufficiently alleged that Klein performed deficiently, and the record conclusively demonstrates that she was not deficient for stipulating to the Statewide's restitution request that included the city's deductible.

### C. Grady insufficiently alleged prejudice and the record demonstrates he was not prejudiced by Klein's stipulation to restitution including the city's deductible.

Finally, Grady failed to sufficiently allege that he was prejudiced and the record conclusively demonstrates that he was not. Grady argues that the court's conclusion that he failed to show he was prejudiced "ignores the legal realities of the restitution process" and the rules that required a "properly submitted" restitution request to hold the defendant "liable for that cost." (Grady's Br. 30.) He claims that "it is simply irrelevant that the City *could* have submitted its own request and obtained the $1,000" deductible as restitution because the city "did not" and therefore, he contends, he "could not be required to pay the additional $1,000" to the city. (Grady's Br. 31.) Grady is wrong.

Because Grady admittedly and indisputably was responsible for the full restitution amount of $19,071.28 for the damage to the police car, his contention that he was prejudiced because if Klein had not stipulated to Statewide's claim for the city's $1,000 deductible, her objection would have "saved" him $1,000, is meritless. (Gradys' Br. 31.) To the contrary, even if Klein had refused to stipulate to Statewide's request to recover the city's deductible, Grady would still have been responsible for the entire amount based on the circuit court's factual finding that Statewide's affidavit and contractual relationship with the city supported its request for the deductible to reimburse the city. (R. 111:26–27.) Although Grady claims that this finding that Statewide had a contractual obligation to reimburse its insured was incorrect, he fails to show that it was clearly erroneous. At bottom, Grady cannot show that the restitution amount was erroneous because he was responsible for the entire $19,071.28 in damages, whether the city filed a claim for the $1,000 deductible or he paid the deductible to Statewide to

reimburse the city. Therefore, because an objection to the restitution amount would not have led to a different result, Grady insufficiently alleged he was prejudiced, and the record conclusively demonstrates that he was not prejudiced.

In concluding that Grady could not show he was prejudiced by Klein's stipulation to restitution that included the City's deductible, the circuit court described that the purpose of restitution is to make "the victims . . . whole," and found there was "no question that $19,071.28 was the loss" suffered by the city, Statewide "had the obligation to reimburse" the City for the deductible, and the restitution award of $19,071.28 "was the correct amount in the end," regardless of Klein's "basis for determining that it was simply best to stipulate to that amount." (R. 111:26–27.) Based on its factual findings, the circuit court concluded that Grady had not shown that he was prejudiced by Klein stipulating to restitution that was the "correct dollar amount of the loss." (R. 111:27.) The court of appeals agreed that it was "undisputed that the full amount of damage to the police car caused by Grady's criminal conduct was $19,071.28," and the restitution to Statewide for the city's $1,000 deductible "contemplated" that Statewide would reimburse the city "based on the parties' contractual relationship" so Statewide would not be unjustly enriched. *Grady*, 2024 WL 3440033, at * 3. Therefore, the court of appeals held that Grady was not entitled to a *Machner* hearing both because "the record demonstrates Grady was not prejudiced by [Klein's] stipulation" and "Grady failed to sufficiently allege that he was prejudiced" by her stipulation to the $19,071.28 restitution to Statewide. *Id.*

In sum, Grady failed to sufficiently allege either that Klein performed deficiently by not objecting to the restitution to Statewide for the $1,000 deductible, or that he was prejudiced by the restitution order requiring him to pay the entire amount of the loss resulting from his criminal conduct,

and the record conclusively shows that Klein did not perform deficiently and Grady was not prejudiced. Therefore, he is not entitled to a hearing on his ineffective assistance claim.

## CONCLUSION

For all these reasons, this Court should affirm the court of appeals decision affirming the circuit court's order denying Grady's postconviction motion seeking to vacate the restitution order, remand for a new restitution hearing, and seeking a hearing on his ineffective assistance claim.

Dated this 5th day of March 2025.

Respectfully submitted,

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## 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 10,983 words.

Dated this 5th day of March 2025.

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## 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 5th day of March 2025.

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