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.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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I. The hearing on Mr. Grady's ability to pay restitution was conducted using a fundamentally unfair procedure, which requires reversal.

Here, rather than focusing on the overall unfair qualities of this hearing, the State asks this Court to hyper-focus on certain legal and procedural technicalities. Its rhetorical aim is to focus this Court's attention on the trees and, in the process, to lose sight of the proverbial forest. This is an invitation the Court would do well to respectfully decline.

The essential question at the heart of this appeal is relatively straightforward: What should the circuit court's response have been when Mr. Grady asked to consult with his lawyer? As Judge Maria Lazar ably describes in her insightful and persuasive dissent, the answer is actually quite clear—use the obvious solutions available in order to ensure that Mr. Grady had a meaningful opportunity to *confidentially* consult with his lawyer.

Instead, however, the circuit court chose a different route. It opted for an ineffectual half-measure of going "off the record" while making no meaningful attempt to clear the courtroom or make sure that Mr. Grady had a truly confidential line of communication with his lawyer.

As this Court has recognized—indeed, as our advocate-centered system emphasizes—the attorney-client relationship, and by extension the attorney-client privilege, is a sacred and essential component of our overall legal system. *See, for example Sands v. Menard, Inc.*, 2010 WI 96, ¶ 53, 328 Wis. 2d 647, 787 N.W.2d 384 ("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."). Accordingly, the circuit court's failure to respect and facilitate this relationship and its corresponding privilege is a fundamental failure which impinges on Mr. Grady's right to due process of law. If this Court is concerned at all with ensuring fundamentally fair hearings in the age of Zoom, it must reverse.

Against these deep-rooted values, the State offers an array of legalistic rhetoric meant to obscure the injustice at the heart of this appeal. Those arguments are unavailing and ineffectual and should not unduly distract the Court from the real issues in this case.

First, the State implies but does not expressly develop an argument that, because this was a restitution hearing, the court's informality and laissez-faire attitude toward the attorney-client privilege was somehow excusable. (State's Br. at 22-23). However, it acknowledges that the requirements of procedural due process are still applicable. (State's Br. at 22). As this is not a case where Mr. Grady is testing the outer fringes of the due process right and

is instead focusing on a central issue—Mr. Grady's right to confidentially consult with counsel—the State's arguments about the "relaxed" nature of the hearing are irrelevant.

Second, the State focuses on whether Mr. Grady "intended" to have a confidential communication with his lawyer as a prerequisite for determining if a due process violation occurred. This, however, is the precise error committed by the majority in the court of appeals decision, which failed to appreciate the structural deficits of this hearing. The State has it backwards: instead of focusing on Mr. Grady's intent, the case centers on the circuit court's structural choices which unlawfully impinged on Mr. Grady's ability to fully realize the benefits of being represented by counsel. Thus, in order for a due process violation to be found, this Court is simply not required to delve into the complex law regarding the attorney-client privilege, as the State suggests. (State's Br. at 24).

Instead, what matters is that the circuit court constructed a procedure under which Mr. Grady was asked to choose between unfavorable options—speak with his lawyer and be overheard or simply forfeit his ability to consult with his lawyer at all. It is the imposition of that unreasonable choice which violates due process.

And, in any case, the record evidence supports a finding that Mr. Grady intended to consult confidentially with counsel. Mr. Grady explicitly told the circuit court he needed to consult with his

appointed counsel. (65:4). The court then paused the proceedings and went "off the record" in response to that request. (65:4). Under these circumstances, did Mr. Grady *really* need to interject—before the court relieved the reporter from transcribing the proceedings—in order to clarify that his request was for a *confidential* consultation? Or course not. Such a holding, which this Court is called upon to issue, does violence to the commonsense reality all parties to this appeal are alleged to inhabit.

Likewise, the court's factual findings about the "off the record" conversation are irrelevant for two reasons. First, the simple "warning" given to Mr. Grady—the centerpiece of the court's factual findings—is, under these circumstances, structurally deficient as it was not accompanied by proffered alternatives that would have enabled a truly confidential line of communication. Second, as Mr. Grady has emphasized in his opening brief, this Court should not excuse potential due process violations merely because the court—which was in control of the hearing—chose to go "off the record" when such violations occurred. Thus, rather than rebutting Mr. Grady's arguments, under these facts, the choice to go "off the record" is another structural component of the hearing which adds further evidence of procedural injustice.

As in the persuasive authorities cited and discussed by Mr. Grady in his opening brief (only one of which is responded to in the State's brief), the procedure in this case was fundamentally flawed. Mr.

Grady was not given an opportunity to meaningfully confer, confidentially, with his attorney. When this Court focuses on the structure of the hearing, rather than irrelevant considerations such as whether Mr. Grady should have made his request with more legalistic precision, the fair and just outcome of this appeal is obvious. Accordingly, this Court should reverse and remand for a new hearing on Mr. Grady's ability to pay.

II. Instead of incentivizing prosecutors to eavesdrop on a defendant's communications with counsel, this Court should hold that this is a reversible error.

The facts are simple. Mr. Grady, a criminal defendant appearing via Zoom, asked to speak to his lawyer. (65:4). The court appeared to acknowledge this request by pausing the proceedings. (65:4). It further acknowledged, implicitly, that this communication with counsel was intended to be confidential, as it explicitly asked the court reporter not to transcribe Mr. Grady's remarks to counsel. (65:4). However, it then permitted the State to listen in and to then use what it learned about Mr. Grady's ability to pay in support of its legal arguments.

These are concerning facts which should concern Wisconsin's highest Court. Yet, once again, the State falls back on technicalities in order to avoid acknowledging injustice. Its chief argument is that Mr. Grady's comments were not *really* confidential; thus, the prosecutor had no reason not to obtain a

litigation advantage by listening in. (State's Br. at 32-35). Once again, the State ignores the structural components of this hearing, the Hobson's choice faced by Mr. Grady (to speak or to be silent), and the record evidence standing in the way of its arguments.

Simply put, Mr. Grady asked to speak to his lawyer. It strains credulity to assume that this request was for anything other than a confidential line of communication. Under these facts, then, the rule of *State v. Meeks*, 2003 WI 104, ¶ 59, 263 Wis. 2d 794, 666 N.W.2d 859 was violated and this Court must reverse.

III. There is no legal authority for an insurance company to be paid money equivalent to losses incurred by another party. Accordingly, counsel was ineffective for not objecting to the proposed restitution.

As Wisconsin precedent makes clear, restitution claimants are limited to requesting reimbursement for a "readily ascertainable pecuniary expenditure paid out because of the crime […]."*State v. Holmgren*, 229 Wis. 2d 358, 365, 599 N.W.2d 876 (Ct. App. 1999). There is no legal provision authorizing a restitution claimant to request and receive restitution for losses "paid out" by a distinct legal party. Accordingly, there was no legal basis for this insurance company to request $1,000 "paid out" by a wholly distinct entity, the City of Muskego. As the request was legally

invalid, reasonably competent counsel should have objected.

The State disagrees, and rather than focusing on Mr. Grady's legal arguments, tries to make this a case about appellate deference to factual findings. (State's Br. at 39). Setting aside the fact that Mr. Grady has already argued there is nothing in the record which would support the court's speculative factual findings, the argument misses the mark. This is a legal, rather than factual, dispute. However, the State does not respond to Mr. Grady's legal argument, instead focusing solely on the circuit court's scant factual findings. (State's Br. at 39). Accordingly, that legal argument as to deficient performance should be conceded in Mr. Grady's favor. *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

As to prejudice, had counsel objected, the restitution would have been $1,000 less—a reasonable probability of a different result. Once again, the State ignores Mr. Grady's legal argument by focusing on whether the overall restitution was correct. (State's Br. at 41-42). However, as Mr. Grady has pointed out, the question of total loss is irrelevant. Restitution is a legal concept, and litigants do not owe restitution unless it is properly claimed. As such, under these facts, there was no legal basis to order restitution and therefore a reasonable probability of a reduced restitution amount.

Accordingly, this Court should remand for an evidentiary hearing.

CONCLUSION

For the reasons set forth herein, Mr. Grady asks this Court to reverse and remand for further proceedings.

Dated this 18th day of March, 2025.

Respectfully submitted,

Electronically signed by
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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 1,620 words.

Dated this 18th day of March, 2025.

Signed:

Electronically signed by Christopher P. August
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