STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP000897-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LAMONT DONNELL SHOLAR,

Defendant-Appellant-Petitioner.

On Appeal from a Judgment of Conviction and
an Order Denying Postconviction Relief
Entered in the Milwaukee County Circuit Court, the
Honorable Thomas J. McAdams, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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TABLE OF CONTENTS

CASES CITED

WISCONSIN STATUTES CITED

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

ISSUES PRESENTED

I. Where counsel performed deficiently by failing to object to an exhibit rife with improper other acts evidence, hearsay, and suggestive photographs that was admitted and given to the jury during deliberations, could the reviewing court hold that Mr. Sholar only demonstrated prejudice as to one of the counts in this six-count jury trial?

After a ***Machner*** hearing, the court found that counsel performed deficiently but that Mr. Sholar was only prejudiced on one of the six counts given the weight of the evidence on the other counts. The Court of Appeals affirmed.

II. *The circuit court denied Mr. Sholar's post-conviction motion without a* ***Machner*** *hearing. The Court of Appeals reversed and remanded on all counts for a* ***Machner*** *hearing, holding that "[w]ith respect to prejudice, Sholar's motion establishes a reasonable probability that, had the text messages not been admitted into evidence and provided to the jury during deliberations, the result of the trial, at least as to the sexual assault charge, would have been different."*

Did the State forfeit its opportunity to argue that Mr. Sholar did not meet his burden to show prejudice on all counts when it failed to file a petition for review following the Court of Appeals' reversal?

The State did not file a petition for review. On remand, it argued that prejudice was an open question. The circuit court found that Mr. Sholar only demonstrated prejudice on one of the six counts. The Court of Appeals affirmed.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court's decision to grant review demonstrates that argument and publication are warranted.

STATEMENT OF FACTS AND CASE

A. Procedural Overview

This is Mr. Sholar's second appeal. Mr. Sholar was found guilty of six counts at a single jury trial; five of the counts involved the alleged pimping/trafficking of two women, one count involved the alleged sexual assault of one of the women. (90).

Mr. Sholar filed a post-conviction motion. (55). He raised multiple claims, including allegations of ineffective assistance of counsel. (55;56). The circuit court denied Mr. Sholar's motion without a ***Machner***[1] hearing. (62; App.157-170).

Mr. Sholar appealed. The Court of Appeals issued a decision reversing the circuit court's order on one of Mr. Sholar's claims of ineffective assistance: counsel's failure to object to an exhibit containing hundreds of text messages with repeated references to drug-dealing and other violent activity, suggestive photographs, and inadmissible hearsay that was both admitted into evidence and provided in its entirety to the jury during deliberations. ***State v. Sholar***, No. 14AP1945-CR, unpublished slip op. (WI App June 30, 2015)(hereinafter "***Sholar I***")(94;App.126-139).

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[1] ***State v. Machner***, 92 Wis. 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

The Court of Appeals remanded for a ***Machner*** hearing for the circuit court to address "whether counsel's decision not to object was a reasonable strategic choice." ***Sholar I***, ¶ 40;(94:14;App.139).

The State did not file a petition for review.

On remand, the circuit court—a new judge now presiding—held the ***Machner*** hearing. (106).

Following the hearing, the court concluded that counsel performed deficiently. (107:25-40;App.197-212).

The circuit court determined that the Court of Appeals' opinion could be interpreted in different ways with regard to prejudice, and addressed prejudice as well. (107:13-17; App.185-189).

It concluded that Mr. Sholar only met his burden to show prejudice from counsel's deficiency on Count Five (the sexual assault charge), and entered an order vacating Mr. Sholar's sentence and conviction on Count Five but denying his motion for a new trial on the remaining counts. (107:24-29;App.196-201).

Mr. Sholar filed a second notice of appeal. (104). The State did not file a motion for cross appeal. The Court of Appeals denied Mr. Sholar's motion for summary reversal.[2]

The Court of Appeals affirmed the circuit court's holding that Mr. Sholar was prejudiced by his attorney's deficient performance with regard to the sexual assault count but not the other counts. ***State v. Sholar***, 16AP897-CR, unpublished slip op. (WI App June 20, 2017)(hereinafter "***Sholar II***")(App.101-125).

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[2] *See* Wisconsin Supreme Court and Court of Appeals Case Access (noting filing of summary reversal, response, and order denying).

This Court granted Mr. Sholar's petition for review.

B. The Charges

The State charged Mr. Sholar with a total of six counts—five related to the alleged pimping of two women: 17-year old EC and 22-year old SG. The complaint further charged Mr. Sholar with the alleged sexual assault of SG.[3] (2;4).

C. The Jury Trial

The circuit court, the Honorable Rebecca F. Dallet presiding, held a six-day jury trial. (78-89).

EC testified that she met Mr. Sholar through his alleged co-actor, Shawnrell Simmons. (80:87-93). She stated that she contacted Mr. Simmons to work for him as a prostitute, but he told her he had women working for him and directed her to Mr. Sholar. (80:91-93). She stated that she worked for Mr. Sholar for a few months and gave him money she made from prostitution. (80:87-165).

EC testified that provocative pictures of her were taken and uploaded to the website "Backpage." (80:95-106). She explained that Mr. Sholar rarely took pictures of her; instead, other girls working for Mr. Sholar and Mr. Simmons would take pictures of her. (80:95-99). She also stated that Mr. Sholar and Mr. Simmons drove her to-and-from hotels to

[3] The charges: (1) Trafficking of a Child (EC, born 2/22/94), in violation of Wis. Stat. § 948.051(1); (2) Soliciting a Child for Prostitution (EC), in violation of Wis. Stat. § 948.08; (3) Pandering/Pimping (EC), in violation of Wis. Stat. § 944.33(2), related to EC; (4) Human Trafficking (SG, born 9/16/89), in violation of Wis. Stat. § 940.302(2)(a); (5) Second Degree Sexual Assault (SG), in violation of Wis. Stat. § 940.225(2)(a); and (6) Pandering/Pimping (SG), in violation of Wis. Stat. § 944.33(2).

perform sex acts. (80:106-110;146). EC testified that on one occasion Mr. Sholar punched her several times. (80:112-14). She explained that Shawrell Simmons smacked, choked, and spit on her, and sexually assaulted her at gunpoint. (80:138,142).[4]

EC testified that she only told police about the pimping after police arrested and questioned her about her involvement in an alleged burglary. (80:136-38,160). EC testified that at Mr. Sholar's direction, she helped take a number of items from her friend's apartment. (80:126-130). She testified that Mr. Sholar told her to leave when her friend returned. (80:126-130). EC admitted that she initially lied to police and claimed no knowledge of the burglary. (80:160).

SG testified that she agreed to do private dances for money at Mr. Sholar's suggestion. (80:176-79). She explained that this turned into having sex with people for money for roughly two weeks. (80:187-88). She testified that Mr. Sholar took pictures of her with his cell phone and would put them on the internet. (80:179-83). She testified that she believed he did this through the website "Backpage." (80:179-83).

SG stated that both Mr. Sholar and Mr. Simmons would drive her to locations to perform these acts, though mostly it was Mr. Sholar. (80:193-94,212). She acknowledged that it was her mother, not her, who first told police that she worked for Mr. Sholar. (80:215-216).

With regard to the sexual assault charge, SG testified that one night Mr. Sholar wanted to have sex but she was tired and said she "didn't feel like it." (80:198-219). She testified that as she stood up from the bed to go to the bathroom, he grabbed her arm, turned her around, and had

[4] Mr. Sholar and Mr. Simmons were not tried together.

vaginal sex with her. (80:198-219). When asked whether she remembered telling police that she did not believe she actually said the word "no," she stated: "I said it wasn't a good idea. I told him I didn't feel like it." (80:219). She testified that she had sex with Mr. Sholar multiple times after that and did not directly tell him no. (80:219).

SG stated that she stopped working for Mr. Sholar when her boyfriend got out of jail. (80:200-202). She explained that Mr. Sholar started threatening her. (80:201-202). The State called SG's mother; she testified that SG called her once because she was scared of Mr. Sholar, and that on another occasion he came to her house asking for a phone he gave SG, and parked outside her house that evening. (83:40-53).

The State also presented evidence showing that Mr. Sholar rented rooms at an Econolodge motel, as well as data from the hotel's lobby computer showing an internet history of "Backpage" ads being posted and viewed. (83:62-72,89-96). The State introduced as exhibits a number of "Backpage" ads with pictures of women, including ads with a contact number the same as the phone taken from Mr. Sholar. (80:100-106). The State called detectives to introduce a number of phone records which included photographs and text messages. (82:14-37;83:1-28). The State further presented photographs taken by police of items including condoms and lingerie, retrieved by hotel staff, from a room in which the State alleged Mr. Sholar operated. (82:14-37).

The State also called NS as a witness, who testified that she worked independently as an escort at the Econolodge. She did not know SG. (82:60). She explained that she did know EC; however, she did not know whether EC worked

for Mr. Sholar, and thought EC might have worked independently. (82:89). She also testified that she never saw any violence between Mr. Sholar and EC. (82:91).

Mr. Sholar testified that he stayed at the Econolodge with his son. (84:17-18). He met EC, SG and other women, and thought they were working for Mr. Simmons. (84:19). He testified that he did develop a friendship with EC, but did not work as a pimp. (84:20-23). He stated that he never had sex with EC and never hit her. (84:24).

Mr. Sholar explained that he met SG through her roommate and he saw her at the Econolodge at some point but did not have further contact with her. (84:27-29). He testified that he never had sexual contact with her. (84:29-31). Once, he did go to her mother's house to ask about a phone he believed she had, but did not return later that evening. (84:113-16).

He asserted that he never put ads on "Backpage," and did not take any pictures of women for ads while at the hotel. (84:31-38). He further testified that the cell phone he had on him at arrest belonged to Mr. Simmons, which he used because the screen on his phone cracked. (84:48).

With regard to the alleged burglary that preceded EC's allegations, he testified that EC wanted him to sell her K2, an "over the counter" product akin to marijuana, and she told him to meet her at an apartment. (84:42-47). When he arrived, she told him that her friend was moving and wanted to sell items from the apartment. (84:42-47). He testified that he paid EC for the television. (84:44). He testified that the owner then saw him carrying the television and asked him what he was doing; Mr. Sholar explained the situation and tried to help the owner find EC until police arrived, at which point he was arrested for the alleged burglary. (84:44-48). The State called

officers who said that Mr. Sholar said he had been at the scene of the burglary to sell "weed." (84:130-153).

D. Exhibit 79: Admitted into Evidence and Provided to the Jury in its Entirety During Deliberations in Response to a Jury Question

Both EC and SG testified that they had conversations with Mr. Sholar via text message about prostitution. (80:121,194). Detective McQuown testified that he extracted data from an iPhone police obtained from EC, and the State moved the data from this phone into evidence with no defense objection. (82:48-49;83:5-6;92:Trial Exhs.69,70). He testified about text messages concerning prostitution and suggestive photos found in this phone. (83:21-26;92:Tr.Exh.70). He testified, however, that neither Mr. Sholar's name nor phone number appeared anywhere in the contacts or messages on EC's phone. (83:38-39).

He also examined the cell phone taken from Mr. Sholar upon his arrest. (83:82). He stated that he found pictures of women in suggestive poses, some of which appeared to be the same images as pictures from Backpage ads previously entered into evidence. (83:84-90).

The State, through Detective McKee, then moved into evidence Exhibit 79: a CD and printout of the 181 page report containing the contents of the phone taken from Mr. Sholar during his arrest, including 100 pages containing nearly 1400 text messages. (83:98,113; (92:Tr.Exhs.77,79)). Defense counsel did not object. (83:98,113).

During deliberations, the jury asked: "Can we request Lamont's phone records, 544 0125, looking for in—slash—out bounds regarding I got dollars text messages while with client." (88:73).

The court asked: "isn't it all contained in the one exhibit that Detective McKee had, has put in the one big thick one, would all those things be answered in there? Because I don't want to be parceling out. I just want to give them the exhibit that they seem to be requesting." (88:73-74). Both the State and trial counsel agreed to provide *all* of Exhibit 79 to the jury. (88:74-75).

The jury also asked for EC's phone records, and both the State and defense counsel agreed to provide the exhibit of her phone records to the jury as well. (90:3-4).

The 100 pages of text messages contained in Exhibit 79 (the data from the phone recovered from Mr. Sholar), handed to the jury during deliberations with no objection, were filled with conversations about violent behavior and the illegal drug dealing of a variety of narcotics. *See, e.g.,* (92:Trial Exh.79;56:PCM Exh.B, Text Messages 148-149, 318-319,360,394,536,750,924,925,1021,1141,1144, 1146).

A few examples:

- An outgoing text message to an unknown number saying: "Fo sho stopping to get my heat to teach him a lesson;" (92:Exh.79;56:PCM Exh.B, Message 536); "Heat" is a street term for a weapon.[5]

- A later incoming text message from a "Brit" saying "Spencer invited me to go to the motel tonight too. Haha damn I shulda went I wanna see u break dudes legs", (92: Exh.79;56:PCM Exh.B, Message 924).

[5] *See* ***State v. Casarez***, 2008 WI App 166, ¶ 4, 314 Wis. 2d 661, 762 N.W.2d 385 (explaining that "heat" is a street term for a weapon).

- An outgoing text message that followed reading: "Ima made nigga out here and soon or later mfs gone no that the hard way this nigga scared shit". (92:Exh.79;56:PCM Exh.B, Messages 925).

- A reference in outgoing text messages to having "beat" a case: an outgoing text message to a "T" saying "I beat my shit," and then a follow-up text message clarifying that this meant "my case" (92:Exh.79;56:PCM Exh.B, Messages 1141,1144, 1146).

- An incoming text message from "N/A" stating: "Come home on a bus. I have reported you to the Columbia county sheriff. Next step is a warrant. I am done I am broke and bit taking it anymore. Goodluc". (92:Exh.79;56: PCM Exh.B, Message 1359).

- Repeated conversations concerning the buying and selling of "pills," specifically "percs," a slang term for the prescription drugs Percocet and Percodan.[6] (92:Exh.79;56: PCM Exh.B, Messages 318-319,360,394).

- Repeated references to "boy," a slang term for heroin[7], including an incoming text message from a "Brit" asking

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[6] *See* University of Maryland Center for Substance Abuse Research, "Oxycodone," available at http://www.cesar.umd.edu/cesar/drugs/oxycodone.asp (last accessed 11/29/17)(explaining the slang term for Percocet/Percodan).

[7] *See* National Drug Intelligence Center, "Heroin Fast Facts," available at http://www.justice.gov/archive/ndic/pubs3/3843/#called (last accessed 11/29/17)(explaining that "boy" is a street term for heroin).

"Can u find boy?" and a response "Yea I can." (92:Exh.79;56:PCM Exh.B, Messages 148-149). [8]

The text messages also reference a threat to someone with the same first name as SG. There is an incoming text message from a "Brit" stating: "the cop told me he's worried because s[][9] said u threatened rt kill her. Idk its all bs. I didn't give out no info I'm all over it. But if I lose my house I'm moving in with u (: aha. And they asked me what u drove and I didn't tell them shit it isnttttt my issue but were getting fucked up tonight we better (;".(92:Exh.79;56:PCM Exh.B, Messages 159-60).

The exhibit also contains numerous photographs of many women in lingerie in explicit and suggestive poses. (92:Exh.79:130-173).

E. Sentencing

The jury convicted Mr. Sholar on all counts. (90). The court imposed a sentence of forty-five years, divided into thirty years initial confinement and fifteen years extended supervision. (91).

F. Post-Conviction Motion

Mr. Sholar filed a post-conviction motion for a new trial, or, if the circuit court denied his request for a new trial, for sentence modification. (55;56). Mr. Sholar sought a ***Machner*** hearing. Following court-ordered briefing, the

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[8] These are but a small sample of the many text messages involving other acts evidence. Mr. Sholar included as Exhibit B to his motion the entire text message section of Exhibit 79 (pages 10-109 of the 181 page Exhibit), with stars placed next to each text message involving improper other-acts evidence. (56:PCM Exh.B).

[9] Counsel has redacted the name, but the name given is a shortened version of SG's first name.

circuit court, the Honorable Rebecca F. Dallet again presiding, denied his post-conviction motion without an evidentiary hearing. (55-59;62;App.157-170).

G. ***Sholar I***

The Court of Appeals issued a decision reversing and remanding on Mr. Sholar's claim of ineffective assistance of counsel with regard to the admission of Exhibit 79 (the records from the phone taken from Mr. Sholar). ***Sholar I***;(94;App.126-139). The Court denied his other claims. ***Id.***

In reversing, the Court of Appeals explained:

> In its decision denying his postconviction motion, the circuit court concluded that even if the text messages contained improper other acts evidence, Sholar had not demonstrated that he was prejudiced given the amount of evidence against him. We are not so sure. As Sholar points out, at the very least, the impact of this evidence could have been significant as to the sexual assault charge.

Sholar I, ¶ 32;(94:10;App.135). The Court quoted from Mr. Sholar's brief and concluded: "Sholar's allegations in this regard, if true, are sufficient to entitle Sholar to a ***Machner*** hearing. Therefore, we reverse and remand on this issue." ***Id.***, ¶¶ 32-33;(94:10-11;App.135-136).

The Court summarized:

> In summary, we conclude Sholar was entitled to a ***Machner*** hearing on his claim that counsel was ineffective for failing to object when hundreds of text messages were both admitted into evidence and provided to the jury during deliberations. Without a ***Machner*** hearing we cannot determine whether counsel's decision not to object was a reasonable strategic choice.

Id., ¶ 40;(94:14;App.139).

The Court concluded that Mr. Sholar's motion established a reasonable probability of a different outcome at his trial:

> With respect to prejudice, Sholar's motion establishes a reasonable probability that, had the text messages not been admitted into evidence and provided to the jury during deliberations, the result of the trial, at least to as to the sexual assault charge, would have been different. We therefore reverse that portion of the circuit court's order denying Sholar's claim that his attorney was ineffective for failing to object when hundreds of text messages were both admitted into evidence and provided to the jury during deliberations. We remand for the circuit court to conduct a ***Machner*** hearing on that claim.

Id.;(94:14;App.139).

The State did not file a petition for review.

H. The ***Machner*** Hearing and Post-***Machner*** Briefing

The circuit court, the Honorable Thomas J. McAdams now presiding, held the ***Machner*** hearing. (106). Trial counsel was the only witness to testify. (106).

The State suggested that perhaps the Court of Appeals had not conclusively decided the question of prejudice with regard to all counts, as the Court stated that Mr. Sholar had met his burden to show prejudice "at least as to the sexual assault charge". (106:115-116). The circuit court ordered supplemental briefing. (106:118-120).

In its supplemental brief, the State argued that the Court of Appeals' "equivocal comments" reflected that prejudice was still an open question. (102:19-20).

Mr. Sholar, on the other hand, asserted that his burden had been to show a reasonable likelihood of a different outcome at his trial, and the Court of Appeals had already concluded that he met that burden. Mr. Sholar maintained: "If the Court of Appeals had somehow believed that the charges could have been isolated, and wished to order a remand with regard to one count and one count alone, it would have done so in its order. It did not, and for this Court to do so would violate the Court of Appeals' order and directive to this Court." (100:1-2).

I. The Circuit Court's Post-***Machner*** Decision

The circuit court issued an oral decision following post-***Machner*** briefing. (107;App.173-214). It noted that it first needed to determine "what it is I'm here to decide." (107:13;App.185). It found "at least four ways to read this Court of Appeals opinion." (107:13-15;App.185-187). The court concluded that "if there is ambiguity here, I think I should just try to cover all the bases." (107:15;App.187). It ruled on both the deficient performance and prejudice prongs, acknowledging that it may have misunderstood the Court of Appeals' order. (107:13-17;App.185-189).

With regard to deficient performance, the court could not find any reasonable strategic basis to explain why counsel would have allowed for the admission and publication of the entirety of Exhibit 79. (107:25-40;App.197-212).

The court concluded: "The messages and the pictures [in the exhibit] are in my opinion so inflammatory that I think a jury then and there might have convicted him of virtually anything." (107:40;App.212).

The court, however, concluded that given the "overwhelming" evidence presented at trial, with regard to Counts One through Four and Six (the pimping/trafficking related counts), the admission of the exhibit was not prejudicial as to those counts. (107:24-25;App.196-197).

With regard to Count Five (the sexual assault charge), the court found that "the defense clearly has shown deficient performance and prejudice". (107:27-40;App.199-212). The court noted that "there's much less evidence on that count". (107:25;App.197).

The circuit court issued an order vacating Mr. Sholar's conviction and sentence on Count Five, but denying his motion to vacate his other convictions and sentences. (107:40;103;109;App.156,171-172,212).

J. ***Sholar II***

Mr. Sholar filed a notice of appeal, (104); the State did not cross-appeal.

Mr. Sholar filed a motion for summary reversal, arguing that the outcome had already been determined by the court's prejudice analysis in ***Sholar I***. The State objected. The court denied the motion.[10]

On appeal, Mr. Sholar argued that the question of prejudice focuses on the reliability of the *trial*, not specific counts in isolation. (Sholar Initial COA Brief at 17-19; Sholar Reply COA Brief at 4-5).

[10] *See* Wisconsin Supreme Court and Court of Appeals Case Access (noting filing of summary reversal, response, and order denying).

Mr. Sholar argued that the State should not be allowed to re-litigate the question of prejudice where it did not file a petition for review following ***Sholar I***. (Sholar Initial COA Brief at 21).

He further argued that even if the court concluded that it had not completely decided the question of prejudice in ***Sholar I***, the deficiency did prejudice Mr. Sholar on all counts. (Sholar Initial COA Brief at 21-29).

The Court of Appeals affirmed the ***Machner*** court's ruling holding that Mr. Sholar was prejudiced by his attorney's deficient performance with regard to the sexual assault count but not the other counts. ***Sholar II***;(App.101-125). It noted that the State conceded that the ***Machner*** court was correct that counsel performed deficiently and that this deficiency prejudiced Mr. Sholar as to the sexual assault count. ***Sholar II***, ¶ 25;(App.109).

The court explained that its "choice of wording in the order for remand" in ***Sholar I*** "was not a model of clarity." ***Sholar II***, ¶ 16;(App.106). It noted that the ***Machner*** court properly interpreted its decision as requiring consideration of both deficient performance and prejudice. ***Sholar II***, ¶¶ 15-20;(App.106-107).

It did not address the State's failure to file a petition for review. *See generally* ***Sholar II***;(App.101-125).

It also did not address Mr. Sholar's arguments about the lack of legal support for parsing out prejudice on a count-by-count basis. Instead, it presented an overview of the evidence presented at trial and concluded that the evidence for the other five counts was "overwhelming." *See generally* ***Sholar II***;(App.101-125).

This Court granted Mr. Sholar's petition for review.

ARGUMENT

The ***Machner*** court and State agree that trial counsel performed deficiently and Mr. Sholar was prejudiced as to the sexual assault count. The question is whether the prejudice Mr. Sholar suffered from his attorney's deficiency could be isolated to a single count in his multiple-count jury trial.

In ***Strickland v. Washington***, 466 U.S. 668 (1984), the U.S. Supreme Court made clear that prejudice cannot be reduced to solely a count-by-count evaluation of the sufficiency of the evidence absent the error. Yet that is what the Court of Appeals did here.

As ***Strickland*** focuses on the reliability of the proceedings and recognizes that a defendant may prove prejudice even where the evidence was sufficient to convict absent the error, isolation of prejudice to particular counts in a single jury trial may only occur where the nature of the deficiency itself is count-specific.

The admission of the text message exhibit rife with damning inadmissible other acts evidence here is the paradigmatic example of an error which cannot be isolated to a particular count. But even under a count-specific analysis, Mr. Sholar has met his burden to show prejudice entitling him to a new trial on all counts.

Ultimately, this Court need not even address the division of prejudice, as the State forfeited opportunity to argue that Mr. Sholar was not prejudiced to all counts when it failed to file a petition for review following ***Sholar I.***

I. Mr. Sholar Met His Burden to Show Ineffective Assistance of Counsel Such That He Is Entitled to a New Trial on All Counts.

"The messages and the pictures are in my opinion so inflammatory that I think a jury then and there might have convicted him of virtually anything." (107:40;App.212) (***Machner*** court).

Both the United States and Wisconsin Constitutions guarantee a criminal defendant the right to the effective assistance of counsel. U.S. Const. AMENDS. VI, XIV; Wis. Const. ART. 1, § 7; ***State v. Roberson***, 2006 WI 80, ¶ 23, 292 Wis. 2d 280, 717 N.W.2d 111.

The United States Supreme Court set forth the standards for ineffective assistance of counsel claims in ***Strickland v. Washington***, 466 U.S. 668 (1984). A defendant must prove that (1) counsel performed deficiently and (2) counsel's deficient performance "prejudiced the defense." ***Id.*** at 687; *see also* ***State v. Artic***, 2010 WI 83, ¶ 24, 327 Wis. 2d 392, 786 N.W.2d 430.

The question of ineffective assistance of counsel is a mixed question of fact and law. ***State v. Thiel***, 2003 WI 111, ¶ 21, 264 Wis. 2d 571, 665 N.W.2d 305. This Court defers to fact-findings made by the circuit court unless clearly erroneous. ***Id.*** This Court reviews de novo whether "deficient performance has been established and whether it led to prejudice rising to a level undermining the reliability of the proceeding." ***Id.,*** ¶ 24.

A. The ***Machner*** court found deficient performance and the State has conceded it.

Deficient performance is not at issue here: the ***Machner*** court concluded that counsel performed deficiently; the State did not file a notice of cross appeal and conceded deficient performance on appeal. *See* ***Sholar II***, ¶ 25; (App.109)("This court need not address the question of whether trial counsel's performance was deficient because on appeal the State concedes that the ***Machner*** court was correct in finding that trial counsel's performance in allowing the jury to receive all of exhibit 79 was deficient.")(107:39-40;App.211-212).

The ***Machner*** court's conclusion and State's concession make sense, given that the phone found on Mr. Sholar was rife with prejudicial inadmissible other acts evidence, hearsay, and suggestive photos, all of which improperly told the jury that Mr. Sholar was a violent, dangerous man. (*See, e.g.* 107:25-40;App.197-212).

B. Mr. Sholar has met his burden to show prejudice entitling him to a new trial on all counts.

The State agrees with the ***Machner*** court that Mr. Sholar was prejudiced on Count Five (the sexual assault charge). *See* ***Sholar II***, ¶ 25;(App.109)("the State concedes that the ***Machner*** court was correct in finding that Sholar was prejudiced because the entire exhibit was given to the jury, but only as the exhibit relates to the sexual assault charge.")(107:25-40;App.197-212).[11]

[11] The State did not file a notice of cross-appeal from the court's decision to vacate Mr. Sholar's conviction and sentence on Count Five.

i. ***Strickland*** does not permit a pure count-by-count weighing of the sufficiency of the evidence absent the error to evaluate prejudice in a multiple-count jury trial.

Consideration must begin with ***Strickland*** itself. The Supreme Court explained that in "giving meaning" to the requirement of effective assistance of counsel, the purpose of requiring effective assistance—"to ensure a fair trial"—must be the guide. ***Strickland***, 466 U.S. at 686.

The Court explained that while it is not enough for the defendant to simply show that the errors "had some conceivable effect on the outcome of the proceeding," a defendant "*need not show that counsel's deficient conduct more likely than not altered the outcome in the case.*" ***Id.*** at 693 (emphasis added).

The Court explicitly rejected an "outcome-determinative standard." ***Id.*** at 693-694. The Court explained that an outcome-determinative standard "presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is being challenged." ***Id.*** at 694.

An ineffective assistance claim, however, "asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower." ***Id.***

The Court held that there will be circumstances where a defendant meets his prejudice burden even where he *cannot* prove by a preponderance of the evidence that the result would have been different: "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair,

even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." ***Id.***

The Court set forth the standard: "The 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." ***Id.***

The Court emphasized that the "ultimate focus" must be on the "fundamental fairness" of the proceeding: "In every case the court should be concerned whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." ***Id.*** at 696.

In ***Pitsch***, this Court also stressed that prejudice is *not* a sufficiency of the evidence "outcome-determinative standard." ***State v. Pitsch***, 124 Wis. 2d 628, 641-642, 369 N.W.2d 711 (1985)(discussing ***Strickland***). This Court there concluded that counsel's errors prejudiced the outcome even though there was "sufficient evidence to sustain the conviction". ***Id.*** at 644-645.

Sufficiency of the evidence asks whether the evidence, viewed most favorably to the conviction, so lacks in force that no trier of fact acting reasonably could have found guilt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). A sufficiency-style analysis would thus focus on whether there would have been enough evidence to convict absent the error. Prejudice under ***Strickland***, however, must instead focus on whether the deficiency undermines confidence in the outcome.

Importantly, United States Supreme Court has never held that the prejudice analysis in a multiple-count jury trial may be divided by simply assessing the sufficiency of the evidence on each count absent the error. Indeed, the U.S. Supreme Court has never before held that that prejudice may be divided on a count-by-count basis in a single trial *at all.*

This Court has also never before so held. The Court of Appeals has never before so held. Mr. Sholar is also unaware of any other federal circuit or state appellate court to directly so hold.

On the contrary, this Court and the Court of Appeals have analyzed whether any deficiency undermines confidence in the outcome of the (single) trial, without any count-by-count weighing of the sufficiency of the evidence: A few examples:

In ***State v. Jenkins***, the defendant was found guilty of first-degree intentional homicide, first degree reckless injury, and felon in possession of a firearm. 2014 WI 59, ¶ 2, 355 Wis. 2d 180, 848 N.W.2d 786. This Court held that counsel performed deficiently by failing to call a bystander witness. ***Id.***, ¶¶ 40-48.

This Court conducted *one* prejudice analysis and found that the error "had a reasonable probability of affecting the result of the *case*." ***Id.***, ¶ 59 (emphasis added). This Court found that there was a reasonable probability that the result of "the *proceeding*" would have been different and remanded for "*a* new trial." ***Id.***, ¶¶ 66-68 (emphasis added).

Similarly, in the cornerstone ***Thiel*** case, where this Court held that prejudice must be assessed based on the cumulative weight of counsel's deficiencies, the defendant

was convicted of seven counts of sexual exploitation by a therapist. 264 Wis. 2d 571, ¶ 2. This Court held that while "much of the State's evidence at trial was strong," counsel's deficiencies "undermined confidence in the outcome of the *case*" and remanded for "*a* new trial". ***Id.***, ¶¶ 79-81 (emphasis added).

This Court noted that "additional credibility evidence [which counsel failed to present] *might have affected the number of charges* on which Thiel was convicted." ***Id.***, ¶ 79 (emphasis added). This Court did not do a count-by-count evaluation of which specific charges could have turned out differently or remand only on a certain number of charges—it did one prejudice analysis. *See generally* ***id.***

The Court of Appeals has done the same: In ***Honig***, for example, the Court of Appeals found that multiple deficiencies "cumulatively deprived Honig of a fair trial" and it reversed for "*a* new trial". ***State v. Honig***, 2016 WI App 10, ¶¶ 46-47, 366 Wis. 2d 681, 874 N.W.2d 589 (emphasis added). Though the State's evidence for one of the counts was weaker than the evidence for the other, the court did not hold that the defendant was entitled to relief on only the count with weaker evidence; instead, it conducted *one* prejudice analysis and found that the errors were prejudicial to "Honig's *case*." *See* ***id.***, ¶¶ 40-46 (emphasis added).

The Court of Appeals here, however, for the first time, and without any acknowledgment of so doing, adopted a new standard and conducted a count-by-count analysis based on an evaluation of the sufficiency of the evidence on each count

absent the error. *See* ***Sholar II***;(App.101-125). This analysis contradicts Wisconsin precedent and ***Strickland***.[12]

The sufficiency-of-the-evidence absent the error test employed by ***Sholar II*** is inappropriate for ineffective assistance claims because a court cannot get into the juror's actual minds to know what affected them or what occurred during deliberations. The Supreme Court prohibited this in ***Strickland***: "evidence about the actual process of decision, if not part of the record of the proceeding under review…should not be considered in the prejudice determination." 466 U.S. at 695; *see also* Wis. Stat. § 906.06 (a court generally cannot receive evidence from a juror about deliberations).

Most importantly, a count-by-count sufficiency evaluation alone is unconstitutional because the Supreme Court specifically held that there will be situations where the evidence was sufficient absent the error but the defendant was still prejudiced. ***Id.*** at 693-694.

ii. Prejudice may only be isolated where the deficiency itself is plainly count-specific and the defendant cannot prove spillover.

To remain consistent with ***Strickland*** and Wisconsin precedent, the better rule would be to hold that where a defendant shows deficient performance at a multiple-count jury trial, he meets his burden to show prejudice entitling

[12] It is worth noting that Wisconsin, compared with other states, has an extremely limited plain error doctrine. *See* ***State v. Jorgensen***, 2008 WI 60, ¶ 21, 310 Wis. 2d 138, 754 N.W.2d 77 (explaining that "[c]ourt should use the plain error doctrine sparingly"). Thus, in Wisconsin, with very few exceptions, errors not previously raised must be raised post-conviction through ineffective assistance of counsel. This system remains constitutional only so long as the standards of ineffective assistance of counsel are constitutionally applied and enforced.

him to a new trial on all counts by showing a reasonable likelihood of a different outcome at his trial as a whole (as opposed to count-by-count division).

The ***Machner*** court held, and the State conceded, that Mr. Sholar showed a reasonable likelihood of a different outcome on the sexual assault charge. *See* ***Sholar II***, ¶ 25;(App.109); (State COA Response Brief);(107:25-40;App.197-212). Thus, he demonstrated a reasonable likelihood of a different outcome at his single trial and is entitled to a new trial on all counts.

If, however, this Court is disinclined to hold that prejudice may never be divided in a single jury trial, then it should hold that prejudice may only be divided where the deficiency itself, by its nature, was plainly isolated to a particular count or counts. Focusing on whether the deficiency by its nature is isolated to a particular count is necessary to comport with ***Strickland*** because, again, ***Strickland*** demands focus on the reliability of the proceedings as opposed to an outcome-determinative standard.

As the Supreme Court discussed in ***Strickland*** when explaining that court should look at all of the evidence before the jury, "[s]ome of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways." 466 U.S. at 695. The Court explained that while errors "will have an isolated, trivial effect," others will have a "pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture." ***Id.*** at 695-696.

> Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the *unaffected findings* as a given, and

> taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Id. at 696 (emphasis added).

This language reflects that the isolation of prejudice must be limited to situations where the nature of the deficiency was isolated to a particular count or counts. How else could we know which findings were "unaffected"? We cannot look into the jurors' minds to separate out how an error which is not directed at a particular count may have affected the jury's decision. ***Id.*** at 695; *see also* Wis. Stat. § 906.06. Further, in assessing prejudice, a reviewing court "may not substitute its judgment for that of the jury in assessing which testimony would be more or less credible." ***Jenkins***, 355 Wis. 2d 180, ¶ 64.

This Court should hold that if the nature of the deficiency appears to be plainly isolated to a particular count, the defendant must prove "prejudicial spillover" to meet his burden to show prejudice as to the remaining counts. The Court of Appeals adopted this analysis for reviewing whether a defendant is entitled to have a second count vacated from a two-count jury trial where the State concedes error as to the first. ***State v. McGuire***, 204 Wis. 2d 372, 556 N.W.2d 111 (Ct. App. 1996).

In ***McGuire***, the Court of Appeals adopted the Second Circuit's test for analyzing "retroactive misjoinder," otherwise known as "prejudicial spillover"—when "joinder of multiple counts was initially proper but, through later developments such as an appellate court's reversal of less than all convictions, joinder has been rendered improper." ***Id.*** at 379.

The "prejudicial spillover" test considers three factors:

(1) whether the evidence introduced to support the dismissed count is of such an inflammatory nature that it would have tended to incite the jury to convict on the remaining count;

(2) the degree of overlap and similarity between the evidence pertaining to the dismissed count and that pertaining to the remaining count; and

(3) the strength of the case on the remaining count.

Id. at 379-380.

The "prejudicial spillover" test would have to be slightly adapted to comply with ***Strickland***. The focus would have to be not on the sufficiency of the evidence to support the remaining count or counts, but on the likelihood of the error affecting the other counts.

Limiting the division of prejudice to cases in which the nature of the deficiency is plainly isolated to a particular count or counts, while allowing the defense in those situations to try and prove a ***Strickland***-based "spillover" effect of the deficiency to other counts, would be consistent with the Supreme Court's directives in ***Strickland***.

Mr. Sholar proposes the following standard: If the defendant proves that counsel performed deficiently at a multiple-count jury trial, to determine whether prejudice should be analyzed as a whole or count-by-count, the court must first determine whether the nature of the deficiency itself was plainly directed at a particular count or counts. If it was not, then the court must analyze whether the defendant showed a reasonable likelihood of a different outcome at the trial as a whole.

If the deficiency does appear to have been plainly isolated, then the defendant has the burden to prove that there is a reasonable likelihood of a different outcome on the other counts. To evaluate whether the defense meets this burden, courts should consider three factors:

(1) whether the error was of such an inflammatory nature that it would have tended to incite the jury to convict on the remaining counts;

(2) the degree of overlap and similarity between the evidence presented to the charge subject to the deficiency and the other charges;

(3) the strength of the evidence on the remaining counts.[13]

Again, the ultimate focus would be on the reliability of the outcome—whether the error undermines confidence in the outcome. ***Strickland***, 466 U.S. at 694.

Consider a few hypotheticals using this standard: A judge incorrectly read the jury instruction elements concerning one of the charges in a multiple count jury trial; defense counsel did not object. The nature of that deficiency appears to be isolated to the particular count, and the defendant would be hard-pressed to show that the error had a "prejudicial spillover" effect on the other charges.

A defendant is convicted of two counts of burglary at a single jury trial. Counsel performed deficiently by not calling a witness who would have provided an alibi to one of the counts. There, the deficiency appears to be isolated to the one

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[13] Under this standard, consistent with ***Thiel***, if counsel performed deficiently in multiple ways, prejudice would be assessed based on the cumulative weight of counsel's deficiencies. *See* 264 Wis. 2d 571.

count. However, the defendant may or may not be able to prove "prejudicial spillover." The defendant may argue, for example, that because the charges were so similar, or perhaps because the State had such little evidence on the remaining count, there is a reasonable likelihood that had the jury heard the alibi to the other charge, the jury (having reason to believe he was not guilty of that charge) would also not have convicted him on the remaining charge.

Given that ***Strickland*** demands a reliability analysis as opposed to a sufficiency analysis, this standard would provide a workable framework to evaluate claims of prejudice at a multi-count jury trial.

iii. The erroneous admission of inadmissible other acts evidence, by its very nature, infected Mr. Sholar's entire trial. The prejudice of this error cannot be isolated to a particular count.

Here, the central error was the admission of improper other acts evidence which told the jury that Mr. Sholar was a violent man who dealt narcotics including heroin and prescription pills, who beat a "case" and had been reported to a sheriff. Other acts evidence, by its very nature, infects the entirety of the proceeding. The nature of the counsel's deficiency was not count-specific; therefore, prejudice must be analyzed based on the single trial.

"The messages and the pictures are in my opinion so inflammatory that I think a jury then and there might have convicted him of virtually anything." (107:40;App.212).

The ***Machner*** court's statement demonstrates the core reason why our criminal justice system generally excludes other acts evidence and why the prejudice Mr. Sholar suffered from the improper admission of Exhibit 79 cannot be

separated into a count-by-count analysis. Exhibit 79's improper other acts evidence, hearsay, and suggestive photographs showed the jury that Mr. Sholar was the very type of dangerous, violent, unlawful man who would commit *all* of the crimes charged here—not just the now-vacated sexual assault charge.

Other acts character evidence is generally excluded from admission in criminal trials because of the real danger that if such information is presented to the jury, the jury will convict the defendant for the wrong reasons. Wis. Stat. § 904.04(2); ***State v. Sullivan***, 216 Wis. 2d 768, 782, 576 N.W.2d 30 (1998).

As this Court explained in ***Whitty***, a core reason for exclusion is the "overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts". ***Whitty v. State***, 34 Wis. 2d 278, 292, 149 N.W.2d 557 (1967).

"In short, the exclusion of other acts evidence is based on the fear that an invitation to focus on an accused's character magnifies the risk that jurors will punish the accused for being a bad person regardless of his or her guilt of the crime charged." ***Sullivan***, 216 Wis. 2d at 783.

The admission of other acts evidence thus has a "pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture". *See* ***Strickland***, 466 U.S. at 695-696.

Here, the jury asked to see specific text messages related to pimping during deliberations. *See* (88:73). Instead, and without any limiting instruction or direction on how to find the text messages they wished to see, the jurors were handed an 181-page exhibit full of text messages related to

violence and hardcore drug dealing and suggestive photographs. (88:73-75).

Even if this Court agrees with the Court of Appeals that the evidence as to the remaining charges was "overwhelming," we still cannot be confident in the outcome because the jury's deliberations were poisoned when they were handed this exhibit.

We exclude other acts evidence because we recognize the very real risk that a jury will conclude that a defendant is guilty not because of the evidence presented to the charge, but because he is (based on the other acts) a person likely to engage in such illegal behavior. As the ***Machner*** court held, "[t]he messages and the pictures are in my opinion so inflammatory that I think a jury then and there might have convicted him of virtually anything." (107:40;App.212).

Mr. Sholar is entitled to a new trial on all counts.

iv. Even under an analysis of the prejudice of the deficiency on each count, Mr. Sholar has shown prejudice to entitle him to a new trial on all counts.

To be clear, the Court of Appeals' division of prejudice based solely on weighing of the sufficiency of the evidence was an unconstitutional application of ***Strickland***. But even under such an analysis, Mr. Sholar has met his burden to show prejudice entitling him to a new trial on all counts.

Mr. Sholar recognizes that the quantum of evidence the State presented with regard to the charges related to the pimping and trafficking of EC and SG (Counts One through Four and Six) was different than that presented with regard to the alleged sexual assault of SG (Count Five).

But this damning exhibit (a) was a central focus of the State's pimping/trafficking case and (b) improperly showed the jury that Mr. Sholar was the very type of person who would engage in violent illegal behavior such as pimping/trafficking.

First, for the non-sexual assault counts, the central question at trial was *who*, if anyone, EC or SG worked for: Shawnrell Simmons, Mr. Sholar, both, or neither. It was not whether they were prostituting.

The central piece of physical evidence the State used to connect Mr. Sholar (as opposed to Mr. Simmons) to these women was the phone found on him when arrested.

Both women testified that they worked primarily for Mr. Sholar, but that Mr. Simmons also was involved. (80:96-99,106-110,138,146,193-194,212).

The State charged Mr. Sholar with three counts related to EC: (1) Trafficking a Child; (2) Soliciting a Child for Prostitution; and (3) Pandering/Pimping. (2;4). The State's case for these charges rested on the jury accepting that Mr. Sholar (not Mr. Simmons) had pimped EC. *See* Wis. Stat. §§ 948.051(1), 948.08, and 944.33(2). The jury had reason to question who EC worked for:

- EC testified that she sought out work as a prostitute from Shawnrell Simmons. She stated that Mr. Simmons referred her to Mr. Sholar. (80:91-93).

- EC, however, only made the allegations against Mr. Sholar after she was arrested for a burglary and questioned by police about her involvement in that burglary. (80:136-38,160). EC admitted that she initially lied to police when she claimed no knowledge of the burglary. (80:160).

- EC indicated that Mr. Sholar punched her multiple times on one occasion; however, she explained that she faced more severe violence at the hands of Mr. Simmons and that she was afraid of Mr. Simmons: that he smacked her, choked her, spit on her, and sexually assaulted her at gunpoint. (80:138,147).

- The State also called NS, who testified that she worked independently as an escort at the Econolodge, where the State alleged Mr. Sholar pimped EC and SG (82:60-91). NS testified that she did not know SG but did know EC; however, she thought EC might have worked independently and could not say that EC worked for Mr. Sholar. (82:89-91).

- NS further testified that after EC was arrested for the alleged burglary, it was *Mr. Simmons*, not Mr. Sholar, who called NS and wanted her to talk with EC. (82:75-78).

- Importantly, though EC testified that she worked for Mr. Sholar and texted with him about prostitution, Detective McQuown testified that neither Mr. Sholar's name nor the number of the phone taken from him appeared *anywhere* in the contacts or messages on EC's phone. (80:121;83:38-39).

Beyond the now-vacated sexual assault charge, the State charged Mr. Sholar with two additional counts related to SG: (4) Human Trafficking and (6) Pandering/Pimping. (2). The State's case on these charges rested on the jury concluding that Mr. Sholar pimped SG. Here too, the jury had reason to question who SG worked for:

- SG acknowledged that she did not first disclose her allegations against Mr. Sholar to the police; it was her mother who first spoke to police. (80:215-216). She

testified that she stopped prostituting herself when her boyfriend got out of jail because she was afraid of how her boyfriend would judge her. (80:201-202).

- SG testified that she only worked for Mr. Sholar for two to three weeks in August of 2011. (80:187). She stated that though Mr. Sholar threatened her in September of 2011, she stopped working for him "probably the beginning of September." (80:187).

  Yet, the State also presented photos of "Sonya,"—the pseudonym SG used on the Backpage website—which were posted on September 23rd and September 27th—*after* she testified she had stopped working for Mr. Sholar. In one of these photos, she is posing with EC. (83:85-88;84:32-33;92:Trial Exhs.58-59).

  Notably, the two pimping-related counts the State charged involving SG (Counts 4 and 6) allegedly occurred between August 20th and September 16th. (87:35-42).

The State presented evidence reflecting that Mr. Sholar rented rooms at the Econolodge motel; however, Detective O'Leary testified that hotel staff obtained items from one of these rooms which included bras, condoms, and cell phone receipt with the name "Jonathan *Simmons*" on it. (82:45) (emphasis added).

The State also presented data from the hotel lobby's computer showing an internet history of "Backpage" ads being posted and viewed. (83:62-72,89-96). Detective McKee, though, testified that he was unable to find any data indicating who put the Backpage ads online other than an "email address with the name Candace" related to some of the photos. (83:111-112).

Mr. Sholar testified that he stayed at the Econolodge with his son. (84:17-18). He explained that he met EC, SG and other women, who he thought were working for Mr. Simmons. (84:19).[14]

The jury—having to weigh evidence suggesting that Mr. Sholar pimped and trafficked EC and SG against evidence indicating that Mr. Simmons did so—asked to see particular text messages related to pimping. (88:73). "Can we request Lamont's phone records, 544 0125, looking for in—slash—out bounds regarding *I got dollars* text messages *while with client*." (88:73)(emphasis added).

Instead of being handed what they asked for, they were handed all of Exhibit 79. (88:73-75).[15]

Where the central question on the non-sexual assault counts was *who* EC and SG worked for when prostituting, Exhibit 79—rife with text messages portraying Mr. Sholar as a violent drug dealer and pictures of many women in lingerie in salacious poses—improperly told the jury that Mr. Sholar was the very type of person who would commit these offenses.

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[14] The Court of Appeals stressed in its analysis that the trial court at sentencing found Mr. Sholar's testimony "wholly incredible." ***Sholar II***, ¶¶ 67-82;(App.120-124). The Court of Appeals "agree[d]" with the trial court. ***Id.***, ¶ 82;(App.124). Though a court may weigh credibility at a ***Machner*** hearing in assessing deficient performance, a court may not substitute its credibility judgment for the jury's in assessing prejudice. ***Jenkins***, 355 Wis. 2d 180, ¶ 64, n.31.

[15] Out of respect for the privacy of the many women pictured in lingerie in salacious poses, Mr. Sholar has not included this exhibit in the Appendix. He stresses, though, that it is in the record and warrants review given that the jury was handed all of it during deliberations. (92:Trial Exh.79).

Further, where SG alleged that Mr. Sholar threatened her after she stopped working for him, Exhibit 79 contained a hearsay text message from someone noting that Mr. Sholar had indeed threatened a person with SG's name. (92:Trial Exh.79;56:PCM Exh.B, Messages 159-60).

The exhibit told the jury that Mr. Sholar was a violent, dangerous man outside of the charges. From this, the jury could have concluded he was more likely to be the violent man E.C. an S.G. described related to the charges. The exhibit told the jury that Mr. Sholar was selling narcotics including heroin and prescription pills. From this, the jury could have concluded that Mr. Sholar, if willing to engage in that serious illegal activity, was the type of man willing to engage in pimping and human trafficking.

Simply put, even if the State had sufficient evidence to convict him of the remaining counts absent the error, a court cannot be confident in those verdicts because Exhibit 79 was handed to the jury during deliberations.

This Court should reverse the decision of the Court of Appeals and remand for a new trial on all six counts.

II. The State Forfeited Opportunity to Argue that Mr. Sholar Did Not Show Prejudice on All Counts When it Failed to File a Petition for Review Following ***Sholar I***.

This Court should hold that the State forfeited opportunity to argue that Mr. Sholar did not meet his prejudice burden on all counts as it failed to file a petition for review following ***Sholar I***.

A. A party seeking further review of an adverse Court of Appeals decision must file a petition for review.

Wisconsin Statute § 809.62 provides that a party who wishes to challenge an adverse decision "may file with the supreme court a petition for review of an adverse decision of the court of appeals." Wis. Stat. § 809.62(1m). By the plain language of the statute, a party may only file a petition from an "adverse decision." *See* ***id.***

Failure to file a petition for review within the thirty-day timeframe deprives this Court of subject matter jurisdiction to review the decision. ***St. John's Home of Milwaukee v. Continental Cas. Co.***, 150 Wis. 2d 37, 43, 441 N.W.2d 219 (1989).

The statutes provide that once a petition is filed, a party opposing the petition may file a response addressing any reasons for denying the petition and any "alternative ground supporting the court of appeals result or a result less favorable to the opposing party than that granted by the court of appeals." Wis. Stat. § 809.62(3). The statutes also provide a procedure for a cross petition. Wis. Stat. § 809.62(3m).

Additionally, the statutes permit the Court of Appeals to reconsider its decision within thirty days of the filing of a petition for review. Wis. Stat. § 809.24(3).

B. Our forfeiture rules are designed to promote judicial efficiency and prevent "sandbagging".

The principle of forfeiture—the idea that a party cannot in fairness withhold making an argument to one court only to raise it later—stands as a central tenant of Wisconsin's appellate system. The forfeiture rule "promotes

efficient and fair litigation." ***In re Guardianship of Willa L.***, 2011 WI App 160, ¶ 26, 338 Wis. 2d 114, 808 N.W.2d 155.

Forfeiture, a rule of judicial administration, encourages diligence and "prevents attorneys from 'sandbagging' opposing counsel by failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal"). ***State v. Ndina***, 2009 WI 21, ¶ 30, 315 Wis. 2d 653, 761 N.W.2d 612; ***Schill v. Wis. Rapids Sch. Dist.,*** 2010 WI 86, ¶ 45, n.21, 327 Wis. 2d 572, 786 N.W.2d 177. In so doing, it ensures that "judicial resources are used efficiently." ***In re Willa L.***, 338 Wis. 2d 114, ¶ 26.

This Court has held that forfeiture principles apply to its review of a case: a party may not raise claims to this Court which it failed to raise in either a response to a petition for review or cross petition. ***State v. Smith***, 2016 WI 23, ¶ 41, 367 Wis. 2d 483, 878 N.W.2d 135; ***State v. Sulla***, 2016 WI 46, ¶ 7, n.5, 369 Wis. 2d 225, 880 N.W.2d 659.

C. The State forfeited its opportunity to challenge whether Mr. Sholar met his burden to show prejudice on all counts when it failed to file a petition for review following ***Sholar I.***

The Court of Appeals reversed for a ***Machner*** hearing on whether counsel had a strategic reason for failing to object to Exhibit 79 being admitted and handed to the jury:

> In summary, we conclude Sholar was entitled to a ***Machner*** hearing on his claim that counsel was ineffective for failing to object when hundreds of text messages were both admitted into evidence and provided to the jury during deliberations. Without a ***Machner*** hearing we cannot determine whether counsel's decision not to object was a reasonable strategic choice.

Sholar I, ¶40;(94:14;App.139).

The Court explained that it found that Mr. Sholar's post-conviction motion established a reasonable probability of a different outcome at trial:

> With respect to prejudice, Sholar's motion establishes a reasonable probability that, had the text messages not been admitted into evidence and provided to the jury during deliberations, the result of the trial, at least to as to the sexual assault charge, would have been different. We therefore reverse that portion of the circuit court's order denying Sholar's claim that his attorney was ineffective for failing to object when hundreds of text messages were both admitted into evidence and provided to the jury during deliberations. We remand for the circuit court to conduct a ***Machner*** hearing on that claim.

Id.;(94:14;App.139).

Three important factors bear consideration here:

- First, the Court of Appeals did not order remand only on Count Five (the sexual assault charge)—it remanded on all counts. *See generally* ***Sholar I***;(App.126-139).

- Second, the Court of Appeals' prejudice analysis did not require any further fact-finding: an evaluation of the prejudice of this claim only involved review of the trial record. *See generally* ***id***;(App.126-139).

- Third, if the Court of Appeals did not find that Mr. Sholar had met his burden to show prejudice, there would have been no reason to remand for the ***Machner*** hearing. *See, e.g.* ***State v. Beauchamp***, 2011 WI 27, ¶ 44, 333 Wis. 2d 1, 796 N.W.2d 780; ***State v. Jacobs***, 2012 WI App 104, ¶¶ 31-33, 344

Wis. 2d 142, 822 N.W.2d 885 (affirming denials of ***Machner*** hearings based on conclusion that defendant did not meet burden to show prejudice).

Yet, instead of filing a petition for review following this adverse decision, the State waited until remand to argue that the Court of Appeals' decision was open to interpretation such that it should be able to continue to argue prejudice. (106:115-116).

It is not just that the State failed to file a petition for review challenging the Court of Appeals' decision concluding that Mr. Sholar met his burden to show prejudice to entitle him to a ***Machner*** hearing—it is further that the State did not file a petition for review to challenge the determination that reversal for the hearing was warranted *on all counts*.

The State's failure to file a petition implicates the concerns against "sandbagging" and judicial inefficiency which rest at the heart of the forfeiture rule.

As to "sandbagging," by not filing a petition, the State did not give Mr. Sholar notice prior to remand that it believed the question of prejudice remained open for debate. Had the State filed a petition, Mr. Sholar would have then been able to file a cross-petition, preserving his challenges to the multiple remaining issues he raised which the Court of Appeals denied in his first appeal.

Further, by not filing a petition, the State was in essence able to profit from the error resulting in reversal: if the circuit court had properly held a ***Machner*** hearing prior to denying Mr. Sholar's post-conviction motion—as the Court of Appeals concluded the court should have done—the State would not have had two opportunities to argue prejudice before the post-conviction court and Court of Appeals.

As to judicial efficiency, by not filing a petition, the State did not notify the Court of Appeals that it found its language unclear and open for interpretation. Had it filed a petition, the Court could have reconsidered or clarified its decision. Wis. Stat. § 809.24(3).

Instead, the State waited until remand to argue that the Court of Appeals' decision was open for interpretation. In return, the ***Machner*** court (now a different judge) had to review all of the trial transcripts to perform the trial-record prejudice analysis which the Court of Appeals already performed. (*See generally* 107;App.173-214). The Court of Appeals then performed that same trial-record analysis again on the second appeal. *See generally* ***Sholar II***;(App.101-125).

Mr. Sholar recognizes that the Court of Appeals explained in ***Sholar II*** that its language in ***Sholar I*** was not a "model of clarity," and that it did wish the circuit court to conduct both parts of the ineffective assistance analysis upon remand. ***Sholar II***, ¶ 16;(App.106). But we only know this because the State continued to argue the question of prejudice on remand—though it never sought the review of this Court following the adverse decision.

If the State did not forfeit this question, consider what that would mean in reverse: in addition to the phone exhibit issue, Mr. Sholar also argued other claims, including that the trial court erred when it denied his attorney's request for a mistrial after the State played an interrogation recording where Mr. Sholar stated that he recently "beat" an armed robbery and had been to prison three times. ***Sholar I***, ¶¶ 34-36;(94:11-12;App.136-137).

In ***Sholar I***, the Court of Appeals noted that it would "briefly" address this argument and affirmed the circuit court's denial of his motion on the recording claim. ***Id;***(94:11-12;App.136-137).

Mr. Sholar did not file a petition for review from that adverse decision when he won reversal for a ***Machner*** hearing on the text message exhibit claim. If the State could argue on remand that the prejudice from the text message exhibit (and whether the Court of Appeals found prejudice only as to one count or all) was still open for interpretation despite the reversal, Mr. Sholar presumably should have been able to continue to argue the recording claim. He did not do so because of our longstanding principles of forfeiture. The State should be held to the same standard.

CONCLUSION

For these reasons, Mr. Sholar respectfully requests that this Court enter an order reversing the Court of Appeals' decision affirming the circuit court's order denying his post-conviction motion for a new trial on Counts One, Two, Three, Four, and Six, vacating his convictions and sentences on Counts One, Two, Three, Four, and Six, and remanding this matter to the circuit court for a new trial.

Dated this 7th day of December, 2017.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 10,522 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 7th day of December, 2017.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 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 § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings 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 of 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 first names and last initials 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 7th day of December, 2017.

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Page

* Documents in the Appendix have been redacted to comport with rules of confidentiality. In addition to the names of the two women involved in the allegations in this case, counsel has also redacted the names of other non-law enforcement witnesses.