STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP897-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LAMONT DONNELL SHOLAR,

Defendant-Appellant-Petitioner.

ON REVIEW FROM A COURT OF APPEALS DECISION AFFIRMING A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE THOMAS J. MCADAMS, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

I. Could the circuit court properly find that trial counsel's failure to object to the jury receiving an exhibit during deliberations[1] prejudiced Sholar on one conviction supported by weak evidence only, but not on the other five convictions?

The circuit court answered yes. It determined that counsel's failure to object prejudiced Sholar on the sexual assault charge because the evidence against him on that charge was weak, but not on the trafficking charges because the evidence against Sholar on those charges was overwhelming. The court of appeals affirmed.

This Court should affirm the decision and hold that, after a *Machner* hearing, a court can properly determine that counsel's deficient performance prejudiced a defendant on one charge but not others.

II. In *Sholar I*, the court of appeals remanded this case for a *Machner* hearing, stating that "[w]ith respect to prejudice, Sholar's motion establishes a reasonable probability that, had the text messages not been admitted into evidence and

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[1] Sholar frames the issue as though the lower courts found that counsel's failure to object to exhibit 79's admission into evidence at all was deficient performance. (*See, e.g.,* Sholar's Br. 8, 29.) They did not, and that claim is forfeited. *See State v. Lass*, 194 Wis. 2d 591, 604–05, 535 N.W.2d 904 (Ct. App. 1995). As the court of appeals recognized in *Sholar II*, at no point during this litigation did Sholar cite to any part of the record indicating that the jury saw any parts of exhibit 79 before deliberations other than those parts referenced during the witness testimony. *State v. Sholar (Sholar II)*, No. 2016AP879, 2017 WL 2704178, ¶ 2 n.3 (Wis. Ct. App. June 20, 2017) (unpublished). (R-App. 101.) The court of appeals therefore refused to address that argument. *Id.* Sholar ignores that fact and still has not even attempted to cure that deficiency. Accordingly, the State limits its briefing to the claim that was properly raised, adjudicated, and preserved.

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 court of appeals establish that Sholar had been prejudiced on all counts with this statement?

The court of appeals answered no. It said that while its order for remand in *Sholar I* "was not a model of clarity," it did not rule that trial counsel's performance was deficient in any manner or that there was prejudice on any of the charges; "those issues were left to the *Machner* court to address."

This Court should affirm the decision and hold that the State did not need to petition for review to challenge Sholar's erroneous interpretation of the court of appeals' decision in *Sholar I*.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with any case meriting this Court's review, oral argument and publication are warranted.

INTRODUCTION

Sholar asks this Court create a windfall for defendants by holding that if an attorney error affected the outcome on any charge in a multi-charge trial, the court must find that the defendant was prejudiced on all counts regardless of how overwhelming the evidence was on other convictions, and overturn the convictions on all charges. In the alternative, he asks this Court to break *Strickland v. Washington*'s simple test for prejudice in order to "fix" it by imposing a complicated, unnecessary inquiry in multi-count cases. But *Strickland*'s plain language shows that the lower courts correctly applied the test for prejudice in this case and properly found that Sholar was prejudiced on only one of the convictions, and it is

black-letter law that the remedy for a Sixth Amendment violation must be tailored to the injury suffered.

Strickland states that the inquiry for prejudice is whether "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt."[2] A jury does not determine "guilt" as an all-or-nothing matter when there are multiple charges in a trial; the jury determines guilt on each separate charge. Consequently when the State charges a defendant with multiple charges, the court must look to the strength of the evidence on each charge to determine whether "the decision reached" on each charge "would reasonably likely have been different absent the errors."[3] That is what the circuit court and the court of appeals did in this case. And by vacating the sexual assault charge, the courts appropriately tailored the remedy to the constitutional violation.

Sholar's additional claim that the State was required to petition this Court for review to challenge his erroneous interpretation of the court of appeals' remand for a *Machner*[4] hearing fails. The court of appeals rejected Sholar's interpretation of its opinion, and his claim ignores the court of appeals' error-correcting function.

This Court should affirm the court of appeals.

STATEMENT OF THE CASE

The charges, trial, and postconviction motion

Police arrested Lamont Sholar after two victims, EC and SG, told police that Sholar had been pimping them out of

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[2] *Strickland v. Washington*, 466 U.S. 668, 695 (1984).

[3] *Id.* at 696.

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

several motel rooms near the Milwaukee airport, including an Econolodge. (R.2:3-4.) The State charged Sholar with five counts stemming from his pimping and trafficking of SG and EC: one count of trafficking of a child, one count of soliciting a child for prostitution, two counts of pandering/pimping, and one count of human trafficking. (R.2:1-2.) The State also charged him with one count of second-degree sexual assault of SG. (R.2:2.) Sholar claimed that an acquaintance, Shawnrell Simmons, was responsible for trafficking the girls, and that Sholar had never had any sexual contact with SG. Sholar pled not guilty and the case proceeded to trial. (R.67:47.)

The State first called Detective Lynda Stott from the Milwaukee Police Department. (R.80:27.) Stott explained human trafficking and how the pimp-prostitute relationship typically evolves in these type of cases. (R.80:28-53.) She testified about how she became involved in the investigation of Sholar. (R.80:53-55.) Stott explained that EC had spoken to detectives, who began to investigate at the Econolodge. (R.80:55-56.) She explained that several items of women's clothing and the hard drive from the hotel's lobby computer were collected. (R.80:56-60.)

The State then called EC to the stand. (R.80:85.) EC, who was 17 years old at the time of the crimes, testified that she first met Simmons, and he told her that he wanted her to prostitute for him. EC said that because two of her friends were already working for Simmons, she starting working for Sholar. (R.80:86, 89, 91-92.) EC testified that Sholar or other girls working for Sholar and Simmons took suggestive pictures of her and of the other victim, SG, and posted them on the internet with Sholar's phone number. (R.80:99-100, 104-06.) These photos of EC and the other girls were introduced as exhibits 32 through 34. (R.80:99-100; *see also* 92:Ex. 32:1-3; Ex. 33:1; Ex. 34:1-2.) EC testified that she

worked for Sholar by taking money from men and engaging in sex acts at homes and at hotels at least 200 times. She said that Sholar would scare her and make her think he wanted to hurt her. EC said that Sholar "bruised" and "punched" her several times and threatened to hurt her if she left him. (R.80:108-15.) Exhibit 35 was entered into evidence, showing bruises on EC. (R.92:Ex. 35.) She further testified that when she would take a call from someone who wanted sex, Sholar would set the price, she would meet the person, take their money first and secure it, and engage in sex. When the person was gone, she would contact Sholar and give him the money. (R.80:118-24.) She also testified that Sholar was involved in a burglary at her friend's house and that he threatened her with violence through texts. (R.80:124-29.)

The State then called SG. (R.80:167.) SG testified that Sholar forced her to engage in sex acts with men for money. (R.80:179-80, 184, 186.) Like EC, she testified that Sholar took suggestive pictures of her and posted them on the internet, gave her a cell phone to receive calls and texts from people who wanted sex for money, and was forced to do many different sex acts, including some she graphically described as "weird." (R.80:180, 194-96.) The State introduced Exhibit 49, which SG identified as pictures of her that had been posted to Backpage.com. (R.80:181-82; 92:Ex. 49.) She testified that Sholar threatened to harm her and her family if she would not prostitute herself. (R.80:184-86.) SG testified that Sholar provided her with ecstasy. (R.80:207.)

Regarding the sexual assault, SG testified that there were several times Sholar wanted to have sex with her. (R.80:198.) She said that one particular time, she told him she was tired, "didn't feel like it," and began to walk toward the bathroom. (R.80:198-99, 218.) She claimed that Sholar grabbed her arm, bent her over the bed, and had sex with her. (R.80:200.) She said she had sex with him several times after

that where she did not consent, but did not say "no." (R.80:219.)

The State requested to publish exhibits 1-50. (R.82:29.) The court granted the State's motion and the exhibits were passed around to the jury. (R.82:29-30.) They included all of the Backpage.com ads EC and SG had testified about, which contained provocative photos of both of them. Exhibits 57-65, printouts of several Backpage.com ads that a detective downloaded at the direction of EC, were also introduced. (R.82:32.)

Several other witnesses corroborated the testimony of EC and SG. Nicole Serdynski, who testified that she was an "escort" who performed sex for money and knew Sholar, EC and SG, confirmed the testimony of both EC and SG about Sholar's involvement with Simmons in the prostitution operation out of the Econolodge. (R.82:58-67.) The manager of the Econolodge testified and identified Sholar as having rented more than one room at a time at the hotel on at least two occasions. (R.83:62-72.)

Both EC and SG had testified that they communicated with Sholar about the prostitution through text messages. (*See* R.94:8.) The State introduced testimony from Detective Richard McQuown, who was trained to examine cell phones and human trafficking evidence, about text messages found on EC's phone. (R.83:20-21.) He testified that several of the text messages on EC's phone appeared to be people who had never met before arranging meetings for sex. (R.83:21.) He also testified that the phone contained several provocative pictures of EC. (R.83:26-27.)

Detective Richard McKee, who was also trained to examine phones and human trafficking evidence, had examined Sholar's phone and printed the contents, which became exhibit 79. (R.83:76-83, 113.) He testified about his

examination and about the incoming and outgoing call log, pictures found on the phone, and the content of several text messages. (R.83:97-113; 84:184-87; 87:4-15.) McKee testified that several pictures found on Sholar's phone matched the Backpage.com ads placed from the Econolodge computer. (R.83:86-91.) He further testified that many of the text messages showed several people, including someone with EC's first name and phone number, texting someone named "L." (R.87:5-9.) Some of the incoming messages were addressed to "Lamont." (R.87:11.) And there was an outgoing message to a person with EC's first name that said "just so you know I also put you down as a special of $100 hour just to increase the calls 'cause something got to give; I can't keep paying for that room on my own." (R.87:12.) EC texted back saying she was not the only girl working from the room and that "every other girl just goes, handles business and that's it." (R.87:13.) Sholar replied "regardless if you bust moves in there or not, you the only one sleeping in there, shit Nikki pay for her own room; but if you feel like that, then get down with her." (R.87:13.)

A detective testified that Sholar had admitted selling marijuana in relation to the burglary incident. (R.84:130.) Exhibit 82, a recording of one of Sholar's interviews with police, shows Sholar's admission. (R.84:150; 92:Ex. 82:03:50.) The jury also heard Sholar say he had been to prison three times and that he "fought a case for a whole year . . . and by the grace of God I beat it." (R.92:Ex. 82:5:20-5:42.)

Sholar testified, claiming that Simmons, not Sholar, was the trafficker. (R.84:18.) Sholar said that he knew that Simmons was pimping girls for prostitution, including the victims EC and SG, but that he did not have any girls prostituting for him. Sholar acknowledged, though, that he "developed a friendship" with 17-year-old EC. (R.84:18-20.) He further identified SG, EC and multiple other prostitutes

working for Simmons in pictures from the internet, but stated that he was not pimping. (R.84:29-38.) Sholar testified that he was using and selling K2. (R.84:43.) He said that the cell phone found on him when he was arrested belonged to Simmons, not to him, but that he had been using it because his phone was broken. (R.84:48-49.)

Sholar also testified that he only knew SG through an acquaintance, Sarah, who was SG's former roommate. (R.84:26-27.) Sholar claimed that Sarah called him when she was being kicked out of the apartment, and he came over to help Sarah get her things. (R.84:27.) He testified that SG thought he was a "nice guy" and asked for his phone number, but he refused. (R.84:28-29.) He said the only other time he saw SG was once at the Econolodge, where he believed she was working for Simmons. (R.84:29.) Sholar claimed he had no contact with SG at all, never had any kind of relationship with her, and never had any kind of sexual contact with her. (R.84:29-30.)

During its deliberations, the jury asked for and received the contents of EC's phone. (R.94:9.) The jury also asked, "[c]an we request [Sholar's] phone records, 544 0125, looking for in[/]out bounds regarding I got dollars text messages while with client."[5] (R.94:9.) The State and defense counsel agreed to provide the jury with the entirety of exhibit 79 containing the phone records, including approximately 1400 text messages. (R.94:5, 9.) Only a few of these texts had been introduced as evidence, and several that the jury had not seen contained information about drug dealing and threats of violence. (*See* R.94:9.)

[5] It is unclear from the trial transcripts or the exhibit what message the jury was requesting. There does not appear to be any message stating "I got dollars."

The jury convicted Sholar on all six charges and he was sentenced to forty-five years, with thirty years of initial confinement and fifteen years of extended supervision. (R.28.)

Sholar filed a postconviction motion. (R.55.) As relevant here, Sholar alleged that his trial counsel was ineffective for allowing the full exhibit to be given to the jury. (R.55:4-15; *see* 56:22-121.)

In a written order, and without a hearing, the circuit court denied the motion. (R.62.) The circuit court found that Sholar was not prejudiced by the text messages contained in exhibit 79 because the evidence against Sholar "was overwhelming [and] the jury would have still found [him] guilty without the improperly admitted evidence, be it other acts evidence or hearsay." (R.62:8.) The court said that "[g]iven the amount of evidence in this case against the defendant, there is no reasonable probability that the result of the proceeding would have been different had the exhibits not been . . . provided to the jury during their deliberations." (R.62:9.)

Sholar appealed. (R.64.)

The court of appeals decision in *Sholar I* remanding for a *Machner* hearing

The court of appeals reversed the circuit court's order denying the postconviction motion. It concluded that Sholar was entitled to a *Machner* hearing on his trial attorney's failure to object when the jury was given exhibit 79 during its deliberations. (R.94:1-2.) After reviewing Sholar's argument why his attorney performed deficiently for failing to object to providing the jury the whole exhibit and whether he was prejudiced, the court of appeals concluded that that "at the very least, the impact of this evidence could have been significant as to the sexual assault charge." (R.94:10.)

In support, the court of appeals referred to Sholar's allegations in his postconviction motion that the text messages influenced the jury on the sexual assault charge because they "suggest[ed] that he is the type of person who threatens violence against others and is involved in the dealing of multiple hardcore narcotics." (R.94:11.) Sholar also alleged that there was a reasonable likelihood that the texts and pictures "affected the jury's decision to convict him of forcible sexual assault." (R.94:11.) The court of appeals concluded that "Sholar's allegations in this regard, if true, are sufficient to entitle Sholar to a *Machner* hearing." (R.94:11.)

The *Machner* hearing and circuit court order

On remand, Sholar's trial counsel testified that the theory of defense at trial was to pin everything on Simmons. (R.107:27.) Counsel testified that because only very few of the messages mentioned Sholar, he did not object to sending the exhibit to the jury. (*See* R.107:27.) No one else testified.

After counsel's testimony, the parties discussed the scope of the court of appeals' remand. (R.106:109-19.) Sholar maintained that the court of appeals' statement that his motion "establishes a reasonable probability that, had the text messages not been admitted into evidence and provided to the jury during deliberation, the result of the trial, at least to the sexual assault charge, would have been different," was a definitive finding of prejudice on all counts. (R.106:115.) He argued that, therefore, the remand was only to address deficient performance. (R.106:112-13.) The State disagreed. (R.106:113.) The State noted that the court of appeals did not state that Sholar had been prejudiced, but rather that the allegations in Sholar's postconviction motion "if true, are sufficient to entitle Sholar to a *Machner* hearing." (R.106:114; 94:11.) It argued that the court of appeals had remanded for a hearing on both prongs of ineffective assistance. (R.106:114.)

The circuit court reviewed the court of appeals' decision remanding the case and rejected Sholar's argument that the court of appeals had already found prejudice on all counts. (R.107:16.) It concluded that the decision charged it "to conduct a *Machner* hearing and rule on both prongs" of Sholar's claim. (R.107:16.) In support of this conclusion, the circuit court noted that "appellate courts are usually error-correcting courts and leave the fact finding to the trial courts" and that "[i]t would be unusual . . . for an appellate court to essentially order or direct a verdict on a legal issue before a trial court hears it." (R.107:16.)

The circuit court then vacated Sholar's conviction and his sentence for second-degree sexual assault, but denied his motion to vacate his other convictions. (*See* R.103.) The circuit court determined that, regarding the trafficking-related counts, not objecting to the text messages when the theory of defense had been to pin everything on Simmons—who was mentioned in the messages hundreds more times than Sholar—was a "sound trial strategy. . . . Much of what is in these messages is mundane." (R.107:22.) It also observed that "virtually all of the things Mr. Sholar complains of here came in in this trial in more than one way." (R.107:24.) There was corroborating testimony about violence, drug use, threats, burglary, car theft, fetishes, group sex parties, and pimping. (R.107:24-25.) Accordingly, the circuit court concluded that "[g]iven that circumstance, I believe there was no chance of a different result on the trafficking counts. So as to the trafficking counts which would be Counts 1, 2, 3, 4 and 6 I find that the performance was certainly not prejudicial as the evidence on those counts was overwhelming." (R.107:25.)

However, as to count five for second-degree sexual assault, the circuit court found that there was much less evidentiary support: "no corroborating witness, no physical evidence, no DNA, and . . . inconsistent versions" from the

victim. (R.107:25-26.) The circuit court observed that allowing the jury to see the exhibit "didn't have to be all or nothing." (R.107:27.) The court said the biggest problem with the exhibit in its entirety being given to the jury

> is the pictures . . . these pictures are shocking, given the age of [EC] if that is [EC] in the photos, there's an argument that they're child porn, and there are hundreds of snapshots on this phone, and in my opinion they serve to inflame the jury. . . . I can't see how a fair trial could be had on the sexual assault count with the jury being given these photos.

(R.107:28-29.) It therefore found that "the decision not to further challenge, not to edit, not to object in my opinion so undermined the proper functioning of the process that the trial cannot be relied on as having produced a just result on the sexual assault charge." (R.107:36.)

The court of appeals' decision in *Sholar II*

Sholar appealed, claiming that the circuit court erred in its interpretation of the court of appeals' decision in *Sholar I* and should not have addressed prejudice on remand. *See State v. Sholar (Sholar II)*, No. 2016AP879, 2017 WL 2704178, ¶¶ 1-2 (Wis. Ct. App. June 20, 2017) (unpublished). (R-App. 101.) He also claimed that trial counsel's deficient performance in allowing exhibit 79 to be given to the jury in its entirety prejudiced him on all six counts, not only on the sexual assault charge. *Sholar II,* 2017 WL 2704178, ¶ 2. (R-App. 101.) The State did not cross-appeal the circuit court's decision to vacate count five. *Sholar II,* 2017 WL 2704178, ¶ 12. (R-App. 102.) The State argued, however, that the *Machner* court had properly concluded that there was not a reasonable probability of a different result on trafficking charges had the jury not been given exhibit 79 during deliberations because the evidence against Sholar on those counts was overwhelming. *Sholar II,* 2017 WL 2704178, ¶ 25. (R-App. 104.)

The court of appeals rejected both of Sholar's claims and affirmed. *Sholar II,* 2017 WL 2704178, ¶ 3. (R-App. 101.) It determined that while the "court's choice of wording in the order for remand in *Scholar I* was not a model of clarity," under no construction could it "be read to mean that that this court found prejudice entitling Sholar to a new trial on all the charges as he now argues." *Sholar II,* 2017 WL 2704178, ¶¶ 16, 18. (R-App. 103.) The court explained,

> ¶19 This court specifically reversed that portion of the trial court's order denying Sholar's claim that his attorney was ineffective for allowing all of exhibit 79 to be provided to the jury during deliberations and we remanded this matter for a *Machner* hearing on that claim. This court did not rule that trial counsel's performance was deficient in any manner nor did this court rule there was prejudice as to any of the charges. Those issues were left to the *Machner* court to address.
>
> ¶20 The *Machner* court properly interpreted our decision on remand and fully addressed Sholar's ineffective assistance claims during the *Machner* hearing.

Id. ¶¶ 19-20. (R-App. 103.)

As to Sholar's substantive claim, the court of appeals determined that the *Machner* court properly concluded that Sholar suffered no prejudice on the remaining five charges because the evidence against him on those charges was overwhelming. *Sholar II,* 2017 WL 2704178, ¶ 28. (R-App. 104.) It undertook an extensive review of the circuit court's findings on the evidence elicited at trial. *Sholar II,* 2017 WL 2704178, ¶¶ 29-82. (R-App. 104-10.) The court of appeals agreed that the testimony from multiple witnesses and the physical evidence recovered supported Sholar's conviction on the trafficking-related charges, and that the trial court's finding that Sholar's own testimony was "wholly incredible" was not clearly erroneous. *Id.* It concluded that "Sholar's

argument ignores that even without exhibit 79 . . . . [t]he evidence clearly portrayed Sholar as a violent, threatening, controlling pimp who enslaved E.C., S.G., and other young girls in the sex trafficking trade, and who was involved in selling drugs." *Sholar II,* 2017 WL 2704178, ¶¶ 83-84. (R-App. 110.) It therefore affirmed Sholar's conviction on the five trafficking-related counts. *Sholar II,* 2017 WL 2704178, ¶ 88. (R-App. 110.)

ARGUMENT

I. Sholar is not entitled to a new trial on all counts because the circuit court properly determined that he was only prejudiced as to one of them.

A. Standard of review.

This case requires this Court to address the proper interpretation of *Strickland v. Washington*, 466 U.S. 688 (1984). The proper interpretation of case law is a question of law that this Court reviews de novo. *State v. Starks*, 2013 WI 69, ¶ 28, 349 Wis. 2d 274, 833 N.W.2d 146.

Whether a defendant was denied the constitutional right to effective assistance of counsel presents a mixed question of law and fact. *State v. Mayo*, 2007 WI 78, ¶ 32, 301 Wis. 2d 642, 734 N.W.2d 115 (citation omitted). A reviewing court upholds a circuit court's findings of fact "unless they are clearly erroneous." *Id.* (citation omitted). "Whether counsel's performance was deficient and prejudicial to his or her client's defense is a question of law" reviewed de novo. *Id.* (citation omitted).

B. Relevant law.

It is well-settled that the right to counsel contained in the United States Constitution[6] and the Wisconsin Constitution[7] includes the right to the effective assistance of counsel. *Strickland*, 466 U.S. at 686. A defendant who asserts ineffective assistance must demonstrate: (1) counsel performed deficiently; and (2) the deficient performance prejudiced the defendant. *Id.* at 687. "The defendant has the burden of proof on both components" of the *Strickland* test. *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997) (citing *Strickland*, 466 U.S. at 688).

To prove deficient performance, a defendant "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted). However, as Sholar correctly states, deficient performance is not at issue here because in *Sholar II*, the State did not dispute that trial counsel performed deficiently by failing to object to the jury being given all of exhibit 79. (*See* Sholar's Br. 19.) The parties dispute only the lower courts' prejudice analysis.

"The defendant may not presume the second element, prejudice to the defense, simply because certain decisions or actions of counsel were made in error." *State v. Balliette*, 2011 WI 79, ¶ 24, 336 Wis. 2d 358, 805 N.W.2d 334. To prove prejudice, Sholar "must show that [counsel's deficient

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[6] U.S. Const. amends. VI, XIV.

[7] Wis. Const. art. I, § 7.

performance] actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. "It is not sufficient for the defendant to show that his counsel's errors 'had some conceivable effect on the outcome of the proceeding.'" *State v. Domke*, 2011 WI 95, ¶ 54, 337 Wis. 2d 268, 805 N.W.2d 364 (citation omitted). Sholar "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." *Strickland*, 466 U.S. at 694; *State v. Love*, 2005 WI 116, ¶ 30, 284 Wis. 2d 111, 700 N.W.2d 62.

When a defendant receives ineffective assistance of counsel, the remedy "should be tailored to the injury suffered from the constitutional violation and should not necessarily infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 364 (1981).

C. The only reasonable construction of *Strickland* demands a consideration of the evidence on each count to determine whether a defendant was prejudiced by a particular action of counsel.

This Court need look no further than *Strickland* to determine that the circuit court and the court of appeals properly addressed prejudice in this case when they found that, based on the totality of the evidence, Sholar was not prejudiced on the trafficking charges. By its own language, *Strickland* requires that the court assess the strength of the evidence presented on each charge when analyzing whether a particular act or omission of counsel prejudiced the defendant.

The Supreme Court in *Strickland* gave explicit direction on how courts are to evaluate prejudice. *See Strickland,* 466 U.S. at 695-96. It stated that generally, a

defendant is prejudiced if "the result of the proceeding" would have been different. *Id.* at 694. But *Strickland*'s explanation of that phrase was more precise. *Id.* at 695. *Strickland* stated that "the question is whether there is a reasonable probability that, absent the errors, *the factfinder would have had a reasonable doubt respecting guilt*." *Id.* (emphasis added). A jury in a multi-count case does not make a general determination of "guilt." It makes a determination of guilt on each charge. This language plainly allows a court to find that a defendant was prejudiced on one count with weak evidence but not on others with overwhelming evidence.

Furthermore, *Strickland* recognized that some errors will have little effect or no effect, while some may alter the entire evidentiary picture. *Id.* Therefore, a court "must consider the totality of the evidence before the judge or jury" when evaluating prejudice. *Id.* The Court then stated that "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." *Strickland*, 466 U.S. at 696. The Court finally explained how a court must evaluate prejudice: "[t]aking 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.* (emphasis added).

If *Strickland* required a reversal on all charges any time it was reasonably likely that an error had an effect on any verdict, a review of the totality of the evidence to determine the strength of the State's case would be unnecessary. And again, "the decision reached" in any multi-count case is not one on guilt or innocence as a whole. The decision reached in a multi-count case is the decision of guilt or innocence on each count. Similarly, the jury does not return a single verdict in a

multi-count case. The jury returns a verdict on each charge. Plainly, *Strickland* directed courts to consider whether counsel's error affected the outcome on each count when it held that courts must consider the totality of the evidence to determine whether the error affected "the decision reached." As Sholar notes, the purpose of requiring effective assistance of counsel is "to ensure a fair trial." (Sholar's Br. 20 (citing *Strickland*, 466 U.S. at 686).) But there is nothing fair about giving a defendant a do-over trial on charges the State proved by overwhelming evidence based on an error that had no effect on the verdict or the decision reached on those charges. Ergo, *Strickland* directs that prejudice be assessed on each charge, not simply as an all-or-nothing conclusion.

The circuit court and court of appeals therefore properly assessed prejudice here. They determined that there was a reasonable probability that the decision reached on the sexual assault charge would have been different. They then appropriately tailored the remedy to the injury suffered from the constitutional violation. *Morrison*, 449 U.S. at 364.

The courts did not employ an "outcome-determinative standard" or apply a "sufficiency-of-the-evidence-absent-the-error test" as Sholar claims. (Sholar's Br. 24.) Rather, both courts looked, as they must, at the totality of the evidence for the various charges introduced at his trial. *See Thiel*, 264 Wis. 2d 571, ¶ 80. It is true that merely showing that the evidence was sufficient to sustain the conviction would be the type of outcome-determinative test for prejudice that this Court rejected in *State v. Pitsch*, 124 Wis. 2d 628, 641-42, 369 N.W.2d 711 (1985). This is so because evidence is sufficient to sustain a conviction as long as a reasonable trier of fact could have found the defendant guilty. *State v. Hayes*, 2004 WI 80, ¶ 56, 273 Wis. 2d 1, 681 N.W.2d 203 (evidence is sufficient to sustain a conviction unless "the evidence, viewed most favorably to the state and the conviction, is so lacking in

probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt"). A reviewing court considering a sufficiency of the evidence claim views the evidence in the light most favorable to the State and "must examine the record to find facts that support upholding the jury's decision to convict." *Id.* ¶ 57. A sufficiency-of-the-evidence review would not consider how or whether counsel's performance affected the decision reached and would indeed be incorrect pursuant to *Strickland*.

The circuit court's reasoning in this case shows that it did not apply a sufficiency-of-the-evidence test. If it had, it would have upheld Sholar's conviction on the sexual assault charge as well; there was sufficient evidence to sustain the conviction on that charge. SG's testimony alone would have been sufficient to uphold the conviction on that charge because a reasonable trier of fact could have believed her. But the court vacated the conviction because the totality of the evidence introduced at trial on that charge was weak, and therefore there was a reasonable probability that seeing exhibit 79 affected the jury's decision on that charge.

But where there is overwhelming evidence to support a conviction that defeats a claim of prejudice, this goes well beyond a showing that there was sufficient evidence to sustain a conviction. *See, e.g., State v. McDowell*, 2003 WI App 168, ¶¶ 68-71, 266 Wis. 2d 599, 669 N.W.2d 204. Overwhelming evidence is usually sufficient to show that an error, even one of constitutional magnitude, was harmless beyond a reasonable doubt. *See State v. Anthony*, 2015 WI 20, ¶ 96, 361 Wis. 2d 116, 860 N.W.2d 10. And to prove prejudice, Sholar must do more than show that counsel's deficient performance had "some conceivable effect on the outcome of the proceeding." *Domke*, 337 Wis. 2d 268, ¶ 54. Rather, to be entitled to a new trial on all of the charges, Sholar must show that in light of the totality of the evidence introduced at trial,

there is a reasonable probability that but for the jury being given the entirety of exhibit 79 at deliberations, he would have been acquitted of the trafficking charges as well as the sexual assault charge. *Strickland*, 466 U.S. at 694.

As the circuit court and court of appeals properly determined, in light of the overwhelming evidence against him on the trafficking charges, Sholar simply cannot show that the jury's decision on the trafficking charges would have been different. There was an enormous amount of properly-introduced evidence, both physical evidence and testimony from many different witnesses, on the trafficking charges. Counsel's error here was slight; the jury already was aware of everything in exhibit 79 that Sholar complains about because it all came in through properly-introduced evidence on the trafficking charges. Had counsel objected, the jury would still have known that he had been to prison, that he admitted to selling drugs, that there were provocative pictures taken of SG and EC and posted to Backpage.com, that Sholar threatened both victims with violence, and that Sholar had texted EC saying that he was running a special on her. Therefore, there was not a reasonable probability that exhibit 79 affected the jury's decision to convict Sholar on those charges. It would not make sense and it would waste scarce judicial resources to require a new trial on the trafficking charges simply because counsel's error may have affected the result on the sexual assault charge. It would also be contrary to the Supreme Court's direction in *Morrison* that a remedy must be tailored to the violation. The circuit court and court of appeals employed the proper test and reached the correct result.

The cases Sholar cites do not support his claim that an error must be prejudicial on all counts if it is prejudicial on any of them, even if the evidence is overwhelming on some of the charges. (*See* Sholar's Br. 22-24.) First, none of these cases

contain overwhelming evidence against the defendant on any charge. Second, in the cases Sholar cites, there was necessarily a reasonable probability of a different result on all the charges because counsel failed to introduce evidence that could have directly rebutted the prosecution's evidence *on all of the charges*. And that is simply not the case here.

For example, in *State v. Jenkins*, 2014 WI 59, 355 Wis. 2d 180, 848 N.W.2d 786, the defendant was convicted of first-degree intentional homicide, first-degree reckless injury, and being a felon in possession of a firearm. *Id.* ¶ 2. These charges all stemmed from the shooting death of Anthony Weaver, who was walking down the street with Toy Kimber and Cera Jones when a man with a rifle exited a car, pulled up next to the group, shot Weaver, got back in the car, and drove away. *Id.* ¶¶ 11-12. Police showed Kimber a photo lineup that included Jenkins, and Kimber identified him as the shooter. *Id.* ¶ 14. Jones, however, gave police a description of the shooter that did not match Jenkins, did not select Jenkins from a photo array, and told police that Jenkins was not the shooter and she had seen Jenkins across the street minutes after the shooting. *Id.* ¶ 15. At trial, Kimber's testimony was the only evidence tying Jenkins to the shooting, and Jenkins' attorney failed to interview or call Jones to testify on Jenkins' behalf. *Id.* ¶¶ 18-23. This Court held that "looking at the totality of the evidence in the trial," there was a reasonable probability of a different result had Jones's testimony been presented, and remanded for a new trial. *Id.* ¶ 51.

There is a critical difference between *Jenkins* and this case. In *Jenkins*, if the jury believed Jones's testimony, Jenkins could not have been convicted of *any* of the charges. *See id.* ¶¶ 53-55. If Jenkins was not the shooter, he could not have committed any of the elements of the three crimes with which he was charged. There was no corroborating evidence

other than Kimber's testimony to tie him to any of the crimes. Jones's testimony would have necessarily affected the outcome of either all of the verdicts or none of them.

But here, looking at the totality of the evidence at trial, there is no possibility that the jury would have acquitted Sholar of the trafficking counts if the jury had been sent only the messages that had been introduced at trial. There was overwhelming evidence on the trafficking charges, including physical evidence and an enormous amount of credible testimony. The jury was already aware of all of the detrimental information contained in exhibit 79 about which Sholar complains. And as the circuit court observed, most of the messages were mundane. Unlike in *Jenkins*, looking at the totality of the evidence at trial, there is no probability that but for counsel's failure to object, the result on the trafficking charges would have been different.

Thiel offers no support for Sholar's claim for the same reason. There, a jury convicted Thiel of seven counts of sexual exploitation by a therapist. *Thiel*, 264 Wis. 2d 571, ¶ 2. Like in *Jenkins*, all seven of Thiel's convictions hinged on the credibility of a single witness, the complaining victim. *See id.* ¶¶ 3, 13-16. There was no physical evidence and were no eyewitnesses. *Id.* ¶ 34. Thiel's attorneys, however, failed to investigate and present an abundance of readily-available evidence that would have impeached the complaining victim, showed motivation for her complaints, and shown lack of corroboration for her story. *Id.* ¶¶ 26-32. This Court held that Thiel's attorneys performed deficiently by failing to adequately investigate, and held Thiel was prejudiced because the omitted evidence went directly to the issue "upon which a reasonable doubt turned" on *all* of the charges. *See id.* ¶ 79 ("[A]dditional credibility evidence might have affected the number of charges on which Thiel was convicted."). Though Sholar is correct that "[t]his Court did not do a count-

by-count evaluation of which specific charges could have turned out differently," the reason for that is clear from the facts of the case: this Court could not say that the jury would have found Thiel guilty on any single charge absent counsels' errors because there was no compelling evidence on any of the charges that the impeachment testimony could not have disproven. But again, that is not the case here.

Honig, too, was a case that hinged entirely on the credibility of the two very young victims and their uncle, Cruz. *State v. Honig*, 2016 WI App 10, ¶ 33, 366 Wis. 2d 681, 874 N.W.2d 589. Honig was charged with one count of first-degree sexual assault by sexual intercourse with a child under age 12 and one count of first-degree sexual assault by sexual contact with a child under 13. *Id.* ¶ 1. Both charges stemmed from Honig's five-year-old granddaughter's report to Cruz that Honig had been inappropriately touching and performing oral sex on her and her three-year-old sister. *Id.* ¶ 2. There was no physical evidence, any eyewitness testimony, or any evidence independently corroborating the victim's account of the assaults. *Id.* ¶¶ 8-13, 29.

Colon, an acquaintance of Cruz, was willing to testify that he heard Cruz talking about framing Honig for sexual abuse by coaching the kids to say things about Honig. *Id.* ¶ 6. But despite Cruz's framing Honig being the theory of defense, defense counsel never called Colon to testify. *Id.* ¶ 16. The court of appeals concluded that failure to call Colon as a witness was deficient performance that prejudiced Honig. *Id.* ¶ 26. The court acknowledged that the entire case—in other words, the verdict on both charges—depended entirely on the jury believing the children and Cruz. It further noted that Colon's testimony would have given "substance to the defense theory that Cruz and Honig's relationship was so contentious that Cruz made up the allegations and coached the girls to go along with them." *Id.* ¶ 33.

And slightly more analogous to the situation here, the court in *Honig* also considered whether Honig's counsel's failure to exclude from evidence inflammatory statements that one of the victims made in her recorded interview that Honig liked to assault little girls prejudiced Honig. *See id.* ¶¶ 34-39. The court concluded that it did, but, importantly: 1) the statements were offered as evidence in the case, unlike all of exhibit 79; 2) the State offered no permissible purpose for introducing them; and 3) the court's analysis again considered the statements against the "totality of the evidence." *Id.* ¶ 39. The court again acknowledged that "[t]here was no physical evidence to support the alleged assaults. The 'totality of the evidence,' was witness testimony." *Id.* ¶ 39. It emphasized that "[t]he entire case depended on whether the jury believed Honig or the other witnesses" and concluded that "[t]he jury could hardly have considered Y.H.'s statements as anything other than evidence that Honig had a propensity to assault little girls." *Id.* This rationale made sense in *Honig* where there was no other evidence aside from witness testimony supporting the charges. Because the "entire case"—both charges—depended entirely on witness testimony that Honig assaulted two little girls, the improperly admitted statements were therefore prejudicial to the "entire case."

In all three of these cases, there was only weak evidence supporting the State's case, and, unlike here, the charges all depended on the same evidence. None of the cases Sholar cites involve a situation where the evidence on any of the charges against the defendant was overwhelming. And all of them involve situations where, unlike here, defense counsel omitted key evidence that could have completely undermined the State's case on *all* of the charges. If they are relevant at all, *Jenkins, Thiel,* and *Honig* actually support, rather than undermine, what the circuit court and court of appeals did here. Both courts recognized that the only evidence

supporting the sexual assault charge was the testimony of the victim and that there was no other corroboration. They therefore considered the effect counsel's error may have had on the jury's decision to convict Sholar of sexual assault in light of the totality of the evidence, and because it was weak, they found that there was a reasonable probability that exhibit 79 affected the decision the jury reached on that charge.

That neither the United States Supreme Court nor other jurisdictions have any published opinions addressing whether a defendant can be prejudiced on one count supported by weak evidence and not others supported by overwhelming evidence does not carry the persuasive force Sholar tries to impute to it. (Sholar's Br. 22.) As shown, assessing prejudice on each count is plainly contemplated by *Strickland* and consistent with *Morrison*. The likely explanation for the lack of cases on point is that "[t]he proposition is so apparent on its face that it is difficult to find legal citation to support it." *State v. Groppi*, 41 Wis. 2d 312, 323, 164 N.W.2d 266 (1969). A court determining whether there is a reasonable probability that counsel's error affected the outcome of the proceeding must look at the strength of the State's case to determine whether the error affected the decision reached. *Strickland*, 466 U.S. at 696. In a case with multiple charges, that necessarily means that an error may affect the reliability of the jury's decision on some charges but not others. *Id.* at 695-96. And where the decision reached on a charge was unaffected, there was no prejudice and therefore no remedy is required. That is the only reasonable construction of *Strickland* and the common sense consideration of prejudice.

D. Sholar was not prejudiced on the trafficking-related counts by the jury being given exhibit 79 because its contents were, at worst, cumulative to the other evidence presented on the trafficking-related counts, and the evidence on those counts was overwhelming.

As a preliminary matter, Sholar's insistence that it was error for the court to admit exhibit 79 into evidence at all is, as explained in footnote one, unsupported by the record, undeveloped, and unpreserved for appeal. (*See* Sholar's Br. 29.) The only question is whether Sholar was prejudiced when the jury received the full exhibit during deliberations.

Applying the proper test from *Strickland* shows that Sholar was not prejudiced on the five trafficking counts by the jury receiving exhibit 79 during deliberations. The transcripts show that the extensive testimony of the victims, which was corroborated by several other witnesses and all of the physical evidence, provided overwhelming evidence that Sholar trafficked EC and SG. And as the circuit court observed, "virtually all of the things Mr. Sholar complains of here came in in this trial in more than one way." (R.107:24.) At worst, the information the jury could have gleaned from receiving the entirety of exhibit 79 during deliberations was cumulative to other evidence properly admitted at trial. There is not a reasonable probability that providing exhibit 79 to the jury during deliberations undermines confidence in his convictions on the trafficking charges.

EC testified that Sholar took suggestive pictures of her and of the other victim, SG, and posted them on the internet with Sholar's phone number. (R.80:99-100, 104-06.) She testified that she worked for Sholar and gave him the money she made prostituting herself. EC said that Sholar scared her, beat her, and threatened her if she left him. (R.80:108-15.)

Exhibit 35 was entered into evidence, showing bruises on EC. (R.92:Ex. 35.) She testified that Sholar would set the price for her sex acts. (R.80:118-24.) She also testified that Sholar was involved in a burglary at her friend's house and that he threatened her with violence through texts. (R.80:124-29.)

SG testified that Sholar forced her to engage in sex acts with men for money by threatening to harm her and her family. (R.80:179-80, 184, 186.) Like EC, she testified that Sholar posted provocative pictures of her on the internet, gave her a cell phone to receive calls and texts from people who wanted sex for money, and was forced to do many different sex acts. (R.80:180, 194-96.) She testified that Sholar gave her illicit drugs, as well. (R.80:207.) Several other witnesses corroborated the testimony of EC and SG. (R.82:58-72.)

All of the Backpage.com ads containing the pictures EC and SG had testified about were shown to the jury. (R.82:29-32.) The detectives who had examined Sholar's and EC's phones testified about the incriminating text messages and pictures. The jury heard Sholar admit to selling marijuana in relation to the burglary incident. (R.84:150; 92:Ex. 82:03:50.) The jury also heard Sholar say he had been to prison three times and that he had "beat" another charge. (R.92:Ex. 82:5:20-5:42.)

The circuit court considered all of this when determining whether Sholar was prejudiced. *See Strickland*, 466 U.S. at 695. The circuit court acknowledged the strength and disturbing nature of the testimony from the victims and others at trial, and that the jury found it to be credible. The court further noted that the testimony was supported by a wealth of physical evidence, and that "virtually all of the things Mr. Sholar complains of here came in in this trial in more than one way." (R.107:24.) The court of appeals reviewed the record and also concluded that "[t]here is no reasonable probability that the trial's outcome on the five sex trafficking

charges would have been different if exhibit 79 in its entirety would not have been given to the jury." *Sholar II,* 2017 WL 2704178, ¶ 87. (R-App. 110.)

But in contrast to the trafficking charges, the evidence on the sexual assault charge consisted only of the testimony of SG. Sholar testified that he only knew SG through an acquaintance. As the circuit court observed, on the sexual assault charge there was no corroborating testimony or physical evidence. Essentially, the evidence on the sexual assault came down to a credibility contest between SG and Sholar.

Ergo, because the evidence was much weaker on the sexual assault charge, the court found that there was a reasonable probability that the jury might have found that the State failed to meet its evidentiary burden on the sexual assault charge if it had not seen the lewd pictures and text messages. (R.107:28-29.) But the same cannot be said for the trafficking charges; there was so much properly-admitted evidence and testimony showing that Sholar was involved in trafficking that the texts and pictures likely made no difference. That was the correct analysis and both courts reached the correct conclusion.

Sholar's claim that exhibit 79 was full of "other acts character evidence" that "poisoned" the jury completely ignores both the contents of exhibit 79 and the voluminous trial record. (*See* Sholar's Br. 30-31.) The bulk of exhibit 79 was, as the circuit court concluded, "mundane." (R.107:22; *see also* 92:Ex. 79.) Even if the jury had only received a redacted version of exhibit 79 showing only the messages introduced at trial, it still would have seen the provocative pictures printed from Backpage.com and heard testimony or recordings discussing all of the things about which Sholar complains. Sholar was not prejudiced on the trafficking charges by the jury seeing things that had already been properly introduced

through other testimony, exhibits, and Sholar's own words. And the circuit court's decision to vacate the sexual assault charge properly tailored the remedy to the injury Sholar suffered. It vacated the one conviction where "the decision reached" may have been different absent the error. The circuit court conducted the proper analysis and provided the appropriate remedy. This Court should affirm.

E. Sholar's proposed test for prejudice when there are multiple charges is unnecessary and would require circuit courts to go through a tedious analysis in nearly every case only to reach the same result as assessing prejudice under *Strickland*'s test.

This Court should reject Sholar's proposed standard that courts can find prejudice on an isolated count in a multi-count trial only if "the deficiency itself was plainly directed at a particular count." (Sholar's Br. 27.) His standard ignores that *Strickland* requires courts to consider the totality of the evidence when considering prejudice and to look to whether the error affected the decision reached. But Sholar also argues that, if this Court follows *Strickland* and holds that prejudice can be limited to one charge in a multi-count trial, this Court should co-opt the test for retroactive misjoinder contained in *State v. McGuire*, 204 Wis. 2d 372, 556 N.W.2d 111 (Ct. App. 1996), to determine prejudice in multi-count cases. (Sholar's Br. 26-31.) He then additionally argues that if counsel performed deficiently in multiple ways, the court would *also* have to undertake the "cumulative prejudice" analysis set forth in *Thiel*. (Sholar's Br. 28.)

There are three reasons to reject Sholar's cumbersome, multi-staged proposed method of evaluating prejudice. First, it is unnecessary. *Strickland* itself plainly lays forth how courts should evaluate prejudice in a simple and straightforward manner. Second, adopting a modified

retroactive misjoinder test would not achieve a different result than the actual test for prejudice but would require the circuit courts to engage in an inefficient, long-winded, and tedious analysis in nearly every case. Third, it would be bad policy that would invite error.

As explained, *Strickland* clearly sets forth how courts are to evaluate prejudice and does so in a straightforward manner that can easily be applied no matter how many charges were brought at trial. The court considers "the totality of the evidence" and evaluates how and whether the factual findings at trial were affected by an attorney's error. *Strickland*, 466 U.S. at 695-96. It then, "[t]aking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings . . . ask[s] if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Id.* There is no need to create a new test for this situation; *Strickland* itself plainly states the test for prejudice that applies regardless of how many charges were brought.

Applying the retroactive misjoinder test as Sholar requests would reach the same result as applying *Strickland's* prejudice test. In both of Sholar's hypotheticals[8] the court would reach the exact same result if it looked at the totality of the evidence and considered whether there was a

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[8] Neither of Sholar's hypotheticals applying his new standard come remotely close to the facts of his case; this is likely because, as the State explains, the result is the same when applying the regular *Strickland* prejudice test or Sholar's multi-step retroactive misjoinder test. The error here was still not exceptionally inflammatory as to the trafficking charges, there was no overlap between the evidence on the sexual assault charge and the trafficking charges, and the strength of the State's case on the trafficking charges was still overwhelming. Even under his own unnecessarily complicated test, Sholar cannot show prejudice.

reasonable probability that the jury would have reached a different decision but for counsel's error. (*See* Sholar's Br. 28-29.) There is nothing stopping a defendant from making the argument that the error was incendiary enough to incite the jury to convict on all counts or that the State's case was weak on a particular count under the normal prejudice test; indeed, a court should consider these things when evaluating prejudice. (*See* Sholar's Br. 28-29.) But adopting the retroactive misjoinder test would require circuit courts to make lengthy factual findings addressing all three prongs of the retroactive misjoinder test for every error claimed and on each charge, and then also compare the evidence presented for each charge. Requiring the circuit court to undertake this tedious analysis and address every claimed error and weigh it against the evidence presented on every count in every multi-count case simply to reach the same result that *Strickland*'s prejudice test would reach is not practical, desirable, or required to safeguard the Sixth Amendment right to counsel.

Third, adopting this test would invite errors in circuit courts' consideration of ineffective assistance claims. Multi-count cases are extremely common. And frivolous postconviction ineffective assistance claims alleging multitudes of attorney errors are routine. Sholar's proposed test would set the circuit courts up to overlook or inadequately address one of the multiple prongs of the analysis. If a defendant was tried on five charges and alleges five attorney errors, under Sholar's proposed method the circuit court would have to make 45 separate findings to properly apply the test—and that is *before* considering cumulative prejudice under *Thiel*. Even the most conscientious circuit court is bound to miss something applying such a complicated test. *Strickland* set forth the test for prejudice. The circuit court

and court of appeals followed it. This Court should follow it as well.

F. If this Court holds that prejudice must instead be determined on an "all or nothing" basis, Sholar's claim still fails.

If this Court holds that prejudice cannot exist on a single charge when a defendant was tried on multiple charges, the State asserts that Sholar still cannot show that he was prejudiced by the jury being given exhibit 79. As shown and as the circuit court recognized, "virtually all" of the things Sholar complains about in exhibit 79 were presented to the jury through other properly admitted evidence to prove the trafficking charges. Sholar cannot have been prejudiced on any of the charges by the jury seeing things in exhibit 79 that it already knew of or saw through other properly admitted evidence, unless the sexual assault charge was improperly joined with the trafficking charges.[9] Sholar has made no claim that the sexual assault charge and the trafficking charges were improperly joined.

The evidence was overwhelming on the other charges and there was nothing in exhibit 79 that the jury did not know about from other evidence. There was no probability of a

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[9] The State recognizes that it did not cross-petition for review of the circuit court or court of appeals' prejudice determination on the sexual assault charge. It did not do so, however, because it did not perceive any impropriety in conducting the *Strickland* prejudice analysis by considering the totality of the evidence supporting the charge. The sexual assault conviction has been vacated; the State is not advancing this argument to attempt to change that result. Rather, the State asserts that if Sholar is correct that prejudice cannot be evaluated on a count-by-count basis, this Court should still uphold his convictions on the trafficking charges because under this set of facts, he cannot show prejudice as to the entire proceeding as a matter of law.

different result on any of the charges had the entirety of exhibit 79 not been given to the jury.

II. The State did not need to file a petition for review in *Sholar I* to challenge Sholar's incorrect interpretation of the court of appeals' decision.

Sholar's contention that the State "forfeited" its opportunity to argue that he was not prejudiced by failing to file a petition for review after *Sholar I* is nonsensical, erroneous, and ignores over 100 years of established Wisconsin jurisprudence on the respective roles of trial and appellate courts. (Sholar's Br. 36-42.) It also ignores the court of appeals' own statement that it "did not rule that trial counsel's performance was deficient in any manner nor did this court rule there was prejudice as to any of the charges. Those issues were left to the *Machner* court to address." *Sholar II,* 2017 WL 2704178, ¶ 19. (R-App. 103.) His claim is frivolous and this Court should reject it.

Sholar's argument is based on his false premise that after he appealed the circuit court's denial of his postconviction motion without a *Machner* hearing, the court of appeals in *Sholar I* declared that he had been prejudiced on all counts and remanded for a hearing only to determine deficient performance. (*See* Sholar's Br. 37.) That is not how Wisconsin courts address ineffective assistance claims and is inimical to the court of appeals' error-correcting function. *See, e.g.*, *Machner*, 92 Wis. 2d at 804; *Kovalic v. DEC Intern.*, 186 Wis. 2d 162, 172, 519 N.W.2d 351 (Ct. App. 1994); *State v. Schumacher*, 144 Wis. 2d 388, 407, 434 N.W.2d 672 (1988). It is also an unsupportable reading of the court of appeals' opinion in *Sholar I* and completely disregards that the court of appeals stated that Sholar's interpretation of its opinion in *Sholar I* was wrong.

It is well-established that an evidentiary hearing is a prerequisite for consideration of an ineffective assistance of counsel claim on appeal. *Machner*, 92 Wis. 2d at 804. This is so because without trial counsel's testimony, there is no way to "determine whether trial counsel's actions were the result of incompetence or deliberate trial strategies." *Id.* Additionally, whether a defendant has been prejudiced by counsel's deficient performance "is necessarily fact-dependent." *Jenkins*, 355 Wis. 2d 180, ¶ 50.

But defendants are not granted a *Machner* hearing simply because they ask for one. *See State v. Allen*, 2004 WI 106, ¶ 10, 274 Wis. 2d 568, 684 N.W.2d 433. Rather, a defendant is entitled to an evidentiary hearing only if his postconviction motion alleges sufficient material facts that, if proven true at an evidentiary hearing, would entitle the defendant to relief. *Id.* ¶ 14. If the defendant's "motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." *State v. Sulla*, 2016 WI 46, ¶ 23, 369 Wis. 2d 225, 880 N.W.2d 659 (citations omitted). Consequently, where the circuit court denies a postconviction motion alleging ineffective assistance of counsel without holding an evidentiary hearing, the issue on appeal is the sufficiency of the motion to entitle the defendant to a hearing, not the ultimate merits of the underlying claim. *See, e.g., Love*, 284 Wis. 2d 111, ¶ 2 (holding that Love's motion alleging ineffective assistance of counsel stated sufficient material facts "that, if true, entitle him to relief" and therefore remanding to the circuit court for a *Machner* hearing).

Further, "[t]he court of appeals is an error-correcting court." *Schumacher*, 144 Wis. 2d at 407. The court of appeals' error-correcting function necessarily contemplates that trial

courts will address legal questions, such as prejudice, in the first instance. *See Cappon v. O'Day*, 165 Wis. 486, 490-91, 162 N.W 655 (1917). In other words, the appellate courts do not assess the legal questions of whether counsel's performance was deficient and whether the defendant was prejudiced before the circuit court has conducted an evidentiary hearing and made an initial determination on those questions.

Here, the circuit court initially denied Sholar's postconviction motion without a *Machner* hearing. (R.62:1.) Sholar appealed that decision. (*See* R.93:1.) The only question regarding his ineffective assistance claim in *Sholar I*, then, was whether Sholar's postconviction motion alleged sufficient facts to entitle him to a *Machner* hearing.[10] The court of appeals recognized this. (R.94:6-7.) It specifically stated that it was "not so sure" that Sholar could not prove he was prejudiced as to the sexual assault charge. (R.94:10-11.) It concluded that "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." (R.94:11 (footnote omitted).) The court of appeals accepted Sholar's allegations as true as it was required to do under *Allen* and remanded for a *Machner* hearing to give Sholar the opportunity to prove both prongs of his ineffective assistance claim: deficient performance by his counsel and prejudice to him as a result. Had the State petitioned for review at that point, as Sholar claims it was required to do, the only question properly before this Court would have been whether Sholar sufficiently pled his motion to entitle him to a *Machner* hearing. *See Allen*, 274 Wis. 2d 568, ¶ 2.

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[10] Sholar's postconviction motion also alleged several other errors that do not require an evidentiary hearing to decide on appeal. (*See* R.55:1–20.)

After the *Machner* hearing, Sholar attempted to advance his argument that the court of appeals had already decided prejudice in *Sholar I*. And the court of appeals unequivocally rejected Sholar's interpretation of its opinion. *See Sholar II,* 2017 WL 2704178, ¶¶ 15-19. (R-App. 103.) In fact, it determined that the wording in *Sholar I* could reasonably be read to mean the opposite: that it had definitively established that there was *no* prejudice on the trafficking charges. *Sholar II,* 2017 WL 2704178, ¶ 18. (R-App. 103.) The court of appeals stated, however, that its opinion in *Sholar I* "cannot be read to mean that this court found prejudice entitling Sholar to a new trial on all the charges as he now argues." *Id.* It then explained that it "did not rule that trial counsel's performance was deficient in any manner nor did this court rule there was prejudice as to any of the charges. Those issues were left to the *Machner* court to address." *Sholar II,* 2017 WL 2704178, ¶ 19. (R-App. 103.) With this statement, the court of appeals appropriately recognized that it is an error-correcting court; the circuit court addresses both prongs of an ineffective assistance claim in the first instance, and the court of appeals then reviews the trial court's conclusion for error. In essence, Sholar is asking this Court upend this well-established delineation of functions, and then to rule that the court of appeals misinterpreted its own order. Apart from enjoying no support in the law, his request does not make sense.

Furthermore, Sholar wholly misrepresents the court of appeals' opinion in *Sholar II* to advance this claim. (Sholar's Br. 38-40.) The court of appeals did not "reverse[] for a *Machner* hearing on whether counsel had a strategic reason for failing to object to Exhibit 79 being *admitted*." (Sholar's Br. 38 (emphasis added).) The court of appeals expressly refused to address that argument. *Sholar II*, 2017 WL 2704178, ¶ 2 n.3. (R-App. 101.) The court of appeals did not

"explain[] that it found that Mr. Sholar's post-conviction motion established a reasonable probability of a different outcome at trial." (Sholar's Br. 39.) The court of appeals explicitly stated that it did exactly the opposite and that the circuit court correctly interpreted its order remanding for a *Machner* hearing. *Sholar II*, 2017 WL 2704178, ¶¶ 19-20. (R-App. 103.) And the State was not unfairly "able to profit from the error resulting in reversal." (Sholar's Br. 40.) That the State had two opportunities to rebut Sholar's contentions is the regular course of proceedings when the court of appeals remands for a *Machner* hearing. Finally, the State did not "sandbag" Sholar. (*See* Sholar's Br. 40.) Any lack of notice[11] that the circuit court was still going to address prejudice on remand that Sholar suffered resulted only from his own failure to recognize the procedural posture of his case and the well-established roles of the circuit and appellate courts when addressing ineffective assistance claims.

Sholar's request that this Court consider what it would mean "in reverse" if the State did not forfeit this claim is also based on a material misrepresentation of his claims below. (Sholar's Br. 41.) Sholar claims that if the State was not required to file a petition for review to argue the prejudice prong at the *Machner* hearing, he should have been able to revive his other claims at the hearing as well. (Sholar's Br. 42.) But Sholar's other claims that the court of appeals addressed were not ineffective assistance of counsel claims. (*See* Sholar's Br. 42; R.94:11-14.) The court of appeals affirmed the circuit court's determination that the jury instructions sufficiently informed the jury how it should consider Sholar's prior convictions and rejected Sholar's request that the court of appeals reverse his conviction in the interests of justice. (R.94:11-14.) No evidentiary hearing was

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[11] *See* Sholar's Br. 40.

required on those claims, and they would have been improperly considered at a *Machner* hearing.

In sum, Sholar's argument on this point is illogical and based upon a misrepresentation of both the law and the facts of this case. The State was not required to file a petition for review to challenge Sholar's erroneous interpretation of the court of appeals' decision in *Sholar I*.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the decision of the court of appeals.

Dated this 8th day of January, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,965 words.

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LISA E.F. KUMFER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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 8th day of January, 2018.

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LISA E.F. KUMFER
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. Lamont Donnell Sholar
Case No. 2016AP897-CR

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

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.

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LISA E.F. KUMFER
Assistant Attorney General

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Dated this 8th day of January, 2018.

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