

FILED  
05-27-2021  
CLERK OF WISCONSIN  
SUPREME COURT

STATE OF WISCONSIN  
IN SUPREME COURT

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STATE OF WISCONSIN,

Plaintiff-Respondent-Cross-Petitioner,

v.

ROBERT DARIS SPENCER,

Defendant-Appellant-Petitioner-Cross-Respondent.

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RESPONSE IN OPPOSITION TO PETITION FOR CROSS-REVIEW  
Appeal No. 2018AP000942 CR

Trial Case No. 2014CF5088 (Milwaukee Co.)

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**ARGUMENT**

The defendant, by his undersigned counsel, opposes the petition for cross-review filed by the State of Wisconsin for the following reasons.

- I. **There is no need to clarify the law regarding whether a postconviction motion may be denied if the record conclusively shows that the defendant is not entitled to relief.**

The State begins its argument regarding the need for clarification by stating that "(t)he court of appeals ruled that because Spencer sufficiently pled his ineffective-assistance claim, the circuit court was required to hold a **Machner** hearing, regardless of whether the record conclusively shows that he is not entitled to relief." The way the State frames the court of appeals' decision leaves the impression that the court of appeals explicitly decided that it was required to remand the case, regardless of the state of the record. That is not the case. When remanding, the majority stated the following:

However, we reverse the trial court's decision to deny Spencer's motion that he received ineffective assistance of counsel because Spencer alleged sufficient material facts in his postconviction motion. We emphasize that we are not deciding that trial counsel was deficient or that Spencer was prejudiced, only that Spencer's postconviction motion was sufficient to require that the trial court conduct an evidentiary hearing on ineffective assistance of trial counsel. We remand to the trial court for a **Machner** hearing and further proceedings consistent with this decision. ¶29

The Dissent concurred by saying "I concur in the Majority opinion that Spencer was denied effective assistance of counsel for failing to object to certain testimony that he argues is inadmissible hearsay." ¶59

From the above the State imputes to District 1 the belief that an appellate court cannot consider the entire record when determining whether a remand for a hearing is appropriate. The opinion does no such thing.

The State's own submission indicates that District 1 is under no such misapprehension. In arguing that the court of appeals implicitly held that a circuit court may not deny a sufficiently pled ineffective-assistance claim without an evidentiary hearing, the State cites to **State v. Ruffin**, No. 2019 AP 1046-CR, 2021 WL 870593. In that case, Justice White, in dissent, disagreed with the majority's conclusion that the defendant had pled sufficient facts to warrant a hearing, concluding that the record conclusively demonstrated that the defendant was not entitled to relief. ¶53.

Clearly, District 1 is aware of the law. There is no need for clarification. In this case, nothing the court stated indicates that it felt it had to remand for a **Machner** hearing even if the record contained overwhelming evidence of guilt. By remanding for a hearing, the court implicitly found that it was

not persuaded that the record evidenced overwhelming evidence of guilt sufficient to deny a **Machner** hearing. No clarification of the law is needed.

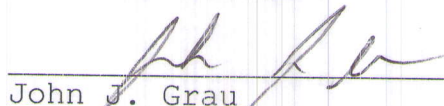
**CERTIFICATION**

I certify that this response conforms to the rules contained in sec. 809.19(8)(b) and (c) Stats., for a brief in non-proportional type with a courier font and is 4 pages long including this page.

Dated: 5/27, 2021.

GRAU LAW OFFICE

By: \_\_\_\_\_

  
John J. Grau  
State Bar No. 1003927

**CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)**

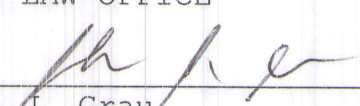
I hereby certify that I have submitted an electronic copy of this response, excluding the appendix, if any, which complies with the requirements of Wis. Stat § 809.19(12).

I further certify that this electronic response is identical to the printed form of the brief filed as of this date.

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

Dated: 5/27, 2021.

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John J. Grau