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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP942-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross Petitioner,

v.

ROBERT DARIS SPENCER,

Defendant-Appellant-Petitioner.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE STEPHANIE ROTHSTEIN, PRESIDING

# BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-CROSS PETITIONER

JOSHUA L. KAUL
Attorney General of Wisconsin

KARA L. JANSON
Assistant Attorney General
State Bar #1081358

Attorneys for Plaintiff-Respondent-Cross Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-5809
(608) 294-2907 (Fax)
jansonkl@doj.state.wi.us

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## INTRODUCTION

"[C]ourts frequently decide—even in the absence of a Machner hearing—that the record conclusively demonstrates a defendant was not prejudiced by alleged deficient conduct, often presuming without deciding that counsel's performance was deficient." *State v. Sholar*, 2018 WI 53, ¶ 54, 381 Wis. 2d 560, 912 N.W.2d 89.

That's what happened in this case when Defendant-Appellant-Petitioner Robert Daris Spencer filed a postconviction motion claiming ineffective assistance of counsel. Noting the "absolute overwhelming evidence" of Spencer's guilt, the postconviction court assumed deficient performance and determined that trial counsel's failure to object to inadmissible hearsay did not cause prejudice. The postconviction court denied Spencer's ineffective-assistance claim without an evidentiary hearing.

Although it's well-established that a sufficiently pled postconviction motion may denied without an evidentiary hearing where the record conclusively shows that the defendant is not entitled to relief, the court of appeals here refused to analyze the basis for the postconviction court's decision. In its apparent view (and notwithstanding the above quoted language), this Court's decision in *Sholar* changed the legal landscape as far as postconviction motions claiming ineffective assistance are concerned. That is, the court of appeals reads *Sholar* as holding that a sufficiently pled ineffective-assistance claim may *not* be denied without an evidentiary hearing on record-conclusively-shows grounds. Reasoning that Spencer sufficiently pleaded his claim, the court of appeals held that the postconviction court was *required* to hold a *Machner*[1] hearing.

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

Surely, when this Court decided *Sholar*, it did not abandon 50 years of precedent designed to avoid such an inefficient practice. This Court should reverse and make clear—perhaps for the third time in recent memory—that "an evidentiary hearing is not mandatory if the record as a whole conclusively demonstrates that defendant is not entitled to relief, even if the motion alleges sufficient nonconclusory facts." *State v. Howell*, 2007 WI 75, ¶ 77 & n.51, 301 Wis. 2d 350, 734 N.W.2d 48.

## ISSUE PRESENTED

Where the defendant sufficiently pleads ineffective assistance of counsel, can the court deny the claim without an evidentiary hearing because the record conclusively shows that the defendant is not entitled to relief?

The circuit court answered, "yes."

The court of appeals implicitly answered, "no."

This Court should answer, "yes."

## STATEMENT ON ORAL ARGUMENT AND PUBLICTION

The State requests oral argument and publication.

## STATEMENT OF THE CASE

A jury found Spencer guilty of felony murder and being a felon in possession of a firearm. (R. 185:5.)

Spencer filed a postconviction motion seeking a new trial. (R. 147.) Relevant here, he argued that his trial counsel was ineffective for failing to object to inadmissible hearsay. (R. 147:7.)

The postconviction court denied Spencer's ineffective-assistance claim without an evidentiary hearing, reasoning that the record conclusively shows no prejudice from any deficient performance. (R. 163:5–6.) More specifically, the

court determined that "there was absolute overwhelming evidence of [Spencer's] guilt," so Spencer could not show a reasonable probability of a different outcome had his counsel objected to the hearsay. (R. 163:5.)

The court of appeals reversed and remanded for a *Machner* hearing, but not because it disagreed with the postconviction court's record assessment of no prejudice. (State's App. 113–14.) Although it recognized the basis for the postconviction court's decision, the court of appeals limited its analysis to whether Spencer sufficiently pled his ineffective-assistance claim. (State's App. 105, 111–14.) Because "Spencer provided the who, what, where, why, when, and how of his allegations that he received ineffective assistance of counsel and did more than recite conclusory allegations," the court of appeals held that "the trial court was *required* to grant Spencer a *Machner* hearing." (State's App. 113 (emphasis added).)

In reaching its decision, the court of appeals did not overlook the well-established principle that a sufficiently pled postconviction motion may be denied without an evidentiary hearing on record-conclusively-shows grounds. (State's App. 112.) But it appears to have interpreted this Court's decision in *Sholar* as upending that precedent, at least as it relates to ineffective-assistance claims. (State's App. 113–14.)

To support the proposition that the postconviction court was required to hold a *Machner* hearing because Spencer sufficiently pleaded his ineffective-assistance claim, the court of appeals twice cited to *Sholar*. First, to reason that the sole issue on appeal was whether Spencer sufficiently pleaded his claim. (State's App. 113–14.) Second, to note the following language: "[W]hen an appellate court remands for a *Machner* hearing, it must leave both the deficient performance and the prejudice prongs to be addressed." (State's App. 114.)

The State filed a motion to reconsider, arguing that the court of appeals misinterpreted *Sholar* and that the postconviction court had the discretion to deny Spencer's claim without a hearing on record-conclusively-shows grounds. It did not matter, the State explained, that Spencer sufficiently pleaded his claim. The court of appeals denied reconsideration.

Following Spencer's petition for review,[2] the State filed a petition for cross-review on the court of appeals' decision to remand for a *Machner* hearing. This Court granted both petitions.

## STANDARD OF REVIEW

Whether a court may deny a sufficiently pled ineffective-assistance claim without an evidentiary hearing on record-conclusively-shows grounds presents a question of law. This Court independently decides questions of law. *See State ex rel. Warren v. Meisner*, 2020 WI 55, ¶ 14, 392 Wis. 2d 1, 944 N.W.2d 588.

## SUMMARY OF ARGUMENT

This Court has gone out of its way on numerous occasions to make clear that a sufficiently pled postconviction motion may be denied without an evidentiary hearing where the record conclusively shows that the defendant is not entitled to relief. It makes perfect sense: why bog down already overburdened postconviction courts with pointless evidentiary hearings?

Lower courts have occasionally struggled with this concept based on their interpretation of language from this Court's opinions. Most recently, this Court's decision in

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[2] Spencer's petition for review involves issues surrounding the circuit court's dismissal of a sick juror before deliberations.

*Sholar* has led the court of appeals to believe that an evidentiary hearing is *required* whenever a defendant sufficiently pleads an ineffective-assistance claim through the "five 'w's' and one 'h'"[3] method. In other words, if the motion is sufficiently pled, a postconviction court has no discretion to deny the claim without a hearing on record-conclusively-shows grounds.

Once again, this Court must clarify that a sufficiently pled postconviction motion may be denied without a hearing where the record conclusively refutes the defendant's allegations. There is no special exception for ineffective-assistance claims, nor should there be. The law is clear that if an ineffective-assistance claim can be rejected on the prejudice prong of the two-part test—which is "often" the case—"that course should be followed." *Strickland v. Washington*, 466 U.S. 668, 697 (1984).[4] Requiring a *Machner* hearing where the record conclusively shows no prejudice (or no deficient performance, for that matter) disregards the Supreme Court's instruction that "[c]ourts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." *Id.*

This Court should reverse the court of appeals' decision to remand for a *Machner* hearing.

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[3] *See State v. Allen*, 2004 WI 106, ¶ 23, 274 Wis. 2d 568, 682 N.W.2d 433 (footnote omitted) ("As an assistance to defendants and their counsel, we propose that postconviction motions sufficient to meet the *Bentley* standard allege the five 'w's' and one 'h'; that is, who, what, where, when, why, and how.").

[4] To establish ineffective assistance of counsel, a defendant must prove deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

## ARGUMENT

### A postconviction court may deny a sufficiently pled ineffective-assistance claim without an evidentiary hearing where the record conclusively shows that the defendant is not entitled to relief.

#### A. This Court has long held that a sufficiently pleaded motion may be denied without an evidentiary hearing if the record conclusively shows that the defendant is not entitled to relief.

A well-established framework exists for assessing whether a defendant is entitled to an evidentiary hearing on his postconviction motion. "A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." *State v. Allen*, 2004 WI 106, ¶ 14, 274 Wis. 2d 568, 682 N.W.2d 433. "However, if the 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." *Id.* ¶ 9 (emphasis added).

The above principles have been around for nearly 50 years. *See Nelson v. State*, 54 Wis. 2d 489, 497–98, 195 N.W.2d 629 (1972). This Court's decision in *Nelson* dealt with a postconviction motion for plea withdrawal, *see id.* at 497, but the standards announced "appl[y] to other postconviction motions in which an evidentiary hearing is requested," *Allen*, 274 Wis. 2d 568, ¶ 13.

That includes postconviction motions alleging ineffective assistance of counsel. As this Court explained in *Sholar*, "If a defendant's motion asserting ineffective assistance '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.'" *Sholar*, 381 Wis. 2d 560, ¶ 50 (citing *State v. Sulla*, 2016 WI 46, ¶ 23, 369 Wis. 2d 225, 880 N.W.2d 659). To take but one example, in *State v. Roberson*, 2006 WI 80, ¶¶ 43–44, 292 Wis. 2d 280, 717 N.W.2d 111, this Court upheld the circuit court's decision to reject an ineffective-assistance claim without a *Machner* hearing because "the record sufficiently establishe[d] that Roberson was not prejudiced by his counsel's actions."

There once was confusion about whether a hearing is mandatory whenever a defendant sufficiently pleads his postconviction motion. That's because in *State v. Bentley*, 201 Wis. 2d 303, 309–10, 548 N.W.2d 50 (1996) (emphasis added), this Court said, "If the motion on its face alleges facts which would entitle the defendant to relief, *the circuit court has no discretion and must hold an evidentiary hearing*." Justice Prosser sounded the alarm on this language in his dissent in *State v. Love*, 2005 WI 116, ¶¶ 68–73, 284 Wis. 2d 111, 700 N.W.2d 62 (Prosser, J., dissenting), fearing that courts appeared "powerless to deny a requested evidentiary hearing when there is a properly pleaded motion, even though the circuit court has compelling evidence from the record that key allegations in the motion are not true," *Howell*, 301 Wis. 2d 350, ¶ 150 (Prosser, J., dissenting).

A couple of years later, this Court clarified the matter in *Howell*: "*Bentley* might be interpreted to make an evidentiary hearing mandatory whenever the motion contains sufficient, nonconclusory facts, even if the record as a whole would demonstrate that the defendant's plea was constitutionally sound. Such an interpretation of *Nelson* and *Bentley,* however, is not correct." *Howell*, 301 Wis. 2d 350, ¶ 77 n.51. This Court continued, "The correct interpretation of *Nelson/Bentley* is that an evidentiary hearing is not

mandatory if the record as a whole conclusively demonstrates that defendant is not entitled to relief, even if the motion alleges sufficient nonconclusory facts." *Id.*

The instruction didn't quite stick. Roughly nine years later, this Court again found it necessary to explain to lower courts that a sufficiently pled postconviction motion may be denied without an evidentiary hearing on record-conclusively-shows grounds. *See Sulla*, 369 Wis. 2d 225, ¶¶ 28–30. In reaffirming that yes, postconviction courts have such discretion, this Court doubled down on a statement it made long ago: "It is incumbent upon the trial court to form *its independent judgment after a review of the record and pleadings* and to support its decision [on a postconviction motion] by written opinion." *Nelson*, 54 Wis. 2d at 498 (emphasis added); *see also Sulla*, 369 Wis. 2d 225, ¶ 29.

In short, it appears beyond dispute that a sufficiently pled postconviction motion—even one alleging ineffective assistance—may be denied without a hearing where the record conclusively refutes the defendant's allegations. *See, e.g.*, *State v. Shata,* 2015 WI 74, ¶ 33 n.10, 364 Wis. 2d 63, 868 N.W.2d 93; *State v. Ortiz-Mondragon*, 2015 WI 73, ¶ 58, 364 Wis. 2d 1, 866 N.W.2d 717; *State v. Phillips*, 2009 WI App 179, ¶ 2, 322 Wis. 2d 576, 778 N.W.2d 157; *State v. Ndina*, 2007 WI App 268, ¶ 15, 306 Wis. 2d 706, 743 N.W.2d 722, *aff'd on other grounds,* 2009 WI 21, 315 Wis. 2d 653, 761 N.W.2d 612; *State v. Marks*, 2010 WI App 172, ¶ 13, 330 Wis. 2d 693, 794 N.W.2d 547. As this Court explained in *Shata*, "A defendant is not 'automatically entitled to an evidentiary hearing no matter how . . . meritless the ineffective assistance of counsel claim might be.'" *Shata*, 364 Wis. 2d 63, ¶ 33 n.10 (citing *State v. Curtis*, 218 Wis. 2d 550, 555 n.3, 582 N.W.2d 409 (Ct. App. 1998)).

The court of appeals seems to see things differently after reading *Sholar*.

### B. *Sholar* does not abandon the principle that a well-pled motion may be denied without a hearing on record-conclusively-shows grounds, nor does it create a special exception for ineffective-assistance claims.

As noted, the court of appeals here relied on *Sholar* to support the proposition that a *Machner* hearing was required because Spencer alleged the "who, what, where, why, when, and how" regarding his ineffective-assistance claim. (State's App. 113–14.) The court of appeals misreads *Sholar*.[5]

*Sholar* primarily involved "an issue of first impression: if a defendant convicted of six counts proves his trial counsel's deficient performance prejudiced him on one of his convictions, is he entitled to a new trial on all six convictions?" *Sholar*, 381 Wis. 2d 560, ¶ 37. (The answer is no). *Id.*

A secondary issue in *Sholar* was whether, at Sholar's *Machner* hearing, the State was precluded from arguing the prejudice prong of the two-part test for ineffective assistance. *See Sholar*, 381 Wis. 2d 560, ¶ 37. This issue takes some explaining to understand.

Initially, the postconviction court denied Sholar's motion alleging ineffective assistance without an evidentiary hearing, reasoning that "Sholar failed to prove prejudice."

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[5] This case is not a one-off. Citing to *State v. Sholar*, 2018 WI 53, ¶ 53, 381 Wis. 2d 560, 912 N.W.2d 89, the court of appeals took a similar approach in *State v. Ruffin*, No. 2019AP1046-CR, 2021 WL 870593 (Wis. Ct. App. Mar. 9, 2021) (unpublished). Reasoning that Ruffin sufficiently pleaded his ineffective-assistance claim, the majority remanded the case for a *Machner* hearing to determine whether trial counsel was ineffective for not arguing that Ruffin was acting in self-defense when he tore out his pregnant girlfriend's labia during a fight. *See Ruffin*, 2021 WL 870593, ¶¶ 3, 47. The dissent would have affirmed the postconviction court's denial of an evidentiary hearing because the record conclusively shows no prejudice from any deficient performance. *Id.* ¶ 53 (White, J., dissenting in part).

*Sholar*, 381 Wis. 2d 560, ¶ 25. "Sholar appealed, and the court of appeals reversed the circuit court. The court of appeals held Sholar's motion alleged sufficient facts to warrant a Machner hearing, and remanded to the circuit court." *Id.* Believing that the court of appeals decided the prejudice prong *in his favor*, Sholar later argued that the State forfeited its ability to argue against prejudice at the *Machner* hearing because it did not appeal the purportedly adverse ruling on that issue. *Id.* ¶ 52.

This Court rejected Sholar's argument. *Sholar*, 381 Wis. 2d 560, ¶ 52. It held that "the court of appeals did not, nor could it, decide in Sholar I that *prejudice had been established*." *Id.* ¶ 56 (emphasis added). This Court stated, "[A]n appellate court should not decide *prejudice exists* in an ineffective assistance claim without a Machner hearing." *Id.* ¶ 54 (emphasis added). "Doing so would put the cart before the horse. For purposes of determining whether counsel was ineffective, prejudice cannot exist without being attached to an error on the part of counsel." *Id.* Because there must be a *Machner* hearing to find deficient performance, *see Curtis*, 218 Wis. 2d at 554–55, it follows that a court cannot find prejudice in a *Machner* hearing's absence, *see Sholar*, 381 Wis. 2d 560, ¶¶ 53–54.

Importantly, *Sholar* distinguished the prohibited practice of finding prejudice without a *Machner* hearing from the accepted practice of finding *no prejudice* without a *Machner* hearing. *Sholar*, 381 Wis. 2d 560, ¶ 54. This Court took no issue with that accepted practice: "We acknowledge that appellate courts frequently decide—even in the absence of a Machner hearing—that the record conclusively demonstrates a defendant was <u>not</u> prejudiced by alleged deficient conduct, often presuming without deciding that counsel's performance was deficient." *Id.* Indeed, earlier in its opinion, this Court recognized that a well-pled ineffective-

assistance claim may be denied without an evidentiary hearing on record-conclusively-shows grounds. *See id.* ¶ 50.

After a careful reading of *Sholar*, it is not difficult to conclude that this Court neither abandoned the rule that a well-pled postconviction motion may be denied without a hearing on record-conclusively-shows grounds, nor created a special exception for ineffective-assistance claims. That said, some of this Court's statements can be taken out of context to conclude that a *Machner* hearing is required whenever a defendant satisfies the "five 'w's' and one 'h'" pleading test. *See Allen*, 274 Wis. 2d 568, ¶ 23. That's what happened here.

In *Sholar*, this Court said, "When a circuit court summarily denies a postconviction motion alleging ineffective assistance of counsel without holding a Machner hearing, the issue for the court of appeals reviewing an ineffective assistance claim is whether the defendant's motion alleged sufficient facts entitling him to a hearing." *Sholar*, 381 Wis. 2d 560, ¶ 51. The court of appeals apparently takes this to mean that whenever an ineffective-assistance claim is denied without a *Machner* hearing, the sole issue on appeal is whether the defendant sufficiently pleaded his claim. (State's App. 113–14.) But read in context, that's not what this Court was saying in *Sholar*. Just before the above quoted language, this Court recognized that a well-pled ineffective-assistance claim may be denied without a hearing on record-conclusively-shows grounds. *Sholar*, 381 Wis. 2d 560, ¶ 50. Further, to support the above quoted proposition, this Court cited to *Love*, *see id.* ¶ 51, and *Love* deals with a postconviction court's denial of a hearing on insufficient-pleading grounds, not on record-conclusively-shows grounds, *see Love*, 284 Wis. 2d 111, ¶¶ 2, 24.

It's evident that when this Court referred to a "summarily denie[d] . . . postconviction motion alleging ineffective assistance of counsel" in paragraph 51 of the *Sholar* decision, it meant a claim that was denied on

insufficient-pleading grounds (i.e., one that did not satisfy the "five 'w's' and one 'h'" pleading test). *Sholar*, 381 Wis. 2d 560, ¶ 51; *Allen*, 274 Wis. 2d 568, ¶ 23. In that situation, the reviewing court is considering whether the defendant "alleged sufficient facts entitling him to a hearing."[6] *See Sholar*, 381 Wis. 2d 560, ¶ 51. Paragraph 51 in *Sholar* does *not* address the situation where, as here, the postconviction court performs a careful review of the record to conclude that the defendant's claim is meritless. *Compare Sholar*, 381 Wis. 2d 560, ¶ 51, *with id.* ¶¶ 50, 54. Therefore, the court of appeals reads *Sholar* far too broadly to conclude that whenever an ineffective-assistance claim is denied without a *Machner* hearing, the sole issue on appeal is whether the defendant sufficiently pleaded his claim. (State's App. 113–14.) Not so: the postconviction court, in its discretion, may have denied a well-pled claim without a hearing because the record conclusively disproved the defendant's allegations.

Having erroneously concluded that it could only analyze whether Spencer sufficiently pleaded his claim, and having answered that question yes, the court of appeals borrowed other language from *Sholar* to support its remand decision. (State's App. 113–14.) That language reads, "[W]hen an appellate court remands for a Machner hearing, it must leave both the deficient performance and the prejudice prongs to be addressed." *Sholar*, 381 Wis. 2d 560, ¶ 54. Perhaps the court of appeals incorporated this language to explain why it refused to analyze the postconviction court's decision that the record conclusively shows no prejudice from any deficient

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[6] It should be noted, though, that the appellate court is always free to affirm on alternative grounds. *See State v. Holt*, 128 Wis. 2d 110, 124–25, 382 N.W.2d 679 (Ct. App. 1985), *superseded on other grounds by statute*. Where a postconviction court denies an evidentiary hearing because a motion is insufficiently pled, an alternative ground to affirm may be that the record conclusively shows that the defendant is not entitled to relief.

performance. But as explained above, a complete reading of paragraph 54 in *Sholar* (or the opinion, for that matter) reveals that neither the postconviction court, nor the court of appeals, was precluded from denying Spencer a *Machner* hearing because the record conclusively shows *no* prejudice. And in fact, the court of appeals here was supposed to "search the record for reasons to sustain the circuit court's exercise of discretion." *State v. Dobbs*, 2020 WI 64, ¶ 48, 392 Wis. 2d 505, 945 N.W.2d 609 (citation omitted); *see Allen*, 274 Wis. 2d 568, ¶ 14 (denying a motion without a hearing is a discretionary decision).

For the above reasons, *Sholar* does not stand for the proposition that a *Machner* hearing is required whenever a defendant sufficiently pleads the "who, what, where, why, when, and how" regarding his ineffective-assistance claim. (State's App. 113–14.) The well-established principle that a sufficiently pled motion may be denied without a hearing on record-conclusively-shows grounds lives on, and there is no special exception for ineffective-assistance claims.

Nor should there be.

### C. Ineffective-assistance claims should not be excepted from the rule that a sufficiently pled motion may be denied without a hearing because the record conclusively disproves the defendant's allegations.

For reasons already explained, the State believes that this Court has made it clear that a sufficiently pled ineffective-assistance claim may be denied without a *Machner* hearing where the record conclusively disproves the defendant's allegations. But it's worth discussing why this is a sound rule.

The practical benefits of the rule are likely obvious to this Court. A rule that allows courts to avoid pointless *Machner* hearings promotes efficiency in an already

overburdened court system. *See generally State v. Lee*, 2021 WI App 12, 396 Wis. 2d 136, 955 N.W.2d 424 (petition for review granted May 19, 2021) (discussing the current challenges in finding counsel for State Public Defender appointments). The rule further serves the interests of finality. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994) ("We need finality in our litigation."). It also aligns with a victim's constitutional and statutory right to a timely disposition. Wis. Const. art. I, § 9m(2)(c)–(d); Wis. Stat. § 950.04(1v)(k).

Where the record conclusively disproves the defendant's well-pled allegations, a *Machner* hearing *is* pointless. Consider a straightforward example. Say a defendant's postconviction motion alleges that his trial counsel was ineffective for failing to request a lesser-included-offense instruction. He alleges the "who" (trial counsel), the "what" (failure to request the instruction), the "where" and "when" (pre-trial and trial proceedings), and the "why" (the defendant wanted the lesser-included-offense instruction, and the jury likely would have convicted him of the lesser included offense). Further, the defendant alleges "how" he would prove his claim at a *Machner* hearing: he attaches a letter that he wrote to his trial counsel one week before trial requesting the lesser-included-offense instruction.

That all sounds like it warrants a *Machner* hearing. But a review of the record reveals that on the first day of trial, defense counsel informed the circuit court that he was not requesting a lesser-included-offense instruction because the defendant wanted to pursue an all-or-nothing defense to the charge. Defense counsel said that the defendant made the decision the night before trial, and the defendant confirmed as much. In this situation, it defies the interests of efficiency and finality to haul defense counsel into court to tell the court what it already knows: the defendant did not want the lesser-

included-offense instruction, so trial counsel was not deficient in failing to request one.

Consider also what happened here, involving the prejudice prong of the ineffective-assistance test. To support his claim that he was prejudiced by his counsel's failure to object to inadmissible hearsay, Spencer alleged that the hearsay evidence was "key evidence" in the State's case for felony murder. (State's App. 113.) He stated that the hearsay "was important to the State, and harmful to the defense." (State's App. 113.) That's not what the postconviction court concluded after reviewing the jury trial transcripts—there was "absolute overwhelming evidence of [Spencer's] guilt." (State's App. 105.) But taking Spencer's allegations as true, the court of appeals remanded for a *Machner* hearing where trial counsel's testimony will *not* affect what's already apparent from the record: his objection to the hearsay would not have made a difference.

That's not how ineffective-assistance claims are supposed to be resolved. As the Supreme Court has instructed, "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697. Again, "Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." *Id.*

Here, the postconviction court followed that binding instruction. The court of appeals did not.

For the above reasons, the court of appeals erred in remanding this case for a *Machner* hearing without addressing the basis for the postconviction court's decision.

## CONCLUSION

This Court should reverse and remand to the court of appeals to decide whether the circuit court erred by denying Spencer a *Machner* hearing on record-conclusively-shows grounds.[7]

Dated this 13th day of September 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

KARA L. JANSON
Assistant Attorney General
State Bar #1081358

Attorneys for Plaintiff-
Respondent-Cross Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-5809
(608) 294-2907 (Fax)
jansonkl@doj.state.wi.us

[7] If this Court elects to independently decide whether the record conclusively shows no prejudice from any deficient performance, the State anticipates that its response to Spencer's brief-in-chief will aid in that endeavor. The State expects to offer a harmless-error analysis in that brief.

## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (c) (2019-20) for a brief produced with a proportional serif font. The length of this brief is 4,307 words.

Dated this 13th day of September 2021.

KARA L. JANSON
Assistant Attorney General

## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12) (2019–2020)

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) (2019–20).

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 13th day of September 2021.

KARA L. JANSON
Assistant Attorney General

# Index to the Appendix
## *State of Wisconsin v. Robert Daris Spencer*
## Case No. 2018AP942-CR

## APPENDIX CERTIFICATION

I hereby certify that filed with this brief is an appendix that complies with Wis. Stat. § 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 Wis. Stat. § 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 one or more initials or other appropriate pseudonym or designation 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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KARA L. JANSON
Assistant Attorney General

**CERTIFICATE OF COMPLIANCE**
**WITH WIS. STAT. § 809.19(13) (2019–20)**

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13) (2019–20).

I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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

Dated this 13th day of September 2021.

KARA L. JANSON
Assistant Attorney General