STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 2019AP1046-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

THEOPHILOUS RUFFIN,

Defendant-Appellant.

ON REVIEW OF A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT I, PARTIALLY REVERSING AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE M. JOSEPH DONALD, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

INTRODUCTION

In Wisconsin, a court may deny a postconviction motion without an evidentiary hearing when the record conclusively shows that the 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. That's what the circuit court did in this case.

Defendant-Appellant Theophilous Ruffin got into a fight with his pregnant girlfriend, which led to a physical altercation on their bed. While his girlfriend was lying on her back, Ruffin reached down to her vagina and tore tissue so severely that it required surgery to repair. A jury found Ruffin guilty of second-degree sexual assault by sexual intercourse causing injury.

In a postconviction motion, Ruffin claimed that his trial counsel rendered ineffective assistance by deciding not to argue that Ruffin acted in self-defense. The circuit court denied Ruffin's motion without a hearing because the trial record conclusively showed that he was not entitled to relief. Under no reasonable view of the evidence would a jury have concluded that Ruffin acted in lawful self-defense.

The court of appeals reversed, deciding that Ruffin's motion alleged sufficient facts, and he was therefore entitled to a hearing. The court of appeals did not analyze whether the record conclusively showed that Ruffin was not entitled to relief. The court appeared to read this Court's opinion *State v. Allen*[1] as *requiring* an evidentiary hearing because the motion alleged sufficient facts.

This Court should reverse and hold that the circuit court properly exercised its discretion to deny Ruffin's motion without a hearing. This Court has clarified several times that

[1] 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433.

a circuit court has discretion to deny a postconviction motion without a hearing if the record conclusively shows that the defendant is not entitled to relief, even if the motion alleges sufficient facts. This Court should clarify this standard once again, to provide guidance for the lower courts. Even aside from the need to further clarify the law, the extreme and undisputed facts of this case warrant correction of the court of appeals' erroneous legal conclusion.

ISSUE PRESENTED

Ruffin got into a fight with his pregnant girlfriend, which led to a physical altercation on their bed. While his girlfriend was lying on her back, Ruffin reached down and tore several inches of vaginal tissue, which required surgery to repair. He was convicted of second-degree sexual assault by sexual intercourse causing injury.

Ruffin filed a postconviction motion claiming ineffective assistance of counsel because his lawyer did not argue self-defense. The circuit court denied the motion because the record conclusively showed that no reasonable jury would have acquitted him. The court of appeals remanded, saying Ruffin was entitled to a *Machner*[2] hearing because his motion alleged sufficient material facts.

Was Ruffin entitled to an evidentiary hearing based on his postconviction allegation that his trial counsel was deficient for not pursuing a theory of self-defense?

The circuit court answered no.

The court of appeals answered yes.

This Court should answer no.

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

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests oral argument and publication.

STATEMENT OF THE CASE

Complaint

Ruffin was charged with second-degree sexual assault, domestic abuse through sexual intercourse, contrary to Wis. Stat. § 940.225(2)(b) and mayhem, domestic abuse, with the intent to disfigure, contrary to Wis. Stat. § 940.21. (R. 1.)

Trial testimony

In November 2015, Delia[3] and Ruffin were in a romantic relationship, living together with their six-month-old son while Delia was pregnant with their second child. (R. 69:105–08.) Both Delia and Ruffin had children from previous relationships who also lived with them. (R. 69:109–11.)

According to Delia's trial testimony, on November 29, 2015, she had a few beers with Ruffin and snorted a couple lines of cocaine. (R. 69:108–15.) Ruffin went to bed around 10:00 or 11:00 p.m. that night. (R. 69:116–17.) Delia stayed up later, not going to sleep until around 3:00 a.m. the next morning. (R. 69:117.) Delia woke up to Ruffin kicking her, telling her that her baby was crying. (R. 69:117.) Delia replied that the baby was teething and had an ear infection. (R. 69:118–19.) She implied that Ruffin should feed his son a bottle. (R. 69:119.) Ruffin replied that he was "so sick and tired of [her] stiff neck monkey ass." (R. 69:119.) The two continued to argue, and Delia told Ruffin that she was taking her children and leaving. (R. 69:119–24.)

[3] To comply with Wis. Stat. § (Rule) 809.86(4), the State uses a pseudonym instead of the victim's name.

The argument then became physical. (R. 69:125–26.) Ruffin pulled Delia by the hair, hit her, and punched her in the back of the head. (R. 69:125–26.) Delia hit Ruffin with her hand. (R. 69:126.) The fight then stopped, and Ruffin told Delia that she did not have to leave, suggesting that she could "just sleep in the other room." (R. 69:127.) But Delia insisted on leaving. (R. 69:127–28.)

Delia tried to get past Ruffin, when he grabbed her by her hair and inner thigh, picked her up and threw her on the bed. (R. 69:128.) She landed on her back, with Ruffin on top of her, kneeling on the bed. (R. 69:128–30.) Ruffin used his left arm to pin her to the bed. (R. 70:7–8.) He then took his right hand, "shove[d]" it into her vagina, and "rip[ped] and pull[ed] out." (R. 70:8–9.) He did this at least three times. (R. 70:11.) Delia said she "felt all this pressure. And then instantly [she] felt wet." (R. 70:9.) Delia thought that he was trying to kill the baby. (R. 70:11–12.) Ruffin jumped off her, and she ran downstairs to the bathroom where she saw that blood was dripping down her legs. (R. 70: 9, 14.) She then noticed that a piece of vaginal tissue was hanging from her body. (R. 70:14–15.)

Shortly thereafter, Delia's mother arrived at the home. (R. 70:16–17; 72:70.) Her mother noticed that Delia's legs were covered in blood and she thought Delia was having a miscarriage. (R. 70:19; 72:70–71.) Her mother asked Ruffin what he had done to Delia. (R. 72:72–73.) Ruffin said, "I just went like this," and made a "bladed" motion with his hand. (R. 72:73.) Ruffin said that he was just trying to "poke her." (R. 70:18–20; 72:74.) Delia's mother then took her to the hospital. (R. 70:21.) As Delia and her mother drove off, the police arrived. (R. 70:22.) But Delia told her mother that she did not want her to stop because she was bleeding. (R. 70:22.) Once at the hospital, Delia told the medical staff that she had fallen down the stairs. (R. 70:22; 71:84–85.)

Delia had surgery to repair and reattach two-and-a-half inches of separated vaginal tissue, part of which was devitalized. (R. 71:83.) On December 2, Delia returned to the hospital, fearing that she had torn her stitches. (R. 70:38–39; 72:79.) While at the hospital, Delia reported the assault to Milwaukee Police Officer Brendan Dolan. (R. 72:4–12.)

Shortly thereafter, the State charged Ruffin as set forth above. (R. 68–74.)

At trial, in addition to testimony from Delia and her mother, the jury heard from Dr. Carol Hasenyager, a gynecologic surgeon with whom the emergency room staff consulted on how to treat Delia's injury. (R. 71:73–75.) Hasenyager—who had 36 years' experience at the time of trial—testified that she "had never seen anything quite like" Delia's injury, calling it "horrible." (R. 71:73–75.) She testified that roughly half of the right labia minora had been torn off. (R. 71:82.) Part of the tissue was no longer viable and was removed, and part was repaired using stitches. (R. 71:83–84.)

Officer Dolan testified as well. (R. 72:4.) He said that when he confronted Ruffin with Delia's accusation, Ruffin admitted that he had grabbed Delia's vagina, but he claimed that he did so in an effort to get Delia off of him. (R. 72:19.) Dolan expressed disbelief that Ruffin—approximately twice as heavy as Delia and one foot taller—would need to grab Delia's vagina to free himself from her grip.[4] (R. 72:22–23.) Ruffin then accepted responsibility for her injury and conceded "that he just made a mistake." (R. 72:24.)

[4] At the time of the incident, Ruffin was approximately six feet four inches tall and weighed 270–300 pounds. (R. 72:21; 73:8, 35.) Delia was four to five months pregnant, approximately five feet two to four inches tall, and weighed approximately 137 pounds. (R. 17:45; 72:21, 42–43.) Although there were conflicting accounts of their precise respective weights, Ruffin weighed at least 100 pounds more than Delia.

Ruffin also testified. (R. 73:4.) According to Ruffin, on the day of the assault, he woke to Delia "fussing" at him. (R. 73:7.) He said that three of his beers and his cocaine were missing. (R. 73:7–8.) Ruffin said that he and Delia "exchanged words," and he "threatened to call the social workers" to report her drug and alcohol consumption. (R. 73:8, 29–30.) Delia then started to hit him, punch him, and tried to push him down the stairs. (R. 73:8.) Ruffin then tried to push Delia onto the bed, but she tripped, grabbed him by the collar, and they both fell on the bed. (R. 73:9.) She pulled him down and wrapped her legs around him while she was on her back. (R. 73:35–36.) Ruffin claimed that in an effort to avoid falling on Delia and their fetus, he tried to hold himself off of her by putting out his arm. (R. 73:9–11.) He denied hitting Delia or calling her names. (R. 73:9–10, 16.) Ruffin said he was on top of Delia and her legs were around his waist. (R. 73:45.)

Ruffin provided no explanation for how his hand got to her vagina and why or how he tore tissue in that area, other than saying he was "pushing in that area" to "push her legs off of me so I [could] go." (R. 73:44–45.) He said that he did not know he was "pushing" her labia. (R. 73:45.) He said he was trying to make sure that he didn't "hit the baby and hurt her and the baby so I go for the leg part just to push her legs off from around me." (R. 73:45.) Ruffin said he was a "big man" and she was "five months [pregnant]" and "kind of small," and he tried to push her legs off by putting his hand on her vagina. (R. 73:48.) He denied using a bladed hand. (R. 73:9.) He asserted that he "wasn't trying to use no forces" and that he touched her "gently." (R. 73:54–55.)

Jury instructions and verdict.

After the close of evidence, Ruffin's counsel, Attorney Givens, asked the court for an instruction on self-defense and defense of others. (R. 73:62.) The court asked Givens the basis for the instruction, and he asserted the injuries were a result of "defensive actions." (R. 73:63.) However, after reading through the self-defense instruction during a break, Givens withdrew his request, stating: "[a]fter reading through it I don't think it can be worded the way I think [it] needs to be worded…I'm not sure it really fits this situation." (R. 73:63–64.) Instead, he asked the court to give the jury the accident instruction on both charges. (R. 73:65.) The court refused to give the accident instruction on second-degree sexual assault by sexual intercourse, because the crime does not require the State prove a mental element, but the court agreed to give the accident instruction for mayhem. (R. 73:69–77.)

The court then instructed the jury. (R. 73:80–91.) The jury found Ruffin guilty of second-degree sexual assault "as charged in Count One of the information," which is the crime of causing injury.[5] (R. 4; 21.) It found him "not guilty of mayhem." (R. 74:3.) The court sentenced Ruffin to eight years' initial confinement and four years' extended supervision. (R. 32.)

[5] Although Ruffin had been charged with second-degree sexual assault by sexual intercourse *causing injury*, and the court told the jury that this was the charge Ruffin faced, it erroneously instructed the jury on the elements of second-degree sexual assault by sexual intercourse *by use or threat of force*. (R. 73:81–83.) After hearing from the parties, the court ruled that the error was harmless, because there was no dispute that Ruffin caused Delia's injury. (R. 76:17–19.) This issue is not before the Court in this appeal. (Order Denying Ruffin's Pet. For Review, dated Sept. 17, 2021.)

Postconviction motion

Ruffin moved for postconviction relief. (R. 49.) He argued, as relevant here, that his trial counsel was ineffective for failing to pursue the self-defense instruction.[6] (R. 49:17–20.)

The court denied the motion without a hearing. (R. 50, Pet-App. 101–04.) The circuit court found that counsel "was not ineffective for failing to renew his request for a self-defense instruction based on the facts of this case." (R. 50:4, Pet-App. 104.) Further, the circuit court ruled that even if a self-defense instruction would have been given, there was not a reasonable probability that the jury would have found in Ruffin's favor, "based on the amount of force that was used." (R. 50:4, Pet-App. 104.) The court elaborated: "Almost entirely ripping off the woman's labia - she testified it was just hanging there—that required 28 stitches to reattach it? When she was laying on the bed face up? There is not a reasonable probability he would have obtained an acquittal." (R. 50:4, Pet-App. 104.)

Court of appeals' opinion

Ruffin appealed. (R. 55.) In an unpublished opinion, the court of appeals affirmed in part and reversed in part. The court affirmed the circuit court's denial of Ruffin's postconviction motion on all grounds except for his ineffective assistance claim related to withdrawing his request for a self-defense instruction. *State v. Ruffin*, 2021 WI App 27, ¶¶ 1–2,

[6] Ruffin also made other arguments, (R. 49:1–17), which the circuit court and court of appeals rejected (R. 50, Pet-App. 101-04); *Ruffin*, 2021 WI App 27, ¶¶ 15–40, 397 Wis. 2d 242, 959 N.W.2d 77, 2021WL870593. This Court denied Ruffin's petition for review, and therefore, only the issues the State raised in its petition are before this Court. (Order Denying Ruffin's Pet. For Review, dated Sept. 17, 2021.)

397 Wis. 2d 242, 959 N.W.2d 77, 2021 WL 870593.[7] On that issue, the court reversed and remanded for a *Machner* hearing. *Id.* ¶ 2.

The court of appeals concluded that Ruffin alleged sufficient facts in his postconviction motion for a *Machner* hearing. *Id.* ¶ 42. Specifically, Ruffin "alleged that [Delia] was attacking him and his decision to push on what he thought were [Delia's] legs was a reasonable action, given that he did not want to put his weight on [Delia] and possibly harm [Delia] and their unborn child." *Id.* ¶ 45. Ruffin further claimed that his "entire defense centered on his actions being taken in self-defense and accidentally causing [Delia]'s injury." *Id.* ¶ 46. According to Ruffin, he was prejudiced because "the jury never had the chance to consider his only defense when there was sufficient evidence introduced at trial to support the instruction." *Id.*

Based on these allegations, the court of appeals concluded that "Ruffin's motion entitles him to an evidentiary hearing on whether trial counsel was ineffective in withdrawing his request for a self-defense instruction." *Id.* ¶ 47. In a footnote, the court of appeals said that on remand, the circuit court would need to address whether trial counsel was required to argue self-defense because Ruffin's stated "objective" was self-defense. *Id.* ¶ 45 n.12.[8]

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[7] The court of appeals' opinion is contained in the appendix to this Petition at Pet-App. 105–14. However, the State will cite to the decision utilizing the Westlaw citation and paragraph number.

[8] This issue was not addressed in the circuit court's postconviction ruling and no fact-finding occurred relating to it; therefore, the State did not address this issue in its brief before the court of appeals. *Ruffin*, 2021 WL 870593, ¶ 45 n.12.

Dissent

Judge White dissented regarding the self-defense issue. Although Judge White "question[ed] whether Ruffin overcame the low bar of 'some evidence,'" she concluded that any error by counsel was harmless.[9] *Id.* ¶ 49 (White, J., dissenting). Judge White concluded that any error by counsel was harmless because there was insufficient evidence from which a jury could find that Ruffin acted in self-defense. *Id.* ¶¶ 49–50. Judge White noted that there was no evidence that Ruffin had tried non-physical means to stop the argument with his girlfriend. *Id.* ¶ 50. "Under any view of the facts, the force Ruffin used was not proportionate to the manner of threat he encountered. I do not believe any jury would conclude that Ruffin's testimony showed he believed his actions that caused [Dalia]'s injury were necessary for his self-defense." *Id.*

Calling Ruffin's theory "antithetical to Wisconsin law on self-defense," *Id.* ¶ 51, Judge White said it "defies common sense that during a physical altercation between a pregnant woman and a man nearly a foot taller and more than one hundred pounds heavier than she, that there was a reasonable basis for Ruffin's use of force." *Id.* ¶ 52. Judge White noted that while Ruffin alleged he did not mean to hurt Delia when he put his arm out to brace his fall, "Ruffin's testimony does not reflect a similar intention when he pushed [Delia] in the vaginal area or that pushing her was necessary to stop her interference." *Id.* ¶ 51.

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[9] Judge White also disagreed with the majority's conclusion that *McCoy* needed to be addressed on remand, concluding that there was no evidence that trial counsel refused to follow Ruffin's instructions or that he objected to counsel's actions at trial. (*Id.* ¶ 48 n.1) (White, J., dissenting).

Judge White concluded: "There is no view of the evidence under which the jury could have found Ruffin's use of force was reasonably made in self-defense, and there is no reasonable probability that the jury would have returned a different verdict had it been instructed on self-defense." *Id.* ¶ 53. Therefore, because the record conclusively established that Ruffin was not prejudiced by his attorney's failure to pursue self-defense, Judge White concluded that the circuit court properly exercised its discretion when it denied Ruffin's motion without a hearing. *Id.*

STANDARD OF REVIEW

When examining a postconviction motion for ineffective assistance, whether the motion alleges facts that would entitle the defendant to relief, and whether the record conclusively shows that the defendant is not entitled to relief are questions of law that this Court reviews de novo. *See State v. Sulla*, 2016 WI 46, ¶ 23, 369 Wis. 2d 225, 880 N.W.2d 659; *Howell*, 301 Wis. 2d 350, ¶ 78. If the record conclusively demonstrates that the defendant is not entitled to relief, then the circuit court in its discretion may deny an evidentiary hearing, even if the postconviction motion alleges sufficient facts. *Id.*; *Howell*, 301 Wis. 2d 350, ¶ 77.

This Court reviews the trial court's discretionary decision under the erroneous exercise of discretion standard. *Id.*; *see also Howell*, 301 Wis. 2d 350, ¶ 79. "A circuit court properly exercises its discretion when it has examined the relevant facts, applied the proper legal standards, and engaged in a rational decision-making process." *Sulla*, 369 Wis. 2d 225, ¶ 23 (citation omitted). When reviewing a trial court's exercise of discretion, an appellate court is permitted to search the record for reasons to sustain the trial court's determination. *Id.*

SUMMARY OF ARGUMENT

This Court has held that a sufficiently pleaded postconviction motion may be denied without an evidentiary hearing where the record conclusively shows that the defendant is not entitled to relief. This rule makes perfect sense, since it does not benefit anyone to require circuit courts to hold meritless evidentiary hearings.

Lower courts have occasionally struggled with this concept based on their interpretation of language from this Court's opinions. Here, the court of appeals appeared to read *State v. Allen*[10] to mean that an evidentiary hearing was required when the defendant alleged sufficient facts in his postconviction motion claiming ineffective assistance of counsel. But since *Allen*, this Court has repeatedly stated that this is not correct.

Once again, this Court must clarify that a sufficiently pleaded postconviction motion may be denied without a hearing where the record conclusively refutes the defendant's allegations. There is no exception for ineffective-assistance claims, nor should there be. Requiring a *Machner* hearing where the record conclusively shows no prejudice (or no deficient performance, for that matter) disregards the United States 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." *Strickland v. Washington*, 466 U.S. 668, 697 (1984).

In this case, the record conclusively shows that Ruffin is not entitled to relief, for two reasons. First, Ruffin's counsel was not deficient for abandoning his request for a self-defense instruction. The evidence, reasonably viewed in the light most favorable to Ruffin, does not support a theory of self-defense.

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[10] *State v. Allen*, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433.

Second, counsel's decision not to pursue self-defense did not prejudice Ruffin. Under no reasonable view of the evidence would a jury have concluded that Ruffin acted in lawful self-defense.

The court of appeals' decision conflicts with this Court's most recent precedent and applies a standard that creates inefficiency in an already overburdened court system. This Court should reverse the court of appeals' decision to remand the case for a *Machner* hearing and affirm the circuit court's denial of Ruffin's postconviction motion.

ARGUMENT

The circuit court properly exercised its discretion to deny Ruffin's postconviction motion without a *Machner* hearing.

A. A court may deny a sufficiently pleaded postconviction motion without a *Machner* hearing when the record conclusively shows that the defendant is not entitled to relief.

A *Machner* hearing is a prerequisite for finding that counsel rendered ineffective assistance. *State v. Sholar*, 2018 WI 53, ¶ 54, 381 Wis. 2d 560, 912 N.W.2d 89. But that does not mean a defendant is automatically entitled to a *Machner* hearing anytime he or she alleges ineffective assistance. *State v. Curtis*, 218 Wis. 2d 550, 555 n.3, 582 N.W.2d 409 (Ct. App. 1998). Rather, a *Machner* hearing is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief. *Sholar*, 381 Wis. 2d 560, ¶ 50 (citing *Allen*, 274 Wis. 2d 568, ¶ 14). 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.* (quoting *Sulla*, 369 Wis. 2d 225, ¶ 23; emphasis added). And when reviewing such a decision, an appellate court should "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).

This standard derives from several well-known plea withdrawal cases: *Nelson v. State*, 54 Wis. 2d 489, 497–98, 195 N.W.2d 629 (1972) (addressing a postconviction motion to withdraw a plea pursuant to Wis. Stat. § 974.06), and *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996) (extending the *Nelson* test to other postconviction motions to withdraw pleas, including those brought pursuant to Wis. Stat. §§ 809.30 and 974.02)). While *Nelson* and *Bentley* dealt with postconviction motions for plea withdrawal, the basic standard applies to other postconviction motions in which an evidentiary hearing is requested. *Allen*, 274 Wis. 2d 568, ¶¶ 9, 13–14. This Court has applied this standard to postconviction motions alleging ineffective assistance after jury trials. *Id.* ¶¶ 7, 9, 13–14; *State v. Roberson*, 2006 WI 80, ¶¶ 18–19, 43–44, 292 Wis. 2d 280, 717 N.W.2d 111.

When a court denies a motion alleging ineffective assistance of counsel without a *Machner* hearing, the issue for the court of appeals "is whether the defendant's motion alleged sufficient facts entitling him to a hearing." *Sholar*, 381 Wis. 2d 560, ¶ 51. However, appellate courts frequently decide—even in the absence of a *Machner* hearing—that the record conclusively demonstrates a defendant was not prejudiced by alleged deficient conduct. *Id.* ¶ 54. For example, in *Roberson*, 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." 292 Wis. 2d 280, ¶ 44.

Historically, there has been some confusion as to whether a hearing is mandatory when a defendant sufficiently pleads his postconviction motion. That appears to be because in *Bentley*, this Court said, "[i]f 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*." 201 Wis. 2d at 309–10 (emphasis added). Justice Prosser expressed concern over 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). As further explained in *Howell*, he feared 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).

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, "[t]he 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.*

This Court reaffirmed *Howell*'s clarification in the plea withdrawal context at least three times since then. In *State v. Negrete,* this Court explained, "[w]here a defendant's motion alleges facts that would entitle him to withdraw his plea, but the record conclusively demonstrates that the defendant is not entitled to relief, no evidentiary hearing is required." *State v. Negrete*, 2012 WI 92, ¶ 17, 343 Wis. 2d 1, 819 N.W.2d

749. And in *Sulla*, this Court explained that a sufficiently pleaded postconviction motion may be denied without an evidentiary hearing on record-conclusively-shows grounds. *Sulla*, 369 Wis. 2d 225, ¶ 30 ("[t]o be clear, a circuit court has the discretion to deny a defendant's motion—even a properly pled motion—to withdraw his plea without holding an evidentiary hearing if the record conclusively demonstrates that the defendant is not entitled to relief.")

This Court elaborated on the correct standard in *State v. Reyes Fuerte*:

> Under the *Bentley* standard, the reviewing court first determines whether the motion "alleges sufficient material facts that, if true, would entitle the defendant to relief." … If sufficient facts are alleged, the court then looks to the record to determine whether an evidentiary hearing is required.… An evidentiary hearing is required if the record is insufficient to determine whether the defendant is entitled to relief. … Conversely, no hearing is required if the record "conclusively demonstrates" that the defendant is not entitled to relief, even if the motion alleges sufficient facts.

State v. Reyes Fuerte, 2017 WI 104, ¶ 14, 378 Wis. 2d 504, 904 N.W.2d 773 (citations omitted).

In short, a sufficiently pleaded 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. Ndina*, 2007 WI App 268, ¶¶ 15, 17–23, 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, 26, 330 Wis. 2d 693, 794 N.W.2d 547. "[A] defendant is automatically entitled to an evidentiary hearing no matter how . . . meritless the ineffective assistance of counsel claim might be.'" *Curtis*, 218 Wis. 2d at 555 n.3.

However, as explained in further detail below, some courts (including the court of appeals here) continue to cite parts of *Allen*, 274 Wis. 2d 568 and rely on the interpretation of *Bentley* that was rejected *Howell*, 301 Wis. 2d 350, ¶ 77 & n. 51. *See, e.g., State v. Spencer*, 2021 WI App 27, ¶ 22, 397 Wis. 2d 241, 959 N.W.2d 74, 2021 WL 870598, at *5 (unpublished) (Pet-App. 118–19). In other words, despite this Court's re-affirmation of the record-conclusively-shows standard in *Howell*, *Negrete*, *Sulla, and Reyes Fuerte*, some courts continue to interpret this Court's earlier precedent as requiring an evidentiary hearing any time a defendant sufficiently pleads an ineffective assistance of counsel claim.

This Court should re-affirm that a sufficiently pleaded postconviction motion alleging ineffective assistance of counsel may be denied without a hearing where the record conclusively shows the defendant is not entitled to relief. And it should unambiguously reject any cases reading *Bentley* as saying otherwise.

B. This record conclusively shows that Ruffin is not entitled to relief.

Applying the correct standard here, the circuit court properly denied Ruffin's motion without a hearing. To establish a prima facie case of ineffective assistance of counsel, a defendant must allege facts that establish that counsel was both deficient and that the deficiency was prejudicial, under the familiar two-part test articulated in *Strickland*, 466 U.S. at 687. Even assuming Ruffin sufficiently alleged relevant facts in his postconviction motion, the record conclusively establishes that he is not entitled to relief. Therefore, the circuit court properly exercised its discretion when it denied Ruffin's postconviction motion without a *Machner* hearing.

1. Ruffin's counsel was not deficient for abandoning his request for a self-defense instruction.

In his postconviction motion, Ruffin argued that "trial counsel erred by failing to renew his request that the self-defense instruction be applied to the sexual assault allegation." (R. 49:18.) He contended that, based on the trial record, the circuit court would have been required to provide the self-defense instruction if counsel had asked for it. (R. 49:18.) Ruffin is wrong.

Self-defense allows a defendant to use force against a person when the following three criteria are met: (1) the defendant believed that there was an actual or imminent unlawful interference with him; (2) he believed that the amount of force he used was necessary to stop that interference; and (3) the defendant's beliefs were reasonable. Wis. JI–Criminal 800 (2005). "A belief may be reasonable even though mistaken." Wis. JI–Criminal 800 (2005). But the standard to determine reasonableness is "what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense." Wis. JI–Criminal 800 (2005).

Additionally, there are limits on self-defense. "The actor may intentionally use only such force or threat thereof as the actor reasonably believes is necessary to prevent or terminate the interference." Wis. Stat. § 939.48(1). Further, "[t]he actor may not intentionally use force which is intended or likely to cause death or great bodily harm unless the actor reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself." Wis. Stat. § 939.48(1).

Similar to Wisconsin Jury Instruction 800, this Court has divided perfect self-defense into two elements: "(1) a reasonable belief in the existence of an unlawful interference; and (2) a reasonable belief that the amount of force the person intentionally used was *necessary* to prevent or terminate the interference." *State v. Head*, 2002 WI 99, ¶ 84, 255 Wis. 2d 194, 648 N.W.2d 413 (emphasis added). A defendant who seeks a jury instruction on perfect self-defense must meet "a reasonable objective threshold" as to both elements. *Id.* A self-defense instruction cannot be based on mere conjecture. *Ross v. State,* 61 Wis. 2d 160, 172, 211 N.W.2d 827 (1973).

A defendant is not automatically entitled to a jury instruction on an offered defense. *State v. Stoehr*, 134 Wis. 2d 66, 87, 396 N.W.2d 177 (1986). But a criminal defendant is entitled to have the jury consider any defense supported by the evidence when he properly requests that the court instruct the jury on that defense.[11] *Id.* In determining whether there is sufficient evidence to support the instruction, courts determine whether the evidence viewed in the most favorable light that it is reasonable to admit from the defendant's point of view supports the instruction. *State v. Coleman*, 206 Wis. 2d 199, 213–14, 556 N.W.2d 701 (1996).

Counsel does not perform deficiently in failing to request a jury instruction for an invalid defense. *State v. Dundon*, 226 Wis. 2d 654, ¶¶ 48–49, 594 N.W.2d 780 (1999). In *Dundon*, the defendant argued that his trial counsel rendered ineffective assistance for failing to request jury instructions on self-defense, Wis JI-Criminal 800, as well as another defense. *Id.* ¶ 48. The circuit court denied the postconviction motion without a hearing. *Id.* ¶ 49. This Court

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[11] No evidence establishes that Ruffin asked his lawyer to maintain self-defense. That issue is not relevant to this appeal, because even if Ruffin had requested self-defense while his attorney did not, counsel cannot be deficient for failing to raise a meritless argument. *State v. Allen*, 2017 WI 7, ¶ 46, 373 Wis. 2d 98, 890 N.W.2d 245.

affirmed, noting that Dundon was not entitled to any privilege instruction, based on the relevant statutes and facts of his case. *Id*., *see also* ¶¶ 25–40. This Court reasoned that "[w]e would be hard pressed to conclude that Dundon's counsel performed deficiently in failing to request a jury instruction to an invalid defense." *Id*. ¶49.

Here, the evidence, reasonably viewed in the light most favorable to Ruffin, does not support the theory of self-defense. According to Ruffin, he and Delia were involved in a verbal argument when she began to hit him and tried to push him down the stairs. (R. 73:8–9.) In response, Ruffin tried to push Delia onto their bed when she tripped, grabbed him by the collar, and they both fell on the bed. (R. 73:9.) Then, Delia wrapped her legs around him. (R. 73:9.) In an effort to avoid falling on Delia and their fetus, and to get her to let go of him, Ruffin tried to hold himself off of her while moving her legs off of him. (R. 73:9–11.) In the process, he ripped Delia's vaginal tissue. (R. 73:11.)

Even if Ruffin's testimony created a factual issue as to whether he had a reasonable belief in the existence of an unlawful interference (which is questionable), there is no evidence from which a reasonable person could find that in nearly detaching Delia's labia, Ruffin's acted with force that he reasonably believed was necessary to stop her aggression. *Head*, 255 Wis. 2d 194, ¶ 84.

The evidence shows that Ruffin was a foot taller and at least 100 pounds heavier than Delia. (R. 17:45; 72:21, 42–43; 73:8, 35.) Ruffin said he was on top of Delia and her legs were around his waist. (R. 73:45.) He testified that he pushed at her vaginal area to avoid hurting the baby. In an effort to avoid falling on Delia and their fetus, Ruffin tried to hold himself off of her by putting out his arm. (R. 73:9–11.) In order to not "hit the baby and hurt her and the baby" Ruffin tried to "go for the leg part just to push her legs off from around me." (R. 73:45.) While in this position, Ruffin ripped her vaginal

tissue. (R. 73:45.) Delia had surgery to repair and reattach two-and-a-half inches of separated vaginal tissue, part of which was devitalized. (R. 71:83.)

Ruffin did not testify that he felt threatened by Delia, nor did he testify that he attempted to de-escalate the situation without using force. Even aside from that, Ruffin's testimony does not establish that he had a reasonable belief that the amount of force he used (tearing two inches of vaginal tissue) was *necessary* to prevent or terminate the alleged interference (her legs around his waist).

Indeed, he claimed that the ripping was an accident. (R. 73:45.) As Judge White explained in her dissent, while Ruffin said his intention in holding out his arm was self-defense, "Ruffin's testimony does not reflect a similar intention when he pushed [Delia] in the vaginal area or that pushing her was necessary to stop her interference." *Ruffin*, 2021 WL 870593, ¶ 51 (White, J. Dissenting). Ruffin's testimony that he "wasn't trying to use no forces," (R. 73:55), is utterly incredible, given the undisputed nature of the injury.

Ruffin provided no explanation for how his hand made contact with her vagina and why or how he tore tissue in that area other than saying he was "pushing in that area" to "push her legs off of me so I [could] go." (R. 73: 44–45.) This does not fit self-defense, where an element is that Ruffin had "a *reasonable* belief that the amount of force [he] *intentionally* used was *necessary* to prevent or terminate the interference." *Head*, 255 Wis. 2d 194, ¶ 84 (emphasis added).

Ruffin's counsel correctly made the same conclusion. Counsel explained that after reading through the self-defense instruction he did not think it could be worded the way he thought it needed to be worded. (R. 73:63–64.) He explained that he was "not sure it really fits this situation." (R. 73:64.)

In his postconviction motion, Ruffin stated that his lawyer argued that the record contained "an abundance of evidence" that Ruffin's actions were "defensive actions" and that "[h]e was trying to protect himself and [his] unborn child when he pushed [Delia] in between her legs while she was attacking him." (R. 49:18.) Ruffin quoted his lawyer's initial argument for the self-defense instruction, not trial evidence. (R. 49:18 (citing R. 73:62–63.)) What the evidence *actually* shows was not sufficient to entitle Ruffin to a jury instruction on self-defense. Counsel does not perform deficiently in failing to request a jury instruction to an invalid defense. *Dundon*, 226 Wis. 2d 654, ¶ 49. For this reason alone, the record shows that Ruffin is not entitled to relief.

2. Counsel's decision not to pursue self-defense did not prejudice Ruffin.

For these same reasons, even if the circuit court had instructed the jury on self-defense, no reasonable jury would have found that Ruffin acted in lawful self-defense. The circuit court explained: "Almost entirely ripping off the woman's labia - she testified it was just hanging there—that required 28 stitches to reattach it? When she was laying on the bed face up? There is not a reasonable probability he would have obtained an acquittal." (R. 50:4, Pet-App. 104.) Judge White agreed in her dissent: "Under any view of the facts, the force Ruffin used was not proportionate to the manner of threat he encountered." *Ruffin*, 2021 WL 870593, ¶ 50 (White, J. Dissenting).

The State proved beyond a reasonable doubt that any belief of Ruffin's that he needed to grab Delia's vagina so forcefully that he nearly detached her labia was an unreasonable one. Even if Ruffin believed he was acting in self-defense, no version of the evidence supports his alleged belief that the amount of force he used was reasonable. Thus, there is no reasonable probability that the jury would have

returned a different verdict had it been instructed on self-defense. And without a reasonable probability of a different result, Ruffin did not establish prejudice. *See Strickland*, 466 U.S. at 693–94.

Because the record shows that Ruffin was not entitled to relief on his ineffective assistance claim, the circuit court properly exercised its discretion in denying the postconviction motion without a hearing.

C. The court of appeals' decision conflicts with this Court's most recent precedent, applies a standard that benefits no one, and creates inefficiency in an already overburdened court system.

The court of appeals' decision is inconsistent with this Court's established precedent. The majority looked only to Ruffin's postconviction allegations without examining the record as a whole. *Ruffin*, 2021 WL 870593, ¶¶ 41–47. The majority compounded its error by failing to recognize that the circuit court could deny Ruffin's motion without a hearing if the record conclusively showed that he was not entitled to relief, and by failing to search the record for reasons to uphold the circuit court's exercise of discretion.

The majority's decision appears to rely on an erroneous interpretation of *Allen*. *Ruffin*, 2021 WL 870593, ¶¶ 16, 41–42. The court of appeals concluded that if Ruffin alleged sufficient facts that his trial counsel was ineffective, the majority reasons, he is entitled to a *Machner* hearing addressing his claim, regardless of whether the record conclusively disproves his allegations. *Id*. ¶ 42.

The majority's reasoning is aligned with this Court's pre-*Howell* clarification of the standard. *Allen* relies in part on the test set forth in *Bentley*. *Allen*, 274 Wis. 2d 568, ¶ 14 ("[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") (citing *Bentley*, 201 Wis. 2d at 310). Isolated paragraphs of *Allen*, as well as *Bentley*, could be interpreted to say that a hearing is required when a defendant's postconviction motion alleges sufficient facts.

This Court has since held that "[s]uch an interpretation of *Nelson* and *Bentley,* however, is not correct." *Howell*, 301 Wis. 2d 350, ¶ 77 n.51. "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.*

This Court reaffirmed this concept for ineffective assistance claims in *State v. Sholar*, though lower courts have taken some of *Sholar*'s language out of context. [12] A *Machner* hearing is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief. *Sholar*, 381 Wis. 2d 560, ¶ 50 (citing *Allen*, 274 Wis. 2d 568, ¶ 14). "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." *Allen*, 274 Wis. 2d 568, ¶ 9 (citing *Sulla*, 369 Wis. 2d 225, ¶ 23). The *Sholar* court acknowledged that appellate courts frequently decide—even in the absence of a *Machner* hearing—that the record conclusively demonstrates a defendant was not prejudiced by alleged deficient conduct,

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[12] In *State v. Spencer*, the court of appeals held that a trial court was required to have a *Machner* hearing when the defendant alleged sufficient material facts that would entitle him to relief. *State v. Spencer*, 2021 WI App 27, ¶ 26, 397 Wis. 2d 241, 959 N.W.2d 74, 2021 WL 870598 (unpublished), (Pet-App. 115-27). The *Spencer* court appeared to read *Sholar* as requiring a *Machner* hearing when a motion is sufficiently pleaded, regardless of whether the record refutes the allegations in the motion. *Id.* This Court granted review of *Spencer* on August 13, 2021. *See generally Spencer*, Appeal No. 2018AP942-CR.

often presuming without deciding that counsel's performance was deficient. *Id.* ¶ 54. *Sholar* does not hold that a *Machner* hearing is required if the defendant sufficiently pleads his motion but the record conclusively shows that he is not entitled to relief.

This Court should clarify once again that that a sufficiently pleaded postconviction motion may be denied without a hearing where the record conclusively refutes the defendant's allegations. There is no exception for ineffective-assistance claims. Requiring a *Machner* hearing where the record conclusively shows no deficient performance or no prejudice 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." *Strickland,* 466 U.S. at 697.

The practical reasons for this rule are obvious. A rule that allows courts to avoid pointless *Machner* hearings promotes efficiency in an already overburdened court system. The rule also 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."). "Not all motions require evidentiary hearings," and a postconviction motion entails more demanding standards for good reason. *Allen*, 274 Wis. 2d 568, ¶ 10. "[O]nce the criminal process has been completed and the defendant convicted and sentenced, the reasons that support a lesser sufficiency standard for pretrial motions are no longer compelling, and instead, [this Court] must consider the strong policy that favors finality." *Id.* ¶ 11; *see also State v. Balliette*, 2011 WI 79, ¶ 53, 336 Wis. 2d 358, 805 N.W.2d 334.

This standard does not interfere with a defendant's right to effective assistance of counsel. When a defendant alleges sufficient facts and the record does *not* conclusively demonstrate that the defendant is not entitled to relief, the circuit court is without discretion, and must grant an evidentiary hearing. *See Negrete*, 343 Wis. 2d 1, ¶ 17 n.6. However, if a defendant's motion is conclusively foreclosed by the record, then it does not benefit the defendant to go through the exercise of a pointless evidentiary hearing.

In this case, the circuit court concluded that trial counsel's decision to not pursue a self-defense instruction was neither deficient performance nor prejudicial. (R. 50:4, Pet-App. 104.) The circuit court reviewed the record, correctly applied the law, and exercised its discretion to deny Ruffin's motion without a hearing. The court of appeals should have searched the record for reasons to uphold the circuit court's exercise of discretion. *Dobbs*, 392 Wis. 2d 505, ¶ 48. Failing to do so was error.

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This Court should reverse the court of appeals' decision to remand Ruffin's case for a *Machner* hearing. In doing so, this Court should clarify that the circuit court has discretion to deny a sufficiently-pleaded postconviction motion for ineffective assistance if the record conclusively shows that the defendant is not entitled to relief.

The lower courts need guidance on this important issue. However, to the extent that this Court believes the law needs no clarification, the extreme and undisputed facts of this case warrant this Court's discretionary correction. *See State v. Paulson*, 106 Wis. 2d 96, 104, 315 N.W.2d 350 (1982). The court of appeals' decision on the self-defense issue was legally incorrect, based on the record evidence viewed in the most reasonable and favorable light to Ruffin, as discussed above. The suggestion that Ruffin's trial counsel rendered ineffective

assistance for not pursuing self-defense under these circumstances is belied by the record and common sense.[13] No reasonable jury would have found that Ruffin reasonably believed that the amount of force he used on Delia was reasonable and necessary to stop her alleged aggression. The court of appeals' decision is so untenable that this case presents "special and important reasons" for this Court to review and reverse. Wis. Stat. § (Rule) 809.62(1r).

[13] Because the issue of whether *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), *required* trial counsel to assert an objectively unreasonable defense was not directly addressed by the court of appeals, the State did not raise it as an independent basis for review. *See Ruffin*, 2021 WL 870593, ¶ 45 n.12. This issue is not directly at play in this appeal, as noted. However, it defies logic for the court of appeals to suggest that trial counsel may have been constitutionally required to assert a meritless defense.

CONCLUSION

The State respectfully requests that this Court reverse the court of appeals' decision to remand Ruffin's case for a *Machner* hearing and affirm the circuit court's decision denying Ruffin's motion for postconviction relief.

Dated: October 26, 2021.

Respectfully submitted,

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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 7874 words.

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 26th day of October 2021.

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