STATE OF WISCONSIN

IN SUPREME COURT

No. 2021AP1399-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MORRIS V. SEATON,

Defendant-Respondent-Petitioner.

# RESPONSE TO PETITION FOR REVIEW

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This Court should deny Morris Seaton's Petition for Review.

This case may look familiar to the Court. It originated as a State's appeal of the Waukesha County Circuit Court's pretrial decision in this as-of-yet-untried sexual assault case. The court of appeals certified the case to this Court. (Pet-App. 50–65.) Following briefing and oral argument, this Court was equally divided on the merits and remanded the case back to the court of appeals. (Pet-App. 67–68.) After the parties submitted new briefs, the court of appeals reversed the circuit court's decision excluding the other-acts evidence in this case. (Pet-App. 3–21.)

In reversing, the court of appeals held the following:

- Contrary to the circuit court's holding that the State failed to identify a permissible purpose for the other act, the State satisfied its low burden under the first *Sullivan*[1] prong by offering the evidence "for the purposes of motive, identity, plan, opportunity, modus operandi, intent, context, and credibility." (Pet-App. 10–11.)

- The court of appeals held that the evidence of the similar alleged other act of sexual assault was relevant to and probative of those purposes. (Pet-App. 15–20.) In so holding, the court distinguished and limited the holdings in *Alsteen* and *Cofield*,[2] based on later case law and the codification of the greater-latitude rule. (Pet-App. 12–16.)

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[1] *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

[2] *State v. Alsteen*, 108 Wis. 2d 723, 730, 324 N.W.2d 426 (1982); *State v. Cofield*, 2000 WI App 196, 238 Wis. 2d 467, 618 N.W.2d 214.

- It held that the probative value of the evidence was high and was not any more prejudicial against Seaton than the charges that the victim in this case alleged against Seaton. (Pet-App. 20–21.)

The petition does not satisfy this Court's criteria for review. Wis. Stat. § (Rule) 809.62(1r). The court of appeals' decision was a well-supported and sound application of the *Sullivan* factors and the greater-latitude rule to proposed other-acts evidence. It correctly reversed the circuit court's erroneous misapplication of the law excluding the evidence.

Seaton argues that review is warranted under Wis. Stat. § (Rule) 809.62(1r)(c)(3) to address a likely-to-recur question of law: whether credibility is a stand-alone permissible purpose under the first *Sullivan* prong. (Pet. 4, 11–12.) He asserts that allowing the court of appeals' decision here to stand will open the "floodgates" to the admission of other acts "in nearly all, if not all, criminal cases." (Pet. 5, 12.)

But recognizing that credibility is a permissible purpose is not a new or novel holding. This Court has already expressly identified credibility as a permissible purpose under the first *Sullivan* prong. *See State v. Marinez*, 2011 WI 12, ¶ 27, 331 Wis. 2d 568, 797 N.W.2d 399. Since *Marinez* was issued, there has not been a flood of other-acts motions premised solely on credibility as the only possible permissible purpose. And even if there had been, this Court has already instructed lower courts how to assess the issue: credibility is a permissible purpose. *Id.* Further, nothing about the portion of the court of appeals' decision recognizing *Marinez*'s holding that credibility is a permissible purpose has altered the guidance that the Department of Justice provides district attorneys for filing or responding to other-acts motions.

Even if there were disagreement over whether credibility can operate as a sole permissible purpose under the first *Sullivan* step, a reversal on that point would have no

impact on the outcome of Seaton's case. As the court of appeals held here, the State identified multiple permissible purposes—not just credibility—supporting admission of the other-act evidence. Accordingly, any ruling abrogating *Marinez* and holding that credibility cannot be a sole permissible purpose would be an advisory decision on a hypothetical question. *See State v. Grandberry*, 2018 WI 29, ¶ 31, 380 Wis. 2d 541, 910 N.W.2d 214.

Seaton also asks this Court to accept review based on the criterion in Wis. Stat. § (Rule) 809.42(1r)(d), arguing that the court of appeals created conflicting law when it limited and distinguished older other-acts case law from *State v. Alsteen* and *State v. Cofield*. (Pet. 6–7.) He argues that *Alsteen* and *Cofield* stand for the proposition that evidence of one victim's nonconsent cannot prove that another victim also did not consent. (Pet. 6–7, 13–14.) He incorrectly asserts that the court of appeals effectively overruled *Alsteen* and *Cofield* because it greenlit the admission of other acts offered "to prove [the victim's] lack of consent in the current offense." (Pet. 6–7, 9, 13–14.)

Starting with that last point first, the State did not seek to admit the other act to prove that the victim in this case did not consent (i.e., to prove her state of mind based on another victim's state of mind). Rather, as the court of appeals accurately noted (Pet-App. 18–20), the State asked to admit the act to prove Seaton's motive, intent, and modus operandi with the current victim, based on evidence that Seaton initiated intercourse with a different victim but declined to obtain consent or to stop when the victim asked.

Further, the court of appeals' decision did not conflict with any controlling precedent or legal principles. The distinction in consent cases between the improper purpose identified in *Alsteen* and *Cofield* (i.e., an other-act proving whether the present victim consented) and a proper purpose (i.e., an other-act proving the defendant's intent, motive, and

modus operandi) is not new to the court of appeals' decision here. Rather, it dates back 30-plus years to *State v. Ziebart*, 2003 WI App 258, ¶ 24, 268 Wis. 2d 468, 673 N.W.2d 369, when the court of appeals recognized that *Alsteen* and *Cofield* did not bar other-acts in consent cases. Rather, other acts were admissible to prove purposes (such as motive or modus operandi) other than the victims' nonconsent. *Id.*

In addition, the court of appeals soundly distinguished the reasoning in *Alsteen* and *Cofield* based on the fact that neither case applied the greater latitude rule to their analyses. (Pet-App. 13–14, 16.) That rule, which was later codified, and which is designed to ease admission of other acts in sexual assault cases, is indisputably important to the *Sullivan* analysis. Accordingly, the lack of consideration of the greater latitude rule in a previous other-acts case is a reasonable and obvious point of distinction for a court in considering the admission of other acts in a greater-latitude case. Recognizing that distinction is not an overruling of those past cases. Rather, it is an exercise of the reason-based decision-making that the court of appeals does every day.

In sum, nothing about the court of appeals' consideration of *Alsteen* and *Cofield* justifies review of Seaton's case. The lower court's reasoning distinguishing and limiting the applicability of those cases (particularly in light of *Ziebart*, codification of the greater latitude rule, and *State v. Dorsey*[3]) was correct, sound, and supported by the law.

Seaton also asks this Court to accept review to reverse the court of appeals' decision on the merits. (Pet. 14.) He correctly acknowledges that this request does not, on its own, support review. *See State ex rel. Dep't of Nat. Res. v. Wis. Court of Appeals, Dist. IV*, 2018 WI 25, ¶ 43, 380 Wis. 2d 354, 909 N.W.2d 114 (footnote omitted) ("We are not, primarily, an

[3] *State v. Dorsey*, 2018 WI 10, 379 Wis. 2d 386, 906 N.W.2d 158.

error-correcting tribunal, and we normally hear only those cases that present something more than just an error of law.").

Even so, there is no error for this Court to fix. The court of appeals correctly held that the circuit court misapplied *Sullivan* when it excluded highly probative other-acts evidence based on the first prong of the test. The court of appeals' reversal corrected that misapplication and will allow the State to admit evidence of a markedly similar other act for limited purposes at Seaton's trial.

As a final point, review is not warranted given that this case has been stalled in a pretrial posture for over three years. To be sure, that pause was initiated by the State when it filed its notice of appeal. (R. 54.) Nevertheless, though the State understood that its appeal would delay trial, it did not expect a delay this prolonged. Granting review now will add an additional lengthy wait on a case in which Seaton has yet to be tried or to hold the State to its burden of proof.

This last point is not a critique of Seaton's choice to petition this Court. He absolutely has the right to seek review of the court of appeals' decision. Still, any further postponement of trial here—particularly to review a factually and legally supported decision on an isolated pretrial issue—will not benefit the victim, the parties, or the bench.

For all of those reasons, the State asks this Court to deny Seaton's Petition for Review.

Dated this 20th day of December 2024.

Respectfully submitted,

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## FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 1,483 words.

Dated this 20th day of December 2024.

Electronically signed by:

Sarah L. Burgundy
SARAH L. BURGUNDY
Assistant Attorney General

## 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 Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 20th day of December 2024.

Electronically signed by:

Sarah L. Burgundy
SARAH L. BURGUNDY
Assistant Attorney General