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STATE OF WISCONSIN

IN SUPREME COURT

No. 2019AP90-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

GEORGE E. SAVAGE,

Defendant-Appellant.

PETITION FOR REVIEW AND APPENDIX

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INTRODUCTION

The State of Wisconsin petitions this Court under Wis. Stat. §§ 808.10 and (Rule) 809.62 to review the Wisconsin Court of Appeals' authored decision reversing the circuit court's decision and order denying George E. Savage's postconviction plea withdrawal motion after a *Machner*[1] hearing. *State v. George E. Savage*, No. 2019AP90-CR, 2020 WL 356735, ¶ 3 (Wis. Ct. App. Jan. 22, 2020) (unpublished). (Pet-App. 101–06.)

Savage, a homeless sex offender, pleaded guilty to one count of failing to comply with Wis. Stat. § 301.45's sex offender registry reporting requirements. Savage moved for postconviction relief, alleging that his counsel was ineffective partly because she failed to discuss with him a defense based on his homelessness. In *State v. Dinkins*, 2012 WI 24, ¶ 5, 339 Wis. 2d 78, 810 N.W.2d 787, this Court held that a sex offender cannot be convicted of Wis. Stat. § 301.45(6) for failing to report required information to the sex offender registry when the offender is unable to provide the information but has made reasonable attempts to provide it. Savage asserted he would have gone to trial had his counsel advised him of the defense. At a *Machner* hearing, counsel testified that Savage pleaded guilty after receiving a favorable plea offer from the State and that she did not discuss a *Dinkins* defense with him because his actions, including cutting off a GPS bracelet and absconding from probation, showed an intent not to comply with his registry obligations.

The circuit court denied Savage's postconviction motion, determining that he could not show *Strickland*[2] prejudice because he did not have a *Dinkins* defense. The

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

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

court of appeals disagreed with the circuit court's interpretation of *Dinkins*. But rather than decide whether it could sustain the ruling given the undisputed facts in the record as required by *State v. Horn*, 139 Wis. 2d 473, 490, 407 N.W.2d 854 (1987), the court of appeals appeared compelled under *State v. Sholar*, 2018 WI 53, 381 Wis. 2d 560, 912 N.W.2d 89, to remand the case to the circuit court to "make proper findings of fact and properly analyze Savage's ineffective assistance of counsel claim in light of [its] discussion regarding *Dinkins*." *Savage*, 2020 WL 356735, ¶ 3. Thus, despite Savage's admissions at the *Machner* hearing that he cut off his GPS bracelet and absconded from supervision, the court of appeals concluded more factfinding was needed regarding Savage's efforts to comply with registry obligations.

ISSUES PRESENTED FOR REVIEW

1. In *Lee v. United States*, 137 S. Ct. 1958 (2017), the Supreme Court affirmed the validity of *Hill v. Lockhart*, 474 U.S. 52 (1985), which has guided this Court's application of *Strickland* in the plea withdrawal context. *Hill* holds that resolution of the *Strickland* prejudice inquiry generally requires a defendant to prove that there is a reasonable probability, but for his counsel's deficient performance, that he would not have pleaded guilty and would have gone to trial and that his defense would have succeeded at trial. In *Lee*, the Supreme Court slightly narrowed *Hill*, recognizing that in "unusual circumstances" a defendant might be able to show *Strickland* prejudice even without a reasonable probability of success at trial.

Savage asserted that if his counsel had told him about the *Dinkins* defense, he would have gone to trial despite his admissions that he cut off a GPS bracelet, absconded from

probation, and did not comply with his agent's orders. Did Savage prove that he was entitled to withdraw his plea without showing a reasonable probability that his defense would have succeeded at trial?

The circuit court determined, based on its interpretation of *Dinkins*, that Savage did not have a defense under *Dinkins*. (R. 45:75.) Therefore, it concluded counsel's decision not to discuss this defense with Savage did not prejudice him. (R. 45:75.)

The court of appeals determined that the circuit court misinterpreted *Dinkins*. *Savage*, 2020 WL 356735, ¶ 24. It remanded for the circuit court to "engage in a proper analysis of Savage's allegations based upon the holding in *Dinkins*." *Id*. ¶ 31.

This Court should grant review to interpret *Lee* and clarify that Savage cannot prove *Strickland* prejudice because his case does not present "unusual circumstances" like those identified in *Lee* and he did not show a reasonable probability, given his admissions, that a *Dinkins* defense would have succeeded at trial.

2. Even when an appellate court disagrees with a circuit court's reasoning, it will sustain a circuit court's decision if the decision itself is correct, provided facts in the record support the decision. *Horn*, 139 Wis. 2d at 490–91. Even though the court of appeals could have affirmed the circuit court's ruling based on the undisputed facts from the *Machner* hearing, the court of appeals concluded that *Sholar*, 381 Wis. 2d 560, compelled remand to the circuit court.

Did *Sholar* prevent the court of appeals from affirming the circuit court's determination that counsel was not ineffective based on the evidence at the *Machner* hearing?

This Court should grant review to clarify that *Sholar* did not limit an appellate court's authority under this Court's past decisions to affirm a circuit court's ruling, even one based on flawed reasoning, when the evidence in the record otherwise supported it.

STATEMENT OF WIS. STAT. § (RULE) 809.62 CRITERIA RELIED ON FOR REVIEW

Both issues satisfy this Court's criteria for review under Wis. Stat. § (Rule) 809.62.

The first issue raises a real and significant question of federal constitutional law and will help develop and clarify the law. Wis. Stat. § (Rule) 809.62(1r)(a) and (1r)(c)2. With some frequency, defendants seek to withdraw guilty pleas based on claims of ineffective assistance of counsel. To establish *Strickland* prejudice in the plea context, a defendant must demonstrate that there is a reasonable probability that he would not have pleaded guilty and would have gone to trial. *See State v. Dillard*, 2014 WI 123, ¶¶ 95–96, 358 Wis. 2d 543, 859 N.W.2d 44 (citing *Hill*, 474 U.S. at 59). In *Hill*, the Supreme Court stated that when the alleged error relates to counsel's failure to advise a defendant of a potential defense to the charged crime, "the resolution of the 'prejudice' inquiry *will depend largely on whether the affirmative defense likely would have succeeded at trial*." *Hill*, 474 U.S. at 59 (emphasis added).

More recently, in *Lee*, 137 S. Ct. 1958, the Supreme Court reaffirmed that "[a]s a general matter, it makes sense that a defendant who has no realistic defense to a charge supported by sufficient evidence will be unable to carry his burden of showing prejudice from accepting a guilty plea." *Id.* at 1966. Although the Court declined to adopt a *per se* rule, and left room for "unusual circumstances," it restated that "[a]

defendant without any viable defense will be highly likely to lose at trial" and "will rarely be able to show prejudice from accepting a guilty plea that offers him a better resolution than would be likely after trial." *Id.* Under the "unusual circumstances" in *Lee*, the Supreme Court determined that Lee had shown prejudice and granted plea withdrawal. *Id.* at 1969.

Through Savage's case, this Court can guide lower courts tasked with determining *Strickland* prejudice in the plea withdrawal context after *Lee*.

The second issue also warrants review because it is necessary to develop and clarify this Court's recent decision in *Sholar*. The court of appeals interpreted *Sholar* as compelling remand even though there had already been a *Machner* hearing in this case and a record of facts to which it could apply the correct law. *Savage*, 2020 WL 356735, ¶ 29. Under well-established principles stated in *Horn*, an appellate court "should . . . sustain" a circuit court's correct holding where there is "a factual underpinning that would support the proper findings." *See Horn*, 139 Wis. 2d at 490–91.

If correct, the court of appeals' interpretation of *Sholar* raises a legal question about the continued vitality of this Court's decisions holding that an appellate court should sustain a lower court's decision when its decision is correct and facts in the record support it, even if the lower court's reasoning is erroneous. *Horn*, 139 Wis. 2d at 490–91.

STATEMENT OF THE CASE

I. Savage's guilty plea and sentencing

The charges. The State charged Savage with a violation of the sex offender registry, based on his knowing failure to

comply with reporting requirements under Wis. Stat. § 301.45(2) to (4), contrary to Wis. Stat. § 301.45(6). (R. 2:1.) The complaint alleged that Savage, who listed his residence as "Homeless," had cut off a GPS bracelet and absconded from supervision. (R. 2:2, 8.)

The plea colloquy. Savage appeared with counsel and entered a guilty plea. (R. 44:2.) Savage and his counsel executed the plea questionnaire, which referenced the State's plea offer and included a copy of Wis. JI–Criminal 2198 (2009), which addresses the elements of failure to comply with sex offender registration requirements. (R. 6:2; 7:1.) Savage initialed each element of the jury instruction, including the element that identified his obligation to provide changes to his address. (R. 7:1.) In exchange for his plea, the State recommended that Savage serve one year in the House of Corrections. (R. 6:2; 44:2.)

The circuit court engaged in an extensive plea colloquy before it accepted Savage's guilty plea. (R. 44:2–19.) During the plea colloquy, Savage told the circuit court that he understood the elements of the offense after the circuit court reviewed them with him. (R. 44:12.) Consistent with his plea questionnaire, Savage also told the circuit court that he understood that it was not bound to follow the parties' recommendations. (R. 44:4.)

Savage's sentence. The circuit court sentenced Savage to a 54-month term of imprisonment, consisting of a 30-month term of initial confinement and 24-month term of extended supervision. (R. 44:29.) The circuit court ordered Savage to serve the sentence concurrently with another sentence that he was already serving. (R. 44:29–30.)

II. Postconviction proceedings

Savage moved for postconviction relief, seeking to withdraw his plea due to a manifest injustice. (R. 19:14.) He contended that his plea was involuntary because his counsel had assured him that he would not receive any additional time when he pleaded to the sex offender registry charge. (R. 19:1–2.) Savage also asserted that his counsel was ineffective for failing to inform him that he had a defense based on his good faith efforts to comply with the registration requirements due to his homelessness. (R. 19:2.)

The circuit court granted Savage an evidentiary *Machner* hearing. (R. 45.) Counsel told Savage "homelessness was not an absolute defense to the charge. I explained as well there was, in fact, a homeless protocol in place through the Sex Offender Registry." (R. 45:13.) Counsel said that she was familiar with this protocol, including "that they would accept park locations, cross streets as long as a call was made in accordance with the registry conditions." (R. 45:24.) Counsel testified that Savage's acts of cutting off the GPS bracelet and his absconding from probation "reflect[ed] a level of intent not to comply" with his registry obligations. (R. 45:25–26.)

Savage claimed that his counsel did not speak to him about his good faith efforts to comply with sex offender registration requirements and whether there was a defense. (R. 45:37.) He insisted that he would have gone to trial if he had known that he had a defense. (R. 45:39–40.) Savage admitted that he had previously been noncompliant with his registry obligations and had previously been convicted for failing to register. (R. 45:41–42.) He admitted that he cut off his bracelet, absconded from probation, and stopped complying with his agent. (R. 45:49–50.)

Counsel stated that she made no promises or guarantees about the sentence that the circuit court would

impose following his plea. (R. 45:27.) Counsel explained what Savage wanted: "[H]e was adamant that he did not want any more supervision. . . . He wanted concurrent time . . . not to have that exceed the revocation time he would be serving." (R. 45:27–28.)

Savage testified that he pleaded guilty because his counsel told him that he would not serve more prison time than the two-year revocation time that he was serving and would not receive additional supervision. (R. 45:33–34.) Savage said that he expected to receive a one-year sentence concurrent to his revoked sentence. (R. 45:34–36, 51.)

The circuit court determined that counsel was not ineffective and denied Savage's postconviction motion. (R. 45:75.) The circuit court's decision relied on its credibility determination that counsel's testimony "overall" was credible, and "more credible" and "more persuasive" than Savage's testimony. (R. 45:65–66, 69.) It also detailed why it concluded Savage's testimony was "less than truthful." (R. 45:66–69.)

With respect to Savage's claim that counsel promised him a specific sentence, the circuit court held that counsel was not deficient because counsel told Savage that the circuit court was not obligated to follow any recommendations. (R. 45:70.) The circuit court found that Savage was motivated to plead guilty to avoid additional jail time and supervision. (R. 45:68, 70.)

The circuit court also determined that counsel's performance was neither deficient nor prejudicial for failing to tell Savage about a potential defense to the charge under *Dinkins* because "he did not have a defense in *Dinkins*." (R. 45:75.) The circuit court stated, "*Dinkins* stands for the proposition that if it is impossible for a person to report an address because of something outside of their control like, for example, being in prison at the time, then there may be a

defense." (R. 45:75.) It explained, "[C]ompared to Mr. Savage's circumstances, Mr. Dinkins' circumstance was impossible. Mr. Savage's circumstance was not." (R. 45:74.)

III. Appellate proceedings

Savage appealed, arguing that the circuit court erred when it denied his postconviction motion to withdraw his plea, which was not knowing, voluntary, and intelligent because his counsel was ineffective. *Savage*, 2020 WL 356735, ¶¶ 2, 13. Savage asserted his counsel was ineffective because she failed "to inform him that good faith efforts to comply with the sex offender registry requirements could be a defense to the charge." *Id.* ¶ 13.

For two reasons, the State argued that counsel's decision not to pursue a *Dinkins* defense based on Savage's homeless status did not constitute deficient performance. First, counsel explained that Savage's removal of his GPS bracelet and his absconding from supervision demonstrated that he did not intend to comply with his registry obligations. (State's Br. 14.) Therefore, counsel could not be deficient because she reasonably assessed that Savage did not have a *Dinkins* defense that required him to show that he made reasonable attempts to provide the required registry information. (State's Br. 14–15.) Second, Savage pleaded guilty because the State's offer included a recommendation for a year in the county jail without additional supervision. (State's Br. 15.) Therefore, counsel could not be deficient for pursuing Savage's goal of minimizing additional exposure through a plea agreement. (State's Br. 15.)

The State also argued that Savage did not prove prejudice for two reasons. First, the State made a favorable plea offer that provided a better resolution than what would have been likely after trial. (State's Br. 16.) Second, Savage's

decisions to abscond from supervision and remove his GPS device undermined his chance of successfully mounting a defense based on his homelessness. (State's Br. 16.)

Contrary to the circuit court, the court of appeals stated that *Dinkins* was not limited to situations where "it was impossible" for registrants to report something outside of their control. *Savage*, 2020 WL 356735, ¶ 23. It explained that a registrant could not be prosecuted for failing to report an address when he is unable to provide this information. *Id.* ¶ 24. Rather, it stated that *Dinkins* provides that "the registrant must make reasonable attempts to provide the required information." *Id.*

The court of appeals concluded that the circuit court erroneously determined that *Dinkins* did not apply to Savage's situation. *Savage*, 2020 WL 356735, ¶ 26. Based on *Dinkins* and without reference to the evidence from the *Machner* hearing, the court of appeals stated, "Savage may have a defense for his failure to register as a sex offender." *Id.* ¶ 27. The court of appeals expressly declined to find counsel's performance was deficient or prejudicial. *Id.* ¶ 31. Relying on *Sholar*, the court of appeals remanded Savage's case to the circuit court to determine whether counsel was ineffective for failing to advise Savage that he might have a *Dinkins* defense based on the court of appeals' interpretation of *Dinkins*. *Id.* ¶¶ 28–29.

DISCUSSION

I. This Court should grant review to decide how a circuit court should assess *Strickland* prejudice after a *Machner* hearing when a defendant claims that he would not have pleaded guilty had counsel informed him of a potential defense.

A defendant may bring a *Nelson/Bentley*[3] motion to withdraw his or her plea on manifest injustice grounds based on a factor extrinsic to the plea colloquy that renders the plea infirm. *State v. Sulla*, 2016 WI 46, ¶ 25, 369 Wis. 2d 225, 880 N.W.2d 659. "One way to demonstrate manifest injustice is to establish that the defendant received ineffective assistance of counsel." *Dillard*, 358 Wis. 2d 543, ¶ 84.

A defendant who seeks to withdraw a guilty plea after sentencing must prove by clear and convincing evidence that a refusal to allow plea withdrawal would result in a manifest injustice. *State v. Taylor*, 2013 WI 34, ¶ 24, 347 Wis. 2d 30, 829 N.W.2d 482. And a defendant alleging ineffective assistance of trial counsel must prove both that counsel's performance was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

To satisfy the prejudice prong in the plea withdrawal context, the defendant must show "that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (quoting *Hill*, 474 U.S. at 59); *Dillard*, 358 Wis. 2d 543, ¶ 96 (citing *Hill,* 474 U.S. at 59).

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[3] *Nelson v. State*, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), *modified by State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

In *Hill*, the Supreme Court explained that in the plea context, the *Strickland* prejudice "inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial." *Hill*, 474 U.S. at 59. And when the alleged error relates to counsel's failure to advise a defendant of a potential defense to the charged crime, "the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." *Id*. As the Supreme Court explained, the assessment of *Strickland* prejudice focuses on the outcome of a possible trial based on an objective assessment of the record. *Id*. at 60 (citing *Strickland*, 466 U.S. at 695).

In *Hill*, the Supreme Court illustrated how a court properly could assess *Strickland* prejudice in the plea context by reference to the Seventh Circuit's decision in *Evans v. Meyer*, 742 F.2d 371 (7th Cir. 1984). *Hill*, 474 U.S. at 59. In *Evans*, the Seventh Circuit determined that Evans did not affirmatively prove prejudice stemming from his counsel's failure to advise him of an intoxication defense before he pleaded guilty. *Hill*, 474 U.S. at 59 (citing *Evans*, 742 F.2d at 375). The court reasoned, "It is inconceivable to us . . . that Evans would have gone to trial on a defense of intoxication, or that if he had done so he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received." *Evans*, 742 F.2d at 375.

Thus, *Hill* and *Evans* stand for the proposition that a defendant must do more than simply assert that he would not have pleaded guilty but for his counsel's failure to advise him of a potential defense. Whether a reasonable defendant would have pleaded guilty but-for counsel's errors is informed by the likely "outcome of a trial," based on an objective assessment of the record. *Hill*, 474 U.S. at 59–60.

In *Burton*, this Court affirmed that it followed *Hill*'s "not have pleaded guilty and would have insisted on going to trial" standard. *State v. Burton*, 2013 WI 61, ¶ 50, 349 Wis. 2d 1, 832 N.W.2d 611. Burton moved to withdraw his plea, claiming that he would not have pleaded guilty, based on counsel's failure to pursue an insanity defense. *Id.* ¶ 62. Even if Burton had established deficient performance, this Court stated that his pleading did not sufficiently allege prejudice because "it [did] not assert *how* the option of bifurcation on mental responsibility would have caused him to decline the plea bargain and proceed to trial." *Id.* ¶ 68. In its analysis, this Court carefully reviewed the evidence and burden that Burton would have had to overcome to prevail at trial. *Id.* ¶ 70. While this Court did not expressly incorporate *Hill*'s "succeeded at trial" language, its decision in *Burton* analysis implicitly suggests *Strickland* prejudice requires a defendant to show some likelihood of success at trial.

In *Dillard*, another plea withdrawal case predicated on an ineffective assistance of counsel claim, this Court referenced *Hill*'s "insisted on going to trial" standard. *Dillard*, 358 Wis. 2d 543, ¶ 96 n.36. Based in part on the differences between Dillard's and Hill's situations, this Court granted plea withdrawal because Dillard presented a "persuasive factual account" at the *Machner* hearing of the circumstances that supported his contention that he would have gone to trial absent the misinformation his attorney provided about the penalties. *Id.* ¶ 100 n.38 (discussing *Hill*, 474 U.S. at 60).

More recently, in *Lee*, 137 S. Ct. 1958, the Supreme Court revisited *Hill*'s "insisted on going to trial" standard. Lee moved to withdraw his guilty plea because he believed, based on his counsel's misrepresentation before he pleaded guilty, that he would not be deported. *Id.* at 1963. Based on Lee's and his counsel's postconviction testimony, a magistrate

determined that "deportation was the determinative issue" in his decision to plead guilty. *Id*. The district court denied relief because a jury would "almost certainly" have found Lee guilty and Lee would have received a longer sentence and subsequent deportation had he gone to trial. *Id*. at 1964. The Sixth Circuit affirmed, based in part on its assessment under *Hill*, that Lee could not show prejudice because he did not have a defense. *Id*. The Supreme Court reversed, declining to adopt a categorical rule that "a defendant with no viable defense cannot show prejudice from the denial of his right to trial." *Lee*, 137 S. Ct. at 1966. It also observed that its analysis in *Hill* focused on "a defendant's decisionmaking, which may not turn solely on the likelihood of conviction after trial." *Id*. Based on "unusual circumstances," the Supreme Court concluded that Lee had demonstrated a reasonable probability that he would have rejected the plea had he known it would lead to mandatory deportation. *Id*. at 1967.

While recognizing Lee's case presented "unusual circumstances," the Supreme Court noted the strong societal interest in finality that attaches to convictions based on guilty pleas and the challenges defendants must overcome to prove *Strickland* prejudice in the plea withdrawal context. *Lee*, 137 S. Ct. at 1967. The Supreme Court cautioned, "Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Id*. In *Lee*, the contemporaneous evidence included Lee's statements during the plea colloquy in response to the judge's questions about potential deportation. *Id*. at 1968. The court emphasized, "As a general matter . . . a defendant who has no realistic defense to a charge supported by sufficient evidence will be unable to carry his burden of showing prejudice from accepting a guilty plea."

Id. at 1966. "A defendant without any viable defense will be highly likely to lose at trial. And a defendant facing such long odds will rarely be able to show prejudice from accepting a guilty plea that offers him a better resolution than would be likely after trial." *Id*.

Thus, while *Hill* recognized that a showing of *Strickland* prejudice generally depends on whether a defense would likely have succeeded at trial, *Lee* recognized that under some unusual circumstances, a successful trial outcome is not always the only consideration in assessing *Strickland* prejudice.

Should this Court grant review, the State will argue, as it did in the court of appeals, that Savage proved neither deficient performance nor prejudice. (State's Br. 13–17.) While *Dinkins* recognized that a registrant's homeless status may prevent a person from making reasonable attempts to comply with his registry obligations, counsel reasonably assessed that Savage's acts of cutting off his GPS bracelet and absconding from supervision evinced his intent not to comply with those obligations. (State's Br. 15–16.) Based on Savage's actions and his desire to accept the State's plea recommendation for a concurrent sentence and no additional supervision, Savage did not prove Strickland *prejudice*, i.e., he would not have pled guilty and would have gone to trial had his counsel informed him of a potential defense under *Dinkins*. (State's Br. 16–17.) Unlike in *Lee*, Savage has not shown that his case presented "unusual circumstances" that demonstrated a reasonable probability that he would have rejected the plea and insisted on going to trial.

Savage's case provides this Court with the opportunity to provide guidance to lower courts charged with determining whether a defendant seeking plea withdrawal has proved *Strickland* prejudice following a *Machner* hearing. While this

Court has generally relied on *Hill* in plea withdrawal cases, it has not had the opportunity to assess when a case presents such unusual circumstances as the Supreme Court recognized in *Lee*.

II. This Court should grant review to decide if *Sholar* prevents an appellate court from deciding whether a defendant has proved an ineffective assistance claim following a *Machner* hearing when it disagrees with the circuit court's reasoning, but the facts support its decision.

The court of appeals determined that the circuit court misconstrued *Dinkins* and, therefore, improperly assessed Savage's ineffective assistance claim. *Savage*, 2020 WL 356735, ¶¶ 27–28. Relying on *Sholar*, the court of appeals determined that it could not decide whether Savage's counsel was ineffective. *Id*. ¶ 29. Instead, it remanded the case to the circuit court to assess deficient performance and prejudice under the court of appeals' interpretation of *Dinkins*. *Id*. ¶ 31. The court of appeals expressly stated that it was "neither finding that trial counsel's performance was deficient nor that Savage suffered any prejudice." *Id*.

The court of appeals' statement that *Sholar*'s holding applied "equally" to Savage's case suggests that the court of appeals misconstrued *Sholar*. *Savage*, 2020 WL 356735, ¶ 29. *Sholar* simply stands for the proposition that an appellate court cannot decide an ineffective assistance claim when "no *Machner* hearing had occurred." *Sholar*, 381 Wis. 2d 560, ¶ 54. "[W]hen an appellate court remands for a *Machner* hearing, it must leave both the deficient performance and the prejudice prongs to be addressed . . . ." *Id*. Thus, without a *Machner* hearing, an appellate court's review of the circuit court's denial of an ineffective assistance claim is limited to deciding whether the circuit court should have granted the

defendant a *Machner* hearing because his postconviction motion alleged sufficient facts entitling him to relief. *Id.* ¶¶ 50–51.

Sholar's holding defines the scope of an appellate court's review of an ineffective assistance claim when the circuit court *did not* conduct a *Machner* hearing. *Sholar* does not guide an appellate court's assessment of an ineffective assistance claim in a case like Savage's where the circuit court *did* conduct a *Machner* hearing and decided the claim based on the evidence presented at the hearing. Based on this Court's past decisions, the court of appeals should have decided whether, even if the circuit court's reasoning was erroneous, it correctly ruled that Savage did not prove ineffective assistance based on the evidence at the *Machner* hearing.

This Court has repeatedly stated that it will not reverse a lower court's decision though the reason for its decision may have been erroneously expressed. *Mueller v. Mizia*, 33 Wis. 2d 311, 318, 147 N.W.2d 269 (1967). As this Court explained, "an appellate court is concerned with whether a court decision being reviewed is correct, rather than with the reasoning employed by the circuit court. If the holding is correct, it should be sustained, and this court may do so on a theory or on reasoning not presented to the trial court." *State v. Baudhuin*, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987). Thus, an appellate court should not reverse a circuit court's ruling "if the ruling is correct and the record reveals a factual underpinning that would support the proper findings." *State v. Fishnick*, 127 Wis. 2d 247, 264, 378 N.W.2d 272 (1985).

Sholar did not limit an appellate court's authority under this Court's past decisions, including *Mueller*, *Baudhuin*, and *Fishnick*, to affirm the circuit court's ruling, even one based on flawed reasoning, when the evidence

otherwise supported it. Even if the circuit court erroneously interpreted *Dinkins* when it denied Savage's postconviction motion, the court of appeals should have reviewed the evidence from the *Machner* hearing to determine whether Savage proved deficient performance and prejudice.[4]

Should this Court accept review, the State will argue that the *Machner* hearing record demonstrates that Savage proved neither deficient performance nor prejudice. (State's Br. 13–17.) Counsel, who was familiar with the DOC's homeless protocols for registrants, acknowledged that she did not tell Savage about a homelessness defense because he engaged in conduct that reflected an intent not to comply with his registry requirements. (R. 45:23–26.) Further, Savage accepted the State's plea offer which recommended a year of jail and no additional supervision. (R. 45:11–12, 27–28, 35–37.) Based on Savage's interest in resolving his case by plea and his conduct that showed an intent not to comply with his registry obligations, he proved neither deficient performance nor prejudice.

By accepting review, this Court can clarify whether *Sholar* precludes an appellate court from affirming a circuit court's decision denying an ineffective assistance claim for reasons different from those that the circuit court considered. When a circuit court decides an ineffective assistance claim based on the record made at the *Machner* hearing, the court of appeals should affirm the circuit court's decision, even one based on flawed reasoning, when the evidence supports it.

[4] Remand might have been appropriate had the circuit court made erroneous evidentiary rulings at Savage's *Machner* hearing that prevented either party from adequately developing the factual record for a determination of his claims.

CONCLUSION

This Court should grant the State's petition for review and reverse the court of appeals' decision.

Dated this 20th day of February 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § (Rule) 809.62(4) for a petition for review produced with a proportional serif font. The length of this petition is 5189 words.

Dated this 20th day of February 2020.

_____
DONALD V. LATORRACA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(12).

I further certify that:

This electronic petition for review is identical in content and format to the printed form of the petition for review filed as of this date.

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

Dated this 20th day of February 2020.

_____
DONALD V. LATORRACA
Assistant Attorney General

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State of Wisconsin v. George E. Savage
Case No. 2019AP90-CR

APPENDIX CERTIFICATION

I hereby certify that filed with this petition for review, either as a separate document or as a part of this petition, is an appendix that complies with Wis. Stat. § 809.62(2)(f) and that contains, at a minimum: (1) a table of contents; (2) the decision and opinion of the court of appeals; (3) the findings or opinion of the circuit court necessary for an understanding of the petition; and (4) portions of the record necessary for an understanding of the petition.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 20th day of February 2020.

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DONALD V. LATORRACA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(13).

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 20th day of February 2020.

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DONALD V. LATORRACA
Assistant Attorney General