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COURT OF APPEALS  
DISTRICT I

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OF WISCONSIN**

Case No. 2018AP2016-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARCUS DEMOND ANDERSON, SR.,

Defendant-Appellant.

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ON APPEAL FROM A JUDGMENT OF CONVICTION AND  
AN ORDER DENYING POSTCONVICTION RELIEF  
ENTERED IN THE MILWAUKEE COUNTY CIRCUIT  
COURT, THE HONORABLE TIMOTHY WITKOWIAK AND  
THE HONORABLE JANET PROTAŚIEWICZ, PRESIDING

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**BRIEF OF PLAINTIFF-RESPONDENT**

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## TABLE OF CONTENTS

	Page
ISSUE PRESENTED.....	1
INTRODUCTION .....	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION .....	1
STATEMENT OF THE CASE .....	1
ARGUMENT .....	3
The circuit court properly denied Anderson's request for a retrospective hearing because he never made a substantial complaint or requested a new attorney.....	3
A. Standard of review.....	3
B. Legal principles.....	4
C. The circuit court properly denied Anderson's request for a retrospective hearing because Anderson never asked for a new attorney. ....	5
CONCLUSION.....	8

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>State v. Darby</i> , 2009 WI App 50, 317 Wis. 2d 478, 766 N.W.2d 770 .....	4
<i>State v. Jones</i> , 2007 WI App 248, 306 Wis. 2d 340, 742 N.W.2d 341 .....	4, 6
<i>State v. Jones</i> , 2010 WI 72, 326 Wis. 2d 380, 797 N.W.2d 378.....	3
<i>State v. Kazez</i> , 146 Wis. 2d 366, 432 N.W.2d (1988) .....	4, 5, 6
<i>State v. Lomax</i> , 146 Wis. 2d 356, 432 N.W.2d 89 (1988) .....	3, 4, 6
<i>State v. McDowell</i> , 2004 WI 70, 272 Wis. 2d 488, 681 N.W.2d 500.....	4, 6, 7
<i>State v. Wanta</i> , 224 Wis. 2d 679, 592 N.W.2d 645 (Ct. App. 1999).....	4, 5

## **ISSUE PRESENTED**

Did the circuit court erroneously exercise its discretion when it denied Defendant-Appellant Marcus Demond Anderson, Sr. a retrospective hearing on the question of whether he requested a new attorney at sentencing?

The circuit court answered no.

This Court should answer no.

## **INTRODUCTION**

At his sentencing for delivery of heroin, Anderson complained that his attorney did not communicate with him and said, “I want to call it -- I want to call it ineffective counsel, man.” (R. 45:4–5.) The circuit court did not inquire further into what Anderson meant by the statement at that point. The court instead proceeded to sentencing, where Anderson did not complain further.

The postconviction court concluded that Anderson never requested a new attorney or made a substantial complaint about his attorney. The postconviction court properly denied Anderson’s request for a retrospective hearing to address whether he sought a new attorney at sentencing. This Court should affirm.

## **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

The State does not request either oral argument or publication. This case may be resolved by applying well-established legal principles to the facts.

## **STATEMENT OF THE CASE**

On April 24, 2015, and April 30, 2015, Anderson sold heroin to an undercover police officer. (R. 1:3.) The State

charged Anderson with two counts of delivery of a controlled substance. (R. 1:2.)

On November 30, 2015, Anderson entered a guilty plea to both counts. (R. 44:5–6.) At that hearing, Anderson told the court that he had a chance to talk to his attorney about what the State would have to prove for Anderson to be found guilty at trial. (R. 44:5.) He told the court that he understood the charges, the maximum penalties, and the elements of the crime. (R. 44:3–5.) Anderson understood the plea questionnaire and the rights that he gave up by entering his plea. (R. 44:6–9.) Anderson believed that his plea was free and voluntary. (R. 44:7.) He told the court that he was satisfied with his attorney’s representation. (R. 44:7.)

On February 16, 2016, the court sentenced Anderson. (R. 45:1.) At the outset of the hearing, Anderson’s attorney sought a delay, but the court proceeded to sentencing. (R. 45:2–3.) The State articulated the plea agreement, and the court asked Anderson if the State’s understanding was also Anderson’s understanding. (R. 45:4.) Anderson replied that,

No. Not on this matter. Man, I want to say my lawyer ain’t come and see me, man, and I want to -- He ain’t been coming to talk to me at ail. I want to be honest. I pled out to something I really don’t know anything about, man. I want to call it -- I want to call it ineffective counsel, man.

(R. 45:4–5.) The court did not address Anderson’s comment and proceeded directly to the State’s sentencing argument. (R. 45:5.) When given a chance to speak at sentencing, Anderson did not complain about his attorney and accepted responsibility for his actions. (R. 45:13–14.)

The court sentenced Anderson to three years of initial confinement and three years of extended supervision on each count and ran the sentences concurrent to each other and to any other sentence. (R. 45:17.)

Anderson filed a postconviction motion seeking a hearing to present reasons why he wanted a new attorney appointed at sentencing. (R. 34:1.) The circuit court denied that motion. (R. 35:4.)

The circuit court held that Anderson did not present a substantial complaint at sentencing that could reasonably be interpreted as a request for new counsel. (R. 35:3.) It held that Anderson did not explicitly request an attorney. (R. 35:3.) Anderson did not make statements that were tantamount to a request. (R. 35:3.) Finally, the court concluded that Anderson did not “manifest a desire to fire his attorney” or demonstrate an unwillingness to cooperate. (R. 35:3.)

The court decided that Anderson needed to do something more substantial to trigger the circuit court to apply the factors in *State v. Lomax*, 146 Wis. 2d 356, 432 N.W.2d 89 (1988). (R. 35:4.) The court noted that Anderson’s conclusory ineffective assistance of counsel claims could be raised in postconviction proceedings, but not at the outset of a sentencing hearing. (R. 35:4.) For those reasons, the court denied Anderson’s motion. (R. 35:4.)

Anderson appealed. (R. 36.)

## ARGUMENT

**The circuit court properly denied Anderson’s request for a retrospective hearing because he never made a substantial complaint or requested a new attorney.**

### A. Standard of review

Whether to allow a change of attorney lies within the circuit court’s discretion. *Lomax*, 146 Wis. 2d at 359. This Court will not disturb the court’s judgment absent an erroneous exercise of discretion. *State v. Jones*, 2010 WI 72, ¶ 23, 326 Wis. 2d 380, 797 N.W.2d 378.

## B. Legal principles

The Sixth Amendment to the United States Constitution and article I, section 7 of the Wisconsin Constitution guarantee an indigent defendant the right to appointed counsel. But an indigent defendant does not have the right to choose his appointed counsel. *State v. Darby*, 2009 WI App 50, ¶ 28, 317 Wis. 2d 478, 766 N.W.2d 770.

“In situations involving appointment of new counsel, a circuit court’s exercise of discretion is triggered by a defendant’s presentation of a substantial complaint that could be interpreted as a request for new counsel.” *State v. McDowell*, 2004 WI 70, ¶ 66, 272 Wis. 2d 488, 681 N.W.2d 500. The defendant’s complaint need not include an explicit request for a new lawyer. *Id.* ¶¶ 67–68. It must be a request that could “reasonably be interpreted as a request for new counsel.” *State v. Kazez*, 146 Wis. 2d 366, 371, 432 N.W.2d 83 (1988).

When considering whether a circuit court erred in denying a motion for substitution of counsel, reviewing courts must consider factors including: (1) the adequacy of the court’s inquiry into the defendant’s complaint; (2) the timeliness of the motion; and (3) whether the alleged conflict was so great it likely resulted in a total lack of communication preventing an adequate defense. *Lomax*, 146 Wis. 2d at 359. Courts also consider whether a defendant previously changed lawyers. *State v. Jones*, 2007 WI App 248, ¶ 13, 306 Wis. 2d 340, 742 N.W.2d 341.

A defendant must show good cause to warrant the substitution of an appointed attorney. *Lomax*, 146 Wis. 2d at 360. A mere disagreement is not enough. *State v. Wanta*, 224 Wis. 2d 679, 703, 592 N.W.2d 645 (Ct. App. 1999). To warrant substitution of appointed counsel, a defendant must show good cause, such as conflict of interest, a complete breakdown

in communication, or an irreconcilable conflict that leads to an apparently unjust verdict. *Id.*

**C. The circuit court properly denied Anderson's request for a retrospective hearing because Anderson never asked for a new attorney.**

Anderson did not make a request that could “reasonably be interpreted as a request for new counsel.” *Kazee*, 146 Wis. 2d at 371. Since Anderson failed to request a new attorney or raise a substantial complaint about his attorney, the circuit court did not need to inquire into Anderson's complaint. The circuit court properly denied Anderson's request for a retrospective hearing. This Court should affirm.

First, Anderson never raised a substantial complaint that could be interpreted as a request for a new attorney. He only complained about a lack of communication and called his attorney “ineffective.” (R. 45:4–5.) The circuit court heard that complaint within the context of the entire proceedings, which did not otherwise suggest that Anderson wanted a new attorney.

Second, Anderson's sentencing statement directly contradicted what Anderson told the court less than three months earlier. At the plea hearing on November 30, 2015, Anderson explained that he had enough time to talk to his attorney about the consequences of entering a plea. (R. 44:5.) He told the court that he was satisfied with his attorney's representation. (R. 44:7.) Not only did he refrain from complaining about representation, he affirmed more than once that his attorney was communicating with him and he was satisfied with his attorney.

On February 16, 2016, at the sentencing hearing, Anderson raised his complaint, but when given the chance to speak later in the hearing, he accepted responsibility for his



actions and did not complain about representation or communication. (R. 45:13–14.)

Third, because Anderson did not make a request that could reasonably be interpreted as a request for new counsel, the circuit court had no obligation to ask further questions about the statement or apply the *Lomax* factors to determine whether Anderson was entitled to a new attorney.

The *Lomax* criteria only become relevant when a defendant moves for substitution of his attorney. *See Lomax*, 146 Wis. 2d at 359. In *Lomax*, the defendant said that he had not been “properly represented” and “at this time I am asking for appointment of another counsel.” *Id.* at 358. Because Anderson did not make such a request, *Lomax* does not apply.

Like *Lomax*, in *Jones* the defendant explicitly requested a new attorney. *Jones*, 306 Wis. 2d 340, ¶ 7 (alteration in original) (in a letter to the court, the defendant wrote: “I do not want [the lawyer] to represent me anymore and I would like for him to be dismiss from my case.”). Anderson implies that his reference to failure to communicate with his attorney implicated *Jones*, and he argues that he is entitled to a lawyer with whom he or she can communicate. (Anderson’s Br. 7–8.) But *Jones* is factually distinguishable based on the fact that *Jones* explicitly asked for a new attorney in writing. *Jones*, 306 Wis. 2d 340, ¶ 7.

This case is also unlike *Kazee*, where the defendant interrupted his attorney and said, “I don’t want him.” 146 Wis. 2d at 369. The supreme court determined that the defendant’s statement could be interpreted as a request for a new attorney. *Id.* at 371. There, the defendant did not explicitly request a new attorney but made a statement that indicated that was his desire. Here, Anderson’s statement did not indicate any desire for a new attorney.

Finally, Anderson’s reliance on *McDowell* is misplaced. (See Anderson’s Br. 5.) In that case, the defendant did not

explicitly tell the court that he wanted a new attorney, but instead the defendant's attorney told the court that the defendant wanted a new attorney. *McDowell*, 272 Wis. 2d 488, ¶ 67. The court held that even though the defendant did not make an explicit request, the circuit court knew that the defendant wanted a new attorney based on the statements by counsel. *Id.* ¶¶ 68–70. The court then proceeded to examine the *Lomax* factors. *Id.* ¶ 72.

Unlike *Lomax*, *Jones*, *Kazee*, and *McDowell*, the circuit court here did not hear an explicit request for a new attorney or a substantial complaint about Anderson's attorney from either Anderson or the attorney. Anderson's vague complaint about communication did not put the circuit court on notice that Anderson wanted another attorney. His use of the word "ineffective" implies a desire to seek postconviction relief but does not imply that he wanted a new attorney at the sentencing hearing.

For all these reasons, the court had no need to address the *Lomax* factors. Anderson did not seek to change attorneys. That is fundamentally different from making a motion to obtain a new attorney. The circuit court properly denied Anderson's postconviction motion.

## CONCLUSION

This Court should affirm Anderson's judgment of conviction and the circuit court's order denying postconviction relief.

Dated this 12th day of April, 2019.

Respectfully submitted,

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## **CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,905 words.

Dated this 12th day of April, 2019.

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CHRISTINE A. REMINGTON  
Assistant Attorney General

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

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 12th day of April, 2019.

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