STATE OF WISCONSIN

IN SUPREME COURT

No. 2019AP2383-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAIMON VON JACKSON, JR.,

Defendant-Appellant.

RESPONSE TO PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

LISA E.F. KUMFER
Assistant Attorney General
State Bar #1099788

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796
(608) 294-2907 (Fax)
kumferle@doj.state.wi.us

INTRODUCTION

The court of appeals appropriately held that Daimon Von Jackson, Jr., failed to show that his trial counsel rendered constitutionally ineffective assistance that would warrant withdrawing his plea. He showed only that he was displeased that his latest trial counsel—Jackson's fourth attorney—did not meet with him in the jail more before his trial date. But he pointed to nothing showing that trial counsel was unprepared for trial, that he left Jackson unprepared for trial, or that his advice to take the plea was unsound.

Nor did Jackson show prejudice. He failed to explain why, in light of the State's overwhelming evidence against him, he would have opted to take the case to trial if counsel had met with him more.

And the circuit court plainly met the requirements for denying a request that counsel be replaced here. Jackson was on his fourth appointed attorney, solely because he was repeatedly unhappy with the level of investment he believed they had in his case. By the time he requested his last trial counsel withdraw, the case had been pending for nearly two years. The circuit court considered the appropriate factors and denied the request.

The court of appeals applied well-settled law to reach this conclusion, and there is nothing novel or requiring clarification in this case that would warrant this Court's review. This Court should deny Jackson's petition for review.

SUPPLEMENTAL STATEMENT OF THE FACTS

The State charged Jackson with one count of felony murder as a party to a crime, one count of felon in possession of a firearm as party to a crime, and one count of armed robbery with the use of force as party to a crime for his role in the death of a man he and two co-actors murdered and robbed

outside of a house. (R. 1.) Jackson eventually admitted he was involved in the incident, but asserted he was only acting as a lookout. (R. 1:3.)

Jackson pled not guilty, but his trial was repeatedly delayed as he discharged multiple attorneys. (R. 59:2–4; 61:2–5; 64:3–7; 66:2–3; 68:11–12.) By the time Jackson's fourth and final trial counsel received the case, it was nearly two years old. (R. 1; 68:1.) Jackson moved to replace this attorney as well, complaining that he was not doing anything for him. (R. 24.) The court denied this request given the age of the case and Jackson's apparent inability to get along with any attorney. (R. 70:2–4.) On the day of trial Jackson entered a plea to second-degree reckless homicide and possession of a firearm by a felon in exchange for several other charges being dismissed. (R. 71:2–3.)

Postconviction, Jackson moved to withdraw his plea on the grounds of ineffective assistance of counsel, claiming counsel had not met with him enough and he only pled because he did not think counsel was adequately prepared for trial. (R. 46.) After a *Machner* hearing the circuit court found that final counsel should have kept in better contact with Jackson but that Jackson failed to show that trial counsel was unprepared for trial and did not explain how he was prejudiced. (R. 52:25–29.) The court of appeals affirmed in a 2–1 decision, with Judge Reilly dissenting but largely on grounds Jackson did not raise. (Pet. App. 38–87.) Jackson petitions for review.

ARGUMENT

I. *Strickland* sets forth the well-established test for ineffective assistance that has been in place for nearly four decades; there is no need for this Court to refine it as Jackson requests.

Preliminarily, it is important to note that Jackson's petition for review misrepresents the issue that this case would present. (Pet. 4.) Trial counsel did "communicate with the defendant in advance of a homicide trial," which Jackson later admits in his petition. (Pet. 4, 6.) He just did not communicate with Jackson as much as Jackson would have preferred. (Pet. 6.) So, the only question presented by this case would be whether Jackson sufficiently showed that trial counsel's pretrial preparation was inadequate and his advice to take the plea was unreasonable, and that but for that unreasonable advice Jackson would have opted for trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Hill v. Lockhart*, 474 U.S. 52, 58–59 (1985).

The court of appeals properly found that Jackson had not met these standards. (Pet. App. 38–70.) While trial counsel's failure to have more contact with Jackson may amount to a breach of his ethical duties to Jackson under SCR 20:1.4(a)(2), this Court has made clear that an attorney's failure to abide by the ethical obligation to reasonably communicate with the client does not *ipso facto* prove deficient performance. *State v. Cooper*, 2019 WI 73, ¶¶ 21–22, 387 Wis. 2d 439, 929 N.W.2d 192.

And there is "no case establishing a minimum number of meetings between counsel and client prior to trial necessary to prepare an attorney to provide effective assistance of counsel." *United States v. Olson*, 846 F.2d 1103, 1108 (7th Cir. 1988); *See also State v. Osborne*, 941 P.2d 337, 344 (Ct. App. 1997) (claims that counsel failed to meet with the defendant an appropriate amount of times, without pointing to some

specific error by counsel, do not establish ineffective assistance because there is no minimum number of times an attorney must meet with the client in order to be adequately prepared for trial). So, Jackson cannot show deficient performance merely by showing dissatisfaction with his representation. And Jackson provided nothing showing that counsel actually wasn't prepared for trial or that his advice to take the plea was unreasonable, and in fact, the record shows otherwise.

Trial counsel testified that he met with Jackson four times, three before the plea, and once after. (R. 78:7.) He testified that he reviewed all of the discovery, including a video of the perpetrators from the Potawatomi casino, DNA evidence reports, interrogation videos of Jackson and the other defendants, and the police reports. (R. 78:8–13.) He reviewed the material with Jackson, though he did not show Jackson the videos. (R. 78:8.) Moreover, Jackson had three prior attorneys who went through all of the discovery and preparation with him, and Jackson had copies of the police reports and therefore knew all the facts. (R. 78:27.) Trial counsel acknowledged that the matter was set for trial. (R. 78:7–8.) He testified that if Jackson decided to reject the State's plea offer, his trial strategy would have been attacking the credibility of Henderson's and Webster's testimony pinning the shooting on Jackson by showing that they both received favorable plea deals in exchange for their testimony. (R. 78:26.) Counsel said Jackson decided to plead on the morning of trial after they had a discussion about the strength of the State's case. (R. 78:14–17.)

Perhaps more importantly, Jackson has failed to acknowledge that there is already a well-articulated standard for prejudice when a defendant claims that an attorney's deficient performance caused him to plead guilty. (Pet. 9.) It is not whether the errors had some ambiguous "adverse effect on the defense." (Pet. 9.) It is whether "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) (citing *Hill*, 474 U.S. at 59). This standard, too, has been established for decades.

II. This Court has already solidly established the factors a circuit court must consider when deciding whether to replace counsel, all of which the circuit court addressed here.

Jackson utterly fails to acknowledge that this Court has already established how a circuit court must address a request to replace appointed counsel in *State v. Lomax*, 146 Wis. 2d 356, 359, 432 N.W.2d 89 (1988). (Pet. 7.) The factors to be considered include:

> (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 between the defendant and the attorney was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case.

Id. at 359. The circuit court considered all of those here. (R. 70:1–4.)

Instead, Jackson seemingly conflates the ineffective assistance analysis with the *Lomax* test for whether a circuit court properly exercised its discretion. (Pet. 9–10.) He argues that review is needed because trial counsel's "errors in this case appear to facially satisfy the prejudice prong" requiring a new trial. (Pet. 9.) But there is no "prejudice prong" to the *Lomax* test. (Pet. 9); *Lomax*, 146 Wis. 2d 356.

In short, Jackson has not even discussed the reasons the trial court refused to allow final trial counsel to withdraw nor identified the proper test, let alone identified anything unclear in the law that needs this Court's clarification about

what a trial court should consider when entertaining such a request.

CONCLUSION

Given the above, there is nothing here that warrants this Court's review. Jackson's issues are governed by well-settled law and are meritless, and there is no real and important issue of state or federal law that this case would resolve.

Dated this 10th day of February 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

LISA E.F. KUMFER
Assistant Attorney General
State Bar #1099788

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796
(608) 294-2907 (Fax)
kumferle@doj.state.wi.us

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 1,534 words.

Dated this 10th day of February 2022.

LISA E.F. KUMFER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 809.19(12) and 809.62(4)(b) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this petition or response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic petition or response 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 petition or response filed with the court and served on all opposing parties.

Dated this 10th day of February 2022.

LISA E.F. KUMFER
Assistant Attorney General