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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP2383-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

DAIMON VON JACKSON, JR.,
Defendant-Appellant-Petitioner.

On Appeal from a Judgment of Conviction
Entered in Racine County Circuit Court, the Honorable Faye M. Flancher, Presiding, and an Order Denying Postconviction Relief, the Honorable Mark F. Nielsen, Presiding

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BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ISSUES PRESENTED

1. Did counsel's failure to communicate with Mr. Jackson deny Mr. Jackson his constitutional right to the effective assistance of counsel?

The circuit court found that counsel's failure to communicate was deficient performance, but that Mr. Jackson was not prejudiced by his conduct.

The court of appeals assumed that counsel's failure to communicate was deficient conduct, but that Mr. Jackson was not prejudiced by his conduct.

2. Did the trial court misuse its discretion by failing to follow up to determine whether counsel had visited Mr. Jackson as she instructed when she denied Mr. Jackson's request for a new attorney on October 17th and decide Mr. Jackson's October 28th motion for a new attorney

Mr. Jackson argued below that the court erroneously exercised its discretion when it denied his motion for a new attorney on October 17th. The circuit court and the court of appeals determined that the court properly exercised its discretion in denying his motion for a new attorney on October 17th.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are warranted, given that this Court granted review.

STATEMENT OF THE CASE

On December 15, 2014, Mr. Jackson was charged with felony murder, as a party to a crime, as a repeater, possession of a firearm by a felon, party to a crime, as a repeater, and armed robbery with use of force, party to a crime, as a repeater.

(1).[1] On November 1, 2022, Mr. Jackson pled no contest to an amended charge of second degree reckless homicide, use of a dangerous weapon, as a repeater. (25, 71). The Honorable Faye M. Flancher sentenced Mr. Jackson to 30 years imprisonment, 20 years initial confinement and 10 years extended supervision. (33, 75:23).

Mr. Jackson, represented by prior postconviction/appellate counsel, filed a postconviction motion for plea withdrawal which included claims of ineffective assistance of trial counsel. (46). Following a *Machner*[2] evidentiary hearing at which trial counsel, Scott Anderson, and Mr. Jackson testified, the circuit court, the Honorable Mark F. Nielsen presiding, denied the postconviction motion. (78, 52; App.54-88).

Mr. Jackson appealed. On December 29, 2021, in a split unpublished decision, the court of appeals affirmed the circuit court's denial of the postconviction motion for plea withdrawal. *State v. Jackson*, No. 2019AP2383-CR, 2021WL6132278 (Wis. Ct. App. Dec. 29, 2021). (App.4-52). On January 28, 2022, Mr. Jackson timely filed a petition for review which this court granted on March 21, 2022.

STATEMENT OF FACTS

Maurice Carter's Killing

This case stems from the December 11, 2014 shooting death of Maurice Carter. The State charged three men, Bobby Henderson ("Henderson"), Travenn

[1] The armed robbery charge was later dismissed, after the state did not oppose Mr. Jackson's motion to dismiss this count, on the grounds that it was duplicative of the felony murder count. (13, 62:19-22).

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

Webster ("Webster"), and Mr. Jackson with crimes related to Carter's killing.[3] The issue for this case is what role each man played.

Mr. Jackson affirmatively maintained throughout the case that he was not the person who shot Carter. He told the police that he was part of a robbery and shooting incident that led to Carter's death, but that his role was only the lookout for the robbery that was supposed to occur. (1:3; 78:78). Mr. Jackson told Anderson that he was the lookout for a planned robbery and not the shooter. (78:30-31). Both to the Presentence Investigation ("PSI") writer and the court at sentencing, Mr. Jackson maintained that he was not the shooter. (28:3-4; 75:11-12).

Henderson, under pressure by the police, claimed Mr. Jackson was the shooter. (1:3). Although the record does not contain Carter's statement, it suggests that Carter told the authorities that Mr. Jackson was the shooter. Carter was a material witness for the State and his potential testimony would incriminate Mr. Jackson. (18; 75:28,78). Both Henderson and Webster ultimately resolved their cases with pleas to reduced charges and both agreed to testify against Jackson.[4]

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[3] *See* Racine County Case No. 2014CF1719 - State of Wisconsin vs. Bobby G. Henderson and Racine County Case No. 2014CF1720 - State of Wisconsin vs. Travenn L. Webster.

[4] It appears from Wisconsin Circuit Court Access ("CCAP") that, like Mr. Jackson, both Henderson and Webster were originally charged with felony murder, armed robbery, and felon in possession of a firearm. *See* Racine County Case No. 2014CF1719 (https://wcca.wicourts.gov/caseDetail.html?caseNo=2014CF001719&countyNo=51&index=0&mode=details, last viewed 9/29/22) and Racine County Case No. 2014CF1720 (https://wcca.wicourts.gov/caseDetail.html?caseNo=2014CF001720&countyNo=51&index=0&mode=details, last viewed 9/29/22). Henderson pled no contest to 2nd degree reckless homicide, party to a crime and received a sentence of 12 years initial confinement and eight years of extended supervision. *See* Racine County Case No. 2014CF1719. Webster pled guilty to robbery, party to a crime and was sentenced to ten years initial confinement and five years extended supervision. *See* Racine County Case No. 2014CF1720. When Henderson and Carter each pled, there was a notation in the court event regarding their participation in the prosecution of co-actors. *See* 9/15/15 court event, Racine County Case No. 2014CF1719 and 9/14/15 court event, Racine County Case No. 2014CF1720.

Henderson's statement, and likely Carter's statement, incriminating Mr. Jackson are the only evidence in the record suggesting that Mr. Jackson was the shooter.

On the other hand, other evidence in the record exists corroborating that Mr. Jackson was not the shooter from an independent eyewitness and an ammunition magazine found at the scene. An independent eyewitness, Tauries Murry, was present during the shooting. (1:2). While Murry was outside with Carter, he saw two black men run to Carter, who scuffled with them. (1:2). Murry heard a gunshot, saw Carter fall to the ground; both men rifled through Carter's pockets and eventually fled. (*Id.*). Murry described the two people who participated directly in the shooting as follows: the first person as a short, heavy set, light skinned male black wearing a light gray hoodie and gray sweatpants and the second person as a dark skinned black male, slightly taller and thinner than the first person and wearing all black and a black hat. (46:20-23). Casino surveillance video from five hours after the shooting showed Henderson wearing all black and Webster wearing a grey hoodie and grey sweatpants, matching Murry's description of the two men directly involved in Carter's shooting. (78:59-60; 81:Exs.1,2). Mr. Jackson was wearing all white in the video. (78:60; 81:Ex.2).

A handgun ammunition magazine recovered at the scene had Henderson's fingerprints on it. (1:2).

Attorney Scott Anderson's representation of Mr. Jackson

On March 11, 2016, the State Public Defender's Office ("SPD"), appointed Attorney Scott Anderson, as Mr. Jackson's fourth attorney. (21). On August 9, 2016, the circuit court scheduled the jury trial for November 1, 2016 and a final pretrial on October 17, 2016. (69:3).

Approximately six weeks later, on September 20, 2016, Mr. Jackson filed a pro se motion for a new attorney, stating that Anderson failed to comply with his requests for information, failed to act with reasonable diligence and promptness,

and failed to maintain a client-lawyer relationship. (24). The motion also noted that Mr. Jackson had filed an OLR grievance against Anderson.[5] (24).

Mr. Jackson asked for a hearing on the motion as soon as possible. (24). However, the court, the Honorable Faye Flancher, did not hear the motion until the October 17th final pretrial. (70:2-3).

State's plea offer

By an early morning October 17th email to Anderson, the prosecutor offered to amend the felony murder charge to party to a crime of second degree reckless homicide, while armed, as a repeater, dismiss and read-in the felon in possession of a firearm charge and all the drug charges in Mr. Jackson's other case[6]. (46:34). The prosecutor would recommend a prison sentence, leaving the amount up to the court. (*Id*.). The prosecutor said that he would leave the offer open until the Friday before the trial.[7] (*Id*.).

At the final pretrial hearing that same day, the prosecutor stated that he had sent his final offer via email, did not have a copy of it, and would make a record of it on the trial date. (70:5). He said that the offer would be held open until the date of trial. (70:6).

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[5]Mr. Jackson's grievance led to the Office of Lawyer Regulation filing a formal complaint against Anderson. *See Office of Lawyer Regulation v. Anderson*, 2020 WI 82, 394 Wis. 2d 190, 950 N.W.2d 191. In these disciplinary proceedings, this Court upheld the referee's findings of fact and conclusions of law that Anderson: (1) failed to timely and reasonably consult with Mr. Jackson about the means by which his defense objectives were to be accomplished, violating SCR 20:1.4(a)(2); (2) failed to timely and reasonably keep Mr. Jackson informed about the status of his case, violating SCR 20:1.4(a)(3); and (3) failed to promptly comply with Mr. Jackson's reasonable requests for information about his case, violating SCR 20:1.4(a)(4). *Anderson*, 394 Wis. 2d 190, ¶¶18, 37, 44. Based on these violations and violations related to another client, this Court suspended Anderson's license for 60 days. *Id*. ¶¶35, 37, 44, 48.

[6] In Racine County Case No. 2016CF252, Mr. Jackson was charged with several felony drug counts and was represented by Anderson.

[7] October 31, 2016 was the Friday before the November 1st jury trial.

October 17th hearing on Mr. Jackson's motion for new counsel

At the final pretrial, Judge Flancher addressed Mr. Jackson's motion for new counsel:

> THE COURT: Mr. Jackson are you… asking that Mr. Anderson withdraw?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Why is that?
>
> THE DEFENDANT: Because he hasn't – he doesn't keep in contact with me. He hasn't been properly representing me at all. He hasn't filed any motions on my behalf that I asked him about. He hasn't done anything for me.
>
> THE COURT: Well, just because you ask Mr. Anderson to file motions, doesn't mean that he will or should.
>
> THE DEFENDANT: But if he says he ---
>
> THE COURT: Stop. Please don't interrupt me when I am speaking. That's my one rule. I give you the courtesy of listening, I expect the same of you. This is a case that is over two years old. You have had a number of other attorneys representing you.
>
> I can see that Mr. Hart represented you. This has been scheduled for trial many times. The information was filed back on January 22nd of 2015. I will not allow Mr. Anderson to withdraw whether it be on your request or anyone else's.
>
> So Mr. Anderson, I ask that you meet with Mr. Von Jackson and that you also be prepared to proceed on November 1st. Again it is the number one trial.

(70:3).

Anderson's failure to visit or speak with Mr. Jackson between October 17th and October 31st

On October 18th, Anderson appears to have sent Mr. Jackson the state's plea offer in a letter. (78:24). This letter is not in the record. There is no evidence in the record that Anderson's letter explained the pros and cons of taking the offer.

In an October 19, 2016 letter to Judge Flancher, Mr. Jackson complained that he had not had much contact with Anderson, who had only visited him three times since his appointment. Among other things, Mr. Jackson said that Anderson

had not reviewed the plea offer with him. Mr. Jackson asked the judge to look into this matter and appoint him a new attorney. On October 28, 2022, Mr. Jackson filed another pro se motion to terminate Anderson as his attorney. [8]

Despite Judge Flancher instructing Anderson to meet with Mr. Jackson, Anderson did not go see him between October 17th and October 31st. (78:9-10).

Anderson did not visit with Mr. Jackson until November 1st, the day Mr. Jackson's trial was scheduled. (78:4). Anderson admitted during his postconviction hearing testimony that he should have met with Mr. Jackson prior to the jury trial date after the judge told him to visit Mr. Jackson. (78:28). Anderson also admitted that he "could have done better" by spending more time with Mr. Jackson reviewing the facts, discovery, weighing the pros and cons of entering a plea and reviewing all the necessary items in a homicide case. (78:27-28).

Anderson testified that he "didn't put much stock in the expiration" date of the prosecutor's offer, believing that it would still be available on the jury trial date, because "deadlines are often not real deadlines." (78:39-40)

November 1st - Anderson meets with Mr. Jackson who pleads no contest that same day

On November 1st, Anderson first discussed the State's plea offer with Mr. Jackson. (78:9-10, 24). Mr. Jackson agreed to accept the State's offer. (78:41). This discussion first took place in the jail and then later in a room next to the courtroom to complete the plea questionnaire. (78:62-64). According to Anderson, these discussions took 1.3 hours, while Mr. Jackson estimated that the jail conversation took about 20 minutes and the second conversation took approximately 5 minutes. (78:52, 62-64).

[8] The letter and motion, although in the circuit court record, are not currently in the record on appeal. Counsel is filing a motion to supplement the record with these items along with this brief.

Both Mr. Jackson and Anderson believed that Mr. Jackson was entering a no contest plea to second degree reckless homicide as a party to a crime and reviewed this charge as party to a crime. (78:29-30, 80, 82, 84, 89; 71:11). The plea form identified the charge as "second degree reckless homicide PTAC (while armed)" and included the statutory citation for party to a crime "939.05" (26:1). "PTAC" was crossed out but it is not clear how and when it was crossed out. *See Id.*

However, a portion of the State's plea offer lapsed. At the plea hearing, after Anderson filed the plea questionnaire, the prosecutor filed an amended information which charged second degree reckless homicide, while armed, as a repeater, and possession of a firearm by a felon, as a party to a crime. (71:2; 25). The second degree reckless homicide charge was not charged as party to a crime. (25). Anderson told the court at the plea hearing, that he had reviewed the crime as party to a crime with Mr. Jackson and that he (Anderson) "wasn't sure" about the amended information. (71:11). Anderson testified at the *Machner* hearing that he was "surprise[d]" during the plea hearing that the charge was without party to a crime. (78:42).

Mr. Jackson entered a no contest plea to second degree reckless homicide. (71:3-12). During the plea colloquy, he did not affirmatively admit to being the shooter. *See Id.*

Sentencing proceedings

On the day Mr. Jackson's sentencing was originally scheduled, January 17, 2017, Anderson filed a motion to withdraw as counsel on the grounds that Mr. Jackson's OLR grievance placed Anderson in an adversarial position, and created a conflict of interest, with Mr. Jackson. (29:1). The court granted Anderson's motion. (72:2, 30).

Mr. Jackson was appointed another attorney who represented him at his June 12, 2017 sentencing hearing. (31, 75).

At sentencing, the court rejected Mr. Jackson's continued assertion that he was not the shooter and that he was not present at the shooting. The court stated: "[t]he information in this case, Mr. Jackson, does indeed place you right in the thick of this, and I fully believe based on everything that I have read that you were the shooter in this case or involved in this shooting. Your lack of remorse, your lack of responsibility is telling." (75:23).

Postconviction Motion and Decision

Mr. Jackson's postconviction motion sought plea withdrawal on the several grounds, including that he was denied the effective assistance of counsel. (46). Among other arguments, he claimed Anderson's conduct was deficient when failed to confer sufficiently with him, failed to review the discovery, and failed to provide enough information or develop a defense strategy for Mr. Jackson to make a knowing and voluntary decision whether to proceed to trial or accept the plea bargain. (46:10). Mr. Jackson asserted he was prejudiced because, but for counsel's conduct, he would have not entered a plea but would have gone to trial. (46:10-11). He also claimed that the court erroneously denied his request for new counsel. (46:15-17)[9].

Following the *Machner* hearing, the circuit court denied the postconviction motion in a written decision. (78; 52; App.54-88). The court concluded that Anderson's performance in failing to meet and confer with Mr. Jackson more frequently constituted deficient performance. (52:25-26,34; App.78-79,87). The court concluded, however, that Mr. Jackson was not prejudiced by Anderson's deficient conduct. (52:28-32; App.81-85). It rejected Mr. Jackson's assertion that he would not have entered a plea and would have gone to trial had counsel communicated more effectively and found that Mr. Jackson's testimony was not

[9] Mr. Jackson also raised a claim that his plea was not knowingly, voluntarily and intelligently entered due to an insufficient plea colloquy, pursuant to *State v. Bangert*, 131 Wis. 2d 246, 285 N.W.2d 12 (1986); the circuit court denied this claim. (46:11-15; 52:13-19,34;

credible. (52:28-29; App.81-82). The court rejected Mr. Jackson's assertion that he was faced with the choice of pleading to something he had not done or going to trial with an unprepared attorney and found that Mr. Jackson entered his plea based on the strength of the State's case and the reduced exposure benefits of the plea offer. (52:29-30,34; App.82-83,87). The court further found that the denial of Mr. Jackson's request for new counsel was not an erroneous exercise of the court's discretion. (52:32-34, 35; App.85-88).

Court of Appeals proceedings

On appeal, Mr. Jackson argued for plea withdrawal on the grounds that he was denied the effective assistance of counsel and that the circuit court erred in denying his request for new counsel.[10] He asserted that counsel's performance was deficient when he failed to meet and confer with him before trial. He argued that he was prejudiced by counsel's conduct because he pled guilty to a crime he did not commit, second degree reckless homicide as a principal and the court sentenced him as such.

In a split decision, the court of appeals affirmed. *State v. Jackson*, No. 2019AP2383-CR, 2021 WL6132278 (Wis. Ct. App. Dec. 29, 2021). (App. 4-53). The majority assumed that counsel's failure to meet more frequently with Mr. Jackson, including after the court instructed him to do so, constituted deficient performance. *Id*., ¶42. (App.26). However, the majority concluded that Mr. Jackson failed to prove prejudice because he failed to demonstrate that but for counsel's limited communication and failure to meet as requested by the court, he would have proceeded to trial and not accepted the state's plea offer. *Id*., ¶¶44-50. (App.27-32). The majority also concluded that the circuit court did not

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App.66-72,87). Mr. Jackson did not raise this claim on appeal. Therefore, the facts and arguments relevant to this issue are not discussed in this brief.

[10] He also argued for plea withdrawal, or alternatively, resentencing in the interests of justice.

erroneously exercise its discretion in denying Mr. Jackson's request for new counsel. *Id.*, ¶¶51-56. (App.32-35).[11]

The dissent concluded that Mr. Jackson was entitled to withdraw his plea on the grounds that the plea colloquy was defective, that the State's breach of its plea offer was prejudicial, and that Anderson's abandonment of Mr. Jackson during all phases of his representation was prejudicial. *Jackson*, supra, ¶63 (Reilly, J., dissenting). (App.37-38). In so concluding, among other things, citing to *Missouri v. Frye*[12], the dissent found that Anderson failed to communication properly with Mr. Jackson about the State's plea offer and failed to inform the court at the plea hearing that the State's plea offer was for a plea to second degree reckless homicide as a party to a crime. *Id.*, ¶¶76-77. (App.44-45). The dissent also concluded that Mr. Jackson was prejudiced by counsel's conduct because Mr. Jackson would have accepted the State's pretrial offer to plead as party to a crime. *Id.*, ¶85. (App. 49-50). It further found that Mr. Jackson was prejudiced because: 1) his plea resulted in Mr. Jackson becoming "the shooter rather than the lookout"; 2) the court sentenced him as the killer rather than the lookout, as the credible facts support; and 3) he received a longer sentence than his co-actors who each pled to crimes, as a party to a crime. *Id.*, ¶¶84-87. (App. 49-51).

Additional facts will be discussed below as necessary.

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[11] The majority also rejected Mr. Jackson's interests of justice claims. (*Jackson*, 2021 WL6132278, ¶¶57-60). (App.35-36).

[12] 566 U.S. 134, 145 (2012).

ARGUMENT

I. Mr. Jackson's attorney's failure to timely communicate with him regarding the State's plea offer violated his constitutional right to the effective assistance of counsel.

A. Standard of review and general principles of law.

The United States and Wisconsin Constitutions both guarantee a criminal defendant the effective assistance of counsel. *State v. Thiel*, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305 (citing *Strickland v. Washington*, 466 U.S. 668, 686 (1984)); U.S. Const. amends. VI, XIV, WI Const. art. I, § 7. To demonstrate that counsel was constitutionally ineffective, the United States Supreme Court in *Strickland* has established a two prong test: first, a defendant must show that counsel's performance was deficient; second, a defendant also must demonstrate that counsel's deficient performance was prejudicial to him. *State v. Savage*, 2020 WI 93, ¶27, 395 Wis. 2d 1, 951 N.W.2d 838 (citing *Strickland*, 466 U.S. at 687).[13]

On appellate review, the question of whether a defendant was denied the effective assistance of counsel is a mixed question of law and fact. *State v. Breitzman*, 2017 WI 100, ¶37, 378 Wis.2d 431, 904 N.W.2d 93. This court reviews *de novo* whether a defendant has proven that his attorney's conduct was deficient and, if so, whether counsel's deficient conduct prejudiced him. *Id*. ¶¶38-39. The circuit court's findings of fact regarding the factual circumstances of the case and counsel's conduct and strategy will not be overturned unless clearly erroneous. *Id*. ¶37.

[13] The standard for determining ineffective assistance of counsel claims under the Wisconsin Constitution is identical to that under the federal constitution. *Thiel*, 264 Wis. 2d 571, ¶18, n.7.

B. A defendant has the constitutional right to the effective assistance of counsel at the plea bargaining stage of the criminal proceedings.

It is well settled that a defendant has the constitutional right to the effective assistance of counsel at all critical stages of a criminal proceeding and at certain steps before trial. *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009). In two cases decided the same day, *Missouri v. Frye* and *Lafler v. Cooper*, the United States Supreme Court unequivocally held that "'the negotiation of a plea bargain is a critical phase of [a criminal proceeding] for purposes of the Sixth Amendment right to the effective assistance of counsel.'" *Frye*, 566 U.S. at 141 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010)); *Lafler v. Cooper*, 566 U.S. 156, 162 (2012), citing *Frye*, 566 U.S. at 144 and *Padilla*, 559 U.S. at 364.

In so holding, the Supreme Court recognized the overwhelming prevalence of guilty pleas and the central role of plea bargaining in today's criminal justice system. The Court observed the stark reality that today's criminal justice system "is for the most part of system of pleas, not a system of trials." *Lafler*, 566 U.S. at 170. In so observing, the Court relied on statistical data showing that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Frye*, 566 U.S. at 143.

The Supreme Court also recognized the central role of plea bargaining in securing convictions and determining sentences. *Lafler*, 566 U.S. at 170. "'[Plea bargaining] is not some adjunct to the criminal justice system, it *is* the criminal justice system.'" *Frye*, 566 U.S. at 144 (quoting Scott & Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1912 (1992), emphasis in quoted authority). Given this reality, the Court emphasized that the plea negotiations, rather than a jury trial, "is almost always the critical point" in the criminal proceedings for a defendant. *Frye*, 566 U.S. at 144.

C. In *Frye*, the United States Supreme Court decreed defense counsel's duty to timely communicate a plea offer and promulgated the applicable prejudice standard.

In *Frye*, the Court imposed a duty on defense counsel to timely communicate formal plea offers to defendants. The Court held that "defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Frye*, 566 U.S. at 145. In so holding, the Court relied on, and cited as persuasive guiding authority, the American Bar Association's standards for professional practice. *Id*. (citing ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(a) (3d ed. 1999). Indeed, the ABA Standards for Criminal Justice, Pleas of Guilty, Responsibilities of defense counsel, advise that defense counsel "should promptly communicate and explain to the defendant all pleas offers made by the prosecuting attorney." ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(a) (3d ed. 1999). The Court found that Frye's counsel's failure to communicate the prosecution's formal offer with a fixed expiration date to the defendant for his consideration before it lapsed constituted deficient performance. *Frye*, 566 U.S. at 145-47.

Regarding the prejudice prong, the Court held that to show prejudice where a plea offer has lapsed or been rejected because of counsel's deficient conduct, a defendant must demonstrate a reasonable probability that: 1) they would have accepted the earlier plea offer; 2) the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it; and 3) the end result of the proceeding would have been more favorable by reason of a plea to a lesser charge or a sentence of less time. *Id*. at 147.

In so holding, the *Frye* Court distinguished the applicable prejudice standard in situations involving uncommunicated, lapsed pleas offers from the *Hill*

v. Lockhart[14] prejudice standard in cases where a defendant asserts that counsel's deficient conduct led him to accept a plea offer instead of going to trial. *Id*. at 148. In a *Hill* situation, a defendant must demonstrate a reasonable probability that but for counsel's deficient conduct, he would not have entered a plea and would have insisted on going to trial. *Hill*, 474 U.S. at 59. In distinguishing *Hill*, the *Frye* Court explained that the *Hill* standard is not "the sole means for demonstrating prejudice arising from the deficient performance of counsel during plea negotiations." *Frye*, 566 U.S. at 148. In a situation where a defendant pled to less favorable terms and claims he missed out on a more favorable earlier offer due to counsel's deficient conduct, the inquiry regarding whether the result of the proceeding would have been different is not whether he would have proceeded to trial, but whether he would have accepted the earlier offer. *Id*.

D. Counsel's failure to timely communicate the State's formal plea offer to Mr. Jackson denied Mr. Jackson the effective assistance of counsel.

1. Counsel's conduct constituted deficient performance.

In the instant case, Mr. Jackson's attorney performed deficiently when he failed to communicate and discuss the prosecution's formal offer with Mr. Jackson for Mr. Jackson to consider and accept the offer before it lapsed. The prosecution's formal offer included a plea to second degree reckless homicide as a party to a crime. This offer expired on October 28th. Although it appears that counsel sent Mr. Jackson a letter advising him of a plea offer from the prosecution, he chose not to meet with Mr. Jackson to discuss the offer until November 1st, after the offer had already expired.

Anderson did not give his client the opportunity to accept this offer before it expired. Counsel knowingly disregarded the expiration date of the State's offer as "not a real deadline" and something he did not "put much stock in". In doing so,

[14] 474 U.S. 52 (1985).

Anderson took a risk that was not his risk to take. Anderson's risk failed and Mr. Jackson paid the consequences. Mr. Jackson lost out on the opportunity to plead to the homicide offense as a party to a crime. Counsel's choice not to communicate and discuss the offer with Mr. Jackson prior to its expiration was not by any means objectively reasonable conduct.

The lapsed offer from the State would was more favorable than the later plea offer from the State. The earlier offer would have enabled Mr. Jackson to plead to the crime in his admitted role as a lookout, not the shooter. By pleading to the homicide charge as party to a crime Mr. Jackson could have shown at sentencing what he had maintained from the beginning, that he was part of the plan to rob Carter, but he was not the shooter.

2. Mr. Jackson was prejudiced by counsel's failure to communicate with him about the offer prior to its expiration.

Application of the *Frye* prejudice test demonstrates that Mr. Jackson was prejudiced by counsel's failure to timely communicate and discuss the State's plea offer before it lapsed. First, Mr. Jackson would have accepted the State's earlier offer to plead to the homicide as a party to the crime. By pleading as a party to a crime, he could maintain his admitted role was that of the lookout and not the shooter and argue his admitted role as a mitigating factor at sentencing.

Second, the plea to the homicide as a party to a crime would have been entered without the prosecution canceling it or the court refusing to accept it. The prosecution would have adhered to its plea offer prior to its expiration. The State had sent a formal written offer for Mr. Jackson to plead to second degree reckless homicide as a party to a crime. This offer did not contain any preconditions, such as, for example, the State verifying certain information about Mr. Jackson or Mr. Jackson agreeing to cooperate in the prosecution of other individuals. Nor had Mr. Jackson been charged with any new crimes during the 11-day period that the offer was open. There is nothing in the record suggesting that the State would have

revoked that offer prior to October 28th. Additionally, the trial court would not have refused to accept the plea to the amended charge. Mr. Jackson would have resolved his case short of trial. There does not appear to be any reason that the court would have refused to accept the plea.

Third, there is a reasonable probability that Mr. Jackson would have received a shorter prison sentence had he pled to second degree reckless homicide as a party to a crime. Pleading as party to a crime of a homicide would have allowed Mr. Jackson to maintain, credibly, that he was not the shooter, but a lookout and accept responsibility for his lesser role in the crime. The court would likely have accepted his explanation that he was not the shooter, instead of, as it did during Mr. Jackson's sentencing, finding that he was the shooter, lacked remorse, and failed to accept responsibility.

Additionally, pleading to the crime in his lookout role would have been mitigating for sentencing. Being sentenced as the lookout versus the shooter directly affects the court's assessment of the three primary sentencing factors. At sentencing, the court considers the gravity of the offense, the character of the defendant, and the need to protect the public in determining the appropriate sentence. *State v. Paske*, 163 Wis. 2d 52, 62, 471 N.W.2d 55 (1991).

For the gravity of the offense, being the lookout mitigates Mr. Jackson's degree of culpability in Carter's death. *See State v. Harris*, 119 Wis.2d 612, 623-24, 350 N.W.2d 633 (1984) (listing "degree of the defendant's culpability" as a factor that the court may consider in determining the appropriate sentence). For character, the lookout is less dangerous than the shooter -- a person who is willing to shoot and kill someone. For this same reason, the need to protect the public from a lookout is less than the need relative to a shooter. In any event, Mr. Jackson need only to establish a "reasonable probability" of a different sentence, not that he would have more likely than not received a lower sentence. *See State v. Sholar*, 2018 WI 53, ¶44, 381 Wis. 2d 560, 912 N.W.2d 89 ("a defendant need not prove

the outcome would 'more likely than not' be different in order to establish prejudice in ineffective assistance cases", *citing Strickland*, 466 U.S. at 693).

Therefore, for all of the above reasons, Mr. Jackson has proven that he was denied the effective assistance of counsel when his attorney failed to timely communicate and discuss with him the State's earlier plea offer which had lapsed. He is thus entitled to plea withdrawal.

II. The trial court misused its discretion by failing to follow up to determine whether counsel had visited Mr. Jackson as she instructed when she denied Mr. Jackson's request for a new attorney on October 17th and decide Mr. Jackson's October 28th motion for a new attorney.

Whether trial counsel should be relieved and a new attorney appointed in his place is a matter within the trial court's discretion. *State v. Lomax*, 146 Wis. 2d 356, 359, 432 N.W.2d 89 (1988). This Court reviews a discretionary decision to determine whether the trial court examined the facts of record, applied a proper legal standard, and, using a rational process, reached a reasonable conclusion. *See Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

In determining whether a circuit court erroneously exercised its discretion in denying a motion for new counsel, a reviewing court must consider a number of 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 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. *Lomax*, 146 Wis. 2d at 359.

At the October 17th hearing, Judge Flancher denied Mr. Jackson's request for a new attorney based on the timeliness of his motion and that his prior requests for new counsel had delayed the proceedings. With regard to Mr. Jackson's complaint that Mr. Anderson had not kept in contact with him, Judge Flancher took other steps, short of ordering a new attorney that she believed might solve the

problem. She directed Anderson to meet with Mr. Jackson in advance of the trial and to be prepared for trial on November 1st.

Mr. Jackson then wrote twice to the judge first complaining that Anderson had only met with him three times, that counsel had not reviewed the plea offer, and then filed a motion to discharge Anderson.

Despite her directive to Anderson and Mr. Jackson's subsequent filings, Judge Flancher failed to follow up with Anderson prior to or at the November 1st hearing to determine whether he had in fact visited with Mr. Jackson prior to November 1st as she directed. The court's failure to do so was an erroneous exercise of discretion. She had reason to believe that Anderson's communication with his client was not happening. But she ignored it.

Judge Flancher should have heard and considered Mr. Jackson's request for a new attorney at the beginning of the November 1st hearing. She should have addressed all of Mr. Jackson's complaints about Anderson's communication with him, including what occurred following the October 17th hearing and because Mr. Jackson had filed another motion to terminate counsel. When a defendant has requested a new lawyer, the court "is required to inquire into the defendant's complaints." *See Lomax* 146 Wis. 2d at 361. A court should take the time to allow the defendant to explain *all* of his complaints about his lawyer so that it can properly exercise its discretion in deciding whether or not to grant the request for a new attorney. *Id*. at 362. The "trial court must…make sufficient inquiry to ensure that a defendant is not cemented to a lawyer with whom full and fair communication is impossible; mere conclusions unless adequately explained will not fly." *State v. Jones*, 2007 WI App 248, ¶13, 306 Wis. 2d 340, 742 N.W.2d 341. If the court fails to make sufficient inquiry into a defendant's request for a new lawyer before denying that request, it abuses its discretion. *See Lomax*, 146 Wis. 2d 356 at 361-362.

Therefore, because the court erroneously exercised its discretion in failing to hear and grant his motion for new counsel prior to the entry of his plea, Mr.

Jackson is entitled to plea withdrawal and to proceed with new counsel.

CONCLUSION

For all of the reasons set forth above, Mr. Jackson respectfully requests that this Court enter an order reversing the court of appeals' decision dated December 29, 2021, reversing the circuit court's denial of the defendant's motion to withdraw his plea, and remanding this case to the circuit court for further proceedings with an order that Mr. Jackson's plea is withdrawn.

Dated this 30th day of September, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of the brief is 6,162 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12) (2019-2020)

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

Dated this 30th day of September, 2022.

Respectfully submitted,

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