STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP2383-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAIMON VON JACKSON, JR.,

Defendant-Appellant-Petitioner.

APPEAL FROM A JUDGMENT OF CONVICTION AND SENTENCE ENTERED IN THE RACINE COUNTY CIRCUIT COURT, THE HONORABLE FAYE M. FLANCHER PRESIDING, AND AN ORDER DENYING POSTCONVICTION RELIEF, THE HONORABLE MARK F. NIELSEN PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Has the defendant, Daimon Von Jackson, forfeited the two issues raised in his petition to this Court – (1) whether the court of appeals properly determined that he had not shown prejudice from his attorney's failure to meet with him more and (2) whether prejudice should be presumed in this situation—by failing to brief them, and are the issues that Jackson decided to brief instead improperly raised because they were not presented in his petition for review?

The issues raised and argued in Jackson's brief to this Court bear no resemblance to the issues he raised in his petition and were not raised below. Moreover, there is no law development to be done in this case. This Court should deem Jackson's arguments in his petition forfeited and his new claims improperly before this Court.

2. Did Jackson prove that his attorney actually rendered deficient performance in his trial preparation or his advice to accept the State's plea offer, or prejudice stemming from them, merely on the theory the attorney breached his ethical duty to maintain sufficient communication with Jackson?

This Court in *State v. Cooper* already held that an ethics violation alone is insufficient to prove deficient performance, and further held that prejudice is not presumed in this situation. Jackson can show neither deficient performance nor prejudice in this case.

3. Was the circuit court required to revisit, on the morning of trial, its previous ruling denying Jackson's motion for new counsel when Jackson gave the court no indication that he wanted the court to do so?

The circuit court was under no obligation to revisit its former ruling nor to monitor defense counsel's activities between the final pretrial conference and the morning of trial,

and the circuit court addressed Jackson's complaints about counsel again during the plea colloquy. Any error was therefore harmless.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court should dismiss this case as improvidently granted because there is no law development to be done here. *Cook v. Cook*, 208 Wis. 2d 166, 188–89, 560 N.W.2d 246 (1997). The outcome of this case is squarely dictated by (1) longstanding law from the Supreme Court of the United States; (2) this Court's recognition of the difference between a deviation from best practices or violation of the rules of professional conduct; (3) the requirement of constitutionally deficient performance along with the necessity for the defendant to prove prejudice; and (4) several prior decisions from the appellate courts regarding what a defendant must establish to prevail on the prejudice prong. *See, e.g.*, *Strickland v. Washington*, 466 U.S. 668 (1984); *Hill v. Lockhart*, 474 U.S. 52 (1985); *Harrington v. Richter*, 562 U.S. 86 (2011); *State v. Fencl*, 109 Wis. 2d 224, 325 N.W.2d 703 (1982); *State v. Cooper*, 2019 WI 73, 387 Wis. 2d 439, 929 N.W.2d 192; *State v. Jeninga*, 2019 WI App 14, 386 Wis. 2d 336, 925 N.W.2d 574.

Moreover, whether to grant a defendant's request for new counsel is a decision committed to the circuit court's discretion—and one that Jackson did not ask this Court to review—that will generally be upheld on appeal as long as the circuit court heard the defendant's complaints and explained its rationale on the record. *State v. Lomax*, 146 Wis. 2d 356, 359, 432 N.W.2d 89 (1988). The court did that here.

Jackson's counsel did not perform deficiently simply because he didn't meet with Jackson enough, given that he did ample trial preparation on his own and gave Jackson sound advice to take the plea offered. Further, the prejudice

prong is not presumed and must be proven and resolved on the specific facts of the particular case. An opinion from this Court in this case will not develop the law in any way. Indeed, *Cooper* addressed the exact same legal issues and factual situation presented here. *Cooper*, 387 Wis. 2d 439, ¶¶ 21–32.

If this Court declines to dismiss this case, oral argument and publication are customary for cases addressed by this Court.

STATEMENT OF THE FACTS

A. The robbery gone wrong

Maurice Carter and a friend, Tauries Murry, were playing cards at a friend's house when Murry's girlfriend called and warned everyone to leave. (R. 1:2.) Murry later told police he and Carter went toward their cars and after Murry got in his own car, he saw two people running towards Carter. (R. 1:2.) Murry heard a gunshot and saw Carter fall to the ground. (R. 1:2.) The men started going through Carter's pockets, and Murry drove his car at them in an attempt to scare them off. (R. 1:2.) They ran away and Murry stopped to help Carter, who later died of his gunshot wounds. (R. 1:2.) Webster, Henderson, and the defendant Daimon Jackson then went to the Potowatomi casino, where they were observed on surveillance cameras wearing clothing similar to what Murry described the perpetrators wearing. (R. 1:2; 46:25.)

Police found a handgun magazine at the scene that had Bobby Henderson's fingerprints on it. (R. 1:2–3.) Henderson admitted his involvement and told the police that he, Jackson, and another man, Travenn Webster, set out to commit a robbery with Webster waiting as a getaway driver. (R. 1:3.) He said Jackson had a handgun, which Henderson asked to see. (R. 1:3.) Henderson ejected the magazine, inspected the gun, and then gave it back to Jackson. (R. 1:3.) Henderson

said he planned to rob Murry while Jackson robbed Carter, but Murry began to drive away. (R. 1:3.) Henderson saw Jackson struggling with Carter and heard two gunshots. (R. 1:3.) Henderson ran, and when Jackson and Henderson met at Webster's car, Henderson asked why Jackson had shot the man. (R. 1:3.) Jackson said he thought the man had a gun, so he shot him. (R. 1:3.) Jackson eventually admitted to police he was involved in the incident, but asserted he was only acting as a lookout. (R. 1:3.)

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 Carter's death. (R. 1.)

B. Jackson's five requests for new counsel before entering his no contest plea

Jackson, first represented by Attorney Antoinette Rich, pled not guilty to all the charges. (R. 57:2.) Several months later, Rich moved to withdraw. (R. 59:2.) She said there had been a breakdown in attorney-client communication. (R. 59:2.)

The court[1] allowed Rich to withdraw, but warned Jackson, "[t]his is not going to be a revolving door. You're not going to come back and back to this Court and say . . . [t]here's been a breakdown until you get a lawyer that you're satisfied with." (R. 59:3.) Jackson said he understood. (R. 59:3–4.)

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[1] The Honorable Eugene A. Gasiorkiewicz presided over Jackson's case between July 28, 2015, and March 9, 2016, which included Jackson's first three requests for new counsel. Due to judicial rotation the case was reassigned to the Honorable Faye M. Flancher in March of 2016, who presided over the case through sentencing. The Honorable Mark Nielsen then presided over Jackson's postconviction litigation in this matter.

Attorney Aileen Henry was next appointed to represent Jackson. (R. 60:2.) Six weeks later Henry, too, moved to withdraw. (R. 61:2.) She said Jackson's mother had intervened to the point where the attorney-client relationship between Henry and Jackson was "irretrievably broken." (R. 10:1.) The court admonished Jackson that his attorneys did not have any obligation to his mother, that the case was now 280 days old. (R. 61:4.) It did, however, allow Henry to withdraw. (R. 61:5.)

The public defender's office then appointed Attorney Richard Hart to represent Jackson. (R. 11.) Hart filed a number of pretrial motions and a speedy trial demand on Jackson's behalf. (R. 12; 13; 16; 18; 19; 20.) At the final pretrial conference, though, Hart informed the court that Jackson wanted him to withdraw as well, alleging that Hart hadn't done anything Jackson asked him to do. (R. 64:3–4.) The court refused to allow Hart to withdraw. (R. 64:4.) The case was adjourned, though, because Webster was in federal custody and the federal authorities refused to release him to be a material witness. (R. 64:2, 7.)

On March 14, 2016, one of Hart's associates appeared and informed the court that Hart had suffered a serious leg injury requiring surgery and would be unable to drive for several months. (R. 66:2.) Given the circumstances, the court, Judge Faye Flancher now presiding, allowed Hart to withdraw. (R. 66:2–3.)

Attorney Scott Anderson was then appointed in March of 2016. (R. 21.) The State had filed another case against Jackson consisting of some felony drug charges in the meantime. (R. 68:1–2.) Anderson entered not guilty pleas in the new case and asked the court to set a new trial date in the old case, since he was newly appointed. (R. 68:11–12.)

In September, Jackson sent a letter to the court asking to replace Anderson as well. (R. 24.) The court addressed the

request at the final pretrial conference in October and after allowing Jackson to explain why he was dissatisfied with Anderson, the court denied the motion due to the age of the case and Jackson's repeated requests for new attorneys. (R. 70:2–4.) It told the parties to be ready to proceed to trial on November 1. (R. 70:3.)

On November 1, Jackson provided a completed plea questionnaire and waiver of rights form to the court and informed the court he had reached a plea agreement with the State. (R. 26; 71:2.) The State filed an amended information charging Jackson with one count of second-degree reckless homicide as a repeater and with a dangerous weapon and one count of possession of a firearm as a felon. (R. 71:2–3.) Jackson agreed to plead no contest to the reckless homicide charge in exchange for the possession charge and all of the charges in the drug case being dismissed and read in. (R. 71:3.) Anderson and Jackson both confirmed that was their understanding of the negotiations. (R. 71:3.)

After a colloquy, which included some extra elaboration on whether Jackson understood the elements of the crime to which he was pleading and, specifically, whether he was satisfied with Anderson's representation, the court accepted Jackson's no contest plea. (R. 71:3–14.) At sentencing, the court rejected Jackson's contention that he was just a lookout. (R. 75:23.) It sentenced him to 20 years of initial confinement and 10 years of extended supervision. (R. 75:23.)

C. The circuit court's and court of appeals's denial of Jackson's claim that fourth counsel was ineffective

Jackson filed a postconviction motion seeking to withdraw his plea. (R. 46.) He claimed that Anderson was ineffective in myriad ways, and that the court had erred when

it denied Jackson's request to replace Anderson.[2] (R. 46:1.) The circuit court held a *Machner* hearing and both Anderson and Jackson testified. (R. 78.) Jackson alleged that he didn't understand that he was pleading to being the shooter but thought he was just pleading to being an accomplice. (R. 78:82–91.) He further complained that Anderson did not confer with him or keep him updated on the case, and claimed he had entered his plea only because he did not think Anderson was prepared for trial. (R. 78:79–80.)

The circuit court denied the motion, finding that Anderson should have kept in better contact with Jackson, but that Jackson was not prejudiced because his three prior attorneys had worked with him through all of the pretrial motions and preparation and Anderson took over with nothing left to do but try the case. (R. 52:25–29.) It further found Jackson's assertions that he pled only because he did not believe Anderson was prepared, and that he did not understand what he was pleading to, not credible, and determined that there was not a reasonable probability Jackson would have opted for trial if Anderson met with him more. (R. 52:29–32.) Finally, the court rejected Jackson's assertion that Judge Flancher had erroneously denied his request to fire Anderson at the final pretrial hearing on October 17, noting that Jackson was given a chance to explain why he wanted new counsel and Judge Flancher's decision denying his request two weeks before trial after the case had been pending for two years and after Jackson had been through three other attorneys with similar complaints an appropriate exercise of discretion. (R. 52:33–34.)

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[2] Jackson raised a host of ineffective assistance claims in the trial court, but did not pursue most of them on appeal. The State therefore discusses only the facts relevant to the claim that he has preserved for consideration by this Court.

Jackson appealed, and a two-judge majority of the court of appeals affirmed in an authored but unpublished opinion. *State v. Jackson*, No. 2019AP2383-CR, 2021 WL 6132278 (Wis. Ct. App. Dec. 29, 2021) (unpublished). Judge Reilly dissented, but, as the majority noted, *id.* ¶ 50 n.23, he did so largely on grounds that neither party raised or argued—he would have found Anderson ineffective for failing to claim that the State "breached" its pretrial plea offer by removing the party to a crime designation in the November 1 plea agreement and that the circuit court gave a defective plea colloquy. *Id.* ¶¶ 63–88. This Court granted Jackson's petition for review.

ARGUMENT

I. Jackson has improperly raised and argued issues that were not argued below or in Jackson's petition for review; they are not preserved for review and should not be addressed.

Jackson raised two questions in his petition for review: (1) whether the court of appeals properly determined that Jackson failed to sufficiently support his assertion that Anderson's failure to meet with him left Anderson unprepared to try the case, and therefore Jackson would have rejected the State's plea offer and proceeded to trial if Anderson met with him more; and (2) whether counsel's failure to communicate with Jackson facially established prejudice without a need for Jackson to show a reasonable probability of a different result. (Pet. 7–8.) This Court granted the petition on those issues only, and did not expand the petition in any manner.

In Jackson's brief before this Court, he does not address either question and now raises and argues two completely different issues: (1) whether counsel was constitutionally deficient for failing to communicate with Jackson about a

purportedly different plea offer than the one he accepted, which was extended October 17, 2016, and initially was set to expire the Friday before trial, though the prosecutor then left the offer open until the morning of trial. Jackson claims this prejudiced him by resulting in his pleading to a "less favorable" plea than initially offered because the charge to which he pleaded was not charged as a party to a crime (Jackson's Br. 21–24); and (2) whether the circuit court had a duty to *sua sponte* revisit Jackson's request for new counsel on the morning of trial, November 1, 2016, based on Jackson's post-October-17 pro se filings (Jackson's Br. 25–26).

These arguments were not made below. (R. 46:9–11.) Accordingly, this ground of deficient performance was not specifically addressed with counsel or the defendant at the *Machner* hearing; Anderson was asked general questions relating to the timing and content of Anderson's communications with Jackson and what Anderson did to prepare for trial. (R. 46:1–19; 78:3–28, 70–99; Jackson's Court of Appeals Appellant's Br. 6–8.) It was not addressed by the circuit court when adjudicating Jackson's motion apart from a passing mention that Jackson stated in the factual background portion of his motion that the State's offer to resolve the case via plea agreement expired the Friday before trial, but noting that Jackson was clearly wrong about that given that the State said at the hearing that negotiations would stay open until the trial commenced. (R. 52:25; *Jackson*, 2021 WL 6132278, ¶¶ 40–42.)

Jackson did not challenge that finding of fact, nor did he appeal on those grounds. In the court of appeals, Jackson argued solely that Anderson's failure to meet with him was by itself enough to establish deficient performance, leading to Anderson's being unprepared for trial, which Jackson alleged prejudiced him by causing him to not knowingly, intelligently, and voluntarily enter his plea. (Jackson's Court of Appeals Br.

6–8); *Jackson*, 2021 WL 6132278, ¶ 40. The court of appeals then opted to decide this case purely on the prejudice prong, because Jackson "fail[ed] to submit anything at all" as to how he was prejudiced. *Id.* ¶¶ 44–45. That is a vast departure from what Jackson now addresses in his brief. (Jackson's Br. 17–24.)

And Jackson never once argued in either the postconviction court or the court of appeals that the circuit court should have revisited his request for new counsel on the morning of trial, and his petition for review didn't hint at this claim. (R. 46; Jackson's Court of Appeals Br. 12–14; Pet. 7–8.) In fact, Jackson's petition for review did not raise the issue of whether the court appropriately denied his request for new counsel at all, and instead appeared to claim that Anderson's failure to communicate was by itself sufficient to establish *Strickland* prejudice without Jackson's needing to provide any other facts. (Pet. 7–8; *see also* Resp. to Pet. 6).

As the appellant and petitioner, Jackson was required to properly preserve his claims for review, and is accordingly limited to the claims he both preserved below and raised in his petition for review. *State v Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997); *Emer's Camper Corral, LLC v. Alderman*, 2020 WI 46, ¶ 44, 391 Wis. 2d 674, 943 N.W.2d 513 (holding that a petitioner cannot raise alternative legal theories to support their claims for relief that were not raised in the petition for review to this Court). Arguing one theory of ineffective assistance of counsel in the circuit court does not preserve for review a similar but distinct ineffective assistance claim on different grounds. *See, e.g.*, *Everett v. Barnett*, 162 F.3d 498, 502 (7th Cir. 1998) (petitioner defaulted on argument that counsel was ineffective for failing to call a specific witness where petitioner had previously argued ineffectiveness in counsel's failure to call other witnesses). Jackson cannot now argue new theories of

ineffective assistance that he did not preserve or petition upon.

This Court should further hold that Jackson's generic, undeveloped argument about the circuit court's inquiry into Jackson's motion for new counsel, one referencing a completely different legal principle (*Strickland* prejudice), is insufficient to bring any complaints before this Court about the denial of his motion for new counsel under *Lomax* or new theory that the court should have readdressed it on the morning of trial. This was not a pro se petition and therefore is not due the liberal reading given to such filings. *See Amek bin-Rilla v. Israel*, 113 Wis. 2d 514, 521–22, 335 N.W.2d 384 (1983). Jackson's petition never suggested that he was raising a challenge to the circuit court's exercise of discretion in denying his motion for new counsel even on October 17, let alone at some time after that. (Pet. 1–8.) His claim was purely about establishing prejudice under *Strickland*.

The only issues raised in Jackson's petition were whether the court of appeals appropriately held that Jackson had not proven prejudice, and whether Anderson's failure to communicate with Jackson relieved him of the burden of proving prejudice. (Pet. 1–8.) Jackson has abandoned those arguments, and neither of the issues Jackson has argued in his brief was sufficiently raised below or even suggested in his petition for review. His arguments should be deemed forfeited and this case dismissed.

II. Fourth counsel's meeting with Jackson only three times before the trial date is not *ipso facto* constitutionally deficient performance, and Jackson is required to, and cannot, show prejudice.

Both Jackson's preserved ineffective assistance claim and his improperly raised claim fail. The record shows that despite not meeting with Jackson as much as Anderson

admitted he should have, Anderson adequately prepared for trial and gave Jackson objectively reasonable professional advice to take the State's plea offer—an offer that Jackson was made aware of at the October 17 hearing, Anderson wrote to him about the day after the hearing, and Anderson discussed with him and advised him about on the morning of trial. Anderson therefore cannot be found to have provided constitutionally deficient performance even if the rules of professional conduct required him to communicate with Jackson more.

And there is no real argument to make that Jackson can show prejudice, which this Court in *Cooper* already held is a required showing and not simply presumed. *Cooper*, 387 Wis. 2d 439, ¶ 32. Jackson had no viable defense whatsoever to the felony murder and felon in possession of a firearm charges in the complaint on which trial would have proceeded. Indeed, by his own telling, Jackson was acting as a lookout during the attempted armed robbery, meaning he would have admitted to being a party to the crimes of felony murder and felon in possession of a firearm. And those charges, combined with the multiple drug charges from a separate case that were dismissed and read in as part of this plea, carried far more prison exposure than the single second-degree homicide charge to which Jackson pleaded no contest.

No reasonable person in Jackson's position would have insisted on proceeding to trial in these circumstances, and the circuit court found that Jackson's averments to the contrary were not credible—a finding that this Court will not supplant on review unless that credibility determination was one no reasonable jurist could make. The circuit court and court of appeals properly applied the law and appropriately rejected Jackson's claim.

A. To be found constitutionally deficient, an attorney must have given inappropriate advice to his client or performed incompetently in his actual preparation for trial; deviation from the ethical rules alone is not constitutional deficiency.

The standard by which counsel's representation of a criminal defendant is judged under the Sixth Amendment is well settled: the representation must not fall "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 686, 688. An attorney's performance is not constitutionally deficient, however, merely because it "deviated from best practices or most common custom." *Richter*, 562 U.S. at 105; *see also State v. Balliette*, 2011 WI 79, ¶ 22, 336 Wis. 2d 358, 805 N.W.2d 334 ("The defendant does not show [deficient performance] simply by demonstrating that his counsel was imperfect or less than ideal."). To be found constitutionally ineffective, the attorney's representation must be so lacking that it "amounted to incompetence under 'prevailing professional norms" to such a degree that it actually effected the outcome of the proceeding. *Richter*, 562 U.S. at 105 (citing *Strickland*, 466 U.S. at 690). In short, "a defendant is entitled to 'reasonably effective assistance' by a 'reasonably competent attorney,'" no more and no less. *Balliette*, 336 Wis. 2d 358, ¶ 22 (citing *Strickland*, 466 U.S. at 687–88.

To that end, "[r]epresentation of a criminal defendant entails certain basic duties," including "duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Strickland*, 466 U.S. at 688. But "[t]hese basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance." *Id.* Additionally, "[w]hile the Sixth Amendment guarantees a right to effective assistance of counsel, this right's purpose is 'not to improve the quality of

legal representation . . . . The purpose is simply to ensure that criminal defendants receive a fair trial.'" *State v. Savage*, 2020 WI 93, ¶ 27, 395 Wis. 2d 1, 951 N.W.2d 838 (quoting *Strickland*, 466 U.S. at 689); *see also United States v. Cronic*, 466 U.S. 648, 658 (1984) ("[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to have a fair trial"). The bottom line is that "[u]nder the *Strickland* standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel." *Nix v. Whiteside*, 475 U.S. 157, 165 (1986).

When an ineffective assistance of counsel claim is brought, then, the question is not whether counsel could have been better or whether the attorney met his or her ethical obligations under the rules of professional conduct. *Balliette*, 336 Wis. 2d 358, ¶ 22; *Cooper*, 387 Wis. 2d 439, ¶ 22 (holding that an attorney's "fail[ure] to meet the demands of SCR 20:1.4(a)(2) [establishing an attorney's ethical duty of communication with a client] cannot mean, ipso facto, that he performed deficiently within *Strickland*'s meaning"). The question is whether counsel's ultimate actions and advice were actions and advice that a reasonable attorney would take and offer under the circumstances.

B. There is no minimum number of meetings an attorney must have with a client to provide constitutionally effective representation.

The State acknowledges that, three years after Jackson entered his no contest plea, this Court found that Anderson violated SCR 20:1.4 (requiring an attorney to maintain reasonable and prompt communication with a client) in this case by failing to timely communicate with Jackson about defense strategy, the status of the case, and failing to respond

to Jackson's reasonable requests for information. *Matter of Disciplinary Proceedings Against Anderson*, 2020 WI 82, ¶ 18, 394 Wis. 2d 190, 950 N.W.2d 191. However, Jackson has never specifically identified: (1) any information Jackson would have given to Anderson that would have altered Anderson's trial preparation including any witnesses Jackson believed would be helpful; nor (2) anything that Anderson should have explained to him that his previous attorneys did not already address or that would have caused him to evaluate the benefit of the plea offer differently. (Jackson's Br. 18–22; R. 46:9–11; 78:99–111.)

In other words, Jackson never provided any facts that would make the crucial connection between Anderson's failure to meet with him and any unreasonable lack of preparation for trial by Anderson or information that would make Anderson's advice to take the plea unreasonable. Unreasonable assistance in *actually meeting the State's case*, either through a plea or through a trial, is the crux of deficient performance. *Cronic*, 466 U.S. at 658. In other words, while reduced communications might affect the defendant's confidence in his attorney's performance, he still must show the substantive impact of the attorney's conduct: that the lack of communication changed the substance or effectiveness of the attorney's plea advice, or, if no plea was entered, how the parties tried the case. Here, Jackson makes no effort to show such an impact. Anderson's failure to perform the professional duties required of Wisconsin attorneys under the ethics rules does not show that Anderson's trial preparation or advice about the plea fell below an objective standard of reasonableness.

And that puts this case squarely on all fours with *Cooper*. This Court already established in that case—consistently with the Supreme Court's and other

jurisdictions'[3] pronouncements on the relationship between professional ethics rules and constitutionally deficient performance—that while ethical rules provide guidelines for what is expected of attorneys, even an attorney's demonstrated failure to fulfill the duty to maintain prompt and diligent communication with the client cannot, by itself, establish deficient performance. *Cooper*, 387 Wis. 2d 439, ¶ 22.

Just like in this case, in *Cooper*, the defendant's attorney did not communicate with him sufficiently; there, the attorney did not respond to the defendant's requests for information for a full ten months until two weeks before the trial date. *Id.* ¶ 2. Cooper then sent a letter to the court requesting new counsel. *Id.* ¶ 2. Shortly before trial, the State offered to resolve the case via a plea agreement, and Cooper decided to accept it after the attorney told him he had no hope

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[3] *See, e.g.*, *Nix v. Whiteside*, 475 U.S. 157, 165 ("Under the *Strickland* standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel."); *Robinson v. State*, 435 S.E.2d 718, 721 (Ga. Ct. App. 1993) (same, quoting *Whiteside*, 475 U.S. 157, 165); *People v. Grimes*, 115 N.E.3d 587, 601 (N.Y. 2018) ("rules of professional conduct "'cannot be applied as if they were controlling statutory [authority] or decisional law'" and not 'every violation of an ethical rule will constitute ineffective assistance of counsel.'" (citation omitted)); *Taylor v. State*, 51 A.3d 655, 670 (Md. 2012) ("the requirements of establishing ineffective assistance of counsel are not coextensive with the requirements of establishing a potential violation of [Maryland's code of professional ethics]"); *State v. Thompson*, 2022 WL 1744242, *14 (Del. Sup. Ct., May 31, 2022) (unpublished) ("[E]thical rules do not govern an ineffective assistance analysis"); *cf. Matter of Wolfram*, 847 P.2d 94, 98–99 (Ariz. 1993) (judicial finding that a defendant received ineffective assistance of counsel does not definitively establish an ethical violation); *but see State v. Clay*, 824 N.W.2d 488, 496 (Iowa 2012) (Iowa courts "rely on our ethical rules for lawyers to measure counsel's performance.").

of winning at trial. *Id.* ¶¶ 3, 5. After a thorough colloquy including questions about Cooper's satisfaction with the representation he received, the court accepted the plea. *Id.* ¶ 3–4. Before sentencing, Cooper moved to withdraw his plea, claiming he received ineffective assistance of counsel due to his attorney's failure to communicate with him causing him to enter the plea in haste and confusion. *Id.* ¶ 5. The circuit court denied the motion.

Two years later, while Cooper's appeal was pending, this Court suspended that attorney's license for his failure to communicate with Cooper. *Id.* ¶ 9. Cooper then argued that this Court's finding that the attorney violated SCR 20:1.4 in his case proved that Cooper received ineffective assistance, and therefore established that the circuit court erred in denying his motion to withdraw his plea. *Cooper*, 387 Wis. 2d 439, ¶¶ 9–10.

This Court disagreed and held that even a proven violation of SCR 20:1.4, without facts connecting the lack of communication to some unreasonable action by counsel that would affect the outcome of the proceeding, did not establish that the attorney was constitutionally ineffective. *Cooper*, 387 Wis. 2d 439, ¶ 21. This was so because the standards established by the rules of professional conduct do not correlate exactly with what is required of attorneys "in substantive areas of the law;" therefore, the mere fact that the attorney did not sufficiently communicate established nothing about whether that lack of communication affected Cooper's ability to enter a knowing, intelligent, and voluntary plea. *Id.* ¶¶ 21–22.

That is directly analogous to the facts of this case. Again, the State does not dispute that Anderson did not communicate with Jackson as much as he should have pursuant to SCR 20:1.4, but that alone does not establish deficient performance because it says nothing about how more

communication would have changed what Anderson or Jackson ultimately did. As the Seventh Circuit has recognized, 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) (citation omitted); *See also State v. Osborne*, 941 P.2d 337, 372 (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). To be sure, "an experienced attorney 'can get more out of one interview with a client . . . than a less well-trained lawyer could get out of several." *Olson*, 846 F.2d at 1108. Jackson has provided nothing showing that Anderson actually wasn't prepared for trial or that his advice to take the plea was unsound, and in fact, the record shows otherwise.

Anderson 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 the video of the perpetrators taken from the Potawatomi casino after the killing that showed what each defendant was wearing, the DNA evidence reports, the 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.) He 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.) Anderson

said Jackson decided to plead on the morning of trial after they discussed the strength of the State's case. (R. 78:14–17.)

Anderson further testified that he has been practicing criminal law for decades, since 1985, and is exclusively a criminal defense attorney. (R. 78:3.) Anderson's many years of experience weigh in favor of his ability to prepare adequately for a case without needing multiple lengthy interviews with his client. *Olson*, 846 F.2d at 1108. Additionally, Anderson noted Jackson had three prior attorneys who conducted the pretrial motion practice and 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.) Anderson also testified that he did not think things would have gone differently if he had met with Jackson more. (R. 78:27–28.) Though Anderson acknowledged that he "[c]ould have done better" (R. 78:27) in communicating with Jackson, his testimony shows he was adequately prepared for trial and therefore did not perform deficiently.

More importantly for the inquiry here, Jackson has provided nothing showing that Anderson's advice about or explanation of the plea was unreasonable. (Jackson's Br. 17–24). The State offered Jackson the opportunity to plead to second-degree reckless homicide in exchange for all of the other charges being dismissed and read in—including the drug charges in the companion case—on October 17, roughly two weeks before trial. (R. 78:22–23.) Anderson sent a letter to Jackson the next day, which he thought conveyed the plea offer.[4] (R. 78:24.) Anderson said he discussed the plea offer with Jackson. (R. 78:15.) He told Jackson that the State's case

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[4] Anderson could not precisely recall the contents of that letter and a copy was not in his file, though a note showed that the letter was sent on October 18.

against him was strong, and testified that both he and Jackson had known for months that Jackson's codefendants were going to testify against him. (R. 78:17–18.) Jackson's statements admitting to police that he acted as a lookout had been determined admissible months beforehand along with the knowledge that Webster and Henderson were going to testify against him, ensuring his conviction felony murder and felon in possession of a firearm as a party to crime charges in the original complaint. (R. 62; 78:17.) Anderson said he went through the plea questionnaire with Jackson and explained the elements of second-degree reckless homicide to him, as well as attaching a copy of the elements to the plea form. (R. 78:29.) The transcript of the plea hearing shows that the court and Anderson explicitly told Jackson he was pleading to second-degree reckless homicide and that he was no longer pleading to it as a party to a crime, which Jackson averred he understood. (R. 71:9–11.)

Anderson provided constitutionally reasonable assistance in advising Jackson about the plea. Had Jackson gone to trial, he faced more than 65 years of imprisonment, and that does not include the sentences he could have received for the drug charges in the companion case. (R. 1.) There is virtually no chance Jackson would have been acquitted of the felony murder and felon in possession charges because they were charged as a party to a crime. (R. 1:1.) That means that even if the jury bought Jackson's lookout story, it would only need to find he was an aider and abettor or a conspirator in committing those two crimes to find guilt, which Jackson's own statements would have sealed as a fait accompli—even without Henderson's and Webster's testimony. The plea deal reduced Jackson's maximum prison exposure for this case to 40 years and eliminated the drug charges in the companion case altogether. Anderson's explaining to Jackson that the State's case was strong and advising him to take the plea was not deficient performance.

Jackson has not discussed any of this case law or these facts because, as explained above, he has completely changed his claim now that it is before this Court. (Jackson's Br. 17–24.) He has consequently forfeited any arguments related to it.

C. Jackson must, and cannot, show prejudice even though Anderson should have been in better contact with him.

Even if Anderson's performance were deficient, though, Jackson's claim fails for lack of prejudice because he failed to establish a reasonable probability that he would have rejected the plea if counsel sufficiently communicated with him.

Jackson has not addressed the issue raised in his petition of whether prejudice is presumed when counsel has not sufficiently communicated with the defendant. (Jackson's Br. 18–24.) But it is well established that it is not, and the defendant must prove prejudice. This Court already held that defendants are required to prove prejudice in this situation. *Cooper*, 387 Wis. 2d 439, ¶¶ 28–29. The Supreme Court itself recognized in *Strickland* that defendants are almost never relieved of the burden to prove prejudice when raising an ineffective assistance of counsel claim. *See Strickland*, 466 U.S. at 692–93; *see also Hill*, 474 U.S. at 57–58; *Missouri v. Frye*, 566 U.S. 134, 147 (2012). The Supreme Court in *Strickland* and subsequent cases has identified only three circumstances in which prejudice is presumed under the Sixth Amendment: a total denial of counsel altogether; state interference with counsel's assistance; and a conflict of interest burdening counsel. *Strickland*, 466 U.S. at 692. Jackson has presented nothing suggesting any reason to depart from this established precedent.

And there is good reason not to. As *Strickland* observed, "[t]he government is not responsible for, and hence not able to

prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial." *Id.* at 693. Given the State and crime victims' interests in finality of criminal convictions and their inability to do anything to prevent defense attorney misconduct, it makes sense to require a defendant complaining that his attorney did not meet with him enough to at least provide some evidence showing that that failure actually made a difference.

Jackson cannot, and has not, met his burden to prove prejudice. As explained above, Jackson's admissions to the police that he was acting as a lookout during these events, which were ruled admissible, alone ensured his conviction on the felony murder and felon in possession charges. (*See* R. 1:3; 78:36–37; 63:5–7.) And those two convictions would have carried a potential 68 years of imprisonment. The plea offer also eliminated multiple charges in his drug case, as well, which eliminated another potential decade of sentencing exposure at least. Jackson has provided nothing explaining why he would have insisted on going to trial on the original charges of felony murder and armed robbery as party to a crime if Anderson would have spent more time with him. There is simply no reasonable probability, on this record, that Jackson would have opted for trial if Anderson met with him more often.

D. Jackson's forfeited claim that Anderson deficiently allowed the plea offer to "lapse" without telling him about it is refuted by the record, and Jackson cannot show prejudice because the plea he accepted was no different in substance than the plea the State offered on October 17.

Jackson claims that Anderson provided deficient performance under *Frye*,[5] because, according to Jackson, Anderson "failed to communicate and discuss the prosecution's formal offer" to allow him to plead to second-degree reckless homicide as a party to a crime "before it lapsed," (Jackson's Br. 21), which he claims was more favorable to him than the plea he accepted solely because it tacked on the "party to a crime" designation. (Jackson's Br. 22–24.) Despite the fact that this claim is not properly before this Court, the State will briefly address it.

First, *Frye* holds only that offers from the prosecution to resolve the case via a plea must be communicated to the defendant so that he is aware of the option and can consider it before it is no longer an option. *Frye*, 566 U.S. at 146. In *Frye,* the defendant was never made aware of the plea offer at all before it expired. *Id.* at 148. Here, there can be no dispute that this plea deal was communicated to Jackson and that he was well aware of it. The prosecutor made the offer to defense counsel via email before the hearing on October 17, 2016, and stated on the record at the hearing, with Jackson present, that he would hold it open until the morning of trial. (R. 46:34.) Anderson then sent Jackson a letter which he believed contained an explanation of the offer the next day,

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[5] *Missouri v. Frye*, 566 U.S. 134, 145 (2012), holds 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" before they expire.

October 18 (but he could not be sure because the file did not contain a copy). (R. 78:24.) Jackson's October 19 letter shows that he knew that the plea was offered and knew what it contained; his only complaint there was that he had not yet discussed it with Anderson. (R. 83.)

Second, as Jackson acknowledges, the prosecutor initially stated in his email that this offer would expire October 28, 2016, the Friday before trial, but then offered at the October 17, 2016, hearing to hold the plea negotiations open until the trial date of November 1, 2016. (R. 46:34; 70:6; Jackson's Br. 11.) Further negotiations clearly took place during that window, because the State showed up for the trial prepared with an amended information and Jackson with a fully filled-out plea questionnaire. (R. 71:2–3.) In other words, the offer that was extended to Jackson on October 17, 2016, never "lapsed." (Jackson's Br. 21.) Even if the plea wasn't communicated the day of the hearing or in Anderson's letter, then, the offer was clearly conveyed to Jackson while it was still available, given that he accepted it before trial commenced on the morning of November 1. (R. 71:2–3.)

Third, under Jackson's own theory he could not prove prejudice because the plea he was offered was not at all "more favorable" to him than the one he accepted. *Frye* holds that to show prejudice based on an attorney's deficiency in failing to communicate a plea deal to the defendant, the defendant must show "a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Frye*, 566 U.S. at 147. The only difference in the plea offer contained in the prosecutor's email to defense counsel on October 17 and the one Jackson accepted on November 1 appears to be that the October 17 email offered Jackson to plead guilty to second-degree reckless homicide as a party to a crime, whereas on November 1, Jackson pleaded no contest

to second-degree reckless homicide without the party to a crime designation. (Jackson's Br. 11; *compare* R. 46:34 *with* 26:1 and 71:2–3).

This is a distinction without a difference—anyone acting as a party to a crime is a principal, and directly committing the crime is one of the methods by which someone can be found criminally responsible as a party to a crime. Wis. Stat. § 939.05(1), (2)(a). By pleading no contest to a charge, one necessarily also pleads no contest to being a party to that crime. Indeed, a defendant can still be convicted as a party to a crime although the information does not charge the defendant as such. *Nicholas v. State*, 49 Wis. 2d 683, 693, 183 N.W.2d 11 (1971). The penalties remain exactly the same as does the severity of the charge. Pleading as a party to a crime of second-degree reckless homicide is not "a plea to a lesser charge" than pleading to second-degree reckless homicide and it does not result in "a sentence of less prison time" than pleading to second-degree reckless homicide. *Frye*, 566 U.S. at 147.

Jackson claims that the plea containing the party to a crime designation was more favorable to him because it would have allowed him to "maintain his admitted role was that of the lookout and not the shooter and argue his admitted role as a mitigating factor at sentencing," which he believes would have resulted in a lesser sentence. (Jackson's Br. 22–23.) This argument ignores both the law and the record. Again, there is no functional difference between being found guilty with or without the party to a crime designation. *Nicholas*, 49 Wis. 2d at 693. And Jackson's claim that it would have allowed him to credibly maintain that he was only a lookout, which he believes could have resulted in a lesser sentence, is immaterial in the face of the record: Jackson was able to maintain that at sentencing anyway (R. 75:10–11), and the sentencing court accepted that possibility: it told him it was

rejecting his claim that he was not present at the shooting (which he stated to the PSI writer) and "fully believe[ed] based on everything [it had] read that you were the shooter in this case or involved in this shooting" (R. 28:3–4; 75:23).

Besides, any judge who has spent more than a few weeks handling criminal cases is well aware that when a case is resolved by a plea bargain, the charges and facts stated in the complaint to which the defendant pleads do not necessarily reflect the defendant's version of what took place. Plea negotiation is an art, and in order to secure a conviction for a lesser crime and lower potential sentencing exposure defendants will often accept pleas to charges that do not correspond exactly to the facts underlying the incident or to the defendant's version of the incident at all. Recognition of this basic reality is why circuit courts "need not go to the same length to determine whether the facts would sustain the charge as it would where there is no negotiated plea." *Broadie v. State*, 68 Wis. 2d 420, 423–24, 228 N.W.2d 687 (1975). Judge Flancher, who both accepted Jackson's plea and sentenced him, had been on the bench for nearly two decades by that time and was surely aware that a defendant pleading no contest to a charge does not necessarily agree to the State's version of events. (R. 71:1; 75:1.)

Jackson fails to explain how he reaches the conclusion there is a reasonable probability that the sentencing court would have given him a lesser sentence if he pled as a party to a crime when it heard that he maintained he was just a lookout and already accepted the possibility that he was merely a lookout for a robbery gone wrong, and nevertheless sentenced him as it did. (Jackson's Br. 23.)

In sum, this claim was not preserved for this Court's review, but would unequivocally fail even if it were properly before this Court. Jackson showed neither deficient performance nor prejudice under *Frye*.

III. The circuit court appropriately exercised its discretion in refusing to allow for a fifth substitution of counsel two weeks before the trial date, and was not required to revisit the issue beyond what it did in the plea colloquy.

As to the claim Jackson raised in the court of appeals that the circuit court erroneously exercised its discretion on October 17 in denying his motion to replace Anderson, the record shows that Jackson is due no relief.

A. Standard of review

"Whether trial counsel should be relieved and a new attorney appointed is a matter within the circuit court's discretion." *State v. Jones*, 2010 WI 72, ¶ 23, 326 Wis. 2d 380, 797 N.W.2d 378. "This court will sustain the circuit court's decision if the court 'examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.'" *Id.* (citation omitted).

B. A circuit court's exercise of discretion in denying a request for substitution of counsel is evaluated using the three-factor test set forth in *State v. Lomax*.

This Court reviews the circuit court's exercise of discretion to deny a request for new counsel using the test set forth in *Lomax*, 146 Wis. 2d at 359. 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 weight appropriately given to each factor "will also depend on the circumstances." *Jones*, 326 Wis. 2d 380, ¶ 30. However, a court still properly denies a request if the defendant fails to show that the third factor was present, even if the inquiry by the court was insufficient and/or the motion was timely. *State v. Boyd*, 2011 WI App 25, ¶ 13, 331 Wis. 2d 697, 797 N.W.2d 546.

C. The circuit court appropriately exercised its discretion under the *Lomax* factors when it denied Jackson's request for a fifth attorney.

1. The circuit court appropriately inquired about the reasons for Jackson's request and considered the timeliness of the motion at the October 17 hearing.

Jackson's October 17 request was Jackson's fifth request for new counsel, and the circuit court appropriately rejected it pursuant to the *Lomax* factors in light of the totality of the record.

Regarding the first two factors, the trial court and the postconviction court found that Jackson's assertions were vague, that he'd made the same complaints about his other counsel, and that his motion was untimely. (R. 52:28–29; 70:3.) The record reflects that those findings were accurate.

Attorney Rich, Jackson's first attorney, moved to withdraw on July 28, 2015, stating there had been a breakdown in communication between she and Jackson. (R. 59:2.) Next, Attorney Henry moved to withdraw, stating that the antagonistic relationship between Jackson's mother and Henry also led to a breakdown in communication between she and Jackson. (R. 61:3.) Jackson then lodged the same complaint about Attorney Hart. At the final pretrial conference, Hart told the court,

> In talking to my client early this morning, he wants a new lawyer.
>
> He feels that I have not represented his best interests. He has multiple complaints about me. I told him, obviously, I'd bring that to the court's attention if that's what he wants. I am not here to make myself represent him.
>
> THE COURT: Are you the first lawyer?
>
> HART: I am actually the third.
>
> THE COURT: All right. Is that accurate, Mr. Jackson?
>
> [JACKSON]: Yes, sir.

(R. 64:3.) The circuit court, Judge Gasiorkiewicz presiding, told Jackson that his attorney is "not your hand puppet. He doesn't do your bidding. He doesn't do everything you ask him to do." (R. 64:4.) Jackson said Hart "hasn't done nothing I asked him to do." (R. 64:4.) The court refused to allow Hart to withdraw based on Jackson's complaints, with Judge Flancher only later permitting withdrawal when Hart was injured. (R. 64:4; 66:2–3.)

Regarding Anderson, Jackson sent a "motion to withdraw legal counsel" to the court on September 20, 2016. (R. 24.) He said he wanted Anderson replaced because Anderson "[f]ailed to promptly comply with reasonable [sic] request by the defendant for information," "[f]ailed to act with reasonable diligence and promptness in representing the defendant," and "[f]ailed to maintain a client-lawyer relationship with the defendant." (R. 24.)

And, when asked at the October 17 hearing why he wanted Anderson to withdraw, Jackson said the exact same things he had said about Hart: "[b]ecause 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." (R. 70:3.) The court informed Jackson that Anderson was not required to do everything he asked including filing his motions, and refused to set this now-two-year-old case over once again to appoint Jackson his fifth attorney. (R. 70:3.) The court is allowed to balance society's interest in the prompt and efficient administration of justice when considering a substitution of counsel request, *Lomax*, 146 Wis. 2d at 360, and this case had been languishing for years due largely to Anderson's repeated changes of counsel.

So, the court inquired into the reasons for Jackson's request for Anderson to withdraw, evaluated their merit in light of the entire record, and rejected them. It also considered the timeliness of the motion in respect not only to the request itself, but in consideration with the rest of the record showing that this was a pattern for Jackson, he had delayed the trial for almost two years by repeatedly requesting new attorneys based on vague claims that they weren't "doing anything" for him, and this request was made only two weeks before trial. The first two *Lomax* factors were met.

2. The record shows there was not a total lack of communication between Jackson and Anderson that prevented an adequate defense.

The third *Lomax* factor assesses "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." *Jones*, 326 Wis. 2d 380, ¶ 25 (citation omitted). And though Anderson admitted he should have maintained better communication with Jackson, their relationship was not so strained as to amount to "a total lack of communication that prevented an adequate defense" or "frustrated a fair [trial]." *Boyd*, 331 Wis. 2d 697, ¶ 13.

Anderson testified that he met with Jackson four times, three times before the entry of his plea, and once afterward. (R. 78:7.) Jackson's post-October-17 filings confirm this: he stated in his October 19 letter that counsel had met with him three times up to that date, which he also confirmed in the postconviction hearing. (R. 83.) Anderson further testified that he received and reviewed all of the discovery in the case, and that he went through the evidence with Jackson, including the codefendants' statements implicating him as the shooter. (R. 78:8.) Jackson's October 19 letter implicitly acknowledges this as well, as his only discovery complaint is that they had not reviewed the DVDs together. (R. 83.)

Anderson reviewed all of the discovery himself for a total of more than 23 hours. (R. 52:22.) He ordered a transcript of Henderson's plea hearing to learn impeaching information about the deal he received. (R. 78:20.) He also sent Jackson a letter on October 18 likely explaining the State's plea offer, which Jackson has provided nothing to refute.[6] (R. 78:24.) Anderson said he had a conversation with Jackson the morning of trial about taking the plea in light the strength of the State's case, but testified that he was ready to proceed to trial, and that his strategy would have been to discredit Henderson's and Webster's testimony. (R. 78:17, 26.)

The record thus conclusively demonstrates that there was not a total lack of communication between Anderson and Jackson that prevented an adequate defense or frustrated a

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[6] Jackson's letter stating that they haven't discussed the plea offer is dated October 19, 2016. (R. 83.) Common sense dictates that a letter Anderson mailed October 18th would not have reached Jackson by October 19. And notably, Jackson does not reraise that complaint in his October 27, 2016, motion for new counsel. (R. 84:1–4.) His complaints there are that Anderson has failed to "perfect" the discovery and interview generic "critical defense witnesses," whom he never named. (R. 84:1–4.)

fair trial. Anderson reviewed all of the discovery and Jackson's codefendants' statements, talked to Jackson about the case several times, and gave him a fair assessment of what he thought the best course of action was—accepting the State's plea offer. That is sufficient to defeat Jackson's claim under *Lomax*.

Jackson presents no argument that there was a total lack of communication preventing an adequate defense or fair trial; in fact, he does not discuss the record at all and merely makes conclusory statements consisting mainly of quoting platitudes from the case law. (Jackson's Br. 24–26.) That is insufficient to show an erroneous exercise of discretion. And while the record shows that Jackson was clearly unhappy with Anderson, "the Sixth Amendment does not guarantee 'a friendly and happy attorney-client relationship," *Jones*, 326 Wis. 2d 380, ¶ 45 (citation omitted), and "as an indigent defendant, [Jackson] [was] not entitled to be represented by counsel of his choice." *Id.* ¶ 41. He was entitled only to effective assistance of counsel, which, shown above, he received. The circuit court appropriately exercised its discretion in denying this motion.

D. Jackson's new claim that the circuit court should have revisited its October 17 decision on the morning of trial is unsupported by law, was forfeited by Jackson's failure to request it, and was sufficiently addressed by his answers during the plea colloquy.

As explained above, Jackson has once again substantially changed his claim in this Court. Postconviction and on appeal to the court of appeals, (and omitted from his petition to this Court entirely), Jackson claimed that the circuit court did not make a sufficient inquiry under the *Lomax* factors at the October 17, 2016, hearing to justify its

order denying his request for a fifth substitution of counsel. (R. 46:15–18; Jackson's Court of Appeals' Br. 12–14; Pet. 7–8.) He has apparently abandoned that claim. (Jackson's Br. 24–25.) Instead, Jackson now claims that, based on Jackson's having sent the court a letter dated October 19, and another motion for new counsel dated October 27,[7] the trial court erroneously "failed to follow up with Anderson" about whether he followed the court's directive to meet with Jackson and thus the court "erroneous[ly] exercise[d] [its] discretion" by not monitoring Anderson's activities since the October 17 hearing and revisiting Jackson's request for new counsel on November 1. (Jackson's Br. 25.) He is wrong.

Jackson cites no law imposing this duty on the circuit court (Jackson's Br. 24–25), and the record shows that: (1) the circuit court had ample reason to believe it had already addressed Jackson's request for new counsel; and (2) any further inquiry the court should have made was satisfied by the plea colloquy.

Again, Jackson's request that Anderson withdraw was his request for his fifth attorney. The circuit court asked Jackson at the October 17 hearing why he wanted Anderson to withdraw, and Jackson replied, "[b]ecause 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." (R. 70:3.) In other words, Jackson's complaints were

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[7] The copy of the October 27 motion supplemented into the record appears to be incomplete, as certain paragraphs are cut off and the submission includes a blank page. (R. 84:1, 3–4.) As the appellant and petitioner, it was Jackson's responsibility to ensure that the record was complete, and this Court must presume that any missing portions of this document support the circuit court's exercise of discretion. *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 26–27, 496 N.W.2d 226 (Ct. App. 1993).

vague generalizations, and they were the same complaints that he had lodged against every other attorney that had represented him in this matter. (R. 59:2; 61:3; 64:3; 70:3.) Jackson reiterated these exact same vague complaints in his October 19 letter and October 27 motion, after the circuit court had already addressed them. (R. 83; 84.)

Given that history, it was perfectly reasonable for the circuit court to assume that it had already inquired about and addressed at the October 17 hearing whatever complaints about Anderson that Jackson was raising in these filings, and Jackson did not provide the court with any further detail that would alert the court that it needed to revisit them.

Nevertheless, the circuit court did have discussions with Jackson about whether he was satisfied with Anderson's advice and communication about the plea, which obviated the court's need to further address Jackson's request for new counsel. During the plea colloquy on November 1, Jackson affirmatively stated that he understood the charge he was pleading to and understood the substantive rights he was waiving. (R. 71:5–9.) The court asked him if Anderson had the opportunity to explain the elements of the offense to him, including the removal of the party to a crime designation, and Jackson said, "yes." (R. 71:9–12.) And after the court found that Jackson was knowingly and voluntarily entering his plea, the prosecutor interjected, stating,

> . . . the last time we were in court Mr. Jackson expressed some concerns about being ready for trial and going to trial. I want to make sure that there is no issue that is going to pop up in a post-conviction motion that he somehow – he felt rushed or in any way, I want to say pushed, but in any way rushed I guess is a good word, on entering this plea. I don't want him coming back later saying this was just a hasty decision and he didn't understand what he was doing.

(R. 71:13.) The court acquiesced, and, addressing Jackson, said,

> You indicated today on the record under oath that you're satisfied with your representation, is that correct?
>
> [JACKSON]: Yes.
>
> THE COURT: When we were present in court on October 17th, you asked Mr. Anderson to withdraw, is that correct?
>
> [JACKSON]: Yes.
>
> THE COURT: That request was denied, is that correct?
>
> [JACKSON]: Yes.
>
> THE COURT: And you understand that Mr. Anderson was prepared to proceed to trial today, correct?
>
> [JACKSON]: Yes.
>
> THE COURT: And again, are you satisfied with your representation?
>
> [JACKSON]: I guess, yes.

(R. 71:13–14). Anderson then offered, "I did not elicit [sic] Mr. Jackson. I'm satisfied it's a decision he made with the advice of counsel, but certainly it's a decision he's made, and I believe it's thought out and in his best interests." (R. 71:14.)

In light of that exchange, along with Jackson's other answers during the plea colloquy and his failure to reraise any complaints about Anderson or a request that the court address his October 27 motion, the circuit court had no reason to believe that Jackson still wanted Anderson removed.

Jackson does not mention the plea colloquy or reference any part of the record to support his claim that the circuit court's purported "failure" to follow up on Jackson's request for new counsel was "an erroneous exercise of discretion." (Jackson's Br. 24–25.) The colloquy shows that even if the

court would have conducted another inquiry under *Lomax*, it would have properly denied the request. Clearly there wasn't a total failure of communication between Jackson and Anderson that would have supported a motion to withdraw, and this request was even less timely than the previous one. Thus, even if there were any merit to Jackson's novel claim that the circuit court was required to "follow up with Anderson" (Jackson's Br. 25) and then revisit its previous ruling based on the October 27 motion, any error in its failure to do so was harmless.

CONCLUSION

This Court should dismiss this case as improvidently granted. There is no law development to be done in this case, and the issues Jackson has argued are not properly before this Court. Moreover, the court of appeals properly determined that Jackson was not prejudiced by Anderson's failure to communicate with him. The court of appeals' decision should stand.

Dated this 27th day of October 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,163 words.

Dated this 27th day of October 2022.

LISA E.F. KUMFER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12) (2019-20)

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) (2019-20).

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 27th day of October 2022.

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