STATE OF WISCONSIN

IN SUPREME COURT

No. 2021AP375-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES A. CARROLL, JR.,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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The State opposes James Carroll, Jr.'s petition for review. The court of appeals applied the correct principles of law and standards of review when it affirmed the circuit court's order denying his postconviction motion to withdraw his plea of no contest based on the alleged ineffective assistance of his trial counsel and, alternatively, to modify the court's requirement that he register as a sex offender. The petition does not meet the criteria enumerated in Wis. Stat. § (Rule) 809.62(1r). Thus, Carroll has not shown any "special and important reasons" warranting review by this Court. *See* Wis. Stat. § (Rule) 809.62(1r).

THIS COURT SHOULD DENY THE PETITION FOR REVIEW BECAUSE IT DOES NOT SATISFY THE CRITERIA IN WIS. STAT. § (RULE) 809.62(1R).

After having sexual contact with S.W. while S.W. was unconscious, Carroll was charged with, inter alia, one count of fourth-degree sexual assault. (R. 34.)

Prior to trial, Attorney Gonzalez was appointed as Carroll's trial counsel. (R. 7.) However, on the morning of the scheduled trial, Attorney Gonzalez was allowed to withdraw from the case and the trial was adjourned. (R. 90:8, 10.)

Carroll was then appointed new counsel, Attorney De La Rosa. (Pet. App. A103.) At a March 2017 hearing, Carroll's trial was rescheduled to begin on June 14, 2017. (R. 92:6.) A June 8, 2017, status hearing was also scheduled. (R. 93.)

At the June 8th status hearing, Attorney De La Rosa informed the court that a plea agreement had been reached. Counsel explained that, in exchange for Carroll pleading no contest to the fourth-degree sexual assault charge, the prosecutor would recommend a period of probation. (R 93:2.) Counsel also explained that the defense was "free to argue all terms but for the sex offender reporting requirement." (R.

93:2.) Carroll then pled no contest to the fourth-degree sexual assault charge. (R. 93:11–12.)

During his colloquy, Carroll praised Attorney De La Rosa's communication with him "in the last couple of weeks." (Pet. App. A199–200.) Carroll added that, while he did not "like" the idea of registering as a sex offender, he confirmed that he and Attorney De La Rosa "did discuss" that portion of the plea agreement. (Pet. App. A201.)

The court withheld sentence and placed Carroll on probation for three years for the fourth-degree sexual assault conviction. (Pet. App. A115.) Pursuant to the parties' agreement, the court also ordered Carroll to register as a sex offender pursuant to Wis. Stat. § 983.048. (R. 93:24.)

Carroll subsequently filed a postconviction motion raising two arguments. First, he argued that he should be allowed to withdraw his plea because Attorney De La Rosa "coerced" him into accepting the plea deal by "failing to investigate" his case. (Pet. App. A134–35.) Second, he argued that he is entitled to a sentence modification based on a new factor, i.e., that being required to register as a sex offender was a "major contributing factor" to Carroll being homeless. (Pet. App. A135–36.) Thus, Carroll argued that he should no longer be required to register as a sex offender.

After a *Machner* hearing in which both Carroll and Attorney De La Rosa testified, the court denied the motion. (R. 81:1.) Addressing the ineffective assistance claim, the court first stated that it found Attorney De La Rosa's testimony "convincing" and found Carroll's testimony incredible. (R. 100:60–61.) It found that Attorney De La Rosa credibly testified that he prepared for the case and also explained his reasons for making certain decisions. (Pet. App. A301–02.) It also noted that most of Carroll's complaints pertained to strategic decisions. (R. 100:61.) Thus, the court

concluded that Carroll failed to establish deficient performance or prejudice. (Pet. App. A302.)

Addressing the sentence modification issue, the court noted that Carroll failed to establish any new factors. (R. 100:62.) The court added, however that, even if a new factor had been established, it would not remove Carroll's sex offender registration requirement because doing so "would be a significant frustration of the need to protect [the public]." (R. 100:62–63.)

On appeal, Carroll argued that, despite the circuit court's finding that his testimony at the *Machner* hearing was incredible, "[he] *did* feel coerced into pleading no contest." (Carroll's Br. 13–14.) Carroll also argued that, contrary to the circuit court's finding, his "age" and "medical issues" at the time of sentencing were new factors justifying the removal of the order requiring him to register as a sex offender. (Carroll's Br. 16–17.)

In an unpublished opinion authored by a single judge under Wis. Stat. § 752.31(2), the appellate court affirmed the circuit court's decision. (Pet. App. A101–09.) Addressing Carroll's ineffective assistance claim, the appellate court noted that "Carroll does not explain in any meaningful way how his trial counsel's performance was deficient." (Pet. App. A107.) The appellate court also pointed out that the circuit court "found that Attorney De La Rosa's testimony about his actions in representing Carroll was credible" and that Carroll "provides no viable basis for overturning the circuit court's determinations that . . . counsel's performance was not deficient." (Pet. App. A107–08.) The court also found that Carroll failed to establish prejudice. Specifically, it found that Carroll failed to show that he "would have gone to trial absent trial counsel's alleged errors." (Pet. App. A108.)

Addressing Carroll's sentence modification issue, the appellate court noted that Carroll's age and medical

conditions were "discussed extensively at the plea and sentencing hearing." (Pet. App. A105.) Thus, the appellate court found that, because the circuit court "knew about Carroll's medical conditions and age at the time of sentencing," neither qualified as a new factor. (Pet. App. A105.)

In his petition to this Court, Carroll merely repeats the arguments he made to the appellate court. In fact, the petition is an almost word-for-word repeat of the brief-in-chief Carroll filed in the appellate court. Carroll does not even address the substance of the appellate court's decision, save for a single paragraph in which he argues that the appellate court "failed to discuss the fact that trial counsel had left the bulk of the preparation for the last three or four days before trial." (Pet. 13.) In other words, Carroll merely disagrees with the appellate court's conclusion and seeks error correction, which this Court does not do.

Error correcting is not a special or compelling reason for this Court to accept review of this case. *See State v. Minued*, 141 Wis. 2d 325, 328, 415 N.W.2d 515 (1987) (it is not the supreme court's institutional role to perform error-correcting functions); *State ex rel. Swan v. Elections Bd.*, 133 Wis. 2d 87, 93, 394 N.W.2d 732 (1986) (the supreme court is not an error-correcting court but a court "intended to make final determinations affecting state law, to supervise the development of the common law, and to assure uniformity of precedent throughout the state."). Importantly, even if this Court did engage in error correcting, there was no error committed in this case. As the appellate court noted, the circuit court found Carroll's testimony at the *Machner* hearing incredible. And, Carroll failed to establish deficient performance or prejudice. He also failed to establish a new factor given that the circuit court was aware of Carroll's age and medical condition at the time of sentencing.

The court of appeals' decision also creates no conflict or need for this Court to clarify law. *See* Wis. Stat. § (Rule) 809.62(1r)(c). The unpublished opinion may not be cited as precedent. Carroll's petition does not demonstrate a need for this court to consider establishing, implementing, or changing a policy within its authority. Wis. Stat. § (Rule) 809.62(1r)(b). Similarly, Carroll's petition does not demonstrate a need to reexamine current law. Wis. Stat. § (Rule) 809.62(1r)(e). For the same reasons, Carroll's petition presents no significant question of state or federal constitutional law. *See* Wis. Stat. § (Rule) 809.62(1r)(a).

In sum, Carroll's petition lacks a special or important reason for this Court to review the court of appeals' decision. Both the court of appeals and the circuit court applied clearly established law to the facts and arrived at the correct result.

CONCLUSION

This Court should deny Carroll's petition for review.

Dated this 23rd day of November 2021.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rule) 809.19(8)(b) and 809.62(4) (2019–20) for a response produced with a proportional serif font. The length of this response is 1,356 words.

Dated this 23rd day of November 2021.

ERIC M. MUELLENBACH
Assistant Attorney General

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

I hereby certify that:

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

I further certify that:

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

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

Dated this 23rd day of November 2021.

ERIC M. MUELLENBACH
Assistant Attorney General