In the

United States Court of Appeals

For the Seventh Circuit

No. 19-1476

CHRISTOPHER R. GISH,

Petitioner-Appellant,

v.

RANDALL HEPP, Warden,

Respondent-Appellee.

Appeal from the United States District Court for the
Western District of Wisconsin.
No. 3:15-cv-730 — **James D. Peterson**, *Chief Judge*.

ARGUED NOVEMBER 7, 2019 — DECIDED APRIL 3, 2020

Before HAMILTON, SCUDDER, and ST. EVE, *Circuit Judges*.

SCUDDER, *Circuit Judge*. Christopher Gish pleaded guilty to first-degree reckless homicide in Wisconsin state court for killing his longtime girlfriend and the mother of his children. He appealed, claiming that his trial counsel provided ineffective assistance by failing to investigate an involuntary intoxication defense. Police found Gish disoriented and delirious on the night of the killing, and he claimed that rare side effects from taking prescription Xanax affected his ability to

appreciate the wrongfulness of his conduct. After the Wisconsin Court of Appeals rejected the claim and affirmed his conviction, Gish turned to federal court and wound his way through a thicket of habeas proceedings. The district court held an evidentiary hearing but denied relief because Gish failed to show that his counsel's deficient performance resulted in prejudice: even if counsel had investigated involuntary intoxication, that defense was so unlikely to succeed that Gish still would have pleaded guilty. We affirm.

I

A

Early in the morning on July 14, 2012, Wisconsin police found Christopher Gish soaking wet, unable to answer questions, and wandering in an unsteady manner on railroad tracks near the Milwaukee airport. The officers took Gish to the hospital, where he told paramedics that he had blacked out. He then proceeded to make a series of nonsensical statements suggesting that he did not understand his whereabouts. At one point, for instance, Gish stated that "all I saw was red" and "you are in my bedroom, why are you in my room?" Upon ascertaining Gish's home address, the police entered and found his longtime girlfriend and the mother of his children, Margaret Litwicki, stabbed to death in a bedroom.

Once Gish's condition stabilized, he agreed to an interview with the police. A videotape showed that Gish gained lucidity over the course of the questioning. Initially Gish denied any memory of the previous night, but later in the interview he confessed to stabbing Litwicki multiple times in his bedroom. He said he attacked Litwicki because he suspected

that she was having an affair and believed she might take his kids from him.

Wisconsin authorities charged Gish with first-degree intentional homicide, which carries a mandatory sentence of life imprisonment. See WIS. STAT. §§ 939.50(3)(a), 940.01(1)(a). Nathan Opland-Dobs served as Gish's court-appointed counsel. Gish told Opland-Dobs that he had taken prescription Lamictal and Xanax before the homicide and thought those medications may have induced his erratic behavior in a way that would afford some legal defense to the charge.

Opland-Dobs researched the effects of Lamictal, but not Xanax—a choice he later said he could not explain. He ultimately determined that any Lamictal-based defense would be futile and so advised Gish. When prosecutors later offered to accept a plea to first-degree reckless homicide, which carries a maximum sentence of 60 years, see WIS. STAT. §§ 939.50(3)(b), 940.02(1), Opland-Dobs advised Gish to take it. Gish agreed, pleaded guilty, and received a sentence of 40 years' imprisonment and 20 years' extended supervision.

B

With the assistance of new counsel, Gish filed a direct appeal in Wisconsin state court. Counsel then filed what Wisconsin law calls a "no-merit report"—the functional equivalent of an *Anders* brief in federal criminal practice—representing that any appeal would be meritless and requesting permission to withdraw as Gish's appointed lawyer. See WIS. STAT. § 809.32 (setting out Wisconsin's procedure for filing no-merit reports); accord *Anders v. California*, 386 U.S. 738, 744 (1967) (advising that "if counsel finds his case to be wholly

frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw").

Gish responded to the no-merit report by insisting that he had a non-frivolous basis for appeal. He claimed that his trial counsel, Opland-Dobs, provided ineffective assistance by failing to pursue the affirmative defense of involuntary intoxication, a complete defense to homicide under Wisconsin law. Gish emphasized that he told Opland-Dobs all about the Xanax he had taken before the homicide and suggested that the medication may have affected his ability to discern right from wrong. See WIS. STAT. § 939.42(1). He supported this contention with police reports describing his delirium shortly after the homicide, medical records showing he had been prescribed Xanax, and information about Xanax's side effects that he had found online and in textbooks. Gish then went a step further: he insisted that, had he known an involuntary intoxication was viable, he would have rejected the government's plea and instead gone to trial.

Appellate counsel responded by emphasizing that Gish never once suggested to his trial counsel, Opland-Dobs, that either the Xanax or Lamictal so affected his mental state as to prevent him from understanding the wrongfulness of his conduct. So, appellate counsel put it, "there wasn't anything to investigate."

The Wisconsin Court of Appeals evaluated Gish's ineffective assistance claim under the familiar standards of *Strickland v. Washington*, 466 U.S. 668 (1984). Gish had to show that Opland-Dobs's performance "fell below an objective standard of reasonableness," *id.* at 688, and resulted in prejudice, meaning that there was "a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different," *id.* at 694.

The Wisconsin court denied relief, concluding that any contention of ineffective assistance was so lacking—having no "arguable merit"—that Gish could not even clear *Strickland*'s first hurdle of showing that Opland-Dobs's performance was deficient. Indeed, the court wholesale adopted Gish's appellate counsel's version of events, disregarding Gish's allegations in their entirety and even refusing to consider the police reports and other documents Gish submitted in support of his ineffective assistance claim. In effect, then, the Wisconsin court affirmed Gish's conviction for the same reason suggested by his appellate counsel—"there wasn't anything to investigate."

The Wisconsin Supreme Court denied review, and Gish then turned his attention to securing relief in federal court.

II

A

Invoking 28 U.S.C. § 2254, Gish petitioned the district court for federal habeas relief, renewing his claim that Opland-Dobs provided ineffective assistance of counsel by failing to investigate a Xanax-based involuntary intoxication defense. To secure relief, Gish had to establish that the Wisconsin Court of Appeals's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2).

Although ultimately denying relief, the district court did so only after holding an evidentiary hearing, taking

testimony, and receiving other evidence on the merits of Gish's contention that Opland-Dobs should have pursued an involuntary intoxication defense. The district court determined the evidentiary hearing was warranted, and indeed necessary, because Gish, despite offering his prescription records, the police reports, and information about the side effects of Xanax, never had a reasonable opportunity to develop the factual basis for his claim on direct appeal in the state court. Even more, the district court found that Gish's allegations, if true, supported his claim that Opland-Dobs performed deficiently. The state court's back-of-the-hand rejection of Gish's ineffective assistance claim, the district court concluded, reflected an unreasonable application of *Strickland*, for Gish had brought forth enough evidence on direct appeal to reasonably question the adequacy of Opland-Dobs's representation in the trial court.

B

Several witnesses testified at the evidentiary hearing. Gish testified on his own behalf and called pharmacology consultant James T. O'Donnell and his trial counsel Nathan Opland-Dobs. For its part, the state called Kayla Neuman, a chemist in the toxicology section of the Wisconsin State Laboratory of Hygiene, and Detective Brent Hart, who had interviewed Gish the morning he was apprehended.

The district court heard conflicting evidence about whether Gish took Xanax on the day he killed Litwicki. On the one hand, Gish testified that he told Opland-Dobs he had taken both Xanax and Lamictal on the day of the homicide. But Gish plainly stated in the interview with Detective Hart the morning of the homicide that he had last taken Xanax "[a] couple days" before, which, given the half-life of Xanax,

would suggest that its effects had worn off by the time of the killing. In much the same vein, a nurse who treated Gish at the hospital wrote in his patient visit records that Gish reported having *sold* his Xanax and Lamictal pills—suggesting that perhaps he had never taken them at all in the days before the homicide. And the district judge heard testimony that the police found no Xanax in a search of Gish's home.

The district court also heard expert testimony about the possible effects of Xanax. Both parties' experts agreed that Xanax can trigger hallucinations, agitation, rage, and hostile behavior. The state's expert, Neuman, added that mixing Xanax with Lamictal can amplify these effects. Gish's expert, O'Donnell, testified that the police finding Gish in a temporary delusional state was more consistent with Xanax intoxication than with the effects of mental illness. O'Donnell added that Gish could not appreciate the criminality of his conduct, but the district court found that conclusion speculative, backed by no medical evidence, and therefore not credible.

Finally, the district court heard from Gish and Opland-Dobs regarding their plea discussions. For the most part, their accounts aligned: Gish testified that he had asked Opland-Dobs to consider defenses based on Xanax and Lamictal. Opland-Dobs did not dispute that aspect of Gish's testimony, admitted that he failed to investigate Xanax, and expressed regret for that failure. He conceded that, given the evidence he had available to him in representing Gish, investigating Xanax would have been "appropriate" and he "didn't give it enough consideration." Opland-Dobs offered no justification for this failure, saying, "[w]hy I didn't follow up on the Xanax, I can't explain," because ignoring that path "doesn't seem like what I should have done."

On the question of prejudice, Gish testified that he only pleaded guilty on the assumption that he would have had a "zero percent chance" of being acquitted at trial. He explained that there was "no sense" in "putting the family through" a trial "that was just a wish-wash," where he believed he had no chance of prevailing. But Gish was equally clear that his decision may have been different had Opland-Dobs pursued the involuntary intoxication defense and told him it had some chance of prevailing. Even if that defense were a weak one, giving him as low as a "one-percent chance" of acquittal, Gish insisted he would have "always take[n] the chance" and rolled the dice at trial.

C

Aided by the evidentiary hearing, the district court proceeded to the merits of Gish's ineffective assistance claim. The court made quick work of *Strickland*'s deficient performance prong by assuming that Opland-Dobs's complete and admitted failure to evaluate a Xanax-based intoxication defense was unreasonable. Moving to *Strickland*'s prejudice prong, the court concluded that Gish fell short of showing he would have forgone the plea deal and gone to trial had Opland-Dobs pursued the defense. While Gish so testified, the district court was not willing to credit that testimony over other evidence pointing in the opposite direction.

The district court placed particular emphasis on Gish's statements to Detective Hart not only that he had last taken Xanax "[a] couple days" before the homicide, but also that he did not regret killing Litwicki in light of her alleged infidelity. The district judge likewise highlighted Gish's statement to the nurse that he had sold his prescriptions—a fact corroborated by the police's failure to find any trace of Xanax in Gish's

home. Considering this evidence in its totality, the district court determined that Gish had no reasonable prospect at trial of demonstrating the essential element of the intoxication defense—that he failed to appreciate right from wrong at the time of the homicide. The district court also found that the state's plea offer was reasonably attractive, as it guaranteed Gish a maximum of 60 years rather than life imprisonment.

Gish now appeals.

III

A

We begin with the decision of the Wisconsin Court of Appeals, the last state court to consider (at least a portion of) Gish's ineffective assistance claim on the merits in a reasoned opinion. See *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). Gish needs to show, as the district court recognized, that the Wisconsin court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2). In answering that question, we must "train [our] attention on the particular reasons—both legal and factual—why state courts rejected [Gish's] federal claims." *Wilson*, 138 S. Ct. at 1191–92. Where, as here, the state court issued an explanatory opinion, we "review[] the specific reasons given by the state court and defer[] to those reasons if they are reasonable." *Id.* at 1192.

The Wisconsin Court of Appeals rejected Gish's ineffective assistance claim on the ground that "there wasn't anything [for his trial counsel, Nathan Opland-Dobs] to investigate." With nothing to investigate, the reasoning ran, Opland-Dobs

could not have rendered ineffective assistance. It made no difference, the Wisconsin court added, that Gish sought on appeal to support his claim with police reports and other evidence showing that his prescription Xanax may have explained his delusional state at the time of the homicide. None of that evidence was before the *trial court* and that is all that mattered on the Wisconsin court's reasoning.

The district court was right to call the Wisconsin court's decision an unreasonable application of *Strickland*'s deficient performance prong. Return to the state court's insistence that Gish's claim lacked merit because (and only because) he never put his evidence before the trial court. That reasoning fails to meet the claim Gish raised on direct appeal—ineffective assistance of his trial counsel, Nathan Opland-Dobs. As the Wisconsin court would have it, Gish—while being advised by Opland-Dobs—somehow and some way (and apparently on his own) had to put before the trial court evidence to support a claim that Opland-Dobs had violated the Sixth Amendment by not pursuing an involuntary intoxication defense. Yet the trial record lacked evidence of Gish's ineffective assistance claim precisely because, by the very terms of the claim, Opland-Dobs's deficient performance occurred during the trial court proceedings. Gish, in short, necessarily needed to support his claim with evidence outside the trial record, for there was no other way he could have demonstrated his ineffective assistance claim or rebutted his appellate counsel's view (as reflected in the no-merit report) that the claim was frivolous.

This is not the first time we have found fault with the exact reasoning the Wisconsin Court of Appeals employed in rejecting Gish's ineffective assistance claim. In *Davis v. Lambert*, we explained that "it would defy logic to deny [a state habeas

petitioner] an evidentiary hearing on whether his counsel's failure to investigate the witnesses violated *Strickland* on the ground that he did not fully present those witnesses' testimony to the state courts." 388 F.3d 1052, 1061 (7th Cir. 2004). Similarly, in *Mosley v. Atchison*, we concluded that a state court unreasonably applied *Strickland*'s performance prong by disregarding a defendant's showing on appeal that his trial counsel failed to pursue two potential alibi witnesses and instead assuming that counsel's choice reflected a strategic determination. 689 F.3d 838, 848 (7th Cir. 2012).

We chart the same course here and have little difficulty concluding that the Wisconsin Court of Appeals's denial of Gish's ineffective assistance claim rooted itself in an "unreasonable application" of *Strickland*'s deficient performance prong as well as an "unreasonable determination of the facts in light of the evidence [Gish] presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2). Gish brought forth specific evidence that, if accepted as true, would have demonstrated that Opland-Dobs rendered deficient performance in failing to pursue a potential involuntary intoxication defense. See *Jones v. Wallace*, 525 F.3d 500, 503 (7th Cir. 2008) (noting that where a petitioner in state custody is "not at fault for failing to develop the factual record" of his ineffective assistance claim, we "look only to whether, if proven, his proposed facts would entitle him to relief"). The Wisconsin Court of Appeals's contrary conclusion reflected an unreasonable application of *Strickland*. In these circumstances, the same error satisfies § 2254(d)(2), for the Wisconsin court's categorical disregard of Gish's evidence resulted in a rejection of his ineffective assistance claim on an unreasonable view of the facts. At the very least, all of this was enough, as the district court recognized, to warrant an evidentiary hearing—to afford Gish an

opportunity to develop the merits of his claim, an opportunity he never received in state court. Like the district court, then, we proceed to the merits of Gish's ineffective assistance claim.

B

In considering Gish's claim, we need say very little on *Strickland*'s first prong. Opland-Dobs testified in the district court and admitted in no uncertain terms that he never assessed a Xanax-based involuntary intoxication defense. We can assume this admitted failure is enough for Gish to show deficient performance. See *Pole v. Randolph*, 570 F.3d 922, 943 (7th Cir. 2009) (opting to "assume that counsel's performance was deficient and move on to the second part of the analysis" because the petitioner could not show prejudice).

This brings us to the primary issue on appeal: whether Opland-Dobs's failure to pursue an involuntary intoxication defense prejudiced Gish. Our review proceeds *de novo* (and not under the deferential standard of § 2254(d)) because this dimension of Gish's claim is one the Wisconsin Court of Appeals never reached and considered. That court stopped at *Strickland*'s first prong. In these circumstances, the Supreme Court has instructed, we treat the two prongs of *Strickland* as divisible and review the prejudice prong by taking our own fresh look at the evidentiary record developed in the district court. See *Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (reviewing *Strickland* prejudice *de novo* because the state court did not reach that issue); see also *Thomas v. Clements*, 789 F.3d 760, 766–67 (7th Cir. 2015) (collecting cases adhering to this same approach).

The controlling substantive standard comes from *Hill v. Lockhart*, 474 U.S. 52 (1985). The Court decided *Hill* one year

after *Strickland* and did so to articulate what a defendant must show to establish that his trial counsel rendered ineffective assistance in advising him to plead guilty. First, and in full alignment with *Strickland*, the defendant must show that his counsel's performance fell below an objective standard of reasonableness. See *id.* at 58. Second, when it comes to prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59. The Court went further and addressed how the inquiry changes where, as here, counsel allegedly failed to advise his client of an affirmative defense. See *id.* at 59–60. In those circumstances, the Court explained, "the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." *Id.* at 59.

The standards announced in *Hill* map directly onto Gish's claim and put him under an obligation to make a twofold showing. First, Gish had to show that Opland-Dobs performed deficiently in failing to investigate the Xanax-based defense. Second, Gish had to demonstrate that there existed a reasonable probability that, had his counsel investigated the defense, he would have rejected the plea offer and proceeded to trial with a likelihood of succeeding on the defense. See *id.* at 59.

Gish urges a slightly different standard—one informed not only by *Hill* but even more by the Supreme Court's decision in *Lee v. United States*, 137 S. Ct. 1958 (2017). Like Gish, Jae Lee pleaded guilty after his trial counsel advised him that going to trial would be risky, and following a conviction, result in more jail time. See *id.* at 1963. But Lee had a consideration other than prison top of mind. He told his attorney he

was a noncitizen and "repeatedly asked him whether he would face deportation as a result of the criminal proceedings." *Id.* Lee's attorney reassured him that a guilty plea would not result in deportation. Lee relied on and followed the advice even though it was wrong. By pleading guilty to an aggravated felony, Lee faced mandatory deportation under the Immigration and Nationality Act—the precise outcome he wanted to avoid. See *id.* (citing 8 U.S.C. §§ 1101(a)(43)(B), 1227(a)(2)(A)(iii)). Lee later pursued federal habeas relief, arguing that his attorney had rendered ineffective assistance of counsel that resulted in severe prejudice. See *id.*

The Supreme Court agreed. Usually a defendant "without any viable defense will be highly likely to lose at trial," and when "facing such long odds will rarely be able to show prejudice from accepting a guilty plea that offers him a better resolution than would be likely after trial." *Id.* at 1966. For Lee, however, "avoiding deportation was *the* determinative factor"—the variable of "paramount importance"—in deciding whether to plead guilty or go to trial, while the time he spent in prison was relatively inconsequential to his litigation strategy. *Id.* at 1967–69. Lee's counsel eliminated any doubt on the point, testifying that Lee would have gone to trial had he been properly informed that deportation would follow as automatic consequence of pleading guilty. See *id.* at 1967–68.

All of this led the Court to conclude that Lee "would have rejected any plea leading to deportation—even if it shaved off prison time—in favor of throwing a 'Hail Mary' at trial." *Id.* at 1967. Lee's laser focus on averting deportation, the Court underscored, showed that his counsel's errors prejudiced him. *Id.* at 1967–68.

Gish labors to situate himself like Lee. He does so mindful of *Hill*, but of the view that *Lee* modifies the prejudice question. In Gish's view, *Lee* teaches that he could show prejudice by now contending in federal habeas that he would have gone to trial on a Xanax-based defense even if that defense had only one percent chance of success.

We disagree and see *Lee* as reinforcing, not transforming, *Hill*. In *Lee* the Court took care to observe that defendants without a viable defense would "rarely" be able to show prejudice from a guilty plea that reduces their sentencing exposure. See *id.* at 1966. Put most simply, the certainty of less jail time creates an incentive to avoid the longer shot of an acquittal at trial. See *id. Lee* was a rare exception: from Jae Lee's perspective, the consequences of pleading guilty and going to trial were "similarly dire"—he would be deported either way—so he was willing to bet on "even the smallest chance of success at trial." *Id.* at 1966–67. Properly informed, Lee would have found nothing attractive about a plea offer that reduced his prison time (a relatively minor concern for him) but *guaranteed* his deportation—the outcome he most wanted to avoid.

Gish's case is much different. The district court found that, unlike Jae Lee, Christopher Gish decided to plead guilty "based primarily on the prospects of success at trial." Gish all but said so himself, testifying in the district court that he pleaded guilty because Opland-Dobs informed him that he had no chance of winning at trial. The district court further found that, in contrast with Lee's persistent concern about deportation, nothing in Gish's communications with Opland-Dobs indicated that some factor other than the prospect of success would have motivated Gish to go to trial.

Unlike Lee, then, Gish wanted to consider an involuntary intoxication defense because he thought it might provide a basis to defeat the homicide charge. What is more, Gish, unlike Lee, said not a word—neither to his trial counsel nor to the district court—suggesting that he was willing to forgo a meaningful reduction in his sentencing exposure (from mandatory life imprisonment to a maximum of 60 years) to avoid collateral consequences. Put another way, the record shows that Gish thought about whether to plead guilty or to go to trial in just the way the Supreme Court in *Lee* described as paradigmatic for most defendants—by comparing the probability of success at trial with the value of a reduced sentence from pleading guilty.

On the record before us, then, we decline Gish's invitation to deviate from the prejudice inquiry the Supreme Court articulated in *Hill*. The proper question therefore is whether there was a reasonable probability that Gish would have gone to trial on his affirmative defense, with the answer "depend[ing] largely on whether the affirmative defense likely would have succeeded at trial." *Hill*, 474 U.S. at 59.

C

In the end, we agree with the district court that Gish's Xanax-based involuntary intoxication defense had no reasonable prospect of success at trial. Even assuming he could marshal the evidence required to get a jury instruction on the defense, we see no likelihood the defense would have persuaded a jury that Xanax rendered him unable to appreciate the difference between right and wrong at the time he stabbed Litwicki to death. Our confidence in this conclusion emerges from the detailed facts the jury would have learned:

- Gish told a hospital nurse that he sold his pills and no longer had any.
- Gish told Detective Hart that he last took Xanax "[a] couple days" before the homicide.
- The police who searched Gish's home found no trace of Xanax.
- Even if Gish had taken Xanax the day of the homicide, it was unlikely that he was the rare patient who would have experienced effects so extreme as to prevent him from appreciating the wrongfulness of his conduct. The district court found that the little evidence Gish offered on that front (from his expert witness, James O'Donnell) lacked credibility.
- In his interview with Detective Hart, Gish confessed to how he went about killing and abusing Litwicki—statements revealing an awareness of his own conduct.
- Gish also offered a clear motive for the crime—that he suspected Litwicki was cheating on him and would take his kids away.

The combined weight of these facts would have left Gish with no likely prospect of prevailing on an involuntary intoxication defense and defeating the state's robust case against him. By extension, then, and especially given Gish's focus on offering a defense with a chance of succeeding, we have difficulty believing that Gish would have proceeded to trial and run the substantial risk of being convicted and receiving a mandatory sentence of life in prison. See *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010) (emphasizing that a petitioner

challenging a guilty plea must show "that a decision to reject the plea bargain would have been rational under the circumstances"); see also *Woolley v. Rednour*, 702 F.3d 411, 429 (7th Cir. 2012) (rejecting prejudice where the defendant had made the bare and unpersuasive allegation that wrongfully excluded witness testimony could have led to acquittal).

Because Gish cannot show prejudice from his trial counsel's errors, we agree with the district court that he is not entitled to habeas relief on his ineffective assistance claim. We therefore AFFIRM.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CHRISTOPHER RANDOLPH GISH,

Petitioner,

v.

MICHAEL DITTMANN,

Respondent.

OPINION and ORDER

15-cv-730-jdp

Petitioner Christopher Randolph Gish pleaded guilty to first-degree reckless homicide in Milwaukee County Case No. 12-CF-3564, but he seeks a writ of habeas corpus under 28 U.S.C. § 2254 so that he can withdraw his plea. Although he admits that he committed the crime, he contends that his trial counsel was ineffective because counsel failed to investigate and inform Gish of a potential defense of involuntary intoxication. If Gish had known about that defense, he says, he wouldn't have accepted the state's plea deal and would have instead gone to trial, where he would try to show that he killed his girlfriend as a result of side effects from Xanax that he was taking under a doctor's prescription.

In an earlier order, I held that the Wisconsin Court of Appeals unreasonably applied federal law regarding ineffective assistance of counsel. Dkt. 22. I concluded that Gish should have had a hearing at which he could present evidence that his trial counsel was ineffective. On July 27, 2018, I held that hearing. The parties have submitted post-trial briefs and the matter is now ready for a decision.

To show that his trial counsel was ineffective, Gish must show both that counsel's performance was deficient, and that Gish was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668 (1984). I will assume that counsel performed deficiently by failing

to inform Gish of a potential defense of involuntary intoxication, but I will deny the petition because I conclude that Gish has not shown prejudice. Had trial counsel advised Gish about a possible involuntary intoxication defense, that advice would have to include an assessment of the prospects of success, which are essentially nil. Gish has some evidence that his conduct the night of the killing might have been influenced by the Xanax he was prescribed, but he has no evidence that he could not tell right from wrong, which is what he would have to prove for an involuntary intoxication defense. Under these circumstances, Gish hasn't shown that there is a reasonable probability that, had his trial counsel informed him of the defense, he would have decided not to plead guilty.

BACKGROUND

In the early morning of July 14, 2012, sheriff deputies found Christopher Gish wandering shoeless and incoherent near General Mitchell Airport south of Milwaukee, after he had crashed the minivan owned by his girlfriend, Margaret Litwicki. Gish was taken to a nearby hospital. Because Gish made statements about "blacking out and seeing red," the investigating officers called for a wellness check at the Greenfield address where the van was registered. Ex. 5, at 4. (Exhibits cited in this opinion are at Dkt. 41.) Police found Litwicki dead in the bedroom she shared with Gish. She had been stabbed repeatedly in the head, neck, and chest. After Gish was released from the hospital, he was taken to the Greenfield Police Department, where he was interviewed by detective Brent Hart. Gish at first denied any recollection of the crime, but ultimately he admitted to stabbing Litwicki because he believed she was having an affair and had threatened to leave him and take their children with her.

Gish was charged with first-degree intentional homicide in Milwaukee County Case No. 12-CF-3564. The charge carries a mandatory life sentence. Nathan Opland-Dobs, a lawyer

from the office of the State Public Defender, was appointed to represent him. On November 19, 2012, Gish pleaded guilty to first-degree reckless homicide, which carries a maximum prison term of 60 years but no mandatory minimum sentence. Wis. Stat. §§ 939.50(3)(b) and 940.02(1). The plea agreement allowed the parties to argue for whatever sentence they thought appropriate. The circuit court sentenced Gish to 40 years' confinement to be followed by 20 years' extended supervision.

Gish had wanted Opland-Dobs to raise Gish's use of Xanax as a defense, and shortly after sentencing he claimed that Opland-Dobs was ineffective because he did not do so. The procedural background of Gish's post-conviction proceedings is set out in my earlier order, Dkt. 22, so I won't repeat it here. The important point is that I concluded that Gish was entitled to a hearing where he would have the opportunity to present evidence that Opland-Dobs had been ineffective.

At the hearing in this court, Gish presented the testimony of three witnesses: pharmacology consultant James T. O'Donnell; Opland-Dobs; and Gish himself. The respondent presented the testimony of two witnesses: Kayla Neuman, a senior chemist in the toxicology section of the Wisconsin State Laboratory of Hygiene; and detective Hart. The parties stipulated to the admission of exhibits. All at Dkt. 41. From this evidence, I find the following facts.

On July 9, 2012, after a very brief consultation with his son's psychiatrist, Gish was prescribed three psychoactive medications, none of which he had taken before: Xanax, Lamictal, and Prestiq. Ex. 3 (pharmacy records). He went to fill the prescriptions the same day. The pharmacy was out of Prestiq, but he filled the prescriptions for Lamictal and Xanax, the latter of which Gish was prescribed to take three times a day. He took the Lamictal as

prescribed, but there is conflicting evidence about whether he took the Xanax on the day of the killing. At the hospital, he told a nurse that he had been prescribed Xanax, Lamictal, and Prestiq, but that he had "sold them for money." Ex. 16, at 10. During his interview with detective Hart, Gish said that he had taken the Lamictal "today sometime," but that he had last taken Xanax "a couple of days ago." Ex. 18, at 4. He also said that he "sold them" immediately after referring to his Xanax prescription and that he and his girlfriend "sell our pills to make money for rent." *Id.* at 4, 8.

No Xanax pills or bottles were found at the Gish/Litwicki residence, although police found bottles for four other prescriptions for Gish, including Lamictal. After he was charged, Gish told Opland-Dobs that he had taken both Xanax and Lamictal on the day of the killing. Gish testified at the hearing in this court that he had taken the Xanax as prescribed, and he could not explain why he told Hart anything different. When asked at the hearing why police didn't find Xanax at his residence, Gish said, "It should have been there."

Gish's blood was tested for the presence of alcohol, but no other drugs, and no alcohol was detected. Gish's testimony that he took no other drugs the day of the killing is unrebutted. So I find that Gish had not taken any drugs other than those prescribed, but whether Gish actually took Xanax the day of the killing is a disputed fact.

O'Donnell and Neuman (the two experts) agreed on the basic facts about Xanax, which they derived primarily from a review of medical literature. I accept their qualifications to testify about the reported effects of Xanax intoxication in the medical literature, but neither of them is an expert on Xanax or Xanax intoxication. Xanax is a benzodiazepine-class drug used to treat anxiety. A typical dose for anti-anxiety use for a first-time user would be .25 mg to .5 mg. Gish was prescribed 1 mg, two to four times a normal dose. Xanax can cause intoxication, with

effects similar to alcohol intoxication, and therefore it is a common drug of abuse. The half-life of Xanax is short, so its effects wear off in less than a day. Although Xanax is a central nervous system depressant, it can also cause a "paradoxical effect" triggering behavioral disturbances, including hallucinations, agitation, rage, and aggressive or hostile behavior. The paradoxical reactions are not necessarily dose-dependent. Neither O'Donnell nor Neuman estimated how common such paradoxical reactions were. Neuman also testified that interaction with Lamictal can amplify the effects of Xanax, including the paradoxical effects.

O'Donnell and Neuman disagreed about whether Gish was suffering from the effects of Xanax intoxication at the time of the killing. Neuman's opinion was that there is not enough information to determine whether Gish had taken Xanax the day of the killing. She also said that amnesia "would not be a side effect of a therapeutic dose." O'Donnell's opinion is that Gish was under the influence of Xanax, that it triggered a drug-induced psychosis, and that "he would have been deprived of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." Ex. 1. I will credit O'Donnell's opinion this far: Gish was found in a confused, delusional state and he recovered in a matter of hours, which O'Donnell says is more consistent with Xanax intoxication than with an episode of psychosis induced by an underlying mental illness.

Opland-Dobs had about 11 years' experience when he undertook Gish's representation, and by the time of the hearing he had handled 15-20 homicide cases. He testified that because Gish had admitted the killing, the defense focused on sentencing mitigation. Nevertheless, Opland-Dobs did consider the defense of adequate provocation, which if established would result in a conviction for second-degree intentional homicide. Opland-Dobs also considered a

defense of not guilty by reason of insanity, but he concluded that he had no support for it. He discussed both of these defenses with Gish.

Opland-Dobs also considered whether the medications Gish had taken would affect his ability to control himself. Opland-Dobs was aware of the involuntary intoxication defense, but he had never raised the defense before and was not aware of any colleagues who had either. He made a formal request for research assistance on the effects of Lamictal, Ex. 10, and he inquired with colleagues and a psychiatrist to find out if Lamictal might have side effects that contributed to the crime. But Lamictal was a dead end. Ultimately, despite Gish's requests that Opland-Dobs consider some defense based on his medications, Opland-Dobs concluded that Gish had no viable defense to the homicide charge. Opland-Dobs testified that he did not consider whether Xanax might have adverse side effects, and he could not explain why he did not investigate Xanax as he had Lamictal. Opland-Dobs's practice is that he does not directly recommend that a client accept a plea offer, but leaves the decision to the client. He believed that the offer to Gish was reasonable under the circumstances, but not an especially good one.

Gish testified at the hearing that he had taken Xanax three times per day as prescribed from July 9 through the day of the killing. He did not say at what time he took the last dose before killing Litwicki. He also testified that he accepted the plea to first-degree reckless homicide because he believed, based on Opland-Dobs's advice, that he had no viable defense. He testified that he was not a violent person and that he believed that he killed Litwicki because of the medications he was taking. Had he known about the involuntary intoxication defense, and the potential side effects of Xanax, he would have rejected the plea and gone to trial, even if the chances of success with that defense were as low as one percent.

Brent Hart, the Greenfield detective who interviewed Gish, also testified. Video recordings of his interviews are in the record as Exs. 17 and 19; transcripts are Exs. 18 and 20. His hearing testimony established that no Xanax bottles or pills were found in the Gish/Litwicki residence after the killing.

ANALYSIS

Gish's claim of ineffective assistance of counsel is straightforward: Opland-Dobs should have investigated the effects of Xanax and informed Gish of the involuntary intoxication defense; had Opland-Dobs done so, Gish would have gone to trial. I evaluate Gish's claim under the familiar two-prong test in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires Gish to show both that Opland-Dobs' performance was deficient and that Gish was prejudiced by the deficiency. Respondent contends that Gish cannot make either showing. Both sides assume that I will apply *Strickland* without deference to the state court because I concluded that the state court unreasonably applied federal law by denying Gish's request for a hearing. Now that I have provided that hearing, I will consider whether Gish has satisfied both of *Strickland*'s requirements.

A. Motions in limine

Before considering the merits, I must address two pending motions in limine, Dkt. 30 and Dkt. 31, but neither require extended discussion. First, Gish asks the court to consider O'Donnell's testimony about Gish's mental state, which Gish says would be permitted in state court. Wis. Stat. § 907.04 ("Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."). I will assume that an expert could testify about Gish's mental state, but I will deny

the motion because I conclude that O'Donnell's testimony on that issue is not adequately supported as required under Wis. Stat. § 907.02, for the reasons explained below.

Second, Gish asks the court to "clarify his obligations regarding privileged attorney-client materials." Dkt. 31, at 1. I will deny this motion as moot. Gish has not claimed as privileged any of the evidence on which I have relied in this opinion, and the respondent has not asked for the disclosure of any other documents or communication between Gish and Opland-Dobs. Gish has not asked the court to place any of the exhibits under seal. Gish has waived his privilege for any communication with Opland-Dobs on the subject of his mental-state defenses, and no further clarification is needed.

B. Involuntary intoxication defense

To provide needed context for the application of the *Strickland* test to this case, I begin with an overview of the involuntary intoxication defense under Wisconsin law. At the time of Litwicki's killing, the defense was set out in Wis. Stat. § 939.42. (The statute has since been amended, but it is substantively the same.) In pertinent part, the statute reads:

> An intoxicated or a drugged condition of the actor is a defense only if such condition . . . [i]s involuntarily produced and renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed . . . .

The involuntary intoxication defense has two requirements: (1) the defendant's intoxicated condition was involuntarily produced, and (2) the intoxication rendered the defendant incapable of distinguishing right from wrong. *State v. Gardner*, 230 Wis. 2d 32, 37, 601 N.W.2d 670 (Ct. App. 1999). Intoxication is involuntary if it is produced solely by medication taken as prescribed; the defense is not available to one who mixes prescription drugs with alcohol or other drugs. *Id*. at 40; *State v. Anderson*, 2014 WI 93, ¶ 33, 357 Wis. 2d 337, 851 N.W.2d 760.

A defendant is entitled to a jury instruction on the involuntary intoxication defense if he proffers some credible evidence on both elements of the defense. *Gardner*, 230 Wis. 2d at 44-45, 601 N.W.2d at 676 (quoting *State v. Strege*, 116 Wis. 2d 477, 343 N.W.2d 100, 105 (1984)). If the defendant successfully raises the defense by adducing evidence on both elements, "the burden is on the state to prove the absence of the defensive matter to support a conviction for the crime charged." Wis. Criminal Jury Instructions § 775A Comments n.3 (2015). (The current instruction tracks the non-substantive amendments to the statute.) If the state does not meet its burden, "the result will be an acquittal on the charge." *Anderson*, 2014 WI 93, ¶ 25 (quoting 9 Christine M. Wiseman & Michael Tobin, *Wisconsin Practice Series: Criminal Practice and Procedure* § 17.25 (2d ed.)).

C. *Strickland* analysis

1. Deficient performance

Counsel provides deficient performance when he or she makes errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687. Gish contends that Opland-Dobs performed deficiently in this case by failing to investigate a potential defense of involuntary intoxication caused by taking Xanax.

Opland-Dobs testified, and as his contemporaneous notes show, that he specifically considered whether Gish's medications might have affected his mood and behavior. He requested "research into Lamictal and adverse reactions involving violence or mood disstability." Ex. 10, at 4. He simply didn't ask about Xanax, even though Gish had filled prescriptions for both Lamictal and Xanax at the same time. Gish himself urged Opland-Dobs to consider the effect of Xanax on his behavior; Gish even drafted part of an argument highlighting his recent prescriptions for Xanax and Lamictal. Ex. 8, at 11.

Respondent offers a reason why it would have made sense for Opland-Dobs to decline to pursue an involuntary intoxication defense: it would have failed. And the court of appeals has held that counsel has no duty to pursue a defense that is "theoretically possible [but] hopeless as a practical matter." *Evans v. Meyer*, 742 F.2d 371, 374 (7th Cir. 1984). But Opland-Dobs himself doesn't contend that he rejected an involuntary intoxication defense for strategic reasons based on his appraisal of the prospects of success. In this case, questions about trial strategy overlap with the question of prejudice. So I will assume that Opland-Dobs performed deficiently by failing to inform Gish of a possible involuntary intoxication defense and turn to the question of whether that failure prejudiced Gish.

2. Prejudice

A petitioner shows prejudice if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In the context of a guilty plea, this means showing that there is a reasonable probability that, but for counsel's deficient performance, the defendant would not have pleaded guilty but would have insisted on going to trial. *Lafler v. Cooper*, 566 U.S. 156, 163 (2012); *Moore v. Bryant*, 348 F.3d 238, 241 (7th Cir. 2003). In the context of this case, Gish must show that, had he been properly advised about the involuntary intoxication defense, there is a reasonable probability that he would have rejected a plea to first-degree reckless homicide and taken his chances at trial on the first-degree homicide charge.

Gish testifies now that, had he known about the potential adverse effects of Xanax and the involuntary intoxication defense, he would have gone to trial. But I must look beyond Gish's hearing testimony to see whether there is contemporaneous evidence to substantiate his currently expressed preferences. *Lee v. United States*, 137 S. Ct. 1958, 1967 (2017).

One factor relevant to this analysis is the value of the plea deal. *Pidgeon v. Smith*, 785 F.3d 1165, 1173 (7th Cir. 2015) ("The terms of a plea deal are admittedly relevant in assessing the credibility of a petitioner's claim that he would have gone to trial had he received correct information at the plea bargaining stage."). Gish questions the value of the deal because he was sentenced to 40 years' incarceration, so he will be 77 when is released. But the question is whether Gish would have accepted the plea *before* he knew what his sentence would be. A defendant's dissatisfaction with the sentence imposed by the judge cannot satisfy the prejudice prong of the *Strickland* analysis, for that would unreasonably undermine the finality of a guilty plea, which the court is obliged to respect. *Lee*, 137 S. Ct. at 1967.

In this case, Gish was charged with a crime that carried a mandatory life sentence; he pleaded guilty to a crime that carried maximum prison sentence of 60 years, but no mandatory minimum sentence. So when Gish accepted the plea agreement, he gained the potential for a significantly reduced sentence, unquestionably an attractive prospect compared to mandatory life imprisonment. Opland-Dobs testified that the deal was "not a particularly good offer," but "[i]t was within reason." Dkt. 42, at 80. And he didn't say that Gish should have expected better under the circumstances. So the plea deal Gish received may not show conclusively that would have pleaded guilty even if he had known about an involuntary intoxication defense, but neither does it show that he would have rejected the deal.

In most cases, the most important evidence regarding prejudice is the strength of the defendant's case were he to reject the plea and proceed to trial. *Lee*, 137 S. Ct. at 1966. "[T]hat is not because the prejudice inquiry in this context looks to the probability of a conviction for its own sake." *Id.* Rather, it is because the court assumes that a defendant will act rationally under the circumstances. *Id.* at 1968. And a rational defendant who has "no plausible chance"

of an acquittal at trial is "highly likely" to accept a plea if the government offers one. *Id.* So, "[a]s a general matter, it makes sense that a defendant who has no realistic defense to a charge supported by sufficient evidence will be unable to carry his burden of showing prejudice from accepting a guilty plea." *Id.* The Supreme Court has applied this logic to cases involving the failure of counsel to advise the defendant of a potential affirmative defense. *Hill v. Lockhart*, 474 U.S. 52, 59–60 (1985) (in that situation, "the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial").

Lee recognizes that a defendant's chance of success at trial is not always decisive. In that case, the defendant had made it clear to his lawyer that deportation, not his chance of success at trial, was the "determinative issue" for him, but counsel failed to inform him before accepting a plea agreement that doing so would "would certainly lead to deportation." *Lee,* 137 S. Ct. at 168. So even though the defendant did not have a viable defense, his chances of avoiding deportation by going to trial were very low, but still better than if he pleaded guilty. Under those "unusual circumstances," the defendant could show a reasonable probability that he would have rejected the plea had he known that it would lead to mandatory deportation. *Id*. at 1967.

The reasoning in *Lee* is not instructive in this case because I find that Gish's original decision whether to plead guilty was based primarily on the prospects of success at trial. As he testified at the hearing, he chose to plead guilty because he was informed that he had essentially no chance of success. He says now that if he had believed he had any chance of success, even a remote one, he would have gone to trial. But nothing in his contemporaneous communication with Opland-Dobs indicated that any factor other than success at trial—such as the deportation at issue in *Lee*—would motivate him to go to trial despite overwhelmingly long odds. Although

Opland-Dobs informed Gish of other potential defenses such as adequate provocation and not guilty by reason of insanity, Gish made the rational choice to accept a plea deal rather than raise defenses that were doomed to fail. And Gish has not contradicted Opland-Dobs's testimony that Opland-Dobs did not make a plea recommendation to him, so Gish made the ultimate decision on his own. It follows that Gish would have made the same decision if Opland-Dobs had informed Gish about an involuntary intoxication defense but explained that he had no realistic chance of succeeding on the defense.[1]

With that framing context, I turn now to the question whether Gish has shown that he would have had any chance of succeeding on a defense of involuntary intoxication. Recall that to get a jury instruction on involuntary intoxication Gish must adduce credible evidence that (1) he was intoxicated by Xanax taken as prescribed, and (2) that as a result of the intoxication, he could not tell right from wrong.

As for the first element, there is some credible evidence. Gish had a prescription for Xanax and was directed to take a large dose for a first-time user. He told Opland-Dobs's research assistant soon after he was charged that he had in fact taken the Xanax as prescribed through the day of the killing. He was in a confused and delusional state when he was picked up about 5 a.m., but was lucid when he was turned over to police custody at 7:51 a.m.

I will assume that, had Opland-Dobs conducted his own investigation, he would have uncovered the same information about Xanax that O'Donnell provided at the evidentiary

[1] Gish also says now that he'd like the opportunity to clear his name with his children, in the sense that he wants them to know that he did not intend to kill their mother. But his name would not be cleared unless he were acquitted, so that is not really a consideration separate from success at trial. In any event, Gish's desire to clear his name would be the same regardless whether he was raising an involuntary intoxication defense, so it does not provide support for a belief that Gish would have rejected the plea deal had he known about the defense.

hearing. Specifically, Xanax can be intoxicating at the dose Gish was prescribed, and Gish's rapidly resolving delusional state after the killing is consistent with Xanax intoxication.

But a competent attorney advising his client would also consider all the weaknesses of Gish's proof on this element. Specifically, Gish told both a nurse and detective Hart that he had not taken Xanax the day of the killing; he also told them that he and Litiwicki had sold their pills for money to pay their rent. These statements are corroborated by the fact that the police found no Xanax pills or bottles at the house, a fact that Gish could not explain at the evidentiary hearing. (If he were taking the Xanax as prescribed, Gish should have had about 25 days, or 75 pills, left.) These clear weaknesses in a potential involuntary intoxication defense would have been apparent to Opland-Dobs and would have informed any objective assessment of Gish's options. But I cannot say that the credibility problems on this element are so pronounced as to utterly doom the defense.

Where Gish falters is the second element, which requires Gish to show that his intoxication rendered him incapable of telling right from wrong. There is simply no evidence to support that element of the defense.

A primary purpose of the evidentiary hearing was to give Gish the opportunity to show that Opland-Dobs, had he conducted an adequate investigation, could have discovered evidence suggesting both that Xanax has the potential to make someone incapable of distinguishing right from wrong and that Xanax had that effect on Gish. But Gish failed to show either of those things.

Both O'Donnell and Neuman testified that Xanax can lead to behavioral changes that include increased hostility and aggression. But hostility and aggression are not the same as the inability to tell right from wrong. *See, e.g., State v. Eggenberger*, 2013 WI App 128, ¶ 14, 351

Wis. 2d 224, 838 N.W.2d 866 (the side effects of Prozac, which include loss of judgment, reduced inhibition, and dementia-like symptoms, did not affect ability to tell right from wrong, and thus did not support involuntary intoxication defense).

O'Donnell took his opinion a step further, stating that Gish "would have been deprived of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." Ex. 1, at 4. This is not necessarily the same thing as being incapable of distinguishing right from wrong. But even if I set aside the difference between O'Donnell's opinion and the statutory standard, I do not credit the opinion because it is completely unsupported. O'Donnell is pharmacist, and knowledgeable in general about drugs and adverse effects. But he is not an expert on Xanax intoxication, so he lacks the expertise to offer so specific an opinion about the effects of Xanax. I also find O'Donnell's opinion on this point to be conclusory and not adequately explained. He relied primarily on medical literature, but he did not point to anything specific in the literature showing that Xanax could have the effect he described. Competent, well-supported expert testimony might be admissible to show that Gish could not tell right from wrong. *Gardner*, 230 Wis. 2d at 42, 601 N.W.2d at 675. But O'Donnell's conclusory opinion on this point does not satisfy that standard.

O'Donnell also testified that he thought that Gish could not tell right from wrong because doctors at the hospital described him as "psychotic, and out of touch with reality, and delusional." Dkt. 42, at 53. And "[i]f a patient is psychotic, they're not able to think, and act, and conclude, and deliberate." *Id*. at 54. Nurses at the hospital described Gish as confused and delusional from about 6 a.m. to shortly after 7 a.m. But they do not describe him as "psychotic." In any event, neither O'Donnell nor Gish pointed to anything in the medical

records showing that Gish didn't know the difference between right and wrong, either while he was at the hospital or any time before that.

So Gish was unable to adduce any credible evidence at the hearing to support one of the elements of his defense. In contrast, the respondent pointed to compelling evidence that would defeat the defense: Gish's interview with detective Hart. In that interview, Gish clearly demonstrates the ability to think, conclude, and deliberate about the killing. It is true that, at one point in his interview with Hart, Gish said "I don't know. I couldn't think. I lost my mind. And I felt at the time that was the right thing to do." Ex. 20, at 11. Taken out of context, this statement might appear to support Gish's claim. But a review of the whole interview makes it clear that Gish knew what he was doing when he killed Litiwicki and he knew it was wrong at the time. His statement that he thought it was "the right thing to do" is a reflection of Gish's belief that his actions were *justified* by Litiwicki's alleged infidelity, not evidence that he was unable to appreciate the criminality of his actions.

At the beginning of the interview, Gish states that he does not remember what happened. (Again, neither expert testified that Gish's alleged amnesia could have been caused by a therapeutic dose of Xanax.) But at a certain point (at page 33 of Ex. 19), Gish says "Remember bits and pieces the more that I think about it." From that point on, he describes the killing in detail and explains his reasons for doing it. He had long suspected that Litwicki was having an affair with a young man whom they had taken in. He was angry because he believed that Litwicki was sexually unfaithful and she was spending Gish's money on the young man. And he tried to make sure no one heard the killing by pinning Litwicki under his knee. To be sure, he was in a rage when he killed her and still extremely angry when he made his statement to Hart. But the killing was motivated by Gish's outrage at how he had been wronged

by Litwicki's infidelity, which he did not deserve because he was a nice, generous guy. Gish had a keen sense that he had been wronged, and he thought the killing was justified: "And you know what? I don't regret it. I honestly don't for some fucking oddball reason, dude, I couldn't take it." Ex. 18, at 41. No one who hears Gish's whole statement to Hart could conclude that, at the time of the killing, Gish was unable to tell right from wrong.

Neither O'Donnell nor Gish himself explained how one could square an involuntary intoxication defense with Gish's statement to Hart. In fact, O'Donnell simply ignored the statement in his testimony.

All of this shows that Gish wasn't prejudiced by Opland-Dobs's failure to investigate or inform Gish about an involuntary intoxication defense. Had Opland-Dobs conducted an investigation into the effects of Xanax, he would not have discovered evidence adequate to support the defense. Rather, he would have discovered that the defense had no chance of success, which he would have communicated to Gish. And the problem is not simply that the jury would not have found the defense persuasive. It is that the jury likely would not even be instructed on the offense. A defendant is not entitled under Wisconsin law to raise any defense he chooses. Rather, he must first convince the trial court that he has some credible evidence of the defense. Based on the evidence presented here, a trial court would almost certainly conclude that Gish could not meet that standard for involuntary intoxication. And Gish would be in an even more precarious situation at that point: headed to trial without any defense and no plea deal on the table. Armed with the knowledge of how the defense would play out, it would not be rational for Gish to reject the plea deal that the state offered.

Gish's situation is close to that considered in *Evans*, in which the court concluded that the defendant could not show prejudice because "no lawyer in his right mind would have

advised [defendant] to go to trial with a defense of intoxication." 742 F.2d at 374. *Evans* involved voluntary intoxication, but the basic principle applies here: the defense of involuntary intoxication was merely a theoretical possibility, not a viable defense for Gish.

I conclude that Gish has not shown prejudice from Opland-Dobs' deficient performance.

D. Certificate of appealability

Under Rule 11 of the Rules Governing Section 2254 Cases, the court must issue or deny a certificate of appealability when entering a final order adverse to a petitioner. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Tennard v. Dretke*, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted). I cannot say in this case that Gish has not made a substantial showing of a denial of a constitutional right. Other judges might disagree with the conclusion that petitioner is not entitled to withdraw his plea. Accordingly, a certificate will issue.

ORDER

IT IS ORDERED that:

1. Christopher Randolph Gish's motions in limine, Dkt. 30 and Dkt. 31, are DENIED.
2. Gish's petition for a writ of habeas corpus under 28 U.S.C. § 2254 is DENIED.

3. A certificate of appealability shall issue.

4. The clerk of court is directed to enter judgment and close this case.

Entered February 19, 2019.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CHRISTOPHER RANDOLPH GISH,

Petitioner,

v.

MICHAEL DITTMANN,

Respondent.

OPINION & ORDER

15-cv-730-jdp

Pro se petitioner Christopher Randolph Gish is currently in the custody of the Wisconsin Department of Corrections at the Columbia Correctional Institution, following his plea of guilty and conviction of first-degree reckless homicide in Milwaukee County Case No. 12-CF-3564. Gish admits that he killed his girlfriend. But he seeks a writ of habeas corpus under 28 U.S.C. § 2254, arguing that the Wisconsin Court of Appeals unreasonably rejected his claim that his trial counsel was ineffective because counsel failed to investigate and inform Gish of a potential defense of involuntary intoxication. If Gish had known about that defense, he says, he wouldn't have accepted the state's plea deal.

Gish's petition is now fully briefed and ready for a decision. After considering the parties' submissions, I conclude that the Wisconsin Court of Appeals unreasonably applied federal law regarding ineffective assistance of counsel. I will hold an evidentiary hearing to determine whether Gish is entitled to habeas relief, and I will appoint counsel to represent him at the hearing.

BACKGROUND

I draw the following facts from the petition, briefs, and state court records.

In the early morning of July 14, 2012, police found Christopher Gish wandering near General Mitchell Airport in Milwaukee, Wisconsin, after he had crashed his girlfriend's minivan. Soon after, police found Gish's girlfriend, Margaret Litwicki, dead in Gish and Litwicki's bedroom. She had been stabbed several times in the head, neck, and chest. Upon questioning, Gish admitted to stabbing Litwicki, explaining that he became upset when she told him she was having an affair and threatened to leave him and take their children with her.

Gish was charged with first-degree intentional homicide in Milwaukee County Case No. 12-CF-3564. He was appointed a lawyer, Nathan Opland-Dobs, to represent him. On November 19, 2012, Gish pleaded guilty to a reduced charge of first-degree reckless homicide. The circuit court sentenced Gish to 40 years' confinement and 20 years' extended supervision. Gish did not file a postconviction relief motion.

On direct appeal, Gish's appointed counsel, Michael Backes, filed a no-merit report under Wis. Stat. § (Rule) 809.32, which Gish contested. Gish contended that Opland-Dobs was ineffective for failing to investigate and inform Gish of a potential involuntary intoxication defense under Wis. Stat. § 939.42(1). He pointed to police reports that Gish was found "wandering on the train tracks[,] soaking wet[,] unsteady on his feet[, and] unable to answer any questions" shortly after the murder, leading the first responders to take him to the hospital, where he continued to appear "disoriented." Dkt. 12-5, at 29, 34. The reports indicate that when Gish began responding to the paramedics' questions, he said things like "All I saw was red," "I blacked out," and "She's upstairs." *Id.* at 29. When asked where he was, Gish responded, "It's midnight. You are in my bedroom, why are you in my room?" *Id.* at 35. And

records of the interrogation indicated that Gish said "he must have blacked out" because he didn't remember how he got to the hospital after going to sleep the previous night. *Id.* at 40. But Gish did remember taking Lamictal hours before the murder and Xanax a day or two before that. *Id.* at 38. Once the interrogator told Gish what happened, he began to remember the events of the previous night. He explained: "[I] lost my mind and I felt at the time it was the right thing to do." *Id.* at 44.

Had Opland-Dobs investigated Gish's symptoms, Gish argued, he would have discovered that five days before the murder, a doctor had prescribed Gish Xanax and Lamictal and instructed him to take Xanax at a dose two to four times the recommended amount for a first-time user. Gish provided pharmacy records that confirm these prescriptions. *See id.* at 81. Gish points to several medical reference sources indicating that side effects of Xanax include fear, confusion, hallucination, rage, disinhibition, hostility, and mania. *See id.* at 53–70. Had Opland-Dobs told him that he could mount an involuntary intoxication defense, Gish argued, he wouldn't have accepted the plea deal that he did.

The Wisconsin Court of Appeals acknowledged that "[t]he effects of prescription drugs may form the basis for an involuntary intoxication defense where they are taken according to prescription." Dkt. 12-7, at 6. But, it explained, the documents submitted by Gish in support of his argument (the pharmacy records and police reports) were outside the appeal record and therefore "not properly before" the court. *Id.* at 7. It went on, "In any event, we are not convinced that this issue has arguable merit." *Id.* It cited Backes's no-merit report concerning "the conclusory nature of the claimed effects of Xanax on Gish," *id.*, and reprinted one long passage from the no-merit report, which included the following argument: "Mr. Gish had no problem recalling the series of events leading up to his [']blind rage['] and the brutal stabbing

death of the victim. *Mr. Gish never claimed to have been in a drug induced stupor at anytime . . . . Mr. Gish . . . has never named a witness which would support his claim as to an intoxicated state of mind. No witness as to his taking Xanax, how much or at what time. No witness to any irrational conduct related to his past consumption of any such drug." Id.* at 7–8 (first alteration in original). The court concluded, "According to Gish's appellate counsel, a claim that Gish's trial counsel was ineffective for not investigating is without merit 'in that there wasn't anything to investigate.' Based on the record before us, we agree." *Id.* at 8.

The Wisconsin Supreme Court denied Gish's petition for review. Gish now seeks federal habeas corpus relief under 28 U.S.C. § 2254.

ANALYSIS

Gish contends that he is entitled to habeas relief because the Wisconsin Court of Appeals unreasonably applied Supreme Court precedent concerning ineffective assistance of counsel when it concluded that his ineffective assistance claim was without any arguable merit. Section 2254(d) allows courts to grant state prisoners' petitions for habeas corpus when the state court's adjudication of the merits of a claim for relief "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." But before reviewing Gish's claim under § 2254(d), I must address any potential procedural grounds barring review.

A. Procedural bars

I'll begin the discussion of potential procedural bars with an explanation of the procedural posture presented in this case. Criminal defendants in Wisconsin have "a statutory right to seek postconviction relief through a postconviction motion or an appeal." *State ex rel.*

Kyles v. Pollard, 2014 WI 38, ¶ 21, 354 Wis. 2d 626, 847 N.W.2d 805. Postconviction motions are "filed in the trial court in which the conviction was adjudicated" and concern claims such as ineffective assistance of counsel—claims that are based on matters outside the trial court record. *Page v. Frank*, 343 F.3d 901, 905–06 (7th Cir. 2003). If the trial court denies the postconviction motion, "the defendant may then appeal to the Court of Appeals of Wisconsin." *Id.* at 906. The subsequent appeal may encompass issues raised during trial as well as issues raised in the postconviction motion. *Id.* Defendants are "entitled to counsel while seeking relief through a postconviction motion . . . or a direct appeal." *Kyles*, 2014 WI 38, ¶ 23. Appointed postconviction counsel must "confer with the defendant regarding the defendant's right to appeal, the potential merit or lack thereof in pursuing either a postconviction motion or appeal, and if applicable, the availability of the 'no-merit option.'" *State ex rel. Ford v. Holm*, 2004 WI App 22, ¶ 4, 269 Wis. 2d 810, 676 N.W.2d 500.

The "no-merit option" is available when "appointed counsel concludes that an appeal or motion for postconviction relief 'would be frivolous and without any arguable merit.'" *Id.* ¶ 5 (quoting Wis. Stat. § (Rule) 809.32(1)(a)). It is constitutionally required. *See Anders v. California*, 386 U.S. 738 (1967). Wisconsin's no-merit procedures are laid out in Wisconsin's Rule of Appellate Procedure 809.32. When appointed counsel determines that seeking postconviction relief would be meritless, the defendant has three options: have the appointed attorney file a no-merit report, close the case without an appeal, or withdraw so that the defendant may proceed without an attorney or with another attorney retained at the defendant's expense. Rule 809.32(1)(b). If the defendant chooses the no-merit report motion, appointed counsel must file a report that "identif[ies] anything in the record that might arguably support the appeal and discuss the reasons why each identified issue lacks merit."

Rule 809.32(1)(a). The defendant may file a response. Rule 809.32(1)(e). The appeals court must then review the report and response. If it "determines that further appellate proceedings would be frivolous and without any arguable merit, [it] shall affirm the judgment of conviction." Rule 809.32(3). But if the defendant and counsel "allege disputed facts regarding matters outside the record, and if the court determines that the [defendant's] version of the facts, if true, would make resolution of the appeal under sub. (3) inappropriate, the court shall remand the case to the circuit court for an evidentiary hearing and fact-finding on those disputed facts before proceeding to a decision under sub. (3)." Rule 809.32(1)(g); *see State v. Aaron Allen*, 2010 WI 89, ¶ 88 & n.9, 328 Wis. 2d 1, 786 N.W.2d 124 ("[T]he court of appeals in a no-merit appeal should identify issues of arguable merit even if those issues were not preserved in the circuit court . . . ."). This is the procedural posture that the Wisconsin Court of Appeals encountered in Gish's case: Gish's appointed counsel filed a no-merit report identifying any perceived issues of arguable merit; Gish filed a response, asserting that a claim of ineffective assistance of counsel would be meritorious and including material from outside the record; Gish's counsel filed a supplemental no-merit brief addressing Gish's arguments.

With this procedural posture in mind, I turn now to a discussion of the potential procedural bars in this case. A claim for habeas relief is barred from federal review entirely when "the last state court that rendered judgment '"clearly and expressly" states that its judgment rests on a state procedural bar.'" *Lee v. Foster*, 750 F.3d 687, 693 (7th Cir. 2014) (quoting *Harris v. Reed*, 489 U.S. 255, 263 (1989)). "[U]nless a state opinion contains a 'plain statement' that it relied upon an independent and adequate state law ground, a presumption arises that the federal claim was reached." *Willis v. Aiken*, 8 F.3d 556, 561 (7th Cir. 1993) (quoting *Michigan v. Long*, 463 U.S. 1032, 1042 (1983)); *accord Richardson v. Lemke*, 745 F.3d

258, 269 (7th Cir. 2014). To bar federal habeas review, the state procedural ground must be "independent of the federal question and adequate to support the judgment." *Lee*, 750 F.3d at 693 (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)). "An independent state ground will be found 'when the court actually relied on the procedural bar as an independent basis for its disposition of the case.' A state law ground is adequate 'when it is a firmly established and regularly followed state practice at the time it is applied.'" *Id.* (quoting *Thompkins v. Pfister*, 698 F.3d 976, 986 (7th Cir. 2012)). "A basis of decision applied infrequently, unexpectedly, or freakishly may be inadequate, for the lack of notice and consistency may show that the state is discriminating against the federal rights asserted." *Page*, 343 F.3d at 909 (quoting *Prihoda v. McCaughtry*, 910 F.2d 1379, 1383 (7th Cir. 1990)).

Respondent argues that the appeals court relied on *State v. John Allen*, 2004 WI 106, 272 Wis. 2d 568, 682 N.W.2d 433, as an independent and adequate state procedural ground for rejecting Gish's ineffective assistance claim. *John Allen* held that a state trial court must hold an evidentiary hearing on a defendant's postconviction relief motion if "the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief," but that a court has discretion to deny a hearing "if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." 2004 WI 106, ¶ 9. The appeals court did not cite *John Allen* at all in its opinion, nor did it refer to an evidentiary hearing. And *John Allen* concerned a postconviction relief motion filed in the trial court, whereas Gish's case concerns a no-merit report originally filed before the appeals court, so it appears that *John Allen* would be inapplicable. The only arguable link to *John Allen* is the appeals court's use of the word "conclusory" to describe the "claimed effects of Xanax on Gish," Dkt. 12-7, at 7, but that

is far from a plain statement that the court actually relied on *John Allen* as an independent basis for its disposition of the case. So *John Allen* does not procedurally bar Gish's federal habeas claims.

But there is another procedural bar at work in the appeals court's decision. Although procedural default is an affirmative defense that can be waived, and respondent only raised *John Allen* as a procedural bar, I have discretion to inquire into other potential procedural bars *sua sponte*. *See Perruquet v. Briley*, 390 F.3d 505, 517–18 (7th Cir. 2004). In Gish's case, the appeals court explained that the police reports, pharmacy records, and information concerning the side effects of Xanax that Gish presented in support of his response to the no-merit report were "outside the record" and "not properly before" the court. Dkt. 12-7, at 7. It cited *State v. Aderhold* for the proposition that "reviewing courts are limited to the record, and are bound by the record." 91 Wis. 2d 306, 284 N.W.2d 108, 112 (Ct. App. 1979). Then, it concluded that "[b]ased on the record before" it, Gish's ineffective assistance claim was "without merit." Dkt. 12-7, at 8. *Aderhold* is an *independent* state procedural ground for the appeals court's resolution of Gish's claims, but it does not bar federal habeas review because it is not *adequate* to support the appeals court's judgment. Application of *Aderhold* to a response to a no-merit report is both unexpected and infrequent, as described in *Page*.

Aderhold is non-objectionable in general: in the typical appeal, the appeals court cannot consider matters outside the record. But the no-merit procedure is not the typical appeal, and in that context, *Aderhold* runs contrary to *Anders* and Rule 809.32(1)(g), which instructs the appeals court to "identify issues of arguable merit even if those issues were not preserved in the circuit court."[1] *Aaron Allen*, 2010 WI 89, ¶ 88 & n.9. In *Aaron Allen*, the Wisconsin Supreme

[1] The appeals court never cited *Anders* or Rule 809.32, other than a passing citation when

Court addressed the Seventh Circuit's statement in *Page* that "[i]t is clear that Wisconsin law would not have permitted" a criminal defendant to assert an ineffective assistance of counsel claim in response to a no-merit brief "without its having been raised initially before the trial court," implying a reliance on *Aderhold*. 343 F.3d at 908. *Aaron Allen* explained that Wisconsin law *does* permit a criminal defendant to assert an ineffective assistance claim in response to a no-merit report because "the broad scope of review mandated by *Anders* suggests that the court of appeals in a no-merit appeal should identify issues of arguable merit even if those issues were not preserved in the circuit court, especially where the ineffective assistance of postconviction counsel was the reason those issues were not preserved for appeal." 2010 WI 89, ¶ 88. *Aaron Allen* implicitly rejects *Aderhold* and embraces Rule 809.32(1)(g) in the no-merit context.

Post-*Aaron Allen*, the appeals court regularly applies Rule 809.32(1)(g), not *Aderhold*, when reviewing no-merit reports. It recently explained, "We normally decline to address an ineffective assistance of trial counsel claim if the claim was not raised in a postconviction motion in the circuit court [i.e., if the basis for the claim is not in the record]. However, because appointed counsel asks to be discharged from the duty of representation, we must determine whether such a claim would have sufficient merit to require appointed counsel to file a postconviction motion and request a *Machner* hearing." *State v. Serra*, No. 14-AP-1717, 2016 WL 8605328, at *3 (Wis. Ct. App. May 18, 2016). For example, in *State v. Vaughn*, Vaughn challenged his appellate counsel's no-merit report, arguing that his trial counsel was ineffective because counsel failed to inform him of a potential affirmative defense and that had he known

explaining what a no-merit report is. *See* Dkt. 12-7, at 1 ("Appellate counsel, Michael J. Backes, filed a no-merit report pursuant to Wis. Stat. Rule 809.32 and *Anders v. California*, 386 U.S. 738 (1967).").

about the defense, he would not have pleaded but would have insisted on going to trial. No. 14-AP-2652, 2015 WL 13135134, at *1 (Wis. Ct. App. June 17, 2015). The appeals court explained that Vaughn had "asserted a fact outside of the record, the veracity of which this court cannot make any judgment, and therefore we must assume is true," citing Rule 809.32. *Id.* at *2. It continued, "Because appointed counsel's no-merit report seeks counsel's discharge from the duty of representation, we must independently determine whether the defendant's ineffective assistance claim has sufficient merit to require appointed counsel to file a postconviction motion and request a *Machner* hearing." *Id.* (footnote omitted). Because the no-merit report failed "to demonstrate why Vaughn would not be entitled to further postconviction proceedings on his claim," the appeals court rejected the no-merit report and set a new deadline for appellate counsel to file a postconviction motion. *Id.* In light of the plain language of Rule 809.32(1)(g) and the appeals court's application of the rule in *Vaughn*, its application of *Aderhold* when reviewing Gish's response to a no-merit report was, to say the least, unexpected. Because *Aderhold* was not an adequate ground for denial, it does not bar federal habeas review.

B. Section 2254(d) review

The Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254, allows federal courts to grant habeas relief only when the state court's denial of relief "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented." § 2254(d). An "unreasonable application . . . must be 'objectively unreasonable,' not merely wrong; even 'clear error' will not suffice." *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014) (quoting *Kockyer v. Andrade*, 538 U.S. 63, 7576

(2003)). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

Here, the Wisconsin Court of Appeals correctly identified the controlling two-part test for reviewing the ineffective assistance of counsel claims. Dkt. 12-7, at 6. First, Gish needed to show deficient performance, meaning that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Second, Gish had to demonstrate that the deficient performance caused him prejudice, which requires showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In the context of a guilty plea, this means showing that there is a reasonable probability that, but for counsel's deficient performance, he would not have pleaded guilty but would have insisted on going to trial. *Lafler v. Cooper*, 566 U.S. 156, 163 (2012); *Moore v. Bryant*, 348 F.3d 238, 241 (7th Cir. 2003). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "The chances of prejudice need be only better than negligible." *Julian v. Bartley*, 495 F.3d 487, 498 (7th Cir. 2007). The likelihood of success at trial is relevant to the prejudice inquiry. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985). But a petitioner's "claim that he would have insisted on going to trial . . . is enough." *Pidgeon v. Smith*, 785 F.3d 1165, 1173 (7th Cir. 2015) (quoting *Ward v. Jenkins*, 613 F.3d 692, 700 (7th Cir. 2010)).

Because the appeals court correctly identified the *Strickland* standard, "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable."

Harrington v. Richter, 562 U.S. 86, 101 (2011). I am not in a position to evaluate the merits of Gish's ineffective assistance claim because the facts relevant to his claim have never been developed. *See Ward*, 613 F.3d at 698. "Given this posture, [my] inquiry is limited to whether [Gish] is entitled to an evidentiary hearing to try and develop facts that would support his petition." *Id.* (granting evidentiary hearing when the state trial and appellate courts denied the petitioner's motion for an evidentiary hearing on his ineffective assistance of counsel claim). Gish is entitled to a hearing only if (1) "he has alleged facts which, if proved, would entitle him to habeas relief" and (2) the failure to develop the factual basis for his claim was beyond his control. *Id.* (citing § 2254(e)(2), *Williams v. Taylor*, 529 U.S. 420, 432 (2000), and *Davis v. Lambert*, 388 F.3d 1052, 1059–60 (7th Cir. 2004)). In this case, these questions are one and the same: if Gish has alleged facts that, taken as true, would satisfy *Strickland*, then the Wisconsin Court of Appeals erred in not remanding his case to the trial court for an evidentiary hearing under Rule 809.32(1)(g) and the failure to develop the facts in an evidentiary hearing was not Gish's fault. So an analysis of Gish's petition boils down to one question: taking Gish's allegations as true, does he state an ineffective assistance of counsel claim?

Gish's ineffective assistance claim focuses on the statutory defense of involuntary intoxication, so I begin by examining that defense. At the time of Gish's arrest and conviction, Wis. Stat. § 939.42(1) read:

> An intoxicated or a drugged condition of the actor is a defense only if such condition . . . [i]s involuntarily produced and renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed . . . .

The involuntary intoxication defense focuses not on the defendant's intent, but rather on whether the defendant was "incapable of distinguishing between right and wrong." *State v.*

Anderson, 2014 WI 93, ¶ 23, 357 Wis. 2d 337, 851 N.W.2d 760; *State v. Gardner*, 230 Wis. 2d 32, 601 N.W.2d 670, 673 (Ct. App. 1999). It "is available . . . to a defendant who takes his prescription medication as ordered." *Anderson*, 2014 WI 93, ¶ 33 n.12 (citing *Gardner*, 601 N.W.2d at 674).

The defense is triggered when the defendant "produce[s] *some evidence* that his intoxication had affected his ability to distinguish right from wrong." *Gardner*, 601 N.W.2d at 676 (emphasis added). "This evidence must be more than a mere statement that the defendant was intoxicated," and it "must be credible." *Id.* (quoting *State v. Strege*, 116 Wis. 2d 477, 343 N.W.2d 100, 105 (1984)). "The defendant must present evidence *both* that the intoxication was involuntarily *and* that it rendered him or her incapable of distinguishing right from wrong at the time the criminal act occurred." *State v. Alby*, 2001 WI App 146, ¶ 8, 246 Wis. 2d 761, 630 N.W.2d 276. For example, a Wisconsin trial court instructed the jury on the defense when the defendant shot and killed his wife several months after being prescribed an antidepressant that was not appropriate for his mental health condition, and known side effects of the antidepressant included "psychotic behaviors, mood swings or violence." *Laguna v. Schwochert*, No. 10-cv-609, 2014 WL 2612069, at *1 (E.D. Wis. June 11, 2014). But the appeals court has held that the defense is unavailable if the defendant "testified that she was not impaired at the time" of the offense, had a "clear recollection of the offense," and presented no evidence "that she was so intoxicated as to be unable to distinguish right from wrong," *State v. Deppiesse*, 2014 WI App 71, ¶ 13, 354 Wis. 2d 622, 848 N.W.2d 903; if the intoxication merely "'caused [the defendant] to lack judgment' and lowered his inhibitions," *State v. Eggenberger*, 2013 WI App 128, ¶ 14, 351 Wis. 2d 224, 838 N.W.2d 866; or if there is no evidence that the defendant

actually experienced the side effects that the medicine theoretically could cause, *see State v. Alswager*, 2011 WI App 75, ¶ 20, 334 Wis. 2d 145, 799 N.W.2d 928.

Once the defendant raises the defense, "the burden is on the state to prove the absence of the defensive matter to support a conviction for the crime charged." Wis. Criminal Jury Instructions § 775A Comments n.3 (2015). If the state does not meet its burden, "the result will be an acquittal on the charge." *Anderson*, 2014 WI 93, ¶ 25 (quoting 9 Christine M. Wiseman & Michael Tobin, *Wisconsin Practice Series: Criminal Practice and Procedure* § 17.25 (2d ed.)).

I turn now to an analysis of Gish's claim, keeping in mind that the ultimate question is not whether Gish's allegations, if true, would support an involuntary intoxication defense; the question is not even whether there is a reasonable probability that the trial court would have instructed the jury on the defense. Rather, the question is whether Gish's counsel erred in failing to investigate or inform him of the defense and whether there is a reasonable probability that Gish would not have pleaded guilty if he had known about the defense—that probability may exist even if the chances of succeeding on the defense would have been slim.

Here, the appeals court determined that Gish's ineffective assistance argument was without any arguable merit because "there wasn't anything to investigate" concerning the involuntary intoxication defense. Dkt. 12-7, at 8. This conclusion is puzzling in light of Gish's allegations. Police records available to Opland-Dobs indicate that Gish was taking prescription psychoactive medicine around the time of the crime and was found hours after the crime in a confused, delusional state. Gish told his interrogator that he blacked out, lost his mind, and thought that stabbing Litwicki "was the right thing to do." Dkt. 12-5, at 44. Upon reviewing these records, competent counsel would have investigated further to determine whether Gish

could raise involuntary intoxication as an affirmative defense. Upon investigation, counsel would have discovered that Gish was prescribed two to four times the recommended amount of Xanax, that known side effects of Xanax include fear, confusional state, hallucination, rage, disinhibition, hostility, and mania, and that "Xanax and Lamictal have been known to produce aggressive, and assaultive behavior, as well as temporary memory loss, and hostile behavior." Dkt. 14, at 18. Armed with "some evidence" that Gish took prescription medicine, that he was unable to distinguish right from wrong during the crime, and that there was a causal link between the two, competent counsel likely could have obtained a jury instruction on involuntary intoxication. At that point, the affirmative defense would have succeeded at trial unless the state proved beyond a reasonable doubt that Gish was *not* rendered unable to distinguish right from wrong by his medicine. Gish says that had he known about the affirmative defense, he would not have accepted the state's plea deal. Gish's allegations, which I must accept as true at this point in the proceedings, satisfy *Strickland*. Gish's claim is far from frivolous. The appeals court's conclusion that Gish's trial counsel was not arguably ineffective is objectively unreasonable.

Respondent argues that the defense would not have succeeded because Gish could remember events that took place before the crime; Gish could not name a witness who could testify about the effect of the medicine on Gish; and later on, Gish showed remorse for his crime. The state certainly could have raised these points at trial, but the ultimate issue is not whether the defense would have succeeded at trial, but whether, if Gish's counsel had investigated the affirmative defense and told Gish about it, it is reasonably probable that Gish would have refused to plead and insisted on going to trial. Taking all of Gish's allegations as

true, the answer is yes. So § 2254(d) does not bar habeas relief, and I will conduct an evidentiary hearing on Gish's ineffective assistance claim.

C. Appointment of counsel

Under Rule 8(c) of the Rules Governing § 2254 Cases, I must appoint counsel to represent a petitioner at an evidentiary hearing if the petitioner qualifies to have counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A. Section 3006A(a)(2) requires me to determine that the appointment of counsel would serve "the interests of justice" and that the petitioner is "financially eligible." Two additional considerations are relevant to the interest of justice prong: whether the petitioner has attempted to obtain representation on his own, *Jackson v. County of McLean*, 953 F.2d 1070, 1073 (7th Cir. 1992), and whether the difficulty of the case exceeds the petitioner's ability to litigate his claims himself, *Pruitt v. Mote*, 503 F.3d 647, 655 (7th Cir. 2007). To determine a petitioner's competence to litigate his own case, the court considers his literacy, communication skills, education level, and litigation experience. *Id.*

To be financially eligible for appointment of counsel, Gish does not have to be indigent; he must demonstrate only that he is financially unable to obtain counsel. *United States v. Sarsoun*, 834 F.2d 1358, 1362 (7th Cir. 1987) ("The Criminal Justice Act . . . merely requires that a defendant be financially unable to obtain counsel—a lower standard than indigency."). Although Gish bears the ultimate burden of demonstrating his financial eligibility, "[a]ny doubts as to a person's eligibility should be resolved in the person's favor; erroneous determinations of eligibility may be corrected at a later time." Admin. Office of the U.S. Courts, Guide to Judiciary Policies and Procedures, Vol. 7, pt. A, § 210.40.30(b).[2] Gish qualified for a

[2] Available at http://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-

public defender during his state-court proceedings. He is now in prison, where his financial situation presumably has not improved. Applying the principles discussed above, I conclude that Gish is financially unable to obtain counsel.

I am also persuaded that appointing Gish counsel would serve the interests of justice. Gish's claim concerns complex medical issues, such as the effects of psychoactive medicines. He would have been entitled to counsel had a hearing on his ineffective assistance claim been conducted during state-court postconviction proceedings. So I will appoint counsel to represent him. Gish should be aware that if the court later finds that he is financially able to retain counsel, it may terminate the appointment of counsel as the interests of justice dictate, and also may direct him to reimburse his attorney for the cost of representation. § 3006A(c), (f).

Once counsel is appointed, the court will hold a status conference to open discovery and set a schedule for the completion of discovery, expert disclosures, and the evidentiary hearing.

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ss-210-representation-under-cja.

ORDER

IT IS ORDERED that the proceedings are STAYED pending appointment of counsel for petitioner Christopher Randolph Gish. Once counsel is appointed, a status conference will be held to establish a new schedule for resolution of the case.

Entered December 14, 2017.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge