No. _____

In The
Supreme Court of the United States

DAVID M. MINNICK,

Petitioner,

vs.

DAN WINKLESKI, Warden,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the "reasonableness" standard for assessing deficient performance of defense counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), and *Hill v. Lockhart*, 474 U.S. 52 (1985), permits a categorical exception immunizing unreasonable advice regarding the likely sentence to be imposed following a guilty plea.

2. Whether the circumstance-specific reasonableness inquiry for assessing deficient performance of counsel under *Strickland* and *Smith v. Robbins*, 528 U.S. 259 (2000), permits application of a standard limiting ineffective assistance of counsel on direct appeal exclusively to circumstances in which counsel's deficient/unreasonable performance consists of omitting or overlooking an issue that is "clearly stronger" than those counsel raised on the direct appeal.

PARTIES IN COURT BELOW

Other than the present Petitioner and Respondent, the only other parties in the courts below were the State of Wisconsin (also represented by the Wisconsin Department of Justice) as real party in interest for the Respondent, and Warden William J. Pollard, who was replaced as nominal Respondent by Warden Winkleski.

DIRECTLY RELATED CASES

- *Minnick v. Winkleski*, Appeal No. 20-3253, Seventh Circuit U.S. Court of Appeals. Final Order Denying Reconsideration entered October 26, 2021.
- *Minnick v. Winkleski*, Appeal No. 20-3253, Seventh Circuit U.S. Court of Appeals. Judgment entered September 21, 2021.
- *Minnick v. Pollard*, Case No. 19-CV-33-JPS, U.S. District Court for the Eastern District of Wisconsin. Judgment entered October 21, 2020.
- *State v. David M. Minnick*, Appeal No. 2017AP1308, Wisconsin Supreme Court. Final Order entered April 9, 2019.
- *State v. David M. Minnick*, Appeal No. 2017AP1308, Wisconsin Court of Appeals. Decision entered November 28, 2018.
- *State of Wisconsin v. David M. Minnick*, Case No. 10-CF-1111, Kenosha County Circuit Court. Final Order entered April 12, 2017.

DIRECTLY RELATED CASES – Continued

- *David M. Minnick v. Wisconsin*, No. 15-737, U.S. Supreme Court. Final Order entered January 25, 2016.
- *State v. David M. Minnick*, Appeal No. 2014AP1504-CR, Wisconsin Supreme Court. Final Order entered September 9, 2015.
- *State v. David M. Minnick*, Appeal No. 2014AP1504-CR, Wisconsin Court of Appeals. Final Decision entered June 10, 2015.
- *State of Wisconsin v. David M. Minnick*, Case No. 10-CF-1111, Kenosha County Circuit Court. Final Order entered June 18, 2014.
- *State of Wisconsin v. David M. Minnick*, Case No. 10-CF-1111, Kenosha County Circuit Court. Judgment of Conviction entered June 29, 2012.

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Petitioner David M. Minnick respectfully asks that the Court issue a writ of certiorari to review the judgment of the Seventh Circuit Court of Appeals which affirmed the denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 challenging his custody by the State of Wisconsin.

OPINIONS BELOW

The published decision of the Seventh Circuit Court of appeals on Minnick's habeas appeal, *Minnick*

v. Winkleski, 15 F.4th 460 (7th Cir. 2021), is in Appendix A (A:1-A:22).

The unpublished decision of the District Court for the Eastern District of Wisconsin, *Minnick v. Pollard*, Case No. 19-CV-33-JPS (E.D. Wis. 10/20/20), is in Appendix C (C:1-C:28).

The unpublished order of the Seventh Circuit Court of Appeals in *Minnick v. Winkleski*, Appeal No. 20-3253, denying rehearing on Minnick's habeas appeal (10/26/21) is in Appendix E (E:1-E:2).

The unpublished Order of the Wisconsin Supreme Court denying discretionary review on Minnick's post-conviction appeal, *State v. David M. Minnick*, 386 Wis.2d 523, 927 N.W.2d 910 (4/9/19), is in Appendix F (F:1-F:2).

The unpublished decision of the Wisconsin Court of Appeals on Minnick's post-conviction appeal, *State v. David M. Minnick*, 385 Wis.2d 211, 923 N.W.2d 169 (11/28/18) is in Appendix G (G:1-G:8).

The unpublished oral findings of the Wisconsin Circuit Court in *State of Wisconsin v. David M. Minnick*, Kenosha County Case No. 10-CF-1111, denying Minnick's subsequent post-conviction motion (4/12/17) is in Appendix H (H:1-H:5).

The Order of this Court denying certiorari on Minnick's direct appeal, *Minnick v. Wisconsin*, 577 U.S. 1120, 136 S.Ct. 990 (1/25/16) (Mem), is in Appendix I (I:1).

The unpublished decision of the Wisconsin Court of Appeals on Minnick's direct appeal, *State v. David M. Minnick*, 364 Wis.2d 527, 868 N.W.2d 198 (6/10/15) is in Appendix J (J:1-J:10).

The unpublished oral findings of the Wisconsin Circuit Court in *State of Wisconsin v. David M. Minnick*, Kenosha County Case No. 10-CF-1111, denying Minnick's original post-conviction motion (6/2/14) is in Appendix K (K:1-K:10).

The unpublished Order of the Wisconsin Supreme Court denying discretionary review on Minnick's direct appeal, *State v. David M. Minnick*, Appeal No. 2014AP1504-CR (9/9/15), is in Appendix L (L:1-L:2).

JURISDICTION

The Seventh Circuit Court of Appeals affirmed denial of Minnick's federal habeas petition and entered judgment on September 21, 2021. It subsequently denied Minnick's timely filed motion for rehearing on October 26, 2021. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) & 2101(c) and Supreme Court Rules 13.1 & 13.3. As he did below, Mr. Minnick asserts the deprivation of his right to due process secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition concerns the construction and application of the Right to Counsel Clause of the Sixth Amendment to the United States Constitution which provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense

U.S. Const. amend. VI.

This petition also concerns the construction and application of the Due Process Clause of the Fourteenth Amendment to the United States Constitution which provides:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

Procedural History

David Minnick suffered, and suffers, from post-traumatic stress disorder ("PTSD") as a result of extensive childhood abuse and abandonment, leading to both a suicide attempt and his leaving home at age 15 after his father attacked him with a baseball bat. He also suffered from alcoholism. However, in 1986, when he was 18, Minnick joined the Navy and forged a

successful career, ultimately retiring in 2008. Between his retirement and his arrest here, he was a consultant to the military.

In November, 2010, the State of Wisconsin charged Minnick with attempted first-degree intentional homicide, aggravated battery, attempted burglary, and four counts of first-degree reckless endangerment, all by use of a dangerous weapon, and with endangering safety by reckless use of a firearm.

According to the criminal complaint, Minnick had an altercation with his wife (now ex-wife), P.M., who informed him that she was leaving him for another man. He later struck her with a gun and attempted to shoot her and then fired shots in the neighborhood and into the home of her parents, who lived down the street from Minnick and his wife.

Minnick's attorney, Laura Walker, entered a plea of not guilty by reason of mental disease or defect ("NGI") on his behalf.[1] Walker retained both a defense

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[1] Under Wisconsin law, a finding of not guilty by reason of mental disease or defect bars a criminal conviction or punishment but results in civil commitment for a term set by the court. Wis. Stat. §§971.15, 971.17.

As summarized by the Wisconsin Supreme Court:

> A bifurcated criminal trial consists of two phases: (1) the guilt phase; and (2) the responsibility phase. When a criminal defendant pleads not guilty and not guilty by reason of mental disease or defect, the jury hears evidence relating to the defendant's guilt in the first phase of the trial, and if the jury finds the defendant guilty, the trial proceeds to the second phase. Wis. Stat. §971.165(1)(a). In the second phase, the jury considers

psychologist, Anthony Jurek, and a PTSD expert, Dr. Howard Lipke.

Although both parties were ready for trial by April, 2012, the court rescheduled it due to other obligations.

Minnick subsequently rejected a plea offer. Within about two weeks thereafter, however, Walker had convinced Minnick to accept the previously-rejected plea offer. Under that offer, Minnick would plead to all but the attempted homicide charge, with both sides free to argue the appropriate sentence. Minnick entered pleas consistent with that agreement.

At sentencing on June 28, 2012, the state asked the Court to impose consecutive sentences totaling 45 years of initial confinement.[2] The defense requested concurrent terms of 4 years initial confinement on each count. The presentence report, which had

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> whether the defendant had a mental disease or defect at the time of the crime and whether, "as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law." Wis. Stat. §971.15(1).

State v. Magett, 2014 WI 67, ¶33, 355 Wis.2d 617, 850 N.W.2d 42. "[T]he defendant has the burden of proof to show mental disease or defect by the greater weight of the credible evidence, the same burden imposed for most issues in civil trials." *Id.*, ¶39.

[2] Wisconsin's "truth in sentencing" scheme abolished parole release for prison sentences. Under that scheme, the court sets an "initial confinement" term that is served in prison, followed by a term of "extended supervision" in the community. *See* Wis. Stat. §973.01.

been released prior to sentencing, recommended consecutive sentences totaling between 16 and 22½ years of initial confinement.

In addition to sentencing arguments by counsel and statements by the victims and Minnick, the sentencing court heard testimony from Drs. Jurek and Lipke. The experts confirmed Minnick's diagnosis of PTSD and that Minnick's PTSD "essentially acted as a trigger for his behavior on the date that the offense occurred" because abandonment is a trigger for him. Dr. Lipke further explained that, although alcohol often acts to remove inhibitions, it can have the opposite result in cases such as Minnick's. In those cases, where the mental illness can cause a lack of control, alcohol can act "to reduce the symptoms, to reduce the anger, to reduce the fear," such that "[t]he intention of the alcohol is to not act on the feelings, it's to suppress the feelings."

Despite this testimony, the circuit court sentenced Minnick to concurrent and consecutive sentences totaling 27 years initial confinement and 14 years extended supervision.

As part of his direct appeal, Minnick moved, *inter alia*, to withdraw his plea, primarily on the ground that his trial attorney misled him by providing unreasonable advice about the likely disposition if he pled guilty. At the hearings on that motion, several of Minnick's friends and family testified that Walker asked them to intervene with Minnick about the plea offer because he was being "stubborn" and that she believed,

based on her experience, that the sentence on a plea would be between 5 and 10 years of initial confinement. Relying on that advice, they encouraged Minnick to accept the plea offer.

Attorney Walker testified and admitted that she only had two years of experience as an attorney when she took the case, and had never previously handled an NGI or mental responsibility defense case. She characterized her statements to Minnick's friends and family members as advice only, not a guarantee. She also admitted she had told Minnick he likely would get only six to ten years of confinement, but told him it was only an opinion and that ultimately the sentence was up to the judge. She told Minnick that she had been before this judge many times and did not believe that he would get consecutive time.

When pressed on this issue, Walker admitted she truly believed the opinion she gave Minnick and his friends and relatives about the likely outcome, and even told the DA that is what she believed.

Minnick also testified that Walker advised him he would not get more than 10 years of confinement, and probably would receive between five and seven years. He understood the sentence was ultimately up to the court, but Walker assured him that if he just went through the motions everything would be fine. He had not been in this position before and had learned that part of decision-making requires relying on the experts.

Although he did not dispute the factual basis for the convictions on the charges to which he pled, Minnick further explained that he wanted a trial on the responsibility phase for the reasons explained by Dr. Lipke and would have insisted on such a trial, as he had before the actual plea, but for Walker's advice. He was willing to give up his right to a trial because he knew he had done something horrible and deserved to be punished and because the 5 to 7 years cited by Walker seemed reasonable to him given his lack of experience in the criminal justice system.

Misconstruing Minnick's motion as arguing only that Walker had "promised" Minnick a particular sentence, the circuit court held that he had failed to meet his burden of proof on that point (Appendix K). In doing so, the court specifically noted the importance of the fact that the motion was made after sentencing, requiring application of a more restrictive standard than the more lenient "fair and just reason" standard for motions filed before sentencing (K:2-K:3).

The court also explained that Minnick should not have been shocked by the prosecutor's sentencing recommendation and the ultimate sentence given the nature of the offenses and since he would have known that the Presentence Report recommended 26½ years (K:6-K:7).[3]

The Wisconsin Court of Appeals affirmed (Appendix J), finding that Walker's assurances were not

[3] The presentence recommended 16 to 22½ years initial confinement, not 26½.

promises, but merely "predict[ions of] an outcome that did not come to pass." According to the court, "[h]er misjudgment of the likely sentence is not a basis for an ineffective assistance of counsel claim," citing *State v. Provo*, 2004 WI App 97, ¶18, 272 Wis.2d 837, 681 N.W.2d 272. (J:6-J:7).

Both the Wisconsin Supreme Court (Appendix L) and this Court (Appendix I) denied Minnick's requests for discretionary review on his claim that, contrary to the court of appeals' holding, unreasonable advice regarding the likely sentence in fact can be grounds for an ineffective assistance of counsel claim.

Minnick subsequently filed his Motion for Post-Conviction Relief Pursuant to Wis. Stat. §974.06.[4] That motion argued that (1) Walker was ineffective for unreasonably failing to advise Minnick of his right to seek to withdraw his plea on "fair and just reasons" grounds prior to sentencing once the presentence report's recommendation of 16 to 22½ years initial confinement made clear that her advice that the sentence likely would not exceed 10 years initial confinement was unreasonable; and (2) that Michael Zell, Minnick's attorney on the direct appeal, was ineffective for unreasonably failing to raise that claim.

At the hearing on the motion, Zell admitted that he had received and reviewed the court file and presentence report and that he was aware that the latter had

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[4] Section 974.06 provides a procedure similar to 28 U.S.C. §2255 for collateral attack raising constitutional challenges to a Wisconsin conviction separate from the direct appeal as of right.

recommended between 16 and 20 years initial confinement, substantially more than Walker had advised Minnick was "likely."[5] He also was aware at the time of the different and more lenient legal standards for withdrawing a plea when the motion is filed before sentencing rather than afterwards.[6]

Zell could not recall having identified or considered raising the trial ineffectiveness claim raised in Minnick's §974.06 motion, i.e., that a reasonable lawyer in Walker's position would have at least advised her client of the option of seeking plea withdrawal prior to sentencing under the "fair and just reason" standard once the presentence report undermined her assurances regarding the "likely" sentence. Zell nonetheless suggested in retrospect that he now viewed such a claim as weaker than the ones he raised originally under a more restrictive standard. Although Zell still viewed as strong his original claim that Walker's "misrepresentation" of the likely sentence was ineffective and created a manifest injustice, he claimed in hindsight that the same unreasonable advice would not give rise to grounds for withdrawal under the less restrictive "fair and just reason" standard.

Denying Minnick's §974.06 motion, the circuit court found that Zell understood the different standards for

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[5] It actually recommended between 16 and 22½ years initial confinement.

[6] In Wisconsin, plea withdrawal before sentencing requires only a "fair and just reason," while post-sentencing plea withdrawal requires a "manifest injustice" such as constitutional ineffectiveness of counsel (*see* A:5 n.3).

assessing motions to withdraw pleas before and after sentencing (H:3). The circuit court appears to have made conflicting findings regarding whether Zell in fact considered the issue raised here at the time he filed his post-conviction motion. At one point, the court stated, consistent with Zell's testimony, that "he didn't consider this issue" (H:3), but it later stated that "[i]t was considered by the attorney based on what was said into the record" (H:4). In any event, the court deferred to Zell's hindsight assertions that, at the time of the hearing, he did not view the fair and just reason claim as stronger than the one he raised previously (H:3-H:4). The court did not address or decide whether it would have granted a "fair and just" reason motion had Walker made one.

The court of appeals affirmed (Appendix G). Applying Wisconsin authority limiting direct appeal ineffectiveness to circumstances in which post-conviction/appellate counsel failed to raise a claim that was "clearly stronger" than those counsel did raise on the direct appeal, *see State v. Starks*, 2013 WI 69, ¶¶59-60, 349 Wis.2d 274, 833 N.W.2d 146, that court held that the "fair and just reason" motion was not "clearly stronger" than the claims Zell raised on direct appeal (G:4-G:7).

The Wisconsin Supreme Court summarily denied Minnick's timely request for discretionary review (Appendix F).

Minnick timely filed this habeas petition in the district court pursuant to 28 U.S.C. §2254. In that

petition, Minnick first renewed his argument that, by unreasonably advising Minnick that an initial confinement term of between 6 and 10 years was "likely," and thus that a longer term was necessarily unlikely, Walker denied him the reasonable advice necessary to make a knowing and informed decision to give up his right to a trial on his NGI defense. Minnick pointed out that, by categorically exempting such unreasonable sentencing advice from ineffectiveness review, the state court's decision was contrary to this Court's case-specific reasonableness analysis mandated by *Strickland*.

Second, Minnick again argued that Walker's unreasonable failure to advise him that he could seek withdrawal of his plea prior to sentencing after the presentence recommendation of 16 to 22½ years initial confinement demonstrated that her advice regarding the "likely" sentence was wildly inaccurate. That failure independently constituted ineffective assistance by denying Minnick the opportunity to pursue such a motion. Zell's oversight in failing to raise this claim on Minnick's direct appeal thus denied him the effective assistance of counsel on his direct appeal.

After briefing, the district court denied Minnick's §2254 petition but granted him a certificate of appealability on his "unreasonable advice" claim and his direct appeal ineffectiveness claim (Appendix C), and entered judgment (Appendix D).

On September 21, 2021, the Seventh Circuit Court of Appeals affirmed (Appendix A). Regarding Minnick's

"likely sentence" ineffectiveness claim, that court noted its own decisions holding that mistaken advice "standing alone" is insufficient absent "bad faith." Despite the absence of any equivalent language in the Wisconsin Court of Appeals' decision modifying its categorical exclusion of unreasonable sentencing advice from deficient performance review under *Strickland*, the Seventh Circuit interpreted the state court's standard as reasonable. (A:12-A:15).

Regarding Minnick's claim concerning Walker's failure to advise Minnick of his opportunity to seek plea withdrawal prior to sentencing on more lenient "fair and just reason" grounds, the Seventh Circuit held that the state court's exclusive use of the "clearly stronger" standard for assessing direct appeal ineffectiveness paralleled its own standard and thus does not conflict with *Strickland*. (A:17-A:18). As such, the court did not address the fact that Zell simply overlooked the "fair and just reason" claim. Instead, it raised hypothetical reasons why someone in Zell's position might consider that claim as weaker than the claims he did raise. (A:18-A:21).

Minnick timely sought rehearing, noting that the court had overlooked the fact that assessing deficient performance solely under Wisconsin's "clearly stronger" standard conflicts with this Court's "circumstance-specific reasonableness inquiry" for deficient performance under *Strickland* and *Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000), this Court's recognition in cases such as *Wiggins v. Smith*, 539 U.S. 510, 534 (2003), that attorney errors due to oversight rather than strategy

are deficient performance, and this Court's recognition in *Smith v. Robbins*, 528 U.S. 259 (2000), that the "clearly stronger" test is just one of the possible tests for assessing reasonableness, *id.* at 288 ("'*Generally*, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome'" (emphasis added)), quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986).

Minnick also noted that, in assessing whether Minnick's "fair and just reason" ineffectiveness claim was "clearly stronger" than the claims Zell raised on direct appeal, the court had misstated his claim. Minnick's claim was based on Walker's failure to advise him of the option to seek plea withdrawal on a more lenient standard prior to sentencing, *see Flores-Ortega*, 528 U.S. at 480 (counsel has constitutionally imposed obligation to consult with client regarding appeal *inter alia*, where defendant demonstrates interest in appealing). The Seventh Circuit, however, only addressed the strength of a claim Minnick never made: that Walker should have affirmatively advised Minnick to seek plea withdrawal (*see* A:17, A:19-A:21).

The Seventh Circuit summarily denied rehearing on October 26, 2021 (Appendix E).

REASONS FOR ALLOWANCE OF THE WRIT

I.

CERTIORARI REVIEW IS APPROPRIATE TO CLARIFY WHETHER THE "REASONABLENESS" STANDARD FOR ASSESSING DEFICIENT PERFORMANCE UNDER *STRICKLAND* AND *HILL* PERMITS A CATEGORICAL EXCEPTION IMMUNIZING UNREASONABLE PREDICTIONS REGARDING THE LIKELY SENTENCE

The Wisconsin Court of Appeals' decision that counsel's advice regarding the likely sentence upon a plea of guilty is categorically excluded from the objective reasonableness analysis for effective assistance mandated by *Strickland v. Washington*, 466 U.S. 668, 688 (1984), and *Hill v. Lockhart*, 474 U.S. 52 (1985), conflicts with the clear mandate of those decisions.[7] Moreover, a number of other courts, including the Seventh Circuit below, have demonstrated a similar hesitancy to apply this Court's deficient performance analysis, choosing instead either to substitute other, more stringent tests for deficiency, or to categorically immunize advice regarding likely outcomes from analysis for reasonableness, as did the courts below.

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[7] The issues arise here in the context of Minnick's request for habeas relief from a state court judgment of conviction. Because the state court of appeals denied each claim on the merits, the federal courts must defer to the state court's decisions unless they were contrary to or reflect an unreasonable application of controlling authority from this Court, or they were based on unreasonable findings of fact. 28 U.S.C. §2254(d).

Because the decisions below both confuse an issue previously settled by this Court and reflect conflicts among the lower courts regarding the proper application of the reasonableness standard under these circumstances, review and clarification by this Court are appropriate. *See* Sup. Ct. R. 10(c).

A. The Decisions Below Conflict with the Decisions of This Court

This Court long ago established that claims of ineffective assistance of counsel must be judged based on the two-prong standard of *Strickland v. Washington*, 466 U.S. 668 (1984). The deficiency prong is met where counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688. The prejudice prong is satisfied when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Although *Strickland* concerned the effectiveness of counsel in a capital sentencing, the same basic standard for deficient performance applies to assess the constitutional effectiveness of counsel in the context of a guilty plea. *Hill v. Lockhart*, 474 U.S. 52, 57-59 (1985).

"[A]n accused is entitled to rely upon his counsel . . . to offer his informed opinion as to what plea should be entered." *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948) (Plurality opinion). However, "[w]aiving trial entails the inherent risk that the good-faith

evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts." *McMann v. Richardson*, 397 U.S. 759, 770 (1970).

Accordingly, the reasonableness analysis turns, "not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." *Id*. at 770-71. "Where . . . a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" *Hill*, 474 U.S. at 56 (quoting *McMann*, 397 U.S. at 771); *see Tollett v. Henderson*, 411 U.S. 258, 266-67 (1973). *See also Lafler v. Cooper*, 566 U.S. 156 (2012) (unreasonable advice leading defendant to reject beneficial plea offer was ineffective assistance).

While holding that the same deficiency standard applies in the context of guilty pleas as at trial, the Court in *Hill* fine-tuned the prejudice prong to "focus[] on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 59. "In other words, in order to satisfy the 'prejudice' requirement, 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.*

The Wisconsin Court of Appeals' categorical or *per se* approach, holding that counsel's "misjudgment of the likely sentence is not a basis for an ineffective assistance of counsel claim" (J:6-J:7), conflicts with the case-by-case analysis of reasonableness required by this Court. As this Court made clear in *Strickland*, "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel." 466 U.S. at 688-689. Rather, courts must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. *See also Williams v. Taylor*, 529 U.S. 362, 391 (2000) (noting that "the *Strickland* test 'of necessity requires a case-by-case examination of the evidence'" (citation omitted)); *Flores-Ortega*, 528 U.S. at 478 (rejecting as inconsistent with *Strickland* lower courts' *per se* rule that counsel's failure to file notice of appeal constitutes deficient performance).

B. The Attempts by Other Courts to Apply *Strickland's* Deficient Performance Standards to Counsel's Advice on the Likely Outcome of a Plea Have Created a Confusing Array of Different Standards

Despite this Court's holdings that deficiency must be assessed "on the facts of the particular case, viewed as of the time of counsel's conduct," *Strickland*, 466 U.S. at 690, the lower courts have produced a variety of different and more restrictive standards for

assessing counsel's advice regarding the likely consequences of a guilty plea.

Like the Wisconsin Court of Appeals here, many other courts have applied a categorical or *per se* approach to claims that a guilty plea resulted from counsel's constitutionally unreasonable advice regarding the likely consequences of the plea. The First, Second, Fourth, Fifth, Sixth, Seventh, and Tenth Circuits appear to have applied this approach. *E.g.*, *Knight v. United States*, 37 F.3d 769, 775 (1st Cir. 1994) ("an inaccurate prediction about sentencing will generally not alone be sufficient to sustain a claim of ineffective assistance of counsel" (citations omitted)); *United States v. Sweeney*, 878 F.2d 68, 69 (2d Cir. 1989) (no deficient performance where defense counsel makes inaccurate prediction about the expected sentence); *Little v. Allsbrook*, 731 F.2d 238, 241 (4th Cir. 1984) ("An attorney's 'bad guess' as to sentencing does not justify the withdrawal of a guilty plea and is no reason to invalidate a plea"); *Daniel v. Cockrell*, 283 F.3d 697, 703 (5th Cir. 2002) ("[A] guilty plea is not rendered involuntary because the defendant's misunderstanding was based on defense counsel's inaccurate prediction that a lesser sentence would be imposed" (citation omitted));[8] *United States v. Stephens*, 906 F.2d 251, 253 (6th Cir. 1990) ("the mere fact that an attorney incorrectly estimates the sentence a defendant is likely to receive is not a 'fair and just' reason to allow withdrawal of a plea agreement"); *United States v. Martinez*, 169 F.3d 1049,

[8] *Daniel* was abrogated on other grounds by *Glover v. United States*, 531 U.S. 198 (2001).

1053 (7th Cir. 1999) ("[A]n attorney's mere inaccurate prediction of sentence does not demonstrate the deficiency component of an ineffective assistance of counsel claim"); *United States v. Gordon*, 4 F.3d 1567, 1570 (10th Cir. 1993) ("A miscalculation or erroneous sentence estimation by defense counsel is not a constitutionally deficient performance rising to the level of ineffective assistance of counsel"). *See also State v. DiFrisco*, 645 A.2d 734, 746 (N.J. 1994) ("Erroneous sentencing predictions, however, do not amount to constitutionally-deficient performance" (citations omitted)).

While these decisions often speak in terms of an inaccurate assessment of the likely sentence "generally" being insufficient to constitute deficient performance, none identifies the missing ingredient in terms of the reasonableness analysis mandated by *Strickland* and *Hill*. Rather, in those few cases where they identify what more they believe is needed, some courts point to the extent to which counsel underestimated the likely sentence and require a "gross mischaracterization" of the likely outcome. *E.g.*, *Sophanthavong v. Palmateer*, 378 F.3d 859, 868 (9th Cir. 2004) ("'Erroneous predictions regarding a sentence are deficient only if they constitute "gross mischaracterizations of the likely outcome" of a plea bargain "combined with . . . erroneous advice on the probable effect of going to trial."'" (citations omitted)); *O'Tuel v. Osborne*, 706 F.2d 498 (4th Cir. 1983) (deficient performance where counsel "grossly misinformed" client regarding parole eligibility). *But see United States v. Barnes*, 83 F.3d

934, 940 (7th Cir. 1996) ("A gross mischaracterization of the sentencing consequences of a plea may provide a strong indication of deficient performance, but it is not proof of a deficiency" (citations omitted)).

Other courts have perceived a distinction between erroneous attorney advice regarding that which they view as "knowable," concerning which they apply *Strickland's* reasonableness standard, and that which they label as "predictions," which they view as immune from reasonableness analysis. *E.g.*, *United States v. Arteca*, 411 F.3d 315, 321 (2d Cir. 2005) (distinguishing a "mistaken prediction" regarding what might happen at sentencing, which does not justify vacating a guilty plea on ineffective assistance of counsel grounds, and "erroneous legal advice about the ultimately knowable," which might (citations omitted); *see Little*, 731 F.2d at 241; *United States v. Rodriguez-Luna*, 937 F.2d 1208, 1215 n.8 (7th Cir. 1991).

A third approach, to date apparently limited to the Seventh Circuit, is to substitute a "good faith" test for *Strickland's* "objective standard of reasonableness" requirement. 466 U.S. at 688. Under that analysis:

> [a] reasonably competent counsel will attempt to learn all of the facts of the case, make an estimate of a likely sentence, and communicate the results of that analysis before allowing his client to plead guilty. "Although the attorney's analysis need not provide a precisely accurate prediction of the respective consequences of pleading guilty or going to trial, the scrutiny must be undertaken in good

> faith." When the attorney fails to do so and that failure is the decisive factor in the decision to plead guilty, the Sixth Amendment is violated and the defendant may withdraw his plea.

Moore v. Bryant, 348 F.3d 238, 241 (7th Cir. 2003), citing and quoting *Barnes*, 83 F.3d at 939-40.

The Seventh Circuit's application of its "good faith" standard has been inconsistent. On occasion, that court has interpreted "good faith" as something resembling objective reasonableness. Thus, that court has held that,

> [w]here erroneous advice is provided regarding the sentence likely to be served if the defendant chooses to proceed to trial, and that erroneous advice stems from the failure to review the statute or caselaw that the attorney knew to be relevant, the attorney has failed to engage in the type of good-faith analysis of the relevant facts and applicable legal principles, and therefore the deficient performance prong is met.

Moore, 348 F.3d at 241-42; *see Bridgeman v. United States*, 229 F.3d 589, 592 (7th Cir. 2000) (deficient performance prong is met only where the inaccurate advice "resulted from the attorney's failure to undertake a good-faith analysis of all of the relevant facts and applicable legal principles").

On others, the Seventh Circuit has deemed its "good faith" standard to be more restrictive than the objective reasonableness standard of *Strickland*. Thus,

in *United States v. Cieslowski*, 410 F.3d 353 (7th Cir. 2005), defense counsel advised her client to stipulate to a sentence of 210 months after overlooking an amendment to the Sentencing Guidelines reducing the maximum Guidelines range for the defendant's conduct to 168 months. The Seventh Circuit upheld the denial of Cieslowski's motion to withdraw his plea, concluding that, although counsel's "error shows negligence on her part, there is no evidence that her failure to spot Amendment 615 resulted from a lack of good-faith effort." *Id.* at 359. Because negligence is, by definition, the failure to do "what an objectively reasonable person would do in the circumstances," *J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011), the Seventh Circuit's application of its "good faith" standard in *Cieslowski*, directly conflicts with *Strickland* and *Hill*.

Finally, several courts have strictly applied the objective reasonableness standards consistently with *Strickland* and *Hill*. *See*, *e.g.*, *United States v. Booze*, 293 F.3d 516, 518 (D.C. Cir. 2002) ("This circuit has held that a lawyer who advises his client whether to accept a plea offer falls below the threshold of reasonable performance if the lawyer makes a plainly incorrect estimate of the likely sentence due to ignorance of applicable law of which he should have been aware." (Internal quotation marks omitted)), citing *United States v. Gaviria*, 116 F.3d 1498, 1512 (D.C. Cir. 1997); *Cullen v. United States*, 194 F.3d 401, 404 (2d Cir. 1999) (deficient representation where counsel provided significantly inaccurate calculation of sentencing ranges upon plea and conviction after trial); *United*

States v. Grammas, 376 F.3d 433, 437 (5th Cir. 2004) (counsel's performance "was deficient because, among other things, [he] was unfamiliar with the Sentencing Guidelines and substantially misstated [client's] exposure"); *Risher v. United States*, 992 F.2d 982, 983-84 (9th Cir. 1993) (failure to advise re potential application of career offender provisions of Sentencing Guidelines was deficient performance). *See also State v. Prindle*, 2013 MT 173, ¶29, 370 Mont. 478, 304 P.3d 712 ("An erroneous prediction by defense counsel can rise to the level of a misrepresentation" and thus deficient performance).

C. Application of the Appropriate Standard Demonstrates Both Deficient Performance and Resulting Prejudice Here

Because its deficient performance analysis conflicts with controlling standards requiring that deficiency must be assessed for reasonableness based "on the facts of the particular case, viewed as of the time of counsel's conduct," *Strickland*, 466 U.S. at 690, the state court's decision on that point is not entitled to deference under the AEDPA. 28 U.S.C. §2254(d)(1). Because that court failed to address or decide resulting prejudice on this claim, that prong likewise is reviewed *de novo*. *Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (*de novo* review where state courts did not reach prejudice prong under *Strickland*).

1. Counsel's Advice was Unreasonable and Thus Deficient

Given what Walker knew at the time, her "likely" sentence was, at best, a remote possibility, and advising her client otherwise was unreasonable. Having only 2 years experience and the results in a single comparable case, it may have been reasonable for Walker to advise Minnick that she would argue for a particular sentence or that a particular sentence was "possible." However, it was wholly unreasonable for her to advise him that a sentence of no more than ten years initial confinement was "likely" under the plea agreement and that consecutive time was unlikely, even if she did not make any guarantee. A reasonably experienced criminal defense attorney would have known that defendants do not generally serve less than 10 years in prison or serve merely concurrent time after a shooting spree in which they shot at three different victims.

At the time of Minnick's plea, Walker knew that it exposed Minnick to a possible sentence of 73 years initial confinement and 30½ years extended supervision with an attempted homicide count being read in, that the state would have a "free hand" regarding a sentence recommendation, and that the court was free to impose anything up to the maximum. As noted by the state court of appeals, "[e]ven with the dismissal of the attempted homicide charge, consecutive sentences could have imprisoned Minnick for over a century." (J:2). She knew that three separate victims were involved and that, although Minnick insisted that he did

not intend to kill anyone, the court was free to disregard that assertion. She also knew that, although evidence supported her claim that the offenses were attributable to Minnick's PTSD, other evidence could be viewed as disputing that claim.

Although denying Minnick's initial post-conviction motion, the state circuit court explained how irrational it was to think that the initial confinement term "likely" would be 10 years or less. That court emphasized at length how something near the 27-year initial confinement term imposed should have been expected given the seriousness of the offenses and the read-in offense and given the recommendations of the presentence author and the prosecutor. (K:6-K:7).

It is irrelevant that Walker's advice and the plea colloquy both indicated that the sentencing court was not bound by any promises or recommendations and could sentence Minnick up to the maximum. Walker's unreasonable advice concerned the *likelihood* the sentencing court would exercise its power in a particular way, not the scope of that court's power or the maximum possible sentence. The maximum possible sentence and the likely sentence are two different things. Reasonable advice regarding each is critically important to one contemplating a plea. *E.g.*, *Moore*, 348 F.3d at 241 ("A reasonably competent counsel will attempt to learn all of the facts of the case, make an estimate of a likely sentence, and communicate the results of that analysis before allowing his client to plead guilty." (Citation omitted)); Wis. Stat.

§971.08(1)(a) (court to advise pleading defendant, *inter alia*, of the potential penalties).

"The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Hill*, 474 U.S. at 56 (citations and quotation marks omitted). In making the decision whether to plead, Minnick was entitled to the reasonable advice of counsel. *Von Moltke*, 332 U.S. at 721 (plurality opinion). Walker's unreasonable advice that an initial confinement term of less than 10 years was likely and that a consecutive or longer sentence thus was unlikely deprived Minnick of the ability to make an informed choice. Her advice thus was deficient performance. It is unreasonable to advise one's client that a particular outcome is "likely" when the opposite is true.

2. Counsel's Deficient Performance Prejudiced Minnick's Defense

The record and the evidence at the post-conviction hearing establish that, but for Walker's unreasonable advice, Minnick would have continued to insist on a trial on his NGI defense, just as he had 18 days earlier when he rejected exactly the same plea offer. *See Hill*, 474 U.S. at 59 ("[T]o satisfy the 'prejudice' requirement, 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.").

As Minnick explained at the post-conviction hearing, he had never disputed that he had done something horrible which he regretted. However, he believed, as Dr. Lipke testified, that his actions resulted from his PTSD and not from anything over which he had control. He only chose to forgo that trial because Walker led him to believe that he likely would receive a sentence of between 5 and 7 years initial confinement which seemed appropriate to him under the circumstances.

The other post-conviction witnesses corroborated this account, reflecting that Walker enlisted them to use the likelihood of a sentence with an initial confinement term of 10 years or less to overcome Minnick's reluctance to give up his right to a trial.

Minnick further explained that part of decision-making involves relying on the opinions and advice of experts who know what he does not. His ultimate decision rested on his trust in Walker's claimed expertise, given that he had never been in trouble before, and his belief that what she said was logical and appropriate given what little he knew.

The difference between the sentence Walker advised Minnick of and the sentence imposed is substantial. To a 45-year-old man, a 10-year initial confinement term leaves him with the possibility of a substantial period of freedom and the physical ability to make a living afterwards. A 27-year initial confinement term, while not necessarily the same as a life sentence, leaves him with much less.

* * *

Review thus is appropriate to resolve the important questions of whether, and if so when, the reasonableness standards for deficient performance in *Strickland* and *Hill* permit a categorical exception immunizing counsel's advice on the likely sentence from reasonableness review. Until this Court acts, the conflicts identified in this Petition will cause unnecessary confusion and litigation in the lower courts. *Cf.* Sup. Ct. R. 10(a) & (c).

II.

CERTIORARI REVIEW IS APPROPRIATE TO CLARIFY WHETHER THE REASONABLENESS STANDARD FOR ASSESSING DEFICIENT PERFORMANCE OF DIRECT APPEAL COUNSEL UNDER *STRICKLAND* AND *SMITH v. ROBBINS* HAS BEEN SUPERCEDED BY THE "CLEARLY STRONGER" TEST

The Wisconsin Supreme Court has concluded that satisfying the deficient performance/resulting prejudice standard of *Strickland*, *supra*, and *Smith v. Robbins, supra*, is no longer sufficient for assessing claims of ineffective counsel on direct appeal. Rather, the Wisconsin court limits such ineffectiveness *exclusively* to cases in which direct appeal counsel failed to raise one or more issues that were "clearly stronger" than the issues counsel chose to raise.[9] *State v. Starks*, 2013 WI

[9] Wisconsin procedure provides the opportunity to file post-conviction motions in the circuit court as part of the direct appeal.

69, ¶¶59-60, 349 Wis.2d 274, 833 N.W.2d 146, *reconsideration denied*, 2014 WI 91, 357 Wis.2d 142, 849 N.W.2d 724, and *reconsideration denied*, 2014 WI 109, 358 Wis.2d 307, 852 N.W.2d 746, *cert. denied*, 575 U.S. 916 (2015);[10] *see State v. Romero-Georgana*, 2014 WI 83, ¶¶4, 44-46, 360 Wis.2d 522, 849 N.W.2d 668.

Because *Starks* is more restrictive than the controlling standard for assessing ineffectiveness claims under *Strickland* and *Robbins*, it is not constitutionally valid. *E.g.*, *Williams v. Taylor*, 529 U.S. 362, 391-97 (2000) (adding supplemental "fairness" or "reliability" inquiry to *Strickland's* "reasonable probability of a different result" standard for prejudice is "contrary to" *Strickland*); 28 U.S.C. §2254(d)(1) (no deference under AEDPA for state court decisions contrary to controlling Supreme Court precedent).

However, once again, several lower courts appear hesitant to apply the standards as mandated by *Strickland*. Not only Wisconsin, but the Seventh Circuit now exclusively applies the "clearly stronger" standard (A:15). *E.g.*, *Makiel v. Butler*, 782 F.3d 882, 898 (7th Cir.

See Wis. Stat. (Rule) 809.30 & §974.02. Wisconsin law distinguishes between ineffectiveness of "post-conviction counsel" and that of "appellate counsel," with the distinction based primarily on whether the challenged act or omission occurred in the circuit court or the appellate court. *State ex rel. Rothering v. McCaughtry*, 205 Wis.2d 675, 556 N.W.2d 136, 137-38 (Ct. App. 1996). To avoid confusion here, Minnick uses the term "direct appeal counsel" to cover both.

[10] The Wisconsin Supreme Court abrogated a different holding in *Starks* in *State ex rel. Warren v. Meisner*, 2020 WI 55, 392 Wis.2d 1, 944 N.W.2d 588.

2015) ("appellate counsel's performance is deficient under *Strickland* only if she fails to argue an issue that is both 'obvious' and 'clearly stronger' than the issues actually raised."). *See also United States v. Palacios*, 982 F.3d 920, 927 n.2 (4th Cir. 2020) ("appellate counsel is ineffective only for failing to raise issues that were 'clearly stronger than those presented' "), *cert. denied*, 141 S. Ct. 2826 (2021).

Because part of the confusion arises from vague *dicta* in this Court's own decisions, only this Court can resolve the confusion and restore some level of consistency.

A. The Decisions Below Conflict with the Decisions of This Court and Those of Other Circuits and State Supreme Courts

Although direct appeal counsel is not constitutionally ineffective solely because the attorney fails to raise every potentially meritorious issue, *see Robbins*, 528 U.S. at 287-88, counsel's decisions in choosing among issues cannot be isolated from review. The same *Strickland* standard for ineffectiveness – unreasonable/deficient performance plus resulting prejudice – applies to assess the constitutional effectiveness of direct appeal counsel. *Id.* at 287-89.

The courts below nonetheless chose to add an additional requirement to the standard for direct appeal ineffectiveness, requiring that the defendant show not just deficient performance and resulting prejudice as

required by *Strickland* and *Robbins*, but also that the issues the defendant claims that direct appeal counsel should have raised are "clearly stronger" than those actually raised on the direct appeal (A:17-A:18; A:21-A22;-G:4-G:7; *see also* C:19-C:22 (District court acknowledging Wisconsin's "clearly stronger" standard has been "rightly criticized for seeming to add a third element to the *Strickland* analysis")).

Deficient performance under *Strickland's* "circumstance-specific reasonableness inquiry," *Flores-Ortega*, 528 U.S. at 478, can arise in any number of different contexts, not just direct appeal counsel's failure to raise a "clearly stronger" claim.

The Seventh Circuit itself previously recognized an alternative deficiency standard that does not address relative strength of the issues:

> [W]hen appellate counsel omits (without legitimate strategic purpose) "a significant and obvious issue," we will deem his performance deficient.

Mason v. Hanks, 97 F.3d 887, 893 (7th Cir. 1996) (citations omitted). This alternative makes sense in some circumstances since the court can rest assured that a reasonable attorney would not overlook an obvious issue.

Other courts have noted, contrary to the decisions below, that the "clearly stronger" test

> does not effectively operate in all cases in which appellate counsel's performance is

> claimed to be deficient because of a failure to assert an error on appeal. Situations may arise when every error enumerated by appellate counsel on appeal presented a strong, nonfrivolous issue but counsel's performance was nonetheless deficient because counsel's tactical decision not to enumerate one rejected error "was an unreasonable one which only an incompetent attorney would adopt."

Shorter v. Waters, 571 S.E.2d 373, 376 (Ga. 2002) (citation omitted); *Carpenter v. State*, 126 S.W.3d 879, 888 (Tenn. 2004) (same); *see, e.g.*, *Chase v. MaCauley*, 971 F.3d 582, 592-93 (6th Cir. 2020) (listing 11 non-exclusive factors to consider in assessing whether appellate counsel acted reasonably). For instance, counsel may raise two strong issues but, by unreasonably failing to raise a third, leave critical state evidence unchallenged, resulting in a finding of harmless error.

Under *Strickland*, moreover, defense counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 690-91. If counsel chooses issues based on less than a full investigation, without obtaining and reviewing all of the court record, trial counsel's file, or discovery, the deficiency determination turns on whether the failure to investigate was itself unreasonable, not on whether that attorney would have chosen to raise the issues discovered by such an investigation. *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003). The failure to complete a

reasonable investigation makes a fully informed strategic decision impossible. *Id*. at 527-28.

Likewise, the failure to raise a viable issue is unreasonable if it was due to oversight rather than an intentional, reasoned strategy. *Id.* at 534. Counsel also acts unreasonably, regardless of the relative strength of the issues, if the claims raised on the appeal are contrary to the defendant's stated goals, as when the defendant only wants to attack the sentence but counsel forgoes such issues for others challenging only the conviction. Direct appeal counsel also acts unreasonably if they identified an issue and intended to raise it but either forgot to do so or inadequately raised it.

By ignoring other means of demonstrating that direct appeal counsel acted unreasonably, the lower courts' exclusive reliance upon the "clearly stronger" test thus conflicts with this Court's deficient performance/resulting prejudice standard mandated by *Strickland* and *Robbins*, exhausting the deference owed the state court under 28 U.S.C. §2254(d).

B. The Confusion Below Arises from Vague Language in This Court's Decisions

The lower courts that have adopted the "clearly stronger" standard as exclusive claim to be following language in this Court's decisions. The Seventh Circuit, for instance, claimed below that the "clearly stronger" standard is mandated by *Davila v. Davis*, 137 S.Ct. 2058 (2017) (A:17). The Wisconsin Supreme Court similarly claimed that the "clearly stronger"

standard is mandated by *Robbins*. *Starks*, 833 N.W.2d 146, ¶¶59-60 & n.12. To avoid further confusion, it is therefore important that this Court clarify that neither *Robbins* nor *Davila* overruled *Strickland's* basic reasonableness standard.

In *Starks*, the majority claimed that *Robbins* held that "the defendant must show that 'a particular nonfrivolous issue was clearly stronger than issues that counsel did present.'" 833 N.W.2d 146, ¶59, quoting *Robbins*, 528 U.S. at 288. *Robbins*, however, did not profess to overrule *Strickland* in this manner. Instead, this Court actually held that

> it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent. *See*, *e.g.*, *Gray v. Greer*, 800 F.2d 644, 646 (C.A.7 1986) ("*Generally*, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome").

Robbins, 528 U.S. at 288 (emphasis added). "Generally" does not mean exclusively.

The *Starks* majority thus somehow overlooked both this Court's clear holding in *Robbins* that *Strickland's* objective reasonableness standards apply to assessment of appellate ineffectiveness, *Robbins*, 528 U.S. at 285, and the qualifying "[g]enerally" in the *Robbins* decision's "clearly stronger" parenthetical reference from *Gray*, *id.* at 288. The state court majority

thus improperly transmogrified a common but by no means exclusive method of establishing that direct appeal counsel's actions were unreasonable into a mandatory additional requirement conflicting with *Strickland*.

Nor does *dicta* in *Davila*, 137 S.Ct. at 2067, suggest an intent to overrule *Strickland's* and *Robbins'* reasonableness standard *sub silentio*. *Davila's* rejection of the petitioner's claim did not turn on whether the *Strickland/Robbins* "objective reasonableness" standard applies versus a more restrictive "clearly stronger" standard for direct appeal ineffectiveness. *Davila*'s aside referencing a "plainly stronger" standard, citing *Robbins*, *supra*, was not remotely central to its ruling.

The "plainly stronger" language in *Davila* therefore is *dicta* and nonbinding. *E.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 737 (2007) (citing *Cohens v. Virginia*, 6 Wheat. 264, 399-400 (1821) (Marshall, C.J.) (explaining why *dicta* is not binding)).

Moreover, *Davila's* actual language itself demonstrates it does not apply where, as here, counsel's errors are due to oversight rather than intentional strategy. Citing the importance of winnowing claims for appeal, the Court continued:

> *Declining to raise a claim on appeal*, therefore, is not deficient performance unless that claim was plainly stronger than those actually presented to the appellate court.

137 S.Ct. at 2067 (emphasis added) (citing *Robbins*, 528 U.S. at 288). By its terms, therefore, *Davila's dicta* at most applies only to intentional decisions by direct appeal counsel "[d]eclining to raise" particular issues, not errors due to oversight which are not entitled to a presumption of reasonableness. *See Wiggins*, 539 U.S. at 534 (attorney errors due to oversight are deficient performance).[11]

C. Applying the Wrong Appellate Ineffectiveness Standard Was Not Harmless

Attorney Zell failed to raise Minnick's "fair and just reason" ineffectiveness claim due to oversight, not strategy, thus satisfying *Strickland's* objective reasonableness standard. *Wiggins*, 539 U.S. at 534 (attorney errors due to oversight are deficient performance).

Zell's failure also prejudiced Minnick. There is no dispute that, despite the presentence report undermining Walker's advice by recommending a sentence twice the maximum she claimed was "likely," she failed to advise Minnick of his option to seek plea withdrawal before sentencing based on a more lenient "fair and just reason" standard.[12] Nor is there any dispute that Minnick would have requested such a motion had he

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[11] As noted *supra*, there are many circumstances when limiting analysis of even intentional attorney actions to the "clearly stronger" test still would conflict with *Strickland's* "objective reasonableness" standard.

[12] The Seventh Circuit mischaracterized Minnick's claim as based on Walker's failure to advise him to file such a motion (*see* A:17, A:19-A:21). Minnick never raised such a claim.

known. Given that Walker had to wheedle Minnick into pleading in the first place using the "likely" sentence as the draw, an ineffectiveness claim based on her failure to provide Minnick the information necessary to rationally decide whether to seek plea withdrawal would have been consistent with *Flores-Ortega's* recognition that counsel has an obligation to advise the client of their options for challenging a conviction when the defendant likely would exercise those options. 528 U.S. at 480. Such a motion also is consistent with Wisconsin recognition that the defendant's misunderstanding of the consequences of the plea or confusion resulting from misleading advice from counsel constitutes fair and just reason for plea withdrawal. *See State v. Jenkins*, 2007 WI 96, ¶34, 303 Wis.2d 157, 736 N.W.2d 24; *State v. Manke*, 230 Wis.2d 421, 602 N.W.2d 139, 141, 143-44 (Ct. App. 1999) ("fair and just reason" where defendant was "confused about his options . . . and the likely outcome . . . of his no contest plea").

* * *

Under *Strickland* and *Robbins*, deficient performance turns on whether counsel acted reasonably, *not* whether counsel's unreasonable actions or omissions are manifest or proven in a particular manner. By insisting that *only* those unreasonable acts or omissions by direct appeal counsel satisfying the "clearly stronger" test qualify as deficient performance, the panel and state court decisions impermissibly altered the *Strickland/Robbins* test. Until this Court acts, the conflicts arising from vague *dicta* in *Robbins* and

Davila and identified in this Petition will continue causing unnecessary confusion and litigation in the lower courts. *Cf.* Sup. Ct. R. 10(a) & (c).

CONCLUSION

For the reasons stated, the Court should grant a writ of certiorari to review the decision of the Seventh Circuit Court of Appeals.

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Respectfully submitted,

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